**EU COMPETENCES IN AN AGE OF COMPLEXITY AND CRISIS: CHALLENGES AND TENSIONS IN THE SYSTEM OF ATTRIBUTED POWERS**

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**Abstract**

*This article argues that the Union’s experience of tackling increasingly complex socio-economic and geo-political problems has revealed certain limitations in our well-established legal understanding of the principle of conferral. Our current legal approach to verifying the existence of Union competence focuses almost entirely on the relationship between each and every discrete and individual Union measure (on the one hand) and its purported legal basis or bases under the Treaties (on the other hand). That approach offers only limited recognition to the particular demands imposed upon Union policymaking by challenges of formidable scale, complexity and often urgency – demanding solutions based on multi-faceted, multi-component, highly integrated regulatory packages. Such legal diffidence can generate a range of tensions: further complicating an already difficult negotiating process; interfering in or even altogether unpicking delicate political compromises; forcing the Union institutions towards sub-optimal policy responses or exposing them to allegations of “competence creep”; and raising difficult questions about the estranged legitimacy claims of robust constitutional law versus effective public governance. That analysis invites us to reflect critically upon the performance, merits and limits of the current Treaty framework governing attributed Union powers, not least by suggesting some potential adaptations and reforms that might help ameliorate such tensions.*

**1. Introduction**

Codifying the system of Union competences was hailed as among the chief achievements of the Lisbon Treaty reforms.[[1]](#footnote-1) Yet nearly 15 years on, we continue to debate whether that system has truly proven itself fit for purpose. Even in the past year or so, the Conference on the Future of Europe, the European Parliament and the Commission have all expressed their support for amending the Treaty rules on the attribution of Union power – largely in the form of specific changes to the existing platter of legal bases, so as to widen or deepen the Union’s ability to adopt measures in particular fields, and mostly in response to the perceived shortcomings revealed by the challenges and traumas of our recent past.[[2]](#footnote-2)

This paper also seeks to contribute to that important debate, albeit by examining the issue from a different perspective. Instead of asking which particular fields would benefit from an expansion in the Union’s existing powers, we will investigate a more horizontal phenomenon, capable of emerging right across the Treaties’ framework of competences – suggesting that some of our struggles with the system of attribution may not be limited to specific gaps or weaknesses, but extend also to how our traditional legal approach to conferral interacts with the political demands of Union policymaking in the face of complex socio-economic and / or geo-political challenges.[[3]](#footnote-3)

In particular, Section 2 explains how the established legal principles governing conferred powers are predicated upon the construction of a bounded world – occupied almost exclusively by an individual and discrete Union measure plus its purported legal basis or bases under the Treaties. The lawfulness of each Union measure is to be tested, on its own distinct terms, against a competence framework that offers only limited recognition to factors or considerations drawn from outside that strictly defined world. Insofar as that constructed legal framework is superimposed onto a policy reality that is comparably bounded, in the sense of pursuing an equally focused problem-solving ambition and debating a similarly defined subject matter for regulation, the two systems manage to interact together in largely sympathetic movement – and that is arguably the paradigm with which many of us are comfortably familiar. But what happens when the bounded legal world of conferred powers has to interact with a much more complex policy context?

This paper proceeds on the basis of an important hypothesis: that the scale and complexity of certain challenges facing the Union demand solutions that go far beyond single initiatives or distinct measures; and instead call for a programme of interconnected regulatory responses – leading to a process of cross-cutting negotiations and mutually dependent political compromises, all culminating in the adoption of an integrated package of multiple acts that may well be “individual” but in reality are far from “discrete”. Section 3 describes in more detail the common characteristics that we will associate with such policy packages. However, is not the role or responsibility of a doctrinal lawyer to substantiate that hypothesis in any more empirical sense. Instead, our task is to proceed from that hypothesis on its own terms and for our own purposes – of thinking more critically about the underlying nature and potential limits of our distinctively legal approach to the constitutional system of conferral.[[4]](#footnote-4)

To that end, Sections 4 and 5 argue that the bounded legal world of conferred powers struggles to acknowledge the role and place of a given Union instrument within its wider policy settlement; and suggests that that dislocation between traditional competence analysis and the needs of more complex policymaking could give rise to certain tensions – sometimes leaving ad hoc “competence creep” as the only effective yet deeply controversial means of resolution. But Section 6 acknowledges that our response to that analysis may be decisively coloured by certain normative assumptions about the very nature of the Union legal order. After all, some readers will simply regard such tensions as among the inevitable constraints imposed by the Treaties so as to discipline the will of the Union’s political institutions. However, on the assumption that we should feel motivated better to accommodate the needs of complex policymaking, and in the spirit of stimulating further reflection and perhaps even the hope of prompting further debate, Section 7 outlines some of the flexibilities or adaptations that might be on offer with a view (at least) to promoting greater cross-transparency in the relationship between political practice and legal analysis; or (going further) to overcoming certain substantive competence objections that might otherwise inhibit the Union’s capacity to provide effective solutions to major policy challenges.

**2. Attributed Powers and the Bounded World of Each Individual and Discrete Union Act**

*2.1 The individual and discrete Union act*

Under the principle of conferral, the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein.[[5]](#footnote-5) To operationalise that overarching principle, a more detailed body of rules has developed – following the cue of the Treaty texts, based on the practice of the Union institutions, and governed by the jurisprudence of the CJEU – to determine the attribution of powers to the Union.[[6]](#footnote-6) Crucially, the logic of the entire system is focused on verifying the competence basis of any given, individual and discrete, Union act. Indeed, the legal framework of conferral is fundamentally predicated upon the construction of a bounded world – in fact, of an infinite number of bounded worlds – in which the lawfulness of each and every Union measure is to be assessed as such and on its own terms.[[7]](#footnote-7)

In order to satisfy the principle of conferral, any given Union act must identify an appropriate legal basis for its own adoption under or pursuant to the Treaties.[[8]](#footnote-8) According to the Court, that is a requirement and a choice of constitutional significance.[[9]](#footnote-9) After all, when read in the light of the general competence principles contained in Part One TFEU, each legal basis will define the substantive aspects of Union competence: for example, the purpose, scope and form of permissible action; any specific limitations on the Union’s proper room for manoeuvre; and the impact of Union action upon the exercise of national competence – whether through the categorisation of Union power as exclusive, shared or complementary etc, or through the applicability of flexibility provisions both specific (primary law opt-outs) and general (enhanced cooperation). Moreover, when read in the light of the horizontal institutional provisions contained elsewhere in the Treaties, each legal basis will also prescribe the procedural aspects of the relevant Union competence: for example, the legislative or non-legislative character of the relevant act; the degree of decision-making involvement enjoyed by the European Parliament; the voting thresholds that should apply within the Council; the scope for participation by other Union institutions or bodies etc.[[10]](#footnote-10)

However, the Court insists that the choice of legal basis is not to be determined through backwards reasoning: we are not to be swayed by certain specific substantive or procedural consequences that might flow from opting for one Treaty provision rather than another; merely because Article X will increase the democratic participation of the European Parliament, or Article Y will allow Ireland to opt-out of an AFSJ initiative, is not in itself relevant to the prior question of whether those provisions furnish an appropriate legal basis for the proposed measure.[[11]](#footnote-11) Instead, the choice of legal basis must be determined in accordance with objective factors amenable to judicial review, in particular, concerning the aim and content of the relevant act.[[12]](#footnote-12) And the desired legal basis must furnish sufficient competence for that act’s valid adoption,[[13]](#footnote-13) with certain particularly important Treaty provisions giving rise to an extensive jurisprudence concerning their proper interpretation, scope and limitations.[[14]](#footnote-14)

In the event that the relevant measure might potentially be based upon two or more legal bases, the institutions must choose the single provision that reflects the act’s predominant purpose / content, rather than its ancillary or incidental objectives / components.[[15]](#footnote-15) Mere institutional practice, preferring one legal basis over another, even for similar acts or indeed for instruments intrinsically linked to the disputed measure, is not to be considered at all decisive.[[16]](#footnote-16) The Court admits that, where the act’s various purposes must be considered genuinely equal in significance, it may exceptionally be adopted using a joint legal basis.[[17]](#footnote-17) However, recourse to joint legal bases is not possible if the latter’s respective decision-making procedures are effectively incompatible with each other.[[18]](#footnote-18) Moreover, the relationship between certain legal bases is governed by more detailed rules establishing hierarchies and according priority: for example, the principle that more specific powers should be used in preference to more general competences;[[19]](#footnote-19) and the fact that certain Treaty provisions, such as Article 352 TFEU, are only permitted by default when no other (sufficient) legal bases are available.[[20]](#footnote-20)

*2.2 Relevance of the broader legal and policy context*

It is important for us to note that, in conducting judicial review for compliance with the principle of conferral, the Court is willing to take into account certain considerations relating to the broader legal and policy context in which the relevant measure was adopted. That is quite naturally the case where the disputed act makes direct or indirect cross-reference to other Union instruments (for example) in order to define key concepts, thresholds or conditions.[[21]](#footnote-21) But the Court will also look at other contextual factors. For example, it will often be necessary to highlight the existing legislative framework, of which the disputed act is essentially an incremental development, or to which it makes some fresh contribution.[[22]](#footnote-22) Similarly, it is appropriate to consider whether the disputed act is designed to amend or replace an existing Union measure, particularly where the latter had itself previously been adopted on the same legal basis.[[23]](#footnote-23) Or again, it may be useful to refer to the aim and content of an international agreement where the disputed act concerns the signature, conclusion or implementation of that agreement for the purposes of the Union legal order;[[24]](#footnote-24) or establishes the position to be adopted by the Union within the context of an existing international organisation.[[25]](#footnote-25)

In such situations, it is particularly pertinent for us to add that the Court is prepared not only to examine the detailed relationship between the disputed act and its prevailing Union framework or legislative predecessor etc; but also to take into account certain broader legal and indeed political factors that characterised, or have occurred since, the establishment or adoption of that original framework or predecessor etc.[[26]](#footnote-26) Indeed, those characteristics of / developments in the wider legal and policy backdrop to the disputed act may prove directly significant for the latter’s evaluation under the principle of conferral. For example, the Court’s appreciation of the different political objectives and distinctive legal frameworks underpinning the European Economic Area, the Union’s relationship with Switzerland, and the EU-Turkey Association Agreement (respectively) directly informed its analysis of the appropriate legal basis, in each of those three situations, under which the Union could update the existing provisions governing external cross-border social security coordination, with each of those international partners, in line with the revised regulations applicable to internal relations between the Member States.[[27]](#footnote-27)

Notwithstanding the Court’s willingness to broaden its investigative horizon so as to cover certain contextual factors, the core conferral question posed by Union constitutional law remains the same: how far does this individual and discrete Union act marry up to the specific and detailed Treaty provision(s) by virtue of which its authors claim to derive a valid legal authorisation? And if the rules on attributed powers are infringed and the purported legal basis is insufficient or otherwise incorrect then, in principle, the disputed measure will be annulled.[[28]](#footnote-28)

*2.3 Two bounded worlds, moving largely in sympathy*

The fact that the legal framework governing conferral is fundamentally predicated upon the bounded world of an individual and discrete Union act does not mean that that legal framework is somehow entirely artificial or divorced from reality. On the contrary: in a great many cases, the Union lawyer’s analysis surely finds a worthy parallel or counterpart in the comparably bounded world of Union policymaking itself – whereby a specific and targeted challenge gives rise to an equally focused political initiative. That initiative will prompt a dedicated process of negotiations about the proposed terms of action. Those negotiations will generate a range of compromises relating to the draft measure. The resulting bargain will be enshrined in the adoption of a definitive regulatory instrument. In both its framing and its subject matter, the Union lawyer’s “individual and discrete act” will often fairly reflect the nature and outcome of the work done by the Union’s policymakers.[[29]](#footnote-29)

And in such situations, where the lawyer and the policymaker frame their efforts through the same lens, the system of conferral surely functions relatively well. After all, the expectation that a distinct Union act will be adopted on a given legal basis in accordance with the latter’s detailed constitutional prescriptions evidently provides, ex ante, a reasonably clear environment within which the relevant decision-making bodies can perform their policy-making functions: making proposals, conducting negotiations, bargaining over compromises, adopting definitive solutions. Moreover, in the event of a dispute about the legality of any resulting Union act – whether motivated by concerns over some substantive or instead procedural dimension to the existence and nature of the available Union competences – the same framework of conferral governs the CJEU’s ex post judicial assessment. If the outcome of such judicial scrutiny is negative, and the disputed act is annulled, the relevant institutions must start the decision-making process again, this time respecting the detailed competence environment provided by the correct legal basis – undertaking fresh negotiations, which may entail hammering out alternative compromises, and lead eventually to the adoption of different solutions.

It is true that some conferral disputes, particularly those brought by a Union institution and alleging an incorrect choice between the various candidates for legal basis, appear motivated more by a concern to vindicate the principle of respect for that disgruntled actor’s due position and proper prerogatives by its peers – rather than by any concrete desire to procure in practice a policy outcome substantially different from that already enshrined in the original act.[[30]](#footnote-30) But in many other situations – not least those involving an aggrieved Member State, or brought by a natural or legal person, concerned about more than mere institutional niceties – annulment under the principle of conferral can indeed radically change the competence framework within which any new instrument will then have to be renegotiated and readopted. After all, annulment might entail a significant reconfiguration of institutional participation (particularly on an issue where there is no settled policy consensus); or lead to an important change in the relationship between Union and Member State regulatory power (e.g. flipping from exclusive to shared competence, or vice versa); or create a specific exclusion from or limitation on the very scope of Union competence (ruling out certain policy options altogether); or indeed expand the potential fields of action available to the Union institutions (thereby introducing the possibility of solutions not previously believed to be in contention).[[31]](#footnote-31)

In any event, the fact remains: in principle, breach of the rules on conferral entails annulment and will oblige the competent institutions to reengage with each other, on the new terms settled by the Court, with a view to adopting a new policy settlement. Even in those situations where the Court’s assessment radically changes the constitutional framework governing the process of institutional reengagement, there is no reason why the parallel bounded worlds, of legal competence and of Union policymaking, need fall out of sympathetic movement with each other. After all, judicial review may have changed the precise terms of engagement from those that prevailed under the negotiation and adoption of the original measure, but it does not significantly alter the shared underlying frame of reference, since the standard consequence of an act’s legal non-compliance is that the competent policymakers simply to start work again for the negotiation and adoption of an equally distinct replacement instrument.

Non-compliance with the principle of conferral need not always lead to annulment of the disputed act immediately and / or in its entirety. For example, the Court will not order annulment where infringement of the rules on attributed powers is to be considered purely formal, lacking in any appreciable procedural or substantive consequences;[[32]](#footnote-32) while the Court regularly exercises its jurisdiction to maintain the application or effects even of an annulled act on compelling grounds of legal certainty (for example) on a temporary basis, while the competent institutions seek to rectify their errors by adopting an alternative measure.[[33]](#footnote-33)

But in addition, the Court recognises the possibility that those individual components of an act which fails to comply with the requirements of attributed powers, might be severed from the remainder of the measure, so that only the bad parts are annulled, while the rest of the regime remains legally valid and in force.[[34]](#footnote-34) That power of partial annulment must (like the Court’s prior investigation into the very existence of a valid legal basis) be exercised according to an independent judicial assessment based on objective criteria. In particular, partial annulment is possible only if the disputed elements can be severed from the remainder of the measure and without causing the latter’s substance to be altered. Severability is not determined according to mere political preferences, as expressed by the relevant Union institutions.[[35]](#footnote-35) It is therefore possible that, in particular circumstances, the Court might identify a partial failure to comply with the rules on competence, but then decide for itself on the severability of an act, and do so contrary to the preferences of (some or even all of) the institutions that have (or should have) rightfully participated in its adoption. In such cases, there would be a greater risk of judicial review intruding more deeply into the political process – denying the competent institutions their full opportunity to engage in a disputed measure’s renegotiation, based on their own (potentially different) appreciation of the available room for and appropriate nature of whatever policy compromises and final outcomes should be agreed.

Yet such a scenario is surely exceptional in nature. In most situations, we can fairly assume that – when it comes to the negotiation, adoption and scrutiny of individual and discrete Union measures – the framework for reaching a political settlement on any given Union initiative, and the principles governing the constitutional basis of the final legal act, stand and operate in relatively close relationship to each other. Even a successful judicial review on grounds of conferral should not unduly interfere with the scope for reaching an equally distinct political (re)settlement by the competent Union institutions – beyond the restrictions that are simply inherent to any system of attributed powers. But what happens if and when the lawyer’s bounded approach to understanding and assessing the competence-compatibility of any and every individual and discrete Union act, is not mirrored by an equally bounded policy perspective shared by the relevant policymakers, but must instead interact with a much more complex reality – one characterised by multifaceted socio-economic and / or geo-political challenges, calling for multiple regulatory initiatives, generating overlapping sets of negotiations, entailing mutually intertwined compromises, and resulting in a diverse package of individual and yet far from discrete regulatory solutions?

**3. Growth and Significance of Policy Packages**

The hypothesis underpinning this paper is that such complex policy packages have become and will remain an important feature of EU legislative and regulatory activity. Suffice to recall the composite nature of the Union’s response to a variety of high-profile challenges, each characterised by their intimidating scale and formidable complexity: for example, the 2008 financial crisis and subsequent sovereign debt problems that shook the Eurozone;[[36]](#footnote-36) the phenomenon of mass (irregular) migration that dominated much of the Union’s political attention particularly during and since 2015;[[37]](#footnote-37) the unprecedented public health disaster and economic upheaval wrought by the Covid-19 pandemic that erupted in 2020;[[38]](#footnote-38) or Russia’s brutal full-scale invasion of Ukraine in 2022, along with its many abrupt and destabilising wider implications, not least for energy security and economic inflation.[[39]](#footnote-39)

It is neither possible nor indeed necessary, in the context of this paper, to recount in any detail the Union experience of confronting each of those major challenges. For present purposes, it will suffice instead for us to reflect on the more general nature of the Union’s responses and thence identify certain common features that we will treat as standard or representative characteristics of a “policy package”.[[40]](#footnote-40) We are certainly not claiming either that the Union’s experience was identical in addressing problems as different as the Eurozone sovereign debt crisis or mass irregular migration; or that exactly the same general pressures or practices shaped the Union’s response to the Covid-19 pandemic as its handling of the Russian war on Ukraine.[[41]](#footnote-41) Our task is rather to construct an informed and workable hypothesis about both the particular nature of certain major challenges facing the Union, and some noteworthy features of the Union’s attempts to resolve or manage those problems – specifically for the purposes of exploring how the changing circumstances and demands of Union policymaking might interact with, and place distinctive pressures upon, our traditional legal analysis of conferral.

To begin with, the sheer scale and complexity of the relevant problem will far exceed our “ordinary” expectation or understanding of the demands made by an “ordinary” regulatory task. The problem – in terms of its underlying causes, its current effects, its knock-on or likely implications, its amenability to amelioration or resolution –might well straddle several of the fields that Union decisionmakers and Union lawyers are accustomed to conceptualising as largely separate and distinctive policies or competences – defying singular categorisation within the pre-defined policy fields or legal bases bestowed upon us by the Treaties. Moreover, it is clear that some policy packages are also motivated by a striking sense of urgency: the potential for imminent (widespread, profound) harm creates unusual pressures of time that demand a relatively more rapid Union response in certain circumstances than in others (though whether every situation of urgency also deserves to be labelled a “crisis” is another question altogether).[[42]](#footnote-42)

In consequence, the Union’s response to these challenges, almost bewildering in their scale and complexity, will entail the proposal, negotiation and adoption of multiple instruments. Of course, the latter must draw upon powers attributed to the Union by the Treaties across different policy fields – so that the entire package still has to be broken down into a series of individual acts, each identifying an appropriate legal basis of its own, and each expected to demonstrate faithful compliance with the relevant substantive and procedural conditions for the valid exercise of Union competence. And yet in reality, those individual acts are far from being discrete. They are conceived as part of a coherent or at least coordinated regulatory response to a common policy challenge. And in turn, the negotiations that eventually lead to the adoption of a series of individual measures may well be conducted on a more holistic and integrated basis. It is taken for granted, in relation to any given individual measure, that “nothing is agreed until everything is agreed”. Perhaps it would go too far to suggest that the same is true for multi-measure packages. But the degree of interdependence between the intended elements of a policy package, and the level of concertation involved in their negotiation and adoption, surely allows them to be perceived and understood – in an empirical sense, since we will consider the legal approach in due course – as something bigger than the sum of their specific parts.[[43]](#footnote-43)

Consider the point in substantive terms. Often explicitly, just as often implicitly, the content of individual elements within an overall package are designed to work closely together: for example, by adapting the same regulatory standard or principles to different contexts or activities; addressing different but complementary aspects of the same policy challenge; closing potential loopholes or routes to compliance evasion; identifying anticipated spillover effects or providing for compensatory action. Changes to one draft element, during the overall negotiations, might necessitate consequential amendments to another proposal. Finding an acceptable policy compromise might entail political agreements that involve varying the content of several formally distinct legal texts. Any given instrument is designed to deliver most effectively when it operates in tandem with its immediate cousins in the overall package, while the latter’s optimum performance depends upon the combined contributions of each individual element.

Consider the same point also in institutional terms. Thinking in terms of the overall package, not just its individual components, surely changes the fundamental logic of the negotiation process. The aim is not to secure a series of ad hoc coalitions each capable of delivering the requisite institutional support for a series of distinct proposals. Rather, the challenge is to build a range and level of political endorsement that will ultimately carry the entire package through to successful adoption – albeit via a series of more specific decision-making routes, each of which might provide a different procedural configuration for its particular component.[[44]](#footnote-44) And the fact that packages consist of mutually interdependent elements, and entail a transversal approach to institutional participation, can surely give rise to some important dynamics. For example, the need to adopt an overall policy response, and the inevitability of cross-instrument compromises in order to deliver that, might allow political bargaining power to accumulate at the “highest uncommon denominator”. The fact that one major component in an overall package entails a decisive role for the European Parliament, can enable the latter institution to exercise greater influence not just within but also across legal bases, even as regards those where the European Parliament’s involvement (viewed in isolation) would appear more limited.[[45]](#footnote-45) Similarly, the fact that one major component in an overall package is subject to a national veto within the Council, can permit any given Member State to increase its political leverage over the remainder of the deal, even as regards those instruments that the Council is entitled to adopt (according to the Treaty text) through QMV.[[46]](#footnote-46)

Without it being necessary for us to define a “policy package” with any greater or legislative-like precision, it is important to add that there are, of course, interesting boundary questions (say) about when two or more acts cease to be individual and discrete initiatives, and effectively merge into a more integrated response that deserves to be conceived of as such. Consider the issue of temporality. Is it necessary to insist that the measures forming part of an identifiable and cognisable “policy package” were adopted by the competent Union institutions simultaneously? Surely not: it should be sufficient to rely on objective evidence demonstrating that a given body of Union acts, adopted within a sufficiently proximate period of time, are to be regarded as mutually interlinked in terms of their overall objectives and their subject matter. On which note, consider precisely that issue of subject matter. Our understanding of a policy package entails a basic threshold of shared objectives and complementary subject matter. That is very different from a situation (say) where one Member State might invoke its veto power over the imposition of Union sanctions against an international aggressor, so as selfishly and shamelessly to maximise its own financial benefits in entirely separate discussions about allocations under the Union budget. We are interested in the enhanced demands that certain challenges make upon the Union’s capacity to deliver effective policy solutions – not in instances of outright political blackmail.

Not only do policy packages share certain common characteristics – in terms of the unusual scale and complexity of their underlying challenge, and the interconnectedness of the multiple instruments that make up the Union’s response – but such packages can also make / produce certain common institutional demands / consequences. Consider the increasing influence exercised by the European Council. The latter has often played a brokering role in difficult or deadlocked negotiations, including over proposals for individual and discrete Union instruments.[[47]](#footnote-47) Indeed, that practice is reinforced in specific cases, under the post-Lisbon constitutional settlement, by the “emergency brake” provisions that escalate political disagreements in the Council to the level of the Heads of State or Government.[[48]](#footnote-48) But the European Council’s mandate to provide the Union with the necessary impetus for its development, and to define the Union’s general political directions and priorities, is even more manifest in the context of complex policy packages.[[49]](#footnote-49) Time and again, the European Council has acted as the primary forum in which the contours of an overall political response to a major socio-economic and / or geo-political challenge have been established; and where difficult negotiating hurdles are overcome, at least between the Member States, through compromises that transcend – or better still, weave together – individual negotiations about specific draft texts.[[50]](#footnote-50) If the European Council has emerged as a more powerful institutional force than ever before, then the Union’s practice of creating complex policy packages is at least partly responsible for that phenomenon. Indeed, one might even argue that the demands imposed by complex multi-field challenges and corresponding multi-instrument responses have made the European Council’s political ascent virtually inevitable.[[51]](#footnote-51)

It is important to note that our hypothesis does not hinge upon whether the phenomenon of policy packages is either entirely new or universally true. Nor does it require us to explain their deeper origins, which would be the subject of a much broader multi-disciplinary debate. Suffice for present purposes to assume that the phenomenon of multi-faceted, multi-instrument initiatives – exhibiting certain identifiable characteristics that distinguish them from the adoption of individual and discrete Union instruments – has indeed been an important feature of the Union’s regulatory activities over recent decades and is likely to remain so for the foreseeable future; particularly as the Union responds to era-defining and all-pervasive societal challenges such as the climate crisis, relentless digital transformation, and major demographic change.[[52]](#footnote-52)

On that basis, our interest will now focus on the relationship between policy packages (on the one hand) and the constitutional principle of conferral (on the other hand). After all, the latter is a legal doctrine developed precisely so as to meet the needs of distinct Union acts rather than more complex regulatory initiatives. So how far (if at all) does the system of attributed powers nevertheless manage to reflect and accommodate the political management of policy packages? What tensions or problems might this give rise to? And what responses (if any) should we consider, in order to address those challenges?

**4. Policy Packages and Attributed Powers**

The legal framework governing the principle of conferral is certainly not insensitive towards issues of policy complexity – at least within the context of evaluating the competence-compatibility of any given individual and discrete Union act. For example, the “mainstreaming” clauses contained (particularly but not exclusively) in Title II, Part One TFEU – exhorting the Union to incorporate highs standards of (say) environmental, consumer and health protection across all its policies and activities – provide clear recognition that the dedicated competences attributed under specific legal bases should not be read in artificial isolation from each other or the Union’s broader values and objectives.[[53]](#footnote-53) Similarly, when primary law exhorts the Union institutions to strive for consistency between different areas of Union policy and activity, the Treaties implicitly acknowledge some of the inherent difficulties involved in responding to challenges of particular complexity and scale, capable of cutting across legally distinct powers created under the system of conferral.[[54]](#footnote-54) And for present purposes, it is important to note that the “predominant purpose” test, for choosing between two or more potential legal bases for the adoption of a proposed instrument, recognises that many initiatives indeed pursue several policy objectives simultaneously, and combine content that touches upon several different legal bases at the same time, in a way that does not map entirely neatly onto the Treaties’ a priori subdivision into dedicated and specific legal categories and attributed powers. But even in this context, there are limits to how far legal formalism will accommodate policy realities: dual legal bases are permitted only in exceptional circumstances, so in most cases (as we know) the Court still insists that a more reductionist choice has to be made.[[55]](#footnote-55)

However, the challenges posed by policy packages are of another scale altogether. As we have seen, the political management of complex challenges displays certain common characteristics: on the one hand, the need for multiple regulatory acts, straddling several different policy fields, but each requiring its own legal basis, which in turn prescribe their own substantive requirements and procedural configurations; yet on the other hand, those multiple regulatory acts are not intended to be discrete or distinct, and together their draft texts and proposed legal bases provide a cumulative environment in which the entire policy package is to be negotiated and adopted – with cross-measure bargaining and compromises, and transversal institutional influence or demands, all embodied in a collective if multi-component solution.[[56]](#footnote-56)

But when it comes to a legal assessment of policy packages through the lens of conferral, those political realities and practices struggle to find a meaningful place and role. Both the lawyer’s articulation of the constitutional standards for how every Union action should comply with the demands of attributed powers, and the ex post judicial assessment of competence-compatibility in any given case, remain concentrated on each distinct Union act, still treated largely as an individual and discrete legal measure, with only limited consideration of either the existence and significance of the overall policy package or the disputed act’s rightful place and role therein. Whether or not we *should* offer greater recognition for the overall policy package is a different question, to which we will return later in this paper.[[57]](#footnote-57) For now, we will simply explain the legal approach as it currently stands and identify the tensions to which it might give rise.

*4.1 The legal act, not the policy package, reigns supreme*

To begin with, it should come as no surprise that the fundamental premiss of the system of conferral remains entirely intact: expectations and challenges are framed and examined only in relation to any given individual and discrete Union act, judged against the criteria imposed by its own dedicated and specific legal basis; neither expectations nor challenges are ever framed or examined in terms of the overall policy package of which the disputed act might form only one, albeit integral, component. The basic significance of that fact is not at all lessened by its self-evident nature: the political management of complex challenges may have exploded far beyond the bounded world of the individual and discrete policy initiative; but when it comes to the legal assessment of the Union’s concrete responses to those complex challenges, we lawyers remain entirely wedded to the bounded world – indeed, to a whole series of bounded worlds – focused on each and every individual and discrete Union measure as such.

But even accepting that the emergence of complex policy packages has done nothing to change the fundamental act-by-act premiss of the entire system of conferral, the question arises: how far do the more detailed legal tests that operate within the underlying framework of attributed powers, recognise and accommodate the wider substantive and institutional context provided by the overall settlement, when it comes to assessing the legality of any of its component measures as such? In particular, we know that whether competence exists, and whether the correct legal basis has been employed, are to be determined by reference to the disputed measure’s own aim and content judged against the specific legal basis under which it was purportedly adopted.[[58]](#footnote-58) But can we find any evidence in the available caselaw, that the Court will look also at the overall aims and extended content of the broader policy package, for the purposes of assessing how far any given component thereof remains within the legitimate bounds of Union competence? Moreover, we also know that the Court is willing to take into consideration certain features related to the wider legal and policy context prevailing at the time of the disputed act’s adoption; though in most of the decided cases, that approach is largely confined to situations in which the relevant measure builds upon an established regulatory framework, or amends / replaces some existing legal instrument etc.[[59]](#footnote-59) But is there any evidence that the Court will extend its contextual analysis to include the political realities that actively surrounded and shaped the disputed act’s proposal, negotiation and adoption as part of a broader package of interrelated and mutually dependent regulatory instruments?

In building answers to those questions, we need to be particularly wary of rushing to inappropriate conclusions based on limited as well as ambivalent sources.

*4.2 Limited judicial cognisance of the policy package as such*

On the one hand, it is true that the Court has not explicitly *excluded* the relevance of policy packages, for the purposes of assessing the aims and content of a disputed act. On the contrary: the current formulation of the tests used to determine competence-compliance is surely broad enough to allow the Court (if so inclined) to take into account the prevailing legal and policy context that influenced the disputed measure’s adoption as part of a complex multi-instrument policy response.[[60]](#footnote-60) And indeed, there are several judgments to suggest that – even if the fundamental act-by-act premiss of the legal framework governing conferral still reigns supreme – the Court has already opened up a promising entry point for policy packages to find a more secure place and influential role within its analysis.

Consider the judgment in *Ship Source Pollution* – a dispute predating the Lisbon Treaty’s demolition of the old Community-Union pillars.[[61]](#footnote-61) The case concerned Framework Decision 2005/667 on the introduction of criminal law offences and penalties in respect of ship source pollution – specifically intended to supplement the provisions of Directive 2005/35 on strengthening maritime safety and environmental protection.[[62]](#footnote-62) The two measures were adopted by the Council in swift succession, even if not quite simultaneously, and were certainly designed to work together as a single legislative package. However, the Commission argued that the legal bases available under the Community pillar provided sufficient competence to adopt the entire regulatory initiative; by carving out its specifically criminal elements and adopting them separately under the Union pillar, the Council had infringed the “Community preference” rule that governed the choice of legal bases in such situations. The Court found that Framework Decision 2005/667 impinged upon the Community pillar only insofar as it required the introduction of certain criminal offences;[[63]](#footnote-63) by contrast, the power to prescribe more specific types and levels of criminal penalties was rightly reserved to the Union pillar.[[64]](#footnote-64) Given that the entire dispute centred on the Council’s “double text” approach towards enforcing Community substantive policies through Union criminal penalties, it is unsurprising to find that the Court highlighted the close relationship between the subject matters, and the cross references between the texts, of both Framework Decision 2005/667 and Directive 2005/35. But for our purposes, *Ship Source Pollution* still provides concrete evidence that judicial consideration of a disputed act’s broader legal and policy context can indeed extend to acknowledging its status as one component measure within an integrated (albeit small scale) policy package.

The ruling in *Pringle* offers another brief yet significant glimpse into how – even though the focus of competence analysis remains the individual and discrete Union act – the latter’s relationship to a wider package of closely related policy instruments can nevertheless be taken into account as relevant contextual information that explicitly informs litigation over compliance with the principle of conferral.[[65]](#footnote-65) As is well known, the Court was called upon to determine whether the European Council could validly adopt a decision amending the Treaties (via a simplified revision procedure) so as to recognise the power of the Member States whose currency is the euro to establish a permanent stability mechanism providing financial assistance subject to strict conditionality.[[66]](#footnote-66) To settle that question, the Court had to decide whether establishment of the European Stability Mechanism related to economic policy, or instead fell within the scope of the Union’s exclusive competence over monetary policy.[[67]](#footnote-67) In concluding that the matter related to economic (not monetary) policy, the Court took into account not only the ESM’s own aims and available instruments, and the close links that existed between the ESM and the Union’s primary law framework on the coordination of Member State economic policies, but also the ESM’s equally close relationship to the Union’s new regulatory framework for strengthened economic governance. In particular, the Court noted that the ESM was specifically intended to complement the Union’s internal “Six Pack” reforms by providing corrective (rather than purely preventive) means to manage (not just avoid) public debt crises – making explicit reference in that regard to the European Council conclusions of 16-17 December 2010, in which those (and indeed, other) elements of the Union’s multi-pronged initiative to address the Eurocrisis were explicitly linked and progressed together.[[68]](#footnote-68) The existence of the Six Pack may not have been decisive in determining the aims and content of the ESM – but the relationship between those various measures was certainly a factor in the Court’s evaluation of whether the European Council’s decision to amend the Treaties complied with the system of Union competences.

*4.3 Sound reasons for continued caution about the legal relevance of policy packages*

On the other hand, there are at least three reasons for remaining sceptical, or at any rate cautious, about how far the legal principles governing attributed powers can or will go further in accommodating the political realities of complex multi-instrument policymaking.

In the first place, it is fair to say that pertinent caselaw remains scant and far from conclusive. Indeed, judgments like *Ship Source Pollution* and *Pringle* are just as striking for their relative isolation. There are other important disputes, that one might have imagined would provide the ideal opportunity to demonstrate and explore the same approach to policy packages, but where the Court nevertheless stayed notably silent on the issue. Consider the rulings in *Hungary / Poland v Parliament and Council*.[[69]](#footnote-69) As readers will well know, Regulation 2020/2092 establishing a general regime of “rule of law” conditionality for protection of the Union budget was challenged, inter alia, on grounds of lack of competence under Article 322(1)(a) TFEU as the appointed legal basis.[[70]](#footnote-70) The Court engaged in a detailed assessment of those claims – based primarily on the aim and content of Regulation 2020/2092, located within its primary law framework, and also taking into consideration other pre-existing measures that provided important legislative context for operationalising the new conditionality regime. In other words: an entirely orthodox analysis, familiar from well-established caselaw on the competence-compliance of any individual and discrete Union measure. Except, of course, that Regulation 2020/2092 was far from “discrete” in policy terms. In reality, the Union had proposed, negotiated and agreed a bold package of multiple measures, together designed to enable the Member State’s economic recovery from the Covid-19 pandemic – while at the same facilitating other strategic objectives such as a just transition towards the green economy, investing in digital innovation and transformation, and tackling major regional inequalities. Although originally proposed before the pandemic hit, reaching agreement on a robust conditionality regime soon became an integral element of that broader policy package – not least to offer credible assurance that the vast sums of money being mobilised under NextGenerationEU would not be misused by those Member States guilty of serious “rule of law” delinquency. That point was stressed repeatedly by the European Council in its role as deal-broker at key staging posts in the complex negotiations – particularly in the crucial Conclusions of 10-11 December 2020, in which the Heads of State or Government hammered out a compromise over the proposed conditionality regime, explicitly intended to give the final push needed for the Union institutions to adopt “the whole package of relevant instruments”.[[71]](#footnote-71)

Of course, it is entirely possible that the Court simply considered it unnecessary to take into account the wider legal and policy context provided by Regulation 2020/2092’s rightful place within the Union’s multi-faceted response to the major challenges created by the Covid-19 pandemic.[[72]](#footnote-72) Perhaps the Hungarian / Polish challenge felt relatively weak, with no serious prospect of condemning Regulation 2020/2092 as ultra vires, even on an entirely traditional appraisal focused solely on the disputed act’s own aims and content, such that there seemed little added value in any expedition into more adventurous legal territory. So *Hungary / Poland v Parliament and Council* is hardly concrete evidence that the legal framework governing conferral has deliberately ruled out any further engagement with or recognition for the complexities of policy packages. More generally, the fact that there are only a handful of cases in which the Court has actually engaged with these issues might simply be because they are not often raised or addressed as such – so maybe the lack of more widespread and explicit recognition for the legal and policy context provided by multi-instrument policymaking is attributable to the Court not consciously or systematically considering the problem, or at least not yet reaching a settled view on whether, how far and by what means to address it. But that is precisely our grounds for caution: it is difficult to ascertain with any certainty or predictability what the Court’s attitude and approach really is. One is left with the impression that judicial recognition of the relevance of policy packages – when it comes either to determining the aim and content of a disputed Union act, or to locating and interpreting that act within its wider legal and policy context – is at best limited, at worst rather haphazard.

In the second place, even if the Court is open (in principle, in practice) to adapting its caselaw on attributed powers so as to acknowledge the existence and relevance of complex policymaking, there are surely limits to how far the latter can really influence the competence framework or determine the outcome of proceedings, when the underpinning frame of reference remains so firmly anchored to testing and evaluating the credentials of each individual and discrete Union act as such. In *Ship Source Pollution*, the legislative package-à-deux was explicitly recognised as part of the basic legal and policy context of the dispute, but it frankly played little further part in the Court’s reasoning and had no particular bearing on the Court’s final decision. In *Pringle*, the Court certainly took greater account of the wider regulatory environment within which the disputed act was negotiated and adopted – but still only as a contextual consideration that informed the primary task of legal interpretation about the proper boundary between two distinct competence fields. So even according to the limited jurisprudence available, the conceptual presence of the policy package appears relatively marginal and its legal force ultimately feels rather weak. There is no evidence (for example) that if a traditional legal analysis of the disputed act’s aims and content in relation to its purported legal basis were to suggest an appreciable gap in the availability of substantive Union competence, that problem could possibly be cured by referring to the broader context of / need for a multi-instrument response to some complex / urgent socio-economic / geo-political challenge. Do we really imagine that, if the Court had found Regulation 2020/2092 to exceed the substantive regulatory powers available under Article 322(1)(a) TFEU, that measure could nevertheless have been saved, simply because it played an integral role in finalising the overall NextGenerationEU package, based on various delicate political compromises hammered out by the European Council?

In the third place, there remain other design features in the underlying framework governing conferral that place inherent limits on how far policy packages can play a role in any competence assessment of their individual components – not least concerning the very consequences of judicial review. Again, to state the obvious does not diminish its importance: annulment of this particular disputed measure does not in any way affect the continued existence and application of the entire remainder of the overall regulatory deal. There is no prospect of the competent political institutions “starting over again” with their complex multi-faceted negotiations, or their mutually dependent cross-instrument compromises, simply because one constituent element has just been annulled. In particular, when it comes to processing the full legal consequences of infringement, the Court is entirely unconcerned with questions about the potential severability of the disputed act from the wider package of measures – even though (from a political perspective) the disputed act might well have formed an integral or even crucial part in the adoption of that wider package of measures, based on its substantive content and / or the transversal compromises that were needed to secure its institutional endorsement.[[73]](#footnote-73)

**5. Potential Consequences of Dislocating Legal Attribution from Policy Packages**

The fact that, neither in framing the basic questions about competence compatibility, nor in assessing the detailed legality of the disputed act, nor in determining the consequences of annulment, nor in assessing the potential for severability, does the current system of attributed powers comfortably and consistently recognise and accommodate the existence of the complex policy package as such, suggests that the political conditions under which important Union legislative and other regulatory initiatives are negotiated and settled (on the one hand) and the constitutional conditions under which those initiatives are assessed from a competence perspective (on the other hand) risk becoming increasingly dislocated. Indeed, it seems clear that the framework within which lawyers evaluate the constitutionality of any given act can differ, perhaps even radically, from the environment in which policymakers actually reach agreement over the package as a whole.

As we know, legal objections on grounds of attributed powers are capable of translating into various substantive and / or procedural consequences: the issue might be the Union’s total lack, or unexpected enjoyment, of competence to adopt a given instrument; or there might be a choice between legal bases that will affect (for example) the balance between Union and national regulatory power or (another example) the terms of institutional participation as regards the disputed measure. The key point is: those varied substantive and / procedural consequences do not matter only for the disputed act and its potential renegotiation; they also matter for the nature and integrity of the wider policy package of which that disputed act is merely one component. On the one hand, since the specific competence variables that might arise within a complex policy initiative can take such different forms, they are also liable to influence the relevant negotiations and / or outcomes in correspondingly diverse ways. And so our traditional legal appraisal of the “individual and discrete Union act” might produce a range of reverberations in respect of the wider policy package, the precise nature and significance of which will inevitably vary from case to case. On the other hand, whatever the precise internal dynamics of any given situation, it is possible to identify certain more general propositions about the potential, and potentially significant, consequences that might arise from the disjuncture between the (artificially) bounded world of Union competence control and the (messy) realities of Union policymaking.

*5.1 Conferral and atomisation*

To begin with: it is obvious that the very intellectual framework of conferral reinforces the atomisation or compartmentalisation of complex policy responses into individual and discrete Union acts. That is true, not just due to the fundamental primary law premiss of attributed powers, but also as a result of the Court’s more detailed principles governing choice of legal basis – and especially the demand for any given Union measure to be adopted under a single legal basis corresponding to its predominant purpose (with joint legal bases accepted only in exceptional cases). Even in the case of Union initiatives that can be considered comparably bounded from both a legal and a policy perspective, we remarked that the Court’s approach is essentially reductionist: it recognises complexity, but hardly strives to accommodate it. In the case of policy packages, that pressure is evidently magnified. The entrenched legal structures of conferral force the Union institutions to parcel up a multifaceted and mutually interdependent policy response, into a series of distinct acts corresponding to particular attributions of power – and even then, demand that the Union institutions further respect the Court’s preference for single legal bases, regardless of whether the component measure undoubtedly straddles several fields simultaneously.

One might add that the chore of satisfying legal demands to compartmentalise certain policy initiatives is already very familiar in certain fields – particularly those where practitioners do not benefit from a comprehensive home in the Treaties, and must instead deconstruct then reconstruct their regulatory activities (as best they can) in accordance with a series of cognate legal bases. Think of Union policies in sectors such as health, energy or sport – where the specific competences conferred under their dedicated Treaty provisions tend to be limited in scope and depth, and the pursuit of more effective and / or comprehensive policy responses needs to call upon a broader range of legal powers (for example) borrowed from the internal market, competition law or environmental protection.[[74]](#footnote-74) In such situations, the legal pressures at work upon policy packages may be magnified still further: it is not only that the relevant challenge might be of particular scale and complexity, or even that the desired policy response is inherently multi-faceted, but also that the very competence framework through which that response must now be chopped up and mediated may in itself be especially fragmented and indeed incomplete.

*5.2 Implications for political institutions*

From that basic proposition – about the legal atomisation of complex policy responses – other consequences might naturally follow. In particular, knowing that the legal approach to Union competences is so unsympathetic to the political realities of complex policy packages may well have certain (direct and indirect) ex ante impacts or influences upon the negotiating environment in which Union policymakers are expected to operate and reach some political settlement. For example: awareness of a specific competence objection, that could potentially expose a given component of the overall bargain to subsequent annulment, in isolation and without regard to the integrity of the wider deal, might have a chilling effect upon the pursuit of effective policy solutions: closing off particular regulatory options, changing the equation of institutional bargaining positions, perhaps and in extreme cases even threatening the prospect for reaching any acceptable deal on particular issues. Or again: the existence of tangible doubts about whether one specific element within the overall policy initiative might pass some future legal challenge under the principle of conferral, could have the effect of focusing disproportionate political attention, leverage and capital on that alleged weak link or gap in the competence chain that binds together the entire package.

Of course, the competent Union institutions could ignore those chilling effects and defuse those competence hotspots, through creative reasoning that seeks to deliver the optimum policy outcomes available to meet the relevant challenges, regardless of any localised suspicions about compliance with the system of attributed powers that might otherwise dog their negotiations – but only at the risk of being challenged in future judicial review proceedings, and witnessing their overall bargain unravel under the pressure of traditional legal doctrine. Needless to say: the temptation to adopt a more plastic interpretation of one’s own competences – and the accompanying risk of judicial scrutiny – must be greater in situations characterised not only by the scale and complexity of the challenge, but also by a sense of relative urgency for the Union to provide an effective response.

Such legal unravelling need not ultimately happen. After all, even a traditional legal analysis of the disputed Union act, viewed and analysed as an individual and discrete measure in time-honoured fashion, might well confirm its full competence-compliance even on its own terms. More by fortuitous coincidence than through sympathetic alignment, the bounded world of law and the unbounded world of policymaking could still reach the same ultimate outcome and uphold the full integrity of the overall regulatory package. Or maybe the Court will be willing and able, thanks to the limited legal space available within the underlying framework of conferral, to take into account the existence and relevance of the policy package as such, *à la* *Pringle*, when it comes to defining the wider legal and policy context that should influence interpretation of the disputed act’s own aims and content in relation to its purported legal basis under the Treaties.

But what if a traditional conferral analysis of the disputed Union act would suggest a genuine competence problem, that cannot be massaged out of existence even by judicial reference to the broader legal environment and policy context – a problem therefore capable of leading to annulment of that individual and discrete measure, effectively divorced from any particular recognition of its place within the broader policy package? In that event, the CJEU would be faced with a difficult choice.

*5.3 Implications for judicial review*

*Either:* the Court might engage in its own creative and expansive interpretation of the relevant attributed powers, under the applicable legal basis, thereby endorsing the existence of adequate and appropriate competence to adopt the disputed act – and indirectly preserving the integrity of the wider policy package, even without granting the latter any explicit status, or at least any greater recognition and force, under the Court’s constitutional reasoning. After all, the Court always has the interpretative means at its disposal to do so: by not only simply decreeing that the scope of a given power is actually wider than was previously understood but also (for example) invoking inherently malleable concepts, such as the need to ensure the “effectiveness” of Union action, so as to extend the breadth or depth of the regulatory competence created by its legal basis;[[75]](#footnote-75) or even falling back upon the doctrine of “implied powers”, conferred implicitly through rather than explicitly by the Treaties, as recognised by the Court in its (largely pre-Lisbon Treaty) jurisprudence.[[76]](#footnote-76)

In any such scenario, both the Union legislature and the Union judiciary are exposed to allegations of “competence creep” – in effect, an abuse of power pitched at the level of constitutional significance.[[77]](#footnote-77) Of course, what one commentator might denounce as an improper abuse of power by the Union institutions, another commentator might regard as an entirely reasonable evolution of the Treaties viewed as living constitutional instruments.[[78]](#footnote-78) But the persistence of such allegations – not only at the Union level, but also among key actors in the domestic constitutional sphere – still generates considerable controversy and can come at considerable cost.[[79]](#footnote-79) Moreover, while allegations of “competence creep” have long been familiar even as regards genuinely individual and discrete Union acts, it is arguable that such allegations assume certain distinctive features in the particular case of policy packages. On the one hand, the temptation to engage in / endorse an expansive interpretation of Union competences may be all the greater where that would ensure not only the survival of the disputed act, but also the integrity of the wider regulatory framework of which that acts forms only one (albeit integral) element. On the other hand, “competence creep” might be considered particularly insidious here, because the utilitarian solution found to solve this particular crisis can easily acquire a life beyond today’s exigencies, becoming a freestanding source of expanded Union power available for use into the future, and without anything comparable to the pressing needs of that original policy challenge to motivate or justify it.[[80]](#footnote-80)

*Or instead:* the Court could simply follow the logic demanded by its own established legal principles – annulling the disputed act in isolation, and accepting that this might unravel an integral or even crucial part of the overall political settlement reached by the competent Union institutions. In that scenario, the Court might avoid allegations of improper “competence creep” – to the satisfaction of particularly vigilant or sensitive scholarly commentators and domestic constitutional courts. But at the same time, the Court risks being accused of hobbling the Union’s capacity to deliver optimal policy solutions to complex challenges, for reasons specifically attributable to the traditional legal framework governing conferred powers. After all, a complex and interconnected policy package would have been partially unravelled, but with no guarantee whatsoever that it can or will be reconstructed – since the latter presupposes both the availability of an alternative legal basis conferring sufficient competence to act, and also a renewal of or commitment to support from the same or indeed any newly empowered institutional actors.

Moreover, judicial self-restraint and the assertion of legal orthodoxy might generate legitimacy controversies of their own – in particular, by fuelling the mismatch between the conditions that influence our evaluation of the Union’s political governance (on the one hand) and the constitutional principles that govern legal competence and judicial review (on the other hand). After all, if the Court strikes down an individual and discrete Union act based on the lawyer’s bounded evaluation of its competence credentials, we may be upholding a particular and even well-settled conception of the system of conferral – but we are also attacking a complex policy package, without granting any clear legal recognition to the latter’s political relevance and importance, that in many cases will have enjoyed very widespread institutional participation and an unusually broad support base. As we have seen: regardless of the decision-making procedure applicable to any given component, the integrated and cumulative demands of the overall negotiating process, as well as the opportunity for bargaining based on the “highest uncommon denominator”, means that the final package may well have been politically endorsed by every major Union institution and received the unanimous support of every single Member State.[[81]](#footnote-81) That point is even stronger in the case of those complex policy packages that might involve approval of one constituent element – and thereby indirectly, but realistically, of all constituent elements – through an “organic law” procedure, i.e. under Treaty provisions that require ratification of a proposed act by every Member State according to its domestic constitutional requirements (in addition to approval by the Union’s own institutions).[[82]](#footnote-82)

Indeed, the effective sidelining of the wider policy package within our traditional legal approach to conferral is capable of generating any or all such tensions, entirely regardless of the fact that (from a political perspective) that policy package may have enjoyed broad institutional participation and support throughout its negotiation and adoption. It is true that the multi-component nature of complex Union policy proposals, and the bargaining opportunities afforded by the “highest uncommon denominator” across their applicable legal bases, may well mean that all the main Union institutions, together with all the Member States, were able to influence and approve the package as a whole. But that does nothing to stop any given component subsequently being challenging before the Union courts – for example, by the European Parliament acting upon ulterior motives related to the more abstract vindication of its institutional prerogatives; or by a Member State whose adherence to that particular element of the package was only ever partial or reluctant to begin with; or by a natural or legal person (bringing a direct or inaction action on competence grounds) with zero personal interest or investment in the effectiveness or legitimacy of the package as such. And that is precisely our point: that specific legal concerns can be raised about the competence compatibility of any Union measure, treated as an individual and discrete act, entirely regardless of the political conditions that produced, or the consequences its annulment might have for, the overall package.

Again, the experience of Regulation 2020/2092 offers a useful reference point for thinking about many of these issues as living tensions rather than just theoretical worries. It is clear that the inescapable need for Hungary and Poland to support the NextGenerationEU package as a whole, focused substantial political attention on their specific objections against any dedicated conditionality component. Whether constitutionally sincere or merely politically convenient, competence queries about one component thereby acted as a vehicle to maximise ex ante negotiating leverage over the entire Union response; conversely, the power of the “highest uncommon denominator” when it came to approval of the wider policy package raised concerns that Hungary and Poland together used that opportunity to water down the potency of the conditionality regime itself.[[83]](#footnote-83) Of course, we will never know whether, if no conditionality regulation had been agreed, the Union would nevertheless have managed to proceed with the remainder of the pandemic recovery plan, at least in the ambitious form that was ultimately adopted. But what was already clear in advance was that Hungary and Poland – even though they had finally subscribed to the overall package – would still bring an immediate challenge to the constitutionality of Regulation 2020/2092.[[84]](#footnote-84) We can safely assume that the Union institutions and the other Member States felt reasonably confident about the Regulation’s competence-compliance and had factored the (slim) possibility of subsequent annulment into their overall negotiating calculations. Again, we will never know how events might have turned, had the Hungarian / Polish challenge in fact succeeded. For sure, Regulation 2020/2092 would have been annulled while the rest of the NextGenerationEU package remained intact. Perhaps the Union could then have found valid competence elsewhere under the Treaties to adopt an identical or at least essentially similar conditionality regime – and under a legal basis that also managed to avoid an inevitable Hungarian and / or Polish veto. But if not, an integral (if not altogether crucial) element of the overall bargain would have been eliminated and the terms of the NextGenerationEU policy package would have been substantially rewritten.

**6. Potential Legal Responses to the Phenomenon of Policy Packages**

Complex regulatory packages undoubtedly occupy a significant space within the Union’s contemporary policymaking activities. Yet the current system of attributed powers appears to offer little recognition to, and makes only limited allowance for, their distinctive features and demands. And we have surmised that that estrangement creates certain tensions: the possibility for competence queries to acquire an exaggerated and even distorting influence within the ex ante institutional negotiation process; the risk that ex post judicial review on competence grounds might unravel an important aspect of the overall package; the danger that a lack of mutual engagement across their two very different worlds might strain the link between constitutional compliance and political legitimacy; and the fact that, in the absence of any better alternative, the only effective solution for competence problems in the case of (especially urgent) policy packages may be the controversial if not altogether undesirable one of ad hoc “competence creep”.

It is important to stress: we are not suggesting that all policy packages will be dogged by constitutional doubts; or that the latter will always revolve around the bounded legal world of conferred powers. After all, competence queries constitute only one example among the many legal challenges and concerns created by the Union’s crisis-led experiments with institutional relations, governance structures, regulatory techniques and enforcement tools.[[85]](#footnote-85) Consider the intensive phase of the Union’s reaction to the “migration crisis” that gained particular momentum during and after 2015. That challenge certainly displayed our assumed attributes of heightened scale and particular complexity, as well as the added demands of (political, humanitarian and logistical) urgency. And the Union’s multifaceted policy response surely shares in our assumed “package” characteristics of enhanced ambition and interconnectedness. But many commentators regard that response as largely unobjectionable in terms of attributed powers: after all, the relevant Union acts could rest upon clear and explicit legal bases under the Treaties.[[86]](#footnote-86) The controversies were more substantive than constitutional: for example, highlighting significant failures in regulatory design and legal implementation / enforcement; or pitting advocates of more effective migration control against those determined to uphold respect for human life and dignity and the possibility of asylum.[[87]](#footnote-87) Of course, there were a few notable exceptions, not least objections to the EU-Turkey Statement of 2016.[[88]](#footnote-88) The latter was widely regarded as an example of inappropriate resort to executive acts that formally lie outside the EU legal order and are thereby also shielded from proper parliamentary as well as judicial scrutiny – a significant critique, of course, but not among our immediate concerns.[[89]](#footnote-89)

Equally, it is important to stress: even where questions specifically about conferral arise within the context of any given policy package, we are not arguing that the inevitable consequence will be tensions and recriminations over the designs, processes, outcomes and legitimacies of the Union’s relevant regulatory activities; nor that such competence questions will necessarily reach the stage of being formally disputed before the Union courts, for the latter to grapple or struggle with the proper place and relevance of policy packages within the legal structures of attributed powers. Rather, our point is as follows: the political realities involved in negotiating policy packages, which appear to be effectively absent from much of our current approach to the system of conferral, invite us to reflect critically upon the relative performance of the legal framework governing Union competences; and in particular, to wonder whether that framework best serves and facilitates the need to manage contemporary societal challenges of particular scale, complexity and (often) urgency.

The outcome of that critical reflection will surely be coloured, even to a considerable degree, by our own normative assumptions and perspectives. We can summarise two main positions, according to whether they tend to prioritise more the autonomy and integrity of the Union’s established constitutional order; or rather the capacity and duty of law to evolve in response to pressing political, social and economic needs.

*6.1 Autonomy and integrity of the legal system*

According to the former perspective, the prevailing dislocation between competence law and package policy is simply inherent to any constitutional system based on a vertically divided allocation of responsibilities, in which the federal level of governance enjoys strictly defined and highly variegated powers.[[90]](#footnote-90) The legal framework governing the principle of conferral is based on its own fundamental structures and guiding logic – including the premiss that every distinct act must find an appropriate basis under, and remain within the limits imposed by, the Treaties. That framework is designed to embody and safeguard its own set of values and safeguards – not least about the appropriate balance of power between the Union and the Member States, as well as among the Union institutions inter se. Adherence to those basic constitutional principles generates its own form of legitimacy.[[91]](#footnote-91) And after all, the primary law framework in which they are embedded was ratified by every Member State in accordance with its own constitutional requirements at the key moments of creation, accession and reform.[[92]](#footnote-92)

In each of those dimensions, the legal principles of conferral are perfectly entitled to differ from the political realities of Union policymaking. Indeed, those legal principles are deliberately intended to impose limits on, sometimes even to frustrate the otherwise unincumbered will of, the Union’s political institutions. The latter might prefer to wield something like a general power to regulate in the public interest, and perhaps we would all be better off if they did, but that is simply not what the Treaties have provided.[[93]](#footnote-93) It may well be that our traditional legal approach to conferral imposes certain constraints and extracts certain costs when faced with the phenomenon of complex policy packages – say, in terms of contributing to suboptimal policy outcomes or frustrating a genuinely widespread political consensus. But those are the unavoidable price to be paid for respecting the rule of law in accordance with the prevailing terms of our own constitutional settlement. So while it is perfectly interesting to identify the potential legal tensions that arise in the case of policy packages, nevertheless, responsibility for processing those consequences lies primarily with the Union’s political institutions – which need to recognise and valorise inevitable legal constraints, among the wider calculations that govern their negotiations, compromises and agreements.

Which is not to deny that it is perfectly appropriate for the Court, in rulings like *Ship Source Pollution* and *Pringle*, to include considerations of complex policymaking among the contextual factors relevant to applying its established legal tests for conferral and legal basis. And nor should we exclude the possibility that there will be other appropriate points where policy packages rightly enter into constitutional discussions – particularly about the lawful exercise of Union competences *in practice* (once the latter are confirmed to exist, in accordance with the system of attributed powers, *in principle*). For example, there is surely room for reflection about the relationship between complex policy packages and the principles of subsidiarity and proportionality.[[94]](#footnote-94) Should the fact that a particular regulatory intervention was adopted, not as some freestanding act or isolated choice, but within the context of a wider process of negotiation leading to a broader programme of legislation, directly (even decisively) influence our assessment of whether that specific Union act represented a justifiable exercise of Union (rather than national) power? Conversely, when it comes to respect for fundamental rights and freedoms, under the Charter and / or the general principles of Union law, there is surely less room for sympathetic accommodation. The complexity of a given negotiation, or the compromises struck between institutional actors, or the fact that a given solution enjoys broad political support, could hardly justify the infringement of an individual’s basic right to liberty or expression or due process, in the case of a policy package any more than in the case of a single and distinct Union act.[[95]](#footnote-95) But otherwise and beyond that? There is no compelling reason why the fundamental legal structures of conferral should have to change or adapt to accommodate the challenges (no matter how massive, complex and urgent) that policymakers are called upon to address.

*6.2 Evolution of the legal system to meet societal needs*

The alternative normative position tells a rather different story. Of course the constitutional system of conferral is fundamental to the legal construct of European integration. But that does not make the legal framework governing Union competences somehow immutable: it still enjoys the intellectual and practical capacity to change and adapt, even in far-reaching ways, without any need to overturn or deny its own fundamental terms of reference. And the tensions that arise from the interaction between our current legal understanding of the principle of conferral (on the one hand) and the realities of complex policy packages (on the other hand) do create a powerful case for exploring the potential of further constitutional evolution and reform. And so we should positively explore the potential for adjustments to our existing legal analysis, that would enable the principle of conferral, and its judicial enforcement, to respond more sensitively to the broader context in which complex policy packages are negotiated and concluded.

After all, what is the alternative? It feels something of a luxury to insist that the prevailing approach to conferral must endure, imperviously so, even if the price consists of otherwise avoidable political failure, and even if such failures concern the most pressing and serious challenges facing European society – and indeed, even where it is not persuasive to argue that the alternative to more effective Union action lies in the pursuit of 27 perfectly adequate Member State solutions, since the very scale and complexity of the relevant problem will often mean that purely national action may itself be seriously suboptimal. As we have seen, the more realistic response to whatever policy package problems might be caused by the prevailing legal orthodoxies on competences, is not for the Union and its Member States to admit defeat and surrender to political failure, but rather to engage in alternative strategies of “competence creep” – paying lip-service to the legal fundamentals of conferral while stretching their application in practice, and without publicly admitting that the real problem relates to the system of attributed powers itself. Ironically, insisting upon a strict approach to conferral for the sake of preserving constitutional legitimacy, may only increase pressure for the surreptitious expansion of Union power in a way that generates its own legitimacy grievances – particularly among those domestic actors (parliaments and constitutional courts) that feel they have most to lose when deals cut at the Union level seem to bend the “rules of the game”.

Let’s accept that there is no realistic prospect of reaching some easy consensus between those two different normative positions. But in order to explore the logical implications of our own analysis, we shall assume that the Union’s constitutional system *should* enable the political process to succeed, to the maximum possible extent, in formulating and adopting optimal solutions that serve the general interest in addressing complex challenges; and that it would be preferable for the relevant adaptations to be delivered through an explicit process of reflection, adjustment and reform, rather than through the more obtuse and controversial practices associated with ad hoc “competence creep” to be practised by the political institutions and endorsed by the Union judiciary. What sort of changes or mechanisms, more precisely, might one have in mind?

**7. Legal Adjustments to the System of Conferral**

*7.1 Some minimalist suggestions*

It would be perfectly possible to propose a minimalist approach to reconciling more effectively the demands of conferral with the needs of policy complexity. Such an approach would accept that our fundamental constitutional framework and well-established practices will continue to frame any competence challenge in terms of the individual and discrete Union act. The goal of reform is essentially to reduce the risk that ex post judicial review, based on competence objections against some specific Union measure, might end up unpicking an important element of a wider and more complex settlement.

The most obvious way to do that, is to encourage the Court to develop further the embryonic degree of legal recognition it currently affords to policy packages – a proposition all the more attractive because to introduce greater flexibility into the existing judicial analysis of Union competences could be delivered without any need for formal Treaty amendment. For example, if the Union institutions wish to facilitate greater legal recognition of the interconnectedness of certain complex policy bargains, we might well encourage the more deliberate use of preambular texts that explain the wider political and regulatory context within which a given measure was adopted and emphasise the ways in which formally distinct instruments are nevertheless designed to interrelate and interact. For its part, the Court could also broaden more explicitly its definition of the relevant legal and policy context that should be taken into account when addressing competence questions – developing isolated judgments like *Ship Source Pollution* and *Pringle* into a more coherent jurisprudence of multi-instrument competence adjudication.[[96]](#footnote-96) Similarly, perhaps the Court could begin to acknowledge that, when it comes to determining the legal consequences of non-compliance, the impact of immediate and / or complete annulment of the disputed measure, not only as a matter of the latter’s internal text and coherence, but also upon the smooth functioning of the wider policy package as such, may properly be considered a relevant factor in deciding whether / how far to uphold the legal effects of the disputed act.[[97]](#footnote-97) Taken together, such reinforcements to existing legislative and judicial practice could enable a better dialogue between the distinct worlds of political practice and legal analysis – enabling the Court to be more (and more systematically) recognisant of the place and importance of the disputed act within its overall policy package.

Going further: perhaps the Court could be persuaded to accept that, in the case of complex policy packages, it might indeed be appropriate to have simultaneous recourse to multiple legal bases for the adoption of acts that are directly interconnected in their overall aims and content. Recognising that the policy package as a whole, or at least significant elements thereof, can enjoy a combined or cumulative legal basis might facilitate the ability for Union policymakers to design integrated regulatory solutions, without getting unduly bogged down in the task of dividing the contents out between specific Treaty provisions, thereby risking that one element of the bargain might be singled out for annulment if that particular choice proves ill-judged or otherwise insufficient.

And there are other ideas to encourage greater transparency and dialogue, and safeguard against the possibility that ex post judicial review might subsequently unpick an important component of the overall political bargain, but that might also help reduce the risk of competence queries acquiring some disproportionate or distorting influence within the ex ante decision-making process. The goal here would be to provide the competent Union institutions with greater advance clarity about how far their negotiations towards an integrated policy package might ultimately comply with the demands of conferral – while there is still time to react and adjust their settlement before it becomes final. To that end, one might introduce a dedicated procedure by which the Union institutions request the CJEU to consider and clarify the competence framework underpinning a given policy initiative – available once the proposals have reached a sufficiently concrete state that they are amenable to useful analysis, even capable of being heard on an expedited basis in cases of urgency, but still leaving ample room for an appropriate political response to the Court’s guidance on attributed powers and legal basis. Such a mechanism could draw direct inspiration from the existing Union law procedure under Article 218(11) TFEU, by which the Court may be asked to deliver an opinion on the compatibility with the Treaties of a proposed international agreement – though it would admittedly require primary law reform in order to create any new form of jurisdiction for the Union courts.[[98]](#footnote-98)

Such devices might well be useful in encouraging the legal framework of conferral to recognise and in some cases respond more sensitively to the complex political realities and logistical needs of Union policy packages – thereby also addressing the danger that a lack of mutual engagement across the two very different worlds of legal analysis and political practice might strain the link between their distinctive approaches to constitutional legitimacy. But none of our suggestions so far have implied any expansion, as such, in the scope and / or depth of existing Union competences. If we really want to address the competence problems that arise from complex policymaking – that is, in a substantive sense, not just through better information or transparency about the fact that those problems exist and should be factored more explicitly into institutional negotiations and / or judicial reasoning; but so as positively to equip the Union with the tools we believe are essential to deliver optimum policy outcomes to major challenges (though without resorting to the dark arts of “competence creep’) – then we cannot avoid intervening more directly in the current framework of conferral itself.

*7.2 More ambitious ideas*

A more maximalist approach to competence reform means focusing on the challenges created by the way that conferral demands the legal atomisation of both complex policy problems and their highly integrated solutions, thereby highlighting potential weaknesses or gaps in the Union’s available powers – competence hotspots that then attract disproportionate attention and generate significant potential risks in both institutional negotiations and judicial enforcement.

At one extreme, one could of course still argue for the introduction of a general power for the Union to regulate in the public interest – of precisely the sort that the Court in *Tobacco Advertising Directive* explicitly rejected in the case of Article 114 TFEU due to the latter’s express mission of Internal Market regulation.[[99]](#footnote-99) Such a general legal basis would immediately shift the focus of attention away from the question of whether the Union enjoys competence to act in principle, and magnify the importance of those principles (subsidiarity, proportionality, respect for fundamental rights) that seek to guide and constrain the circumstances and manner in which Union powers are exercised in practice.[[100]](#footnote-100) But let’s accept that – whatever the merits of such a major (indeed, radical) reform to the Treaties – there is currently no realistic prospect of it being enacted, given the likely scale of political opposition (as well as domestic judicial constitutional objections) any such proposal would surely provoke across the Union.

At the other extreme, one could simply call for more liberal recourse to Article 352 TFEU as a default legal basis capable of curing many potential competence concerns – including those that might plague negotiations over specific components of some complex policy package. And after all, some of the major drawbacks associated with Article 352 TFEU (unanimity rather than majority voting in Council; consent of rather than co-decision by the European Parliament) arguably feel less pressing in the context of multi-instrument initiatives than they are for genuinely individual and discrete Union acts – since the “highest uncommon denominator” encourages the exercise of effective institutional bargaining power across legal bases. But Article 352 TFEU is not a universal solution – particularly given the express exclusion of measures seeking to harmonise national laws other than where already permitted under the Treaties (as well as those encroaching into objectives covered by the CFSP).[[101]](#footnote-101)

Or going further, one could do as the Conference on the Future of Europe, the European Parliament and the Commission have recently done: propose to amend the Treaties so as to fill specific competence gaps that we have already experienced or that we might anticipate arising in the future; for example, in fields like public health (learning lessons from the Covid-19 pandemic), or energy and defence (in the light of the Russian invasion of Ukraine).[[102]](#footnote-102) Such proposals would certainly help to address particular attribution limits that concrete experience tells us are capable of undermining the Union’s capacity to design and deliver effective policy packages. But the limits of ad hoc solutions based largely on hindsight are obvious, given that the next crisis might throw up a new array of problems and highlight a fresh set of weaknesses in the Union’s power to respond. And in any case, reinforcing the breadth or depth of competences conferred under specific legal bases does not necessarily address the wider problems associated with fragmentation, transversality and severability – problems specifically arising from the demands of complex, integrated policy packages – of the sort we identified in Section 5.

*7.3 Three tentative reform suggestions*

Our contribution to the more maximalist options for future reform will instead consist of suggesting three additional possibilities – which need not be considered at all mutually exclusive – each designed to upgrade the entire competence system, rather than repair some of its individual cogs, while still respecting the fundamental conferral premiss of a Union based on attributed (not inherent or general) powers.

First, the Union could further evolve, and in due course even formalise, its already nascent practice of internal “mixed agreements” – inspired by the longstanding experience of external relations.[[103]](#footnote-103) Where an overall policy package depends upon certain component regulatory responses, as regards which the Union is acknowledged to lack the necessary competence, or at least such competence is seriously disputed in a way that might become a source of uncertainty in negotiations or instability in outcomes, the Member States might undertake to adopt those components through the exercise of their own domestic powers – thereby “completing” the regulatory framework through an agreed combination of Union measures and national instruments.[[104]](#footnote-104) Such internal mixity need not suffer the same objections as (say) the Treaty on Stability, Coordination and Governance or the EU-Turkey Statement – about executive actors relying on international instruments located outside the Union legal order, thereby creating both parliamentary and judicial problems of transparency and accountability.[[105]](#footnote-105) After all, the Member State’s undertakings would relate precisely to subjects falling outside the Union’s competences. And their commitments (if they were to be regarded as binding at all) could be undertaken as a matter of internal Union law to be governed primarily by the principle of sincere cooperation: in effect, a duty to make best efforts to deliver.[[106]](#footnote-106) On the one hand, such a system could help deliver integrated policy responses without entangling the Union institutions or the CJEU in damaging disputes about “competence creep”. In effect, potential attribution problems would be defused, simply by abandoning a fully Union-level package solution, in favour of combining certain Union-level initiatives with the coordination of supplementary national action. On the other hand, the natural weakness of this proposal consists in the risk of fragmented and therefore sub-optimal delivery, particularly should certain Member States fail or even refuse to deliver on their own commitment to undertake appropriate domestic action.

Secondly, one might propose, this time through explicit primary law reform, the adoption of a special approval mechanism – not dissimilar to the Treaties’ existing organic law procedures – whereby the Union’s main political institutions, together with every Member State acting in accordance with its domestic constitutional procedures, are able to approve the Union’s adoption of a complex policy package *as such*.[[107]](#footnote-107) By calling upon the widest democratic participation and authority that the European integration process can muster, such a special approval mechanism would entitle the entire programme to be positively categorised as intra vires at the Union level – notwithstanding any specific concerns that might otherwise have been harboured over the Union institutions’ attributed power to adopt some of its individual elements; and without setting any wider or more lasting precedent that would expand the Union’s ordinary competences under the Treaties.[[108]](#footnote-108) In effect, such an exceptional mechanism would enable the Union to overcome isolated competence gaps or concerns that might otherwise inhibit the negotiation and adoption of an integrated policy package enjoying widespread institutional support. Again, however, this proposal would still exhibit certain natural weaknesses. After all, an inevitably contingent and potentially protracted programme of national approval procedures appears less well-suited to managing any policy package motivated not only by considerations of scale and complexity but also by the demands of urgency.[[109]](#footnote-109) And the same question arises as before: what would happen should one or more of the 27 domestic constitutional authorities withhold its consent? Only this time, the danger would be less about sub-optimal fragmentation across the Union because a given Member State fails to adopt its own supplementary measures; and more about collective failure by the Union as a whole, since a single Member State’s non-ratification would affect approval of the entire policy package.[[110]](#footnote-110)

Thirdly, when searching for a solution precisely to those dangers of individual fragmentation across the Member States or indeed of collective failure by the Union as a whole, one might look to reform of the existing Treaty provisions on enhanced cooperation.[[111]](#footnote-111) Enhanced cooperation offers the potential for certain Member States to harness the Union legal order so as to pursue a broader or deeper level of integration and cooperation than that currently agreed between the EU27. But for present purposes, the current system governing enhanced cooperation also has significant limitations – not least the requirement that any proposed action must still remain within the existing framework of Union competences and is therefore still subject to the demands of attributed powers and correct legal basis.[[112]](#footnote-112) So as it stands, enhanced cooperation does not offer an effective solution for the adoption of complex policy packages dogged by particular competence limitations. But what if the Treaties were reformed, so as to open up the possibility of certain Member States being able to harness the Union legal order – its institutions and instruments, its structures and enforcement mechanisms – for purposes and initiatives that would admittedly exceed the attributed powers ordinarily available to the Union acting as a whole? On the one hand, enhanced cooperation “beyond attributed powers” could help deliver integrated policy responses to complex challenges, at least through the medium of the Union, even if not (yet) involving every single Member State. On the other hand, such a proposal would once more need careful scrutiny to address its natural weaknesses – not least the question: what happens when more and more Member States gradually join the enhanced cooperation? After all, by the time all 27 might eventually participate in the relevant regulatory package, might that enhanced cooperation not have been used simply to bypass the principle of conferral itself?[[113]](#footnote-113)

The purpose of our suggestions is less to “solve” the problem of policy packages, than to provoke critical reflection about the current framework of conferral. But in that regard, the fundamental question that accompanies any proposal for reform of Union competences – whether minimalist or maximalist – is, of course, the national perspective. On one level, the legal tensions raised by effective integrated policymaking in response to particularly complex challenges may be distinctive. But on another level, this is merely a rearticulation or magnification of constitutional issues that have long been familiar to Union law: questions about the utility and legitimacy of collective action; about the latter’s costs and burdens for national institutions; about channels of effective participation and accountability; about the inherent limits to integration identified by certain national supreme courts even regardless of executive and parliamentary acquiescence. Whatever our diagnosis of the problems surrounding policy packages, whatever our own normative perspective on how far Union law should feel responsible for addressing those problems, and whatever our suggestions for potential solutions, this debate needs to be conducted in conjunction with the relevant domestic constitutional actors. And we are all entitled to hear their answers to some frank questions. Is a Union of strictly limited powers always and by its very nature preferable to a Union capable of delivering more effective policy outcomes in the general interest? If we want the Union to manage some of our most difficult shared societal problems, are we willing to equip it with the necessary legal and policy tools? And if not, are we willing to accept that the price is either a less ambitious Union, or one that is prone to failure, in each case as a direct result of our own choices?

**8. Conclusions**

The famous quip attributed to Bismarck – that laws are like sausages: it is better not to see them being made – finds a particularly appreciative audience among lawyers themselves. We often prefer to work only with a final and purified text, worthy of scrutiny and amenable to validation (or invalidation) according to objective constitutional criteria. The system governing conferred powers under the Treaties takes that approach rather seriously and, partly in consequence and partly through further magnification, the Court and its commentators work within a largely bounded world of well-defined legal bases and discrete legal texts.

In many situations, that bounded legal world provides a perfectly appropriate and workable framework for analysis. But this paper has argued that, in some situations, law’s splendid isolation comes with certain costs. Our current approach to Union competences makes limited allowance for the particular demands upon Union policymaking imposed by socio-economic and / or geo-political challenges of formidable scale, complexity and often urgency. In particular, law’s apparent diffidence towards the pressure upon Union policymakers to deliver multi-faceted and multi-component regulatory packages, can generate a range of tensions: further complicating an already difficult negotiating process; interfering in or even altogether unpicking delicate political compromises; forcing the Union institutions towards either sub-optimal policy responses or ad hoc “competence creep”; and raising difficult questions about the estranged legitimacy claims of robust constitutional law versus effective public governance.

That analysis invites us to reflect critically upon the performance, merits and limits of the current Treaty framework governing attributed Union powers. Such reflection appears particularly timely, given that the prospects for significant primary law reform now appear at their highest since the Treaty of Lisbon, and questions about the (in)adequacy of Union competences already occupy a prominent place within those debates. Of course, tweaks to this or that legal basis have their place. But broader tensions call for more systematic solutions. We have suggested various concrete changes that could tangibly enhance the capacity of Union law to facilitate more effective policymaking in the case of particularly complex challenges – thereby also disarming familiar criticisms about “covert EU power grabs”, while still managing to respect the fundamental premiss of conferral.

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   See further, e.g. Garben and Govaere (eds), *The Division of Competences between the EU and the Member States: Reflections on the Past, the Present and the Future* (Hart, 2017). [↑](#footnote-ref-1)
2. See further, e.g. Editorial Comments, “From Conference to Convention? Ideas and Prospects for Reform of the EU Treaties”, 59 CML Rev. (2022), 1583. [↑](#footnote-ref-2)
3. Note: in this contribution, the terms “conferral”, “attribution” and “competence” are used interchangeably – with apologies to those who would normally be more careful about drawing distinctions between them. [↑](#footnote-ref-3)
4. See further, e.g. de Witte, “Legal Methods for the Study of EU Institutional Practice”, 18 EUConst (2022), 637. [↑](#footnote-ref-4)
5. Art 5(2) TEU. [↑](#footnote-ref-5)
6. See further, e.g. Dashwood, “The Limits of European Community Powers”, 21 EL Rev. (1996), 113 and “States in the European Union”, 23 EL Rev. (1998), 201. [↑](#footnote-ref-6)
7. For discussion of the bounded nature of Union competences, and their relationship to the wider constitutional environment, see Azoulai, “The Complex Weave of Harmonization” in Arnull and Chalmers (eds), *The Oxford Handbook of European Union Law* (OUP, 2015). [↑](#footnote-ref-7)
8. E.g. Case C-370/07, *Commission* v. *Council*, EU:C:2009:590. Certain judgments also treat this requirement as an aspect of the duty to state reasons and / or the principle of legal certainty, e.g. Case 45/86, *Commission* v. *Council*, EU:C:1987:163; Case C-325/91, *France* v. *Commission*, EU:C:1993:245. [↑](#footnote-ref-8)
9. E.g. Opinion 2/00, EU:C:2001:664; Case C-263/14, *Parliament* v. *Council*, EU:C:2016:435; Opinion 1/19, EU:C:2021:832. [↑](#footnote-ref-9)
10. The Union institutions cannot seek to amend or evade those conditions and limitations through the creation of “secondary legal bases”, which in itself amounts to an infringement of the principle of conferral, e.g. Case C-133/06, *Parliament* v. *Council*, EU:C:2008:257; Joined Cases C-317/13 and C-679/13, *Parliament* v. *Council*, EU:C:2015:223. [↑](#footnote-ref-10)
11. E.g. Case C-130/10, *Parliament* v. *Council*, EU:C:2012:472; Case C-137/12, *Commission* v. *Council*, EU:C:2013:675; Opinion 1/19, EU:C:2021:832. [↑](#footnote-ref-11)
12. E.g. Case C-43/12, *Commission* v. *Parliament and Council*, EU:C:2014:298; Case C-377/12, *Commission* v. *Council*, EU:C:2014:1903; Case C-267/16, *Buhagiar*, EU:C:2018:26. There is no hierarchy between the two criteria of aim and content, e.g. Case C-180/20, *Commission* v. *Council*, EU:C:2021:658. The Court’s test excludes consideration of essentially speculative factors such as the subsequent / actual effects of the disputed measure, e.g. Case C-5/16, *Poland* v. *Parliament and Council*, EU:C:2018:483. [↑](#footnote-ref-12)
13. E.g. Case C-482/08, *UK* v. *Council*, EU:C:2010:631. [↑](#footnote-ref-13)
14. Such as Art 114 TFEU, e.g. Case C-358/14, *Poland* v. *Parliament and Council*, EU:C:2016:323. [↑](#footnote-ref-14)
15. E.g. Joined Cases C-164-165/97, *Parliament* v. *Council*, EU:C:1999:99. Note the more detailed criteria for determining predominant / ancillary aims / components provided, e.g. in Opinion 1/19, EU:C:2021:832, paras 285-287. [↑](#footnote-ref-15)
16. E.g. Case C-155/07, *Parliament* v. *Council*, EU:C:2008:605. Note that the Court does not privilege certain legal bases on the grounds that they would favour, e.g. participation of the European Parliament (e.g. Case C-130/10, *Parliament* v. *Council*, EU:C:2012:472); or the exercise of Internal Market competences (e.g. Case C-155/91, *Commission* v. *Council*, EU:C:1993:98). [↑](#footnote-ref-16)
17. E.g. Case C-94/03, *Commission* v. *Council*, EU:C:2006:2; Case C-178/03, *Commission* v. *Parliament and Council*, EU:C:2006:4; Opinion 1/15, EU:C:2017:592. [↑](#footnote-ref-17)
18. E.g. Case C-300/89, *Commission* v. *Council*, EU:C:1991:244. [↑](#footnote-ref-18)
19. E.g. Case C-338/01, *Commission* v. *Council*, EU:C:2004:253; Case C-48/14, *Parliament* v. *Council*, EU:C:2015:91; Case C-348/22, *Autorità Garante della Concorrenza e del Mercato*, EU:C:2023:301. [↑](#footnote-ref-19)
20. E.g. Case C-22/96, *Parliament* v. *Council*, EU:C:1998:258; Case C-436/03, *Parliament* v. *Council*, EU:C:2006:277. Note also the principles to police “pillarisation” under the pre-Lisbon Treaties, e.g. Case C-176/03, *Commission* v. *Council*, EU:C:2005:542; Case C-440/05, *Commission* v. *Council*, EU:C:2007:625; Case C-91/05, *Commission* v. *Council*, EU:C:2008:288. [↑](#footnote-ref-20)
21. E.g. Case C-440/05, *Commission* v. *Council*, EU:C:2007:625 – a ruling to which we will return in section 4 (below). [↑](#footnote-ref-21)
22. E.g. Case C-187/93, *Parliament* v. *Council*, EU:C:1994:265; Case C-533/03, *Commission* v. *Council*, EU:C:2006:64; Joined Cases C-124-125/13, *Parliament and Commission* v. *Council*, EU:C:2015:790; Case C-156/21, *Hungary* v. *Parliament and Council*, EU:C:2022:97; Case C-157/21, *Poland* v. *Parliament and Council*, EU:C:2022:98. [↑](#footnote-ref-22)
23. E.g. Case C-301/06, *Ireland* v. *Parliament and Council*, EU:C:2009:68; Case C-411/06, *Commission* v. *Parliament and Council*, EU:C:2009:518. [↑](#footnote-ref-23)
24. E.g. Case C-36/98, *Spain* v. *Council*, EU:C:2001:64; Opinion 2/00, EU:C:2001:664; Case C-411/06, *Commission* v. *Parliament and Council*, EU:C:2009:518. [↑](#footnote-ref-24)
25. E.g. Case C-244/17, *Commission* v. *Council*, EU:C:2018:662. [↑](#footnote-ref-25)
26. E.g. Case C-482/17, *Czech Republic* v. *Parliament and Council*, EU:C:2019:1035; Case C-620/18, *Hungary* v. *Parliament and Council*, EU:C:2020:1001; Case C-626/18, *Poland* v. *Parliament and Council*, EU:C:2020:1000. [↑](#footnote-ref-26)
27. See Case C-431/11, *UK* v. *Council*, EU:C:2013:589 (EEA); Case C-656/11, *UK* v. *Council*, EU:C:2014:97 (Switzerland); Case C-81/13, *UK* v. *Council*, EU:C:2014:2449 (Turkey). It is interesting to recall other judgments in which the Court, called upon to interpret provisions of the EEA Agreement, has also placed considerable emphasis on the latter’s particular constitutional and political context, e.g. Case C-897/19 PPU, *Ruska Federacija v I.N.*, EU:C:2020:128. [↑](#footnote-ref-27)
28. Art 264 TFEU. [↑](#footnote-ref-28)
29. Every reader will think of their own examples drawn from their own interests and experiences. The present author recalls the experience of the Citizens’ Initiative Regulation 211/2011, O.J. 2011, L 65/1 as discussed in “What are we to make of the Citizens’ Initiative”, 48 CML Rev. (2011), 1807. But consider also, e.g. the Patients’ Rights Directive 2011/24, O.J. 2011, L 88/45 as discussed by de la Rosa, “The Directive on cross-border healthcare or the art of codifying complex case law”, 49 CML Rev. (2012), 15; or indeed the relatively complex legislative context and process surrounding adoption of the Services Directive 2006/123, O.J. 2006, L 376/36 as discussed by Barnard, “Unravelling the Services Directive”, 45 CML Rev. (2008), 323. [↑](#footnote-ref-29)
30. E.g. Case C-490/10, *Parliament* v. *Council*, EU:C:2012:525; Joined Cases C-103/12 & C-165/12, *Parliament and Commission* v. *Council*, EU:C:2014:2400; Joined Cases C-14/15 & C-116/15, *Parliament* v. *Council*, EU:C:2016:715. See further, e.g. Cullen and Charlesworth, “Diplomacy by Other Means: The Use of Legal Basis Litigation as a Political Strategy by the European Parliament and Member States”, 36 CML Rev. (1999), 1243; Ovádek, “Procedural Politics Revisited: Institutional Incentives and Jurisdictional Ambiguity in EU Competence Disputes”, 59 JCMS (2021), 1381. [↑](#footnote-ref-30)
31. Consider, e.g. Case C-211/01, *Commission* v. *Council*, EU:C:2003:452. [↑](#footnote-ref-31)
32. E.g. Case 165/87, *Commission* v. *Council*, EU:C:1988:458; Case C-210/03, *Swedish Match*, EU:C:2004:802; Case C-81/13, *UK* v. *Council*, EU:C:2014:2449. [↑](#footnote-ref-32)
33. E.g. Case C-166/07, *Parliament* v. *Council*, EU:C:2009:499. [↑](#footnote-ref-33)
34. E.g. Case C-84/94, *UK* v. *Council*, EU:C:1996:431; Case C-113/14, *Germany* v. *Parliament and Council*, EU:C:2016:635. Though in many cases, severability of good from bad is not possible and the entire measure must be annulled, e.g. Case C-440/05, *Commission* v. *Council*, EU:C:2007:625. [↑](#footnote-ref-34)
35. E.g. Case C-441/11, *Verhuizingen Coppens* v. *Commission*, EU:C:2012:778; Case C-156/21, *Hungary* v. *Parliament and Council*, EU:C:2022:97; Case C-157/21, *Poland* v. *Parliament and Council*, EU:C:2022:98. [↑](#footnote-ref-35)
36. This Review has devoted many pages to analysing the Union’s response to those challenges – beginning with Editorial Comments, “Weathering through the credit crisis: Is the Community equipped to deal with it?”, 46 CML Rev. (2009), 3. Consider, in particular, the major contributions by Moloney, 47 CML Rev. (2010) 1317; Ruffert, 48 CML Rev. (2011), 1777; Adamski, 49 CML Rev. (2012), 1319; de Gregorio Merino, 49 CML Rev. (2012), 1613; Chiti and Gustavo Teixeira, 50 CML Rev. (2013), 683; Beukers, 50 CML Rev. (2013), 1579; Hinarejos, 50 CML Rev. (2013), 1621; Schwarz, 51 CML Rev. (2014), 389; Wolfers and Voland, 51 CML Rev. (2014), 1463; Moloney, 51 CML Rev. (2014), 1609; Adamski, 52 CML Rev. (2015), 1451; Borger, 53 CML Rev. (2016), 139; Steinbach, 53 CML Rev. (2016), 361; Ioannidis, 53 CML Rev. (2016), 1237; Dawson and Bobic, 56 CML Rev. (2019), 1005; de Boer and van ’t Klooster, 57 CML Rev. (2020), 1689. [↑](#footnote-ref-36)
37. Again, the subject of extensive analysis in this Review. Consider, in particular, the significant contributions by Cornelisse, 51 CML Rev. (2014), 741; Editorial Comments, 52 CML Rev. (2015), 1437; den Heijer, Rijpma and Spijkerboer, 53 CML Rev. (2016), 607; Thym, 53 CML Rev. (2016), 1545; de Witte and Tsourdi, 55 CML Rev. (2018), 1457. [↑](#footnote-ref-37)
38. Once more, an important topic for research in the pages of this Review. Consider, e.g. Editorial Comments, 57 CML Rev. (2020), 619; Sokol, 57 CML Rev. (2020), 1819; de Witte, 58 CML Rev. (2021), 635; Leino-Sandberg and Ruffert, 59 CML Rev. (2022), 433; Petti, 59 CML Rev. (2022), 1333. [↑](#footnote-ref-38)
39. Consider, already in this Review, e.g. Editorial Comments, 59 CML Rev. (2022), 623 and 59 CML Rev. (2022), 1289. [↑](#footnote-ref-39)
40. In the same way that others have sought to identify and examine other cumulative effects or common characteristics of the various “crises”, e.g. de Witte, “EU emergency law and its impact on the EU legal order”, 59 CML Rev. (2022), 3. See further, e.g. Gehring, *Europe’s Second Constitution: Crises, Courts and Community* (CUP, 2020); Bignami (ed), *EU Law in Populist Times* (CUP, 2020); Riddervold, Trondal and Newsome (eds), *The Palgrave Handbook of EU Crises* (Palgrave Macmillan, 2021); Auer and Scicluna, “The Impossibility of Constitutionalising Emergency Europe”, 59 JCMS (2021), 20. [↑](#footnote-ref-40)
41. See further, e.g. Anghel and Jones, “Is European really forged through crisis? Pandemic EU and the Russia-Ukraine War”, 30 *Journal of European Public Policy* (2023), 766; and (more theoretically), e.g. Ferrara and Kriesi, “Crisis pressures and European integration”, 29 *Journal of European Public Policy* (2022), 1351. [↑](#footnote-ref-41)
42. And the demands of “urgency” can also generate distinctive approaches to policymaking: see, e.g. Rhinard, “The Crisification of Policy-Making in the European Union”, 57 JCMS (2019), 616. [↑](#footnote-ref-42)
43. On the legal position, see section 4 (below). [↑](#footnote-ref-43)
44. Including an incentive to engage in more inclusive / cooperative approaches to policy design: consider, e.g. Ladi and Wolff, “The EU Institutional Architecture in the Covid-19 Response: Coordinative Europeanization in Times of Permanent Emergency”, 59 JCMS (2021), 32. [↑](#footnote-ref-44)
45. See further, e.g. Meissner and Schoeller, “Rising despite the polycrisis? The European Parliament’s strategies and self-empowerment after Lisbon”, 26 *Journal of European Public Policy* (2019), 1075. [↑](#footnote-ref-45)
46. Particularly within the context of an institution that has a longstanding preference for consensus building, even in areas formally governed by QMV: see further, e.g. Heisenberg, “The institution of ‘consensus’ in the European Union: Formal versus informal decision-making in the Council”, 44 *European Journal of Political Research* (2005), 65. [↑](#footnote-ref-46)
47. See further, e.g. Editorial Comments, “An ever mighty European Council: Some recent institutional developments”, 46 CML Rev. (2009), 1383; Dashwood et al, *Wyatt and Dashwood’s European Union Law* (Hart, 6th ed, 2011) pp 43-45. [↑](#footnote-ref-47)
48. E.g. Arts 82 and 83 TFEU. [↑](#footnote-ref-48)
49. Art 15(1) TEU. [↑](#footnote-ref-49)
50. See further the examples provided in section 4 (below). [↑](#footnote-ref-50)
51. Despite concerns about the European Council’s potential to distort the institutional balance (consider, e.g. Editorial Comments, “Compromising (on) the general conditionality mechanism and the rule of law”, 58 CML Rev. (2021), 267), note the CJEU’s relatively accommodating approach, e.g. in Case C-5/16, *Poland* v. *Parliament and Council*, EU:C:2018:483. [↑](#footnote-ref-51)
52. Consider, on climate policy, e.g. Kulovesi, Morgera and Muñoz, “Environmental integration and multi-faceted international dimensions of EU law: Unpacking the EU’s 2009 climate and energy package”, 48 CML Rev. (2011), 829; Chiti, “Managing the ecological transition of the EU: The European Green Deal as a regulatory process”, 59 CML Rev. (2022), 19. [↑](#footnote-ref-52)
53. As recognised also by the CJEU, e.g. in Case C-376/98, *Germany* v. *Parliament and Council*, EU:C:2000:544. [↑](#footnote-ref-53)
54. See, e.g. Art 13(1) TEU on the Union’s general institutional framework; Art 21(3) TEU on Union external action; Art 7 TFEU on the general obligation of consistency. Again, as recognised by the CJEU, e.g. in Case C-156/21, *Hungary* v. *Parliament and Council*, EU:C:2022:97, especially at para 128. [↑](#footnote-ref-54)
55. See section 2 (above). [↑](#footnote-ref-55)
56. See section 3 (above) [↑](#footnote-ref-56)
57. See section 6 (below). [↑](#footnote-ref-57)
58. See section 2 (above). [↑](#footnote-ref-58)
59. See section 2 (above). [↑](#footnote-ref-59)
60. See, e.g. Case C-180/20, *Commission* v. *Council*, EU:C:2021:658: “the context of a measure may certainly also be taken into account in order to determine its legal basis…” (para 54). [↑](#footnote-ref-60)
61. Case C-440/05, *Commission* v. *Council*, EU:C:2007:625. See further, e.g. Dawes and Lynskey, “The ever-longer arm of EC law: The extension of Community competence into the field of criminal law”, 45 CML Rev. (2008), 131. [↑](#footnote-ref-61)
62. Framework Decision 2005/667, O.J. 2005, L 255/164; Directive 2005/35, O.J. 2005, L 255/11. [↑](#footnote-ref-62)
63. Following Case C-176/03, *Commission* v. *Council*, EU:C:2005:542. [↑](#footnote-ref-63)
64. Though the offending provisions were considered non-severable, so the entire Framework Decision was annulled. [↑](#footnote-ref-64)
65. Case C-370/12, *Pringle*, EU:C:2012:756. See further, e.g. de Witte and Beukers, “The Court of Justice approves the creation of the European Stability Mechanism outside the EU legal order: *Pringle*”, 50 CML Rev. (2013), 805; Adam and Parras, “The European Stability Mechanism through the legal meanderings of the Union’s constitutionalism: comment on *Pringle*”, 38 EL Rev. (2013), 848. [↑](#footnote-ref-65)
66. European Council Decision 2011/199 amending Article 136 TFEU with regard to a stability mechanism for Member States whose currency is the euro, O.J. 2011, L 91/1. [↑](#footnote-ref-66)
67. In which regard, recall also, e.g. Case C-62/14, *Gauweiler*, EU:C:2015:400; Case C-493/17, *Weiss*, EU:C:2018:1000. [↑](#footnote-ref-67)
68. European Council, Conclusions of 16-17 December 2010, paras 1-8. [↑](#footnote-ref-68)
69. Case C-156/21, *Hungary* v. *Parliament and Council*, EU:C:2022:97; Case C-157/21, *Poland* v. *Parliament and Council*, EU:C:2022:98. See further, e.g. Borger, “Constitutional identity, the rule of law, and the power of the purse: The ECJ approves the conditionality mechanism for the protection of the Union budget”, 59 CML Rev. (2022), 1771; Baraggia, “The ‘Conditionality’ Regulation under the ECJ’s Scrutiny: A Constitutional Analysis”, 47 EL Rev. (2022), 687. [↑](#footnote-ref-69)
70. Regulation 2020/2092, O.J. 2020, L 433I/1 (as corrected by O.J. 2021, L 373/94). [↑](#footnote-ref-70)
71. European Council, Conclusions of 10-11 December 2020, para 4. [↑](#footnote-ref-71)
72. The Court’s only brief allusion to the wider policy package comes from its direct quotation of the recitals to Regulation 2020/2092, when summarising the contested act at the outset of the ruling: see paras 18 and 16 of the *Hungary* and *Poland* rulings (respectively). [↑](#footnote-ref-72)
73. We will consider below whether the package as such *could* be treated as a factor relevant to the Court’s jurisdiction over the consequences of infringement: see section 6. [↑](#footnote-ref-73)
74. Consider, e.g. Hervey, “EU Health Law” in Barnard and Peers (eds), *European Union Law* (OUP, 4th ed, 2023). [↑](#footnote-ref-74)
75. E.g. Case 242/87, *Commission* v. *Council*, EU:C:1989:217; Case C-295/90, *Parliament* v. *Council*, EU:C:1992:294; Case C-440/05, *Commission* v. *Council*, EU:C:2007:625. [↑](#footnote-ref-75)
76. E.g. Joined Cases 281, 283-285 & 287/85, *Germany* v. *Commission,* EU:C:1987:351. [↑](#footnote-ref-76)
77. See further, on the phenomenon of “competence creep”, e.g. Weatherill, ‘Competence Creep and Competence Control”, 23 YEL (2004), 1; Garben, “Competence Creep Revisited”, 57 JCMS (2019), 205. [↑](#footnote-ref-77)
78. E.g. contrast the views of de Witte, “The European Union’s COVID-19 recovery plan: The legal engineering of an economic policy shift”, 58 CML Rev. (2021), 635; with those of Leino-Sandberg and Ruffert, “Next Generation EU and its constitutional ramifications: A critical assessment”, 59 CML Rev. (2022), 433. [↑](#footnote-ref-78)
79. One thinks of the damaging impacts of the (legally dubious but politically explosive) ruling of the German Federal Constitutional Court in the *Public Sector Purchase Programme* case (Judgment of 5 May 2020). [↑](#footnote-ref-79)
80. A concern expressed, e.g. in relation to the “generous” interpretation the Union institutions adopted in relation to the “exceptional competence” conferred by Art 122 TFEU, so that the latter could furnish the legal basis for key elements of the NGEU package – an interpretation that drew scepticism, but ultimately not condemnation, from the German Federal Constitutional Court in its ruling on the *Act Ratifying the EU Own Resources Decision* (Judgment of 6 December 2022). See further, e.g. Porras-Gómez, “The EU Recovery Instrument and the Constitutional Implications of its Expenditure”, 19 EUConst (2023), 1. [↑](#footnote-ref-80)
81. See section 3 (above). [↑](#footnote-ref-81)
82. E.g. Art 42(2) TEU; Arts 25, 218(8), 223(1), 262 and 311 TFEU. [↑](#footnote-ref-82)
83. Consider, e.g. Editorial Comments, “Compromising (on) the general conditionality mechanism and the rule of law”, 58 CML Rev. (2021), 267. [↑](#footnote-ref-83)
84. Note the European Council’s Conclusions of 10-11 December 2020, especially para 2(c). [↑](#footnote-ref-84)
85. See further, in the context of the financial / sovereign debt crisis, e.g. Dermine, *The New Economic Governance of the Eurozone: A Rule of Law Analysis* (CUP, 2022). [↑](#footnote-ref-85)
86. In particular, under Title V, Part 3 TFEU. [↑](#footnote-ref-86)
87. See further, e.g. den Heijer, Rijpma and Spijkerboer, “Coercion, prohibition and great expectations: The continuing failure of the Common European Asylum System”, 53 CML Rev. (2016), 607; Thym, “The ‘refugee crisis’ as a challenge of legal design and institutional legitimacy”, 53 CML Rev. (2016), 1545. [↑](#footnote-ref-87)
88. EU-Turkey Statement of 18 March 2016, available via <<https://www.consilium.europa.eu/en/press/press-releases/2016/03/18/eu-turkey-statement/>>. [↑](#footnote-ref-88)
89. See further, e.g. Molinari, “The EU and its perilous journey through the migration crisis: Informalisation of the EU return policy and rule of law concerns”, 44 EL Rev. (2019), 824. [↑](#footnote-ref-89)
90. Comparative colleagues could no doubt inform us about parallel experiences, e.g. in the US or Canadian (or indeed German) legal systems. [↑](#footnote-ref-90)
91. Consider further, e.g. Ruffert, “The European debt crisis and European Union law”, 48 CML Rev. (2011), 1777; Tuominen, “The European Banking Union: A shift in the internal market paradigm?”, 54 CML Rev. (2017), 1359. [↑](#footnote-ref-91)
92. In particular: Arts 48 (revision) and 49 (accession) TEU. [↑](#footnote-ref-92)
93. Recall, e.g. Opinion 2/94, EU:C:1996:140; Case C-376/98, *Germany* v. *Parliament and Council*, EU:C:2000:544. [↑](#footnote-ref-93)
94. Arts 5(3) and (4) TEU. [↑](#footnote-ref-94)
95. Consider, e.g. Joined Cases C-402/05 & C-415/05, *Kadi*, EU:C:2008:461; Case C-236/09, *Test-Achats*, EU:C:2011:100; Case C-362/14, *Schrems*, EU:C:2015:650. [↑](#footnote-ref-95)
96. On the Court’s current approach, see section 4 (above). [↑](#footnote-ref-96)
97. On the Court’s current approach, see section 2 (above). [↑](#footnote-ref-97)
98. See, on the purpose and functioning of Art 218(11) TFEU, e.g. Opinion 2/00, EU:C:2001:664. [↑](#footnote-ref-98)
99. Case C-376/98, *Germany* v. *Parliament and Council*, EU:C:2000:544. [↑](#footnote-ref-99)
100. However, thereby also rekindling concerns that neither the Union’s political institutions, nor the CJEU, take those constraints seriously enough in practice: see, e.g. Wyatt, “Is the European Union and Organisation of Limited Powers?” in Arnull et al (ed), *A Constitutional Order of States? Essays in EU Law in Honour of Alan Dashwood* (Hart, 2011). [↑](#footnote-ref-100)
101. Arts 352(3) and (4) TFEU. [↑](#footnote-ref-101)
102. See further, e.g. Editorial Comments, “From Conference to Convention? Ideas and Prospects for Reform of the EU Treaties”, 59 CML Rev. (2022), 1583. [↑](#footnote-ref-102)
103. See further, e.g. Hillion and Koutrakos (eds), *Mixed Agreements Revisited: The EU and Its Member States in the World* (Hart, 2010). [↑](#footnote-ref-103)
104. A feature, in particular, of the EU’s collective response to the Covid-19 pandemic: see further, e.g. Delhomme and Hervey, “The European Union’s response to the Covid-19 crisis and (the legitimacy of) the Union’s legal order” [2023] *Yearbook of European Law* (forthcoming but already available online via <<https://academic.oup.com/yel/advance-article/doi/10.1093/yel/yeac011/7008320>>). [↑](#footnote-ref-104)
105. See further, e.g. Spaventa, “Constitutional creativity or constitutional deception? Acts of the Member States collectively and jurisdiction of the Court of Justice”, 58 CML Rev. (2021), 1697. [↑](#footnote-ref-105)
106. Art 4(3) TEU. [↑](#footnote-ref-106)
107. See further, e.g. Dashwood et al, *Wyatt and Dashwood’s European Union Law* (Hart, 6th ed, 2011), p. 80. [↑](#footnote-ref-107)
108. Thus going further than our current understanding of the Treaties’ existing organic law procedures, i.e. since domestic ratification under the latter provisions cannot somehow cure an a priori lack of Union competence – a view also reflected by the German Federal Constitutional Court in its ruling on the *Act Ratifying the EU Own Resources Decision* (Judgment of 6 December 2022), especially at paras 159-160. [↑](#footnote-ref-108)
109. Recall the Union’s efforts to ensure that the key agreements relating to UK withdrawal (Withdrawal Agreement; Trade and Cooperation Agreement) were not consider mixed and so did not require national ratification. See further, e.g. Dougan, *The UK’s Withdrawal from the EU: A Legal Analysis* (OUP, 2022). [↑](#footnote-ref-109)
110. Recall the experience of both the proposed Treaty establishing a Constitution for Europe (negative French and Dutch referenda in 2005) and the Lisbon Treaty (negative Irish referendum in 2008 followed by second, positive, referendum in 2009). [↑](#footnote-ref-110)
111. Art 20 TEU and Arts 326-334 TFEU. [↑](#footnote-ref-111)
112. In particular: Art 20(1) TEU and Art 326 TFEU. [↑](#footnote-ref-112)
113. The gradual expansion of an existing enhanced cooperation raises similar problems, e.g. where the restricted formation of the Council might already have agreed to change its internal voting rules using the simplified procedure available under Article 333(1) TFEU. See further, e.g. Dougan, “The Unfinished Business of Enhanced Cooperation: Some Institutional Questions and their Constitutional Implications” in Ott and Vos (eds), *Fifty Years of European Integration: Foundations and Perspectives* (TMC Asser Press, 2009). [↑](#footnote-ref-113)