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Delegated Rule-making in Times of Crisis: New Challenges for Democratic Scrutiny?

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Abstract

The delegation of powers to the European Commission, facilitating the adoption of non-legislative acts to implement centrally provisions of European legislation, has long been an essential part of administrative governance in the European Union. However, the established practice of delegating legislative and implementing powers to the European Commission has increased over the last decade, at the same time in the context of the various crises that the EU has had to confront during this period. The crisis context has generally demonstrated that executive institutions often emergency politics, and the amplified use of delegated powers in such circumstances raises questions about the capacity of legislative institutions to carry out their usual control and scrutiny functions. The concern here is whether – at times when the established mechanisms of control need to be carried out in times of crisis, under greater time pressure – there is the risk of legislative institutions (that had originally delegated powers to the Commission) are being sidelined, with the detrimental effects that this may have on the democratic accountability of the whole process. Against this background of normative question-marks, this article examines empirically to what extent the scrutiny of the Commission's adoption of delegated powers has fundamentally changed during times of emergency. In particular, it provides an analysis of the use of delegated powers by the European Commission in the context of the EU's response to the Covid-19 pandemic in order to establish whether the Council and the European Parliament managed to enable the usual control mechanisms effectively. By way of conclusion, the article discusses the implications of the findings for the wider discussion and the future use of emergency governance in the European Union.

Keywords: delegated rule-making; democratic legitimacy; EU crises management

I. Introduction

The practice of delegating powers to implement legislation is a long-standing feature of the European Union's decision-making process. Since its inception in the 1960s, the system of delegated rule-making has expanded to become a fundamental element of administrative governance in the European Union (EU).¹ This gradual expansion in turn led to a series of reforms, driven by the desire to simplify the system and adapt it to the changing institutional balance, in particular the rising influence of the European Parliament (EP).²

¹ T Christiansen and M Alfé, "The Functioning of Comitology Committees in Practice" in T Christiansen, J Miriam Oettel and B Vaccari (eds), *21st Century Comitology: The Role of Implementing Committees in the Wider European Union* (EIPA 2001).

² KSt C Bradley, "The European Parliament and Comitology: On the Road to Nowhere?" (1997) 3 *European Law Journal* 3.

A cornerstone of delegated rule-making in the EU has been the system of control that Member States installed in parallel to the powers of implementation conferred on the European Commission. Over time, a growing number of committees, composed of Member State representatives, have been set up to oversee how the Commission makes use of its powers – the system that has come to be known as “comitology”.³ The most recent reform arrived with the Lisbon Treaty which introduced the novel instrument of Delegated Act and – recognising the importance of advancing democratic accountability further in this area of EU rule-making – elevated the role of the European Parliament as an equal to Council of Ministers and Member States in the role of scrutinising the execution of delegated powers.

The present article examines the extent to which this well-established system of delegated rule-making has been affected by the series of crises that the EU has had to confront over the past decade. Given the impact that these challenges have had on the Union’s institutional arrangements and procedures – the need for swift action and the corresponding loss of transparency, combined with the greater saliency of the issues concerned and the potential for increasing contestation of EU decision-making – the article explores the impact of these developments on the use of delegated and implementing acts, and specifically on the system of democratic controls over their adoption that had been established through the Lisbon Treaty. In short, the article addresses the question whether the procedures installed to ensure the accountability of executive rule-making has also been operating satisfactorily in the context of an emergency, or whether democratic control of delegated rule-making has been compromised under the special circumstances of crisis governance?⁴

The article addresses these questions by first identifying the operation of delegated powers and comitology in “normal” times, in order to establish a kind of “baseline” on the basis of which to assess more recent developments. This involves a review of the decision-making procedures and accountability protocols that have been installed in this area over time, followed by a discussion of how these standard procedures are potentially challenged by the kind of crises that the EU has had to contend with in recent years, and which have imposed particular tensions in the system of EU decision-making.⁵ This juxtaposition serves to establish the potential vulnerability of the process of delegated rule-making in times of emergency.

The article then proceeds in a second step to explore this question in the context of the recent, most impactful, endogenous crises and the regulatory response it required from the European Union: the sovereign debt crisis, the global Covid-19 pandemic and the implications of the Russian aggression of Ukraine. An empirical examination is undertaken into how the practice of delegated powers has been affected by the extraordinary circumstances created by these crises, both in terms of the practical operation of the decision-making system and the wider policy-response it required. The analysis relies on a comparative case study methodology, whereby the instances in which delegated powers have been employed during the above-mentioned crises are assessed and compared against each other. This approach allows for a comprehensive perspective of the use of delegated rule-making during crises, thereby facilitating the evaluation of its dynamics and implications. By way of conclusion, the article then reflects on the wider significance of these findings. This research sets the agenda for a wider investigation into the relationship between delegated powers, democratic accountability of executive delegated rule-making and the politics of crisis-response in the European Union.

³ *Supra*, note 1.

⁴ J White, *Politics of Last Resort: Governing by Emergency in the European Union* (Oxford, Oxford University Press 2019); J White and C Kreuder-Sonnen, “Europe and the Transnational Politics of Emergency” (2022) 6 *Journal of European Public Policy* 952.

⁵ M Rhinard, “The Crisisification of Policy-making in the European Union” (2019) 57 *Journal of Common Market Studies* 616.

II. The evolution of delegated powers: from standard practice to crisis management

The long-standing practice of delegating legislative and implementing powers to the European Commission has been a part of the Treaties since the early days of the European Community but has been revised quite a few times ever since.⁶ The EU has indeed inherited the constitutional tradition of its Member States, which involves the delegation of powers to the executive branch and the related scrutiny over the enactment of such delegated powers. In the EU institutional and legal framework, this practice is translated into the European Commission's adoption of delegated and implementing acts, enshrined in Articles 290 and 291 TFEU (Treaty on the Functioning of the European Union) respectively. Before delving into the analysis of both instruments, it is worth noting that the objectives, duration, scope and content of the delegation of both legislative and implementing powers to the Commission must be duly outlined in the basic legislative act. Delegated acts are non-legislative acts aimed at amending or supplementing certain non-essential elements of a basic legislative act. In other words, they entail the delegation of legislative powers to the Commission. As such, the legislative institutions of the EU – the European Parliament and the Council of Ministers – usually retain both the roles of delegators and scrutinisers. The control over the adoption of delegated acts is, as a matter of fact, carried out *ex post* by the co-legislators. There are two ways in which the co-delegators can exercise control over delegated acts. The first is by objecting to it – either institution may pose their veto *ex post* on a delegated act within a period of two (extendable) months following its adoption. The second way is by revoking the delegation altogether, also informally known as the “nuclear option”.⁷ However, the latter has never been used so far.

Implementing acts, on the other hand, are adopted when “uniform conditions for implementing legally binding Union acts are needed.”⁸ They confer implementing powers upon the European Commission or, in specific and properly justified cases, on the Council of Ministers. They specify how particular legislation should be implemented and provide additional details to ensure consistent enforcement across Member States. Provided that the competence to implementing Union law lays in the hands of the Member States, committees composed of national representatives are entrusted with the *ex ante* scrutiny of such acts. Implementing acts mirror the original comitology procedure, which was formally established at the end of the 1960s. However, following recent reforms, the adoption of implementing acts and the role of comitology committees require less complex processes as numerous scrutiny procedures have been merged into two more straightforward ones. While under the advisory procedure comitology committees only retain an advisory role, the examination procedure bestows upon the committee the power to veto a given implementing act proposed by the Commission by means of a negative opinion.⁹ Finally, an appeal committee,¹⁰ consisting of representatives of the Member States at a higher level of representation and chaired by the Commission, is aimed at dealing with controversial cases that are left pending at the committee level.

⁶ Before the current provisions in the TFEU came into force, the legal basis for comitology was enshrined in Art 155 of the Treaty of Rome, which later became Art 211 EC. The Single European Act provided a fully-fledged constitutionalisation of comitology in Art 145 thereof, later Art 202 EC. See M Del Monte and R Mañko, “Understanding Delegated and Implementing Acts” (2021) European Parliamentary Research Service.

⁷ GJ Brandsma and J Blom-Hansen, *Controlling the EU Executive? The Politics of Delegation in the European Union* (Oxford, Oxford University Press 2017).

⁸ Art 291 (2) TFEU.

⁹ Art 5 (3) of the Regulation (EU) no. 182/2011 of the European Parliament and of the Council laying down the rules and general principles concerning mechanisms for control by Members States of the Commission's exercise of implementing powers (2011) OJ L 55/13; Art 4 of the Standard Rules of Procedure for Committees Rules of Procedure for the [Name of the Committee] Committee (2011/C 206/06).

¹⁰ Art 6 of the Regulation (EU) no. 182/2011 of the European Parliament and of the Council.

Delegated rule-making, whether in the form of delegated acts or implementing measures, has historically been a source of inter-institutional contention between the European Commission, the European Parliament and the Council of Ministers.¹¹ The legislators are reluctant to delegate powers to the Commission as they are determinate to uphold their role in the decision-making process and to ensure democratic accountability.¹² The European Parliament, in particular, has a rather limited role in the scrutiny of implementing acts predominantly in the area of co-decided legislation, which creates further tensions when negotiating what kind of empowerment to delegate to the Commission in the parent legislative act. The Council, on the other hand, tends to be sceptical of delegated acts due to the *ex post* nature of their scrutiny and the difficulty to exercise the veto powers necessary to block them.¹³

Tensions first emerged in the 1970s, when the European Parliament demanded to be granted an active role in the control of the intricate comitology system, and are still quite relevant to this day.¹⁴ Much of the recent scholarly analysis¹⁵ has concentrated either on formal arrangements from a legal perspective, or on the application of principal-agent models which assume that Member States or legislative institutions control the European Commission in its execution of delegation powers. Notwithstanding this history of inter-institutional tensions and the attention that these have received in the literature, questions remain about the application of these procedures and their value in terms of democratic accountability.

In this regard, a closer look at developments in the field of delegated powers over time does not sustain the expectation of the legislative institutions exercising systematic control being exercised over the European Commission. The Council and European Parliament not only rarely make use of their power of veto over delegated acts,¹⁶ but may also often grant “early non-objections” in order to speed up the whole process.¹⁷ The behaviour of comitology committees follows a similar pattern, whereby the proportion of opinions and implementing acts that are sent to the Appeal Committee is very low, and that of negative votes is almost null.¹⁸ Instead, the Commission appears to be in command of the process of centralised policy-implementation, engaging in the practice of bureaucratic collusion, which will be further analysed in the section below.

¹¹ See, eg Case C-427/12 European Commission v European Parliament and Council of the European Union (Biocides) (2014), Case C-363/14 European Parliament v Council of the European Union (EUROPOL) (2015); Case C-88/14 European Commission v European Parliament and Council of the European Union (Visas) (2015).

¹² Interview with Legal advisor, Permanent Representation of EU Member State (Brussels, Belgium, 23 May 2023); Interview with Legal advisor, European Parliament (Brussels, Belgium, 1 June 2023).

¹³ In order to successfully veto a delegated act, the Council needs to reach a (reinforced) qualified majority, while the European Parliament needs the majority of its component members.

¹⁴ *Supra*, note 1.

¹⁵ Z Xhaferri, *Law and Practices of Delegated Rulemaking by the European Commission* (Brill Nijhoff 2022); E Tauschinsky and W Weiß (eds), *The Legislative Choice Between Delegated and Implementing Acts in EU Law Walking a Labyrinth* (Edward Elgar Publishing 2018); A Volpato, *The Delegation of Powers in the EU Legal System* (Routledge, 2022); G Jan Brandsma and J Blom-Hansen, *Controlling the EU Executive? The Politics of Delegation in the European Union* (Oxford University Press 2017); AMF Pasarín, R Dehousse and JP Plaza, “Comitology: The Strength of Dissent” (2020) 43 *Journal of European Integration* 311.

¹⁶ It has been shown that the Council has objected to 0.6% of delegated act adopted between 2010 and 2019. Over the same period, the EP has objected to 1.2% of delegated acts. See T Christiansen and S Lange, “Executive-Legislative Relations and Delegated Powers in the European Union. Continuous Recalibration?” in D Fromage and A Herranz-Surrallés (eds), *Executive-Legislative (Im)balance in the European Union* (Bloomsbury Collections, 2019).

¹⁷ Interview with Legal advisor, European Parliament (Brussels, Belgium, 1 June 2023).

¹⁸ European Commission, “Report from the Commission to the European Parliament and Council”, <<https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52023DC0664>> (last accessed 14 November 2023). See also *supra*, note 7.

In addition to these long-standing trends, the “polycrisis”¹⁹ has further complicated matters also in this field. The succession of serious, even existential crises has raised questions not only about the EU’s capacity to respond to emergencies, but also – in the current context – whether the use of delegated powers is compromised in such situations. The crises impacting the EU have intersected with traditional debates between established theories of European integration.²⁰ The role of the intergovernmental vis-à-vis that of supranational institutions is often discussed in the literature, usually with particular attention to whether crises strengthened the former or the latter. Due to the different ramification of crises, the intertwining levels of governance and conflicting actors, conceptualising EU crises and their management remains challenging even through the lens of traditional integration theories and their more recent developments.

Beyond theoretical considerations, there are also constitutional dilemmas: the EU Treaties do not envision fully-fledged emergency powers for the Union to enact during crisis, as emergency response traditionally lays in the hands of the Member States.²¹ In other words, Member States may activate emergency powers at the national level, while the EU does not have the competence nor the instruments to do so. Nevertheless, the EU has increasingly played a significant role in the management of the most recent crises, enacting various instruments of different nature.

Supranational crisis management, intended as European institutions enacting and broadening their executive discretion to deal with emergencies,²² nevertheless appears to have become increasingly more prominent as opposed to intergovernmental or domestic crisis management. The EU has also adopted a “crisis-oriented” policy-making behaviour during normal times, by framing its politics with an approach aimed at always looking out for the next crisis – in other words, as emphasised by the scholarship, a “crisification” approach.²³ In this way, European institutions become endowed with increased administrative powers, facilities and mechanisms that they have the competence to enact in the case of crises. This phenomenon includes, but is obviously not limited to, the increase and strengthening of empowerments for the adoption delegated powers present in basic legislative acts. Consequently, the use of delegated powers as instruments of crisis management has steadily evolved and grown over the course of the crises that the EU has had to face. While delegated powers were barely ever involved in the resolution of crises in earlier times, such as in the context of the sovereign debt crisis, the Commission was quick and consistent in adopting both delegated and implementing acts with the outbreak of the Covid-19 pandemic. The pandemic saw a boost in the general adoption of delegated powers, peaking in 2021 with the highest ever amount of delegated acts adopted²⁴ and in 2022 with a record number of implementing acts.²⁵ However, the Covid-19 pandemic also marked a turning point in the use of delegated powers as aimed directly at managing crises – with 21 relevant delegated acts and 64 implementing acts adopted,²⁶ as well as a significant boost in the number of empowerments in non-legislative acts. It is also relevant

¹⁹ J Zeitlin, F Nicoli and B Laffan, “Introduction: The European Union Beyond the Polycrisis? Integration and Politicization in An Age of Shifting Cleavages” (2019) 26 *Journal of European Public Policy* 963.

²⁰ N Brack and S Gürkan, *Theorising the Crises of the European Union* (Routledge 2021).

²¹ *Supra*, note 4.

²² *ibid.*

²³ *Supra*, note 5.

²⁴ The Commission adopted a total of 217 delegated acts in 2021. Data retrieved from the Register of Delegated and Implementing Acts <<https://webgate.ec.europa.eu/regdel/#/home>>.

²⁵ The Commission adopted a total of 2,141 implementing acts in 2022. See: European Commission, “Report from the Commission to the European Parliament and the Council on the Working of Committees in 2022” <<https://eur-lex.europa.eu/statistics/2023/legislative-acts-statistics.html>> (last accessed 16 February 2024).

²⁶ *Supra*, note 24.

to note that the first pandemic-related delegated act was adopted as early as April 2020,²⁷ highlighting the procedural swiftness of these instruments. Delegated and implementing acts have also been adopted in the context of managing the consequences of the war in Ukraine, especially on the internal market.²⁸ As a result, emergency situations have shown that executive institutions are the indisputable winners of emergency decision-making, with the national governments taking on a central role in this regard. In situations of crisis, the Commission has also increasingly resorted to instruments of delegated rule-making, despite being a less high-profile, albeit not unimportant, feature of EU governance. The section below will delve into this trend, discussing in particular how crises have affected the use of delegated powers.

III. Delegated rule-making in times of crisis: managing the sovereign debt crisis

After the ratification of the Treaty of Maastricht, the EU and especially the newly established EMU lived through a period that was relatively steady financially thanks to the lack of inflation, abundant availability of liquidity and the boost of financial and transaction networks within the Union. This generally widespread optimism resulted, nevertheless, in a remarkable asymmetry concerning the behaviour of Member States within the Eurozone.²⁹ Certain Member States, for instance, overlooked the budgetary rules enshrined in the Treaties and the Stability and Growth Pact.³⁰ Moreover, the national economic policies were not coordinated as they were initially meant to be. Finally, the EMU was not empowered with a crisis-halting device but only with a prevention system outside the Lisbon framework.³¹ The sovereign debt crisis in the Eurozone famously emphasised the role of intergovernmental institutions and decision-making approaches. In this framework, the European Council indeed became the forum in which all the key decisions were taken.³² The establishment of the EMU governance tilted towards the European Council, which attempted to take upon itself the role of “legislative initiator to the detriment of the Commission”.³³ However, within a narrower scope, namely that of macroeconomic policy, the trend was different. Firstly, evidence of multilateral emergency politics can be found in the establishment of the European Stability Mechanism as an organisation outside of the EU legal framework.³⁴ More specifically, the governance reforms to the EMU contributed to strengthening the role of supranational institutions.

Following a similar pattern, the Commission also strengthened its role as a powerful player in the EMU governance, particularly within the macroeconomic dimension. The consolidated coordination of economic policies derived from the adoption the Six Pack, the Two Pack and the Fiscal Compact, tightened the Commission’s hand on various aspects of Member States’ fiscal policy.³⁵ They broadened the Commission’s surveillance regime by

²⁷ *Ibid.*

²⁸ Seven delegated acts and 16 implementing acts have been adopted within this scope. See: *Ibid.*

²⁹ PA Hall, “Varieties of Capitalism and the Euro Crisis” (2014) 37 *West European Politics* 1223.

³⁰ *Ibid.*

³¹ J Pisani-Ferry, A Sapir and GB Wolff, “The Messy Rebuilding of Europe” (2012) *Brugel Policy Briefs*, no. 1.

³² R Dehousse, “Why has EU Macroeconomic Governance Become More Supranational?” (2016) 38 *Journal of European Integration* 617.

³³ J-P Keppenne, “Introduction”, in U Neergaard, C Jacqueson and JH Danielsen (eds), *The Economic and Monetary Union: Constitutional and Institutional Aspects of the Economic Governance within the EU* (DJØF Publishing 2014).

³⁴ *Supra*, note 4.

³⁵ *Supra*, note 32.

including national expenditures, economic trends, budgetary and debt plans.³⁶ Moreover, the implementation of the European Semester through the Six Pack increased the interactions between the Commission and national authorities prior to the submission of draft budgets. Against this background, the Commission can now issue country-specific recommendations based on the national reports on budgetary policies. If the Council decides to adopt such recommendations, they must be considered during the drafting of national budgets.³⁷

Delegated powers, specifically of delegated and implementing acts, have started making their appearance in the management of the sovereign debt crisis a few years after its inception. Against this background, it is crucial to highlight that delegated acts under Article 290 TFEU were only established with the Lisbon Treaty. As a matter of fact, the first delegated acts were not submitted until 2010 – by the end of that year, only four delegated acts were adopted by the Commission, and seven by the end of 2011.³⁸ Delegated acts were clearly a new, (to an extent) unfamiliar instrument, thereby excluded from the various provision packages adopted as crisis management tools dealing with the Eurozone crisis. On the other hand, implementing acts and comitology were already well-established in the EU legal framework – albeit on a different degree than they are now. The Comitology Regulation,³⁹ which codified the advisory and examination procedures, thereby simplifying the otherwise intricate and untransparent old comitology system, was only adopted in 2011 jointly for the first time by the EP and Council. Therefore, it follows that neither delegated nor implementing acts could be deemed as suitable and procedurally quick instruments to be adopted to manage a crisis – either because they were new, or very complicated. The first reference to delegated powers is made in the European Banking Authority Regulation, which states the Authority has powers to develop technical standards by means of implementing acts pursuant to Article 291 TFEU, which should be then submitted to the Commission for endorsement and eventual adoption.⁴⁰ These technical standards may be adopted by the Commission as delegated acts pursuant to Article 290 TFEU.⁴¹ Moreover, both delegated and implementing acts play an important role in the Level 2 phase of the Lamfalussy architecture, of which the EBA is part. Their role, again, involves the adoption and implementation of technical standards.⁴² In other words, the adoption and implementation of technical standards dealing with regulation and supervision across the European financial and banking sector is placed in the hands of the Commission. Similarly, the *ex ante* contributions to the Single Resolution Fund, established in 2014 as part of the banking union project, were established by means of an implementing act, although in this particular case the delegation is unusually conferred on

³⁶ MW Bauer and S Becker, “The Unexpected Winner of the Crisis: The European Commission’s Strengthened Role in Economic Governance” (2014) 36 *Journal of European Integration* 213.

³⁷ *Supra*, note 32.

³⁸ M Kaeding, “Overriding the European Commission’s Rulemaking? Practical Experience in the European Union with post-Lisbon Legislative Vetoes with Quasi-Legislative Acts” (2017) *Bruges Political Research Papers* 64/2017.

³⁹ Regulation (EU) 182/2011 of the European Parliament and the Council of 16 February 2011 laying down the rules and general principles concerning mechanisms for control by Members States of the Commission’s exercise of implementing powers (2011) OJ L 55/13.

⁴⁰ Art 15 of Regulation (EU) No 1093/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Banking Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/78/EC.

⁴¹ E Fahey, “Does the Emperor Have Financial Crisis Clothes? Reflections on the Legal Basis of the European Banking Authority” (2011) 74 *The Modern Law Review* 581.

⁴² European Commission, “The Lamfalussy architecture” <https://ec.europa.eu/info/business-economy-euro/banking-and-finance/regulatory-process-financial-services/regulatory-process-financial-services_en> (last accessed 19 September 2023).

the Council and not the Commission.⁴³ Finally, both delegated and implementing acts play an important role in the Level 2 phase of the Lamfalussy architecture for the adoption and implementation of technical standards.⁴⁴ It is therefore possible to note that, despite not playing a frontrunner role in the management of the sovereign debt crisis, delegated and implementing acts have timidly contributed to the empowerment of the Commission's supranational authority, particularly in the banking and financial sector.

IV. Delegated rule-making in times of crisis: responding to the covid-19 pandemic

The outbreak of the Covid-19 pandemic was undoubtedly not only a health emergency – rather, the spheres affected by the crisis were many. The economy received severe shocks caused by several factors, including the national lockdowns halting both production and demand. The crisis started as exogenous, but inevitably spilled over to the domestic and EU level. Moreover, the Covid-19 pandemic was of a symmetric nature in that all Member States were indeed affected by the emergency, albeit with different timelines. As perhaps expected, the first immediate reactions came from the domestic level through the imposition of national lockdowns, the use of decree-laws and the enactment of parliamentary debates.⁴⁵ Other than the need for a quick response, the fact that Member States were initially hit differently by the same crisis also played a significant role in determining the level of immediate emergency politics. As the emergency spilled over, almost all Member States unilaterally decided to suspend Schengen and reintroduce internal border controls for a limited amount of time.⁴⁶ Intergovernmental institutions – and especially the European Council – have been crucial for a for the establishment of instruments and mechanisms aimed at tackling the crisis. The European Council negotiated and agreed on the largest stimulus package – Next Generation EU⁴⁷ – first, after it was proposed by the Commission. It also quickly adopted several resolutions regarding public health, the economy, the internal market and free movement by means of conclusions, statements and so on. It did so by efficiently navigating the new challenges posed by travel restrictions and lockdowns – meetings, for instance, were held by videocall.⁴⁸

The pandemic has, however, also triggered a substantial supranational response. The Commission was a crucial player in the adoption of Next Generation EU – not only because it reacted swiftly to the pandemic outbreak with such a proposal, but also because the package itself endows it with new powers, such as the capacity to contract loans on the market. The Commission, alongside the External Action Service and the European Food and Safety Authority, was also able to capitalise on instruments that it had previously established following the wave of *crisification* of EU policy-making since the sovereign debt crisis (Rhinard, 2019).⁴⁹ These tools include early warning and detection mechanisms aimed at exposing upcoming threats across various policy sectors – such as, but not limited to, the Early Warning and Response System for communicating disease outbreaks and the

⁴³ Council Implementing Regulation (EU) 2015/81 of 19 December 2014 specifying uniform conditions of application of Regulation (EU) No 806/2014 of the European Parliament and of the Council with regard to *ex ante* contributions to the Single Resolution Fund.

⁴⁴ *Ibid.*

⁴⁵ *Supra*, note 4.

⁴⁶ *Ibid.*

⁴⁷ Regulation (EU) 2021/241 of the European Parliament and of the Council of 12 February 2021 establishing the Recovery and Resilience Facility.

⁴⁸ P Culley, D Oldenburg and S Vanhoonacker, “The European Council and Council of the EU. What Lessons from Covid-19 Decision-Making?” (CEPS Policy Insight 2022).

⁴⁹ *Supra*, note 5.

Animal Disease Information System for emerging animal health problems, along with systems designed to coordinate the various mechanisms.⁵⁰

Clearly, the pandemic has uncovered several deep-rooted vulnerabilities of the EU administrative machinery, such as a lack of and consequent need for a fast-response mechanism to employ in the case of emergencies – or, at least, in some policy areas. Whereby the relevant empowerment was already present in a basic legislative act, the Commission has resorted to both delegated and implementing acts to introduce new provisions in a fast and efficient way. The clarification of the scrutiny procedure, as well as the reduction of the time available for such procedures, has most likely been an important factor in determining the choice to adopt more delegated and implementing acts than in the past. Also, the need for uniform implementation of several measures naturally led to the need to resort to implementing acts. It comes as no surprise, thus, that some provisions within Next Generation EU and especially the Recovery and Resilience Facility envision the adoption of both delegated and implementing acts. The Commission may adopt delegated acts pursuant to Article 290 TFEU for monitoring purposes – for example, to set common indicators and scoreboards for reporting progress and evaluating the Member States.⁵¹ The establishment of the Recovery and Resilience Facility indeed shows that the role of delegated acts has clearly evolved within the scope of emergency politics, becoming more central over time. Of course, this development also allows for space for the European Parliament and Council, endowed with the power of scrutiny over the Commission under Article 290 TFEU. The European Parliament, in particular, risks being somewhat sidelined during emergencies in favour of the executive. In times of crises, under enormous time pressure and in a politically highly charged context, the European Commission and the Member States have favoured informal arrangements and quick decisions rather than pursuing the traditional legislative route.

In general, delegated rule-making facilitated the rapid adoption of measures and provided the necessary flexibility and coordination to address the evolving nature of the crisis.⁵² The most active policy areas in this regard have been agriculture, transport, justice and consumers, and the internal market. Broadly speaking, the measures concerned the safeguard of the fruit, vegetable and wine sectors, the recognition of vaccine certificates issued by third countries, the extension of temporary relief measures in the transport sector. More specifically, the spheres of application of delegated acts were of a varied nature – the issuance of certificates of recovery from Covid based on antigen tests, for instance, is one of them.⁵³ Examples of implementing acts adopted to tackle the pandemic include the application of the passenger locator forms for travelling, as well as technical specifications for the EU Digital Covid Certificate.⁵⁴ It is quite remarkable that the vast majority of the delegated and implementing acts adopted during this time do not apply to the scope of public health, despite the pandemic being, among other things, a public health crisis. Even when they do, such as in the case of the EU Digital Covid Certificate, these measures are still predominantly related to issues of freedom of movement and the internal market. As a matter of fact, before 2020, the EU had barely any public health competences. As such, the lack of basic legislative acts empowering the Commission to

⁵⁰ A Boin and M Rhinard, “Crisis Management Performance and the European Union: The Case of COVID-19”, (2023) 30 *Journal of European Public Policy* 655.

⁵¹ Arts. 10 (3), 29 (4) and 30 (2) of the Regulation (EU) 2021/241 of the European Parliament and of the Council of 12 February 2021 establishing the Recovery and Resilience Facility.

⁵² Interview with Officer, European Commission, DG JUST (Brussels, Belgium, 08 June 2023).

⁵³ *Supra*, note 24.

⁵⁴ Regulation (EU) 2021/953 of the European Parliament and of the Council of 14 June 2021 on a framework for the issuance, verification and acceptance of interoperable COVID-19 vaccination, test and recovery certificates (EU Digital COVID Certificate) to facilitate free movement during the COVID-19 pandemic.

enact delegated powers consequently explains the lack of delegated measures dealing with public health.

While it is certainly relevant to analyse the adoption of delegated powers during a specific crisis, it is equally telling to look at the trend of powers that were conferred during the same time. This is the case of the Recovery and Resilience Facility, as mentioned above, but there are other examples. In general, during the pandemic, many crisis-tackling measures were adopted through the ordinary legislative procedure fairly quickly, thereby providing a broad rather than specific framework.⁵⁵ A rise in the empowerment for the adoption of delegated and implementing acts to then implement or refine certain aspects of such measures can therefore be observed.⁵⁶ Delegated acts, in particular, are aimed at amending or supplementing non-essential elements of a parent legislative act. Such non-essential elements, contrary to what one might think, are usually quite *essential* in practice, in that they may comprise specific details that are fundamental to the execution of the primary act – for example, but not exclusively, the duration of applicability, technicalities related to the expertise, and more, depending on the context. In other words, non-essential elements tend to regulate practical aspects of the application of the basic act, and are therefore quite important.⁵⁷

Perhaps not surprisingly, some conferred powers also include the possibility of activating the urgency procedure for either delegated or implementing acts, when duly specified in the parent act. The urgency procedure is aimed at ensuring a faster process by overriding certain procedural steps, such as the *ex-post* scrutiny for both delegated and implementing acts.⁵⁸ Such procedure thus practically enables the Commission to avoid formal control, whether *ex ante* or *ex post*, on delegated powers in situations that require urgency, such as crises. During the pandemic, a good part of the relevant delegated and implementing acts were adopted through the urgency procedure.⁵⁹ As a result, the scrutiny enacted by the legislators or by the Member States ends up being lawfully sidelined for reasons of time and efficiency.

Empowering the Commission with the possibility of adopting delegated powers, however, does not come without controversy. Upon negotiating the parent act, the nature of the empowerment – namely, whether it should involve a delegated or an implementing act – is a usually a contested issue.⁶⁰ The nature of the delegation not only deeply affects the type of act and related procedure but, perhaps most importantly, it shifts the power of control from one actor to another – despite such control may then pan out to be almost a mere formality. On the one hand, the European Parliament and the Council, which is notoriously inactive in the scope of delegated acts. On the other hand, committees comprised of representatives of the Member States. To complicate matters, the wording of the Treaties and the related case law⁶¹ does not always result in help in determining the kind of delegation that would be most appropriate in a given situation.⁶² Regardless of whether the control is thoroughly carried out at a later stage, or whether it is caught in a system of bureaucratic collusion between administrative actors within the scope of wider

⁵⁵ Interview with a Senior official, European Commission, DG AGRI (Brussels, Belgium, 24 May 2023).

⁵⁶ *Ibid.*

⁵⁷ Interview with a Legal advisor, Permanent Representation of an EU Member State (Brussels, Belgium, 26 May 2023). Also see M Chamon, “How the Concept of Essential Elements of a Legislative Act Continues to Elude the Court: *Parliament v. Council*” (2013) 50 *Common Market Law Review* 849.

⁵⁸ *Ibid.*

⁵⁹ *Supra*, note 24.

⁶⁰ Interview with Legal advisor, Permanent Representation of EU Member State (Brussels, Belgium, 23 May 2023).

⁶¹ The most famous example of this being Case C-427/12 *European Commission v European Parliament and Council of the European Union (Biocides)* (2014).

⁶² *Supra*, note 7.

institutional dynamics, the negotiations for its allocation are usually quite vigorous. During situations of crisis, the nature of the empowerment, and therefore the negotiations over the distribution of power, may be particularly delicate considering the tense and likely politicisation of the context. However, the urgency of the circumstances might have led the institutional actors involved to agree on the empowerment more promptly.⁶³ Once the empowerment is eventually agreed upon, both the legislators and the Member States generally comply with the Commission's use of delegated powers – and the case of the pandemic is, in fact, no different. As a matter of fact, none of the delegated or implementing acts aimed at the management of the Covid-19 emergency have been objected or vetoed by the legislators or the Member States respectively.⁶⁴ The crisis context appears not to have impacted on the degree of contestation of delegated powers, whether that is due to a desire to ensure quick and effective problem-solving, to demonstrate trust in the Commission, or simply because the “efficient” manner in which the Commission is normally running the process has continued. What seem to become more controversial, however, are the negotiations over the nature of the empowerment and, therefore, the allocation of control powers across the institutions involved. The discretion between Articles 290 and 291 TFEU appears to often be a political choice, rather than a legal one, in that the delineation between the two kinds of measures may be blurred.⁶⁵ The choice of delegation translates into an inter-institutional contention over who will eventually detain the power of scrutiny, inevitably putting the transparency and accountability of the system into question.

V. Delegated rule-making in times of crisis: addressing the consequences of Russia's war against Ukraine

The Russian invasion of Ukraine on 24 February 2022 has posed another big challenge to the EU and its crisis management capacity. Already in the first few months since the beginning of the war, the Commission has adopted and published several delegated and implementing acts. The former mainly deal with agriculture, development, transport and tariffs.⁶⁶ The latter similarly entail issues related to agriculture, but also the disruption of the markets and the equivalence of Covid-19 certificates issued in Ukraine to facilitate the freedom of movement. There is no evidence, once again, of contestation with regard to such measures, which have been adopted smoothly and within the prescribed times. One issue-sensitive case is worth mentioning in this regard, namely the EU regulation dealing with grain imports from Ukraine.⁶⁷ This regulation establishes trade liberalisation measures aimed at supporting the Ukrainian economy, allowing for the temporary suspension of tariff-rate quotas outlined in the EU-Ukraine Association Agreement. Under this provision, products falling within these quotas can be imported into the EU from Ukraine without incurring any customs duties.

However, significant logistical challenges for Ukrainian grain exports persisted, including the elevated costs due to the inadequate infrastructure handling the increased

⁶³ Supra, note 52.

⁶⁴ Supra, note 24.

⁶⁵ In the case *Biocides*, the CJEU has not provided an unequivocal distinction between delegated and implementing acts, somewhat rejecting the normative base according to which Arts. 290 and 291 TFEU are distinct and mutually exclusive. See supra, note 7.

⁶⁶ Supra, note 24.

⁶⁷ Regulation (EU) 2022/870 of the European Parliament and Council of 30 May 2022 on temporary trade-liberalisation measures supplementing trade concessions applicable to Ukrainian products under the Association Agreement between the European Union and the European Atomic Energy Community and their Member States, on the one part, and Ukraine, on the other part.

traffic at Ukraine–EU border crossings. Consequently, there was a significant rise in imports from Ukraine to those EU Member States bordering Ukraine, namely Bulgaria, Hungary, Poland, Romania and Slovakia. This rise in imports strained the storage capacity and logistical infrastructures in these countries, thus also negatively impacting the economic capability of local producers. In response to these issues, the European Commission then introduced – via an implementing act⁶⁸ – a temporary preventive measure on the imports of certain products originating in Ukraine, such as wheat, maize, rapeseed and sunflower seed. This time-limited measure established that these goods could continue to enter free circulation within the internal market, with the exception of the affected neighbouring states. This implementing act was adopted as a response to the unilateral actions taken by some of the affected Member States concerning specific imports from Ukraine. As may be imagined, the implementing act was deemed as controversial given its potential interference with internal market rules.⁶⁹ Nonetheless, frictions were once solved using the negotiations, as the legal basis for such a measure was found in the basic act.⁷⁰ Once sent out to the comitology committees for scrutiny, the act was no longer contested and swiftly adopted as per usual.

Moreover, the proposal for a regulation addressing situations of crisis and *force majeure* in migration and asylum dimensions⁷¹ becomes particularly relevant in light of the current situation. The proposal contains, *inter alia*, provisions for the Commission to be endowed with the powers to adopt implementing acts pursuant to Article 291 TFEU dealing with the relocation of applicants for international protection, irregular migrants, persons granted immediate protection, as well as return sponsorship. The key here is that the Council would normally be empowered to adopt such implementing measures, under the exceptions mentioned in Article 291(2) TFEU, respectively under Articles 24 and 26 TEU. Millions of Ukrainians were forced to flee their homes, seeking refuge – primarily, but not only – in neighbouring EU countries such as Hungary, Poland and Slovakia. If the proposal is adopted, the Commission, instead of the Council, would be granted crucial implementing powers in the migration and asylum dimension – which may become particularly relevant in the case of an emergency. It therefore follows that the Commission would play a more crucial role in the case where the migratory flows from Ukraine proved to put pressure on the EU and the Member States.

VI. Concluding remarks

The above overview of the use of delegated powers through delegated and implementing acts in the context of the major crises the EU had to confront over the past decade has been necessarily brief. While each crisis posed distinct challenges to EU decision-making, they have all had in common the need for rapid responses and innovative solutions to novel threats and risks. Against this background, the present article sought to establish the degree to which the crisis mode in EU decision-making has had an impact on the delegation of rule-making powers, with particular focus on the standards of democratic scrutiny which may have suffered in the context of the demands.

The research presented here revealed that EU delegated rule-making has indeed come under considerable stress during periods of crisis, but that the system of delegated powers – and the democratic controls surrounding it – has not been fundamentally

⁶⁸ Commission Implementing Regulation (EU) 2022/903 introducing preventive measures concerning certain products originating in Ukraine.

⁶⁹ *Supra*, note 60.

⁷⁰ *Ibid.*

⁷¹ Proposal for a Regulation of the European Parliament and of the Council addressing situations of crisis and *force majeure* in the field of migration and asylum, COM/2020/613.

Table 1. Impact of crises on the use of delegated powers in the EU

Crisis	Challenges for EU decision-making	Impact on the use of delegated powers
Sovereign debt crisis	<ul style="list-style-type: none"> – Little or no governance around newly established delegated acts – Framework of implementing acts not yet reformed via the Comitology Regulation 	– Limited legislative change, but no increase in the use of delegated powers during emergency
Covid-19 Pandemic	– Limited existing secondary legislation on public health, consequent lack of empowerments for delegated powers	– Delegated powers used for the first time during the emergency, mainly as instruments aimed at safeguarding the internal market
Consequences of Russia's War against Ukraine	– Empowerment for delegated powers present within the scope of the internal market	– Delegated powers used during the emergency, mainly as instruments aimed at safeguarding the internal market and to address the energy crisis

affected. As a matter of fact, delegated rule-making in times of crisis has appeared to continue largely as “business as usual”: neither has there been a significant increase in the use of delegated and implementing acts, nor have we been able to observe a shift in the way the procedures have been applied (see summary in Table 1).

The analysis of the impact of the various crises on delegated rule-making indicates that EU decision-making in these extraordinary circumstances does not, in itself, compromise the procedures that have been laid down to ensure the democratic accountability of the executive actions in this domain. There are several reasons for this state of affairs – which is not necessarily as reassuring as it seems at first sight.

First, the first principle of delegated powers is that any such delegation can only occur on the basis of existing empowerments via legislative acts already in force, and in each of the crises under investigation here the EU lacked the kind of legislative base that would have permitted an increase in delegated powers in response to dealing with the specific challenges they posed. What we have in fact witnessed is a rise in the adoption of secondary legislation, including new provisions for future delegation of powers, but that of course has no immediate impact and indeed has been largely aimed at future contingencies, not current crisis-management.

Second, the observation that crises did not have a detrimental effect on the democratic scrutiny of delegated powers is also due to the fact that even in “normal” times the formal control mechanism built into the system do not fully correspond to the actual practice. As discussed above, the everyday reality of delegated powers is that of a European Commission firmly in control of the process, only facing challenges to its proposed acts in a tiny minority of cases. Instead, the experience of the Union’s response to the pandemic has merely served to amplify a more deeply rooted question about the functioning of the system, namely whether Member States and legislative institutions actually have the capacity and the political will to apply the control mechanisms that they have at their disposal. As we have seen, the answer to this question is overwhelmingly negative: in the vast majority of the cases the European Commission is not challenged in how they propose to use their executive powers, neither by the Member States in comitology committees and Council, nor by the elected deputies in the European Parliament.

Whereas the representatives of Member States and of the European citizens formally exercise control over the Commission, in practice they are more likely in collusion with the European executive, facilitating an essentially obstacle-free passage for the adoption of delegated and implementing acts. Consequently, rather than one branch, the legislative,

overseeing the use of powers delegated to the other executive branch, there appears to be close cooperation among all actors involved. This routine collusion among the institutions, facilitating the smooth and timely implementation of EU legislation, has also enabled the de-politicisation of decision-making in this realm, leaving it to technocratic elites rather than elected representatives to effectively decide on the nature of legislative implementation.

Only in exceptional circumstances is this pattern of formal control and de facto collusion interrupted by instances of contestation: rare instances when proposed implementing measures or delegated acts receive attention by opinion leaders in political parties, or in the media, and their adoption is then subject to greater scrutiny, public debate and potential objections. However, such occasions are few and far between, and are not representative of the actual nature of the system. Indeed, these rare moments of contestation of delegated rule-making are best understood as the exceptions that prove the rule.

Without engaging in a more far-reaching normative assessment, the diagnosis here is simply that centralised implementation of EU legislation through delegated powers is a largely de-politicised affair that is rarely contested by political actors. This “below-the-radar” nature of delegated powers is well suited for crisis-mode decision-making which also relies on the smooth and swift adoption of new legal provisions. In a way, the manner in which the EU’s system of delegated powers has remained – rather stubbornly in the face of significant reforms aimed at democratisation and greater transparency – a process dominated by technocratic elites has made it, unwittingly perhaps, quite suitable for crisis-mode decision-making. In other words, one reason why the impact of crises on the democratic scrutiny of delegated powers has not been noteworthy is the actual weakness of such scrutiny even in normal times – something of a vice appearing as a virtue in the context of the kind of emergencies the EU has had to confront.

This finding raises new questions that future work will need to address – questions such as whether there is a need for more *effective* democratic scrutiny of delegated powers, and whether contestation is ultimately detrimental or actually beneficial to the operation of the system. The long-standing issue of how delegated rule-making can be legitimated also remains an ongoing concern,⁷² especially in the context of the special circumstances imposed by decision-making in times of crisis. This is because the wider tension between the need for genuine democratic control of delegated powers on the one hand, and the pressure to act quickly and decisively in the context of emergencies, is certainly palpable. Future scenarios are certainly imaginable where greater scrutiny of delegated powers has become the norm, only for this then to be set aside when crisis-related decision-making is seen to require immediate action. An expansion of the “urgency procedure” – the executive rule-making equivalent of shooting first and asking questions later – is a likely consequence in such a scenario which would also imply a delay, and hence a potential weakening, of the democratic control of the executive.

Developments on the legislative front following the pandemic demonstrates that these are not only abstract considerations, but pertinent questions arising from concrete developments in the early 2020s. In this regard, the Commission’s 2022 proposal for a “Single Market Emergency Instrument” (SMEI)⁷³ was a remarkable example of the manner in which the lessons learned from ad hoc decision-making during the pandemic can have lasting effects on EU decision-making. This legislative initiative was a potentially far-reaching attempt to close the gap left by the absence of treaty-based emergency powers, preparing the Union for a more effective defence of the Single Market while at the same

⁷² R Dehousse, “Comitology: Who Watches the Watchmen?” (2003) *Journal of European Public Policy* 798.

⁷³ European Commission, “Proposal for a regulation of the European Parliament and of the Council establishing a Single Market Emergency Instrument” <https://single-market-economy.ec.europa.eu/single-market/single-market-emergency-instrument_en> (last accessed 19 September 2023).

time raising normative questions about the legitimacy of delegated powers and the impact it may have on the EU's institutional balance.

At the time of writing, the Commission's legislative proposal neared adoption in the legislative process, with agreement between EP and Council having been reached in trilogue on 1 February 2024. With a new label, the "Internal Market Emergency and Resilience Act (IMERA)" is likely to become a powerful new set of tools at the disposal of the European Commission to maintain the governance of the Single Market in a crisis situation.⁷⁴ The new Regulation sets out a range of options at the disposal of decision-makers to the threats that an emergency may institute to the functioning of the Single Market. These innovations rely to a remarkable extent on the adoption of delegated and implementing acts, be it to invoke the so-called "vigilance" and "emergency" modes, or to adapt existing legislative acts.

The prospect of IMERA coming into force in 2024, alongside other new laws as the Artificial Intelligence Act that also involve the expansion of delegated powers, is a clear sign that decision-makers consider delegated powers to be key instruments in dealing with future risks and new crises. It remains to be seen whether the efforts to safeguard the democratic scrutiny of such powers can keep up with the pace and the extent of these developments. Past performance, as we have seen, ought to make us sceptical in this regard.

This discussion of past, current and future developments demonstrates that the cumulative effect of the various crises and the introduction of new instruments such as those contained in the IMERA may yet have far-reaching implications for the functioning as well as the normative assessment of delegated rule-making in the EU. Even if the immediate responses have largely served to confirm the *status quo ante* in this domain, the reliance of the Union on the practice of delegated powers is set to continue, and indeed to expand. With this expansion, the normative dilemmas are also bound to grow, meaning that the challenge of "watching the watchmen" of executive rule-making in the EU will remain a formidable one.

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⁷⁴ G Ragonnaud, "Internal Market Emergency and Resilience Act (IMERA)" (2024) European Parliamentary Research Service.