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**Delegated Rulemaking in Times of Crisis**  
**Rethinking Emergency Powers in the EU**

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# Table of Contents

<b>List of Tables</b> .....	<b>5</b>
<b>List of Figures</b> .....	<b>5</b>
<b>List of Abbreviations</b> .....	<b>6</b>
<b>Summary</b> .....	<b>8</b>
<b>Sintesi</b> .....	<b>10</b>
<b>Introduction</b> .....	<b>12</b>
<b>1. The Relevance of Delegated Rulemaking in Crisis Management</b> .....	<b>12</b>
<b>2. The Complexity of Crisis Management in the EU</b> .....	<b>14</b>
2.1 Delegated Rulemaking in EU Crisis Management .....	19
<b>3. Research Question</b> .....	<b>22</b>
<b>4. State of the Art</b> .....	<b>22</b>
4.1 Crises and Crisis Management in the EU .....	22
4.2 Delegated and Implementing Acts.....	24
4.3 Gaps in the Literature .....	25
<b>5. Structure of the Thesis</b> .....	<b>25</b>
<b>Historical and Institutional Context</b> .....	<b>27</b>
<b>1. Delegated Rulemaking in the EU: An Historical and Institutional Overview</b> ....	<b>27</b>
1.1 The Early Days of Comitology .....	28
1.2 The Maastricht Treaty and Beyond.....	31
1.3 The Lisbon Era.....	33
1.4 Urgency Procedures .....	38
<b>2. Crisis Management in the EU: From Conceptual to Historical Considerations</b> <b>40</b>	
2.1 Practices of Crisis Management.....	43
2.2 The Case for an EU Emergency Constitution .....	45
<b>3. Concluding Remarks</b> .....	<b>47</b>
<b>Framing Legitimacy in EU Decision-making</b> .....	<b>50</b>
<b>1. Framing Legitimacy</b> .....	<b>50</b>
1.1 Processes of Legitimation: Input, Output, Throughput.....	52
<b>2. Democratic Legitimacy and Crises</b> .....	<b>55</b>
2.1 Delegated Rulemaking, Crises, and Legitimacy .....	56
<b>3. Main Hypothesis</b> .....	<b>60</b>
<b>4. Definition of the Criteria</b> .....	<b>61</b>

<b>5. Methodology and Approach.....</b>	<b>66</b>
5.1 Definition of the Cases .....	66
5.2 Semi-structured Interviews and Beyond.....	68
<b>6. Concluding Remarks .....</b>	<b>69</b>
<b>Input Legitimacy .....</b>	<b>71</b>
<b>1. The Sovereign Debt Crisis.....</b>	<b>73</b>
1.1 Empowerments for Delegated and Implementing Acts .....	74
<b>2. The Refugee Crisis .....</b>	<b>76</b>
2.1 The Refugee Crisis and (the lack of) Delegated Rulemaking .....	77
<b>3. The Covid-19 Pandemic.....</b>	<b>80</b>
3.1 The First Signs of Delegated Rulemaking in Crisis Management .....	81
3.2 Other Delegated and Implementing Acts.....	86
<b>4. The Consequences to the War in Ukraine .....</b>	<b>89</b>
4.1 Contested Empowerments .....	90
4.2 Other Delegated and Implementing Acts.....	92
<b>5. Concluding Remarks .....</b>	<b>93</b>
<b>Throughput Legitimacy.....</b>	<b>96</b>
<b>1. The Sovereign Debt Crisis.....</b>	<b>97</b>
<b>2. The Refugee Crisis .....</b>	<b>99</b>
<b>3. The Covid-19 Pandemic.....</b>	<b>101</b>
3.1 What Happens in the Black Box.....	102
3.2 ... Stays in the Black Box.....	107
<b>4. Consequences to the War in Ukraine.....</b>	<b>109</b>
4.1 Low Transparency or Lack of Interest? .....	113
<b>5. Concluding Remarks .....</b>	<b>114</b>
<b>Output Legitimacy .....</b>	<b>117</b>
<b>1. The Sovereign Debt Crisis.....</b>	<b>118</b>
<b>2. The Refugee Crisis .....</b>	<b>119</b>
2.1 The Regulation Addressing Situations of Force Majeure .....	121
<b>3. The Covid-19 Pandemic.....</b>	<b>123</b>
3.1 Delegated Rulemaking as an Instrument of Crisis Management .....	124
3.2 The Internal Market Emergency and Resilience Act.....	128
<b>4. The Consequences to the War in Ukraine .....</b>	<b>131</b>
4.1 More Delegated and Implementing Acts in Times of Crisis.....	133

<b>5. Concluding Remarks .....</b>	<b>136</b>
<b>Conclusions .....</b>	<b>138</b>
<b>1. Delegated Rulemaking in EU Crisis Management.....</b>	<b>139</b>
1.1 (Weak) Input Legitimacy.....	144
1.2 (Inconsistent) Throughput Legitimacy .....	148
1.3 (Efficient) Output Legitimacy.....	150
<b>2. Concluding Reflections .....</b>	<b>153</b>
<b>Bibliography .....</b>	<b>157</b>
<b>Appendix .....</b>	<b>172</b>
<b>Acknowledgements.....</b>	<b>173</b>

## **List of Tables**

Table 1: Framework Criteria .....	64
Table 2: Delegated Rulemaking and the Input Legitimacy of Crisis Management.....	147
Table 3: Delegated Rulemaking and the Throughput Legitimacy of Crisis Management .....	150
Table 4: Delegated Rulemaking and the Output Legitimacy of Crisis Management .....	153

## **List of Figures**

Figure 1: Input Legitimacy.....	64
Figure 2: Throughput Legitimacy .....	65
Figure 3: Output Legitimacy .....	65
Figure 4: Overlaps.....	66

## **List of Abbreviations**

CAP	Common Agricultural Policy
CJEU	Court of Justice of the European Union
EBA	European Banking Authority
ECDC	European Centre for Disease Prevention and Control
EEC	European Economic Communities
EFSD	European Financial Stability Facility
EIOPA	European Insurance and Occupational Pensions Authority
EMA	European Medicines Agency
EMU	Economic and Monetary Union
EP	European Parliament
ESM	European Stability Mechanism
ESMA	European Securities and Markets Authority
EU	European Union
EUAA	European Union Agency for Asylum
EURATOM	European Atomic Energy Community
Eurojust	European Union Agency for Criminal Justice Cooperation
DGs	Directorates-General
DG AGRI	Directorate-General for Agriculture and Rural Development

DG JUST	Directorate-General for Justice and Consumers
DG MOVE	Directorate-General for Mobility and Transport
Frontex	European Border and Coast Guard Agency
IIA	Interinstitutional Agreement on Better Law-making
IMERA	Internal Market Emergency and Resilience Act
MEP	Member of the European Parliament
MFF	Multiannual Financial Framework
NGEU	Next Generation EU
OLP	Ordinary Legislative Procedure
PEPP	Pandemic Emergency Purchase Programme
PLF	Passenger Locator Form
RPS	Regulatory Procedure with Scrutiny
RRF	Recovery and Resilience Facility
SEA	Single European Act
SMEI	Single Market Emergency Instrument
TEU	Treaty on the European Union
TFEU	Treaty on the Functioning of the European Union

## Summary

The insurgence of different transnational crises over the course of the last decade has uncovered several vulnerabilities in the administrative governance of the European Union (EU) and raised questions about its crisis management capacity. Emergency response traditionally lies in the hands of the member states, but the increasing spillovers, overlaps, and intertwining elements of crises have showcased a clear need for a collective European crisis management. Beyond a couple of very specific and isolated exceptions, the Treaties do not envision fully-fledged emergency powers. Consequently, the EU has had to often resort to the creation of mechanisms outside the scope of the Treaties, later incorporating them in its legal framework and thus casting further doubts on the democratic legitimacy of the process. The executive institutions are generally in charge of emergency politics, leaving the legislative branch little room to carry out its normal functions. The legitimacy of crisis management in general is in any case subject to frequent questioning, as it tends to favour effectiveness and efficiency over the fulfilment of a thorough democratic process.

The long-standing practice of delegated rulemaking pursuant to Arts. 290 and 291 of the Treaty on the Functioning of the European Union (TFEU) has significantly increased in the last few years. This has included, though it was not limited to, the management of the most recent crises. Delegated and implementing acts, while traditionally carrying the burden of a disputed transparency and accountability, are rooted in the Treaties and arguably ensure the adoption of measures quickly and effectively. Despite their relatively limited scope, they have been increasingly adopted among the plethora of measures of EU crisis decision-making.

Against this background, this thesis analyses the role of delegated and implementing acts in the crisis management strategy of the EU. It focuses in particular on their implications on the democratic legitimacy of EU decision-making during crises, evaluating the potential trade-off between their

controversial accountability against their democratic ground and procedural effectiveness. The general objective of this work is to evaluate the impact of delegated rulemaking on EU crisis management through the lens of democratic legitimacy – specifically, input, throughput, and output. The empirical contribution of this thesis is articulated by means of a comparative analysis of the most recent crises faced by the EU, namely the sovereign debt crisis, the so-called refugee crisis, the Covid-19 pandemic, and the consequences to the war in Ukraine. The data, also collected by means of semi-structured interviews with EU officials in Brussels, and overall findings suggest that delegated rulemaking is an effective tool of crisis management, but it is nevertheless subject to several limitations. Its democratic standing, however, does not fundamentally impinge on the already output-driven legitimacy of emergency politics. Future research could be aimed at further exploring the potential for integrating emergency ruling by decree in EU governance.

## Sintesi

Le crisi transnazionali dell'ultimo decennio hanno portato alla luce significative vulnerabilità nella governance amministrativa dell'Unione europea (UE), sollevando interrogativi sulla sua capacità di rispondere in modo adeguato alle emergenze. Tradizionalmente, la gestione delle crisi è stata una prerogativa degli stati membri; tuttavia, la natura sempre più interconnessa e sovrapposta di tali crisi ha reso evidente l'esigenza di un approccio collettivo a livello europeo. I trattati dell'UE, salvo alcune disposizioni specifiche e circoscritte, non contemplano poteri di emergenza pienamente strutturati. Di conseguenza, l'UE si è spesso trovata costretta a introdurre misure straordinarie al di fuori del perimetro normativo dei trattati, integrandole successivamente nel quadro giuridico dell'Unione e alimentando così ulteriori dubbi sulla legittimità democratica del processo. La gestione delle politiche di emergenza è in gran parte affidata alle istituzioni esecutive, lasciando al ramo legislativo un ruolo marginale nello svolgimento delle sue funzioni ordinarie. Tale gestione, tuttavia, è frequentemente oggetto di contestazione, poiché tende a privilegiare l'efficacia e l'efficienza a scapito di un processo democratico pienamente inclusivo. Negli ultimi anni, l'attività normativa non legislativa della Commissione europea, ai sensi degli articoli 290 e 291 del Trattato sul funzionamento dell'Unione europea (TFEU), ha registrato una significativa espansione, interessando, tra l'altro, la gestione delle crisi più recenti. Gli atti delegati e di esecuzione, sebbene tradizionalmente oggetto di critiche per la limitata trasparenza e responsabilità, trovano il loro fondamento nei trattati e consentono l'adozione di misure in maniera rapida ed efficace. Pur mantenendo un ambito di applicazione relativamente circoscritto, questi strumenti sono sempre più frequentemente utilizzati nell'ambito delle opzioni disponibili per il processo decisionale dell'UE in situazioni di crisi. Questa tesi esamina il ruolo degli atti delegati e di esecuzione nella strategia di gestione delle crisi dell'UE, con particolare attenzione alle loro implicazioni sulla legittimità democratica del processo decisionale in situazioni di emergenza. L'analisi si

concentra sull'equilibrio tra la responsabilità democratica, spesso contestata, e l'efficacia procedurale di tali strumenti. L'obiettivo principale è valutare l'impatto dell'uso dei poteri delegati nella gestione delle crisi attraverso la teoria sulla legittimità democratica, articolata nelle dimensioni di input, throughput e output. Il contributo empirico della ricerca si sviluppa attraverso un'analisi comparativa delle principali crisi recenti affrontate dall'UE: la crisi dell'euro, la cosiddetta crisi dei rifugiati, la pandemia di Covid-19 e le conseguenze della guerra in Ucraina. I dati, raccolti anche mediante interviste con funzionari dell'UE a Bruxelles, evidenziano che l'attività normativa non legislativa rappresenta un mezzo efficace per la gestione delle crisi, pur presentando alcune limitazioni. Infatti, i difetti legati alla responsabilità e alla trasparenza non sembrano incidere in modo significativo sulla legittimità complessiva delle politiche di emergenza. La ricerca suggerisce che futuri studi potrebbero approfondire ulteriormente l'integrazione delle decisioni di emergenza per decreto nel sistema di governance dell'UE, al fine di consolidare un approccio più efficace e democraticamente sostenibile.

# Chapter 1

## *Introduction*

This thesis analyses the use of delegated rulemaking as a tool of crisis management in the European Union (EU), especially focusing on its impact, significance, and complexities in a multilayered and ever-relevant context such as that of the polycrisis (Zeitlin et al., 2019). The purpose of the work is to unravel the interesting, yet understudied, role that delegated powers pursuant to Arts. 290 and 291 TFEU have played in the EU administrative governance during the most recent crises, as well as the way they impacted the democratic legitimacy therein, with an eye on a legal framework in which emergency powers are fundamentally lacking.

### **1. The Relevance of Delegated Rulemaking in Crisis Management**

In the past decades, the EU has had to face multiple crises, which have deeply affected the policymaking, governance, and overall polity of the Union. And indeed, when Jean Monnet predicted that ‘Europe would be built through crises, and [...] it would be a sum of their solutions’ (Monnet, 1978), it was seemingly clear to him not only that crisis over crisis would foster the future of EU politics and institution, but also that further European integration would have played a pivotal role in the way crises are managed.

The insurgence of different crises over the course of the last few years has indeed raised questions on the emergency solving capacity of the EU. On the one hand, the traditional debate between grand theories of European integration arises. The role of the intergovernmental vis-à-vis supranational institutions is often discussed in the literature, usually with particular attention to whether crises strengthened the former or the latter (see, among others, Bauer and Becker, 2014; Dehousse, 2016). Due to the different ramifications 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 (see, among others, Brack and Gürkan, 2021; Schimmelfennig, 2024). On the other hand, the EU Treaties do not envision fully-fledged emergency powers for the Union to enact during a crisis, as emergency response traditionally lies in the hands of the member states. As such, the EU lacks efficient instruments to tackle emergencies in a coordinated and centralised way.

Nevertheless, the EU has increasingly played a significant role in the management of the most recent crises, enacting or establishing various instruments of different nature. Just as it may happen at the national level, the EU has also increasingly resorted to both general instruments and instruments of delegation of powers during crises – namely, delegated and implementing acts pursuant to Arts. 290 and 291 TFEU respectively.

The experience of the member states in this regard may have served as a guideline for the EU to follow. After all, the very constitutional option of delegating powers to an executive institution derives from the principle of separation of powers and, as such, can be found in the legal orders of many of the EU countries (Haibach, 1997). As this mechanism significantly cuts down procedural times and steps, it has gradually become a synonym to efficiency and, therefore, a frequent administrative strategy to deploy in the context of managing a certain crisis or emergency. For example, Italy's primary strategy in the response to the Covid-19 pandemic involved the use of instruments of delegation to the executive for establishing lockdowns and other public health measures, thus allowing a swift governmental action and fostering an efficient policymaking (Vese, 2023). Naturally, delegating powers to an executive branch and forgoing ordinary parliamentary procedures often come at the expense of democratic legitimacy and accountability, which frequently end up in the sidelines of the governance of a crisis.

The response of the EU to the most recent transnational crises has increasingly involved the strategy to delegate, where possible, executive rulemaking and implementing powers to the European Commission through the respective adoption of delegated and implementing acts. While this is not to say that the

adoption of delegated and implementing acts has increased only in the context of managing crises, there has been a notable rise in the use of such instruments within such scope as of late, compared to crises that started at the beginning of the decade (Gallinella and Christiansen, 2024). This new trend may pave the way for yet a different perspective on crisis management in the EU, but it may also lead to several other outcomes simultaneously. Firstly, the increasing reliance on delegated powers may be a symptom of a broader tendency toward the centralisation and supranationalisation of decision-making in response to crises – particularly, in this case, the Commission. Secondly, resorting to delegated rulemaking may bear a positive impact on the efficiency of crisis management. While the adoption of delegated and implementing acts respectively requires the scrutiny of the EU legislative institutions and of committees made of representatives of the member states (also known as comitology committees), urgency clauses and other kinds of procedural shortcuts may be activated in both instances. Finally, the democratic legitimacy of crisis management may be hindered by executive-dominated decision-making, especially given that the accountability of delegated and implementing acts is still widely debated in the legal and political science scholarship. Against this background, this thesis seeks to analyse these three phenomena, devolving particular attention to the latter two.

## **2. The Complexity of Crisis Management in the EU**

The crises of the last decade, often overlapping, have certainly put the EU polity under a certain strain. The Treaties, as well as the corollary of secondary legislation and other instruments, are not thoroughly endowed with the necessary tools to counter crises in a centralised manner. This has become particularly problematic in the context of the increasingly supranational and transnational recent crises, starting from the sovereign debt crisis until the Covid-19 pandemic, the energy crisis, and the war in Ukraine. While these crises may have affected the different member states asymmetrically, they have

arguably all been crises of the EU, as they have, among other things, impacted on the functioning of the internal market and free movement.

Crisis management has long been an endeavour of the sovereign state, and emergency clauses are present in most of the world's democratic constitutions. However, the Europeanisation of policymaking (Radaelli, 2023) and the establishment of the EU as a fully-fledged monetary union has changed the way crises impact its member states, opening the way to interdependence (Quaglia, 2018). It has therefore become clear that a European response is required to solve a European problem, and the management of the sovereign debt crisis serves as a great example of such a dynamic. At the time, the lack of emergency powers in the Treaties in the framework of the Economic and Monetary Union (EMU), proved to be one of the main problems to the resolution of the crisis (Pisani-Ferry et al., 2012). This led to the establishment of *ad hoc* emergency structures, such as the Troika, drastic provisions, strict bailouts and conditionalities, to 'exceptional measures for exceptional circumstances' (Rauh, 2021), and to 'whatever it takes' (Draghi, 2012).

Setting up instruments and mechanisms outside of the EU framework has become a frequent practice of crisis management since then. The creation of the European Financial Stability Facility (EFSF), followed by the European Stability Mechanism (ESM), aimed at circumventing the no-bailout clause laid out in Art. 125(1) TFEU and at avoiding changing the Treaties is perhaps the most obvious example (White and Kreuder-Sonnen, 2021). It has been argued, though, that most of those instruments that have been created outside of the Treaty framework with the aim of managing a certain crisis, have then been incorporated in the normal EU legal order without a real accountability mechanism safeguarding the process (White, 2019; Kreuder-Sonnen, 2019). The democratic legitimacy of these instruments, particularly once they are absorbed by the EU legal framework, may be at times blurred and is therefore debatable.

A rather interesting tool within this scope is Art. 122 TFEU, one of the few emergency clauses enshrined in the Treaties. The provision grants the Council

the possibility to adopt autonomous non-legislative acts deciding ‘upon the measures appropriate to the economic situation’<sup>1</sup> and to grant financial assistance to member states facing severe threats or difficulties (Mańko, 2025). This article has been invoked several times in the past and has been also used to establish permanent instruments related, for instance, to public health, energy procurement, or as a response to economic challenges. The absence of a specific procedure in the provision has caused it to be interpreted with a broader scope, and not only related to emergencies, causing the Court of Justice of the EU (CJEU) to intervene on the matter.<sup>2</sup> Most importantly, adopting measures under Art. 122 TFEU completely excludes parliamentary participation or oversight. The absence of a formal legislative procedure means that the Council can act more swiftly, but this comes at the cost of reduced scrutiny and accountability.

Another emergency provision enshrined in the Treaties can be found in Art. 78(3) TFEU. The article gives powers to the Council to adopt emergency measures in the event of one or more member states being confronted by a sudden influx of nationals of third countries, resulting in a crisis. The Council acts on a proposal by the Commission, and the European Parliament (EP) may be consulted. Together with Art. 122 TFEU, this is the only emergency tool enshrined in the Treaties that allows the EU to respond to a crisis in a centralised way.

A good bulk of the provisions used to counter crises are nonetheless adopted via the ordinary legislative procedure (OLP). Naturally, the OLP is a rather lengthy process and as such it might not fulfil the need for efficacy and quick action that emerge during situations of crisis. The urgency procedure<sup>3</sup> therein offers some degree of flexibility and the possibility of speeding up the process, such as by giving priority in the agenda to the issue that is flagged as urgent. The voting still happens on the basis of a written report by the relevant

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<sup>1</sup> Art. 122 TFEU.

<sup>2</sup> Case C-370/12 *Thomas Pringle v Government of Ireland and Others* [2012].

<sup>3</sup> Rule 170 of the Rules of the European Parliament, July 2024.

committee, which can be delivered orally only in specific and extraordinary circumstances. However, the negotiations that happen behind closed doors, particularly at the technocratic level, may get the machine running faster than it would appear on paper. In times of emergency, measures may be thus adopted more promptly. The need for quick action plays a fundamental role in this, but other circumstantial factors are important as well. The management of a crisis may take up all the spots on the daily agenda and therefore everyone's efforts and attention, for one. During the Covid-19 pandemic, for example, legislation concerning the safeguard of agricultural products was adopted via OLP in less than two months (Interview 4). The urgency of the situation was certainly the primary trigger for such efficiency, but online meetings and less crowded offices have proved to be much more effective than regular in-person gatherings. It goes without saying that, even in this case, issues of accountability and democratic legitimacy remain problematic.

Finally, while the core focus of this thesis is the use delegated rulemaking pursuant to Arts. 290 and 291 TFEU, it is nevertheless relevant to briefly discuss how EU crisis management has been impacted by executive rulemaking more broadly. In particular, EU agencies, regulatory networks, and other non-majoritarian bodies have played a very significant role in the response to recent crises, especially the sovereign debt crisis and the refugee crisis (Volpato, 2022). To fill the regulatory gap that was uncovered by the sovereign debt crisis, the Union's strategy included the establishment of three decentralised agencies within the framework of the EFSF, namely the European Banking Authority (EBA), the European Securities and Markets Authority (ESMA), and the European Insurance and Occupational Pensions Authority (EIOPA). These agencies were tasked with developing and enforcing a centralised supervisory rulebook within their respective domains, as well as issuing binding decisions to ensure regulatory consistency (Pollack and Slominski, 2021). They were entrusted with wider regulatory powers compared to other decentralised agencies, including the competence to propose implementing technical standards, adopting guidelines and recommendations addressed at marketing authorities and market actors, and the possibility to enact intervention powers

as part of their supervisory role both in emergencies and normal times (Volpato, 2022).

During the so-called refugee crisis, the competences of already existing agencies such as the European Border and Coast Guard Agency (Frontex) and the European Union Agency for Asylum (EUAA) were enhanced to ensure the effective implementation of the European border management (ibid.; Tsourdi, 2021). Similarly, the mandates of the European Medicines Agency (EMA) and the ECDC (European Centre for Disease Prevention and Control) were expanded by means of two Regulations<sup>4</sup> that put forward as a proposal already in late 2020. Other than providing scientific advice, they are now entrusted with reinforced monitoring, coordinating, preparedness and response planning, and epidemiological surveillance tasks (Renda and Castro, 2020).<sup>5</sup> The war in Ukraine, on its hand, triggered the extension of the mandate of the European Union Agency for Criminal Justice Cooperation (Eurojust), allowing the agency to collect, store and analyse evidence on international war crimes.<sup>6</sup>

The process of agencification as an emergency response strategy may certainly be framed as a channel of seeking and reinforcing technocratic expertise in the context of a crisis. Consequently, it leads to the fulfilment of technocratic legitimacy, namely the idea that a governing authority should entrust actors who possess the capacity and expertise to solve complex policy problems on behalf of the citizens (Rittberger, 2023). In a way, such a mechanism feeds into the questions and debates around the democratic legitimacy of crisis management, as technocratic legitimacy cannot always be reconciled with

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<sup>4</sup> Regulation (EU) 2022/123 of the European Parliament and of the Council of 25 January 2022 on a reinforced role for the European Medicines Agency in crisis preparedness and management for medicinal products and medical devices; Regulation of the European Parliament and of the Council Amending Regulation (EC) No 851/2004 establishing a European Centre for disease prevention and control.

<sup>5</sup> Ibid.

<sup>6</sup> Regulation (EU) 2022/838 of the European Parliament and of the Council of 30 May 2022 amending Regulation (EU) 2018/1727 as regards the preservation, analysis and storage at Eurojust of evidence relating to genocide, crimes against humanity, war crimes and related criminal offences.

democratic participation and accountability (ibid.). The clash goes in both directions – on the one hand, the objective of technocratic governance is not necessarily to be responsive to citizens’ preferences; on the other, majoritarianism may be an obstacle to independent and expertise-based decisions (ibid.). However, as it is widely discussed in this thesis, certain components of democratic legitimacy such as citizens’ participation and accountability are often sidelined in the context of an emergency, in order to favour swifter and more efficient decision-making. As such, the EU’s tendency to resort to technocratic rulemaking during crises may result in de-politicised decisions or highly politicised decisions that are justified as necessary but that do not necessarily undergo a process of democratic contestation (Scicluna and Auer, 2019).

### *2.1 Delegated Rulemaking in EU Crisis Management*

The use of delegated and implementing acts may be easily overlooked in such a plethora of crisis management strategies, which include emergency powers and, as the OLP or delegated rulemaking, instruments that are part of the EU standard decision-making process but that may be deployed in the context of managing a crisis. As such, as it is further addressed below, delegated and implementing acts have increasingly been used to adopt measures aimed at tackling certain aspects of the most recent crises. Both kinds of act entail a mechanism of delegating powers, albeit of different kinds, to the Commission. On the one hand, Art. 290 TFEU allows the Commission to adopt non-legislative acts to amend or supplement non-essential elements of a basic legislative act. On the other hand, Art. 291 TFEU grants the Commission (or occasionally the Council)<sup>7</sup> the powers to implement EU law when uniform conditions for implementation are required. Both instruments involve, in other words, a concentration of power in the hands of an executive institution which,

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<sup>7</sup> According to Art. 291(2) TFEU, the Council shall be conferred implementing powers only in duly justified cases provided for in Arts. 24 and 26 TEU, namely in the scope of the common foreign and security policy.

in turn, can ensure efficiency and swiftness in situations of crisis. Moreover, each provision has a scrutiny mechanism in place – enacted by the EP and Council in the case of delegated acts, and by comitology committees in the case of implementing acts. In short, such mechanisms involve the veto power at the hands of the institutions entrusted with the scrutiny, and the power of revocation of the delegation altogether in the case of Art. 290 TFEU. The scrutiny is intended to take place rather quickly,<sup>8</sup> and further strategies may be employed in order to cut down procedural times.

The use of delegated and implementing acts has significantly increased in the last decade, reaching the adoption of more than one hundred delegated acts and roughly one thousand implementing acts per year (Kaeding, 2017; Christiansen and Lange, 2019). In recent years, delegated and implementing acts have started to encompass a wide array of areas within EU policymaking which was, on its hand, increasingly compelled to extend to crisis response activities and measures in order to respond to the risks posed by the emergence of the ‘polycrisis’. It is important to clarify that this thesis does not argue that the number of delegated and implementing acts has increased during the peak moments of crises, nor does it suggest that such acts proliferated solely as a consequence of the crises themselves, or that the Commission sought further empowerments for delegated rulemaking during those times (Brandsma and Blom-Hansen, 2024). Instead, it is argued that the categorisation of these acts has shifted in the context of crises, with a growing proportion being allocated to emergency-related measures than before, thereby mirroring the overarching trajectory of EU policymaking during the peak times of crises and emergencies. For example, while eleven delegated acts laying down emergency provisions aimed at tackling the Covid-19 pandemic were adopted in 2020 alone, and

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<sup>8</sup> The period of scrutiny for delegated acts is of two months, extendable by another two months, as defined by the Common Understanding on Delegated Acts, 14 April 2011, 8753/1/11. Two months is also the period within which comitology committees are mandated to deliver an opinion on an implementing act, according to Art. 3 of Regulation 182/11 of the European Parliament and the Council laying down the rules and general principles concerning mechanisms for control by Member States of the Commission’s exercise of implementing powers, also known as the Comitology Regulation.

seven in 2021, it is also relevant to note that at the time of writing the number of exceptional measures introduced by means of delegated and implementing acts has dropped.<sup>9</sup> For instance, only two crisis-related delegated acts were adopted in 2024, unrelatedly from the transnational crises that are hereby considered as case studies.<sup>10</sup> As it was mentioned beforehand, the democratic legitimacy and accountability of delegated and implementing acts is extensively debated in the literature (see, among others, Schütze, 2011; Mendes, 2013; Christiansen and Dobbels, 2013; Brandsma and Blom-Hansen, 2017). The low percentage of vetoes over the total number of delegated and implementing acts adopted in the last ten years raises questions over the active involvement of the scrutinising institutions over a rather *laissez-faire* or collusive behaviour (Kaeding, 2017; Christiansen and Lange, 2021). Despite the improvements that the publication of records in online registers have brought to the sphere of transparency, many of the negotiations still happen behind closed doors or before the formal start of the process. Previous research (Gallinella and Christiansen, 2024) has nevertheless shown that crises have not exacerbated this already complex dynamic making, for instance, the process of empowerment or adoption of delegated and implementing acts less transparent or accountable. Hence, it becomes compelling to examine the other side of the coin – namely, to uncover the role that delegated rulemaking has played in the scope of the democratic legitimacy of crisis management and to then evaluate its impact also in light of possible future crises.

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<sup>9</sup> The data on the number, content, and timeline of delegated and implementing acts has been retrieved from the Register of Delegated and Implementing Acts, available online at: <https://webgate.ec.europa.eu/regdel/#/home>.

<sup>10</sup> Commission Delegated Regulation (EU) 2024/1995 of 19 July 2024 on a temporary exceptional crisis distillation measure to address the market disturbance in the wine sector in Portugal in the marketing year 2024/2025; Commission Delegated Regulation (EU) 2024/2159 of 12 August 2024 on temporary exceptional measures derogating from certain provisions of Regulation (EU) No 1308/2013 of the European Parliament and of the Council concerning the scheme of authorisations for vine plantings to address the market disturbance in the Union wine market.

### **3. Research Question**

Against this background, this thesis seeks to find an answer to the following question: How has delegated rulemaking impacted the democratic legitimacy of EU decision-making during crises? The puzzle arises not only from the need to shed light on this understudied phenomenon, but also from the ambition to set the stage for a future normative evaluation. In other words, this work stems from the question stated above, then follows the line of further related queries, such as: Are delegated and implementing acts useful tools of crisis management? Do they ensure efficiency and effectiveness while still upholding some level of accountability and democratic legitimacy? To what extent is citizens' participation accounted for?

This analysis encompasses and seeks to answer these and other pertinent questions that may arise in this regard. From a more practical point of view, the aim of this work is to lay the groundwork for a potential debate on delegated rulemaking becoming an attainable and legitimate emergency instrument in the EU, particularly in light of an increasingly centralised and supranational crisis management. Finally, this research is based on the assumption that delegated rulemaking has not fundamentally impacted emergency politics in the EU, but it widely aligned with its legitimacy requirements.

### **4. State of the Art**

#### *4.1 Crises and Crisis Management in the EU*

Perhaps unsurprisingly, a considerable amount of literature has been dedicated to crises and crisis management in the field of EU studies. From the definition and conceptualisation of crises (see, among others, Zeitlin et al., 2019; Brack and Gürkan, 2021; Schimmelfennig, 2024) to empirical analyses of the most recent examples and the role of the various EU institutions therein (see, among others, Bauer and Becker, 2014; Fabbrini, 2015; Dehousse, 2016), the scholarship has covered a vast ground of research within this scope. Mostly relevant to this thesis are the studies on the administrative aspects of crisis management and on emergency politics in the EU. In the former instance, in

the strand of literature on crisis management in the EU (Boin et al., 2013), previous research on the use or addition of crisis-tackling tools to already existing instruments of policymaking in order to prepare for the next crisis or shock is particularly useful. This body of literature refers to the wave of crisification (Rhinard, 2019) that has interested the EU polity since the sovereign debt crisis. The crisification tools include, but are not limited to, early warning systems, detection mechanisms, and urgency procedures (Boin and Rhinard, 2023). The significance to this particular piece of work relates to the applicability of the crisification framework to the sphere of delegated rulemaking, and especially the activation of the relevant embedded urgency mechanisms.

The discussion over the emergence of emergency politics in the EU has surged relatively recently and finds its roots in the questions around the general lack of emergency provisions in the Treaties. Scholars (White, 2015; Kreuder-Sonnen, 2018) have observed an increase in the enactment of emergency politics at the EU level, but without the same democratic safeguards that are ensured at the national level. This has led to a debate on whether there is the need to strengthen the EU's emergency powers in the EU. As it is further discussed in the later chapters of this thesis, the low democratic input with which the EU tends to adopt emergency measures has a significant cost on its legitimacy (Goetz and Sindbjerg Martinsen, 2021; White, 2022). It has been argued that endowing the Treaties with an agreed set of codified procedures aimed at managing exceptional situations,<sup>11</sup> referred to in the scholarly debate as an EU emergency constitution (ibid.; Kreuder-Sonnen, 2022, 2023), would also to enhance the democratic legitimacy of the use of emergency powers at the hands of the EU and to halt the populist backlash (ibid.). However, it has also been held that the prospect for an EU emergency constitution lacks practical feasibility as well as desirability in the public's eye, and that further democratising the executive power in the EU would be more sensible instead (White, 2022).

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<sup>11</sup> To complement the already-existing emergency powers enshrined in Arts. 78 and 122 TFEU.

#### *4.2 Delegated and Implementing Acts*

The study of delegated rulemaking and comitology goes back to the early 1990s (Bradley, 1992; *ibid.*, 1997; Haibach, 1997) but flourished particularly from the early 2000s until today. There are several strands of literature that have developed in this particular field. From a legal perspective, much attention has been devoted to the nature, definition, and implications of the delegation (Schütze, 2011; Craig, 2011; Bast, 2012; Mendes, 2013; Chamon, 2021; Volpato, 2022; Xhaferri, 2023). The legal scholarship has also focused on the judicial review of delegated powers and the constitutional distinction between delegated and implementing acts (Chamon, 2015; Vosa, 2015; Tauschinsky and Weiß, 2018; A Campo, 2021).

Political science literature has concentrated on the application of principal-agent models which assume that member states or legislative institutions control the Commission in its execution of delegation powers. Great emphasis has been put on inter-institutional relations and tensions, particularly between the Council and the EP and their scrutiny role over the adoption of delegated and implementing acts (Christiansen et al., 2009; Héritier, 2012; Christiansen and Dobbels, 2012; *ibid.*, 2013; Brandsma and Blom-Hansen, 2012; Bergström, and Ritleng, 2016; Lange and Kaeding, 2023). Recently, political science scholars have also focused on issues related to consensus, contestation, and expertise with regard to delegated rulemaking (Nørgaard et al., 2018; Robert, 2019; Blom-Hansen, 2019; Finke and Blom-Hansen, 2021; Fernández Pasarín et al., 2021). Finally, the political science and legal scholarship together have been committed to unravelling the conundrum around the scrutiny mechanisms of delegated powers and the doubts surrounding democratic legitimacy, transparency, and accountability. (Dehousse, 2003; Brandsma et al., 2008; Peers and Costa, 2012; Brandsma, 2016; Brandsma and Blom-Hansen, 2016, 2017; Marissen, 2019; Yordanova and Zhelyazkova, 2020; Turk, 2021; Blom-Hansen, 2021).

### *4.3 Gaps in the Literature*

Despite the existence of extensive literature on both crisis management and delegated rulemaking, these two aspects of EU governance are rarely combined. Previous research has been conducted to establish whether crises have had an impact on the scrutiny of delegated rulemaking (Gallinella and Christiansen, 2024). In other words, this analysis is primarily concerned with the democratic legitimacy of the process and on whether the urgency resulting from a situation of crisis affects it in any way. The results show that the scrutiny of delegated and implementing acts, although already rather controversial, is not hindered by crisis management and therefore maintains the same level of legitimacy as during times of normalcy.

In their most recent collaboration, Brandsma and Blom-Hansen (2024) carry out a quantitative study measuring the empowerments for delegated and implementing acts during times of crisis. They conclude that the Commission appears to not have sought to centralise its powers by increasing the number of empowerments present in basic legislative acts. This is particularly interesting in light of the present work, which, as it is further discussed in the chapters below, explores the qualitative impact of delegated rulemaking on crisis management in the EU.

Building on this existing scholarship, this thesis aims to combine these two existing stands of literature and to bridge the knowledge gaps that have arisen. The starting points for the reflection are common to both research dimensions – namely, democratic legitimacy, institutional roles and inter-institutional relations, and overall dynamics in EU governance. Ultimately, this work has the purpose to contribute and position itself in the wider debate on the regulation of EU emergency powers.

## **5. Structure of the Thesis**

In order to carry out a systematic analysis of the impact of delegated rulemaking in EU crisis management, this thesis is structured with the aim to showcase the multi-dimensional evolution of the use of such instruments

during the most recent crises. The upcoming chapter (Chapter 2) is devoted to providing an historical and institutional overview on both delegated rulemaking and crisis management in the EU. It focuses on the evolution of processes and procedures, as well as the institutional involvement and tensions that have characterised these two dimensions since the early days of the European Communities. Subsequently, the framework and analytical criteria for this analysis are defined in Chapter 3. The chapter focuses on democratic legitimacy during crises and its operationalisation into input, output, and throughput legitimacy (Scharpf, 1999; Schmidt, 2013). It then establishes the legitimacy typology as the criterion aimed at assessing the impact of delegated rulemaking on the legitimacy of EU crisis management. Finally, it lays out the sovereign debt crisis, the so-called refugee crisis, the Covid-19 pandemic, and the consequences to the war in Ukraine as the case studies, and discusses the methodology employed throughout the thesis.

Against this backdrop, this preliminary analysis is followed by the empirical chapters, each focusing on one of the criteria – namely input (Chapter 4), throughput (Chapter 5), and output legitimacy (Chapter 6). Every chapter aims to analyse each of the case studies through the lens of the relevant criterion, highlighting the role that delegated rulemaking has played in the management of the crisis under consideration. Within each chapter, the crises are examined chronologically. In the case of temporal overlaps, the period of outbreak of the crisis is nevertheless used as an ordering criterion. Finally, some conclusive remarks wrap up the analysis, with particular attention being devoted to the repercussions that the use of delegated and implementing acts has on the legitimacy of crisis management in the EU, as well as some considerations for future research and policy recommendations.

## Chapter 2

### *Historical and Institutional Context*

This chapter aims at providing a thorough overview of the historical, institutional and legal context in which the discourse of this thesis is rooted. More specifically, it looks at delegated rulemaking and crisis management in the EU, highlighting their key developments, practices, and shortcomings. The first section of the chapter is dedicated to the history and evolution of delegated and implementing acts, from the early days of the European Economic Communities (EEC) until today. The issues surrounding inter-institutional tensions, accountability, and (the lack of) transparency are particularly emphasised. The second section is, on the other hand, devoted to crisis management and its decision-making practices. After having delved into a discussion on the history and peculiarities of emergency response in the EU, the section also briefly explores the wider debates on EU crisis management – namely, that on the establishment of an EU emergency constitution. This serves to provide an overview on the debate which this work aims to contribute to. Finally, the chapter lays the groundwork for answering the main research question, by discussing some contextual points about delegated rulemaking in times of crisis.

#### **1. Delegated Rulemaking in the EU: An Historical and Institutional Overview**

The possibility of delegating executive powers to the Commission was envisaged in the Treaties since the dawn of the EEC. Nevertheless, early primary legislation did not foresee specific measures outlining the way such delegated powers would be used, and especially the way they would be scrutinised. The Treaty of Rome, more specifically, did not include any provision aimed at the establishment of monitoring committees. The only reference to the possibility of delegating regulatory powers to the Commission

was made by the last indent of Art. 155 therein, which stated that the Commission shall, indeed, ‘exercise the powers conferred on it by the Council for the implementation of the rules laid down by the latter.’ This provision became more popular at the beginning of the 1960s, after the adoption of the Common Agricultural Policy (CAP) and the formation of the first committees aimed at scrutinising such delegated powers – informally known as comitology committees. (Nørgaard et al., 2013). Nevertheless, the lack of clarity in the Treaty structure is part of the reason why the comitology procedure was often at the centre of multiple inter-institutional tensions, as well as litigations before the Court of Justice of the EU (CJEU).

### *1.1 The Early Days of Comitology*

The institutional architecture of the EEC envisaged that the Council had the power to adopt legislative norms resulting from a Commission proposal, while the Member States retained the competence of implementing such norms. The entry into force of the CAP in 1962, however, made it clear that the adoption of the related policies also required implementation at the European level. Hence, a common legal framework for the EEC-wide implementation of such policies was urgently needed. The Council subsequently began to make use of the provision laid out in Art. 155 of the Treaty, while also starting to foster relevant scrutiny mechanisms through the formation of committees. Such committees, composed by representatives of national administrations and chaired by the Commission, were conferred the power to review the Commission’s exercise of delegated powers, granted under Art. 155 of the Treaty. The first committees appointed by the Council had a merely advisory function, similar to expert groups, and were introduced in the area of competition and trade relations with third countries. However, the Member states fostered a new, management procedure for the policies falling under the field of agriculture, whereby the committee, in case of negative opinion, could refer the draft implementing measure to the Council, which could confirm the

decision of the committee or overthrow it.<sup>12</sup> The management procedure quickly became standard practice also for several other committees acting outside of the area of agriculture.

Different comitology procedures were established. Art. 26 of Council Directive 69/73/EEC of 1969, which concerned the harmonisation of legislation on custom duties for third parties, accounted for the creation of the so-called regulatory procedure. This procedure entailed that, within the committee, Member States representatives were asked to express their opinion on the draft measure presented by the Commission by means of formal vote. A positive opinion meant that the Commission could adopt the measure; on the other hand, in case of a negative opinion or in case of absence of an opinion, the measure had to be referred back to the Council. Over the following years, the use of comitology committees and the related procedures increasingly expanded beyond the area of CAP and custom duties. It is estimated that the Council established at least 200 committees by the end of the 1960s (Alfé, 2009).

While comitology became more and more popular, several doubts and uncertainty with regard to the legality of the procedure arose around the 1970s, thereby requiring further clarification at the judicial level. In the *Köster*<sup>13</sup> case of 1970 and in the *Rey Soda*<sup>14</sup> case of 1975, the CJEU was for the first time called into play to shed some light on the controversies surrounding comitology. In these two rulings, the CJEU highlighted the existence of a hierarchy of norms by distinguishing between the basic legislative act and the implementing measures. Moreover, it defined the limits of the delegation of powers to the Commission and established that the procedures entailed by such delegation were in line with the institutional balance fostered by the Treaty.

Despite the increased use of the comitology procedure and the lack of clarity surrounding it, further systemisation came along in the 1980s. The entry into

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<sup>12</sup> Art. 25 of Regulation No. 19 of 1962, later repealed.

<sup>13</sup> Case 25/70 *Einfuhr und Vorratsstelle für Getreide und Futtermittel v Köster and Berodt & Co* [1970].

<sup>14</sup> Case 23-75 *Rey Soda v Cassa Conguaglio Zucchero* [1975].

force of the Single European Act (SEA) in 1987 marked the addition of implementing measures to a Treaty dimension.<sup>15</sup> The core of the committees' role remained the same as that established in the 1960s – that is, to scrutinise the Commission's draft of implementing act beforehand and then deliver a vote on its implementation. In fact, the Commission was only able to proceed with the adoption of such acts if the relevant committee's votes were favourable (Christiansen et al., 2009). Shortly after, the Council adopted its first comitology Decision<sup>16</sup> which, as provided by the SEA, outlined the conditions of the Commission's exercise of delegated powers. The Decision, moreover, laid out the horizontal rules governing the work of the committees and organised the already-existing numerous comitology procedures into four main generic types and their variants, namely the advisory, management, regulatory and safeguard procedure. (Nørgaard et al., 2013; Neuhold, 2008).

Despite bringing order to the comitology system, whose variants amounted to around 30 under the SEA, the 1987 Decision did not cover crucial aspects such as the criteria for the choice of the committee procedures, thus impinging on the clarity and smoothness of the system (Schütze, 2011). The political discretion for the choice of committee procedures was, nevertheless, conferred upon the Council. Incidentally, the Council had the final say on the whole process, as it was granted the power to exercise a double safety net procedure that enabled it to unilaterally overturn the Commission's proposal (ibid.). The EP, on its hand, was clearly excluded from the game, despite its legislative competences having been recently enhanced by the SEA. In a pre-emptive

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<sup>15</sup> Art. 10 of the SEA, supplementing Art. 145 TEC, states that: '[The Council shall] confer on the Commission, in the acts which the Council adopts, powers for the implementation of the rules which the Council lays down. The Council may impose certain requirements in respect of the exercise of these powers. The Council may also reserve the right, in specific cases, to exercise directly implementing powers itself. The procedures referred to above must be consonant with principles and rules to be laid down in advance by the Council, acting unanimously on a proposal from the Commission and after obtaining the Opinion of the European Parliament.'

<sup>16</sup> Council Decision 87/373 laying down the procedures for the exercise of implementing powers conferred on the Commission [1987] OJ L 197/33.

parliamentary Resolution,<sup>17</sup> it criticized the Council for not taking into account its demands for increased participation in the existing practice (Bradley, 1997). After a failed action for annulment brought before the CJEU,<sup>18</sup> the EP opted to use its informal powers with the aim of putting pressure on the Commission and Council (Blom-Hansen, 2011). For instance, it frequently chose to block the most restrictive practices on the Commission and the Council's proposals for comitology procedures.

A series of agreements were concluded between the conflicting parties as a result of the tension and pressure exercised on the three institutions. For instance, the Plumb-Delors agreement was ratified by means of a letter between the then Parliament President Henry Plumb and the then Commission President Jacques Delors. Following up on certain undertakings which Delors had promised in the midst of previous debates on comitology, Plumb requested that the EP had to be notified of draft implementing measures. The Commission accepted the proposed arrangements in order to attempt to alleviate the tension and to confer to the EP a more consistent right of information.

### *1.2 The Maastricht Treaty and Beyond*

The entry into force of the Maastricht Treaty in 1992 brought about an institutional reform which granted the EP equal rights and competences in the legislative process, despite only in specific areas. This was possible through the introduction of the co-decision procedure. Against this background, the EP was now able to appeal to its new role of co-legislator in order to seek further enhancement of its competences in the comitology process and to, eventually, pursue the role of co-delegator.<sup>19</sup> While the conflict between the EP and the

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<sup>17</sup> Resolution of 8 July 1987 on the Council Decision of 22 June 1987 on the implementing powers of the Commission [1987] OJ C 246/42.

<sup>18</sup> Case 302/87 *European Parliament v Council of the European Communities* [1987].

<sup>19</sup> Against this backdrop, the EP issued the *De Giovanni report* in which it argued that Art. 202 TEC, formerly Art. 155, was invalid for it only made reference to the Council. It followed that such provision, as well as the first Comitology Decision, could not apply when the basic legislative act was adopted under co-decision.

Council consequently intensified, the dialogue between the EP and the Commission started to ease.<sup>20</sup> The Commission also facilitated the dialogue between the EP and the Council by adopting the Modus Vivendi<sup>21</sup> in 1994, which allowed the EP to be informed of any draft implementing act and opened the doors of comitology committee meetings to members of the European Parliament (MEPs). However, the non-binding nature of the agreement resulted in it being often disregarded and further tensions ensued.

Whilst the Amsterdam Treaty of 1997 did not bring any significant innovation to the comitology dimension, the Council ratified the second comitology Decision<sup>22</sup> in 1999. The Decision, aimed at simplifying the comitology system, preserved the four generic types of procedures but abolished its variants (Nørgaard, 2013) and it increased the predictability on the choice of the committees (Christiansen and Dobbels, 2012; Schütze, 2011). Most importantly, however, it enhanced the competences and involvement of the EP within this scope. The EP's requests to gain the same rights as the Council in the comitology procedure were partially granted (Blom-Hansen, 2011) and plainly stated in the text of the legislation.<sup>23</sup> The EP was now endowed with the right of information and the right to scrutiny on measures adopted under co-decision (Bradley, 2016). Moreover, the EP was granted the power to notify the Council if, in its view, the Commission had exceeded its delegated powers

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<sup>20</sup> The Klepsch-Millan agreement, adopted by the Commission and the EP, allowed the EP to overview the implementation of structural funds-related measures.

<sup>21</sup> Also known as Samland-Williamson Agreement.

<sup>22</sup> Council Decision 1999/468 laying down the procedures for the exercise of implementing powers conferred on the Commission [1999] OJ L 184/23.

<sup>23</sup> Art. 8 of the Decision 1999/468 recites: 'The second purpose of this Decision is to simplify the requirements for the exercise of implementing powers conferred on the Commission as well as to improve the involvement of the European Parliament in those cases where the basic instrument conferring implementation powers on the Commission was adopted in accordance with the procedure laid down in Article 251 of the Treaty; it has been accordingly considered appropriate to reduce the number of procedures as well as to adjust them in line with the respective powers of the institutions involved and notably to give the European Parliament an opportunity to have its views taken into consideration by, respectively, the Commission or the Council in cases where it considers that, respectively, a draft measure submitted to a committee or a proposal submitted to the Council under the regulatory procedure exceeds the implementing powers provided for in the basic instrument.'

envisaged in the basic act if, again, that act was adopted through co-decision procedure (Peers and Costa, 2012). Under these circumstances, however, the Commission was not obliged to revise the disputed draft as long as it informed the EP of its intention (Schütze, 2011). Nevertheless, although the EP was conferred new powers and competences as second delegator and controller of the Commission's delegated powers, it still did not retain a *de facto* veto power as the Council did. Arguably, the Decision was only adopted to avoid further inter-institutional frictions (Bradley, 2016).

In the aftermath of the failure of the Constitutional Treaty, a third comitology reform took place by means of another Council Decision<sup>24</sup> whose purpose, this time, was to considerably amend the 1999 Decision. The most significant feature introduced by the 2006 Decision was the Regulatory Procedure with Scrutiny (RPS), which is still in use today. The RPS confers the EP and the Council equal powers to scrutinise implementing measures when they are empowered by basic legislative acts adopted under co-decision. Under the RPS, the Council, acting by a qualified majority, and the EP, acting by a majority of its component members, are entitled to veto implementing measures on the grounds of lack of competence, substantial incompatibility with the basic instrument, subsidiarity and proportionality.<sup>25</sup> Hence, the RPS significantly enhanced the role of the EP as a key player in the comitology procedure. At the same time, however, it strengthened that of the Council, which still enjoyed a predominant role in the procedure (Bradley, 2008).

### *1.3 The Lisbon Era*

Against the atmosphere of uncertainty and vagueness surrounding the delegation of powers in the framework of the European Communities, the entry into force of the Lisbon Treaty had the priority of clarifying the hierarchy among EU legal acts. The newly introduced order established the distinction

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<sup>24</sup> Council Decision 2006/512 amending Decision 1999/468/EC laying down the procedures for the exercise of implementing powers conferred on the Commission [2006] OJ L 200/11.

<sup>25</sup> Art. 5(a) of Decision 2006/512.

between legislative and non-legislative acts: the latter entailing a further distinction between delegated and implementing acts (Xhaferri, 2013). Enshrined in Art. 290 TFEU, delegated acts concern the voluntary delegation of regulatory powers to the Commission through non-legislative acts of general application, that can modify legislative acts. More specifically, Art. 290(1) TFEU holds that the Commission may be delegated the power to adopt ‘non-legislative acts of general application to supplement or amend certain non-essential elements of the legislative act’. The objectives, duration, scope and content of the delegation must be duly laid out in the basic legislative act. The aim of delegated acts is indeed to amend or supplement non-essential elements of a basic legislative act, whereby the latter is too ambiguous and thus not ready to be applied. The nature of non-essential elements may nevertheless be quite misleading, in that they might include specific details that are rather crucial to the implementation of the primary act – for instance, the duration of applicability, certain technicalities related to expertise proceedings, or other, depending on the context. Simply put, non-essential elements may regulate practical aspects of the application of the primary act (Chamon, 2013) and are therefore quite *essential* in practice (Interview 5).<sup>26</sup>

The second paragraph of Art. 290 TFEU outlines the monitoring procedure that concerns the scrutiny of the Commission’s adoption of delegated acts. In this case, the right of scrutiny is directly exercised by the Council and the EP. More specifically, the provision holds that the Council, or alternatively the EP, may revoke the delegation from the Commission. Moreover, it remarks that a given delegated act can be adopted only if neither the Council nor the EP express their objection. It is significant to pinpoint that, after more than two decades or inter-institutional tensions, the role of the EP is finally recognised on an equal footing to that of the Council at the level of the Treaty in all policy areas. Nonetheless, when enacting the supervising mechanisms envisioned by the

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<sup>26</sup> Also see Case 25/70 *Einfuhr und Vorratsstelle für Getreide und Futtermittel v Köster and Berodt & Co* [1970].

provision, the EP may vote by a majority of its component members. The Council, on the other hand, may act by means of a qualified majority.

Implementing acts, on the other hand, are established by Art. 291 TFEU. The text of the provision reiterates the link between the legislative and executive powers of the EU. Its first paragraph, in fact, highlights the crucial role and obligation of Member States to implement Union law. The second paragraph, nonetheless, lays out the exception under which the EU can implement Union law directly. More precisely, when ‘uniform conditions for implementing legally binding Union acts are needed’<sup>27</sup>, those acts confer implementing powers upon the Commission or, in specific and properly justified cases, on the Council. Finally, the provision also describes the scrutiny process the Commission is subject to when exercising its implementing powers. The comitology procedure is hereby maintained, and both the EP and the Council only retain a marginal role. The competence of the Council in the regime of implementing acts is very peculiar, for it may undertake the role of addressee of the delegation in lieu of the Commission under specific circumstances.<sup>28</sup> Aside from this exception, however, the Treaty clearly confines the Council and the EP to a merely pre-emptive and advisory role. Indeed, the third paragraph of Art. 291 TFEU states that the co-legislators are obliged to lay out the general rules and principles regarding the control mechanisms that Member States undertake by means of comitology as against the Commission’s exercise of implementing powers, but do not retain any scrutiny powers directly.

The entry into force of the Lisbon Treaty and the subsequent amendments to which the system of delegation of powers was subject naturally led to the establishment of a regime composed of secondary legislation. The first stepping-stone to the construction of such a framework was laid down in 2011 by Regulation 182/2011, also known as the Comitology Regulation, aimed at strengthening the control mechanisms on implementing powers exercised by member states. For that purpose, it streamlined the comitology procedures to

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<sup>27</sup> Art. 291(2) TFEU,

<sup>28</sup> Ibid.

mainly two (Craig, 2018) – namely the examination and the advisory procedure. More specifically, the former can be applied to the adoption of both measures of general scope and measures related to programmes implying significant budgetary implications. The latter, on the other hand, pertains to all the remaining categories of acts. While under the advisory system the committee only retains an advisory role, the examination procedure bestows upon the committee the power to veto a given Commission act by means of a negative opinion. Finally, the Regulation replaced the Council as body of second instance by creating an appeal committee, which consists of representatives of the Member States, chaired by the Commission and aimed at dealing with controversial cases that were left pending at the committee level.

Additionally, according to Art. 11 of the Regulation, either the Council or the EP are granted the right to inform the Commission if, in their view, a given draft of implementing act exceeds its implementing powers and if, thus, the Commission acted *ultra vires*. However, similarly to the pre-Lisbon regime, such opinion is non-binding. The Commission is, hence, free to decide whether to amend the contested draft according to the criticism or not. While the Council has never resorted to issuing an *ultra vires* measure, the EP has instead once opted to undertake the judicial patch and sought the annulment of the implementing Decision 2012/733 before the CJEU. In the case, known as *EURES*,<sup>29</sup> the Court eventually ruled against the EP by deeming the primary legislative act as compatible with the contested decision. The judgment, overall, shows that the EP is generally wary of the system of implementing acts, while the CJEU is willing to act as guardian against undue use of delegation measures (Brandsma and Blom-Hansen, 2017).

As opposed to the system of implementing acts, the newly established dimension of delegated acts did not envision the application of horizontal provisions nor the implementation of other detailed measures. Shortly after the adoption of the Lisbon Treaty, the Commission, Council and EP adopted the Common Understanding on Delegated Acts as part of the Interinstitutional

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<sup>29</sup> Case C-65/13 *European Parliament v European Commission* [2013].

Agreement on Better Law-making (IIA).<sup>30</sup> The Common Understanding comprises rules clarifying issues such as the consultation and preparation of delegated acts, the transmission of documents, the calculation of time limits for exercising the right of objection, the duration of delegation of power, and urgency procedure.

Overall, the IIA puts emphasis on the importance of establishing a new and more systematic set of procedures related to the adoption of Art. 290 and Art. 291 TFEU, in order to decrease the risk of escalating inter-institutional conflict. The Agreement is largely based on the implications of the *Biocides*<sup>31</sup> case of 2014, a landmark judgment within this scope in which the CJEU attempted to disentangle the complexity surrounding the legislative choice between delegated and implementing acts. The controversy surrounds the vagueness of the Treaty regarding two crucial actions of Art. 290 and 291 TFEU, namely ‘supplementing’ and ‘implementing’. The vagueness has led to tensions regarding which instrument to empower in a basic act, whether a delegated or implementing act. Inevitably, the tension comes down to what institution retains the power of scrutiny over the Commission’s exercise of delegated powers. The CJEU did not settle the matter in a definite manner, ruling that the EU co-legislators have wide discretion in deciding which kind of delegation to enact in a given basic act, taking into account political and technical elements of the context.<sup>32</sup>

Finally, it is worth mentioning that a reform to the comitology system, aimed at changing the technical decision-making process, is still pending. In 2017, the

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<sup>30</sup> Interinstitutional Agreement between the European Parliament, the Council of the European Union and the European Commission on Better Law-making of 13 April 2016.

<sup>31</sup> Case C-427/12 *European Commission v European Parliament and Council of the European Union (Biocides)* [2014].

<sup>32</sup> *Biocides* paved the way for a series of other cases in which the CJEU has followed a similar reasoning and approach, such as 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].

Commission put forward the proposal for a new Regulation<sup>33</sup> aimed at refining certain aspects of the comitology regime (Mańko, 2021). The focus is on taking further steps towards a more transparent system, especially after the establishment of the Comitology Register and Register of Delegated and Implementing acts. The proposal includes the plan of making the votes within the comitology committees public, particularly within the appeal committee (Interview 2). Moreover, the proposal aims to address the issues that arise in case of the meetings not producing a qualified majority, given that the Commission is legally obliged to take a decision regardless. The ‘no opinion’ situations are particularly problematic when they concern politically sensitive areas.<sup>34</sup>

Nevertheless, this proposal is currently hampered due to the Council’s scarce interest in adopting new measures within this scope and is unlikely to pass (Interview 1; Interview 6; Interview 7).

#### *1.4 Urgency Procedures*

Since the focus of this thesis is the use of delegated rulemaking in the context of crises and crisis management, it goes without saying that the urgency and efficiency of the various proceedings are largely central to the analysis. The legal frameworks of both delegated and implementing acts envision the possibility to activate urgency clauses in the case of imperative and utmost need. There are, of course, specific rules and requirements governing the use of such clauses, and vary depending on the relevant act in use. In the case of delegated acts, the urgency procedure is laid out in the Common Understanding

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<sup>33</sup> Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) No 182/2011 laying down the rules and general principles concerning mechanisms for control by Member States of the Commission’s exercise of implementing powers, COM/2017/085.

<sup>34</sup> Report from the Commission to the European Parliament and the Council on the working of committees in 2023, SWD 2024 235.

on Delegated Acts; the regulatory framework for the urgency procedure of implementing acts is, on the other hand, set by the Comitology Regulation.

The Common Understanding states that an urgency procedure should be reserved for exceptional cases, such as security matters, the protection of health and safety, external relations, humanitarian crises, and more.<sup>35</sup> The Commission should justify the choice of an urgency procedure in the legislative procedure. Indeed, all cases in which the urgency procedure may be used must be specified in the legislative act<sup>36</sup> and the respective recitals as explicitly and clearly as possible. As such, the standard provision on the urgency procedure should always be explicitly detailed in the basic act. When the Commission decides to make use of the power to adopt a delegated act under the urgency procedure, the EP and the Council should be duly informed of the reasons for the use of such a procedure.<sup>37</sup> Most importantly, a delegated act adopted under the urgency procedure enters into force without delay, meaning that the scrutiny phase is postponed to after the entry into force of the act, and it applies as long as no objection is expressed within the period provided for in the basic act.<sup>38</sup> If an objection is indeed presented by the EP or the Council, the Commission has the obligation to repeal the delegated act immediately.<sup>39</sup>

On a similar note, the Comitology Regulation allows the Commission to adopt, without prior consultation of a committee, implementing acts that apply immediately when there are ‘duly justified imperative grounds of urgency grounds of urgency’.<sup>40</sup> The consultation must nevertheless no later than fourteen days after adoption: the Commission must submit the act to the relevant comitology committee in order to obtain its opinion in accordance with the relevant comitology procedure, namely advisory or examination. When the

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<sup>35</sup> Point II.20 of the Common Understanding on Delegated Acts.

<sup>36</sup> Ibid.

<sup>37</sup> Ibid., Point II.23.

<sup>38</sup> Ibid. Point II.22.

<sup>39</sup> Ibid.

<sup>40</sup> Art. 8 of Regulation 182/2011.

advisory procedure applies, the Commission must take the conclusions drawn from the discussions within the committee and the opinion delivered into account, and it may then decide whether the act remains into force or is to be repealed.<sup>41</sup> When the examination procedure applies, on the other hand, the committee's opinion is binding. Consequently, if the committee issues a negative opinion, the Commission must immediately repeal the implementing act.<sup>42</sup> If the committee delivers a positive opinion or does not deliver one at all, the act remains in force for a maximum of six months unless the basic act provides otherwise.<sup>43</sup> After adoption, it is possible to replace the immediately applicable implementing act with a definitive one, namely one that applies for an indefinite period. The urgency procedure envisioned by the Comitology Regulation effectively succeeded the safeguard procedure, that was present in previous legislation regulating the comitology process, and especially the second Comitology Decision.<sup>44</sup>

## **2. Crisis Management in the EU: From Conceptual to Historical Considerations**

The insurgence of different serious, even existential crises over the course of the last few years has indeed raised questions on the emergency solving capacity of the EU. Due to their context, these crises have inevitably converged with traditional debates among established theories of European integration. The role of intergovernmental versus supranational institutions is frequently discussed in the literature, often focusing on whether crises have resulted in one prevailing over the other. Several other theories and issues have often been called into question, such as the different kinds of institutionalism (Schmidt, 2020), as well as differentiated integration and neo-functional politicisation (Brack and Gürkan, 2019). Due to the varied and often unpredictable

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<sup>41</sup> Ibid. Art. 4(2).

<sup>42</sup> Ibid. Art. 8(4).

<sup>43</sup> Ibid.

<sup>44</sup> Art. 6 of Council Decision 1999/468.

ramifications of crises, the intersecting levels of governance, and conflicting stakeholders, theorising EU crises and their management remains difficult even through the lens of traditional integration theories and their more recent developments.

Beyond conceptual dilemmas, there are also legal considerations to be made: namely, the EU Treaties are not endowed with comprehensive emergency powers for the EU to use during crises, as emergency response traditionally lies in the hands of member states. Consequently, member states may mobilise an emergency response at the national level, while the EU lacks both the competence and the relevant tools to do so. Nonetheless, the EU has increasingly played a significant role in the management of the polycrisis (Zeitlin et al., 2019) as various institutions, instruments, and mechanisms have been deployed. Supranational crisis management, where European institutions exercise and expand their executive discretion to tackle emergencies, has gained a more prominent role over the course of the last decade (White and Kreuder-Sonnen, 2021).

In the same work, the authors develop a further categorisation of emergency politics in the EU, which distinguishes between the already-mentioned supranational, multilateral, unilateral and domestic emergency politics (*ibid.*). Simply put, multilateral emergency politics involves member state governments jointly enlarging their discretion through the establishment of ad-hoc authority structures outside of the EU legal framework; unilateral emergency politics implies one or more member state governments enhancing their discretion by temporarily suspending or abrogating EU provisions; domestic emergency politics traditionally involves the expansion of discretion by national governments opposite their constitutional normalcy (*ibid.*; White, 2022). This typology is particularly useful, as it can be used to show the evolution of the emergency politics of the EU in the last fifteen years. Of course, none of the above-mentioned categories can claim to individually explain the approach of the EU during a specific crisis, as characteristics of different kind of emergency politics can be observed during different crises. For instance, the management of the Covid-19 pandemic has exhibited features

of domestic emergency politics through the imposition of lockdowns, the use of decree-laws and parliamentary debates; however, it has also clearly shown a degree of supranational emergency politics<sup>45</sup> through the establishment of the Pandemic Emergency Purchase Programme (PEPP) and Next Generation EU (NGEU) (ibid.). Nevertheless, they are certainly useful to display potential trends and developments of EU emergency politics over time.

This conceptualisation widely acts as a follow up to previous seminal work, which focuses work on European governance in conditions of emergency (White, 2019). There, it is argued the EU has witnessed the rise of a mode of governance centred on the logic of emergency, which guided political decisions and influenced the practice and legitimation of governments. Consequently, this way of governing is characterised by an emphasis on the need to act quickly and decisively in the face of exceptional and urgent threats. The need to stabilize economies and protect European integration has led to extraordinary measures and to the creation of new institutions and mechanisms that go beyond what was previously formalised in the EU system. These new institutions and mechanisms, however, tend to later be incorporated in the EU legal framework even in conditions of normalcy, without accountability or democratic safeguards in place when doing so (Goetz and Sindbjerg Martinsen, 2021; White, 2022).

The EU has also adopted a crisis-oriented policymaking behaviour during normal times, framing its policies with an approach aimed at anticipating the next crisis – a phenomenon that is described as crisification (Rhinard, 2019; Boin and Rhinard, 2022). In other words, European institutions are granted further administrative powers, facilities, and mechanisms that are available to be activated for identifying the next crisis and eventually tackling it. 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

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<sup>45</sup> Supranational emergency politics entails the expansion of executive discretion enacted by EU institutions (White and Kreuder-Sonnen, 2021).

the Animal Disease Information System for emerging animal health problems, along with systems designed to coordinate the various mechanisms (ibid.). In situations of crisis, the Commission has also increasingly resorted to instruments of delegated rulemaking, despite being a lesser known, nonetheless not unimportant, feature of EU governance. Consequently, the use of delegated powers as instruments of crisis management has steadily evolved and grown over the course of the crises the EU has faced.

### *2.1 Practices of Crisis Management*

In practical terms, the EU has resorted to a variety of tools and instruments when facing and managing crises – not least, the ordinary legislative procedure (OLP). As a matter of fact, many decisions concerning the governance of crises have been taken following the traditional path of OLP such as, for example, the Recovery and Resilience Facility (RRF) (Fasone, 2022; Bressanelli et al., 2023). Clearly, the urgency procedure enshrined in the Rules of Procedure of the European Parliament<sup>46</sup> has had to be activated for the sake of time and in order meet the need for quick action posed by the nature of the crisis. This has proved to be possible, and it appears to have become standard practice in such a context. For crisis management normally sees the role of the legislative branch as being sidelined in favour of that of the executive, the Commission appears to have taken the lead when it came to ensuring that decisions taken under OLP were adopted swiftly and efficiently. Shortly after the outbreak of the Covid-19 pandemic, for instance, legislative measures were adopted through OLP within only a couple of months (Interview 4). The achievement of such a record might have been aided by the conditions of lockdown and social distancing which have necessarily cut some steps and even certain practical procedures within the bureaucratic machinery (Culley et al., 2022). The possibility to carry out trilogues more informally as a result of virtual meetings and emptier offices has seemingly also played a role in speeding up

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<sup>46</sup> Art. 163 of the Rules of Procedure of the European Parliament.

the various processes (Interview 4).<sup>47</sup> While certain questions may arise on the democratic legitimacy of the procedure, resorting to such short-cuts is not a novelty in exceptional circumstances (ibid.) – especially given that trilogues remain embedded in a black box even in times of normalcy. Resorting to the OLP and other standard practices such as the Multiannual Financial Framework (MFF) and NGEU as crisis management tools, however, certainly secures a degree of democratic legitimacy, in that it allows for the EP to still be involved.

The EU – or EU member states governments collectively – has also been keen to create new measures and authority structures outside of the Treaty framework in order to get ahead of certain obstacles posed by the Treaties themselves. In crisis situations, the goals collectively shared by the EU and its members may shift, or actors may find the existing framework inadequate for achieving the unchanged goals. This may therefore lead to the formation of alternative formal or informal arrangements that circumvent the usual constraints on authority – this process is, as mentioned above, described as multilateral emergency politics (White and Kreuder-Sonnen, 2021). The creation of the European Council serves as an example –summits between heads of state provided a means to engage in crisis decision-making free from the limitations of the Community method (White, 2019). The sovereign debt crisis also offers poignant examples. To bypass the no-bailout clause<sup>48</sup> and avoid the tortuous road of Treaty revision, members of the Eurozone initially established the EFSF as a *société anonyme* and later created the ESM as an international organization outside the Treaty framework (ibid.; Gocaj and Meunier, 2013).

Finally, while it is true that the EU does not have an emergency constitution and that the Treaties lack fully-fledged emergency powers, Article 122 TFEU can provide the legal basis for the adoption of measures in times of urgency.

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<sup>47</sup> The interviewee has also implied that the general trust towards the Commission, especially in policy areas in which it has been historically very active, has allowed it to speed up decisions taken under OLP during the Covid-19 pandemic. However, the statement has not been cross verified.

<sup>48</sup> Art. 125(1) TFEU.

The article states that if a member state ‘is in difficulties or is seriously threatened with severe difficulties caused by natural disasters or exceptional occurrences beyond its control’,<sup>49</sup> the Council, acting on a proposal from the Commission, the EU may grant ‘financial assistance to the member state concerned’.<sup>50</sup> Art. 122 TFEU has been widely applied during the Covid-19 pandemic, for it has provided the legal basis for two important temporary measures that have been established during the crisis. Firstly, the joint vaccine procurement, which has represented an unprecedented initiative of the EU in the health sector and has been essential for public health and economic recovery. Secondly, the European Instrument for Temporary Support to Mitigate Unemployment Risks in an Emergency, namely a programme which has supported the social security systems of the member states through loans of €100 billions. However, the exclusion of the EP from the procedure certainly raises doubts on the democratic legitimacy and transparency of the whole process. As a matter of fact, when Art. 122 TFEU is applied, the EP shall be informed of the decision taken by the President of the Council,<sup>51</sup> thus being completely sidelined. Therefore, while the content and perhaps rather vague wording of the article allows for procedural swiftness and flexibility, the trade-off with democratic legitimacy remains problematic.

## *2.2 The Case for an EU Emergency Constitution*

The concept of an emergency constitution, originally found in the literature on the state level (see, among others, Ackerman, 2004; Ferejohn and Pasquino, 2004), refers to a chapter in a constitution containing provisions which outline the terms when normal politics needs to be suspended to avert an imminent crisis. It generally delineates the legal framework for establishing and limiting emergency powers, detailing the processes required to declare an emergency,

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<sup>49</sup> Art. 122(2) TFEU.

<sup>50</sup> Ibid.

<sup>51</sup> Ibid.

grant extraordinary authority to the executive, and defining the mechanisms of checks and balances (Kreuder-Sonnen, 2022). Broadly speaking, it should designate the actors entrusted with the declaration of a state of emergency, the exercise of emergency powers, the restoration of constitutional normalcy, the legal limits to the reach and intrusiveness of emergency powers, as well as the relevant mechanisms for review and control (ibid.) Applying such a concept to the EU Treaties requires taking into account the complexities of governance and crisis management within a multilevel policy, encompassing both theoretical and practical dimensions (ibid., 2023). The idea is rooted in the recognition that existing legal and political frameworks may not be sufficient to address extraordinary circumstances, such as pandemics, economic crises, or security threats, that require swift and coordinated responses. New Treaty provisions dedicated to emergencies could potentially streamline decision-making processes, enhance solidarity among member states, and ensure the protection of fundamental rights during crises (ibid., 2022). Furthermore, it would ensure a clear allocation of powers, competencies and instruments to employ in a situation of crisis, thus avoiding potential delays, uncertainty and, potentially, contestation. There are, of course, several theoretical and practical challenges impending on the possibility of creating a European constitution for emergency, hence the reason why the topic is still widely debated in the literature (Schmidt, 2021; White, 2022; Kreuder-Sonnen, 2022, 2023). The establishment of emergency powers that ought to be well-defined, temporary and subject to the relevant checks and balances, while also fitting in the multi-level governance structure of the EU so as to safeguard democratic legitimacy and accountability, represents the first obstacle to this endeavour. Core values would need to be reflected in any emergency constitution, ensuring that foundational values, such as human rights, democracy, and the rule of law, are upheld even under extraordinary circumstances.

Then, of course, the tension with the member states, as well as striking the right balance between supranational and intergovernmental powers, remains, as usual, problematic. Naturally, an emergency constitution would centralise significant powers at the supranational level, raising concerns about the erosion

of national sovereignty and the compliance with the principle of subsidiarity. Another key issue in this sense is the diversity of legal and political systems among EU member states. The EU comprises 27 members, each with its own constitutional traditions and crisis management protocols. Harmonising these divergent systems under a single constitutional framework for emergencies would require careful negotiation and compromise, particularly around sensitive areas like public health, national security, and economic interventions.

Finally, the EU would need to establish clear criteria for declaring an emergency, the scope of the powers granted, and the duration of such powers. Mechanisms for inter-institutional cooperation and communication would also be critical to ensure a coordinated response. This includes defining the roles of various EU institutions and agencies, as well as collaboration with national authorities. Again, this would inevitably result in friction between the institutions, particularly between the Commission and the Council, as shown by the negotiations over the IMERA (Ragonnaud, 2024).

The creation of a specific constitutional framework for emergencies would mellow the (input) legitimacy problem that arises from crisis management. For one, the EU would not need to resort to the creation of instruments outside of the Treaties, entailing ambiguous legitimation (White, 2019). The issue of legitimacy, or its contended lack thereof, has long been discussed when it comes to European integration (see, among others: Majone, 1998; Moravcsik, 2002; Follesdal and Hix, 2006; Schmidt, 2013). The following sections explore democratic legitimacy in the EU, first generally, then narrowing it down to the context of crises. The discussion is aimed at the establishment of the analytical framework for this thesis.

### **3. Concluding Remarks**

As shown in the sections above, delegated rulemaking has become an increasingly prominent decision-making instrument over the course of the last decade. In the context of the polycrisis, where the need for quick decisions has

often trumped the democratic need for legitimacy, delegated and implementing acts have increasingly been adopted as tools of crisis management (Gallinella and Christiansen, 2024). In particular, these acts have been adopted – where provided by in the basic legislative act – within the scope of agriculture, transports, internal market, and justice and consumers. A previous study (ibid.) has shown that the democratic legitimacy of delegated rulemaking, already contested and widely debated in the literature as aforementioned, is not impacted by crises. In other words, the adoption of delegated and implementing acts in the context of crisis management does not showcase any further encroachment on their democratic legitimacy as opposed to times of normalcy. Especially since the Covid-19 pandemic, empowerments for delegated and implementing acts may also be found in recovery packages and other crisis-relevant instruments. For instance, some provisions within NGEU and especially the RRF envision the adoption of both delegated and implementing acts. The Commission may adopt delegated acts pursuant to Art. 290 TFEU for monitoring purposes – for example, to set common indicators and scoreboards for reporting progress and evaluating the member states.<sup>52</sup> Moreover, in 2023, the Commission brought forward the proposal for a Single Market Emergency Instrument (SMEI)<sup>53</sup> aimed at protecting the internal market and free movements in case of a crisis. The SMEI included several empowerments for delegated and implementing acts – in the latter case, both to the Commission and the Council. Now having been adopted as the Internal Market Emergency and Resilience Act (IMERA), the instrument has maintained the original empowerments envisioned in the proposal (Ragonnaud, 2024).

Whereas this contextual evidence may point towards some changes in the role of delegated rulemaking in crisis management, other literature carried out in the field demonstrates that such a link is not at all straightforward (Brandsma

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<sup>52</sup> Regulation (EU) 2021/241 of the European Parliament and of the Council of 12 February 2021 establishing the Recovery and Resilience Facility.

<sup>53</sup> Proposal for a Regulation of the European Parliament and of the Council establishing a Single Market emergency instrument and repealing Council Regulation No (EC) 2679/98.

and Blom-Hansen, 2024). Extensive quantitative research (ibid.) has clearly shown that the Commission has not significantly sought to add more empowerments for delegated rulemaking pursuant to Arts. 290 and 291 TFEU in basic legislative acts since the Covid-19 pandemic. This suggests that the Commission has at least formally given up on the strategy of self-empowerment in the context of a crisis. Whereby a distinction must be made between *empowerments for* delegated and implementing acts, and delegated and implementing acts actually *adopted*, the two are fundamentally intertwined as the latter depends on the former. Careful considerations also need to be made with regard to the role that the other actors play in the scrutiny of delegated rulemaking, particularly the member states and the Council, which may unsurprisingly oppose the empowerments for delegated rulemaking when it comes to politicised issues such as in crisis decision-making (ibid., 2016). Why is it worth to still discuss delegated rulemaking as tools of crisis management and why does it remain relevant? The following chapters and sections seek to find an answer to this question, among others, by exploring the impact that delegated rulemaking has on the democratic legitimacy of EU crisis decision-making.

## Chapter 3

### *Framing Legitimacy in EU Decision-making*

This chapter is devoted to the definition of the analytical framework that is used throughout the empirical analysis and to answer the research question. In particular, it develops the three criteria that serve to test the hypotheses in the empirical section of this thesis. The selected criteria correspond to the three legitimization processes, namely input, throughout and output legitimacy (Schmidt, 2013, 2020). They are employed to assess whether the use of delegated rulemaking has changed matters vis-à-vis the status quo ante of the legitimacy of EU decision-making during crises.

This chapter builds a discussion on the concept legitimacy in general and its issues in the EU, followed by some considerations on the difference that apply to such a framework in the context of a crisis. The hypotheses on which this thesis is grounded are subsequently laid out, and then the criteria are illustrated. Finally, this chapter concludes with an overview of the methods and approach that have been employed throughout the analysis.

#### **1. Framing Legitimacy**

Questions surrounding the democratic legitimacy of the EU have been recurring both in the scholarly and in the political discourse since at least the 1990s (ibid.). The contention generally focuses on whether the EU has a sufficiently robust democratic foundation to legitimately enact policies that impact its member states and citizens. Legitimacy may be understood, broadly speaking, as the basic consent and trust citizens give to governing bodies, insofar as electing them –whether directly or indirectly – accepting their decisions (Weber, 1964). Following this line, legitimacy is also embedded in the institutionalisation of certain democratic principles such as the rule of law, public participation, and equality (ibid.).

In a multilevel polity such as the EU, the steps towards legitimacy and legitimation in this sense have started from the first EP elections in 1979 and have slowly progressed until the establishment of the EP as co-legislator. The road has certainly been tortuous, and there arguably is still a long way to go – particularly in the realm of foreign policy and crisis management, where the EP is either sidelined if not completely excluded (Fasone, 2014; Fromage, 2018; Szép, 2020; Schramm and Wessels, 2022). The struggle was reflected, among other things, in the EP’s attempts to gain an equal status as the Council in delegated rulemaking, culminating with the creation of delegated acts and the *de facto* exclusion of the Council from comitology proceedings under Art. 291 TFEU (see Chapter 2).

All in all, legitimacy remains a central aspect to the notorious dilemma on the so-called democratic deficit of the EU (Majone, 1998; Moravcsik, 2002; Follesdal and Hix, 2006). On the one hand, it has been argued that the application of legitimacy standards typically used in national parliamentary democracies may not necessarily suit the unique structure and functioning of the EU, whose legitimacy should focus on criteria appropriate for a regulatory system (Majone, 1998). Understanding legitimacy in terms of an institution’s ability to fulfil its assigned functions effectively and appropriately, particularly in contexts where traditional democratic mechanisms may not be feasible, may provide a much broader scope to apply such a standard to the EU (*ibid.*). Moreover, the EU arguably follows realistic democratic criteria as it is constrained by constitutional checks and balances, including narrow mandates, fiscal limits, and a strong separation of powers (Moravcsik, 2002).

The other side of the coin contends that these arguments overlook the importance of democratic representation and accountability in legitimising policy outcomes (Follesdal and Hix, 2006). In other words, issues such as the concentration of executive power, the EP’s limited influence compared to the Council, the nature of European elections as second order elections (Reif and Schmitt, 1980), the perceived distance between EU institutions and citizens, and policy outcomes that diverge from citizens’ preferences, all point towards the existence of a legitimacy gap in the EU polity (Follesdal and Hix, 2006).

This brief overview serves to show that theorists have consistently focused on providing a positive or negative response to the question on the alleged, so-called democratic deficit of the EU. Nevertheless, substantial scholarly work has also been carried out on the establishment of normative standards aimed at assessing legitimacy and legitimation.

### *1.1 Processes of Legitimation: Input, Output, Throughput*

However, democratic legitimacy may also be observed and understood in terms of the quality of the processes that lead up to it or, in other words, the processes of legitimation (Schmidt, 2013). Following this line, attention may on the one hand be brought on the quality of procedural and governance aspects of the EU, such as representation, authorisation and accountability (ibid). On the other hand, legitimacy may be assessed on the basis of citizens' participation and deliberation (Bellamy, 2019) or of policy outcomes (Majone, 1998; Moravcsik, 2002). Simply put, focusing on the processes of legitimation entails keeping an eye on what comes in and out of EU governance, as well as what goes on therein (Schmidt, 2013). This conceptualisation is translated into three normative criteria, namely input, output and throughput legitimacy.

Input legitimacy refers to the politics that leads up to the establishment of a responsive polity, bringing legitimacy *in* (Scharpf, 1999),<sup>54</sup> from the people to the institutions. As such, input legitimacy is secured by majoritarian institutions and electoral representation, thus requiring democratic participation by the citizens. Citizens can effectively voice their demands through institutional channels, offering support through their sense of identity and community (Schmidt, 2013). It is rather straightforward to conclude that a strong input legitimacy can enhance public trust and support towards a polity. In the EU, the most evident embodiment of input legitimacy is the EP and its elections, through which EU citizens can express their preferences and participate

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<sup>54</sup> The concepts of input and output legitimacy were first theorised by Scharpf in *Demokratietheorie zwischen Utopie und Anpassung* (1970).

directly in the democratic process. Nevertheless, issues such as the low electoral turnout in EP elections, the low saliency of European issues, the absence of a government that citizens can vote out, raise questions on the fulfilment of input legitimacy and feed into the debate on the so-called democratic deficit of the EU (ibid.).

In multi-level governance structures, the participation of civil society may also be articulated through formal or social organisations rather than direct citizen engagement, such as lobbying (Piattoni, 2010). While citizens' involvement and support play a fundamental role in the building of input legitimacy, one must not overlook other relevant factors. The involvement of institutions at any governance level, and particularly those institutions that have the right to initiate or validate decisions, constitute important aspects of input legitimacy (ibid.). In the EU, different levels of government, including the Commission, member states, and subnational authorities, are considered legitimate participants, while social partners and civil society representatives are incorporated to a lesser extent (ibid.). The reliance on technocratic governance and expertise raises questions on the fulfilment of input legitimacy at the EU level. In general, it is sensible to note that any factor that enhances the democratic process, bringing legitimacy into a governance structure, is relevant to input legitimacy. The politicisation of issues and procedures, on the other hand, may be a driver of legitimacy in that it ensures the increasing involvement of the citizens and majoritarian institutions, thereby enhancing the democratic process and triggering contestation of EU policies (Schmidt, 2019).

Output legitimacy is primarily concerned with policy quality and effectiveness, or, in other words, what brings legitimacy *outside* of a polity – that is, from the institutions to the people. More specifically, it focuses on the effectiveness of policy outcomes, thus involving the extent to which laws and rules can provide a solution to certain problems (Scharpf, 1999; Schmidt, 2013). In order to be legitimate in an output sense, policies must both perform effectively and reflect citizens' demands or values (ibid.), in that output legitimacy is strongly intertwined with the public assessment of the relevance and quality of the performance of an institution. The establishment and consolidation of the EU

as a polity has often been justified by the focus placed on output legitimacy, traditionally intended as the capacity to achieve concrete goals such as peace and economic prosperity (Lindgren and Persson, 2010; Piattoni, 2010). Nevertheless, as public expectations evolved, legitimacy based solely on policy outcomes and performance has become insufficient, especially when policies directly affect sensitive areas where citizen preferences may differ widely across member states (ibid.; Bellamy, 2019).

Throughput legitimacy encompasses the governance processes that occur between input and output, focusing on their efficacy, accountability, transparency, inclusiveness, and openness to interest consultation (Schmidt, 2013). It has been theorised as a distinct aspect of the legitimation process only in the last decade (ibid.), as its features are often found in the earlier literature as intertwined in the dimensions of input or output legitimacy (see, among others, Lindgren and Persson, 2010; Piattoni, 2010). Naturally, throughput legitimacy is strongly linked to either improving public engagement or ensuring more effective policy outcomes. Moreover, poor throughput can hinder public perceptions of legitimacy regardless of the quality of input or output (Schmidt, 2013). In other words, while strong throughput governance can protect the legitimacy of the EU, weak or corrupt processes can undermine it, regardless of successful policies or public participation. This makes throughput crucial but insufficient by itself for democratic legitimacy, as it serves more to prevent failures than to enhance public perceptions (ibid.).

In the EU, accountability remains an issue, especially given opaque decision-making in bodies like the Commission and the Council. Reforms have aimed to increase scrutiny and transparency but often fall short, with complex internal accountability not translating into public oversight. Moreover, fast-track legislative processes have improved efficiency but at the cost of reducing transparency. Efforts to address these challenges include enhancing citizen engagement in national and EU processes and ensuring broader representation of disadvantaged groups. However, throughput legitimacy cannot replace the need for robust democratic input – it must complement it, contributing to the fulfilment of democratic legitimacy (ibid.).

To use an example relevant to the main themes of this thesis, the throughput legitimacy of delegated rulemaking would refer in particular to its scrutiny mechanisms and to the extent to which the EP, Council or comitology committees are able to keep the Commission accountable in an open, transparent, and inclusive way. As already illustrated in Chapter 2, the scrutiny of delegated rulemaking has been criticised for its questionable accountability and transparency practices (Brandsma, 2016; Brandsma and Blom-Hansen, 2016, 2017). Not only the throughput legitimacy of the system is hence compromised, but also, arguably, its input. As a matter of fact, the controversial scrutiny mechanism of delegated rulemaking entails a reduced role of the EP, therefore of the major driver of input legitimacy in EU governance.

## **2. Democratic Legitimacy and Crises**

The balance between input, output, and throughput legitimacy is considerably challenged in the context of a crisis or an emergency. In times in which the need for swift actions overtakes the agenda, priority is then given to quick, efficient, and effective policies. Input and throughput legitimacy are, in other words, sidelined and the fulfilment of output legitimacy becomes central to policymaking. Tools that are explicitly aimed at crisis management, such as Art. 122 TFEU, frequently envision only a marginal role for the EP. Similarly, the activation of urgency clauses in the scope of regular instruments may exclude (or postpone) legislative oversight. Procedural times may be cut, transparency mechanisms may be overlooked, and new instruments are often created in favour of effective and sharp decision-making. The impact on legitimacy, however, is not confined to the emergency only – in other words, it does not necessarily end when the crisis is over. When crisis-related instruments and mechanisms are created outside of the Treaties to circumvent certain constitutional limitations, they are often later incorporated in the EU legal order without concrete accountability safeguards (White, 2019; Kreuder-Sonnen, 2019).

However, the emphasis on the outcome and output of policy choices is used to justify the bypassing of normal democratic processes. During the Covid-19 pandemic, for instance, leaders explained the need for restrictive measures, such as lockdowns, border closures, and unprecedented fiscal initiatives, by highlighting the necessity for public health and economic stability (Schmidt, 2024). Moreover, the member states initially acted unilaterally, re-establishing border controls without coordination, undermining procedural (throughput) and participatory (input) legitimacy. Although national governments used coercive power, they tried to legitimise actions by calling for public health benefits, economic recovery, and solidarity, thereby strongly focusing on output (ibid.). The management of the Covid-19 pandemic is merely an example of a broader trend in which effective performance can temporarily compensate for the reduction of traditional democratic practices during crises, provided that the actions taken are seen as proportional and beneficial.

### *2.1 Delegated Rulemaking, Crises, and Legitimacy*

As it was already discussed above, crisis decision-making in the EU has not only entailed the creation of unprecedented measures, but also the use of Treaty-based or anyway regular instruments such as the OLP (Interview 4). Most times, these instruments are endowed – or have been endowed over time as a result of the crisification of EU policymaking (Rhinard, 2019) – with emergency clauses or different kinds of mechanisms to be activated in the case of a crisis. This also applies to delegated rulemaking. Delegated acts, for instance, may be adopted on the basis of an urgency procedure, where provided for in the legislative act. This means that they can enter into force without delay and apply as long as no objection is expressed within the period laid out in the basic act.<sup>55</sup> In the case the basic act does not provide grounds for the enactment of the urgency clause, the EP and/or the Council can speed up the procedure by stating their early non-objection to the delegated act soon before the end of the

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<sup>55</sup> Art. b of the Common Understanding on Delegated Acts.

scrutiny period (Interview 5). On the other hand, the Comitology Regulation allows the Commission, in imperative and well-justified urgent circumstances, to adopt implementing acts without prior consultation with a committee. These acts, referred to as immediately applicable implementing acts, may only be applied for six months unless specified differently by the basic act.<sup>56</sup>

Even during normal times, the input legitimacy of delegated rulemaking is highly debated. While electoral representation is normally secured by parliamentary involvement, Art. 291 TFEU<sup>57</sup> does not provide a relevant role for the EP because it provides the basis for administrative regulation. As such, it completely excludes the participation of civil society from the processes leading to the adoption of implementing acts. Comitology is *de facto* controlled by unelected institutions and stakeholders, and it therefore leaves a democratic gap between citizens and the institutions. The EP is nevertheless a central actor in the scrutiny of delegated acts, given that the delegation starts from the legislative branch to the executive. Together with the Council, it retains a veto power on the adoption of the acts and even the power to revoke the delegation altogether. A power, however, it rarely makes use of (Christiansen and Lange, 2021; Kaeding, 2017). As a matter of fact, the EP (and the Council) is more likely in collusion with the Commission, enabling an essentially hurdle-free path to the adoption of delegated acts (Gallinella and Christiansen, 2024). Consequently, there appears to be close cooperation among all stakeholders involved, which has also facilitated the de-politicisation of decision-making in this scope, allowing the technocratic elites rather than elected representatives to actually decide on the nature of delegated rulemaking (*ibid.*). In exceptional cases, however, proposed delegated or implementing acts receive the attention of political parties or the media, and therefore their adoption entails rigid scrutiny, politicisation and public debate.<sup>58</sup> Despite them being an exception,

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<sup>56</sup> Art. 8 of Regulation 182/2011.

<sup>57</sup> Art. 291(3) TFEU.

<sup>58</sup> An example is the controversy that surrounded the adoption of the complementary delegated act on the EU taxonomy (namely, Commission Delegated Regulation (EU) 2022/1214 of 9 March 2022 amending Delegated Regulation (EU) 2021/2139 as regards economic activities

these cases of increased politicisation trigger an increased involvement of elected institutions and thus the fulfilment of the democratic process from an input perspective. Crisis decision-making may lead to a similar outcome, if the topic at hand is contested enough.

The throughput dimension of the legitimacy of delegated rulemaking is, on the hand, intertwined with what was discussed regarding its input legitimacy. The scrutiny carried out by the relevant institutions – whether the EP, the Council, or the comitology committees – ensures that a degree of accountability is fulfilled. The bureaucratic collusion between these institutions therefore raises questions on the establishment of a strong accountability link. It has already been established that crises do not further impinge on the already weak input and throughput legitimacy of delegated rulemaking (Christiansen and Gallinella, 2024). On the other hand, the transparency of the procedure is still somewhat problematic. Despite the creation of tools such as the Comitology Register and the Register of Delegated and Implementing acts, certain mechanisms of allocation of power remain foggy. In particular, when actually preparing the empowerments for delegated rulemaking in the basic act, much of the negotiation between the EP and the member states regarding the nature of the empowerment happens via informal channels (Interview 3). For rather obvious reasons, the member states tend to push for the inclusion of an empowerment for implementing acts, while the EP favours delegated acts. In situations of crisis, the nature of the empowerment, and thus the bargaining over the distribution of the power of scrutiny, may be particularly critical given the tension and likely politicisation surrounding the context (Gallinella and Christiansen, 2024). However, the sense of urgency brought by the

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in certain energy sectors and Delegated Regulation (EU) 2021/2178 as regards specific public disclosures for those economic activities), which included specific nuclear and gas energy activities in the list of economic activities covered by the EU taxonomy. The scrutiny of the act received intense public attention and, despite several MEPs and party groups within the EP threatening to block it, the relevant majority was not reached, and the act was eventually adopted. In 2023, a group of environmental NGOs including WWF and ClientEarth filed a case in the CJEU against the delegated act's inclusion of certain uses of fossil gas as sustainable (WWF, 2023).

circumstances might in fact result in quicker agreements on the empowerments (Interview 10).

As perhaps many aspects of EU governance, whether crisis-related or not, delegated rulemaking appears to have a stronger output legitimacy. The effectiveness of the measures has never been questioned in the literature, and their specificity and focus are likely the reason behind it. Moreover, the procedures leading to both delegated and implementing acts guarantee a relatively short turnover from the draft to the adopted measure. The scrutiny processes last two months, with possibility of extension, which is rarely exploited to the fullest for reasons related to the practice of bureaucratic collusion, as discussed above. The possibility of activating the urgency clause, where provided for in the basic act, or of using the early non-objection option for delegated acts, further speeds up the whole process. In general, delegated and implementing acts appear as highly effective and efficient tools that the Commission can use whereby it deems fit. In the context of an emergency, they have proven to be useful tools to regulate crisis-related aspects in a swift and rather smooth way (*ibid.*). However, one must not forget the limitations that are intrinsic to the instruments themselves. Their non-legislative nature, for instance, is one of them. Furthermore, delegated acts are aimed at amending and supplementing non-essential elements of a basic act, formally leaving little room for manoeuvre. The nature of such non-essential elements may nonetheless be rather vague, in that they might include specific details that are instead crucial to the actualisation of the basic act. For example, the duration of the applicability of the act, certain technicalities concerning the proceedings, or other, depending on the context. It has emerged that the Commission may, on occasion, intentionally leave certain elements of a basic act in general terms within the legislative proposal, while ensuring the inclusion of empowerments for delegated acts aimed at refining these elements at a later stage (Interview 4). In short, non-essential elements may actually regulate concrete aspects of the application of the basic act (Chamon, 2013) and may therefore be intentionally quite essential (Interview 5). As such, it remains relevant to

examine the use of delegated rulemaking in situations of crises, particularly considering its inherent inclination towards output legitimacy.

### **3. Main Hypothesis**

Against this background, it is possible to formulate the main hypothesis that serves as a common thread throughout the analysis and that is then tested in the upcoming empirical chapters. The hypothesis is derived from the framework that is discussed above, and answers directly to the central research question of this thesis. This work hypothesises that delegated rulemaking has become an increasingly appealing instrument of crisis management due to its output-driven nature. It follows that the Commission (and, occasionally in the case of implementing acts, the Council) may seek the use of such measures where possible in order to avoid resorting to more cumbersome or less legitimate forms of crisis decision-making. Surely, delegated and implementing acts also guarantee the enactment of supranational power, therefore facilitating a more supranational and centralised crisis management.

Having stated all the premises, the analysis conducted in this thesis starts from the hypothesis that if practices of delegated rulemaking pursuant to Arts. 290 and 291 TFEU are used during crises, then the democratic legitimacy of crisis management will be affected. By analysing the use of delegated rulemaking in the context of four of the major crises the EU has had to face – namely the sovereign debt, the so-called refugee crisis, the Covid-19 pandemic and the war in Ukraine – through the lens of democratic legitimacy, it is then possible to evaluate whether it has had a positive or negative impact on EU crisis management. This question fits into the previously mentioned wider debate on the possibility for a European emergency constitution, in that it provides an in-depth study on a possibly highly relevant instrument. Following this line, a null hypothesis may be drawn, namely that if practices of delegated rulemaking pursuant to Arts. 290 and 291 TFEU are used during crises, then the democratic legitimacy of crisis management will not be affected.

The empirical chapters are focused on answering the research questions and on testing the main hypothesis. In other words, they are aimed at assessing whether delegated rulemaking has led to a change to the democratic legitimacy of EU crisis decision-making vis-à-vis the *status quo ante*. In order to do so, the analysis relies on three criteria that are drawn from the framework, namely the three dimensions of legitimacy – input, throughput, and output.

#### **4. Definition of the Criteria**

This thesis seeks to answer the question of whether and to what extent the use of delegated rulemaking impacts the legitimacy of EU crisis decision-making. It does so by examining each of the crises selected as case studies (see Section 6.1 below) through the analytical framework of three distinct processes of legitimation: input, throughput, and output legitimacy. First of all, the evolution of delegated rulemaking in relation to input legitimacy over the course of the selected crises is evaluated. The relevant indicators of input legitimacy considered in this thesis are, in particular, the extent of democratic representation ensured by parliamentary participation and the level of politicisation that accompanies delegated rulemaking. The former particularly relates to the empowerments that are present in the basic legislative act and questions whether and how the EP has been able to exert meaningful influence over the allocation of such empowerments in the context of the negotiations. However, it also relates to the democratic grounds that the very existence of the empowerments provides, as they imply the occurrence of negotiations triggering the democratic process. The latter, on the other hand, entails the extent to which an issue is politicised, thus causing the involvement of other institutions and the public, or even the enactment of public consultations on the part of the Commission.

The second criterion employed in this analysis is throughput legitimacy. The way accountability and transparency issues of delegated rulemaking have unfolded in the context of crises are key aspects to be considered. Specifically, the second criterion pertains to whether the scrutiny and transparency of

delegated and implementing acts are affected by a crisis context. The line between throughput and input legitimacy may be blurred at times, especially when considering the role of the EP. On the one hand, the EP provides the democratic dimension to the process by embodying democratic representation. On the other hand, in its scrutiny of delegated acts, it plays a central role in guaranteeing accountability, transparency. It can be also said, nonetheless, that its involvement in the *throughput* inevitably brings *input* into the process. Accountability itself, after all, is a multifaceted concept that can also be understood as vertical (input) and horizontal (throughput). Similarly, the negotiations over the nature of the empowerments to be added in the basic act also imply some degree of accountability and questions over transparency. For the sake of clarity and simplification, this work understands throughput legitimacy within the scope of the scrutiny of delegated and implementing acts and considers input legitimacy in relation to the empowerments and (where possible) their negotiations. However, the constant spillover and trade-offs between input and throughput legitimacy are fully acknowledged.

Finally, output legitimacy is used to evaluate delegated rulemaking during crises, especially in considering both the nature of delegated rulemaking and crisis management as output driven. The literature broadly links output with effectiveness, but this thesis refrains from measuring effectiveness and focuses on the measures that have been adopted in response to a crisis, whether delegated or implementing acts or other legislative packages containing empowerments for the management of future crises. While it may be possible to make general statements on the effectiveness of specific delegated or implementing measures, it would be difficult and perhaps premature to adequately assess their effectiveness once they enter into force. As a consequence, output legitimacy is hereby understood as legitimacy through output, hence relating to what new policies have stemmed from a certain crisis, to whether procedures have been swift, proportionate and effective in delivering desired policy outcomes. As such, the efficiency of the procedure is used as a proxy as well. That entails both the length and swiftness of the adoption of delegated and implementing acts, but also the promptness with

which the procedure has been initiated following the onset of a given crisis. Table 1 below provides a summary of the criteria for clarification purposes. Moreover, Figures 1, 2, and 3 break down the indicators that are considered to evaluate the criteria in the empirical chapters.

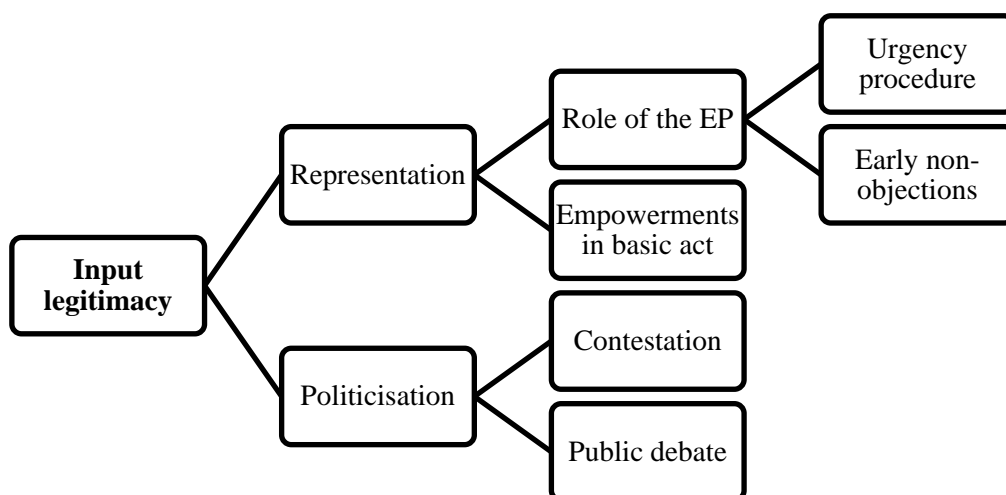
Following the same logic, overlaps and spillovers between input and output legitimacy are also foreseeable. The nature and role of the empowerments come into play, for one, due to their twofold nature as triggers for input legitimacy and sources of output – especially when they are added to a basic act that directly results from a crisis and that is aimed at providing tools to potentially manage a future one. The distinction here is tentative and has to be made only for the purpose of following the structure and horizontal comparison offered by this thesis. For purely organisational purposes, if the empowerments appear in an instrument designed to manage the crisis under discussion, then they are considered under the input dimension. If, on the other hand, the empowerments are added to instruments that are adopted or negotiated as a result of a given crisis, but aimed at potential future emergencies, then they are regarded as adding to the scope of output legitimacy. Similarly, effectiveness may be a common element of both throughput and output – in the former case, it is procedural effectiveness, while it is outcome effectiveness in the latter. However, there are no more practical indicators shared between the two criteria. Finally, the role of urgency procedures is relevant to all three criteria. They pertain to input legitimacy with regard to the parliamentary role therein, whether it is reduced or not; they related to throughput legitimacy considering the effect they have on the accountability of the process; and they are important to output legitimacy in that they ensure a major procedural efficiency. Figure 4 aims, to this effect, at illustrating the elements and indicators that the three criteria have in common.

These three criteria – input, throughput, and output legitimacy – provide an all-round perspective on democratic legitimacy and therefore allow a comprehensive evaluation of the use of delegated and implementing acts during crises. By employing this tripartite framework, the thesis encompasses the different nuances of crisis management and highlights the multifaceted nature

of legitimacy in EU governance. Moreover, this analysis does not merely seek to evaluate the democratic legitimacy of delegated and implementing acts through this framework. As a matter of fact, it aims at offering a holistic assessment of whether the use of delegated rulemaking during emergencies aligns with the principles of democratic governance that underpin the Treaties, and thus whether that could potentially lead to a more legitimate crisis management in the EU.

<b>Input Legitimacy</b>	<b>Throughput Legitimacy</b>	<b>Output Legitimacy</b>
<ul style="list-style-type: none"> <li>- Representation</li> <li>- Politicisation</li> </ul>	<ul style="list-style-type: none"> <li>- Accountability</li> <li>- Transparency</li> </ul>	<ul style="list-style-type: none"> <li>- Efficiency</li> <li>- Legitimacy through output</li> <li>- Effectiveness</li> </ul>

*Table 1: Framework Criteria*



*Figure 1: Input Legitimacy*

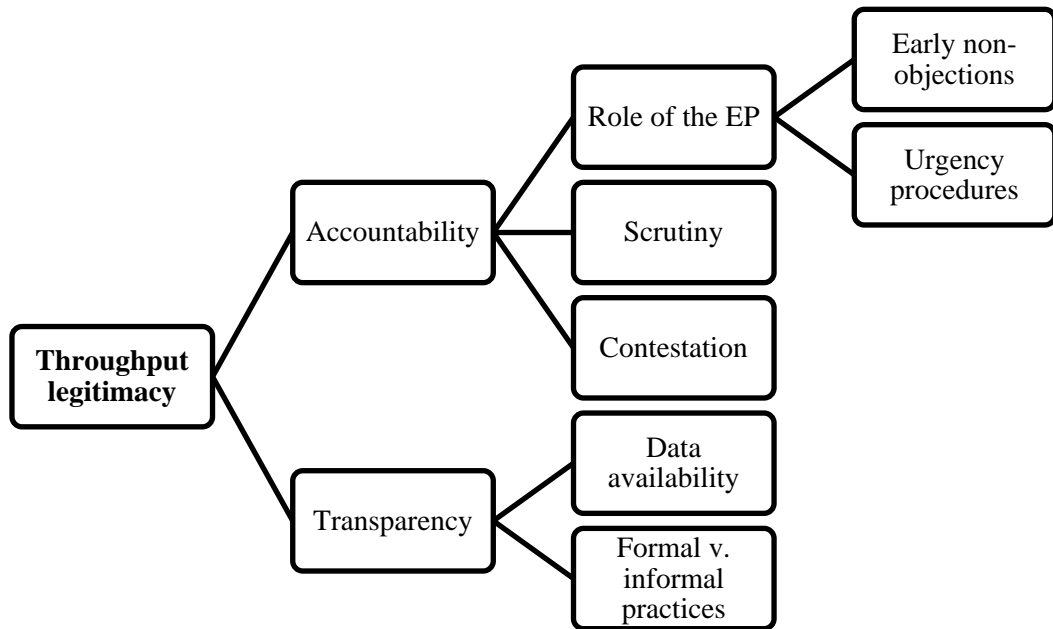


Figure 2: Throughput Legitimacy

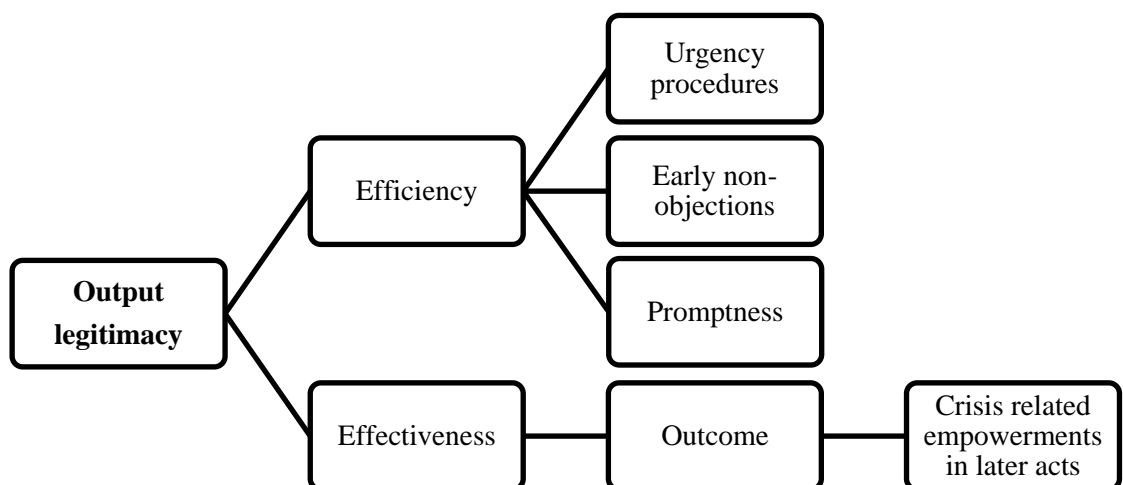


Figure 3: Output Legitimacy

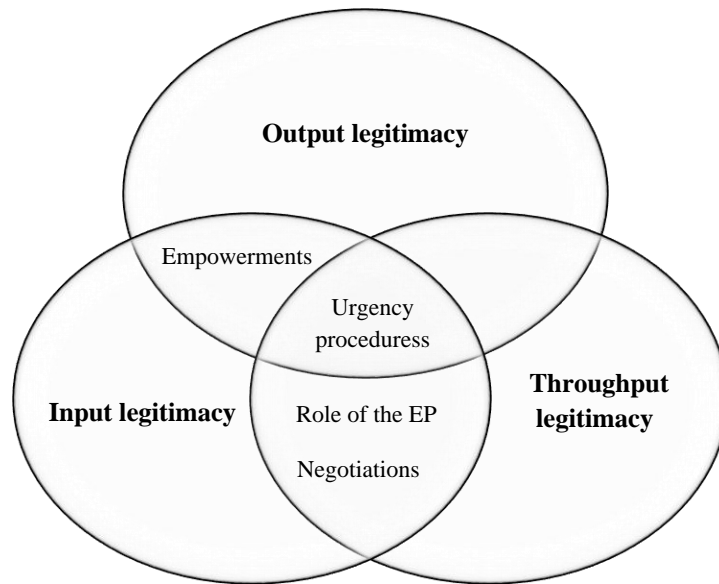


Figure 4: Overlaps

## 5. Methodology and Approach

To achieve its purposes, this thesis primarily relies on a comparative case study methodology and semi-structured interviews. The qualitative approach and the small-n research design allow to discern less detectable phenomena that may otherwise stay under the radar. While the quantitative change in the adoption of delegated and implementing acts as tools of crisis management is crucial and is thus not overlooked in this analysis, the priority here is rather to understand the qualitative change in the perception and discourse around delegated rulemaking in times of crisis. Moreover, the focus on the dimension of delegated rulemaking, where there have been significant improvements in transparency but where many of the negotiations are nonetheless still quite elusive, calls for the need to ask questions and gather further knowledge from the people directly involved.

### 5.1 Definition of the Cases

Given the broader aim to gain a deeper understanding on the crisis management and emergency-solving capacity of the EU in general, the case studies hereby

considered are, indeed, the crises that have followed one another since the entry into force of the Lisbon Treaty. The literature offers several definitions and explanations of what a crisis is, as crises contain objective elements but also subjective ones (Nugent et al., 2024). However, this work understands crises in a broader sense, namely as threats to societal fundamental values or essential pillars, requiring an urgent response often in the face of significant uncertainty (Rosenthal et al., 1989 cited in Nugent et al., 2024). The emphasis on the need for swift crisis management is particularly relevant to this context. In other words, a crisis is also understood as a situation in which policymakers are confronted with a significant need for action and limited time for extensive policy deliberations (Falkner, 2016).

Against this background, crises are employed as the case studies in this analysis. The selected case studies are the sovereign debt crisis, the so-called refugee crisis, the Covid-19 pandemic, and the war in Ukraine. Other than having occurred since the entry into force of the Lisbon Treaty, these crises are arguably the most significant threats that the EU has had to face in the last two decades. Moreover, the crises hereby considered are exogenous, but all imparted a degree of disruption on the functioning of the internal market. Solely endogenous crises, such as Brexit, have been excluded from this analysis. The risk of selection bias (Geddes, 1990) is rather low, since the four selected crises may be arguably considered as the major exogenous-driven threats the EU has experienced since the Lisbon Treaty.

The horizontal comparison of different crises allows to highlight the vertical dynamics of crisis management, and especially the use of delegated rulemaking therein. However, the juxtaposition is not horizontal, strictly-speaking, and identifying a linear temporal dimension may be more problematic than it seems. These (and other minor) crises have indeed unravelled one right after the other, often having overlapping time frames, and have contributed to a sense of permanent crisis (Voltolini et al., 2020), permacrisis (Zuleeg et al., 2021) or polycrisis (Junker, 2016; Zeitlin et al., 2019) in the EU. Nevertheless, despite the challenges, the order in which the case studies are presented in this thesis is still chronological, based on the date of the outbreak of a given crisis.

Most importantly, given the current nature of some of these crises, which are still ongoing at the time of writing, a greater emphasis will be given to the two-year period following their inception.

### *5.2 Semi-structured Interviews and Beyond*

Following this note, in-depth interviews have been carried out in Brussels with EU civil servants and officials. Interviews are certainly not a novelty tool in this field and have been previously used in studies on delegated rulemaking quite a few times (see, among others: Brandsma, 2016; Gallinella and Christiansen, 2024). The interviews were aimed at officials of the major institutional stakeholders involved in the process of delegated rulemaking, namely the Commission, the EP, and the representatives of the member states.

In the case of the Commission, the interviewees were identified within the relevant units of the Directorates-General (DGs) that were active in the adoption of delegated and implementing acts in the scope of the case studies. These were Agriculture and Rural Development (AGRI), Justice and Consumers (JUST), and Mobility and Transport (MOVE). As for the member states, the representatives were chosen among the national representations of those member states that held the Council presidency during the outbreak of the selected crises. Finally, an MEP who acted as a rapporteur within the parliamentary committee for a few of the relevant delegated acts, and a legal officer within the EP were also interviewed.

These interviews were firstly aimed at gaining the perspectives of the three institutional stakeholders on their roles, whether as principal actor or scrutiniser, in delegated rulemaking in times of crisis. Secondly, although not less importantly, the purpose of the interview was to gather further insights on those inter-institutional negotiations and interactions that still happen behind closed doors or at the technocratic level, but that nonetheless contribute to the achievement of the final result. Interviewing officials from the three most

important actors within this scope allowed to triangulate and cross-reference the information obtained.<sup>59</sup>

Finally, a portion of the data collection was carried out through online archival research. In particular, documents concerning delegated and implementing acts, their drafts, the adoption process, and (where available) the agenda of the committee meetings, were retrieved from the Register of Delegated and Implementing acts<sup>60</sup> and the Comitology Register.<sup>61</sup> Other primary legal documents and sources have been pulled from the Legislative observatory of the EP.<sup>62</sup>

## **6. Concluding Remarks**

This chapter has provided the analytical framework aimed at evaluating the democratic legitimacy of EU crisis decision-making, emphasising the three-dimensional nature of legitimacy. By dissecting the complex interplay between input, throughput, and output dimensions, this chapter has laid the groundwork for the empirical part of this thesis to analyse the evolving role of delegated rulemaking in EU crises. The comparative framework set out here is essential to this work's goal of exploring how delegated rulemaking impacts on the legitimacy of crisis management, and more broadly how crises shape governance processes.

The empirical chapters test the hypothesis developed in this chapter, particularly whether delegated rulemaking serves as a strategic instrument for managing crises effectively while circumventing other forms of crisis decision-making. The analysis relies on case studies, including the sovereign debt crisis, the refugee crisis, the Covid-19 pandemic, and the consequences to the war in Ukraine. Each case is examined through the lens of the legitimacy framework, and especially the three dimensions of legitimacy outlined above. In order to

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<sup>59</sup> This work acknowledges that semi-structured interviews have the risk of being potentially less reliable and hard to generalise (Halperin and Heath, 2012).

<sup>60</sup> Available online at: <https://webgate.ec.europa.eu/regdel/#/home>.

<sup>61</sup> Available online at: <https://ec.europa.eu/transparency/comitology-register/screen/home>.

<sup>62</sup> Available online at: <https://oeil.secure.europarl.europa.eu/oeil/home/home.do>.

allow for a horizontal comparison of the cases, each empirical chapter is organised according to the three criteria.

As this research moves into its empirical phase, the significance of the analytical framework developed here becomes clear. On the one hand, it serves the specific purpose of setting the criteria aimed at answering the research question. On a broader, more general level, it opens the scope for a wider discussion on the nuanced ways in which crises can recalibrate governance practices, often tipping the scales towards effectiveness and efficiency at the expense of other democratic norms. Understanding this balance is crucial for evaluating the potential need for structural reforms, such as further Treaty-based emergency measures or the introduction of a general emergency regime, which could streamline crisis response while better safeguarding democratic values.

## Chapter 4

### *Input Legitimacy*

The unfolding of the most recent crises has demonstrated that emergency response prioritises swift, effective policies over deliberative processes of democracy. As a matter of fact, the urgency of crises, whether financial, humanitarian, or health-related, often necessitates immediate action that cannot afford the delays that may characterise standard democratic procedures. Parliamentary and legislative activities are often reduced or even circumvented, as crisis management frequently takes the form of executive rulemaking. The executive's capacity to react quickly is perceived as crucial to respond to the need for swift action, yet this approach comes with significant democratic trade-offs. In particular, traditional forms of democratic debate and scrutiny are often sidelined, resulting in concerns about democratic representation.

The EU is not immune to this dynamic. The EP is frequently excluded from emergency response mechanisms, and the executive branch becomes the core of where major decisions are taken. This sidelining is not just a procedural choice but has broader implications on democratic legitimacy, as the EP is the only directly elected EU body and upholds a fundamental role for securing democratic debate and representation. However, it is undeniable that the European Council has played a leading role in the response to the most recent emergencies (Schramm and Wessels, 2022). The Commission has also steadily strengthened its position as a key crisis manager since the sovereign debt crisis (Bauer and Becker, 2014; Dehousse, 2016). The Commission's enhanced role in crisis management, as well as the European Council's unquestionable leadership, has been both praised for its efficiency and criticised for its questionable democratic legitimacy, particularly from an input perspective.

The Commission's exercise of delegated rulemaking pursuant to Arts. 290 and 291 TFEU fits into the narrative of the executive branch's empowerment in the context of crisis decision-making. Notably, the use of delegated and

implementing acts has not only increased during normal times but it has also become an increasingly relevant tool in times of crisis (Gallinella and Christiansen, 2024; Interview 10).<sup>63</sup> As mentioned above, that is to say that the delegated and implementing acts adopted during times of crisis are largely aimed at emergency and temporary measures, as opposed to the acts adopted during normal times. This trend reflects a broader pattern where technical and regulatory responses are preferred over prolonged legislative deliberations, especially when urgency is a concern. Additionally, as previously discussed in Chapter 3, the input legitimacy of delegated and implementing acts themselves does not stand on solid grounds. Their input legitimacy is weakened, in short, by the *de facto* (in the case of the former) and *de jure* (in the case of the latter) limited engagement of the EP. The lack of active parliamentary oversight raises concerns about the democratic deficit of the EU and whether crisis management measures adequately reflect citizens' interests.

Moreover, measures adopted by means of delegated rulemaking tend to be highly technical and de-politicised. The specificity of these measures often places them beyond the immediate comprehension or interest of the general public and political elites, thus rarely triggering contestation. As a result, they seldom gain significant attention or scrutiny, even when their impact is considerable. In general, however, the legality of delegated and implementing acts, specifically their rooting in the Treaty framework and the specific empowerments enshrined in secondary legislation, secures some level of input legitimacy, albeit indirectly. The balance between technical efficiency and democratic involvement remains a critical issue, nonetheless.

This chapter seeks to analyse the developments of the use of delegated rulemaking during crises from an input legitimacy perspective. Each of the following sections is dedicated to one of the case studies, namely the sovereign debt crisis, the refugee crisis, the Covid-19 pandemic, and the consequences of

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<sup>63</sup> The data on the number, content, and timeline of delegated and implementing acts has been retrieved from the Register of Delegated and Implementing Acts, available online at: <https://webgate.ec.europa.eu/regdel/#/home>.

the war in Ukraine. Every section begins with a brief historical and institutional overview of the relevant crisis, providing context for the subsequent analysis. The discussion then delves into an evaluation of parliamentary involvement and the (often limited) politicisation of the process of adopting delegated and implementing acts. By assessing these dynamics, this chapter reflects on whether the apparent weaknesses in input legitimacy of delegated rulemaking ultimately affect the overall input legitimacy of crisis management in the EU. The overarching question on whether this governance approach, while efficient, upholds democratic standards acts as a background for the whole analysis.

### **1. The Sovereign Debt Crisis**

Following the entry into force of the Maastricht Treaty, the EU and the newly formed EMU experienced a period of financial stability due to low inflation rates, ample availability for liquidity, and the boost of financial and transaction networks within the Union. However, this optimism masked significant asymmetries in the member state's financial behaviour within the Eurozone (Hall, 2014). The design of the EMU also revealed critical weaknesses, such as the lack of robust mechanisms to manage or halt crises, being only endowed with preventive tools outside of the framework of the Lisbon Treaty (Pisani-Ferry et al., 2012). When the sovereign debt crisis broke out, the European Council emerged as the primary decision-making body, becoming the central forum in which major decisions were taken (Dehousse, 2016). Nevertheless, a different trend emerged in macroeconomic governance – namely, increasingly supranational efforts characterised the response to the crisis within that scope. For instance, multilateral emergency politics led to the creation of the European Stability Mechanism, established outside the Treaty framework, emphasising the shift to more coordinated and supranational approaches (White and Kreuder-Sonnen, 2021).

The Commission also played a significant role, particularly through reforms like the Six Pack, Two Pack, and the Fiscal Compact. These regulatory

frameworks gave the Commission greater oversight over the fiscal policies of the member states, encompassing national budgets, debt levels, and economic trends (Bauer and Becker, 2014). Overall, the growing influence of supranational institutions represented a pivotal shift towards greater economic policy convergence in the Eurozone. By reinforcing the role of the Commission in the spheres of economic oversight and fiscal governance, the EU paved the way towards a more centralised crisis management, despite the substantial role still retained by intergovernmental institutions and national governments. The gradual crisisification of EU governance that originated from the crisis, which led to the endowment of policymaking instruments with crisis-related mechanisms (Rhinard, 2019), appears to also point towards the same direction.

### *1.1 Empowerments for Delegated and Implementing Acts*

Evidence of delegated rulemaking, specifically delegated and implementing acts, in the response to the sovereign debt crisis appears a few years after its outset in the late 2000s. Against this backdrop, it is relevant to point out that delegated acts and Art. 290 TFEU were only added to the EU legal framework by the Lisbon Treaty. The first four delegated acts were actually only adopted as of late 2010, and only seven more followed in 2011 (Kaeding, 2017). Moreover, the IIA, including the Common Understanding on Delegated Acts, came into force in 2016. The novelty and perhaps unfamiliarity around delegated acts likely resulted in their exclusion from the various provision packages adopted to deal with the Eurozone crisis. Implementing acts and the practice of comitology, on the other hand, were already well-established instruments of EU decision-making. However, the Comitology Regulation, which codified crucial aspects of the scrutiny procedure, and which was aimed at simplifying the otherwise too complex old comitology system, was not adopted until 2011. It follows that the regime of delegated rulemaking as it is known today did not exactly exist when the crisis first hit the EU, and it was not fine-tuned until a later phase of the crisis in 2016. Although it was

introduced by the Lisbon Treaty, it took a few years of various adjustments before it could run smoothly.

As a matter of fact, there is no evidence of the adoption of delegated and implementing acts aiming directly at solving the sovereign debt crisis. There are, however, a few empowerments concealed in some of the instruments that were established during and as consequence to the crisis, stressing the idea that it is possible to reduce the risk of financial crises through harmonisation and control over financial transactions. These empowerments provide the basis for democratic input and are therefore relevant for the purpose of this chapter. Firstly, references to delegated rulemaking appear in the Regulation establishing the European Banking Authority (EBA).<sup>64</sup> The Regulation enables the EBA to develop draft regulatory standards that the Commission may later adopt by means of a delegated act (Fahey, 2011), provided that the Commission is already empowered to adopt such standards pursuant to Art. 290 TFEU and in order to ensure consistent harmonisation.<sup>65</sup> Similarly, the EBA may develop implementing technical standards and submit a draft implementing act to the Commission, after having conducted open public consultations.<sup>66</sup> These standards must be technical in nature and must not imply any strategic decision or policy choice.<sup>67</sup>

Similarly, empowerments for delegated and implementing acts may also be found in the broader Level 2 phase of the Lamfalussy architecture, which includes the EBA. These empowerments are once again aimed at primarily facilitating the development and adoption of technical standards, which are essential for regulating and supervising the European financial and banking sectors (European Commission, 2019). In addition, the establishment of *ex ante* contributions to the Single Resolution Fund, which was introduced in 2014 to

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<sup>64</sup> Regulation (EU) 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.

<sup>65</sup> *Ibid.*, Art. 10(1).

<sup>66</sup> *Ibid.*, Art. 15(1).

<sup>67</sup> *Ibid.*

support the Banking Union project, was possible by means of a Council implementing act.<sup>68</sup> The presence of empowerments for delegated acts, both in the EBA Regulation and the Level 2 phase of the Lamfalussy architecture, entails some level of parliamentary participation. However, the highly technical nature of the empowerments leaves little or no room for political debate. Moreover, there is no evidence of adoption of delegated acts on the basis of such empowerments, whether during the crisis or otherwise, thus it is to possible to further reflect on the role of the EP in this regard.

Although delegated and implementing acts may not have been at the forefront of efforts to address the sovereign debt crisis, their subtle influence in shaping supranational governance is noteworthy. The empowerments for their adoption have contributed to a gradual but significant reinforcement of centralised regulatory mechanisms by legitimately bolstering the Commission's authority in matters of financial and banking oversight. In other words, the very presence of these empowerments in basic legislative acts hints to the political will to legitimately centralise certain aspects of a kind of decision-making that was strictly linked to the management of a crisis. Certainly, one cannot state that these rare empowerments for delegated and implementing acts have played a crucial role in the response to crisis. However, they do represent the beginning of a trend that has grown in a steadier and more evident manner in the crises of the following decade. That is, the tendency – fundamentally rooted in the democratic process of the ordinary legislative procedure – to render more and more aspects of crisis management centralised and supranational.

## **2. The Refugee Crisis**

The so-called refugee crisis emerged when the surge in migratory flows put EU institutions and member states under sudden pressure. Refugees escaping conflicts, prosecutions, and poverty came to Europe – predominantly, but not

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<sup>68</sup> 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.

limited to – crossing the Aegean Sea into the Balkans. It is estimated that over 221,000 people crossed the Mediterranean between January and October 2015 (Clayton and Holland, 2015). The pressure on EU member states, especially those whose borders overlap with those of the EU, was so harsh and the overall situation so chaotic that several unilateral emergency measures were adopted. For example, on 1st September 2015 Hungary closed outbound traffic from one of Budapest's main train stations (Nolan and Connolly, 2015), and Germany ceased to apply the rules of the Dublin Regulation to Syrian refugees, therefore halting deportation to other EU countries (Dernbach, 2015).

Nevertheless, the EU also acted in a unified, centralised manner. To this end, the Treaties empower the Council to adopt procedural measures to support member states under pressure from migration influxes.<sup>69</sup> As a result, the Council, as well as the European Council, was once again some of the main protagonists of the crises – several multilateral meetings and summits were held, and some exceptional intergovernmental decisions were taken.<sup>70</sup> In particular, However, the crisis also produced some supranational elements at first glance – namely, the empowerment of Frontex and the European Border and Coast Guard, as well as pushback operations on land borders and on the Mediterranean (White and Kreuder-Sonnen, 2021).

### *2.1 The Refugee Crisis and (the lack of) Delegated Rulemaking*

Similarly to the sovereign debt crisis, the response to the refugee crisis has not entailed the use of delegated rulemaking right away, nor the direct empowerment for delegated and implementing acts while the emergency was still ongoing. This likely occurred for different reasons than during the sovereign debt crisis, where the novelty of the instruments and of crisis management more in general led to the need to resort to the creation of

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<sup>69</sup> Art. 78(3) TFEU.

<sup>70</sup> For example, the Council laid out a Recommendation which allowed for the continuation of temporary internal border controls in exceptional circumstances (European Council and Council of the European Union, 2024a).

mechanisms outside of the Treaties. The management of an emergency triggered by the sudden influx of migrants or refugees, on its hand, is regulated first and foremost by the Treaties. As a matter of fact, Art. 78(3) TFEU states that in the event of one or more member states facing such a crisis, the Council, acting on a proposal from the Commission, may adopt provisional measures aimed at the member state(s) concerned. The EP is entitled to be consulted in this case.

Secondary legislation also regulates the management of migration at the EU level. At the time of the crisis, the Dublin Regulation,<sup>71</sup> now replaced by a new Regulation on asylum management,<sup>72</sup> laid out a set of rules for the management of migration influxes from third countries. The Dublin Regulation empowered the Commission to adopt delegated and implementing acts to enhance cooperation, standardisation, and procedural clarity among the member states. Delegated acts could be adopted to regulate specific issues such as unaccompanied minors, particularly concerning the identification of family members, siblings, or relatives; criteria for establishing the existence of proven family links; criteria for assessing the capacity of a relative to take care of the minor; the application of these criteria when family members are in more than one member state.<sup>73</sup> They may also be adopted in the framework of dependent persons, in order to address elements to assess and establish the familial connection.<sup>74</sup> Implementing acts, on the other hand, may be adopted to establish common and specific leaflets containing essential information concerning the Regulation,<sup>75</sup> to adopt uniform conditions for the submission of

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<sup>71</sup> Regulation (EU) 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast).

<sup>72</sup> Regulation (EU) 2024/1351 of the European Parliament and of the Council of 14 May 2024 on asylum and migration management, amending Regulations (EU) 2021/1147 and (EU) 2021/1060 and repealing Regulation (EU) No 604/2013.

<sup>73</sup> Art. 8(5) of the Dublin Regulation.

<sup>74</sup> *Ibid.*, Art. 16(3).

<sup>75</sup> *Ibid.*, Art. 4(3).

take charge,<sup>76</sup> take back<sup>77</sup> or transfer<sup>78</sup> requests, and to create a common standard form for the exchange of relevant information,<sup>79</sup> including health-related details.<sup>80</sup>

However, none of these empowerments referred to crisis or emergency situations. As a matter of fact, the technical nature of the empowerments, and particularly on the case of delegated acts, does not encourage debate, contestation, and a more active role of the EP. The Regulation laid out a framework aimed at strengthening preparedness and ensuring effective responses to migration-related crises,<sup>81</sup> but it did not entail the practice of delegated rulemaking. The framework provided that, in case of a risk or dysfunction, the Commission, working with the European Union Agency for Asylum (EUAA), could recommend that a member state create a preventive action plan to address these issues. This plan, which was voluntary but encouraged, included steps to stabilise the situation while respecting asylum seekers' fundamental rights. The affected member state must keep the Council, and the Commission updated on the implementation of the plan, and the Commission was then tasked with informing the EP. If the preventive measures failed or the asylum system faced severe risks, the Commission could request the member state to draft a crisis plan with the involvement of EUAA. Throughout this process, the Council monitored the situation, provided guidance, and considered solidarity measures if needed. The EP and Council could jointly discuss solutions to support the affected member state.

The management of migration-related crises is therefore understood to be carried out at the supranational level, and the existence of a detailed framework both in the Treaties and in secondary legislation is clearly a testament to that.

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<sup>76</sup> Ibid., Art. 21(3).

<sup>77</sup> Ibid., Art. 23(4).

<sup>78</sup> Ibid., Art. 29(4).

<sup>79</sup> Ibid., Art. 31(4).

<sup>80</sup> Ibid., Art. 32(5).

<sup>81</sup> Ibid., Art. 33.

This has arguably allowed the EU to craft its response to the refugee crisis without having to resort to mechanisms outside of the Treaties or to other devices. In other words, input legitimacy was at least formally strong in the management of the refugee crisis, even without the use of delegated rulemaking. The crisis has nonetheless highlighted some problems in the framework, such as the former Dublin system putting a great burden on a limited number of member states with external borders. The Commission has presented proposals to improve the Common European Asylum System already in 2016 as a direct response to the crisis, but the reform to the Dublin system has been brought forward only since 2020 (ibid.). The New Pact on Migration and Asylum adopted in 2024, including a new Regulation on asylum and migration management repealing the Dublin Regulation (ibid.), indeed entails some empowerments for delegated and implementing acts. Most importantly, however, a recently adopted Regulation<sup>82</sup> is aimed at providing a set of rules to manage situations of crisis and *force majeure* in the field of migration and asylum, involving a few empowerments for delegated rulemaking. As the Regulation was proposed and then adopted as a consequence to the refugee crisis, it is later discussed in Chapter 6.

### **3. The Covid-19 Pandemic**

The outbreak of the Covid-19 pandemic in early 2020 uncovered several deep-rooted vulnerabilities in the EU administrative engine, such as the need for an all-encompassing framework for emergencies and quick response to crises. The pandemic was also undoubtedly not only a health emergency – rather, it affected many other dimensions. The economy, for instance, received severe shocks caused by several factors due to, among others, the national lockdowns halting both production and demand. Moreover, as opposed to the sovereign debt crisis, the Covid-19 pandemic had a symmetric nature, namely all member

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<sup>82</sup> Regulation (EU) 2024/1359 of the European Parliament and of the Council of 14 May 2024 addressing situations of crisis and force majeure in the field of migration and asylum and amending Regulation (EU) 2021/1147.

states were affected, albeit on different timelines. As it happens, 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 (White and Kreuder-Sonnen, 2021). However, the different timeline in which member states were hit by the crisis played a significant role in shaping their response and 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 (ibid.).

Finally, once again, intergovernmental institutions, and especially the European Council, have acted as a crucial forum for the establishment of instruments and mechanisms aimed at tackling the crisis. Upon a Commission proposal, the European Council negotiated and agreed on NGEU, the largest stimulus package for economic recovery. It also quickly adopted several resolutions regarding public health, the economy, the internal market, and free movement by means of conclusions, statements, and more. It did so by efficiently navigating the new challenges posed by travel restrictions and lockdowns – meetings, for instance, were held by video call (Culley et al., 2022). Finally, the ECB intervened massively by purchasing sovereign bonds worth almost €2000 billion through the PEPP (European Central Bank, 2024).

### *3.1 The First Signs of Delegated Rulemaking in Crisis Management*

The management of the Covid-19 pandemic has shown the first signs of consistent use of instruments of delegated rulemaking pursuant to Arts. 290 and 291 TFEU. Naturally, the adoption of delegated and implementing acts in general has steadily and significantly increased since the entry into force of the Lisbon Treaty (Christiansen and Lange, 2019; Kaeding, 2017). It is therefore safe to assume that these measures have become prominent instruments of EU decision-making broadly speaking. The clarification of certain procedural aspects, and especially the adoption of the Common Understanding and the Comitology Regulation, have certainly made it easier for the Commission to

adopt these acts and for the relevant institutions to carry out their scrutiny. It is nevertheless poignant to highlight that such an increase of delegated rulemaking in decision-making has also applied to the crisis management sphere, despite the Commission not actively seeking more self-empowerments than usual during the emergency (Brandsma and Blom-Hansen, 2024).

The use of delegated rulemaking aimed at responding to the Covid-19 pandemic has taken various forms, from the adoption of actual delegated and implementing acts on the basis of already-existing legislative acts to the empowerments for new delegated and implementing acts added to crisis-related instruments. In the case of the latter, the most notable examples can be observed in the RRF Regulation.<sup>83</sup> In fact, Art. 33 of the Regulation confers upon the Commission the power to adopt delegated acts for an indeterminate amount of time from 21 February 2021 and sets the general rules for the delegation. It clearly highlights the scrutiny role of the Council and EP in this regard and does not make any reference to the possibility of activating the urgency procedure. However, it grants the Council and EP only one month, extendable by another month, to conduct their scrutiny instead of two.<sup>84</sup> The Commission is empowered to adopt delegated acts to supplement the Regulation in order to lay out the common indicators to be used for reporting on the progress and for the purpose of monitoring and evaluating the achievement of the objectives of the RRF.<sup>85</sup> Moreover, delegated acts may be aimed at defining a methodology for reporting social expenditure, including on children and the youth, under the RRF system.<sup>86</sup> Finally, the Commission may adopt delegated acts to determine the elements of a resilience scoreboard,

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<sup>83</sup> Regulation (EU) 2021/241 of the European Parliament and of the Council of 12 February 2021 establishing the Recovery and Resilience Facility.

<sup>84</sup> *Ibid.*, Art. 33(6).

<sup>85</sup> *Ibid.*, Art. 29(4).

<sup>86</sup> *Ibid.*

whose purpose is to display the progress on the implementation of the RRF by the member states.<sup>87</sup>

As discussed in Chapter 2, empowerments to adopt delegated acts are often added when there is no time to specify certain information or details in the basic act (Chamon, 2013). The elements that are postponed and assigned to a delegated act end up being rather essential in practice, because they often deal with certain technical standards without which the measure would not be applicable (Interview 4; Interview 5). The RRF Regulation appears to follow this pattern, as the matter of urgency was likely imperative upon its adoption, therefore leading to the deferral of specific details to a later stage. Reporting on social expenditure, monitoring the achievement of the objectives of the RRF, and determining the rules for a resilience scoreboard were probably not deemed as urgent as other issues and therefore delayed. In the occurrence in which they ended up being urgent, however, the framework could have been prepared to handle a swift decision via a delegated act in the span of one month.

The symmetrical nature of the crisis has clearly created grounds for the need for uniform application of measures, thereby calling for empowerments for the adoption of implementing acts. Interestingly, the RRF Regulation contains several empowerments for the adoption of implementing acts by the Council, not the Commission, still acting on a proposal from the latter. The concentration of implementing powers in the hands of an intergovernmental institution arguably points to the situation of crisis in which the Regulation was conceived, and to the will of the member states to maintain control over matters of emergency politics. However, the type of power conferred is still supranational, and certainly centralised, thus remaining relevant to the general scope of delegated rulemaking. While it is not possible to know for sure what kind of informal negotiations led to such a decision behind closed doors, it is possible to safely deduce that the member states have fought to maintain their powers over emergency response, leading to the EP being widely sidelined. Generally speaking, the Regulation confers to the Council the power to adopt

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<sup>87</sup> Ibid., Art. 30(2).

an implementing act to establish the suspension of commitments or payments towards a negligent member state,<sup>88</sup> to grant loans,<sup>89</sup> and update the plan submitted to the member states.<sup>90</sup> Art. 20 therein regulates the framework for the delegation of implementing powers to the Council and the role of the Commission as initiator of the proposal.

The RRF Regulation has provided the basis for the actual adoption of two delegated and two implementing acts respectively. In all of the cases, the adoption has been relatively quick, occurring only a few months after the entry into force of the basic act. The relevant delegated acts deal with the definition of a methodology for reporting social expenditure<sup>91</sup> and of the detailed indicators of the resilience scoreboard.<sup>92</sup> The EP requested an additional month for scrutiny in both instances, indicating an attempt to fulfil its oversight thoroughly, but eventually did not oppose the acts. It is important to point out that urgency was likely no longer a concern at this point in 2021, and therefore the pressure to enact a swift response had probably been lifted. A similar story applies to the implementing acts curiously adopted by the Commission, and not the Council, within the scope of the RRF Regulation. Now expired, they both had to do with lending and borrowing procedures,<sup>93</sup> and both fell under the

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<sup>88</sup> Ibid., Art. 10(3).

<sup>89</sup> Ibid., Art. 14(8).

<sup>90</sup> Ibid., Art. 19(1).

<sup>91</sup> Commission Delegated Regulation (EU) 2021/2105 of 28 September 2021 supplementing Regulation (EU) 2021/241 of the European Parliament and of the Council establishing the Recovery and Resilience Facility by defining a methodology for reporting social expenditure.

<sup>92</sup> Commission Delegated Regulation (EU) 2021/2106 of 28 September 2021 on supplementing Regulation (EU) 2021/241 of the European Parliament and of the Council establishing the Recovery and Resilience Facility by setting out the common indicators and the detailed elements of the recovery and resilience scoreboard.

<sup>93</sup> Commission Implementing Decision establishing the necessary arrangements for the administration of the borrowing operations under Council Decision (EU, Euratom) 2020/2053 and for the lending operations related to loans granted in accordance with Article 15 of Regulation (EU) 2021/241 of the European Parliament and of the Council; Commission Implementing Decision (EU) 2021/1095 of 2 July 2021 establishing the methodology for allocating costs related to borrowing and debt management operations under NextGenerationEU.

umbrella of the European Atomic Energy Community (EURATOM).<sup>94</sup> The implementing acts list both the RRF and the EURATOM Decision as their legal basis, but it is likely the latter that conferred implementing powers to the Commission and therefore allowed it to exercise regulatory powers.

Further crisis-related legislation including empowerments for delegated rulemaking includes the Regulation introducing the EU Digital Covid Certificate.<sup>95</sup> The Regulation includes empowerments for the adoption of delegated acts amending the data fields related to the vaccination,<sup>96</sup> test,<sup>97</sup> and recovery<sup>98</sup> certificates, as well as modifying the criteria for the issuance of the latter. Moreover, delegated acts may be adopted to amend the Annex in order to ensure alignment with scientific developments and interoperability requirements.<sup>99</sup> The empowerments for delegated acts appear to have a wider scope, albeit naturally maintaining the technical nature mandated by the Treaties. Through its role of scrutiny, the EP is therefore at least formally involved in more regulatory aspects within this domain. According to the Regulation, implementing acts may be adopted to establish the equivalence of certificates issued in third countries,<sup>100</sup> as well as implementing acts containing technical specifications.<sup>101</sup> Finally, the Regulation envisions the activation of

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<sup>94</sup> Particularly in relation to Council Decision (EU, Euratom) 2020/2053 of 14 December 2020 on the system of own resources of the European Union and repealing Decision 2014/335/EU.

<sup>95</sup> 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.

<sup>96</sup> *Ibid.*, Art. 5(2).

<sup>97</sup> *Ibid.*, Art. 6(2).

<sup>98</sup> *Ibid.*, Art. 7(2).

<sup>99</sup> *Ibid.*, Art. 12.

<sup>100</sup> *Ibid.*, Art. 3(10) and Art. 8(2).

<sup>101</sup> *Ibid.*, Art. 9.

the urgency procedure in case of emergency both for delegated<sup>102</sup> and implementing acts.<sup>103</sup>

### *3.2 Other Delegated and Implementing Acts*

Contrary to the previous cases, delegated and implementing acts have also been adopted during the Covid-19 pandemic to deal with specific aspects of the crisis. Broadly speaking, mechanisms of delegated rulemaking provided the necessary flexibility to address the evolving nature of the crisis by facilitating the rapid adoption of measures (Interview 10). As it is further analysed in Chapter 6, the most prominent policy domains addressed by these acts have been agriculture, transportation, justice and consumer protection, as well as the internal market. In general, the actions taken focused on supporting the fruit, vegetable, and wine industries, recognizing vaccine certifications from non-EU countries, and prolonging temporary measures in the transport sector. Specifically, delegated acts encompassed diverse areas, including the issuance of Covid recovery certificates based on antigen testing. Implementing acts aimed at managing the pandemic included setting technical guidelines for the use of the passenger locator form (PLF) and the EU Digital Covid Certificate.<sup>104</sup> Interestingly, most delegated and implementing acts adopted during this period did not pertain directly to public health, even though the pandemic represents a health crisis. When such acts did touch on public health, as with the EU Digital Covid Certificate, their primary focus was on ensuring freedom of movement and facilitating internal market operations. Notably, prior to 2020, the EU held limited authority in public health matters, which explains the absence of empowerments in secondary legislation conferring the Commission the power to adopt delegated and implementing acts within this scope.

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<sup>102</sup> Ibid., Art. 13.

<sup>103</sup> Ibid., Art. 9(3).

<sup>104</sup> This includes establishing the equivalence of Covid-19 certificates issued by third countries.

The accountability and transparency issues tied to the adoption of these acts is assessed in Chapter 5. It is nevertheless still relevant to tease out a few procedural points that have implications on input legitimacy. For instance, half of the delegated acts aimed at dealing with certain aspects of the Covid-19 pandemic were adopted under the urgency procedure.<sup>105</sup> This entails the immediate entry into force of the act, which can nevertheless be repealed in case of objection from the EP or Council after the period of scrutiny set by the basic act. The possibility to activate the urgency procedure must be laid out in the basic act, hence it is possible that the remaining delegated acts adopted during this crisis did not have such an option in their empowerments. A few of these were passed after the expression of early non-objection by the EP or the Council, which is another way to speed the procedure further. The early non-objection option entails that either the EP or the Council, or both, manifest their lack of objection towards a delegated act before the end of the scrutiny period by means of a Decision. This has clearly positive implications for efficiency, but further excludes the participation of the EP from the procedure.

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<sup>105</sup> Commission Delegated Regulation (EU) 2021/95 of 28 January 2021 amending Delegated Regulation (EU) 2020/592 on temporary exceptional measures derogating from certain provisions of Regulation (EU) No 1308/2013 of the European Parliament and of the Council to address the market disturbance in the fruit and vegetables and wine sectors caused by the COVID-19 pandemic and measures linked to it; Commission Delegated Regulation (EU) 2020/1275 of 6 July 2020 amending Delegated Regulation (EU) 2020/592 on temporary exceptional measures derogating from certain provisions of Regulation (EU) No 1308/2013 of the European Parliament and of the Council to address the market disturbance in the fruit and vegetables and wine sectors caused by the COVID-19 pandemic and measures linked to it; Commission Delegated Regulation (EU) 2020/1564 of 6 August 2020 amending Delegated Regulation (EU) 2018/985 as regards its transitional provisions in order to address the impact of the COVID-19 crisis; Commission Delegated Regulation (EU) 2022/255 of 15 December 2021 amending Council Regulation (EEC) No 95/93 as regards the extension of measures for temporary relief from the slot utilisation rules due to the COVID-19 crisis; Commission Delegated Regulation (EU) 2021/374 of 27 January 2021 amending Delegated Regulation (EU) 2020/884 derogating in respect of the year 2020 from Delegated Regulation (EU) 2017/891 as regards the fruit and vegetables sector and from Delegated Regulation (EU) 2016/1149 as regards the wine sector in connection with the COVID-19 pandemic, and amending Delegated Regulation (EU) 2016/1149; Commission Delegated Regulation (EU) .../... derogating in respect of the year 2020 from Commission Delegated Regulation (EU) 2017/891 as regards the fruit and vegetables sector and from Commission Delegated Regulation (EU) 2016/1149 as regards the wine sector in connection with the COVID-19 pandemic.

Furthermore, in only two cases were the rapporteurs appointed, interestingly both related to the area of agriculture and rural development.<sup>106</sup> While the need for quick action may be one of the concerns, two (perhaps slightly conflicting) reasons have emerged as possible explanations. First, MEPs may tend to discuss less politicised issues informally within the relevant committee, thus virtually eliminating the need for formal coordination (Interview 8). When a rapporteur is nevertheless appointed, he or she is likely going to be the MEP that acted as a rapporteur for the basic act (*ibid.*). Secondly, the system for the appointment of rapporteurs allows MEPs to enact such a role only a few times during their mandate to allow for diversification and to potentially keep a high involvement of all the MEPs (Interview 6). A virtual scorebook is maintained, and MEPs may not be willing to use their possibility to take on the role as rapporteur for a delegated act, which is less politicised and hence less likely to attract attention (*ibid.*). Regardless, the unwillingness to appoint a rapporteur is another hint towards the *laissez-faire* approach of the EP in crisis management and, in this specific case, delegated rulemaking. The tradeoff between efficiency and democratic representation, with the former prevailing on the latter, is ever clearer by observing these procedural details that may otherwise seem irrelevant.

And, of course, objections (or lack thereof) remain a relevant aspect of the discussion. Given the low rate of objections even during normal times, it does not seem too far-fetched to imagine that the legislators may be especially inclined to enter into a bureaucratic collusion with the Commission during times of crisis, where efficiency is an utmost priority (Gallinella and Christiansen, 2024). On top of the delegated acts that received an early-non

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<sup>106</sup> Commission Delegated Regulation (EU) 2020/592 of 30 April 2020 on temporary exceptional measures derogating from certain provisions of Regulation (EU) No 1308/2013 of the European Parliament and of the Council to address the market disturbance in the fruit and vegetables and wine sectors caused by the COVID-19 pandemic and measures linked to it; Commission Delegated Regulation (EU) 2021/374 of 27 January 2021 amending Delegated Regulation (EU) 2020/884 derogating in respect of the year 2020 from Delegated Regulation (EU) 2017/891 as regards the fruit and vegetables sector and from Delegated Regulation (EU) 2016/1149 as regards the wine sector in connection with the COVID-19 pandemic, and amending Delegated Regulation (EU) 2016/1149.

objection, none of the other measures referred to above were vetoed by the EP or the Council, nor were they subject to any degree of public scrutiny and politicisation. This is perhaps not a surprise, and it is a testament to the fact that the EP does not highly involve itself not only in delegated rulemaking, but clearly in crisis management too.

#### **4. The Consequences to the War in Ukraine**

The Russian invasion of Ukraine on 24th February 2022 has posed another important challenge to the EU and its crisis management capacity. In general, the EU has adopted a broader strategy to mitigate the consequences of the war and to provide support to Ukraine. This included offering financial assistance to Ukraine (Balázs, 2022),<sup>107</sup> first by means of loans and later through the creation of the Ukraine Facility (European Commission, 2024a). Moreover, the EU was able to provide military assistance through the European Peace Facility,<sup>108</sup> as well as through bilateral support from member states. Generally speaking, as of October 2024, EU and member state support to Ukraine totalled nearly €122 billion between military, financial, humanitarian, and emergency assistance, including the support to Ukrainian refugees within the EU.

On the Russian front, the EU has adopted 14 packages of restrictive measures targeting Russia's governmental, financial, business, defence, technology, and media sectors. However, EU dependence on Russian gas has made it difficult to target the energy sector. The EU has therefore focused its efforts on accelerating its transition to renewable energy sources and diversifying its energy suppliers, pledging to phase out all Russian fossil fuel imports by 2030 (European Commission, 2022). Nevertheless, the internal market has not only been affected by energy shortages, but also by the lack of other primary goods.

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<sup>107</sup> The EP approved a €18 billion loan by means of the OLP urgent procedure pursuant to Art. 163 of the Rules of Procedure of the European Parliament.

<sup>108</sup> The European Peace Facility was established in 2021 via Council Decision (CFSP) 2021/509 of 22 March 2021 establishing a European Peace Facility, and repealing Decision (CFSP) 2015/528.

Ukraine, a leading grain exporter, has seen almost a 30% drop in its exports between 2022 and 2023 as the Russian military blocked Ukraine's ports on the Black Sea (European Council and Council of the European Union, 2024a). The EU and the United Nations have worked towards curbing the prices, but the global grain supply remains insecure (*ibid.*).

#### *4.1 Contested Empowerments*

In May 2022, the EP and Council adopted a Regulation<sup>109</sup> establishing trade-liberalisation measures aimed at Ukrainian products, most notably grain, as part of the EU's effort to provide relief to Ukraine during the early stages of the war. The Regulation was designed to support the Ukrainian economy by provisionally suspending the tariff-rate quotas established under the EU-Ukraine Association Agreement<sup>110</sup> and thus allowing products falling within these quotas to be imported to the EU without incurring any customs duties.<sup>111</sup> However, the negotiations over the empowerments for measures of delegated rulemaking were considerably strained (Interview 3). The representatives of the member states were able to informally coordinate efforts and stir the empowerments away from delegated acts, allowing only implementing acts to be possible under this regime (*ibid.*). More specifically, the Regulation confers the power to adopt implementing acts to the Commission for the suspension of preferential arrangements in case of Ukraine's failure to comply with the conditions laid out therein;<sup>112</sup> to reintroduce customs duties in case the imports of products from Ukraine cause difficulties to EU producers or competing

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<sup>109</sup> 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, of the one part, and Ukraine, of the other part.

<sup>110</sup> Association Agreement between the European Union and its Member States, of the one part, and Ukraine, of the other part, OJ L 161, 29.5.2014, p. 3-2137.

<sup>111</sup> Art. 1(a), (b), and (c) of Regulation (EU) 2022/870.

<sup>112</sup> *Ibid.*, Art. 3(1).

products.<sup>113</sup> The Commission may also adopt an implementing act to terminate<sup>114</sup> or extend<sup>115</sup> an investigation concerning the impact of the Regulation on the EU market, as well as to introduce preventive measures in cases requiring immediate action.<sup>116</sup> These implementing acts were to be adopted in accordance with the examination procedure.<sup>117</sup>

The relevance, here, is the complete exclusion of the EP from practices of delegated rulemaking and crisis management. It may be argued that implementing acts are more suitable instruments for the purposes of the above-mentioned measures, but the grey area between the two kinds of acts has nonetheless opened the doors to lengthy negotiations. The willingness of the member states, particularly larger ones, to remain in control of regulating procedures clearly emerges from these hidden dynamics that might go otherwise unnoticed. This is also evident from the empowerments that are added to the so-called Gas Regulation,<sup>118</sup> adopted very quickly (*ibid.*) on the basis of Art. 122 TFEU to manage the energy related concerns after the Russian invasion of Ukraine. It is worth noting that the adoption of the Regulation under Art. 122 TFEU effectively sidelines the EP, which is subsequently reflected in the empowerments. In short, the Regulation empowers the Council, following a Commission proposal, to adopt an implementing decision to declare a Union alert in case of severe gas supply shortages or high demand for gas.<sup>119</sup> It is clear that an implementing act would facilitate the consistent and effective implementation of the measure, enabling swift action and ensuring uniform application across member states. It is perhaps not a surprise that the EP would be sidelined in crisis decision-making in such a way, but it is equally clear that

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<sup>113</sup> *Ibid.*, Art. 4(8).

<sup>114</sup> *Ibid.*

<sup>115</sup> *Ibid.*, Art. 4(9).

<sup>116</sup> *Ibid.*

<sup>117</sup> *Ibid.*, Art 5(2).

<sup>118</sup> Council Regulation (EU) 2022/1369 of 5 August 2022 on coordinated demand-reduction measures for gas.

<sup>119</sup> *Ibid.*, Art. 4.

these empowerments do not provide any additional input legitimacy to crisis management in general.

#### *4.2 Other Delegated and Implementing Acts*

As it is further assessed in Chapter 6, the Commission has adopted several delegated and implementing acts already in the first few months since the beginning of the war. The former were mainly adopted in the areas of agriculture, development, transport, and tariffs. Similarly, the latter dealt with 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. The first relevant delegated act,<sup>120</sup> adopted as early as April 2022, is the only one whose scrutiny involved an early non-objection from both the EP and Council's end. The act introduces exceptional measures to derogate from certain provisions regarding the certificates of inspection issued in Ukraine, including simplifying the validation of such certificates. It is also the only delegated act with an assigned rapporteur, again within the Agriculture and Rural Development Committee. The rapporteur acted as a shadow rapporteur in the negotiation of the basic act<sup>121</sup> several years prior; however, the appointment may indicate an increased interest in the delegated act. As a matter of fact, four more delegated acts<sup>122</sup> were adopted in this context within

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<sup>120</sup> Commission Delegated Regulation (EU) 2022/760 of 8 April 2022 amending Delegated Regulation (EU) 2021/2306 as regards the transitional provisions for certificates of inspection issued in Ukraine.

<sup>121</sup> Regulation (EU) 2018/848 of the European Parliament and of the Council of 30 May 2018 on organic production and labelling of organic products and repealing Council Regulation (EC) No 834/2007.

<sup>122</sup> Commission Delegated Regulation (EU) 2022/1225 of 14 July 2022 on temporary exceptional measures derogating from Regulation (EU) No 1308/2013 of the European Parliament and of the Council to address the market disturbance in the fruit and vegetables sector caused by Russia's invasion of Ukraine; Commission Delegated Regulation (EU) 2022/1623 of 14 July 2022 derogating from Delegated Regulation (EU) 2017/891 for the year 2022 as regards the value of marketed production, the national strategy and the recovery of Union financial assistance for multiannual commitments in the fruit and vegetables sector due to the crisis caused by Russia's invasion of Ukraine; Commission Delegated Regulation (EU) 2022/1450 of 27 June 2022 supplementing Regulation (EU) 2018/848 of the European

the scope of agriculture and rural development, but none of these envisioned a rapporteur.

Moreover, none of the delegated acts adopted in the context of the war in Ukraine<sup>123</sup> entailed the urgency procedure, which may have not been empowered for in the basic act or simply not needed. This would suggest a more deliberative process and imply a more thorough involvement of the EP, carrying out its scrutiny functions to a full degree. However, there is no evidence of significant contestation with regard to such delegated acts, which, on the contrary, have been adopted smoothly and within the prescribed times. Once again, the EP appears to forfeit its scrutiny powers and enter into bureaucratic collusion with the Commission, *de facto* removing the inputs for democratic representation. This recurring pattern not only diminishes the input legitimacy of delegated acts, but also further weakens that of the whole crisis management process.

## 5. Concluding Remarks

That crisis management allows little room for input legitimacy has been widely demonstrated and accepted (Schmidt, 2021, 2024). After all, in a time of pressing urgency, the need for efficient and effective policy responses trumps the potentially lengthy fulfilment of democratic standards. The Commission's (or Council's) enactment of delegated rulemaking pursuant to Arts. 290 and 291 TFEU shares a similar fate, with low parliamentary oversight securing democratic representation and rare politicisation hindering the possibility for public debate. Crises and crisis management does not seem to have a particular

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Parliament and of the Council as regards the use of non organic protein feed for the production of organic livestock due to Russia's invasion of Ukraine; Commission Delegated Regulation (EU) 2022/2238 of 22 August 2022 amending Delegated Regulation (EU) 2021/2306 as regards the transitional provisions for certificates of inspection and extracts thereof and as regards the transitional provisions for certificates of inspection issued in Ukraine.

<sup>123</sup> Ibid.; Commission Delegated Regulation (EU) 2023/1176 of 14 July 2022 amending Regulation (EU) No 1315/2013 of the European Parliament and of the Council as regards the indicative maps of the trans-European transport network.

impact on the input legitimacy of delegated rulemaking, which is fundamentally unchanged whether under times of normalcy or emergency (Gallinella and Christiansen, 2024). However, the point here is the opposite, namely whether a mechanism whose input legitimacy is not fundamentally affected by crises conversely impacts on the input legitimacy of crisis management itself. It is possible to argue through a simple syllogism that the use of delegated rulemaking during crises does not appear to affect –improve or worsen, for that matter – the input legitimacy of crisis management, provided its weak standing in both processes. One could still argue, however, that the legality of delegated and implementing acts, fundamentally embedded in the Treaties and dependent on empowerments within pieces of secondary legislation, provides at least some democratic grounds.

The adoption of delegated and implementing acts as instruments of crisis management has nevertheless evolved over time. In particular, the use of the empowerments in basic legislative acts appears to have shifted and somewhat become more flexible. From the sovereign debt crisis, where the rare empowerments duly limited the scope of implementing acts by forbidding even the slightest implication to policy choices, to the Covid-19 pandemic, where certain aspects of the basic act were purposefully left in general terms to then be refined by delegated acts. This may be interpreted as another blow to input legitimacy, but also as the slow collective realisation of the potential of these instruments in the context of a crisis and the subsequent attempt to adapt them to the needs posed by emergency response. There seems to be some level of politicisation in the negotiations for the empowerments (Interview 1), triggering discussion between the institutions, but the lack of transparency surrounding them and the eventual exclusion of the EP from the overall practice still raises doubts on its input legitimacy.

The low parliamentary oversight and politicisation remain nevertheless an unresolved issue. If practices of delegated rulemaking have become more prominent in EU governance in general, and crisis management in particular, it has certainly not been for any added value they bring to input legitimacy. But again, that is a complex problem to unravel, given the output-focused nature of

emergency response. Perhaps the mere fact that delegated rulemaking does not further hinder input legitimacy, such as, for instance, the creation of new instruments outside of the Treaties and the subsequent incorporation in the EU legal framework, is relatively satisfactory. Certainly, that is not to suggest that it is remotely sufficient to fill the democratic gap in EU crisis governance. The limited scope allowed by the empowerments, and especially the Treaties, makes it even more clear that delegated and implementing acts have important procedural and substantive constraints.

In sum, the evolution of the empowerments for the adoption of delegated and implementing acts in times of crisis is perhaps another hint of an increasingly supranational and centralised crisis decision-making. While it has been demonstrated that the Commission has not sought for further empowerments during crises (Brandsma and Blom-Hansen, 2024), it is still remarkable that the overall increase of empowerments has involved the crisis sphere too. As mentioned above, this work is not only interested in showing this trend in relation to the role of the Commission, but to the enactment of supranational powers during crises more in general. The impact on democratic legitimacy is intertwined at different levels, for democratic legitimacy is a multifaceted concept with occasional grey areas. The low parliamentary oversight, typical of both delegated rulemaking and crisis management, has for instance some implications on accountability as well. The negotiations over the nature of the empowerments to be added to the basic act, which oftentimes happen behind closed doors, severely impinge on the transparency of the process. These latter aspects and dynamics are at the core of Chapter 5.

## Chapter 5

### *Throughput Legitimacy*

Through its temporary suspension of norms, crisis management deeply impacts the democratic legitimacy of processes and decision-making more broadly. As it was seen in Chapter 4, input legitimacy, hence democratic representation, is often overlooked in favour of procedural efficiency. However, emergency politics and the consequent need for swift policymaking often also result in a reduced throughput legitimacy. During normal times, throughput legitimacy emphasises procedural integrity, requiring decision-makers to be transparent, accountable, and inclusive (Schmidt, 2021, 2024). During crises, however, secrecy and unilateral decisions become rather common, thereby temporarily suspending mechanisms ensuring transparency and accountability (ibid.). Moreover, executive decisions are often taken without robust oversight by parliaments or other deliberative bodies in favour of a more effective and efficient decision-making.

The throughput legitimacy of delegated rulemaking is firstly ensured by the mechanisms of scrutiny to which the Commission<sup>124</sup> is subjected when exercising delegated powers. The EP and the Council have the right to object to delegated acts or to revoke the delegation altogether,<sup>125</sup> while committees composed of representatives of the member states oversee the adoption of implementing acts.<sup>126</sup> Furthermore, the Comitology Register and the Register of Delegated and Implementing acts, as well as the European Parliament Legislative Observatory and other open repositories, were established for the purpose of opening the black box of delegated rulemaking. However, the low accessibility of the resources, coupled with the bureaucratic collusion that

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<sup>124</sup> Or occasionally by the Council, as specified by Art. 291(2) TFEU.

<sup>125</sup> Art. 2(a) and (b) TFEU.

<sup>126</sup> Art. 3 of Regulation (EU) No 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 Member States of the Commission's exercise of implementing powers.

seems to characterise the institutions' attitude towards the scrutiny of the Commission's use of delegated powers (Gallinella and Christiansen, 2024) weakens the standing of the throughput legitimacy of delegated rulemaking.

Interestingly, the role of the EP is dual, in that it secures democratic representation by being the only directly elected EU institution, and it ensures the accountability of the delegated acts procedure by enacting its role of scrutiny. In other words, it embodies the fulfilment, or lack thereof, of both vertical and horizontal accountability. Once again, it is clear how the different dimensions of legitimacy, in this case input and throughput, are fundamentally intertwined. However, several other institutions are involved in the throughput process, such as the Council and the comitology committees. This chapter indeed focuses on examining the impact of the use of delegated rulemaking on crisis management from a throughput legitimacy perspective. The upcoming sections are organised on the basis of the case studies, mirroring the previous chapter. Starting from the sovereign debt crisis until the war in Ukraine, the discussion aims at teasing out the salient aspects of the accountability and transparency of delegated rulemaking during crises. The underlying purpose is to put the throughput legitimacy of delegated rulemaking during crises in the bigger picture of crisis management in general, whereby throughput legitimacy is reduced nonetheless.

## **1. The Sovereign Debt Crisis**

The sovereign debt crisis has represented a critical turning point for the EU, in that it has significantly tested its governance and policymaking structures. The response has been varied, predominantly intergovernmental, but with some important supranational turns. Delegated rulemaking has not, however, been a part of the latter, given that its framework had not definitely been refined at the time of the inception of the crisis. As it was discussed above, a couple of empowerments for the adoption of delegated and implementing acts have been added to some crisis-related instruments such as the Regulation establishing the EBA, or the Level 2 phase of the Lamfalussy architecture, during a later

phase of the crisis. These empowerments, however, have not actually been used until a decade later,<sup>127</sup> certainly not while the crisis was still ongoing, and they were in any case not strictly related to crisis situations.

The existence of those empowerments implies the presence of vertical accountability, since they were added to the basic act by means of the legislative procedure. Moreover, it can be argued that the empowerments establish a link of implicit trust between the legislators and the member states on one side, and the Commission on the other. The scrutiny mechanisms finally secure the accountability between the relevant institutions. Nevertheless, the lack of practical application of these empowerments during the crisis makes it impossible to draw conclusions beyond conjecture and normative interpretations. In fact, it remains impossible to determine the level of accountability and transparency surrounding the introduction of these empowerments without falling into speculation. Not only is there a lack of availability of relevant data through primary and secondary sources, but the interviews conducted in Brussels for the purpose of this work took place more than a decade after the onset of the sovereign debt crisis. This significant gap made it virtually impossible to find interviewees who could offer meaningful firsthand insights.

A couple of points may nevertheless be made on the transparency of the system of delegated rulemaking around the time of the sovereign debt crisis. Firstly, the Comitology Register was not established until after the Comitology Regulation of 2011. Its legal basis can indeed be found in the Regulation itself, and especially Art. 10 therein, which states that the Commission shall keep a register of committee proceedings containing a list of the committees, agendas of the meetings, summary records, draft implementing acts, voting results, information concerning the adoption of the final draft, and statistical data on

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<sup>127</sup> Commission Delegated Regulation (EU) 2024/595 of 9 November 2023 supplementing Regulation (EU) No 1093/2010 of the European Parliament and of the Council with regard to regulatory technical standards specifying the materiality of weaknesses, the type of information collected, the practical implementation of the information collection and the analysis and dissemination of the information contained in the Anti-money laundering and counter terrorist financing (AML/CFT) central database referred to in Article 9a(2) of that Regulation.

the work of the committees. The same article also provides the legal basis for the Commission's Annual Reports on the work of the committees.

The Register of Delegated and Implementing acts was not established until much later. Its legal basis can be found in the IIA of 2016, where it is stated that the Commission, the EP, and the Council commit to set up a joint functional register of delegated acts providing information in an accessible way, in order to improve transparency and enable traceability of all the different stages in the lifecycle of a delegated act.<sup>128</sup> The document sets 2017 as a deadline to establish the Register, which was launched only on 28th October 2020.<sup>129</sup> As such, it is clear that the system of delegated rulemaking was rather premature both from both an input and throughput perspective at the time of the sovereign debt crisis. It is therefore not surprising if it has not played a role in its management. It has nevertheless been useful to lay the groundwork for the management of future crises.

## **2. The Refugee Crisis**

The refugee crisis prompted both a supranational and unilateral response, owing it both to the Treaties and former Dublin framework, and to some member states' decision to close their borders to the migratory influxes. Similarly to the sovereign debt crisis, delegated rulemaking has not played a part in the emergency politics at the time. This time, however, the relevant legislative framework already included empowerments for delegated and implementing acts, although not strictly to be employed in times of crisis. The now-repealed Dublin Regulation of 2013 did in fact contain some provisions for the adoption of delegated and implementing acts aimed at the clarification of certain elements or at the establishment of common standards. However, there is no evidence that these empowerments were actually applied or that any

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<sup>128</sup> Paragraph 29 of the IIA.

<sup>129</sup> Report from the Commission to the European Parliament and Council on the working of committees during 2020, SWD (2021) 24.

delegated and implementing acts were adopted as part of the crisis management strategy enacted by the EU at the time.

The inability to interview EU officials who might have been involved at the time makes it challenging to ponder what might have been the perception on the use of delegated rulemaking as instruments of crisis management then. Certainly, the simplification of the comitology process brought by the Comitology Regulation did certainly clarify the accountability mechanisms. The IIA, on the other hand, had not been ratified yet, even if it was very much about to be. Consequently, the framework of delegated acts had not yet been enriched in the way it is today, even if over one hundred delegated acts were being adopted each year around that time (Christiansen and Lange, 2021).<sup>130</sup> It follows that the transparency mechanisms, while more developed than they were during the sovereign debt crisis, were not yet completed. The Comitology Register, for one, was already in place, but it would not be reformed until 2020.<sup>131</sup> The Register of Delegated and Implementing acts, as it was mentioned above, was only launched in late October 2020.

The incompleteness of the accountability and transparency structures of delegated rulemaking probably played a part in why it was not employed as an instrument of crisis management as much as it would in the later years. While throughput legitimacy is certainly reduced during crises in favour of an effective and efficient output, it still matters to ensure the fulfilment of certain democratic norms. The clarity of democratic grounds, whether rooted in the Treaties or elsewhere, naturally remains a core principle when devising a strategy of crisis management. Moreover, the relative novelty of both crisis management and (to an extent) delegated rulemaking meant that their interplay

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<sup>130</sup> The adoption of delegated acts grew by roughly 50% from 2013 to 2014, with 57 and 120 total delegated acts respectively. In 2015, the year of the onset of the refugee crisis, the Commission adopted 104 delegated acts. Since then, the number of adopted delegated acts never went below three digits (Christiansen and Lange, 2021).

<sup>131</sup> Report from the Commission to the European Parliament and Council on the working of committees during 2020, SWD (2021) 240.

lacked the established precedents necessary to ensure both output on the one hand, but also throughput on the other.

### **3. The Covid-19 Pandemic**

The outbreak of the Covid-19 pandemic not only called for an urgent response, but also for rethinking and readapting decision-making practices to a new context. The dangerously fast-paced spread of the virus led to the establishment of national lockdowns and the closing of borders within the EU. Consequently, much of the work carried out by EU institutions took place mostly online or in hybrid form as travel restrictions and social distancing measures severely limited the possibility to hold in-person meetings (Welle, 2020; Culley et al., 2022). This new system naturally raised concerns on the accountability and transparency of the procedures, as even the apparently smallest of choices such as shutting down the personal camera during a video call could significantly impact on the lawfulness of the process. It has been reported, for instance, that several EU leaders had officials listening off-camera during important meetings that would normally only require the presence of four to five essential officials (ibid.). In one case the Spanish newspaper *El País* was even able to reconstruct an intense European Council summit, including direct quotes from EU leaders, through the direct testimony of several delegations (Urra, 2020). This level of unforeseen publicness comes at the expense of trust and would limit leaders' openness and willingness to discuss sensitive topics during normal times (Culley et al., 2022). When meetings were on the other hand possible, they included two or three senior officials and allowed for an incredibly fast adoption of measures, including via the OLP (Interview 4).

The procedures behind delegated rulemaking shared a similar fate, as meetings within the EP, Council, and comitology committees<sup>132</sup> were held fully online until at least late 2020 or early 2021 (Welle, 2020; Culley et al., 2022). The

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<sup>132</sup> Report from the Commission to the European Parliament and Council on the working of committees during 2020, SWD (2021) 240; Report from the Commission to the European Parliament and Council on the working of committees during 2021, SWD (2022) 279.

scrutiny of delegated and implementing acts, including those aimed directly at the management of the crisis, therefore happened by means of video calls. Nevertheless, as it was already discussed in Chapter 4, the EP has not been highly involved in the scrutiny of the crisis-related delegated acts. The Council, that is normally even less keen to object to a delegated act (Kaeding, 2017), has not changed its approach either. Similarly, the crisis-related implementing acts have entered into force without general opposition from the comitology committees. In only one case, an implementing act establishing the digital PLF was blocked (Interview 3).<sup>133</sup> Broadly speaking, however, there has not been contestation with regard to both delegated and implementing measures adopted during the pandemic.

The virtual nature of the scrutiny meetings seems to not have particularly impacted on the relevant institutions' proactiveness in overseeing the Commission's exercise of delegated powers, neither in one sense nor another. Similarly, both the Comitology Register and the Register of Delegated and Implementing acts were regularly updated and included information on whether committee meetings took place online or not. Recent research (ibid.) highlights the unsuitability of virtual meetings for delicate discussions on crisis management instruments and strategies. However, the technical and non-politicised nature of the delegated and implementing acts adopted to respond to the Covid-19 pandemic likely allowed for smooth discussions even on an online venue.

### *3.1 What Happens in the Black Box...*

It has already been highlighted that none of the ten delegated acts adopted in the context of managing the Covid-19 pandemic were objected by the EP or the Council. Five<sup>134</sup> of these were acts adopted via the urgency procedure,

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<sup>133</sup> Commission Implementing Decision (EU) .../... of XXX amending Implementing Decision (EU) 2017/253 as regards the establishment of a system of digital Passenger Locator Forms.

<sup>134</sup> Commission Delegated Regulation (EU) 2020/592 of 30 April 2020 on temporary exceptional measures derogating from certain provisions of Regulation (EU) No 1308/2013 of

circumventing potentially lengthy accountability mechanisms and postponing them to a later stage. The urgency procedure may be activated only in case of exceptional circumstances and must be provided for in the basic act.<sup>135</sup> It is indeed very suitable in the case of a crisis, as it allows the delegated act to enter into force without delay, with the possibility of being repealed at a later stage in case of objection by the legislators. During the Covid-19 pandemic, the urgency procedure allowed delegated acts to enter into force as quickly as two weeks after the start of the negotiations (Interview 10). The horizontal accountability structure is therefore maintained, at least formally, but only postponed allowing for a more efficient output. The subsequent lack of

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the European Parliament and of the Council to address the market disturbance in the fruit and vegetables and wine sectors caused by the COVID-19 pandemic and measures linked to it; Commission Delegated Regulation (EU) 2020/1477 of 14 October 2020 amending Council Regulation (EEC) No 95/93 as regards the temporary extension of exceptional measures to address the consequences caused by the COVID-19 pandemic; Commission Delegated Regulation (EU) 2020/2114 of 16 December 2020 amending Regulation (EC) No 1008/2008 of the European Parliament and of the Council as regards the temporary extension of exceptional measures to address the consequences of the COVID-19 pandemic with regard to selection of groundhandling service provider; Commission Delegated Regulation (EU) 2020/2115 of 16 December 2020 amending Regulation (EC) No 1008/2008 of the European Parliament and of the Council as regards the temporary extension of exceptional measures to address the consequences of the COVID-19 pandemic with regard to operating licences; Commission Delegated Regulation (EU) 2021/2288 of 21 December 2021 amending the Annex to Regulation (EU) 2021/953 of the European Parliament and of the Council as regards the acceptance period of vaccination certificates issued in the EU Digital COVID Certificate format indicating the completion of the primary vaccination series; Commission Delegated Regulation (EU) 2022/503 of 29 March 2022 amending Regulation (EU) 2021/953 of the European Parliament and of the Council as regards exempting minors from the acceptance period of vaccination certificates issued in the EU Digital COVID Certificate format; Commission Delegated Regulation (EU) 2020/2180 of 18 December 2020 extending the reference period of Regulation (EU) 2020/1429 of the European Parliament and of the Council establishing measures for a sustainable rail market in view of the COVID-19 outbreak; Commission Delegated Regulation (EU) 2021/1061 of 28 June 2021 extending the reference period of Regulation (EU) 2020/1429 of the European Parliament and of the Council establishing measures for a sustainable rail market in view of the COVID-19 outbreak; Commission Delegated Regulation (EU) 2022/1036 of 29 June 2022 amending Regulation (EU) 2020/1429 of the European Parliament and of the Council, as regards the extension of the reference period; Commission Delegated Regulation (EU) 2021/95 of 28 January 2021 amending Delegated Regulation (EU) 2020/592 on temporary exceptional measures derogating from certain provisions of Regulation (EU) No 1308/2013 of the European Parliament and of the Council to address the market disturbance in the fruit and vegetables and wine sectors caused by the COVID-19 pandemic and measures linked to it.

<sup>135</sup> Title VI of the Common Understanding on Delegated Acts.

objection demonstrates either a high level of trust that the legislators bestow upon the Commission, or the general attitude of bureaucratic collusion which the EP and Council seem to opt for even in normal times. Similarly, five<sup>136</sup> other acts entered into force after the expression of early non-objection by the EP or the Council. The early non-objection does not mean that the EP or Council forgo their right of scrutiny, but only that they enact it in a quicker manner than necessary. Contrary to letting the scrutiny period expire on its own, the early non-objection mechanism is a proactive action that the legislators have to undertake by means of a Decision. It therefore indicates a clearer will to speed up the process, especially in times of emergency and in case of a lack of empowerment for the use of the urgency procedure in the basic act. Finally, the remaining delegated acts<sup>137</sup> were passed by means of the

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<sup>136</sup> Commission Delegated Regulation (EU) 2021/95 of 28 January 2021 amending Delegated Regulation (EU) 2020/592 on temporary exceptional measures derogating from certain provisions of Regulation (EU) No 1308/2013 of the European Parliament and of the Council to address the market disturbance in the fruit and vegetables and wine sectors caused by the COVID-19 pandemic and measures linked to it; Commission Delegated Regulation (EU) 2020/1275 of 6 July 2020 amending Delegated Regulation (EU) 2020/592 on temporary exceptional measures derogating from certain provisions of Regulation (EU) No 1308/2013 of the European Parliament and of the Council to address the market disturbance in the fruit and vegetables and wine sectors caused by the COVID-19 pandemic and measures linked to it; Commission Delegated Regulation (EU) 2020/1564 of 6 August 2020 amending Delegated Regulation (EU) 2018/985 as regards its transitional provisions in order to address the impact of the COVID-19 crisis; Commission Delegated Regulation (EU) 2022/255 of 15 December 2021 amending Council Regulation (EEC) No 95/93 as regards the extension of measures for temporary relief from the slot utilisation rules due to the COVID-19 crisis; Commission Delegated Regulation (EU) 2021/374 of 27 January 2021 amending Delegated Regulation (EU) 2020/884 derogating in respect of the year 2020 from Delegated Regulation (EU) 2017/891 as regards the fruit and vegetables sector and from Delegated Regulation (EU) 2016/1149 as regards the wine sector in connection with the COVID-19 pandemic, and amending Delegated Regulation (EU) 2016/1149; Commission Delegated Regulation (EU) .../... derogating in respect of the year 2020 from Commission Delegated Regulation (EU) 2017/891 as regards the fruit and vegetables sector and from Commission Delegated Regulation (EU) 2016/1149 as regards the wine sector in connection with the COVID-19 pandemic.

<sup>137</sup> Commission Delegated Regulation (EU) 2022/518 of 13 January 2022 amending Delegated Regulation (EU) 2018/985 as regards its transitional provisions for certain agricultural and forestry vehicles fitted with engines in the power range greater than or equal to 56 kW and less than 130 kW in order to address the impact of the COVID-19 crisis; Commission Delegated Regulation (EU) 2022/256 of 22 February 2022 amending Regulation (EU) 2021/953 of the European Parliament and of the Council as regards the issuance of certificates of recovery

regular procedure. However, they all entered into force in late 2021 or early 2022, when the crisis had entered into a later, less urgent phase.

The scrutiny of the implementing acts adopted during Covid-19 pandemic<sup>138</sup> appears to have followed a broadly collusive pattern. In other words, only the

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based on rapid antigen tests; Commission Delegated Regulation (EU) 2021/1889 of 23 July 2021 amending Council Regulation (EEC) No 95/93 as regards the extension of measures for temporary relief from the slot utilisation rules due to the COVID-19 crisis; Commission Delegated Regulation (EU) 2021/2027 of 13 September 2021 amending Delegated Regulation (EU) 2020/884 as regards the derogations from Delegated Regulation (EU) 2016/1149 to address the crisis caused by the COVID-19 pandemic in the wine sector, and amending Delegated Regulation (EU) 2016/1149; Commission Delegated Regulation (EU) 2021/2026 of 13 September 2021 amending Delegated Regulation (EU) 2020/592 as regards certain temporary derogations from Regulation (EU) No 1308/2013 of the European Parliament and of the Council to address the market disturbance in the wine sector caused by the COVID-19 pandemic and their period of application.

<sup>138</sup> Commission Implementing Regulation (EU) 2020/1627 of 3 November 2020 on exceptional measures for the third reference period (2020-2024) of the single European sky performance and charging scheme due to the COVID-19 pandemic; Commission Implementing Regulation (EU) 2021/2071 of 25 November 2021 subjecting certain vaccines and active substances used for the manufacture of such vaccines to export surveillance; Commission Implementing Regulation (EU) 2022/526 of 1 April 2022 derogating from Implementing Regulation (EU) 2017/39 in respect of school year 2021/2022 as regards on-the-spot checks on the premises of aid applicants or educational establishments for the purposes of the school scheme; Commission Implementing Decision (EU) 2021/2014 of 17 November 2021 amending Implementing Decision (EU) 2021/1073 laying down technical specifications and rules for the implementation of the trust framework for the EU Digital COVID Certificate established by Regulation (EU) 2021/953 of the European Parliament and of the Council; Commission Implementing Decision (EU) 2021/2301 of 21 December 2021 amending Implementing Decision (EU) 2021/1073 laying down technical specifications and rules for the implementation of the trust framework for the EU Digital COVID Certificate established by Regulation (EU) 2021/953 of the European Parliament and of the Council; Commission Implementing Regulation (EU) 2020/2043 of 11 December 2020 derogating from Implementing Regulation (EU) 2017/39 in respect of school years 2019/2020 and 2020/2021 as regards on-the-spot checks on the premises of aid applicants or educational establishments for the purposes of the school scheme; Commission Implementing Decision (EU) 2021/1272 of 30 July 2021 establishing the equivalence, for the purpose of facilitating the right of free movement within the Union, of COVID-19 certificates issued by the Vatican City State to the certificates issued in accordance with Regulation (EU) 2021/953 of the European Parliament and of the Council; Commission Implementing Regulation (EU) 2021/1728 of 29 September 2021 amending Implementing Regulation (EU) 2021/442 and Implementing Regulation (EU) 2021/521 related to the mechanism making certain products subject to the production of an export authorisation; Commission Implementing Regulation (EU) 2021/1325 of 10 August 2021 amending Implementing Regulation (EU) 2020/977 as regards the period of application of the temporary measures in relation to controls on the production of organic products; Commission Implementing Decision (EU) 2022/483 of 21 March 2022 amending

implementing act establishing the PLF was vetoed by the relevant comitology committee (Interview 3), while the others were uncontested. Due to the nature of the emergency, the committee meetings mostly took place online throughout 2020 and 2021.<sup>139</sup> The online meetings were held to discuss draft implementing acts and were then followed by a written procedure for the vote of the committee.<sup>140</sup> The written procedure is envisioned by Art. 3(5) of the Comitology Regulation, which lays out that voting can take place during a regular committee meeting or, in duly justified cases, by means of a written procedure. As a matter of fact, the number of written procedures saw a sharp fifty per cent increase in 2020 compared to previous years.<sup>141</sup> According to the Commission's Annual Report on comitology,<sup>142</sup> this approach was adopted

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Implementing Decision (EU) 2021/1073 laying down technical specifications and rules for the implementation of the trust framework for the EU Digital COVID Certificate established by Regulation (EU) 2021/953 of the European Parliament and of the Council; Commission Implementing Regulation (EU) 2021/933 of 9 June 2021 derogating from Implementing Regulation (EU) 2017/39 as regards certain measures to address the crisis caused by the COVID-19 pandemic; Commission Implementing Decision (EU) 2021/1073 of 28 June 2021 laying down technical specifications and rules for the implementation of the trust framework for the EU Digital COVID Certificate established by Regulation (EU) 2021/953 of the European Parliament and of the Council; Commission Implementing Regulation (EU) 2021/772 of 10 May 2021 amending Implementing Regulation (EU) 2020/977 as regards the temporary measures in relation to controls on the production of organic products, in particular the period of application; Commission Implementing Regulation (EU) 2021/1763 of 6 October 2021 amending Implementing Regulation (EU) 2020/600 as regards the derogations from Implementing Regulation (EU) 2016/1150 to address the crisis caused by the COVID-19 pandemic in the wine sector; Commission Implementing Decision (EU) 2022/1516 of 8 September 2022 amending Implementing Decision (EU) 2021/1073 laying down technical specifications and rules for the implementation of the trust framework for the EU Digital COVID Certificate established by Regulation (EU) 2021/953 of the European Parliament and of the Council. Plus 48 additional implementing acts establishing the equivalence of Covid-19 certificates issued in Hong Kong, Azerbaijan, New Zealand, Brazil, Peru, Philippines, Oman, Jordan, Malaysia, Ecuador, Korea, Kosovo, Bahrain, Benin, Colombia, Vietnam, Seychelles, San Marino, Montenegro, Indonesia, Serbia, Moldova, Georgia, Armenia, United Kingdom, Monaco, Faroe Islands, Israel, Morocco, Panama, Albania, Andorra, Taiwan, Uruguay, Thailand, Turkey, Ukraine, North Macedonia, Tunisia, Switzerland, Cabo Verde, United Arab Emirates, Lebanon, Togo, Singapore, and El Salvador.

<sup>139</sup> Report from the Commission to the European Parliament and Council on the working of committees during 2020, SWD (2021) 240.

<sup>140</sup> Ibid.

<sup>141</sup> Ibid.

<sup>142</sup> Ibid.

because the written procedure ensures a stable and reliable framework for vote casting and counting. The lack of vote meant a positive vote, and most member states adopted this approach (Interview 10). Nevertheless, voting has occasionally taken place during meetings in case of urgency. Against this background, it is possible to conclude that the scrutiny and accountability mechanisms for implementing acts have been kept in place, albeit adapted to the specific needs of the context. The lack of objections and the smooth adoption of implementing acts dealing with the Covid-19 pandemic may again indicate a tendency of bureaucratic collusion which characterises the system even during normal times (Christiansen and Lange, 2021; Gallinella and Christiansen, 2024), as well as the will to get things done quickly for the sake of an effective crisis management.

### 3.2 ... *Stays in the Black Box*

The last few years have seen a significant improvement in the transparency of delegated rulemaking and its processes. Rendering the procedures more accessible, maintaining online registers and repositories, as well as publishing committee reports and other resources have certainly contributed to dissolving some of the confusion around the adoption of delegated and implementing acts. Incidentally, the Register of Delegated and Implementing acts was launched on 28th October 2020.<sup>143</sup> Similarly, the new Comitology Register was released on the same day with improved search criteria and committee pages.<sup>144</sup> The efforts towards building a more transparent and more accessible system of delegated rulemaking did not stop during the pandemic, although there are doubts on whether the mechanisms in place are actually adequate and sufficient. First of all, the Comitology Register remains rather complex from a user perspective and the information provided is anyway limited to the draft implementing acts,

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<sup>143</sup> Ibid.

<sup>144</sup> Ibid.

the kind of procedure, and the relevant committee.<sup>145</sup> No information is provided with regard to the discussion that took place during a committee meeting or the related voting. It has been suggested in the past that opening the doors of committee meetings to a selected audience may be a way of increasing transparency (Peers and Costa, 2012). Moreover, the proposal for a new Comitology Regulation<sup>146</sup> focuses precisely on the transparency of the system, aiming to make the votes within the appeal committee public (Interview 1; Interview 2).<sup>147</sup> The proposal is nevertheless unlikely to ever be adopted due to the Council's scarce interest in the matter (Interview 1; Interview 6; Interview 7).

The most strained negotiations seem to take place in the context of determining the kind of empowerment in a basic act. Naturally, the EP appears to favour delegated acts, while the member states have a strong preference towards implementing acts (Interview 6). It is striking that these negotiations may informally take place, or may be coordinated, by means of emails (Interview 3). When the legislative proposal for a basic act is circulated, it is not completely uncommon for the legal services of the member states and EP to comment on the empowerments and decide on the strategy to adopt in the trilogues via virtual correspondence (*ibid.*). This has occurred, for instance, in the context of the negotiations for the Regulation establishing the EU Digital

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<sup>145</sup> The accessibility and richness of information provided in the Register of Delegated and Implementing acts varies depending on the act that is being researched. In the case of the former, more details are available whereas, in the case of the latter, only the bare minimum information is provided.

<sup>146</sup> Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) No 182/2011 laying down the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers, COM/2017/085.

<sup>147</sup> The Commission's initial legislative proposal was actually aimed at making all votes within comitology committee meetings public. However, the member states were opposed, and the proposed measure was changed to only involve the appeal committee. The appeal committee is invoked rarely, giving the proposal a symbolic value rather than a practical one (Interview 1; also see Annual Reports from the Commission to the European Parliament and Council on the working of committees).

Certificate.<sup>148</sup> The original legislative proposal empowered the Commission to adopt certain technical standards, including the extension of the validity of the certificates, by means of delegated acts (ibid.; Interview 10). However, a group composed of larger member states coordinated via email and managed to lobby the empowerment for implementing acts instead (Interview 3). A similar tendency may be found within the EP, where delegated acts are often discussed informally among the relevant committee members and are often barely mentioned at the committee level (Interview 8).

Informal negotiations have certainly sped up the process, allowing for greater coordination and preparedness. However, it is certainly not beneficial for the fulfilment of throughput legitimacy, in that it annihilates all forms of transparency and puts the accountability of the system into question. Moreover, the intense negotiations over the kind of empowerments in the basic acts and the bureaucratic collusion in which the Commission, EP, Council, and member states fall into in the context of the scrutiny of the actual acts raises doubts on the overall procedural legitimacy of delegated rulemaking. It would not be so farfetched to presume that this form of bureaucratic collusion may be a direct consequence of the strenuous negotiations that happen beforehand. In other words, it may almost look like once the empowerments are agreed upon, the relevant institutions lose interest in actually enacting the scrutiny power which they have fought on during the negotiations on the basic act.

#### **4. Consequences to the War in Ukraine**

The war in Ukraine saw a united European reaction in the support of Ukraine and the condemnation of the Russian invasion. However, the EU's response extended beyond humanitarian efforts and sanction packages; it also included measures designed to protect the internal market from supply shortages in

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<sup>148</sup> 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.

energy and other essential products. In that regard, the EU has adopted a Regulation<sup>149</sup> for the trade liberalisation of Ukrainian exports, especially grain, and the Gas Regulation<sup>150</sup> on demand reduction measures for gas. The former has provided the basis for the adoption of an implementing act<sup>151</sup> temporarily suspending the export of Ukrainian wheat, maize, rapeseed, and sunflower seeds from Romania, Slovakia, Bulgaria, Hungary, and Poland.<sup>152</sup> Moreover, several other implementing acts<sup>153</sup> have been adopted to deal with the threats

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<sup>149</sup> 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, of the one part, and Ukraine, of the other part.

<sup>150</sup> Council Regulation (EU) 2022/1369 of 5 August 2022 on coordinated demand-reduction measures for gas.

<sup>151</sup> Commission Implementing Regulation (EU) 2023/903 of 2 May 2023 introducing preventive measures concerning certain products originating in Ukraine.

<sup>152</sup> The trade liberalisation had helped alleviate the Ukrainian economy, but the logistical infrastructure had proved to be insufficient to handle the trade between Ukraine and member states. As a result, the member states bordering Ukraine had been the primary recipients of Ukrainian products, resulting in unfair competition with local producers (Kleimann, 2023).

<sup>153</sup> Commission Implementing Regulation (EU) 2022/861 of 1 June 2022 laying down exceptional rules for the Member States' second requests for Union aid for school fruit and vegetables and for school milk and derogating from Implementing Regulation (EU) 2017/39 as regards the reallocation of Union aid, for the period from 1 August 2022 to 31 July 2023; Commission Implementing Decision (EU) 2022/500 of 25 March 2022 establishing the military aggression of Russia against Ukraine as the occurrence of an exceptional event causing a significant disruption of markets; Commission Implementing Regulation (EU) 2022/595 of 11 April 2022 amending certain Regulations concerning restrictive measures and setting out a single list for the Annexes to those Regulations containing the contact details of Member States' competent authorities and the address for notifications to the European Commission; Commission Implementing Regulation (EU) 2022/1228 of 14 July 2022 derogating from Implementing Regulation (EU) 2017/892 for the year 2022 as regards applications for aid as well as applications for advance payments and for partial payments due to the crisis caused by Russia's invasion of Ukraine; Commission Implementing Regulation (EU) 2022/1227 of 15 July 2022 amending Implementing Regulations (EU) No 808/2014 and (EU) No 809/2014 as regards a specific measure to provide exceptional temporary support under the European Agricultural Fund for Rural Development (EAFRD) in response to the impact of Russia's invasion of Ukraine; Commission Implementing Regulation (EU) 2022/2368 of 3 December 2022 amending Council Regulation (EU) No 833/2014 concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine; Commission Implementing Regulation (EU) 2023/251 of 4 February 2023 amending Council Regulation (EU) No 833/2014 concerning restrictive measures in view of Russia's actions destabilising the situation

that the conflict in Ukraine has posed to the internal market. There is, again, no evidence of objections at the committee level. The acts appear to have been ratified rather quickly, with the first one being adopted one day after the Russian invasion of Ukraine and being published four days after that. In the context of crises, member states, particularly smaller ones (Interview 5), appear to be compliant with the Commission's exercise of regulatory powers, which is seen as practical and efficient (Interview 10). However, the power to adopt implementing measures on highly politicised issues is often conferred to the Council, albeit still relying on the Commission's technical expertise (Interview 7). This is evident from the empowerments present in the Gas Regulation, which bestow upon the Council the power to adopt an implementing decision to declare a state of alert in case of severe energy shortage.<sup>154</sup> The low politicisation and technical nature of the implementing acts adopted by the Commission in the context of the war in Ukraine, coupled with the need for efficiency given by the nature of the crisis, have therefore resulted in an inevitable weakening of accountability structures.

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in Ukraine; Commission Implementing Regulation (EU) 2023/365 of 16 February 2023 terminating the expiry review investigation concerning imports of certain hot-rolled flat products of iron, non-alloy or other alloy steel originating in Ukraine; Commission Implementing Regulation (EU) 2023/403 of 8 February 2023 amending Implementing Regulation (EU) 2015/2447 as regards the provision of information for entry summary declarations and risk analysis for security and safety purposes at entry of goods, and adding Ukraine to the list of countries in the guarantor's undertakings for transit; Commission Implementing Decision (EU) 2023/1061 of 31 May 2023 on the establishment of the list of travel documents of the Russian Federation issued in or to persons resident in regions or territories in Ukraine which are occupied by the Russian Federation or breakaway territories in Georgia which are not under the control of the Georgian government that are not accepted as valid travel documents for the purposes of issuing of a visa or of crossing the external borders; Commission Implementing Regulation (EU) 2023/1100 of 5 June 2023 introducing preventive measures concerning certain products originating in Ukraine; Commission Implementing Regulation (EU) 2024/1673 of 6 June 2024 laying down rules for the application of Council Regulation (EU) No 833/2014 as regards reporting and the implementation of revenue operations for the financial contribution due to the Union; Commission Implementing Regulation (EU) 2024/1671 of 6 June 2024 laying down the arrangements for monitoring the import volumes referred to in Article 4(7) of Regulation 2024/1392; Commission Implementing Decision (EU) 2024/1697 of 12 June 2024 on the establishment of the Ukraine Facility Audit Board.

<sup>154</sup> Art. 4 of Council Regulation (EU) 2022/1369.

A similar story applies to the delegated acts adopted within the same scope, which were all ratified rather smoothly and quickly.<sup>155</sup> The EP and the Council have once again shown compliance with the Commission's exercise of delegated powers, although it is difficult to determine whether this was prompted by the crisis situation or by the bureaucratic collusion in which they enter even during normal times. The technical nature of the acts clearly did not incentivise the legislators to intervene in the process, even if the urgency of the situation could have gathered a wider attention on lesser-known aspects of policymaking. Furthermore, in one case,<sup>156</sup> they expressed their early non-objection, allowing the act to be adopted more promptly. In general, there appears to have been less urgency surrounding the adoption of delegated acts dealing with the consequences of the war in Ukraine than those adopted during the Covid-19 pandemic. This may depend on the empowerments in the basic acts, but also by a different perception surrounding the urgency of the situation. As it was mentioned above, the delegated acts adopted in the framework of the conflict in Ukraine deal with its possible consequences to the internal market and appear to be mostly preventive in nature. Although still aimed at dealing

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<sup>155</sup> Commission Delegated Regulation (EU) 2022/760 of 8 April 2022 amending Delegated Regulation (EU) 2021/2306 as regards the transitional provisions for certificates of inspection issued in Ukraine; Commission Delegated Regulation (EU) 2022/1225 of 14 July 2022 on temporary exceptional measures derogating from Regulation (EU) No 1308/2013 of the European Parliament and of the Council to address the market disturbance in the fruit and vegetables sector caused by Russia's invasion of Ukraine; Commission Delegated Regulation (EU) 2022/1623 of 14 July 2022 derogating from Delegated Regulation (EU) 2017/891 for the year 2022 as regards the value of marketed production, the national strategy and the recovery of Union financial assistance for multiannual commitments in the fruit and vegetables sector due to the crisis caused by Russia's invasion of Ukraine; Commission Delegated Regulation (EU) 2022/1450 of 27 June 2022 supplementing Regulation (EU) 2018/848 of the European Parliament and of the Council as regards the use of non organic protein feed for the production of organic livestock due to Russia's invasion of Ukraine; Commission Delegated Regulation (EU) 2022/2238 of 22 August 2022 amending Delegated Regulation (EU) 2021/2306 as regards the transitional provisions for certificates of inspection and extracts thereof and as regards the transitional provisions for certificates of inspection issued in Ukraine; Commission Delegated Regulation (EU) 2023/1176 of 14 July 2022 amending Regulation (EU) No 1315/2013 of the European Parliament and of the Council as regards the indicative maps of the trans-European transport network.

<sup>156</sup> Commission Delegated Regulation (EU) 2022/760 of 8 April 2022 amending Delegated Regulation (EU) 2021/2306 as regards the transitional provisions for certificates of inspection issued in Ukraine.

with certain aspects of a crisis, these delegated acts were likely surrounded by a lower sense of urgency than different measures ratified at the same time or other delegated acts adopted during the Covid-19 pandemic.

#### *4.1 Low Transparency or Lack of Interest?*

It is perhaps unsurprising that the handling of the transparency of delegated rulemaking during the war in Ukraine has followed a similar pattern to what is discussed in Section 3.2. above. Since its introduction in late 2020, the Register of Delegated and Implementing acts has contributed to increasing transparency in the processes of delegated rulemaking. Similarly, the Comitology Register is a useful resource to shed light on the committees and their procedures, though it is still complex to navigate and inconsistent in presenting information. In the case of delegated and implementing acts adopted during the war in Ukraine, some of the details such as the exact numbering of the measures are missing from the Register of Delegated and Implementing acts. These missing details, although accessible on other platforms like the EUR-Lex website, highlight a fragmentation in transparency efforts. Similarly, the Comitology Register does not showcase information in a consistent way, with some entries being much richer in details than others. Such discrepancies raise questions about the priorities and consistency of transparency efforts. One might wonder whether these minor oversights reflect a broader systemic issue, namely a lack of genuine commitment to enhancing transparency in delegated rulemaking.

Much of the relevant negotiations continues to take place behind closed doors anyway. Once again, the kinds of empowerments to be added to the Regulation on the trade liberalisation of Ukrainian exports were discussed through email exchanges among the member states (Interview 3). Moreover, the original proposal for the Gas Regulation empowered the Commission to adopt a state of emergency via an implementing act, and not the Council (Interview 7). The empowerment was, once again, changed in the context of informal negotiations (*ibid.*). It could nevertheless be argued that the mere existence of negotiations safeguards a certain degree of accountability and legitimacy, as opposed to

them being completely scrapped from the process due to the imperative urgency of the circumstances. It could also be argued that transparency and throughput legitimacy more broadly are reduced in crisis management, thus the impact of delegated rulemaking does not appear to make a great difference in that regard. Nevertheless, this is a problem that concerns the framework of delegated and implementing acts in general, not only during times of crisis. While crisis management may make bureaucratic collusion and the low transparency to a certain degree acceptable, there are grounds for improvement for the overall process.

## **5. Concluding Remarks**

The role of delegated rulemaking in the context of crisis management within the EU showcases a nuanced picture of throughput legitimacy. Throughput legitimacy in crisis management often faces a trade-off, as the urgency to act overshadows the procedural safeguards such as accountability and transparency. Delegated rulemaking, by design, offers flexibility and technical expertise, yet this very adaptability can undermine fulfilment of certain democratic norms. The lack of proactive scrutiny, the institutions' tendency to enter into bureaucratic collusion with one another, and the closed-door negotiations weakens the accountability and transparency structures that are envisioned by the legal framework. As such, delegated rulemaking does not significantly address the reduced throughput legitimacy that can be found in crisis management.

There is no evidence of the use of delegated rulemaking the sovereign debt crisis and the refugee crisis, except for a few empowerments that were already discussed in Chapter 4. The absence of established precedents and the lack of an all-encompassing legal framework highlighted the procedural immaturity of the system. Transparency mechanisms, such open registers and repositories, were either absent or insufficiently developed at the time, further constraining the throughput legitimacy of delegated rulemaking in these contexts.

The Covid-19 pandemic marked a significant turning point, in that it saw the consistent adoption of delegated and implementing acts as tools of crisis management. Due to the circumstances, urgency procedures or fast-track strategies were chosen whenever possible, prioritising output over throughput. While these procedures are endowed with accountability safeguards, their expedited nature often postponed or diminished the opportunity for meaningful legislative scrutiny. An increased use of early non-objections, informal negotiations, and online meetings certainly cast some doubts on soundness of throughput legitimacy. This trend was consistent in subsequent crises like the war in Ukraine, where the focus on efficiency often relegated transparency and accountability to secondary concerns.

On a more positive note, the EU has continued its efforts to demystify the black box of EU governance despite the situation of crisis. The Register of Delegated and Implementing Act, for instance, was launched amid the Covid-19 pandemic. Furthermore, the Comitology Register was refurbished in the same year. That is not to say that systemic challenges related to transparency, such as the fragmentation of information across platforms and the closed-door negotiations, do not persist. However, there is clearly an effort to enhance the throughput legitimacy of delegated rulemaking that goes beyond the constraints imposed by crisis management.

In sum, both delegated rulemaking and crisis management present some shortcomings with regard to their throughput legitimacy, which are particularly visible when the two overlap. The very presence of accountability and transparency mechanisms in the framework of delegated rulemaking has a degree of positive impact because it is rooted in the law, upholding throughput legitimacy even during crises. Moreover, these mechanisms are not entirely disregarded or violated. Rather, they are formally fulfilled, though often with minimal active institutional involvement. This situation reflects a dual reality for the throughput legitimacy of crisis management and delegated rulemaking. On the one hand, the legal embedding of accountability and transparency provides a baseline of procedural legitimacy that safeguards against arbitrary decision-making. On the other hand, the lack of active engagement and

scrutiny, often justified by the need for quick action, suggests that throughput legitimacy remains sidelined. As a conclusion, the impact that delegated rulemaking brings on the throughput legitimacy of crisis management is fundamentally encapsulated in this duality.

## **Chapter 6**

### ***Output Legitimacy***

Whereas input and throughput legitimacy are often sidelined in the context of crisis management, output legitimacy lies at its very core. The urgent need for the effectiveness and efficiency of both procedures and their outcomes overshadows the more far-reaching and possibly time-consuming call for democratic representation, accountability, and transparency. Governments tend to justify this democratic shortcoming by highlighting the effectiveness of extraordinary measures in achieving public good outcomes (Schmidt, 2024). Similarly, they rely on proportionality to legitimise measures, such as lockdowns, that could potentially restrict individual freedoms (ibid.; 2021). The focus is placed on the temporary but necessary nature of the measures, which are framed as crucial for the expeditious resolution of the crisis.

The EU, whose overall governance tends to be stronger on the output side especially when considering the democratic deficit it has been accused of having (Majone, 1998; Moravcsik, 2002; Follesdal and Hix, 2006), is not exempted from this dynamic. The unfolding of the polycrisis has required an increased involvement of the Union in emergency response. As a result, not only its polity has been endowed with crises-related instruments (Rhinard, 2019), but its institutions have played a fundamental role in the management of the most recent transnational crises. In order to legitimise its actions in the absence of significant coercive competences, it relied on discursive powers and persuasive communication emphasising the output aspects of its policies (Schmidt, 2024). This tendency can be observed, for instance, in its discourse around the establishment of NGEU or the coordination of the vaccine procurement during the Covid-19 pandemic (ibid.).

As it was discussed in the previous chapters, delegated and implementing acts are particularly output-driven, in that their input and throughput appear to be fulfilled formally without active institutional engagement most of the time. The efficiency through which decisions can be adopted by means of delegated

rulemaking, given by its centralised nature, has the capability to positively impact the output legitimacy of crisis management. The possibility to enact an urgency procedure, when provided for in the basic act, allows for further procedural optimisation. Naturally, the technical nature of delegated and implementing acts does not allow them to fully contribute to important political decisions, but this work has hopefully shown that these measures have the potential to execute rather essential, effective policies. This chapter is therefore aimed at assessing the use of delegated rulemaking in the context of crises, with a particular outlook on its impact on the output legitimacy of the latter. Given the complexity in assessing the effectiveness of policies, the primary focus is placed on efficiency, more specifically on the swiftness with which a measure can be adopted by means of delegated and implementing act and the promptness with which a procedure can be initiated. This, together with policy effectiveness, is assumed to be a fundamental element of crisis management and its output legitimacy. Finally, this chapter also considers the policy outcomes of each of the crises under study, which are deemed as relevant in the wider scope of legitimacy through output. In particular, it analyses those measures and instruments adopted following a crisis, not during, that are aimed at addressing future emergencies. A great focus is naturally placed on the empowerments for the adoption delegated and implementing acts thereof.

### **1. The Sovereign Debt Crisis**

The response to the sovereign debt crisis involved only a minimal role for delegated rulemaking, limited to a few empowerments added to instruments aimed at addressing the crisis, namely the Regulation establishing the EBA and the Level 2 phase of the Lamfalussy architecture. Such empowerments were never enacted during the crisis or in any other similar situations. Moreover, they are not endowed with any emergency-related capacity of sorts. As a result, it is not possible to assess the impact that delegated rulemaking had on the output legitimacy of the management of the sovereign debt crisis, as it played no direct role. Nevertheless, the inclusion of these empowerments, albeit

marginal, signals a recognition of the potential utility of delegated rulemaking in providing flexibility and efficacy in difficult regulatory contexts.

A decade will have to pass before the first meaningful contributions of delegated rulemaking to the efficiency and efficacy of EU crisis management or, for that matter, to EU crisis management in general. In the meantime, the legal frameworks governing both delegated and implementing acts will be significantly strengthened, and their use in daily policymaking will skyrocket (Christiansen and Lange, 2021). At the same time, the EU will have expanded its governance and will find itself having to deal with multiple crises on multiple fronts. It will become clear, as it had started to become clear already during the sovereign debt crisis, that more centralised and supranational powers will be required to successfully manage the context of the polycrisis.

## **2. The Refugee Crisis**

As it was discussed in the previous chapters, the refugee crisis did not bring about particular novelties regarding the use of delegated rulemaking as an instrument of crisis management. No delegated and implementing acts were adopted to deal with certain aspects of the crisis, nor were empowerments added to other instruments aimed at the management of the crisis. Instead, the EU relied on the pre-existing Treaty framework and secondary legislation to effectively address the evolving challenges brought by the crisis. The emergency response strategies were briefly discussed in Chapter 4 and are nevertheless beyond the scope of this work. Therefore, even if the impact of delegated rulemaking on the output legitimacy of crisis management cannot be observed, it is still possible to analyse the role it played in the general outcome of the crisis.

The crisis led to the adoption of a new Pact on Migration and Asylum by the European Parliament and the Council in May 2024, aimed at fostering a broad framework based on a comprehensive approach to migration management and encouraging mutual trust among member states. The Pact, moreover, was designed to prevent the recurrence of a similar emergency, incorporating a

series of emergency-driven responses and strategies that were proposed in 2015 by the Commission in its agenda on migration (Nicolosi, 2021). Additionally, the Pact includes ten legislative acts aimed at reforming the entire EU framework for migration and asylum (European Council and Council of the European Union, 2024b). Two of these legislative acts are particularly relevant for the purpose of this analysis, in that they include provisions on contingency planning and emergency management. First, the new Regulation on Asylum Management,<sup>157</sup> replacing the Dublin Regulation, regulates the management of migration influxes from third countries with more streamlined rules and shorter waiting times than its predecessor.

The Regulation contains several empowerments for the adoption of delegated and implementing acts. In the case of the former, they mirror the empowerments that were originally present in the Dublin Regulation. More specifically, delegated acts may be adopted to regulate specific issues such as unaccompanied minors, particularly concerning the identification of family members, siblings, or relatives; criteria for establishing the existence of proven family links; criteria for assessing the capacity of a relative to take care of the minor; the application of these criteria when family members are in more than one member state.<sup>158</sup> They may also be adopted in the framework of dependent persons, in order to address elements to assess and establish the familial connection.<sup>159</sup> Implementing acts, on the other hand, may be adopted to establish a template to be used by member states to ensure that their national strategies are aligned on specific core elements, and especially contingency planning.<sup>160</sup> However, despite being part of a broader framework aimed at reducing the risk of the occurrence of similar crisis, it is clear that none of the

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<sup>157</sup> Regulation (EU) 2024/1351 of the European Parliament and of the Council of 14 May 2024 on asylum and migration management, amending Regulations (EU) 2021/1147 and (EU) 2021/1060 and repealing Regulation (EU) No 604/2013.

<sup>158</sup> *Ibid.*, Art. 25(2).

<sup>159</sup> *Ibid.*, Art. 34(3)

<sup>160</sup> *Ibid.*, Art. 7(6).

empowerments endow delegated and implementing acts with a crisis-related capacity.

### 2.1 *The Regulation Addressing Situations of Force Majeure*

Another Regulation<sup>161</sup> aimed at addressing situations of crisis and *force majeure* was adopted as part of the new Pack on Migration and Asylum. The Regulation confers the Commission powers to adopt an implementing act to establish a situation of *force majeure* after assessing a reasoned request from a member state that considers itself to experience an emergency.<sup>162</sup> This assessment involves determining whether the conditions set out in the Regulation are met,<sup>163</sup> which includes evaluating if the member state's asylum and reception system has become non-functional due to mass arrivals of third-country nationals or stateless persons, or if it is subject to an instrumentalisation that threatens its functioning including, but not limited to, national security. The Commission's assessment must be conducted expeditiously in close cooperation with the requesting member state and in consultation with relevant EU agencies and international organisations, particularly the United Nations High Commissioner for Refugees and the International Organisation for Migration.<sup>164</sup> If the Commission finds that the situation meets the relevant criteria, it shall adopt an implementing decision without delay and within two weeks of the submission of the reasoned request.<sup>165</sup> This decision shall specify whether the requesting member state is indeed facing a situation of crisis or *force majeure* and shall lay out the necessary measures to address it.<sup>166</sup>

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<sup>161</sup> Regulation (EU) 2024/1359 of the European Parliament and of the Council of 14 May 2024 addressing situations of crisis and force majeure in the field of migration and asylum and amending Regulation (EU) 2021/1147.

<sup>162</sup> Ibid., Art. 3.

<sup>163</sup> The conditions are laid out in Art. 1 of the Regulation.

<sup>164</sup> Ibid., Art. 3(1).

<sup>165</sup> Ibid., Art. 3(8)

<sup>166</sup> Ibid.

Following the adoption of an implementing decision declaring a situation of *force majeure*, the Commission is required to make a proposal for a Council implementing decision including specific derogations that the relevant member state should be authorised to apply to face the emergency.<sup>167</sup> Moreover, the proposal shall include a draft Solidarity Response Plan indicating the relevant solidarity measures required to address the situation, including the relocations, financial contributions or alternative adequate provisions.<sup>168</sup> The Council shall then adopt an implementing decision in compliance with the principles of necessity and proportionality, authorising the Member State to apply the derogations and establish a Solidarity Response Plan.<sup>169</sup> The implementing decision shall specify the duration for which the derogations and solidarity measures can be applied, initially set at three months, with the possibility of extension based on the persistence of the crisis.<sup>170</sup> Finally, the Commission shall closely monitor whether the situation of *force majeure* persists and report to the EP and Council every three months.<sup>171</sup>

It is certainly interesting to observe the EU's effort to expand its capacity for supranational emergency politics. First of all, it is noteworthy that such efforts are a direct result of a previous crisis, where the EU has had the chance to learn from its past actions and adapt accordingly. Secondly, and perhaps most strikingly, the establishment of a supranational framework for dealing with emergencies in the scope of migration envisions the exercise of delegated rulemaking. Implementing acts are used as an instrument for declaring an emergency, thus relying on their uniform application for a centralised implementation of the measure. Moreover, Council implementing decisions are envisioned as crisis instruments of sorts, laying out the measures that the affected member state can derogate from in the interim of the emergency and the plan

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<sup>167</sup> Ibid., Art. 4(1).

<sup>168</sup> Ibid., Art. 4(2)(a) and (b).

<sup>169</sup> Ibid., Art. 4(3).

<sup>170</sup> Ibid., Art. 5(1).

<sup>171</sup> Ibid., Art. 6(1) and (4)

to adopt as a response. As it is further highlighted in the following section, this is not just a one-off occurrence, and a similar pattern can be found in other relevant instruments. The adaptability and efficiency of delegated rulemaking has certainly played a role in the choice of adding the empowerments to the basic act. Concentrating and centralising power in the hands of an institution, usually the Commission, certainly indicates the will to expedite the process. Furthermore, the timing is crucial. The Regulation addressing situations of crisis and *force majeure* was adopted in the spring of 2024, not only after the EU's management of the refugee crisis, but other crises as well. This may signify that the EU's experience in resorting to delegated rulemaking as a form of crisis management which started during the Covid-19 pandemic has set a positive precedent on how to proceed forward.

### **3. The Covid-19 Pandemic**

The management of the Covid-19 pandemic showcases a more consistent use of delegated rulemaking. Naturally, however, other instruments and mechanisms were at the forefront of the response to the emergency. It is known, for instance, that the European Council played a fundamental role as a crisis manager (Schramm and Wessels, 2022). Despite the utmost urgency and need for quick action imposed by the nature of the crisis, moreover, it was possible to adopt measures via the OLP with unprecedented speed. Incidentally, restrictions and social distancing favoured smooth negotiations and a quick achievement of results. This was mainly due to practical reasons, such as the relatively empty offices that facilitated smaller gatherings of officials, the possibility to drop by someone's office without an appointment as there were fewer meetings, or the ability to quickly join a call with little notice (Interview 4). As a result, it has been possible to adopt legislative acts via the OLP in as little time as two months (ibid.).

The OLP proved to be so efficient that policymakers were not discouraged from enacting it even when they had the opportunity to do otherwise. In fact, there were negotiations over the proposal to extend the validity EU Digital Covid

Certificate via a delegated act, which was then rejected in March 2022 (Interview 3). A substitute implementing act was prepared with the context of the relevant expert group, but the EP and Council soon opted to adopt a Regulation<sup>172</sup> by means of OLP instead (ibid.). As seen in Chapter 4, the empowerments in the original Regulation did not specifically include the extension of the validity, but they were potentially broad enough to be possible. Nevertheless, adopting a legislative act was deemed more suitable for substantive reasons and the previous experience had shown that the long waiting times of the OLP could be widely avoided.

### *3.1 Delegated Rulemaking as an Instrument of Crisis Management*

The management of the pandemic has nevertheless included the adoption of delegated and implementing acts. Their frameworks, bolstered by the IIA and the Comitology Regulation respectively, have certainly been pivotal in this regard by allowing for the streamlining and clarification of the procedures. Moreover, the increased number of empowerments in secondary legislation over the years naturally laid the ground for the adoption of such measures. When the empowerments were indeed present, the Commission resorted to delegated rulemaking to deal with certain aspects of the crisis for practical reasons (Interview 3). Delegated and implementing acts can be adopted rather quickly, with the time frame for their scrutiny set in the basic act to usually two months, extendable by other two. And in fact, the first crisis-related delegated act<sup>173</sup> was adopted in April 2020 to establish some temporary measures aimed at addressing the market disturbances caused by the Covid-19 pandemic in the

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<sup>172</sup> Regulation (EU) 2022/1034 of the European Parliament and the Council of the European Union of 29 June 2022 amending Regulation (EU) 2021/953 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.

<sup>173</sup> Commission Delegated Regulation (EU) 2020/592 of 30 April 2020 on temporary exceptional measures derogating from certain provisions of Regulation (EU) No 1308/2013 of the European Parliament and of the Council to address the market disturbance in the fruit and vegetables and wine sectors caused by the COVID-19 pandemic and measures linked to it.

fruit, vegetable, and wine sectors. The act was published on 4th May 2020, after being adopted only four days prior via the urgency procedure. The process of scrutiny then took the usual two months, but the act had already entered into force because of the urgency procedure. The validity of the measure was then extended by another delegated act,<sup>174</sup> which was again adopted through the urgency procedure and involved an early non-objection of the EP before the end of the period of scrutiny.

Other delegated acts that were adopted through the urgency procedure dealt with transports, especially the extension of the slot waiver for airlines<sup>175</sup> and the period for reduction of track access,<sup>176</sup> as well as handling the consequences of the pandemic on the ground handling service providers,<sup>177</sup> on operating licenses,<sup>178</sup> and on the rail market.<sup>179</sup> Similarly, the urgency procedure was employed for delegated acts regulating the acceptance period of vaccination

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<sup>174</sup> Commission Delegated Regulation (EU) 2021/95 of 28 January 2021 amending Delegated Regulation (EU) 2020/592 on temporary exceptional measures derogating from certain provisions of Regulation (EU) No 1308/2013 of the European Parliament and of the Council to address the market disturbance in the fruit and vegetables and wine sectors caused by the COVID-19 pandemic and measures linked to it.

<sup>175</sup> Commission Delegated Regulation (EU) 2020/1477 of 14 October 2020 amending Council Regulation (EEC) No 95/93 as regards the temporary extension of exceptional measures to address the consequences caused by the COVID-19 pandemic.

<sup>176</sup> Commission Delegated Regulation (EU) 2022/1036 of 29 June 2022 amending Regulation (EU) 2020/1429 of the European Parliament and of the Council, as regards the extension of the reference period.

<sup>177</sup> Commission Delegated Regulation (EU) 2020/2114 of 16 December 2020 amending Regulation (EC) No 1008/2008 of the European Parliament and of the Council as regards the temporary extension of exceptional measures to address the consequences of the COVID-19 pandemic with regard to selection of groundhandling service provider.

<sup>178</sup> Commission Delegated Regulation (EU) 2020/2115 of 16 December 2020 amending Regulation (EC) No 1008/2008 of the European Parliament and of the Council as regards the temporary extension of exceptional measures to address the consequences of the COVID-19 pandemic with regard to operating licences.

<sup>179</sup> Commission Delegated Regulation (EU) 2020/2180 of 18 December 2020 extending the reference period of Regulation (EU) 2020/1429 of the European Parliament and of the Council establishing measures for a sustainable rail market in view of the COVID-19 outbreak; Commission Delegated Regulation (EU) 2021/1061 of 28 June 2021 extending the reference period of Regulation (EU) 2020/1429 of the European Parliament and of the Council establishing measures for a sustainable rail market in view of the COVID-19 outbreak.

certificates issued via EU Digital Covid Certificate<sup>180</sup> and exempting minors from it.<sup>181</sup> In all the above cases, the acts were adopted and published right away, mostly on the following day. In the absence of the urgency procedure, the early non-objection has significantly helped speed up the process in at least one instance. In the case of another delegated act dealing with the disruption of the fruit, vegetable, and wine sector,<sup>182</sup> the EP expressed its early non-objection ten days after the adoption of the act, and the Council ten more days after that. The publication of the delegated act was therefore possible in roughly a month since its adoption. In other cases, the EP or Council expressed their early non-objections individually, not prompting the early publication of the acts, which nevertheless entered into force within the regular two-month period.

Implementing acts were adopted with much less urgency than delegated acts. Regardless, the procedures were always concluded within a couple of months from the initial planning of the act. The first implementing act, for instance, was adopted in November 2020, almost nine months after the onset of the crisis, and it dealt with the European sky performance and charging scheme.<sup>183</sup> In one case, an implementing act<sup>184</sup> laying down technical specifications and rules for

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<sup>180</sup> Commission Delegated Regulation (EU) 2021/2288 of 21 December 2021 amending the Annex to Regulation (EU) 2021/953 of the European Parliament and of the Council as regards the acceptance period of vaccination certificates issued in the EU Digital COVID Certificate format indicating the completion of the primary vaccination series.

<sup>181</sup> Commission Delegated Regulation (EU) 2022/503 of 29 March 2022 amending Regulation (EU) 2021/953 of the European Parliament and of the Council as regards exempting minors from the acceptance period of vaccination certificates issued in the EU Digital COVID Certificate format.

<sup>182</sup> Commission Delegated Regulation (EU) 2021/374 of 27 January 2021 amending Delegated Regulation (EU) 2020/884 derogating in respect of the year 2020 from Delegated Regulation (EU) 2017/891 as regards the fruit and vegetables sector and from Delegated Regulation (EU) 2016/1149 as regards the wine sector in connection with the COVID-19 pandemic, and amending Delegated Regulation (EU) 2016/1149.

<sup>183</sup> Commission Implementing Regulation (EU) 2021/2071 of 25 November 2021 subjecting certain vaccines and active substances used for the manufacture of such vaccines to export surveillance.

<sup>184</sup> Commission Implementing Decision (EU) 2021/1073 of 28 June 2021 laying down technical specifications and rules for the implementation of the trust framework for the EU Digital COVID Certificate established by Regulation (EU) 2021/953 of the European Parliament and of the Council.

the EU Digital Covid Certificate was adopted and published in roughly one month, including the scrutiny period. Hence the use of these measures is still quite efficient, as it allows for the whole process to wrap up in a limited amount of time. Finally, it is worth mentioning that no delegated or implementing acts could be adopted in the area of free movement of persons, as the 2004 Directive<sup>185</sup> does not contain any empowerments and it has not been amended since then (Interview 10).

Thoroughly assessing the effectiveness of the above mentioned delegated and implementing acts would be rather difficult, especially because a good part of them has now expired. Nonetheless, it can be assumed that they had a positive impact on the effectiveness of crisis management given the urgency with which they have mostly been adopted, and particularly in the case of those delegated acts that have been extended. Furthermore, their efficiency is key. Not only do delegated and implementing acts have the potential to be adopted fairly quickly, but they are embedded in a system of low contestation and bureaucratic collusion that triggers a rather efficient institutional machinery. This happens even in the case of apparently technical decisions that actually have a wider effect, such as the extension of certain already-existing measures or the derogation from others. While not ideal for the input and throughput legitimacy of crisis management, it is particularly relevant for output legitimacy, which is mostly sought in situations of crisis. As it was seen in the previous chapters, potential deadlocks and politicised discussions may arise in the context of deciding on the empowerments to be added to the basic act. However, the process behind the actual adoption of delegated and implementing acts appears to be in line with the output expectations of crisis management. This idea seems to be reinforced by the increasingly crisis-related empowerments that can be found in recent emergency instruments.

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<sup>185</sup> Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC.

### *3.2 The Internal Market Emergency and Resilience Act*

To mark the 30th anniversary of the entry into force of the Maastricht Treaty, the Commission brought forward a series of proposals aimed at tackling the vulnerabilities of the internal market that were exposed by the most recent crises. In particular, it presented the proposal for a Regulation establishing a Single Market Emergency Instrument (SMEI)<sup>186</sup> and two accompanying proposals amending harmonised product legislation<sup>187</sup> in order to safeguard free movement and maintain economic stability (Kramer, 2022; Ragonnaud, 2023). The proposals aimed to enhance the single market's preparedness and response capabilities during crises by establishing a regulatory framework that includes contingency planning and an early warning system. The proposal for the SMEI package included several specific measures designed to support the economy during crises and its provisions were designed to ensure the sustainability of the four fundamental freedoms of the internal market. The general idea behind such an instrument was to establish a basic framework aimed at dealing with crises and to provide last resort measures in case of a crisis threatening the supply of fundamental goods and services. The negotiations leading to the adoption of this instrument proved to be rather lengthy and delicate (Interview 9). The member states were reluctant of the proposal, as they perceived the risk that restrictions towards free movement, normally regulated through soft law and by means of Council Recommendations, would then fall under the scope of hard law (Interview 10).

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<sup>186</sup> Proposal for a Regulation of the European Parliament and of the Council establishing a Single Market emergency instrument and repealing Council Regulation No (EC) 2679/98.

<sup>187</sup> Proposal for a Directive of the European Parliament and of the Council amending Directives 2000/14/EC, 2006/42/EC, 2010/35/EU, 2013/29/EU, 2014/28/EU, 2014/29/EU, 2014/30/EU, 2014/31/EU, 2014/32/EU, 2014/33/EU, 2014/34/EU, 2014/35/EU, 2014/53/EU and 2014/68/EU as regards emergency procedures for the conformity assessment, adoption of common specifications and market surveillance due to a single market emergency (2022/0280(COD)); Proposal for a Regulation of the European Parliament and of the Council amending Regulations (EU) 2016/424, (EU) 2016/425, (EU) 2016/426, (EU) 2019/1009 and (EU) No 305/2011 as regards emergency procedures for the conformity assessment, adoption of common specifications and market surveillance due to a single market emergency (2022/0279(COD)).

In the end, the Council and the EP found a compromise by means of the IMERA, which was published as a Regulation<sup>188</sup> in the Official Journal of the European Union on 8th November 2024. The Regulation defines crises as exceptional and unexpected events that have a severe impact on the internal market,<sup>189</sup> and distinguishes between a vigilance<sup>190</sup> and emergency<sup>191</sup> mode. The former is to be activated to monitor potential crises, while the latter aims at rapid response measures when a significant disruption occurs. The IMERA proceeds to outline several last-resort measures and establishes a Single Market Emergency Board, composed of representatives of the member states, for facilitating the cooperation, exchange of information and the smooth implementation of the Regulation.<sup>192</sup>

The IMERA includes several empowerments for the adoption of implementing acts, whether by the Commission or the Council. For instance, the activation of both the vigilance<sup>193</sup> and emergency<sup>194</sup> modes shall be enacted by a Council implementing act on the basis of a proposal by the Commission. The Commission may adopt an implementing act establishing the contingency framework, particularly to enhance the cooperation between the member states and the EU, to secure the exchange of information, and to coordinate crisis communication.<sup>195</sup> During the emergency mode, it may adopt administrative measures by means of an implementing act in order to facilitate the free movement of persons and services during emergencies.<sup>196</sup> Other

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<sup>188</sup> Regulation (EU) 2024/2747 of the European Parliament and of the Council of 9 October 2024 establishing a framework of measures related to an internal market emergency and to the resilience of the internal market and amending Council Regulation (EC) No 2679/98 (Internal Market Emergency and Resilience Act).

<sup>189</sup> Ibid., Art. 3(1).

<sup>190</sup> Ibid., Art. 3(2).

<sup>191</sup> Ibid., Art. 3(3).

<sup>192</sup> Ibid., Art. 4.

<sup>193</sup> Ibid., Art. 14.

<sup>194</sup> Ibid., Art. 18.

<sup>195</sup> Ibid., Art. 9.

<sup>196</sup> Ibid., Art. 22.

empowerments for implementing acts involve the request of information from operators,<sup>197</sup> the activation of emergency conformity assessments,<sup>198</sup> and the requests for priority production or supply of certain goods.<sup>199</sup> The Regulation sets the conditions for use of the examination procedure<sup>200</sup> and envisions the adoption of immediately applicable implementing acts in case of imperative urgency.<sup>201</sup>

A couple of differences between the proposal for the SMEI and the Regulation establishing the IMERA indicate what kind of negotiations might have taken place behind the scenes. For instance, the Commission was originally empowered to establish crisis protocols concerning the cooperation between national and EU competent authorities in vigilance and emergency modes by means of a delegated act,<sup>202</sup> and not an implementing act. Moreover, while the Council was always the one empowered to adopt the emergency mode,<sup>203</sup> the Commission was originally the one empowered to activate the vigilance mode by means of an implementing act.<sup>204</sup> As a result, it is likely that the member states lobbied for concentrating more power in their own hands and those of the Council. The EP is therefore completely excluded from the game, considering that its role provided by the Regulation is in any case minimal.<sup>205</sup>

Despite the concerns for input and throughput legitimacy, it is remarkable how the trend of including empowerments for implementing acts in emergency

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<sup>197</sup> Ibid, Art. 27.

<sup>198</sup> Ibid., Art. 28.

<sup>199</sup> Ibid., Art. 29.

<sup>200</sup> Ibid., Art. 45(2).

<sup>201</sup> Ibid., Art. 45(3).

<sup>202</sup> Art. 6 of the Proposal for a Regulation of the European Parliament and of the Council establishing a Single Market emergency instrument and repealing Council Regulation No (EC) 2679/98.

<sup>203</sup> Ibid., Art. 14.

<sup>204</sup> Ibid., Art. 9.

<sup>205</sup> According to Art. 39 of the Regulation, for instance, the EP may be informed of the joint procurement procedures conducted by the Commission.

instruments started by the Regulation addressing situations of *force majeure* in the migration sector is being reprised by the IMERA. Both Regulations have been adopted in 2024, after the EU's lengthy experience with managing the polycrisis, which has increasingly and systematically included mechanisms of delegated rulemaking. In both cases, implementing acts – whether of the Commission or the Council – are envisioned as the relevant measures to declare a state of emergency of sorts. Moreover, several other provisions may be adopted by means of Art. 291 TFEU, including more substantive measures on how to respond to the crisis. It is surely interesting to note that while in the case of the IMERA the Council is the sole addressee of the delegation of regulatory powers, the Commission may at least declare a situation of *force majeure*. This has likely to do with the nature of the policy area and with the outcome of negotiations that took place behind closed doors. In any case, it is perhaps not a stretch to assume that, had delegated and implementing acts not brought a positive impact on the effectiveness of crisis management and perhaps EU decision-making in general, the empowerments would have likely not been added in this scope. The Covid-19 pandemic has shown that, when applicable, delegated rulemaking can be an effective and efficient tool of crisis management. The IMERA, in particular, is a form of output of the Covid-19 pandemic that will serve as a source of input in the eventuality of another crisis.

#### **4. The Consequences to the War in Ukraine**

The war in Ukraine had a severe impact on the internal market, particularly due to the Russian occupation of ports on the Black Sea and the subsequent dramatic drop of Ukrainian food exports (European Council and Council of the European Union, 2024a). Moreover, the EU had to deal with a reduced energy supply resulting from its efforts to phase out Russian fossil fuel imports (European Commission, 2022). As such, other than being active on the foreign policy front in supporting Ukraine and enacting restrictive measures against Russia, the EU has worked on safeguarding the internal market from possible external shocks. As it was already discussed, two Regulations were adopted in

particular to deal with the issues deriving from the diversification of energy imports and the impossibility of trading with Ukraine. In the former case, the framework of Art. 122 TFEU allowed for a swift adoption of the Gas Regulation (Interview 3),<sup>206</sup> which occurred roughly two months after the Commission presented the REPowerEU plan to end the dependence on Russian fossil fuels.<sup>207</sup> The Council later adopted the Commission's proposal<sup>208</sup> to extend the Regulation by a further twelve months. A Commission's report<sup>209</sup> shows that between August 2022 and December 2023 the member states collectively reduced gas demand by over 100 billion cubic meters compared to the five-year average (European Commission, 2024b). Due to its effectiveness and efficiency, the Gas Regulation is seemingly a success story for the output legitimacy of EU crisis management.

The latter case, namely a Regulation to establish trade-liberalisation measures applicable to Ukrainian exports,<sup>210</sup> was adopted two months after the Russian invasion via the OLP. However, despite its efficiency, it had a more complex development. The Russian occupation of the ports on the Black Sea rendered trade with Ukraine particularly difficult, leading its products to be predominantly exported in its neighbouring EU countries. Against this background, the EU adopted an implementing act temporarily suspending Ukrainian exports in Romania, Hungary, Slovakia, Bulgaria, and Poland in

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<sup>206</sup> Council Regulation (EU) 2022/1369 of 5 August 2022 on coordinated demand-reduction measures for gas.

<sup>207</sup> *Ibid.*, para. 2.

<sup>208</sup> Proposal for a Council Regulation amending Regulation (EU) 2022/1369 as regards prolonging the demand reduction period for reduction measures for gas and reinforcing the reporting and monitoring of their implementation.

<sup>209</sup> Report from the Commission to the Council, review on the functioning of Regulation (EU) 2022/1369 on coordinated gas demand reduction, amended by Regulation (EU) 2023/706

<sup>210</sup> Regulation (EU) 2022/870 of the European Parliament and of the 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, of the one part, and Ukraine, of the other part.

order to prevent unfair competition with local producers (Kleimann, 2023).<sup>211</sup> The implementing act, initially set for one month until June 2023, was extended until 15 September 2023 (Dabrowski, 2023). The provision eventually proved to be ineffective, largely because Ukrainian exports could enter the affected countries via other member states (ibid.).

#### *4.1 More Delegated and Implementing Acts in Times of Crisis*

Other delegated and implementing acts were nonetheless adopted to manage the threat that the war in Ukraine posed on the internal market. No urgency procedures were applied to delegated acts. However, in one instance,<sup>212</sup> the early non-objection by both the EP and the Council expedited the scrutiny process, allowing it to wrap up in one month. The delegated act sought to authorise the electronic issuance of certain certificates of inspection for organic and in-conversion products in Ukraine, thus addressing the disruptions that the war caused to the work of control authorities. Most of the other delegated acts dealt with the agricultural and rural sector, and especially with managing the market disturbance on the fruit and vegetable sector caused by the war<sup>213</sup> and on the use of non-organic feed for the production of organic livestock.<sup>214</sup> The

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<sup>211</sup> Commission Implementing Regulation (EU) 2023/903 of 2 May 2023 introducing preventive measures concerning certain products originating in Ukraine.

<sup>212</sup> Commission Delegated Regulation (EU) 2022/760 of 8 April 2022 amending Delegated Regulation (EU) 2021/2306 as regards the transitional provisions for certificates of inspection issued in Ukraine.

<sup>213</sup> Commission Delegated Regulation (EU) 2022/1225 of 14 July 2022 on temporary exceptional measures derogating from Regulation (EU) No 1308/2013 of the European Parliament and of the Council to address the market disturbance in the fruit and vegetables sector caused by Russia's invasion of Ukraine; Commission Delegated Regulation (EU) 2022/1623 of 14 July 2022 derogating from Delegated Regulation (EU) 2017/891 for the year 2022 as regards the value of marketed production, the national strategy and the recovery of Union financial assistance for multiannual commitments in the fruit and vegetables sector due to the crisis caused by Russia's invasion of Ukraine.

<sup>214</sup> Commission Delegated Regulation (EU) 2022/1450 of 27 June 2022 supplementing Regulation (EU) 2018/848 of the European Parliament and of the Council as regards the use of non organic protein feed for the production of organic livestock due to Russia's invasion of Ukraine.

scrutiny periods lasted the usual two months, allowing for the acts to be published in the Official Journal accordingly. In one case, a delegated act addressing the indicative maps of the trans-European transport network<sup>215</sup> was published in the Official Journal almost a year after its adoption in 2022, despite the scrutiny period being concluded on time. What happened in the meantime is unclear, especially because the delegated act is not recorded in the Legislative Observatory of the EP and the Register of Delegated and Implementing acts only provides minimal information. Nevertheless, the use of delegated acts dealing with the consequences of the war in Ukraine still proved to be relatively efficient, despite not having the same urgency as during the Covid-19 pandemic.

The use of implementing acts within this scope tells a more interesting story. First of all, the relevant first implementing act<sup>216</sup> was adopted on 25th March 2024, one day after the Russian invasion of Ukraine, even without the urgency procedure which was not envisioned by the basic act.<sup>217</sup> This implementing act establishes the war as an exceptional event causing a significant disruption of markets, thereby introducing a sort of state of alert. This measure is very similar to the empowerments that were added to both to the Regulation addressing situations of *force majeure* in the migration sector and to the IMERA. As it was discussed above, the Commission is empowered to establish a situation of crisis or *force majeure* by means of an implementing act in the former case. In the latter case, the Council is empowered to adopt an implementing decision to declare a vigilance or emergency mode. As demonstrated by the first implementing act adopted to address the conflict in Ukraine, a measure

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<sup>215</sup> Commission Delegated Regulation (EU) 2023/1176 of 14 July 2022 amending Regulation (EU) No 1315/2013 of the European Parliament and of the Council as regards the indicative maps of the trans-European transport network.

<sup>216</sup> Commission Implementing Decision (EU) 2022/500 of 25 March 2022 establishing the military aggression of Russia against Ukraine as the occurrence of an exceptional event causing a significant disruption of markets.

<sup>217</sup> Regulation (EU) 2021/1139 of the European Parliament and of the Council of 7 July 2021 establishing the European Maritime, Fisheries and Aquaculture Fund and amending Regulation (EU) 2017/1004.

establishing a state of alert or emergency should be adopted efficiently and be effective in laying down the exceptional rules therein. The choice of using implementing acts for these purposes is therefore remarkable, as their uniform application and centralisation features allow them to be efficient and effective instruments of crisis management. Finally, it is unclear whether the implementing act adopted in the context of the war in Ukraine served as an inspiration for the empowerments mentioned above, but it is surely the first instance in which an implementing act is endowed with the power to declare a state of emergency.

Another implementing act,<sup>218</sup> amending the annexes of certain Regulations on restrictive measures with regard to the member states' competent authorities, was adopted on 11th April 2024 and published the following day. Other implementing acts addressing the agricultural market disruption were adopted a couple of months later.<sup>219</sup> The remaining relevant implementing acts were adopted between 2023 and 2024, encompassing multiple policy areas such as trade, home affairs, taxation, and financial stability. The Registers do not offer a comprehensive overview of the adoption timeline, but it is safe to assume that it has likely been uncontroversial and efficient given the relevant past experiences. Moreover, the procedural efficiency of the acts can be further boosted by the timeframe envisioned between the publication in the Official Journal and the entry into force. An act can be specific on when it enters into

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<sup>218</sup> Commission Implementing Regulation (EU) 2022/595 of 11 April 2022 amending certain Regulations concerning restrictive measures and setting out a single list for the Annexes to those Regulations containing the contact details of Member States' competent authorities and the address for notifications to the European Commission.

<sup>219</sup> Commission Implementing Regulation (EU) 2022/1228 of 14 July 2022 derogating from Implementing Regulation (EU) 2017/892 for the year 2022 as regards applications for aid as well as applications for advance payments and for partial payments due to the crisis caused by Russia's invasion of Ukraine; Commission Implementing Regulation (EU) 2022/1227 of 15 July 2022 amending Implementing Regulations (EU) No 808/2014 and (EU) No 809/2014 as regards a specific measure to provide exceptional temporary support under the European Agricultural Fund for Rural Development (EAFRD) in response to the impact of Russia's invasion of Ukraine; Commission Implementing Regulation (EU) 2022/2240 of 20 October 2022 amending Implementing Regulation (EU) 2021/1378, Implementing Regulation (EU) 2021/2119 and Implementing Regulation (EU) 2021/2307 as regards the use of the qualified electronic seal for the issuance of certificates.

force after its publication, setting such a timeframe to one day if needed.<sup>220</sup> The response to the consequences of the war in Ukraine has therefore shown how implementing acts can generally be efficient and effective instruments of crisis management, owing it to their legal framework and adaptability.

## **5. Concluding Remarks**

The imperative grounds for urgency and need for a quick response render crisis management fundamentally output-driven. Policy effectiveness and procedural efficiency make up for the reduced democratic representation, accountability, and transparency, as long as emergency measures are considered to be temporary and proportionate. This chapter has focused on analysing how the use of delegated rulemaking fits into these dynamics, and on how it intertwines with the output legitimacy of crisis management in the EU. Starting from the sovereign debt and the refugee crises, where the use of delegated rulemaking was marginal and the empowerments not emergency-related, the discussion has then moved to the management of the Covid-19 pandemic and the consequences to the war in Ukraine. In the latter cases, numerous delegated and implementing acts have been adopted with the explicit aim of addressing certain aspects of the crises. When empowerments were present in the basic act, delegated rulemaking has proven to have the potential of being an efficient and effective tool of crisis management due to its relatively short adoption timeline, its smooth and uncontested decisions, and its flexible framework. The exercise of centralised powers, particularly of implementing acts, seems to be particularly suitable for enacting emergency measures in a uniform way.

Against this background, it is possible to conclude that the solid grounds of output legitimacy of delegated rulemaking respond to the requirement of crisis management. Naturally, the doubts surrounding input and throughput legitimacy remain, but they are inevitably not a primary concern in the context

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<sup>220</sup> Art. 2 of the Commission Implementing Regulation (EU) 2022/2368 of 3 December 2022 amending Council Regulation (EU) No 833/2014 concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine.

of crises. Their solution should nevertheless be sought during normal times. Moreover, it is important to be reminded of the tension between the member states and the Commission over the empowerments for delegated rulemaking. Member states remain sceptical of the delegation of regulatory powers to the Commission, especially when it comes to delegated acts. In order to retain some control over the process of scrutiny, they tend to favour empowerments pursuant to Art. 291 TFEU. The ambiguity of the legal framework often allows room for negotiation, the result of which is often politicised rather than technical. While, in the end, these concerns might not affect output legitimacy, they are crucial for understanding the process of delegated rulemaking and how it might have an impact on crisis management in the EU.

Finally, the recent developments in the governance of crisis management makes an interesting case. In 2024, two ground-breaking Regulations reshaping emergency response in the EU were adopted. First, a Regulation addressing situations of *force majeure* in the scope of migration and, secondly, the IMERA, aimed at managing severe disruptions in the internal market. Both instruments are endowed with a series of empowerments on delegated and (mostly) implementing acts with the specific purpose of managing a potential crisis. It is remarkable that in both cases, a state of *force majeure* or emergency may be declared by means of an implementing act, respectively of the Commission or the Council. While delegated and implementing acts generally regulate highly technical aspects of EU governance, empowerments for crisis-specific measures and, particularly, the adoption of a state of emergency through the latter, seemingly indicate an increase in the politicisation of the decisions enacted by means of delegated rulemaking.

## Chapter 7

### *Conclusions*

In the context of the polycrisis, emergency response and crisis management have become central elements of EU decision-making. The crisisification of EU policymaking has entailed the endowment of the polity with emergency mechanisms, such as early warning systems and urgency procedures, to prepare the EU for the next crisis (Rhinard, 2019). Bearing in mind the recent crisis-oriented developments of the last decade, it has also been argued that the Treaties may benefit from the addition of a series of codified procedures aimed at managing exceptional situations. These provisions, referred to as an EU emergency constitution, would be aimed at establishing the legal framework for the use and limits of emergency powers, detailing the mechanism required to declare an emergency, designating the relevant actors (usually the executive) to exercise emergency powers and restoring constitutional normalcy, and defining the relevant mechanisms of checks and balances (Kreuder-Sonnen, 2022). The introduction of such a framework would enhance the legitimacy and credibility of the EU's use of emergency powers by providing it with an input and, hence, stronger democratic grounds. On the flipside, the prospect for an EU emergency constitution lacks practical feasibility as well as desirability in the public's eye, provided that crisis management fundamentally remains an endeavour of the sovereign state (White, 2022).

The major crises that the EU has faced have clearly posed a set of challenges to its governance structure, yet they all shared a common need for swift action to address the unprecedented circumstances. Crisis management may require setting aside certain democratic principles, such as participation and accountability, in favour of fulfilling procedural effectiveness and efficiency. As a result, it has been already widely established in the literature that the input and throughput legitimacy of crisis decision-making is often sidelined to make room for a stronger output legitimacy (Schmidt, 2021, 2024). Against this background, this thesis has analysed the use of delegated rulemaking pursuant

to Arts. 290 and 291 TFEU in the context of crises and its subsequent impact on the legitimacy of crisis management in the EU. Its aim was to solve the research puzzle on how delegated rulemaking has impacted the legitimacy of EU decision-making during crises, and to answer other related questions which may arise.

The above has been undertaken by examining the adoption of delegated and implementing acts, as well as their related empowerments, in the context of addressing the major crises that the EU has had to confront – specifically, the sovereign debt crisis, the refugee crisis, the Covid-19 pandemic, and the consequences to the war in Ukraine. After laying the historical and institutional context of both crisis management and delegated rulemaking, and after building an analytical framework based on the three processes of legitimation, the analysis has delved into a discussion on each of the crises chosen as case studies. The use of delegated rulemaking during each of the crises has been observed from the perspective on input, throughput, and output legitimacy, followed by some considerations on how the former has affected the latter. This final chapter aims to provide a comprehensive overview of what has been discussed throughout this work, and to offer some cross-cutting conclusive reflections.

## **1. Delegated Rulemaking in EU Crisis Management**

Over the last decades, delegated and implementing acts have become an increasingly prominent instrument of decision-making in the EU, with an average of over one hundred delegated acts and over one thousand implementing acts being adopted each year (Christiansen and Lange, 2021). Delegated rulemaking provides a swift and practical way to adopt measures (Interview 10) which are technical in nature and rarely politicised. As such, despite the thorough mechanisms of scrutiny that are envisioned by the Treaties and strengthened by secondary legislation, the adoption of delegated and implementing acts remains widely uncontested. A higher politicisation emerges in the context of the negotiations on the kind of empowerment to add

to the basic act (Interview 1). Taking advantage of the blurred line that at times separates the two categories of acts (Chamon, 2015; Vosa, 2015; Tauschinsky and Weiß, 2018; A Campo, 2021), the EP and the member states tend to exert pressure on each other to obtain the empowerment that suits them best. Naturally, the EP favours empowerments for delegated acts due to its binding scrutiny role of the Commission's exercise of delegated powers. The member states, on the other hand, push for empowerments for implementing acts, over which they have full control through the comitology committees.<sup>221</sup> The discretion between Arts. 290 and 291 TFEU then appears to be a political choice, rather than a legal one, as it is often translated to an inter-institutional contention driven by interest and power control.<sup>222</sup>

Beyond the scrutiny of delegated acts and the legislative role enacted upon negotiating the empowerments in the basic act, the EP does not retain other significant powers in the scope of delegated rulemaking.<sup>223</sup> Furthermore, it does not appear to actively involve itself with the scrutiny of delegated acts, having exercised its right to objection in 1.2 per cent of the occasions between 2009 and 2019 (Christiansen and Lange, 2021). Following a similar pattern, the Council has vetoed only 0.6 per cent of delegated acts during the same time frame (ibid.). Moreover, comitology committees also appear to be caught in a system of bureaucratic collusion with the Commission, facilitating an essentially obstacle-free process for the adoption of implementing acts (Gallinella and Christiansen, 2024). Against this background, the input and

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<sup>221</sup> Though it may appear at first glance that the member states also retain control over delegated acts through the role of the Council, the scrutiny of delegated acts is actually carried out by the Council Legal Service (Interview 2). While still representing the member states, it is a different entity from the Permanent Representations, whose experts and attachés are invited to the comitology committees (Interview 1).

<sup>222</sup> In the case *Biocides*, the CJEU has rejected the normative base according to which Arts. 290 and 291 TFEU are distinct and mutually exclusive, not providing an unequivocal distinction between delegated and implementing acts.

<sup>223</sup> The EP also has the right to object to measures adopted via the RPS. However, the procedure can no longer be used in new legislation since the Lisbon Treaty, despite some empowerments being still present in older secondary legislation. It may also submit a non-binding opinion on the adoption of an implementing act to the Commission.

throughput legitimacy of delegated and implementing acts is broadly questioned in the literature building on the issues surrounding their accountability, transparency, and democratic representation (see, among others, Peers and Costa, 2012; Bergström, and Ritleng, 2016; Brandsma and Blom-Hansen, 2017; Marissen, 2019; Turk, 2021; Blom-Hansen, 2021). Their output legitimacy, on the other hand, is widely recognised by practitioners who have praised delegated and implementing acts for their all-round efficiency and effectiveness (Interview 1; Interview 3; Interview 7; Interview 10).

The onset of different crises and the subsequent turn to emergency politics appear not to have altered these dynamics. Although crises often require a shift in the legitimacy balance of governance structures, putting emphasis on output legitimacy and temporarily sidelining input and throughput, the overall legitimacy of delegated rulemaking remains overall unaffected (Gallinella and Christiansen, 2024). The degree of contestation, in particular, remains low, whether to ensure quick decision-making, to demonstrate trust in the Commission, or plainly because the technical nature of delegated powers does not trigger sufficient attention during an emergency as much as during normal times.

Yet, this work has shown that the use of delegated rulemaking has become increasingly popular in the context of managing crises, from being virtually non-existent to providing for frame to political decisions such as the declaration of a state of emergency. This is not to say that the use of delegated rulemaking has boosted only in the context of crises. Quite the contrary, the Commission has not used the crisis setting to seek further empowerments for delegated powers in secondary legislation and the ratio between the number of empowerments and basic acts has remained constant (Brandsma and Blom-Hansen, 2024). However, the overall increase in the empowerments and the adoption of delegated and implementing acts over the course of the last decade, coupled with the higher need to resort to crisis management due to the polycrisis, has inevitably led to a surge in the use of delegated rulemaking in the context of crisis management as well. As hinted to above, there appears

also to have been a shift in the political significance of delegated rulemaking within this scope.

Such a shift is clearly reflected in the evolution of the use of delegated rulemaking over time and across different crises. The sovereign debt crisis and the refugee crisis, for instance, saw a very limited use of delegated and implementing acts as part of their emergency response strategies. In both cases, however, the Commission still sought empowerment through atypical channels, such as the creation or enhancing the competences of relevant decentralised agencies (Pollack and Slominiski, 2021; Volpato, 2022). The Covid-19 pandemic and the war in Ukraine, on the other hand, showcase a stronger use of delegated rulemaking, which was not necessarily aimed at purely technical measures. While the Commission still resorted to decentralised agencies and other instruments, delegated and implementing acts clearly consolidate a pattern of relying on executive rulemaking during crises.

The empowerments that allowed for the adoption of delegated and implementing acts during the two most recent crises were already present in the legislation, as it has been proven that the Commission did not seek further empowerments pursuant to Arts. 290 and 291 TFEU during that time (Brandsma and Blom-Hansen, 2024). This is likely one of the reasons why delegated rulemaking played a greater role during the Covid-19 pandemic and the war in Ukraine, coupled with an attempt to foster an increasingly supranational crisis management at the EU level. Conversely, the lack of delegated and implementing acts during the sovereign debt crisis and the refugee crisis can be framed as a result of the absence of relevant empowerments in secondary legislation, but it also stems from the specific circumstances of each crisis. The management of the sovereign debt crisis, for instance, was a combination of strictly intergovernmental action and the creation of bodies and instruments outside of the Treaties. The refugee crisis, on its hand, saw the Commission with a central role, but it chose to enact its

powers through different channels.<sup>224</sup> Following this line, the Commission has continued, if not strengthened, the trend of delegating emergency measures to delegated and implementing acts, likely as a lesson learned from the Covid-19 pandemic and the war in Ukraine, even if the Council maintains most of the empowerments of high political nature.

Against this background, it is compelling to assess and discuss the impact of delegated rulemaking on crisis management, particularly on its democratic legitimacy. The delegation of powers to an executive institution is a common strategy of crisis management, both at the national and EU level. Other than ensuring effective and streamlined decisions, it establishes a centralised channel for decision-making, as well as a more supranational emergency politics. Finally, despite the shortcomings illustrated above, delegated and implementing acts are embedded and safeguarded by the Treaties, providing a democratic basis for the whole process.

The typology of the processes of legitimation – input, throughput, output – (Schmidt, 2013) is a useful criterion to evaluate how the use of delegated rulemaking during crises has impacted crisis management in the EU. Input legitimacy pertains to the extent of democratic representation and politicisation in the decision-making process. It is hereby operationalised through the involvement of the EP, whether in the scrutiny or, empowerment process, the very empowerments providing democratic grounds for the Commission's, or occasionally the Council's, exercise of delegated powers, as well as public or institutional debate resulting from the potential politicisation of the measures. Throughput legitimacy focuses on the procedural quality of decision-making, emphasising especially the roles of accountability and transparency. The fulfilment of the scrutiny of delegated and implementing acts, the availability of data through online registers or archives, and the publicness of negotiations are used and the relevant indicators within this domain. Finally, output

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<sup>224</sup> As discussed above, it is remarkable that one of the most recent policy outcomes of the refugee crisis, namely the Regulation Addressing Situations of *Force Majeure*, puts delegated rulemaking at the forefront of crisis management in the migration sector.

legitimacy relates to the effectiveness and efficiency of policies and procedures, particularly to the swiftness and promptness with which they are adopted to respond to a certain crisis.

There are clearly several overlaps and grey zones between the three criteria, especially when projected in this specific framework. The role of the EP, for example, encompasses both input and throughput legitimacy. The enactment of urgency procedures, moreover, touches upon all three criteria, in that it affects the role of the EP, the fulfilment of scrutiny procedures, and the efficiency with which measures are adopted. Following a similar line, empowerments may be considered as a source of input, but they may as well result as a policy outcome following an emergency. While acknowledging these potential issues, this framework nonetheless offers a suitable lens to analyse the relevant aspects of crisis management and the extent to which they are impacted by the use of delegated rulemaking.

### *1.1 (Weak) Input Legitimacy*

Input legitimacy, and consequently democratic representation, participation, and politicisation, are often reduced or suspended in the context of a crisis (Schmidt, 2021, 2024). The need to take swift, technical decisions often results in the empowerment of executive institutions and trumps the fulfilment of democratic principles. Emergency politics in the EU has seldom entailed the adoption of instruments and mechanisms outside of the Treaties, which have then been integrated to the EU legal system without considerable legal safeguards or accountability (White, 2019). The adoption of measures by means of delegated rulemaking has at least ensured democratic grounds rooted in the Treaties. However, their limited scope and technocratic nature restrict meaningful democratic input.

During the sovereign debt crisis, delegated rulemaking, particularly delegated acts, was relatively rare and underdeveloped. Its limited use, constrained to only a couple of empowerments added to the Regulation establishing the

EBA<sup>225</sup> and the Level 2 phase of the Lamfalussy architecture, reflects the novelty of the instruments introduced by the Lisbon Treaty and the EU's narrow resources for dealing with a crisis. Similarly, the lack of significant use of delegated and implementing acts during the refugee crisis, except for a couple of non-crisis-related empowerments in relevant secondary legislation, makes it rather difficult to assess their impact on the input legitimacy of EU crisis management in these two cases. The role of the EP has been minimal beyond the allocation of the empowerments, which were highly technical and not in any case politicised. The management of the refugee crisis has nevertheless sparked the need for the introduction of crisis-related empowerments over a decade later which, in turn, will provide the relevant input in the event of a similar emergency.

The Covid-19 pandemic marked a turning point in this regard, with a notable increase in the adoption of delegated and implementing acts in the sphere of crisis management. Several instruments adopted to respond to the emergency, such as the RRF Regulation<sup>226</sup> and the Regulation establishing the EU Digital Covid Certificate,<sup>227</sup> provide the relevant empowerments for the use of Arts. 290 and 291 TFEU. The technical standards regulated by such empowerments are aimed to fill the gaps where the basic act was purposefully left quite general for reasons of time and efficiency (Interview 3). A similar story applies to the empowerments that were added to the Regulations addressing the gas supply

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<sup>225</sup> Regulation (EU) 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.

<sup>226</sup> Regulation (EU) 2021/241 of the European Parliament and of the Council of 12 February 2021 establishing the Recovery and Resilience Facility.

<sup>227</sup> 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.

shortage<sup>228</sup> and trade-liberalisation<sup>229</sup> following the war in Ukraine. The negotiations, in this instance, were contentious, with member states resisting the inclusion of empowerments for delegated acts to maintain control of the decision-making process.

The increasing reliance on mechanisms of delegated rulemaking over the course of these crises highlights the need for flexibility and practicality, but the input legitimacy remains weak overall. The negotiations for the empowerments, though admittedly politicised (Interview 1), often occur behind closed doors, thereby rendering public debate and participation virtually impossible. Moreover, the member states, particularly larger ones, tend to work together to avoid delegated acts, thereby further limiting the role of the EP (Interview 3; Interview 6). It is therefore possible to observe that the use of delegated rulemaking during crises exhibits the same symptoms that affect the input legitimacy of crisis management in general - namely, low parliamentary oversight, low public debate, secret and informal negotiations (Schmidt, 2021, 2024). As a result, it can be argued that delegated rulemaking, despite its weaknesses, does not fundamentally reduce the input legitimacy of crisis management, which is expected to be low. The Treaty-based nature of the measures provides a baseline level of input legitimacy which, while certainly not satisfactory, strengthens the democratic grounds of crisis management, contrary to those emergency instruments that have been integrated in the EU legal framework without any significant legal safeguard (White, 2019). Table 2 below summarises the impact of delegated rulemaking on the input legitimacy of crisis management in the EU.

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<sup>228</sup> Council Regulation (EU) 2022/1369 of 5 August 2022 on coordinated demand-reduction measures for gas.

<sup>229</sup> 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, of the one part, and Ukraine, of the other part.

	<b>Highlights of delegated rulemaking</b>	<b>Impact on input legitimacy of EU crisis management</b>
<b>Sovereign debt crisis</b>	<ul style="list-style-type: none"> <li>- Empowerments in EBA Regulation</li> <li>- Empowerments in Level 2 Lamfalussy architecture</li> </ul>	<ul style="list-style-type: none"> <li>- Democratic and legal basis for adoption of measures, but not strictly crisis-related</li> <li>- Role of the EP formally secured via the scrutiny of delegated acts</li> <li>- Empowerments not used, thus difficult to make a thorough evaluation</li> </ul>
<b>Refugee crisis</b>	<ul style="list-style-type: none"> <li>- Non-crisis-related empowerments in already existing Dublin Regulation</li> </ul>	<ul style="list-style-type: none"> <li>- Democratic and legal basis for adoption of measures, but not strictly crisis-related</li> <li>- Role of the EP formally secured via the scrutiny of delegated acts</li> <li>- Empowerments not used, thus difficult to make a thorough evaluation</li> </ul>
<b>Covid-19 pandemic</b>	<ul style="list-style-type: none"> <li>- Empowerments in RRF Regulation</li> <li>- Empowerments in EU Digital Covid Certificate Regulation</li> <li>- Urgency procedure or early non-objection employed for most of the delegated acts adopted</li> <li>- No rapporteurs appointed for every but two delegated acts</li> </ul>	<ul style="list-style-type: none"> <li>- Democratic and legal basis for adoption of measures in the scope of crisis-related instruments</li> <li>- Role of the EP formally secured via the scrutiny of delegated acts</li> <li>- <i>De facto</i> marginalisation of the role of the EP</li> <li>- No public debate or politicisation of issues</li> </ul>
<b>Consequences to the war in Ukraine</b>	<ul style="list-style-type: none"> <li>- Empowerments in Gas Regulation</li> <li>- Empowerments in Regulation on trade-liberalisation</li> <li>- Marginal use of urgency procedures and early non-objections for delegated acts</li> <li>- No rapporteurs appointed for every but one delegated act</li> <li>- Politicised negotiations over empowerments</li> </ul>	<ul style="list-style-type: none"> <li>- Democratic and legal basis for adoption of measures in the scope of crisis-related instruments</li> <li>- Role of the EP formally secured via the scrutiny of delegated acts</li> <li>- <i>De facto</i> marginalisation of the role of the EP</li> <li>- No public debate or politicisation of issues</li> <li>- Internal tensions and politicisation triggering informal negotiations</li> </ul>

*Table 2: Delegated Rulemaking and the Input Legitimacy of Crisis Management*

### *1.2 (Inconsistent) Throughput Legitimacy*

Akin to input legitimacy, the processes ensuring throughput legitimacy are normally reduced in times of emergency (ibid.). Accountability and transparency mechanisms become secondary to the adoption of swift decisions and, as a result, urgency procedures are activated, procedural times are cut, and informal meetings are held. Even during normal times, the scrutiny of delegated and implementing acts is often seen as a formality, as the delegating institutions are caught in a dynamic of bureaucratic collusion with the Commission (Gallinella and Christiansen, 2024). Similarly, the transparency reform of delegated rulemaking has been undertaken only relatively recently, with the Register of Delegated and Implementing Acts being launched in 2020, and the Comitology Register being established in 2011 before being renewed in 2020.

During the sovereign debt crisis and the refugee crisis, delegated and implementing acts were not adopted as part of the emergency response strategy. In the absence of practical application of the framework, it is not feasible to assess its impact on throughput legitimacy, as the accountability and transparency mechanisms were consequently not enacted. The shift happened, once again, during the Covid-19 pandemic, which saw a consistent use of delegated and implementing acts in crisis management. The frequent recourse to the urgency procedure and early non-objections expedited decision-making, though postponing or sidelining thorough scrutiny. An implementing act establishing a digital PLF was nonetheless objected to, signalling a more proactive scrutiny that goes beyond mere formality. However, given that this was a single case, it appears more as an outlier than a general rule. Moreover, virtual meetings and informal negotiations raised concerns on the transparency of the system, though efforts to enhance it, such as the establishment of the Register of Delegated and Implementing Acts, continued. In the context of management of the consequences to the war in Ukraine, on the other hand, delegated and implementing acts continued to be part of the response to the crisis, albeit with less urgency. This allowed, at least formally, the normal fulfilment of scrutiny procedures that nevertheless appeared to have been

conducted following the usual collusive approach. Finally, closed-door and telematic negotiations hindered the efforts towards further transparency.

The use of delegated rulemaking in EU crisis management paints an incongruent picture for throughput legitimacy. On the one hand, the accountability and scrutiny mechanisms envisioned by the Treaties and secondary legislation ensure a baseline of procedural integrity. On the other hand, however, these mechanisms are rarely followed in a proactive manner, whether during crises or normal times, leading the way for bureaucratic collusion undermining thorough oversight. After negotiating the empowerments, the relevant institutions adopt a seemingly *laissez-faire* behaviour concerning the Commission's exercise of delegated powers. Additionally, efforts to strengthen the transparency of the system have been fragmented and inconsistent. The relevant registers are available online, but they provide varying data and appear rather inaccessible. Further efforts to render the voting mechanisms in the comitology committees more transparent have been included in the proposal for a new Comitology Regulation, though without success. Against this backdrop, it can be concluded that the throughput legitimacy of crisis management, in any case generally overlooked, has not undergone significant changes and therefore has not essentially been impacted by the use of delegated rulemaking. However, the occasional efforts to carry out its scrutiny actively and to enhance the transparency of the system certainly contribute positively to the context. On the other hand, serious limitations are embodied by informal negotiations and practices of bureaucratic collusion. Table 3 illustrates the impact of delegated rulemaking on the throughput legitimacy of crisis management.

	<b>Highlights of delegated rulemaking</b>	<b>Impact on throughput legitimacy of EU crisis management</b>
<b>Sovereign debt crisis</b>	n/a	n/a
<b>Refugee crisis</b>	n/a	n/a
<b>Covid-19 pandemic</b>	<ul style="list-style-type: none"> <li>- Frequent use of urgency procedure for delegated acts</li> <li>- Frequent use of early non-objections for delegated acts</li> <li>- One implementing act objected</li> <li>- Launch of the Register of Delegated and Implementing Acts and reform of the Comitology Register</li> <li>- Virtual and informal meetings</li> </ul>	<ul style="list-style-type: none"> <li>- Low active scrutiny or accountability</li> <li>- High bureaucratic collusion</li> <li>- Inconsistent efforts to enhance transparency</li> </ul>
<b>Consequences to the war in Ukraine</b>	<ul style="list-style-type: none"> <li>- Formal scrutiny procedure in place, but no evidence of active engagement</li> <li>- Virtual and informal meetings</li> </ul>	<ul style="list-style-type: none"> <li>- No active scrutiny or accountability</li> <li>- High bureaucratic collusion</li> <li>- Encroachment on transparency</li> </ul>

*Table 3: Delegated Rulemaking and the Throughput Legitimacy of Crisis Management*

### *1.3 (Efficient) Output Legitimacy*

The primary goal of crisis management is to achieve output legitimacy (Schmidt, 2021, 2024). Reaching effective and efficient procedures and policy outcomes is fundamental to offer immediate relief and to address an emergency. Delegated and implementing acts are particularly suited to align with crisis management’s inherent emphasis on output, as their streamlined processes and technical focus enable the swift adoption of measures. However, their minimal role during the sovereign debt crisis does not allow for a well-grounded evaluation of their impact on output legitimacy in that context. While similar considerations can be made with regard to the refugee crisis, the

adoption of a relevant instrument as an outcome of the crisis calls for further analysis. The Regulation addressing situations of crisis or *force majeure*<sup>230</sup> in the field of migration envisions empowerments for the adoption of implementing acts as tools of crisis management. As a matter of fact, the Commission may declare a situation of *force majeure* by means of an implementing act, and the Council may adopt an implementing decision to establish derogations aimed at the ailing member state(s). It is therefore interesting to note how implementing acts are hereby used to adopt measures of utmost urgency that may also likely imply far-reaching political decisions.

During the Covid-19 pandemic, delegated rulemaking had become a more integral part of crisis management. Delegated and implementing acts were adopted disruptions to the internal market, especially in the areas of agriculture, transports, and justice and consumers. The urgency procedure, early non-objections, and the generally uncontested adoption of the measures facilitated efficient decision-making. Furthermore, the IMERA was adopted as an outcome to the crisis, particularly to protect the internal market from potential future emergencies. Once again, the Regulation envisions the empowerments for Council implementing decisions to declare a state of vigilance or emergency. Implementing powers are also conferred upon the Commission to adopt a contingency framework and administrative measures facilitating free movement. The first evidence of an implementing act used to establish a state of disruption of sorts can actually be found in the context of the management of the war in Ukraine.<sup>231</sup> Strikingly, such an act was adopted one day following the Russian invasion, giving proof of great efficiency. Other delegated and implementing acts were also adopted within that context, still rather efficiently even without the activation of the urgency procedure.

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<sup>230</sup> Regulation (EU) 2024/1359 of the European Parliament and of the Council of 14 May 2024 addressing situations of crisis and force majeure in the field of migration and asylum and amending Regulation (EU) 2021/1147.

<sup>231</sup> Commission Implementing Decision (EU) 2022/500 of 25 March 2022 establishing the military aggression of Russia against Ukraine as the occurrence of an exceptional event causing a significant disruption of markets.

Delegated rulemaking appears to be highly responsive to the demand for output legitimacy, which is typical of crisis management. There are, however, a couple of shortcomings that deserve to be mentioned. First, the member states' reluctance to delegate extensive regulatory powers to the Commission may impinge on the neutrality of the empowerments and, as such, of the institutions involved. Finally, the limited scope of such regulatory measures generally constrains them to regulate highly technical and non-politicised decisions, that may not be deemed as central in the context of a crisis, even if some changes seem to be happening in this regard. Table 4 below offers an overview of the impact of delegated rulemaking on the output legitimacy of EU crisis decision-making.

	<b>Highlights of delegated rulemaking</b>	<b>Impact on output legitimacy of EU crisis management</b>
<b>Sovereign debt crisis</b>	n/a	n/a
<b>Refugee crisis</b>	<ul style="list-style-type: none"> <li>- Adoption of the Regulation addressing situations of crisis and <i>force majeure</i> in 2024</li> </ul>	<ul style="list-style-type: none"> <li>- Implementing acts endowed with emergency capacity and seemingly far-reaching political decisions</li> <li>- Centralised and supranational crisis-management</li> </ul>
<b>Covid-19 pandemic</b>	<ul style="list-style-type: none"> <li>- Efficient adoption of delegated and implementing acts</li> <li>- The extension of some of these measures indicates, to an extent, their effectiveness</li> <li>- Adoption of the IMERA in 2024</li> </ul>	<ul style="list-style-type: none"> <li>- High efficiency and effectiveness</li> <li>- Implementing acts endowed with emergency capacity and seemingly far-reaching political decisions</li> <li>- Centralised and supranational crisis-management</li> </ul>
<b>Consequences to the war in Ukraine</b>	<ul style="list-style-type: none"> <li>- Efficient adoption of delegated and implementing acts even without urgency procedure</li> <li>- First evidence of implementing act declaring a state of emergency</li> </ul>	<ul style="list-style-type: none"> <li>- High efficiency</li> <li>- Implementing acts endowed with emergency capacity and seemingly far-reaching political decisions</li> <li>- Centralised and supranational crisis management</li> </ul>

*Table 4: Delegated Rulemaking and the Output Legitimacy of Crisis Management*

## 2. Concluding Reflections

The above analysis has shown, in short, that the use of delegated rulemaking does not have a significant impact on crisis management in the EU, thereby rejecting the initial hypothesis, namely that if practices of delegated rulemaking pursuant to Arts. 290 and 291 TFEU are used during crises, then the democratic

legitimacy of crisis management will be affected. However, while it is true that delegated and implementing acts do not positively affect the democratic legitimacy of crisis management, it is also true that they do not encroach on it either. In fact, rather than improving or worsening the legitimacy of crisis management, delegated rulemaking appears to align with its requirements for input, throughput, and especially output. The legal basis for the empowerments, scrutiny mechanisms, and transparency, as well as the tendency for bureaucratic collusion, allow for sufficient input and throughput without standing in the way of output. Therefore, in situations of crisis, democratic legitimacy may continue to function in the way that it is expected from the particular context. Delegated rulemaking appears to be especially in line with the need for policy effectiveness and efficiency, hence output legitimacy, but so are other instruments of decision-making that the EU has at its disposal during crises. It should be noted, for instance, that even the procedural times of the OLP may be dramatically cut down in the case of an emergency (Interview 3). Moreover, it is important to be reminded that the technical and administrative nature of delegated and implementing acts normally prevents them to address broader political decisions, which are often at the core of crisis management.

However, the increasing empowerments for implementing decisions aimed at declaring a state of emergency and to adopt temporary measures is indeed remarkable. Whether to ensure a quick response or centralised decision-making, it may be a sign that this category of acts is slowly being entrusted with political, emergency related decisions, thus resulting in a conscious shift in the use of delegated rulemaking as a tool of crisis management. Delegated acts have also, on occasion, been at the centre of attention of public debate and politicisation. In the context of negotiating the EU Green Deal, the adoption of a complementary delegated act<sup>232</sup> on the EU taxonomy sparked a critical debate

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<sup>232</sup> Commission Delegated Regulation (EU) 2022/1214 of 9 March 2022 amending Delegated Regulation (EU) 2021/2139 as regards economic activities in certain energy sectors and Delegated Regulation (EU) 2021/2178 as regards specific public disclosures for those economic activities.

in the EP. The delegated act classified certain nuclear and gas energy activities as green under the EU taxonomy. The scrutiny of such an act received widespread public attention and, although many MEPs and party groups in the EP voiced strong opposition and threatened to reject it (Miklavc, 2022), the relevant majority was not reached, and the act was eventually adopted. In 2023, some environmental organisations including WWF and ClientEarth challenged the act before the CJEU, suing the EU for the labelling of certain fossil gas activities as sustainable (WWF, 2023). Despite this example not being applicable to the context of crises, except if considering climate change as a slow burning crisis (Kamkhaji and Radaelli, 2017; Seabrook and Tsingou, 2019; Radaelli, 2022), it nevertheless demonstrates that delegated acts also have potential to enact far-reaching political decisions.

Having insofar established the alignment of delegated rulemaking with the democratic legitimacy requirements of crisis management, as well as its increasing capacity regulate political issues, some reflections on future outlooks are due. Carrying out such an endeavour is important because it fills a gap in two different strands of literature – namely, that on EU crisis governance and on delegated rulemaking. In the case of the former, this thesis provides an innovative look at an understudied, yet increasingly relevant, instrument of standard decision-making that has been used as part of recent strategies of crisis management. The focus on its democratic legitimacy, in particular, lays the ground for potential normative analysis and a re-evaluation of the standards and practice for emergency response in the EU. In the case of the latter, this thesis aims to bring relevance to the framework of delegated rulemaking, which does not appear to be very popular in the EU scholarship and yet it is crucial in EU decision-making, by projecting it into a widely discussed and politically rich sphere such as EU crisis governance.

The use of implementing acts, and delegated acts to an extent, may appear at first glance as the perfect recipe for crisis management. The delegation of powers to an executive institution<sup>233</sup> enabling centralised and swift decisions,

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<sup>233</sup> Or, occasionally, the Council.

the relevant scrutiny mechanism ensuring accountability, and the possibility to enact urgency clauses or other procedural shortcuts seem to be very similar to the emergency politics that is often undertaken at the national level. However, differently from the legal orders of some member states, the EU Treaties do not provide the basis for decree ruling. On the one hand, such provisions are relevant in the scope of the proposed and debated EU emergency constitution (Kreuder-Sonnen, 2022, 2023), as it would provide a legal basis and further democratic grounds for an increasingly swift and streamlined EU emergency politics. On the other hand, one must acknowledge the consequences that may lead to, particularly at the national level concerning public perception and the rise of Eurosceptic parties. The delegation of regulatory powers during emergencies may be especially risky in this sense because of the political responsibility that it entails (Interview 10), and as such the Commission may have consciously chosen to forgo a further regulation of the use of delegated powers as instruments crisis management. Nevertheless, in a context of crisisification of policymaking (Rhinard, 2019), it appears that delegated rulemaking, and particularly implementing acts, are slowly becoming a more integral part of crisis management in the EU by being endowed with an emergency-solving capacity.

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## Appendix

### *Interviews*

<b>Interview</b>	<b>Interviewee</b>	<b>Place</b>	<b>Date</b>
1	Legal advisor, Permanent Representation of member state to the European Union	Brussels	04/05/2023
2	Legal advisor, Permanent Representation of member state to the European Union	Brussels	22/05/2023
3	Legal advisor, Permanent Representation of member state that held the presidency of the Council during the Covid-19 pandemic	Brussels	23/05/2023
4	Senior Official, Procedural and inter-institutional affairs, DG AGRI	Brussels	24/05/2023
5	Legal advisor, Permanent Representation of member state that held the presidency of the Council during the Covid-19 pandemic	Brussels	26/05/2023
6	Legislative affairs officer, European Parliament	Brussels	01/06/2023
7	Legal advisor, Permanent Representation of member state that held the presidency of the Council during the first stages of the Russian invasion of Ukraine	Brussels	05/06/2023
8	Member of the European Parliament and member of the Committee on Agriculture and Rural Development	Brussels	06/06/2023
9	Senior official, Policy coordination, DG MOVE	Brussels	07/06/2023
10	Policy officers, DG JUST	Brussels	08/06/2023

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