

EXECUTIVE ACCOUNTABILITY IN TIMES OF CRISIS

DELEGATED RULEMAKING IN THE EU

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Culminating more than a decade of crisis in Europe, the Covid-19 pandemic has opened an important window of opportunity for institutional and policy change, not only at the “reactive” level of emergency responses, but also to tackle more broadly the many socio-political challenges caused or exacerbated by Covid-19. Building on this premise, the Horizon Europe project REGROUP (*Rebuilding governance and resilience out of the pandemic*) aims to: 1) provide the European Union with a body of actionable advice on how to rebuild post-pandemic governance and public policies in an effective and democratic way; anchored to 2) a map of the socio-political dynamics and consequences of Covid-19; and 3) an empirically-informed normative evaluation of the pandemic.



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FUNDED BY THE EUROPEAN UNION
HORIZON EUROPE - RESEARCH AND INNOVATION ACTIONS
GRANT NO. 101060825

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Executive summary

The European Union's (EU's) ability to respond effectively to crises has been a subject of debate in recent years. Its crisis governance has been particularly discussed, with a renewed debate centring around the accountability of executive institutions during times of crisis. Due to the urgency of the circumstances, and to ensure efficient and effective policy outputs, crisis decision-making is often led by executive institutions, and the scrutiny mechanisms normally enacted by the legislators are often sidelined. Against this background, this paper discusses the Commission's accountability in its exercise of delegated powers pursuant to Arts. 290 and 291 TFEU in the context of crises.

Arts. 290 and 291 TFEU regulate the use of delegated and implementing acts, respectively. Delegated acts are non-legislative acts of general application aimed at amending or supplementing an existing legislative act. Implementing acts, on the other hand, establish detailed rules for the uniform implementation of legally binding acts within the EU. The Commission is empowered to adopt both kinds of acts and is subject to two different scrutiny mechanisms in doing so. In the case of delegated acts, it is the European Parliament (EP) and Council that may object to their adoption. Meanwhile, implementing acts are instead scrutinised by committees made of representatives of the member states, known as comitology committees.

Even during normal times, the Commission appears to be able to adopt delegated and implementing acts relatively quickly and smoothly, without opposition from the relevant bodies entrusted with their scrutiny. As such, the accountability of such exercise of powers is often questioned and debated in the academic literature. Considerations become more complex when an emergency situation is factored into the equation. On the one hand, the already disputed accountability of the Commission vis-à-vis the legislators and the comitology committee does not positively contribute to the overarching executive accountability in crisis management - nor, one could argue, does it worsen it. On the other hand, the short procedural times and smoothness of the process enable the efficient adoption of measures, which is imperative in times of crisis.

To address the accountability gaps identified in the exercise of delegated and implementing powers during the Covid-19 pandemic, this paper proposes three policy recommendations: strengthening the scrutiny mechanisms for delegated acts by enhancing the capacity of the European Parliament and the Council; increasing the transparency of comitology committee meetings and procedures, including through a revision of the Comitology Regulation and improvements to the related registers; and introducing a

clear legal framework for emergency powers to ensure that crisis-driven decision-making remains legitimate. These measures aim to reinforce executive accountability while preserving the EU's ability to act swiftly in times of crisis.

Keywords: Executive accountability; delegated rulemaking; crisis management; Covid-19; democratic legitimacy

Introduction

The emergence of various crises over the last few years has raised questions about the EU's emergency-solving capacity. On the one hand, the traditional debate between grand theories of European integration arises. The role of 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. 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 played an increasingly significant role in managing the most recent crises, enacting or establishing various instruments of different natures. Just as normally happens at the national level, the EU executive branch has been at the forefront of crisis management, often sidelining legislators. Executive-led decision-making naturally raises questions about the accountability of the executive branch and whether it is adequately fulfilled, especially in delicate times such as emergencies. Against this background, this paper seeks to discuss such a process by focusing on the case study of the European Commission's use of delegated rulemaking during the Covid-19 pandemic. The aim is to shed light on a relatively understudied tool of crisis management and evaluate it in the context of the accountability balance between the executive and legislative branches. The analysis is then concluded by a brief discussion on relevant recent developments and a reflection on the implications for the democratic legitimacy of crisis management in the EU.

For the purposes of this paper, 'delegated rulemaking' refers to delegated and implementing acts pursuant to Arts. 290 and 291 TFEU, respectively. Delegated acts are adopted by the European Commission, and they are aimed at amending or supplementing non-essential elements of a given legislative act, usually referred to as the basic act. Legislators are tasked with scrutinising such acts, and they normally have two months to object to their entry into force. Implementing acts are also adopted by the Commission, though they may also be adopted by the Council in duly justified cases. They establish detailed rules for the uniform implementation of secondary legislation, and their adoption is subject to a scrutiny process by committees made up of representatives of the member states, also known as comitology committees.

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 EU member states. As this mechanism significantly cuts down procedural times and steps, it has gradually become a synonym for efficiency and, therefore, a frequent administrative strategy to deploy in the context of managing a certain crisis or

emergency. Naturally, delegating powers to an executive branch and forgoing ordinary parliamentary procedures often comes at the expense of democratic legitimacy and accountability, which are frequently sidelined in the governance of a crisis.

The EU's response to the most recent transnational crises has increasingly involved a strategy of delegating, where possible, executive rulemaking and implementing powers to the 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 another 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 increase the efficiency of crisis management. While the adoption of delegated and implementing acts, respectively, requires scrutiny by the EU's legislative institutions and comitology committees, urgency clauses and other kinds of procedural shortcuts may be activated in both instances. As such, the system's accountability may be sidelined by executive-dominated decision-making, especially given that the democratic legitimacy of delegated and implementing acts is still widely debated in legal and political science scholarship.

Against this background, this paper seeks to delve into the discussion on the accountability of executive institutions, particularly the Commission's exercise of delegated powers in times of emergency. To this end, it first describes delegated and implementing acts and presents the general state of play of crisis management in the EU. The use of delegated rulemaking in the context of the Covid-19 pandemic, the first crisis to see a surge in the use of delegated and implementing acts as crisis-related instruments, is assessed. This is done by maintaining a focus on the Commission's accountability vis-à-vis the EP, the Council, and the comitology committees - particularly, on the fulfilment of the scrutiny procedures. Finally, conclusions are drawn based on the somewhat ambiguous picture depicted above.

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. Although the Treaties are not endowed with fully fledged emergency powers, there are a couple of provisions that may be activated in

case of an emergency. As a matter of fact, Art. 122 TFEU is 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’ 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 also been used to establish permanent instruments related, for instance, to public health or energy procurement, or as a response to economic challenges. However, 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.

When addressing a crisis, the EU has also utilised instruments that are part of the EU’s standard decision-making process but may be deployed in the context of crisis management, such as the ordinary legislative procedure (OLP) and, indeed, delegated rulemaking. However, as 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. Following this line, both instruments involve concentrating power in the hands of an executive institution, which, in turn, can ensure efficiency and swiftness in crisis situations. Moreover, each provision has a scrutiny mechanism in place, which is intended to take place within around two months, and further strategies may be employed 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 has been increasingly compelled to extend to crisis response activities and measures in order to respond to the risks posed by the emergence of the ‘polycrisis’ (Zeitlin et al. 2019). It is important to clarify that this paper 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). Moreover, the legislative choice between delegated and implementing acts is not discussed in this instance, as the acts adopted during the Covid-19 pandemic are based on already existing empowerments, which the crisis could not have influenced. Analysing whether crises impact the balance between the kinds of empowerment that are added to a given basic act is beyond the scope of this paper, but nevertheless interesting for future research.

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 addressing the Covid-19 pandemic were adopted in 2020 alone, and seven in 2021, it is also relevant to note that the number of exceptional measures introduced by means of delegated and implementing acts has recently dropped. The data on the number, content, and timeline of delegated and implementing acts has been retrieved from the Register of Delegated and Implementing Acts, which is available online.

The Covid-19 Pandemic

The outbreak of the Covid-19 pandemic in early 2020 uncovered several deep-rooted vulnerabilities in the EU's administrative engine, such as the need for an all-encompassing framework for emergencies and a 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, including national lockdowns that halted both production and demand. Moreover, unlike the sovereign debt crisis, the Covid-19 pandemic had a symmetric nature in that all member 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 (Kreuder-Sonnen and White 2022). However, the different timelines in which the crisis hit member states 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 time.

The pandemic called not only for an urgent response, but also for rethinking and re-adapting decision-making practices to a new context. The dangerously fast spread of the virus led to the establishment of national lockdowns and the closure 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 of holding in-person meetings (Culley et al. 2022). This new system naturally raised concerns about the accountability and transparency of the procedures, as even the apparently smallest of choices, such as shutting off the personal camera during a video call, could significantly impact 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 (Culley et al. 2022). This level of unforeseen publicness came at the expense of trust and would limit leaders' openness and willingness to discuss sensitive topics during normal times.

The procedures behind delegated rulemaking shared a similar fate, as meetings within the EP, Council, and comitology committees were held fully online until at least late 2020 or early 2021 (Annual Report on the Working of the Committees 2022; Culley et al. 2022). The scrutiny of delegated and implementing acts, including those aimed directly at managing the crisis, therefore took place via video calls. Nevertheless, the EP has not been highly involved in scrutinising the crisis-related delegated acts. The Council, which 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 generally without opposition from the comitology committees.

The virtual committee meetings were followed by a written procedure for the committee's vote. 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 (Annual Report on the Working of the Committees 2022, 2021). According to the Commission's Annual Report on comitology (Annual Report on the Working of the Committees 2022, 2021), this approach was adopted because the written procedure ensures a stable and reliable framework for vote casting and counting.

The virtual nature of the scrutiny meetings seems not to have particularly impacted the relevant institutions' proactiveness in overseeing the Commission's exercise of delegated powers, neither in one sense nor another, given that there has been no contestation with regard to both delegated and implementing measures adopted. 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 (Culley et al. 2022) 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 in an online venue.

What happens in the black box...

None of the ten delegated acts adopted in the context of managing the Covid-19 pandemic were objected to by the EP or the Council. Ten (Commission Delegated Regulations 2020/592, 2020/1477, 2020/2114, 2020/2115, 2020/2180, 2021/95, 2022/1036,

2021/1061, 2021/2288, 2022/503) of these were acts adopted via the urgency procedure, circumventing potentially lengthy accountability mechanisms and postponing them to a later stage. The urgency procedure may be activated only in exceptional circumstances and must be provided for in the basic act (Title VI, Common Understanding on Delegated Acts, Interinstitutional Agreement between the European Parliament, the Council of the European Union and the European Commission on Better Law-Making). 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. The horizontal accountability structure is therefore maintained, at least formally, but only postponed, allowing for a more efficient output. The subsequent lack of 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, six (Commission Delegated Regulations 2020/884, 2020/1275, 2020/1564, 2021/95, 2021/374, 2022/255) other acts entered into force after the expression of early non-objection by the EP or the Council. The early non-objection option does not mean that the EP and Council forgo their right of scrutiny, but only that they enact it more quickly 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 (Commission Delegated Regulations 2021/1889, 2021/2026, 2021/2027, 2022/256, 2022/518) were passed by means of the regular procedure. However, they all entered into force in late 2021 or early 2022, when the crisis had shifted into a later, less urgent phase.

The scrutiny of the implementing acts adopted during Covid-19 pandemic (see, among others, Commission Implementing Regulations 2020/1627, 2020/2043, 2021/772, 2021/993, 2021/1325, 2021/1728, 2021/1763, 2021/2071, 2022/526; Commission Implementing Decisions 2021/1073, 2021/1272, 2021/2014, 2021/2301, 2022/483) appears to have followed a broadly collusive pattern. In other words, only an implementing act establishing the PLF was vetoed by the relevant comitology committee, while the others were uncontested. Due to the nature of the emergency, the committee meetings mostly took place online throughout 2020 and 2021 (Annual Report on the Working of the Committees 2022). 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 effective crisis management.

Policy recommendations

The EU should strengthen the scrutiny mechanisms for delegated acts

To enhance accountability, the EP and the Council should be empowered and resourced to conduct more rigorous scrutiny both before and after the adoption of delegated acts. This may include systematic review timelines, mandatory impact assessments, and formalised debate procedures. Such reforms would help prevent executive overreach by ensuring that the Commission's actions remain aligned with the original legislative intent and that there is institutional memory and learning after each legislative cycle.

The EU should enhance the transparency of comitology committee meetings and procedures

Although the Comitology Register has brought some transparency to the workings of comitology committees, voting results and procedures remain largely obscure. To prevent bureaucratic collusion, these committees should be subject to greater transparency. The co-legislators should discuss a revision of the Comitology Regulation, proposed by the Commission, which should include provisions for transparent and open procedures. Additionally, a more user-friendly Comitology Register and Register of Delegated and Implementing Acts should be implemented. Making these forums accessible and documentable would allow the co-legislators, as well as civil society, national parliaments, and other stakeholders, to conduct independent oversight and press for more accountable behaviour.

The EU should introduce a legal framework for emergency powers

Whether enshrined in the Treaties or in secondary legislation, and whether based on already existing or new provisions, the EU should introduce a clearly defined and legally binding framework for emergency powers. This would be essential to safeguard democratic accountability during crises, ensuring that crisis-driven executive decision-making remains exceptional, proportionate, and subject to institutional checks, thereby reinforcing trust and legitimacy in EU governance.

Concluding remarks

The accountability of executive institutions in the context of crises is often discussed, since the urgency of the circumstances may render accountability mechanisms secondary to the adoption of swift decisions. When discussing delegated rulemaking, the scrutiny of the executive's exercise of delegated powers is nevertheless often seen as a formality, as the legislators are caught in a dynamic of bureaucratic collusion with the Commission (Gallinella and Christiansen 2024). As was outlined above, the use of delegated rulemaking in the context of the Covid-19 pandemic saw frequent recourse to the urgency procedure, and early non-objections expedited decision-making while postponing or sidelining thorough scrutiny. Moreover, virtual meetings and informal negotiations raised concerns about the system's transparency, though efforts to enhance it, such as the establishment of the Register of Delegated and Implementing Acts, continued.

The use of delegated rulemaking in EU crisis management thus paints an incongruent picture of the accountability of executive institutions. 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 proactively, whether during crises or normal times, leading the way for bureaucratic collusion to undermine 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 Commission's accountability and transparency in its exercise of delegated powers, which have generally been overlooked, have not undergone significant changes and therefore have not been essentially impacted by the use of delegated rulemaking. However, the occasional efforts to scrutinise it actively and to enhance the system's transparency certainly contribute positively to the context. On the other hand, serious limitations are embodied by informal negotiations and bureaucratic collusion practices.

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