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Master's Degree in Policies and Governance in Europe

Chair of Regulation by Independent Agencies

An analysis of the European Union emergency
powers in State aid law and the limits to their
exercise

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1 Introduction

1.1 An overview of the Background, Rationale, Research Question Research Problem, Significance of the study

In the EU treaties, the allocation of competences operates based on the principle of conferral, which dictates that EU institutions can only exercise authority within the limits of the competences specifically granted to them by the Treaties. However, the treaties also contain certain provisions that enable responses to emergencies, without explicitly labeling them as emergency powers. The use of extraordinary powers to address emergencies has traditionally been a fundamental element of public law. Nevertheless, the boundaries of the application of these special measures in the field of State Aid law remain unclear since the scholarship did not examine and categorize the presence and the limits of these powers. The work will examine the legal nature of these articles, as intended by De Witte: “These competences are ordinary EU constitutional law in the sense that the normal legal basis conditions apply, but they are also distinctive from other EU competences in that their legal basis requires things to be out of the ordinary.”¹ This work contributes to clarifying the existence and the limit of the European Union discretion in applying State aid law. A field of European law which over the years became ever more central because State aid played the role of mitigating the risks deriving from the multiple crises of the last few years.

In today's context, the increasing number of emergencies necessitates the intervention of supranational institutions, and their role involves striking a balance between effectively addressing the crisis and upholding the principles enshrined in the Treaties. Indeed, over the years the EU has institutionalized certain informal practices, which became customary during emergencies. For example, in recognizing that only a supranational effort can provide genuine safeguarding

¹ Bruno De Witte, "Guest Editorial: EU emergency law and its impact on the EU legal order," *Common Market Law Review* 59, no. 1 (2022), 6.

against emergencies, the Lisbon Treaty has vested in the Union a pivotal or a supporting role in warding off disasters, bolstering its collaborative prowess with the endeavors of member states. For instance, article 222 of the Treaty on the Functioning of the European Union (hereinafter TFEU) allows for mutual assistance among EU member states in the event of natural or man-made disasters. Article 352 TFEU allows the EU to take action to achieve its objectives in cases where the Treaty has not provided specific powers but where the EU's action is necessary. In the field of state aid, under art.107 TFEU the European Commission has the capacity, in ordinary times, to control the compatibility of aids conferred by Member States with the internal market and competition law. The article gives the European Commission the power to derogate, in certain specific circumstances, the general rule according to which State aids in any form whatsoever are forbidden, unless the aids are deemed to be compatible with the internal market according to paragraph 2 of the same article. This provision includes some powers which have not been explicitly categorized as emergency powers, despite the fact that they have been used in emergency situations. In particular, two provisions are concerned: Art. 107 (2) b, which declares the compatibility by law of the aids conferred to make good the damage caused by natural disasters or exceptional occurrences; and Art. 107 (3) c, which confers on the Commission the capability to evaluate whether aid may be compatible with the internal market if it is aimed at facilitating the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest. This non-categorization creates legal uncertainty in the hands of the Commission when it comes to intervene in emergency situations. As crises have been somehow frequent as demonstrated by events such as the Covid Pandemic, the Russian invasion of Ukraine, and the climate change, the margin of maneuver of the Commission seems to become critical to the functioning of state aid law and enforcement. For example, the European Commission can adopt a Temporary Framework for State

Aid, which provides guidelines on how member states should provide aid to companies without infringing EU competition rules. This framework can be adapted during emergencies to allow for more flexibility and swift approvals of aid measures. Further, during emergencies, the Commission can expedite the approval process for state aid measures that are deemed necessary to address the crisis. This allows member states to provide support more quickly to affected companies without undergoing lengthy approval procedures. However, it is unclear if deviating from the general rule (prohibition of State aids) may constitute an exercise of an emergency power in the cases in which the aid is not automatically compatible with the internal market. In other words, neither the Treaties nor their interpretation do clarify whether the derogation to the general prohibition rule can be defined as an application of emergency powers.

It is thus necessary to investigate: “what EU emergency powers in the field of State Aid are” and “what the limits to their exercise are”. First, the presence of emergency powers would better explain the State aid provisions in the treaties. Second, the existence of those kinds of powers would require a description of their boundaries. This research question may be divided into two parts. While the first part (“what are EU emergency powers in State aid”), which looks for the definition of certain powers provided by the Treaties as emergency ones, will be addressed by analyzing the actual implementation of those provisions. The second part of the research question (“what are the limits of the emergency powers”) aims at finding limits at the exercise of such powers, only if they will be considered as emergency powers in the first section. This thesis aims to shed light on the characterisation of the limits of emergency powers of the European Union in the area of State aid law. This work will analyze article 107, in order to have an understanding of whether these are emergency powers or whether they are instead ordinary law. The relevant legal scholarship, which will be analyzed in detail in the next chapter, is

missing three aspects in this context. As a consequence, my work is filling a gap in the literature on three aspects. First, authors frame article 107(3)(b) as an emergency power but the same cannot be said for subparagraph (c). Second, there is not a description of the Commission's application of EU emergency powers in the field of state aid rules and more specifically pursuant to article 107(3)(b) and (c). Third, the definition of the limit to those powers in the state aid field is missing. These missing parts were considered the starting point of my research. As a result, the identified problems in the literature pose the central research question of this inquiry. The main focus of this investigation is to define the existence and the limits to the use of emergency powers in state aid. This work is intended to identify the criteria that the European Union institutions should follow when exercising certain powers in the state aid field. In trying to reach the objective of comprehending if the selected powers can be framed as emergency or not and only after a positive finding, the work will look for their limits.

1.2 Methodology and Research Structure

To address my research question, two main methods will be employed. First, a legal analysis of the literature (analysis of legal texts, such as the Treaties, regulations, case law, and legal commentary) will frame such powers in the area of state aid. Second, a scholarship review will be carried out. To briefly mention the methodology of this review, it will employ the style of the narrative reviews and it will be qualitative in nature. It involves examining a wide range of sources, such as books, research articles, and other scholarly publications, and presenting the findings in a narrative format. After that, a case study approach regarding the powers under discussion will be used to describe the "limit".

The work is divided into five sections. The introduction provides background information on the topic of the thesis, describing the

significance of the research and its relevance in the specific area of study. It has been used to state the problem and to set out the research question and the research objectives and also to enunciate the structure of the dissertation. The second chapter identifies the theoretical framework and the gaps and so it is dedicated to the literature review. The third chapter is devoted to the analysis of certain European Union's powers in state aid, provided by the Treaties, in order to clarify whether or not they may be considered as emergency competences. The fourth chapter will gather the identified limits and will employ the case study of the "balancing test", as intended in the case law (*Ryanair v Commission & others*), in order to define the "limit" to the European Union presumed emergency powers in state aid. Lastly, the final section will draw some conclusions on the research thesis carried out.

2 Literature Review

2.1 Introduction

This review aims at providing a comprehensive overview of existing scholarly literature on two main areas. First, it will gather the literature on emergency powers, then it will delve into the European Union emergency powers, as they were intended in the scholarship revolving around the EU competences. Second, it will collect all the relevant sources on the attempts made to find limits to the EU emergency powers. The reason behind the first focus is that looking at how the scholarship framed certain powers as emergency ones is used as a benchmark to understand whether articles 107(3)(b) and (c) and 107(2) confer some emergency powers on the European Commission. The reason behind the second focus is that to set the limits to emergency powers in state aid, it is fundamental to look for similar limits to emergency powers in other fields.

2.2 Overview of the scholarship on the European Union emergency powers

The concept of emergency powers has a central position in legal discourse, presenting intricate questions regarding the balance between state authority and individual rights during exceptional circumstances. Many Western countries have constitutions that set out the balance of powers between the government and the society. These constitutions often include provisions for declaring and regulating states of emergency. Article 78 of the Italian Constitution empowers the President of the Republic to declare a state of emergency, which can be limited in time and scope. Article 1 section 8 of the U.S. Constitution grants Congress the power to provide for the common defense and general welfare of the United States. The French Constitution contains Article 16, which grants the President of the Republic extensive powers in times of crisis. The President can assume extraordinary authority and take measures necessary to protect the nation's institutions, though these measures require the approval of Parliament within a specified time frame. The German Basic Law, pursuant to article 35, allows the federal government to request military assistance from the federal states (Länder) in cases of a natural disaster or an accident of exceptional scope. This includes the authority to declare war, raise and support armies, and maintain a navy. At the European Union level, as emphasized by Ursula von der Leyen in her speech to the European Parliament, the common theme linking all actions taken at the EU level to address the pandemic appears to be embodied by a (greater) adaptable interpretation of the above-mentioned principle of conferral, as defined in EU primary legislation, primarily reliant on flexible powers and tools, granting the Union the capacity to adopt an assertive role (acting with extraordinary powers) in addressing the crisis even without a distinct mandate explicitly outlined in the EU Treaties². In practice, this trend

² Alemanno A., 'The European Response to COVID-19: From Regulatory Emulation to Regulatory Coordination' (2020) 11 European Journal of Risk Regulation, 307.

has empowered the Union to assert robust coordination capabilities concerning the emergency. Certainly, the use of only if necessary measures during critical situations has indeed become a usual practice at the European Union level. As confirmed by the words of Lonardo “by and large, EU law enabled the Member States to adopt measures foreseen by emergency as well as non-emergency powers, without the need for explicit or implicit constitutional amendments, so far.”³ A comparable pattern surfaced in the EU's response to the economic and financial crises, as well as the refugee crisis⁴. It's crucial to note that this tendency isn't exclusive to EU law; a substantial reliance on soft-law tools to address the COVID-19 pandemic is also well-documented in international and municipal contexts. One notable scholar whose work illuminates this field is Bonner⁵, who provides an in-depth analysis of the legal complexities surrounding emergency powers. One contribution of Bonner's work is his delineation of the criteria that should guide the invocation and exercise of emergency powers. He grapples with questions such as the threshold for declaring an emergency, the duration of emergency measures, and the degree of transparency and accountability required. The author aims at establishing a framework that tempers the potential excesses of emergency powers while preserving the state's ability to respond effectively to emergent threats.

Looking at the latest developments in the field Kreuder-Sonnen specified, in his work, that “the COVID-19 pandemic underscores that transboundary crises may require collaborative solutions at the global and European levels that defy the application of conventional rules and procedures”.⁶ The application of non-conventional measures is the basis behind the idea of emergency powers. Those kind of powers

³ Lonardo, L. (2022). Law: The Use of Force, EU Sanctions, and Assistance to Ukraine. In: Russia's 2022 War Against Ukraine and the Foreign Policy Reaction of the EU. Global Foreign Policy Studies. Palgrave Macmillan, Cham.

⁴ Alberti J., ‘Challenging the evolution of the EMU: the justiciability of soft law measures enacted by the ECB against the financial crisis before the European courts’ (2018) 37 Yearbook of European Law, 626.

⁵ Bonner D., whose seminal work "Emergency Powers in Peacetime" (Sweet & Maxwell, London, 1985).

⁶ Kreuder-Sonnen C., Does Europe Need an Emergency Constitution? , Political Studies 2021 71:1, 125-144 (126).

have found application especially in the economic and financial history of the EU as underlined by Casolari⁷. He says that “pre-existing powers for emergency support foreseen in the context of the economic, monetary and financial policies of the Union have been triggered”. Among them, one might include the decision to trigger the "general escape clause" of the Stability and Growth Pact, the already mentioned implementation of a temporary framework for State aid measures aimed at supporting the economies of Member States, the European Central Bank's (ECB) adoption of a non-standard monetary policy to counter severe risks to the transmission of monetary policy and the economic prospects of the Euro area stemming from the COVID-19 outbreak, the introduction of a European instrument designed to provide temporary support for mitigating unemployment risks in emergencies (SURE) following the COVID-19 outbreak, and, finally, the commencement of the Next Generation EU program.

Yet at the EU level, many scholars have described the presence and the significance of emergency powers. Kreuder-Sonnen and White affirmed that when it comes to emergency politics the EU can intervene in two ways, which address the question: who is empowered? Those who can be empowered are the EU institutions or the national governments acting alone or in cooperation⁸. In the case under discussion in this thesis, the European Commission is empowered, as it has the power to apply article 107 TFEU. The treaties conferred on the Commission the authority to act with a wide (but respectively different) discretion when applying both letter “b” and “c” of article 107(3) TFEU. The authors also carry out a distinction of emergency politics which helps us contextualize the Commission’s powers when it decides to use politics to face emergencies. The authors split into four blocks the forms that politics in times of crisis can take. According to White and Kreuder-Sonnen,

⁷ Casolari, F. (2023). The EU Approach towards Disaster Management: A Critical Appraisal in the Light of the Action Put in Place to Face the COVID-19 Pandemic. *Yearbook of International Disaster Law Online*, 4(1), 51-69.

⁸ Christian Kreuder-Sonnen and Jonathan White, "Europe and the transnational politics of emergency," *Journal of European Public Policy* 29, no. 6 (2022): 953-965, 957.

emergency politics can be supranational, multilateral, unilateral and domestic. The Commission exercise of its powers in state aid is supranational emergency politics, since “Supranational emergency politics entails European institutions expanding their executive discretion by undermining or circumventing the constraints that bind their authority in normal times.”⁹ However, emergency politics is a slightly different concept compared to emergency powers. Emergency politics is the entire set of procedures, measures, and bargaining that can be invoked when there is a situation of emergency. The primary distinction between emergency politics and emergency powers lies in their scope and focus. Emergency politics encompasses the entire political landscape during a crisis, emphasizing the actions and strategies of political actors and the shaping of public discourse. In contrast, emergency powers specifically pertain to the legal and institutional mechanisms that enable governments to take exceptional actions during a crisis. While emergency politics deals with the management of public perception and political maneuvering, emergency powers address the practical and legal aspects of crisis response. Interestingly, a scholar who has discussed the concept of emergency politics is Bonnie Honig. In her book she extensively wrote about emergency politics, intended as policy making in times of emergencies¹⁰. Nevertheless, to what extent it can be said that the EU uses its presumed emergency powers and in doing so it expresses the presence of emergency politics may be an area for further research.

Furthermore, De Witte describes how EU emergency powers differ from the traditional way of administering the power. These competences are "ordinary" EU constitutional law in the sense that the EU can only act for the purpose defined in the legal basis, and following the decision-making procedure defined therein but they are also distinctive from other EU competences in that their legal basis requires things to be out of the ordinary¹¹.” This definition is deemed

⁹ Ibid. 958.

¹⁰ Honig, Bonnie. (2009) 2009. *Emergency Politics*. Princeton University Press. 1-11.

¹¹ Bruno De Witte, "Guest Editorial: EU emergency law and its impact on the EU legal order", 6

to be the most appropriate benchmark to identify whether the selected articles are emergency or ordinary powers. Among the examples of those powers, De Witte includes article 107(3) TFEU. In this article the author mentions that, this emergency competence was used by the Commission to adopt a temporary framework for State aid to banks and financial institutions during the global financial crisis and that it was used to face the dire economic effects of the Covid pandemic. The adoption of the TF was convenient for “reasons of urgency, transparency and legal certainty and that ‘it was also fitting for the Commission to enact again an extraordinary and temporary framework rather than to resort to the direct application of the existing rules on a case-by-case basis’¹². The definition of EU emergency competences (in this case “competences” is considered as a synonym of powers) provided by the author is very valuable because it can be used in order to check if letters “b” and “c” of the article under discussion should or should not be considered as emergency powers. Interestingly, the Author affirms that “This emergency competence stands out from others in that the decision to exercise it is entirely in the hands of the Commission, without the need to obtain the agreement or the opinion of the other EU institutions.” This feature is very significant when it comes to creating a proper definition of “limit” to the Commission emergency powers in state aid rules.

The work of Delia Ferri¹³ is one of the most complete articles touching upon the two specific paragraphs of article 107 under discussion in this dissertation. Indeed, it focuses on letter “b” and “c” of article 107(3), contributing to clarify the scope of those law provisions. The article offers a clarification of what is meant by “exceptional occurrences”, the term provided by the Treaties to proceed with the provisions found in letter “b”. The term implies that the Commission can allow an aid in three cases, two of them will be

¹² Cini and Piernas Lopez, “State Aid Legal Bases and the Temporary Framework During the COVID-19 Crisis”, 25th January 2023, EU Law Live.

¹³ Ferri D., "The Role of EU State Aid Law as a 'Risk Management Tool' in the COVID-19 Crisis," *European Journal of Risk Regulation* 12, no. 1 (2021)

analyzed in the next section because they are presumed to be more in line with the goal of the next segment. One of the criteria identified by the author is very useful for the aim of considering the letter “b” as an emergency power or, on the other hand, a standard power, that is the goal of this paragraph. The author states that to consider an aid in line with the rules “the event, further to which the aid is granted, should qualify as a natural disaster or exceptional occurrence.”¹⁴ Thus, categorizing an aid as an occurrence that is exceptional seems subject to wide discretion, because clearly there is not a shared view on what an emergency is, the author also acknowledges that “the categorisation of an event as an exceptional occurrence has always been made by the Commission on a case-by-case basis”. And yet “The Commission qualified as exceptional occurrences war, internal disturbances or strikes or major nuclear or industrial accidents, but the Commission also considered the outbreak of the bovine spongiform encephalopathy (BSE) disease as an exceptional occurrence.”¹⁵ Clearly, the Covid pandemic, a major blow for the internal market, has been considered an exceptional occurrence, as the author notices.¹⁶

Chachko and Linos¹⁷ drew up a paper that is here considered as an integration of the above mentioned literature on emergency powers, since in this article the authors described the European Commission’s exercise of emergency powers during the Ukrainian crisis, a missing piece in the previous articles mentioned. In this sense, it is particularly relevant for this research the authors’ evaluation of the EU’s emergency decisions. In the words of the scholars “The EU created legal workarounds to circumvent treaty constraints or longstanding rules without eliminating them.”¹⁸ Moreover, since this article draws a list of differences between the EU and other International Organizations, it is very relevant when it comes to comprehending the

¹⁴ Ibid. 180-181.

¹⁵ Ibid. 181.

¹⁶ Ibid 182.

¹⁷ E. Chachko and K. Linos, "Ukraine and the Emergency Powers of International Institutions," *American Journal of International Law* 116, no. 4 (2022): 775-787.

¹⁸ Ibid. 786.

European Commission specificities in applying article 107(3) TFEU, a one of a kind power within the spectrum of the international organizations. In this sense, the authors confirm the view of D. Ferri on the Commission discretion in applying the law provisions under discussion. Furthermore, the authors recognized that the invasion of Ukraine has been considered an “exceptional occurrence” pursuant to article 107(3)(b), as confirmed by the Commission extension of the “State aid Temporary Crisis Framework.”¹⁹

To conclude, it can be said that the authors mentioned in this literature review share the idea that the European Union has certain emergency powers, this seems very handy for addressing the first part of my research question. Among them, article 107(3)(b) is presumed to be the most relevant for my work, as it was considered in several cases as a power that can be solicited in exceptional circumstances. When it comes to framing letter “c” of the same article as an emergency power, the literature seems to be scarce and insufficient. For this reason in the third chapter, the one devoted to classifying certain powers as emergency ones, article 107(3)(c) will be compared to article 107(3)(b), to comprehend if the concept of emergency can also apply in the former case. The same reasoning applies to article 107(2) TFEU, which is not qualified by the literature as an emergency power in an explicit way because the Commission has no authority in scrutinizing *ex ante* the aid pursuant to paragraph 2. However, there is still a degree of discretion *ex post*, which requires an analysis. For this reason, article 107(2) TFEU is evaluated in comparison with article 107(3) TFEU in the next chapter.

2.3 Overview of the scholarship on the limit to the European Union emergency powers

The second section of this review aims at clarifying the research

¹⁹ European Commission, "Press Corner," accessed May 5, 2023, https://ec.europa.eu/commission/presscorner/detail/en/ip_22_6468.

behind the second part of my research question. With regards to the literature revolving around the determination of a “limit” to the European Commission emergency powers in all fields of European law, many scholars have identified certain yardsticks.

In its work, Van ‘t Klooster (2018) affirmed that “emergency powers are limited to doing whatever, but not more than events require.”²⁰ This idea recalls the principle of proportionality. This principle means that the EU institutions must ensure that any measures taken are necessary to achieve their intended objective, the work that has more completely delved into a definition of that principle is the work of Ranchordás and de Waard.²¹ Van ‘t Klooster also identified other limits, intended as principles of law. As it will be evident in the next chapters, also the Court of Justice of the European Union applied those principles in several cases regarding article 107(3) TFEU. They coincide with well-established principles of law, such as the principle of transparency and its subsequent reporting obligations²², the principle of necessity²³ and the principle of non-discrimination²⁴.

Furthermore, Dyzenhaus affirms that in exercising emergency powers an institution has “a legal space in which there are some legal constraints on executive action, it is not a lawless void, but the constraints are so insubstantial that they pretty well permit the institution to do as it pleases.”²⁵ Clearly, the author’s work is evaluated on the basis of the fact that the scholar was referring to institutions in general and to a legal framework that is precedent to that of the Lisbon Treaty. However, this definition of emergency powers Dyzenhaus gave seems to be particularly fit for describing the role that the European Commission plays in declaring state aids

²⁰ Van ‘t Klooster J., "Democracy and the European Central Bank's Emergency Powers," *Midwest Stud Philos* 42 (2018): 273.

²¹ Ranchordás, S., & de Waard, B. (Eds.). (2015). *The Judge and the Proportionate Use of Discretion: A Comparative Administrative Law Study* (1st ed.). Chapter 6.

²² Treaty on Functioning of the European Union, art. 108(3).

²³ Treaty on European Union, art. 5(4).

²⁴ Treaty on Functioning of the European Union, art. 18.

²⁵ Dyzenhaus D., *The Constitution of Law: Legality in a Time of Emergency* (Cambridge University Press, 2006), 2

compatible with the Treaties pursuant to article 107(3) TFEU.

Cole and Ackerman both argued for the need for the European Union (EU) to introduce an emergency Constitution. While this topic may seem unrelated to the main focus of this literature review, the way in which the authors discuss the creation of such a Constitution can provide insights into identifying other limits on the Commission's emergency powers. Cole emphasizes that the EU's current emergency powers are inadequate for dealing with unforeseen circumstances such as terrorist attacks or natural disasters. He argues that a dedicated emergency Constitution would provide a legal framework for the EU to take swift and effective action in such situations²⁶. Ackerman similarly highlights the need for a Constitution that would allow the EU to respond quickly and decisively to emergencies, however he also stressed the importance of democratic accountability and transparency in the decision-making process²⁷. The appeal of the authors for the emergency Constitution has not been heard, despite that other authors tried to define the scope of such a Constitution.

More recently, for example, Auer & Scicluna (2021), in trying to organize the emergency powers of the EU affirmed that “supranational emergency politics occurs when EU institutions that hold either delegated authority (for example, the ECB, the European Commission) or pooled authority (for example, the Council), [expand] their executive discretion by undermining or circumventing the constraints that bind their authority in normal times”.²⁸ This assertion is an important contribution to the literature on the EU's emergency powers, as it sheds light on the ways in which institutional actors may act during crises. Overall, Auer and Scicluna's work adds to a growing body of scholarship that seeks to understand the implications of the EU's emergency powers for democracy and governance. By

²⁶ Cole D., "The Priority of Morality: The Emergency Constitution's Blind Spot," *Yale Law Journal* 113 (2004): 1753-1800, 1785.

²⁷ Ackerman B., "The Emergency Constitution," *Yale Law Review* 113 (2004): 1029–1091, 1066.

²⁸ Auer S. and Scicluna N., "The Impossibility of Constitutionalizing Emergency Europe," *JCMS: Journal of Common Market Studies* 59, no. 1 (2021): 20-31.

examining the behaviors of specific institutional actors during crises, the authors provide valuable insights into the political dynamics that underlie the exercise of emergency powers at the supranational level. Their work is relevant for the goal of this section because they identified “political limits” EU institutions may face, such as the duty to adhere to democratic norms.

As already mentioned, the literature falls short of defining the limits to the Commission emergency powers in applying specifically article 107(3) letters (b) and (c). However, Alain Ronzano, in his piece on the AG Pitruzzella opinions on the case C-320/21 P, helps in spotting certain limits to the Commission authority to declare compatible with the Treaties a series of state aids. Building on the AG opinions, the author stressed that the opinions highlighted that article 107(3)(b) “must be read as authorizing only aid schemes and not individual measures”²⁹. Further, the author emphasized that to apply that article “it is also necessary that the selection of the beneficiary corresponds to the function of this derogation, and that it is not arbitrary or dictated by the sole desire to favor an undertaking over its competitors”³⁰. The opinions of Pitruzzella are of particular relevance since they introduce further limits to the discretion the Commission enjoys in applying article 107(3)(b). Moreover, the opinions will be analyzed in the fourth chapter with the aim of picking out the elements required to ameliorate the criteria of the limit to the EU emergency powers in the field of State aid. The work by Delia Ferri is relevant for the definition of certain criteria that may be used as limits. The author stresses that article 107(3)(b) TFEU can be triggered when there is a direct link between the damage and the natural disaster or exceptional occurrence; and when the aid does not overcompensate for the damage that occurred.”³¹ Yet, in the words of the author, “The

²⁹ Ronzano A., "Covid-19: The Advocate General Pitruzzella invites the Court of Justice of the European Union to confirm the legality of the individual aids adopted to respond to the consequences of the pandemic and to reject the appeal of an airline against the judgment of the General Court of the European Union validating the compatibility of these aids by Sweden to a competing airline (Ryanair)," *Concurrences* N° 1-2023, Art. N° 110967 (January 26, 2023).

³⁰ Ronzano A., "Covid-19," *Concurrences* N° 1-2023, Art. N° 110967, 2.

³¹ Delia Ferri, "The Role of EU State Aid Law as a 'Risk Management Tool' in the COVID-19 Crisis," 180.

Commission qualified as exceptional occurrences war, internal disturbances or strikes or major nuclear or industrial accidents, and all of those events that fulfill three cumulative criteria: firstly, they are unforeseeable (or extremely difficult to foresee); secondly, they have significant economic impact; and thirdly, they are extraordinary.”³² Those criteria will be used as the core benchmarks in the fourth chapter, with the aim of finding the limits to the emergency powers.

This second section of the literature review highlighted two important aspects. First, the literature seems reluctant to identify clear limits to emergency powers, the reason lies in the discretion that the EU enjoys in identifying and managing emergencies. Indeed, when there is wide discretion in exercising a power, defining the boundaries of that power is more difficult because the implementation of the power can significantly vary on a case-by-case basis. This assumption has also been confirmed by the case *Freistaat Sachsen* where the General Court held that Article 107(3)(b) “ involves complex assessments of an economic and social nature, to be made within a Community context, which fall within the exercise of the wide discretion which the Commission enjoys under Article 107(3) of the Treaty³³.” The same view was reaffirmed in the case law *Greece v Commission*³⁴. Despite that, there were certain above-mentioned attempts to set limits that will be used in this work. Second, it can be stressed out the lack of a description of those limits in the field of State aid rules. The exception is the work by Delia Ferri, in which certain criteria applying to article 107(3)(b) TFEU have been identified.

2.4 Final Remarks

After an accurate reading of all the sources gathered in this review, it

³² Ibid. 181.

³³ Joined Cases T-132/96 and T-143/96 *Freistaat Sachsen & Volkswagen v European Commission* [1999] EU:T:1999:326.

³⁴ Case T-1 50/1 2 *Greece v European Commission* [2014] EU:T:2014:191.

can be affirmed that the literature revolving around emergency powers of the EU is quite extensive. Moreover, the literature is exhaustive (in the sense that certain authors gave a description of limits to emergency powers in many different areas of law) when it comes to categorizing the limits to the EU's emergency powers in certain fields of law. The literature overview has demonstrated that the scholarship has described certain limits to emergency powers but they have not been applied to article 107 and they were not categorized. Indeed, this literature review was helpful to identify the research gap, from which my thesis stems from. The research shortcomings identified are based on two missing parts. The literature is missing a description of article 107(3) (c) and article 107(2) as emergency powers. The works by De Witte and Ferri, which described article 107(3)(b) as an extraordinary power, is the basis on which my dissertation will build on to describe the presence or the absence of emergency powers. The research is also missing a methodological determination of the limits to those powers in the field of state aid. The following section will draw on these two missing pieces.

3 An analysis of the EU Emergency Powers in State Aid

3.1 Introduction

This chapter is devoted to addressing the first part of my research question. Thus, the aim of this chapter is to look for the European Union emergency powers in the field of State aid rules. In doing so, it will build on the theoretical framework defined in the previous chapter. Further, it will fill the scholarship gaps identified in the literature review. Considering that the literature seems to agree that article 107(3) with its letter “b” are emergency powers, this chapter will evaluate whether or not article 107(2) and 107(3)(c) can be considered emergency powers. To do so, it has been conceived that to state with certainty that a certain EU competence should be identified as an emergency power, it would be useful to take an appropriate definition of emergency powers in EU law from the literature and then use this definition to comprehend if it applies to the articles of the Treaties this work is trying to get if they are emergency competences. This chapter will conceive emergency powers as intended by De Witte. The definition he gives, as already mentioned in the literature review, is that of “legal basis articles in the Treaties allowing the EU to take action to address emergencies or, more generally, unforeseen situations. They are “ordinary” EU constitutional law in the sense that the normal legal basis conditions apply: the EU can only act for the purpose defined in the legal basis, and following the decision-making procedure defined therein. But they are also distinctive from other EU competences, in that their legal basis requires things to be out of the ordinary.”³⁵ Two aspects of this definition can be used as criteria to state if a competence can be considered an emergency power: the provision should be enforceable to address emergencies or unforeseen events; the legal basis of the provision requires things to be out of the ordinary. This work adds a further condition that is the presence of a wide degree of discretion in the hands of the decision-maker. The aim

³⁵ Bruno De Witte, "Guest Editorial: EU emergency law and its impact on the EU legal order", 6.

of the chapter, which will employ the above-mentioned and described definition, is to understand whether the concept of emergency applies not only to articles 107(3) and 107(3)(b), but also to article 107(2) and letter “c” of article 107(3). For this reason, in this chapter, the discussion is divided into two parts. The first part focuses on a comparison between paragraphs 2 and 3 of article 107. The second section will compare letters "b" and "c" in the third paragraph of article 107 TFEU. Furthermore, when comparing two provisions of law it is important to define the terms of comparison, that is the explanation of the criteria used in carrying out such a comparison. The terms of comparison vary depending on the context and the purpose of the comparison. For this reason, with the aim of understanding whether the two articles can be defined as emergency powers in the field of State aid rules, the articles will be compared under two dimensions. First, the articles will be scrutinized with an analysis of the wording. Second, they will be compared on the basis of how they were concretely applied and interpreted by the EU institutions and the Court of Justice. If the wording of the articles and the way they were implemented match with the characteristics of emergency powers picked, this would mean that both the articles can be considered as emergency competencies of the EU. In other words, should the wording of the articles and their execution align with the selected criteria for emergency powers, it would signify that both articles constitute essential emergency competencies within the European Union.

3.2 Examining Article 107(2)

Article 107(2) of the Treaty on Functioning of the EU allows EU member states to grant aid to certain types of undertakings or regions without the need for prior approval from the European Commission, provided certain conditions are met. This article includes several compatibility conditions where the Commission has no discretion.

Thus, measures fulfilling the criteria included therein are automatically considered compatible. If these conditions are met, member states can provide state aid under Article 107(2) TFEU to support economic development in disadvantaged regions or sectors and those aids are considered compatible by law. However, confirming whether these conditions are satisfied necessitates the evaluation of intricate factual scenarios such as the presence or not of the Commission's degree of discretion. Article 107(2) is worded as follows: "The following shall be compatible with the internal market: (a) aid having a social character, granted to individual consumers, provided that such aid is granted without discrimination related to the origin of the products concerned; (b) aid to make good the damage caused by natural disasters or exceptional occurrences"³⁶. This work excludes letter "c" of this article since it is referred to as a special provision for Germany, in the context of the reunification with its East. Indeed, for all practical purposes this article 107(2)(c) TFEU has largely fallen into disuse³⁷. The primary intention behind this article was to mitigate the effects of the separation of Germany, particularly in regions of former Western Germany. This involved addressing challenges like geographic isolation, severed communication connections, and the erosion of traditional markets after the inner-German border was established. Germany's efforts to invoke this article for providing state aid in the new Laender following reunification, with the goal of rectifying the disadvantages left by the former Communist regime, did not succeed in their arguments³⁸. Instead, article 107(2)(a) TFEU applies to state aid with a social purpose that is given to individual consumers. This indicates that the assistance must be aimed at the broader goal of reinstating trust among consumers. The assistance must also be provided without prejudice to the undertakings affected in the geographical market

³⁶ Treaty on Functioning of the European Union, art. 107(2).

³⁷ Rusche M., 'Article 107 TFEU', in Manuel Kellerbauer, Marcus Klamert, and Jonathan Tomkin (eds), *The EU Treaties and the Charter of Fundamental Rights: A Commentary* (New York, 2019; online edn, Oxford Academic).

³⁸ Case C-301/96, *Germany v Commission* ('Volkswagen'), EU:C:2003:509.

identified, which means it must be offered to all customers, regardless of what they purchase. Subsidies for food and other basic items, tax advantages for low-income families, grants for energy-efficient equipment, and loans at below-market rates for home renovations are examples of state aid that potentially fall under Article 107(2)(a) TFEU. It has mainly been used in the transport sector. For instance, the Court of Justice affirmed that the purchase of travel vouchers from *P&O Ferries* by the Basque authorities in Spain, with the intention of subsidizing ferry journeys between Bilbao and Portsmouth for senior citizens and specific other groups with special travel needs, qualified as state aid pursuant to this article. Another case is when Article 107(2)(a) TFEU has been applied in the context of initiatives aimed at safeguarding borrowers from income losses, which could potentially result in their eviction from their residences³⁹. Article 107(2)(a) provides the EU with the flexibility to respond swiftly to social emergencies or crises, such as public health emergencies, natural disasters, or other situations where individual consumers are adversely affected. By allowing aid with a social character, the EU could support affected individuals and mitigate the impact of the crisis on the internal market. The provision's emphasis on aid without discrimination related to product origin could be interpreted as a way to ensure that assistance is provided to those in need without being constrained by market-based considerations. In times of emergencies, the EU may prioritize humanitarian and solidarity objectives over strict adherence to market principles. Despite that, there are some elements which are not compatible with the idea of emergency context. First, article 107(2)(a) seems to be designed primarily to address specific instances of aid with a social character and is not intended to serve as a general emergency power. The provision focuses on aid to individual consumers, which may limit its applicability in broader emergency situations that require more

³⁹ Commission Decision (EU) N179/2009, Homeowners Mortgage Support Scheme [2010] OJ C209/1; N 358/2009 Support scheme for housing loans [2009] OJ C184/1.

comprehensive actions or actions that target a certain portion of the economy or the population. The requirement of non-discrimination related to product origin might indicate that the provision's purpose is to prevent protectionist measures that could distort competition within the internal market. This suggests that the provision is meant to maintain the integrity of the single market rather than serve as a tool for addressing emergencies. Moreover, the EU has developed other mechanisms and policies to address emergencies, such as the EU Civil Protection Mechanism and the already mentioned “Solidarity Clause”. These mechanisms are better suited to dealing with various types of emergencies and crises and are more comprehensive in nature. Moreover, the Commission’s discretion in applying article 107(2) is by far lower than that it has in comparison to article 107(3). Indeed, in paragraph 2 the Commission can only act *ex post* (by repealing the aid) in the cases in which the aid is automatically compatible with the Treaties. For all these reasons, while examining the letter “a” it seems difficult to state that this provision applies to emergency cases, letter “b” requires a more detailed examination. Pursuant to letter “b”, the European Union can adopt aids to allow Member States to face severe occurrences. The purpose of this provision is to allow member states to provide financial assistance to individuals or businesses affected by natural disasters or exceptional occurrences, such as floods, earthquakes, or terrorist attacks. This provision has been implemented many times during the Covid pandemic, and indeed as the Commission acknowledged, the pandemic is an exceptional occurrence⁴⁰. However, it has been used less often than article 107(3)(b)⁴¹. To apply letter “b” of article 107(2) an aid may qualify as state aid only if it satisfies all criteria outlined in Article 107(1) of the TFEU⁴² (the criterion of incompatibility of an aid with the internal market). This specific criterion circumscribes the application of this

⁴⁰ European Commission, "Notification Template for Article 107(2)(b) TFEU."

⁴¹ Nicolaides P., "Application of Article 107(2)(b) TFEU to Covid-19 Measures: State Aid to Make Good the Damage Caused by an Exceptional Occurrence," *Journal of European Competition Law & Practice* 11, no. 5-6 (May-June 2020): 238.

⁴² Commission decision 2020/394, Compensation for Significant Forest Fires, [2020] OJ L 91/27.

article. Moreover, the TFEU does not provide a specific definition for a natural disaster or extraordinary incident. Under Article 50 of the General Block Exemption Regulation (GBER hereinafter), an aid is permissible pursuant to Article 107(2)(b) but this regulation solely mentions “natural disasters” and presents examples such as “earthquakes, avalanches, landslides, floods, tornadoes, hurricanes, volcanic eruptions, and wildfires of natural origin.” The GBER does not explicitly include “extraordinary incidents” nor make references to epidemics or disease outbreaks⁴³. The way in which the forms of assistance approved under Article 107(2)(b) have been in practice applied, tell us that this subparagraph can be invoked only when three conditions are satisfied. The first condition is that of exceptionality, indeed “the event must be (i) unforeseen or unpredictable, (ii) out of the bounds of normality, and (iii) have a large or significant impact.”⁴⁴ Causality is the second criterion, it implies that there needs to be a clear causal link between the exceptional occurrence and the resulting damage experienced. The third criterion is the respect of the proportionality principle. This involves that the assistance provided can encompass the entire extent of the damage or loss, but must not exceed the overall costs incurred due to the damage. Those criteria explicitly make reference to emergency and they confirm that those competences can be defined as emergency since they can be activated only in the case of an unpredictable event. The Commission clarified this aspect by affirming that “in general, an exceptional occurrence must at least present the characteristics of an occurrence that, by its nature and its effect on the operators concerned, is clearly distinguished from usual conditions and is outside the framework of the normal conditions under which a market operates”⁴⁵. Furthermore, the Commission has stated that the exceptional occurrence is an “event, clearly outside the normal functioning of the market, [such as]

⁴³ General Block Exemption Regulation (GBER), Regulation (EU) No 651/2014, 2014 OJ L 187/1.

⁴⁴ Nicolaidis P., "Application of Article 107(2)(b) TFEU to Covid-19 Measures: State Aid to Make Good the Damage Caused by an Exceptional Occurrence," 239.

⁴⁵ Directive 2010/32/EU of the European Parliament and of the Council," Official Journal of the European Union L 149 (2010): 20-26, paragraph 60.

loss of consumer confidence, serious disturbance in the relevant market, significant losses for a number of undertakings, large-scale human food, and animal feed contamination”⁴⁶. This description fits with the way in which this article has been implemented before and after the Covid Pandemic. Furthermore, the analysis of Article 107(2) requires evaluating this provision in light of the State aid temporary framework (hereinafter TF)⁴⁷, which has changed the application modalities of the article. Indeed, it has experienced major changes in light of the Covid TF, adopted on 19th March 2020. Those changes did not affect the wording of the article, but they had crucial consequences on the way the article has been applied after the introduction of the temporary framework, confirming the idea that it is an emergency provision. In fact, the fifth amendment of the TF has brought back the principle of immediacy, a central tenet of EU law. This principle has influenced the application of article 107(2) introducing a further condition: the immediacy of the harm. It is satisfied when the crisis has a direct impact on the economic sectors affected. To meet the "immediacy of the harm" condition in Article 107(2), it is not sufficient for there to be a potential or future harm. Instead, the harm must be current and directly impacting the economic sectors or regions that the aid is intended to benefit. In essence, this condition ensures that state aid is not used to address speculative or remote economic issues. As a result, State aids can be awarded with certain leeway from the TF onwards, including favoring enterprises that have previously benefited from rescue or restructuring aids. The TF has been modified also in light of the Russian invasion of Ukraine. This new version has extended the cases according to which article 107(2) can be applied. The new version has introduced a clarification relevant for the purpose of this section. The seventh and last amendment provided that state aid measures, designed to support the recovery of businesses that have been affected by the pandemic and

⁴⁶ European Commission. "Case No 232552 – Aid to Ireland, Decision of 20 July 2009."

⁴⁷ European Commission. (2020, March 19). State aid Temporary Framework.

the invasion of Ukraine, must be "immediate"⁴⁸ in order to be considered compatible with the internal market. This means that the aid must be provided as soon as possible after the business has been affected by the extraordinary event. This update of the TF confirms the principle of immediacy and reinforces the idea that article 107(2)(b) can be activated in times of emergency. Another argument which suggests that there is a tendency to consider this part of the article as a response to emergency is the fact that the provision serves as an economic stabilization tool. It allows the EU to assist member states in recovering from the economic shocks caused by emergencies. In these cases the aid can take the form of financial assistance and fiscal support to maintain consumer and investor confidence and to prevent negative spillover effects, which may arise from the emergency itself. So, this provision is usually not implemented for a short period of time, but it is mostly applied in the long term.

In conclusion, after a wording analysis and an analysis of the cases in which the article has been applied it can be affirmed that article 107(2) is only partly an emergency power of the EU. As a result of this method, it can be said that the provision grants emergency powers to the European Commission only when it comes to applying its letter "b". Instead, letter "a" is here presumed to be an ordinary provision of the EU, which can be activated even in periods of normalcy. Despite the low degree of discretion in the hands of the Commission when applying provisions under paragraph 2 of article 107, its letter b seems to fit with the definition of emergency power picked.

3.3 Examining Article 107(3) letter "b"

When it comes to applying article 107(3) TFEU the Commission may, in compliance with two sub-paragraphs of this provision, decide to

⁴⁸ Commission Decision C(2022) 4253 final of 23 March 2022 amending Decision C(2020) 1084 final on the temporary framework for State aid measures to support the economy in the context of the COVID-19 outbreak (the "Temporary Framework").

declare compatible with the Treaties two series of aids: pursuant to article 107(3)(b) the Commission can approve schemes “[...] to remedy a serious disturbance in the economy of a Member State”; instead, according to article 107(3)(c), the Commission may declare compatible with the rules a range of aids “to facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest”. Those sub-paragraphs were selected because analyzing their different wording and application may be useful to define whether or not these provisions can be considered emergency powers. In other words, by comparing the two articles, the objective is that of tracing back to the interpretation given by the EU to the subparagraphs b and c.

Article 107(3)(b) has been framed by most of the authors as an emergency power, as shown in the literature review. Despite that, a wording analysis and an implementation evaluation are still required to confirm or reject the assumption made by the authors selected in the literature section. The phrasing of Article 107(3)(b) TFEU explicitly allows the European Commission to approve state aid aimed at "remedy[ing] a serious disturbance in the economy of a Member State." The term "serious disturbance" implies a level of crisis or emergency that goes beyond routine economic fluctuations. The intent here is to provide the Commission with the power to take rapid and decisive action when a Member State's economy is severely destabilized. This provision has been activated during exceptional economic crises, such as the 2008 financial crisis. It allowed the Commission to deliver, with immediacy, aid measures to stabilize the economies of affected Member States. The Commission's role in approving state aid in such critical situations showcases the emergency nature of this provision. Thus, the provision's interpretation aligns with the concept of emergency powers. The Union Courts also maintain that, given its exception status, Article 107(3)(b) and the informal regulations derived from it should be

interpreted narrowly⁴⁹. Its applicability is contingent upon the presence of a "serious disturbance," indicating a state of economic emergency that necessitates urgent intervention. The Commission's decisions to allow state aid under this provision underscore its role in responding to unforeseen economic shocks promptly. The Luxembourg judges made clear, in *Breuninger v Commission*⁵⁰, that Article 107(3)(b) TFEU does not require that an aid scheme approved under this provision is capable, by itself, of remedying the serious disturbance in the economy of the Member State concerned⁵¹. Once the Commission has established the existence of a serious disturbance in the economy of a Member State, there could be several aid schemes, each of which would contribute to redress such disturbance. Importantly, by permitting state aid to address serious disturbances, the provision serves a broader public interest. It helps prevent the wider economic harm that can result from uncontrolled economic crises. In this way, it can be seen as a measure of last resort to stabilize economies and prevent contagion effects. Moreover, Article 107(3)(b) emphasizes that the aid granted under this provision must be of a temporary nature. This underscores the idea that the provision is not meant for routine or long-term state aid measures but rather for addressing emergencies on a time-limited basis. Certainly, the implementation of Article 107(3)(b) TFEU by the EU has indeed been a subject of controversy, primarily revolving around the balance between responding to economic crises and preserving fair competition within the single market. Critics argue that the provision has been invoked too broadly, leading to the provision of state aid to various industries and sectors that may not necessarily be in a state of emergency. When multiple Member States provide state aid to their respective industries or companies under the guise of addressing a "serious disturbance in the economy," it can result in market

⁴⁹ Case T-52/12, *Greece v Commission*, EU:T:2014:677, para 159–61; Case T-487/11, *Banco Privado Portugues*, EU:T:2014:1077, paras 83 and 91.

⁵⁰ Case T-260/2, *E. Breuninger/ Commission*, ECLI:EU:T:2022:833.

⁵¹ Ferri D., Op-Ed: “ ‘No wind of Blame’ – *Breuninger v Commission* (T-260/21 and T-525/21) and *Falke v Commission* (T-306/21)”, 23rd February 2023.

fragmentation and disparities within sectors of the economy. Some other critics contend that the conditions under which state aid is granted pursuant to Article 107(3)(b) are not stringent enough, potentially allowing for misallocation of resources and inefficient state intervention in the economy. For this reason, looking at its implementation is of primary importance. As highlighted by Nicolaides, prior to the onset of the financial crisis in 2008, which subsequently evolved into an economic crisis, Article 107(3)(b) TFEU saw infrequent utilization. The European Commission had applied the provisions of that Article only in one case relating to a privatization plan in Greece during the early 1990s. The dynamics shifted following the Lehman Brothers' collapse in September 2008⁵². There, the EC allowed banks facing temporary cash flow issues to receive aid in the form of guarantees. Most of the beneficiaries of the measures approved by the Commission during the 2008-2011 financial crisis were primarily financial institutions⁵³. Since the start of the Covid-19 pandemic in early 2020, Article 107(3)(b) has once more seen extensive use. Moreover, the General Court held, in *Freistaat Sachsen*⁵⁴ that the disturbance “must affect the whole of the economy of the Member State concerned, and not merely that of one of its regions or parts of its territory”. As a consequence, the article cannot apply to address the needs of a single recipient as highlighted in the Commission Decision of 20 May 1998 concerning aid granted by France to the Crédit Lyonnais group and the Decision of 4 June 2008 on State aid implemented by Germany for Sachsen LB. It can be deduced that while the size of the aid recipient might not be the key factor, what does matter is the potential impact on financial and economic stability if the recipient were to fail. The financial sector has received substantial amounts of government assistance due to its significance for the broader economy and for the potential negative

⁵² Nicolaides, P., "The Evolving Interpretation of Article 107(3)(b) TFEU." *European State Aid Law Quarterly (ESTAL)*, vol. 21, no. 1, 2022, pp. 31-42.

⁵³ Commission Staff Working Paper, The effects of temporary State aid rules adopted in the context of the financial and economic crisis, SEC(2011) 1126

⁵⁴ Cases T-132/96 and T-143/96 *Freistaat Sachsen & Volkswagen v European Commission*.

spillover effects. In support of this, before the Pandemic, the Commission has applied the provision just to few cases outside the financial sector. In 2014, it intervened with liquidity support to the Greek “Public Power Corporation”. Interestingly, here the Commission mentioned “adequacy, necessity and proportionality of the aid” as principles that shall be taken into account when applying the article. These might serve as limits to the Commission discretion and for this reason they will be evaluated in the next chapter. Another noteworthy exception was Commission Decision 2018/1040, which pertained to Greece providing aid to Trainose, a company operating trains. There, the “serious disturbance of the economy” was ascertained since the undertaking was the exclusive provider of passenger rail services. Furthermore, in order to grant aid under this provision is not sufficient to ascertain that there is a “serious disturbance in the economy”. In fact, the article provides for discretion in its application as it can be inferred by the wording of article 107 TFEU itself⁵⁵, which says that some forms of aid “*may* be considered to be compatible with that market.” In other words, the presence of a serious disturbance in the economy by itself is not sufficient to justify the granting of a state aid under the provision at stake. To conclude on this article, it follows that the application is not just about a significant disturbance affecting the entire economy, it's also about how aid granted under article 107(3)(b) can help prevent economic conditions from deteriorating further. So, it is not limited to aiding a single company (within an aid scheme) only if it is directly affected by the disturbance, it can also be used to prevent the situation from getting worse due to the potential failure of that company. Thus, it can be definitely affirmed that article 107(3)(b) TFEU is an emergency power held by the European Commission, because the normal legal basis applies, but to activate the provision an exceptional occurrence should inevitably already exist.

⁵⁵ Case T-457/09 Westfälisch-Lippischer Sparkassen- und Giroverband v European Commission [2014] EU:T:2014:683.

3.4 Examining Article 107(3) letter “c”

Article 107(3)(c) permits state aid to "facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest." The central objective of this provision is to allow Member States to provide aid that promotes the development of particular economic activities or areas within their territories. This provision allows Member States to grant aid to support and stimulate certain economic activities. These activities could encompass a wide range of sectors, including but not limited to agriculture, manufacturing, services, research and development, and innovation. To be deemed compatible with the internal market, the aid provided under Article 107(3)(c) must meet a critical condition. Specifically, it must not "adversely affect trading conditions to an extent contrary to the common interest." This condition serves as a safeguard against any aid that could distort or disrupt fair competition within the EU, and for this reason it will be considered, in the next chapter, a limit to the emergency powers of the Commission. Unlike the more explicit emergency-oriented wording of Article 107(3)(b), sub-paragraph “c” focuses on targeted economic support. The exercise of discretionary powers involves assessments of an economic and social nature that must be made within an EU context⁵⁶. That context recalls the assessment of potential negative effects on competition in the internal market. To be approved an aid must satisfy two criteria: it should pull out from the crisis economic activities or areas and second, as mentioned before, it should not adversely affect trading conditions. The first criterion rules out the support of operating aid, which encompasses an undertaking's normal expenses. These expenses typically include costs related to day-to-day operations, such as wages, rent, utilities, and other overhead expenses necessary for the functioning of the business. This type of aid, by its very nature does not facilitate the development of certain economic activities, rather, it

⁵⁶ Case C-301/87, *France v Commission*, EU:C:1990:67, para 49.

merely sustains them maintaining the *status quo*. The second criterion represents a balancing act, in which the favorable consequences of the aid must be weighed against the unfavorable impacts, specifically the influence on trading conditions. The debate on the balancing test will be used in the next chapter to better define the limits to the emergency powers of the Commission. According to the Court of Justice⁵⁷, the Commission can deem state aid as consistent with the internal market if the aid contributes to achieving a common interest objective. This introduces an unwritten condition to Article 107(3)(c) TFEU⁵⁸. Obviously, it would have been unconventional if an article of a Treaty can waive the fundamental objectives of the Treaty itself. However, in most instances, the aid aims to achieve one of the objectives (facilitating economic development) that the Commission deems requiring incentives and for which it has established guidelines or frameworks to enhance clarity and legal predictability, so it may happen that the Commission goals in pursuing its State aid policy could be slightly diverse from those enshrined in the Treaties. The Commission guidelines fall into two primary categories: those applicable across all sectors of the economy (horizontal guidelines) and those specific to particular sectors (sectoral guidelines). The Commission can self-restrain its discretion by endorsing these guidelines, frequently referred to as frameworks. In these frameworks, it outlines how it will exercise its discretion in forthcoming cases, making them instruments of soft law.

The implementation of article 107(3)(c) has been multifaceted. It has been applied to support a range of economic initiatives, including regional development projects and research incentives. This flexibility highlights its capacity to adapt to evolving economic priorities. While it might not be directly designed as an emergency power, its adaptability is valuable in addressing changing economic

⁵⁷ Case T-162/06, Kronoply, EU:T:2009:2, especially paras 65, 66, 74, and 75.

⁵⁸ Rusche T.M., 'Article 107 TFEU', in Manuel Kellerbauer, Marcus Klamert, and Jonathan Tomkin (eds), *The EU Treaties and the Charter of Fundamental Rights: A Commentary* (New York, 2019; online edn, Oxford Academic)

circumstances. A domain where the Commission regularly issues decisions directly under Article 107(3)(c) is infrastructure funding, particularly for projects related to seaports and highways. To this day, the Commission has refrained from constraining its discretion under Article 107(3) TFEU when evaluating state aid for ports, even though it has repeatedly announced the intention to create "port guidelines" since 1997⁵⁹. In addition, the provision has been also used for rescuing and restructuring firms in difficulty. This form of aid enables less efficient firms to remain in the market and is thus fundamentally distortionary. Typically, these companies are large entities with a substantial workforce, and they sometimes are national champion companies, so in these cases, the Commission decision is highly political. In light of this, the Commission's policy has allowed rescuing and restructuring aid only in exceptional circumstances, using the words by Rusche "as *ultima ratio*"⁶⁰. The necessity of ensuring nationwide access to economically significant services could also provide a rationale for rescue and restructuring aid. For example, essential utilities like energy, communications, railways and air transport infrastructures hold may receive an aid under subparagraph "c", as confirmed by the 2014 Rescue and Restructuring Guidelines⁶¹. The rules regarding state aid intended to assist businesses facing bankruptcy due to COVID-19-induced liquidity crises were backed by Article 107(3)(c) TFEU as well. According to the article interpretation in the context of the Pandemic, Member States can provide support to these companies following state aid regulations like the Commission's guidelines on rescue and restructuring aid⁶². Furthermore, the Commission has increased public investment in COVID-19 research with compliance to State aid rules, as outlined in its Communication from April 4, 2020. The Commission recognizes the possibilities

⁵⁹ Community guidelines on State aid to maritime transport (97/C 205/05), Official Journal of the European Communities No C 205/5

⁶⁰ Rusche T.M., 'Article 107 TFEU. 1163.

⁶¹ Communication from the Commission — Guidelines on State aid for rescuing and restructuring non-financial undertakings in difficulty OJ C 249, 31.7.2014, p. 1–28.

⁶² Fernandez J. E., European Papers, Vol. 5, 2020, No 3, European Forum, Insight of 16 January 2021, pp. 1399-1423.

provided by Article 107, paragraph 3, letter c, TFEU to facilitate research and development aid, as well as investment aid for scaling up infrastructure and expanding production of essential COVID-19 response products⁶³.

To understand if Article 107(3)(c) may be considered an emergency provision and so whether it leans more toward strategic economic planning or towards responding to immediate emergencies, it is important to interpret the information above-gathered. The provision emphasizes the need to strike a balance between fostering economic growth and ensuring fair competition. While it may not be a tool for rapid crisis response, it offers the EU the means to proactively sustain its economic sectors of significance. The provision's implementation has demonstrated its versatility. It has been employed to support a range of economic initiatives. In those cases, the Commission's decisions can carry significant political weight, highlighting the potential for Article 107(3)(c) to be utilized in situations that require urgent intervention to prevent economic collapse rather than during non ordinary circumstances. Arguments in favor of considering the provision an emergency power stem from two main occasions in which the article has been implemented: Covid Pandemic and rescue and restructuring aid. During the COVID-19 pandemic, Article 107(3)(c) played a crucial role in allowing Member States to support businesses facing liquidity crises. This underscores its adaptability to address unforeseen economic challenges, resembling an emergency response in its intent. Despite that, this way of interpreting the article (which may be an argument in favor of considering it an emergency power) should be discarded because this provision has been used for purposes beyond emergencies, such as restructuring aid, regional development aid, and support for specific sectors long before the pandemic. Yet, when the article is applied to rescue and restructuring aid, the Commission has interpreted it as an *ultima ratio*, which means that it is to be activated only in exceptional circumstances. While this

⁶³ Communication C/2020/2215 of 4 April 2020 from the Commission, Amendment to the Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak.

circumstance is close to the idea of emergency, it can be argued that, to consider the entire article an emergency competence is not sufficient that just one of its several implementations is triggered when an emergency pops up. In other words, labeling the entire article as a manifestation of emergency competence is inadequate, given that it provides that only one of its several implementations is activated when an emergency arises. The other application cases had nothing to do with an emergency intended as an unforeseeable event. Many of the cases in which the article has been used concerned foreseeable circumstances because the upheaval came from predictable economic problems. Moreover, some of the fundamental conditions for triggering emergency powers as outlined by the scholarship are not fulfilled by the provision. Indeed, in the evaluation of state aid under Article 107(3)(c) TFEU, the State Aid Action Plan⁶⁴ departs from the traditional notion of the "common interest", as the CJEU held in the case *Kronoply*⁶⁵. Instead, it establishes that state aid can receive approval only if it serves to rectify a market failure or advances an equity objective, thereby drawing upon two economic principles and not the idea of recovering from crises. For all these reasons, it does not fit into the selected definition of emergency power because it does not fulfill one of the conditions. In this sense, it should be noticed that, the application of the article is in contrast with the criterion of "things out of the ordinary" introduced by the De Witte definition here selected since the article has been applied many times to favor economic growth even in ordinary conditions. Many of the Commission decisions, among which those previously described, having as a legal basis article 107(3)(c), concerned ordinary and foreseeable events. For all the above, it should be rejected the idea that article 107(3)(c) TFEU is an emergency power.

⁶⁴ State aid action plan - Less and better targeted state aid : a roadmap for state aid reform 2005-2009 (Consultation document) {SEC(2005) 795}, COM/2005/0107 final.

⁶⁵ Case T-162/06, *Kronoply*, EU:T:2009:2, especially paras 65, 66, 74, and 75.

3.5 Final Remarks

In conclusion, Article 107(3)(b) is more clearly aligned with the concept of emergency powers. Its wording, intent, implementation in times of crisis, and interpretation all underscore its role in addressing serious economic disturbances promptly. On the other hand, Article 107(3)(c) is better categorized as a tool for strategic economic development. While it offers flexibility and adaptability, it does not focus on immediate crises but rather on promoting specific economic activities for longer-term benefits. To conclude, article 107(3)(b) stands out as a genuine emergency power, allowing the Commission to swiftly address severe economic disruptions. Article 107(3)(c), while not designed as an emergency power, provides the EU with a versatile mechanism to strategically foster economic growth over time. The analysis offered in this chapter has been highly functional to address the first part of my research question. At this point, it can be affirmed that the European Union (the Commission in our case) has the power, under its State Aid rules, to apply two emergency powers. The emergency powers here identified are: article 107(2)(b) and article 107(3)(b) of the Treaty on Functioning of the EU.

4 An analysis of the limits to emergency powers in state aid

4.1 Introduction

In the preceding chapters, the investigation has framed certain competences as emergency powers of the European Union's in the context of state aid. The work meticulously examined the provisions enshrined in the Treaties, regulations, case law, and legal commentaries to ascertain whether certain powers vested in the EU can be rightfully categorized as emergency competences. This chapter marks a pivotal juncture in our research journey. Having successfully identified the potential existence of emergency powers, the focus now shifts towards a deeper exploration of these powers' limits and boundaries. The presence of emergency powers, while significant, is but one facet of our inquiry. A nuanced understanding of their limits is crucial for several reasons. First and foremost, it helps in delineating the precise contours of these powers, making it possible to differentiate between ordinary and emergency competences. Secondly, it ensures a clear demarcation of authority within the EU legal framework, striking a balance between responsive action in times of crisis and the preservation of democratic checks and balances. The approach is methodical, drawing upon an analysis of selected law principles and in-depth case studies to define the concept of "limit" as it applies to the presumed emergency powers within the realm of state aid. By the conclusion of this chapter, we aim to shed light on the intricate interplay between the EU's emergency powers and the legal boundaries that circumscribe them. The analysis will contribute to a more comprehensive understanding of the EU's constitutional framework and its capacity to respond effectively to crises. In defining the limits to the EU emergency competences in the state aid field it should be noticed that the results will be subject to high volatility. This uncertainty is due to the wide discretion the Commission enjoys in using these powers, as already described in the previous sections.

Despite that, the following paragraphs attempts to categorize a set of limits, which have been divided in two main pillars. First, this work gathers and uses as limits certain specific principles of European Union law. Second, this dissertation employs selected cases of law, revolving around the concept of balancing test (which may be a further limit to emergency powers) that work as the case study of this thesis.

4.2 The Principles of Law

As we delve deeper into the intricate terrain of the European Union's emergency powers in the context of state aid, it becomes imperative to ground our analysis in the foundational bedrock upon which the EU's legal edifice is constructed. These foundational principles, often referred to as the "EU principles of law," form the essence of the Union's legal order. They provide the guiding assumptions that not only underpins the EU's operations but also ensures the integrity, coherence, and adherence to common values within this supranational entity. These principles are the touchstones against which the exercise of emergency powers and the delineation of their limits must be assessed. They represent the core values and norms that give the European Union its distinct identity and underpin the entire European legal system. Understanding these principles is fundamental to deciphering how the EU functions, how it balances the pursuit of common objectives with respect for national sovereignty, and how it upholds the rule of law in the face of emergent challenges. These principles encompass a wide spectrum of values and norms, ranging from fundamental rights and democracy to subsidiarity and the rule of law, however this work discusses their relevance in the context of emergency powers and state aid. For this reason, the literature review in the second section was useful to select only certain principles of law. Indeed, the scholarship has designated some principles that apply

to article 107(2)(b) and article 107(3)(b) of the Treaty on Functioning of the EU. As a result, this section excludes that, principles of EU law that have not been applied over the years to the emergency powers identified in this work, can be considered limits.

First, this thesis pinpoints the principle of proportionality as a fundamental limit to the discretion of the Commission. The principle of proportionality holds a prominent and indispensable position within European Union law. The concept of proportionality, at its heart, states that any action or measure adopted by EU institutions, even those prompted by emergencies, must be appropriate to the goals they seek to achieve. In simpler terms, it requires that the measures used to achieve a certain objective do not exceed what is essential to achieve that goal, and that any infringement on individual rights, national competences, or subsidiarity principles be justified by the seriousness of the circumstance. While it may appear straightforward, the notion of proportionality has been considerably developed and improved via law, notably by the CJEU. These court interpretations have given us a more sophisticated view of how the principle applies inside the EU legal framework. The Luxembourg Judges have included the concept of necessity in that of proportionality. The principle of necessity states that any action taken by EU institutions, particularly in emergency situations, must be required to accomplish the desired goal. This indicates that in the context of state aid, less invasive measures should be examined before resorting to more restrictive ones. For example, if there are less onerous approaches to solve a crisis that do not materially distort competition, these alternatives should be investigated and, if viable, utilized. The measures used must not only be required, but also suitable for attaining the targeted goal. In the context of state aid, this means that the European Commission's emergency powers must be directly relevant to addressing the situation at hand. Excessive measures to alleviate the crisis may be regarded as disproportionate and hence incompatible with the notion

of proportionality⁶⁶. The obligation to investigate less intrusive measures before resorting to more restrictive ones is a basic feature of necessity. This is especially true in emergency situations, where the reaction should be commensurate to the severity of the issue. In the context of state aid, for example, if there are less onerous alternatives to solve a problem without unnecessarily distorting competition, these avenues should be investigated and, if viable, implemented. The relevant legal doctrine⁶⁷ has unpacked the concept of necessity. To find application, the principle should be implemented only when the event is unforeseeable, when the economic impact is “significant” and whereas the occurrence is extraordinary. These three standards pose a clear boundary to the Commission’s discretion. The idea of proportionality emerges as a major restraint on the European Commission's emergency powers in the realm of state aid. While the Commission has the jurisdiction to accelerate approval procedures, waive some competition regulations, and provide direction on state aid in times of emergency, these powers are not unlimited. One of the limits resides in the concept of proportionality that requires that any emergency measures adopted by the Commission be proportionate to the gravity of the situation⁶⁸. During the COVID-19 epidemic, for example, the Commission created a Temporary Framework for State Aid, which provided instructions for member states to give assistance to suffering businesses. Nonetheless, even under this extraordinary scenario, the concept of proportionality necessitated that the actions implemented be not only essential, but also appropriate for properly resolving the issue. It served as an important check on the Commission's powers, ensuring that the reaction did not go too far or encroach on member states' competencies. In the field of State Aid, the proportionality principle is also articulated in terms of the Commission responsibility to avoid over compensation in clearing aid

⁶⁶ Sauter, W. (2013). Proportionality in EU Law: A Balancing Act? *Cambridge Yearbook of European Legal Studies*, 15, 439-466.

⁶⁷ Ferri D, "The Role of EU State Aid Law as a 'Risk Management Tool' in the COVID-19 Crisis," 181.

⁶⁸ Blockmans S., (2008), *The European Union and Crisis Management, Policy and Legal Aspects*, T.M.C. Asser Press The Hague.

to companies in the single market. This refers to the idea that when a government provides financial support or other form of aid to a specific company or industry, the aid should not exceed what is necessary to achieve the intended objectives. This idea is critical to preserving fair competition within the European Union (EU) and in many other nations with similar state assistance restrictions. One of the fundamental objectives of state aid rules is to provide a level playing field in the internal market. Overcompensating a specific enterprise (often a corporation or industry) can distort competition by providing it with an unfair advantage over competitors. This can stifle other firms' development and competitiveness, as well as disturb the operation of the single market. Overcompensation can cause market distortions by artificially bolstering inefficient or non competitive firms. If these businesses receive more assistance than is necessary, they may lack the motivation to improve their operations, engage in innovation, or become more competitive. This can lead to resource misallocation within the economy, which eventually harms competition in the internal market.

Moreover, the principle of transparency is another important limit to the Commission exercise of its discretion. Transparency is an essential component of the European Commission's approach to emergency state aid. This notion is critical for preserving accountability, promoting fair competition, and preventing the misappropriation of governmental funds, especially during times of crisis⁶⁹. Comprehensive reporting responsibilities apply when member states seek European Commission authorisation for state assistance measures. These reporting requirements are stringent, requiring member nations to give full documentation on proposed aid programs. This paperwork normally includes the aid's goal and objectives, intended beneficiaries, projected budget, and expected outcomes. These extensive reports are required for the Commission to make informed choices and determine if the aid measures are necessary,

⁶⁹ Buijze, A.W.G.J. (2013), The Principle of Transparency in EU law Utrecht University Repository.

proportionate, and in line with the particular objectives. The permission of the aid is not the end of transparency. Member states must continue to provide regular updates on the implementation of state aid measures. These follow-up reports provide information on how the help is distributed, its impact on beneficiaries, and any changes made to the aid plan over time. This constant monitoring guarantees that the aid continues on track to meet its goals and that it may be changed if circumstances change. Another critical part of the openness concept is public notice. Member states are expected to disclose information on state assistance measures as soon as possible, including complete data about aid packages. This information must be made available to the public so that it may be scrutinized and held accountable. Timely sharing of such information is critical to ensuring fair competition. It guarantees that market players are aware of the help being provided by making information on state aid measures available to everybody, including rivals of aid beneficiaries. This transparency helps to prevent competitive distortions and allows other firms to respond or seek similar assistance if they match the eligibility conditions⁷⁰. The European Commission promotes the transparency concept by maintaining the State Aid Transparency Portal. This unified website provides a comprehensive resource for all information relating to state assistance measures, notifications, and Commission judgments. It serves as a one-stop shop for stakeholders to receive extensive and up-to-date information on state aid, providing transparency and accessibility. In an emergency, the Commission may provide temporary authorization for state aid measures without undertaking a comprehensive review (as often occurred during the Covid-19 pandemic). Even in such circumstances, member states are expected to quickly disclose and notify the Commission about these steps. These temporary clearances are often conditional and subject to a more complete evaluation. In this context, Schmidt⁷¹ argued that

⁷⁰ Alemanno, A. Unpacking the Principle of Openness in EU Law: Transparency, Participation and Democracy (July 30, 2013). *European Law Review*, HEC Paris Research Paper No. LAW-2013-1003.

⁷¹ Schmidt, Vivien A., *Europe's Crisis of Legitimacy: Governing by Rules and Ruling by Numbers in the Eurozone* (Oxford, 2020; online edn, Oxford Academic, 23 July 2020).

output and input legitimacy of a policy are strictly linked to the transparency of the decision-making process. As a consequence, legitimacy of the state aid rules depends on the way in which the Commission interprets its transparency obligations. In this regard, Schmidt⁷² sustains that there is a difference in secrecy as crisis management (to not deteriorate the situation) and secrecy as crisis exploitation (where opacity is there to adopt policies that would otherwise not have been possible). The first case took place during the 2008 financial crisis. The Commission provided financial aid to struggling banks and financial institutions. Much of the negotiations and decision-making processes were kept secret to avoid causing panic among investors and depositors. By maintaining secrecy, the Commission could swiftly address the crisis and stabilize the financial system without triggering widespread fear and bank runs. With regard to exploiting crises, some scholars are arguing that the Commission has exploited the Covid-19 Pandemic in order to advance its agenda of helping the more hit countries disproportionately, creating imbalances in the internal market. This area of research (still in development) forms part of a further limit that the Commission has: the principle of non-discrimination.

The idea of non-discrimination in the EU may be traced back to its founding treaties but the principle is also a basic rule of the WTO legal order, of which the EU and individual EU Member States are members, as well as of a number of regional and bilateral trade agreements to which the EU and its Member States are parties. The Treaty on the Functioning of the European Union (TFEU), in particular, has clauses that expressly forbid discrimination. Article 18 of the TFEU, for example, forbids discrimination on the basis of nationality within the area of the Treaty's application. Article 18 states that "within the scope of application of the Treaties, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited." A

⁷² Ibid. 34.

Member State cannot grant a subsidy to a domestic undertaking that it would not grant to a foreign undertaking in a comparable situation. Similarly, a Member State cannot impose a stricter regulatory burden on foreign undertakings than on domestic undertakings. The idea of non-discrimination is fundamental in the field of competition law. In the EU competition law, the principle aims to ensure fair competition within the EU's internal market. To achieve this purpose, it is critical that all economic operators, regardless of country or origin, be subject to the same laws and enjoy the same protection under EU law. With regard to the relation between non-discrimination and article 107 TFEU, EU Member States cannot selectively grant help to enterprises of their own nationality while excluding others depending on their origin inside the EU⁷³. In the *Cassis de Dijon* case⁷⁴ the European Court of Justice held that Member States cannot prohibit the sale of products from other Member States simply because they do not comply with national technical regulations. This ruling established the principle that goods lawfully marketed in one Member State must be allowed to be marketed in all Member States, without discrimination. In the *Ryanair Ltd v Commission of the European Communities* case⁷⁵, the Commission found that Ireland had granted illegal State aid to Ryanair. The Commission found that the State aid discriminated against foreign airlines by granting Ryanair a tax break that was not available to other airlines.

Strictly connected to transparency in the international public law there is a further limit the executives (in this case the European Commission) have to respect when it comes to exercising emergency powers, that is the respect of the democratic norms. The limits originating from this form of government are here considered as political in nature. In the field of state aid rules the respect of the

⁷³ Case Salzgitter Mannesmann Handel GmbH v SC Laminorul SA, C-157/12, ECLI:EU:C:2013:597.

⁷⁴ Case Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein, Judgment of the Court of 20 February 1979, C-120/78, ECLI:EU:C:1979:42.

⁷⁵ Case Ryanair Ltd v Commission of the European Communities, Judgment of the Court of First Instance (Eighth Chamber, extended composition) of 17 December 2008, Case T-196/04.

political limits is deemed important in terms of allocating resources to the undertakings respecting the democratic rules. Democratic norms within the EU are also upheld through procedural safeguards. Member states have the right to be heard and participate in the decision-making process, as outlined in Article 4(3) TEU. In the context of state aid, this ensures that affected member states can express their concerns and provide input before the European Commission makes a decision on a specific state aid measure. This aspect is particularly safeguarded in the pre-notification phase where the Commission starts preliminary talkings with the Member State concerned by the measure. This principle also means that the European Commission must not interfere in the democratic decision-making of Member States when they are deciding whether or not to grant state aid. The Commission must even take into account the specific circumstances of the Member State concerned, including its economic situation and its social and political objectives. When examining state aid applications, the Commission adopts an open and complete approach in order to respect democratic principles, political boundaries and the rule of law. This approach includes allowing member states and other interested parties to submit input and defend their viewpoints, thus encouraging accountability and fairness⁷⁶. Furthermore, judicial review is an essential tool. If a member state or an interested party disagrees with the Commission's judgment on a state assistance matter, they may seek remedy in EU courts. This process strengthens the rule of law and protects individual rights.

The literature review highlighted the importance of another limit that the Commission has in clearing state aid. Indeed, when there is not a link between the damage and the exceptional occurrence the European Commission cannot apply article 107(2)(b). The European Court of Justice (ECJ) interpreted the concept to indicate that there must be a direct and causal relationship between the harm and the extraordinary event. The loss must be caused by the extraordinary event and not by

⁷⁶ Van 't Klooster J., (2018), *Democracy and the European Central Bank's Emergency Powers*, Volume 42. *Midwest Studies in Philosophy*.

other factors, such as the normal course of business or the Member State's economic policy. The idea of a causal relationship between the harm and the extraordinary occurrence acts as a check on the European Commission's emergency powers. The Commission has the authority to award State help in exceptional situations, but it cannot do so just because it considers a certain scenario is extraordinary. The Commission must be able to demonstrate that the damage is actually caused by the exceptional occurrence, and that the aid is necessary to make good that damage. Moreover, the scholarship has identified the limit of granting aid only in the form of aid schemes and the prohibition of delivering individual measures. However, the CJEU, in *Ryanair DAC v European Commission*, has clarified that Article 107(3)(b) TFEU applies both to aid schemes and to individual aid⁷⁷. Similarly, the General Court, in the judgments *Ryanair v Commission* (T-378/20 & T-379/20) has confirmed the legality of individual aid measures adopted in response to the Covid-19 Pandemic under article 107(2)(b) TFEU⁷⁸. However, while this limit may seem procedural in nature, it actually has substantial consequences. It is based on Article 107(3) of the TFEU, which provides that state aid can be considered compatible with the internal market if it is granted "under a scheme that is not selective". The prohibition of individual measures has been interpreted by the CJEU to mean that state aid can only be granted to a specific undertaking or group of undertakings if it is part of a general scheme that applies to all undertakings in a particular sector or region. Individual actions might be viewed as a constraint on the European Commission's emergency powers. The Commission has the authority to allow governmental aid in extreme circumstances, such as a natural catastrophe or economic crisis. However, the Commission could only offer state aid in the shape of an aid program, not as an individual action. This was to guarantee that the Commission does not exploit its

⁷⁷ Case *Ryanair v Commission* (Finnair I; Covid-19), Judgment of the General Court (Tenth Chamber, Extended Composition) of 14 April 2021, Case T-388/20, ECLI:EU:T:2021:196

⁷⁸ *Ryanair DAC v European Commission*, Judgment of the General Court (Tenth Chamber, Extended Composition) of 14 April 2021, T-378/20, ECLI:EU:T:2021:194; *Ryanair DAC v European Commission*, Judgment of the General Court (Tenth Chamber, Extended Composition) of 14 April 2021, T-379/20, ECLI:EU:T:2021:195.

emergency powers to allow undue benefits to specific enterprises. However, as mentioned before, in the last few years both the Court's judgment and the praxis are overturning this constraint. For example, there are a few exceptions to the idea of individual measures other than that above mentioned with regard to article 107(3)(b). Individual aid measures, for instance, can be cleared by the Commission to small and medium-sized firms (SMEs) or businesses in financial distress.

These cases are covered by the guidelines or the frameworks that the EU Commission issues as soft law instruments. The guidelines (or frameworks) have been mentioned many times in this work. Here, the guidelines are framed as “non binding self imposed limits” to the emergency powers of the Commission as opposed to the above-mentioned principles of law which are settled principles of law. The Commission is not obliged to follow the guidelines, and can grant state aid in any way it sees fit. However, the guidelines are an important source of guidance for the Commission, and they are usually followed in practice. The rules are not legally binding since they have not been ratified by the European Union's legislative bodies. They are approved by the Commission and have the status of soft law. This implies that the rules are not hard law instruments, but they are nonetheless regarded as an essential aspect of EU state aid legislation. The guidelines allow the Commission to be flexible and responsive to changing circumstances. This is important because the state aid landscape is constantly evolving. For example, the Commission has recently updated the guidelines on renewables to take into account the new challenges posed by the climate crisis⁷⁹. However, the fact that the guidelines are not legally binding can lead to uncertainty. This is because it is not always clear whether the Commission will follow the guidelines in a particular case. In this perspective, it is necessary to highlight two major repercussions of the Commission's adherence to its guidelines or frameworks. First, they have legal consequences (they bind the Commission) and hence

⁷⁹ State aid: Commission updates guidance for measures to support the green transition, 4 April 2023, Press release.

constitute challengeable acts⁸⁰. As a result, member states have effectively challenged guidelines in direct actions⁸¹. Non-privileged applicants, on the other hand, are not immediately affected by guidelines because the Member States are not required to give state funding. If an applicant wishes to question the legality of guidelines, it must first appeal a decision by which it is directly and individually concerned and raise an exception of illegality⁸². The appropriate soft law documents (guidelines or frameworks) frequently define the situations under which the principles of proportionality and necessity are satisfied. The case law has established that even if soft legislation does not clearly envisage circumstances relevant to these two criteria, the Commission must nonetheless assess compliance with them. Indeed, the Commission cannot waive, by the adoption of guidelines, the exercise of the discretion that Article 107(3) TFEU confers on it, as confirmed in *Greece v Commission*⁸³ and *Kotnik*⁸⁴. Another example that demonstrate the flexibility of the limits imposed through soft law (in this case national legislation) is the incentive effect⁸⁵. In the case *Freistaat Sachsen*, the incentive effect was discovered to be absent if mandatory national legislation requires the (possible) assistance beneficiary to perform particular acts (e.g. staff training). In such a case, a mandatory activity under national law cannot profit from state aid since there is no incentive impact. This confirms, as previously stated, that the Commission is bound in permitting aid by soft law instruments, even when they originate from national legislation.

Moreover, deviation from them would be a violation of the principle of equal treatment and the preservation of legitimate expectations. These two other principles are here considered further limits to the emergency powers of the Commission in the field of state aid rules.

⁸⁰ Case T-176/01 *Ferriere Nord*, EU:T:2004:336, paras 134–40.

⁸¹ Case C-135/93, *Spain v Commission*, EU:C:1995:201.

⁸² Case T-110/97, *Kneissl Dachstein Sportartikel*, EU:T:1999:244, paras 49–52;

⁸³ Case C-431/14 P, *Greece v Commission*, EU:C:2016:145, para 71.

⁸⁴ Case C-526/14, *Kotnik*, EU:C:2016:570, para 41.

⁸⁵ Case C-459/10 P, *Freistaat Sachsen*, EU:C:2011:515, paras 30–8.

The principle of equal treatment applies to all areas of EU law, including competition law⁸⁶. The implication in the realm of SGEIs (Service of General Economic Interest) is that equal pay is provided for equal services to various service providers. Where service providers have varying levels of efficiency, it may be difficult to reconcile this with the desire to avoid overcompensation, despite that the principle should be ensured when applying article 107 TFEU as confirmed by the case law⁸⁷. The principle of protection of legitimate expectations is a general principle of EU law that protects the interests of individuals and businesses who have relied on the actions or statements of the EU institutions. It is closely related to the principle of legal certainty, which requires that individuals and businesses should be able to plan their activities with confidence, knowing what the law is and what to expect from the EU institutions. In the case *Kronofrance*⁸⁸, the CJEU held that the principle of legitimate expectations requires the EU institutions to respect the expectations that individuals and businesses have legitimately formed on the basis of their actions or statements. This principle is incorporated in Article 41 of the European Union's Charter of Fundamental Rights, which states that "every person has the right to have his or her affairs handled impartially, fairly, and within a reasonable time by the Union's institutions, bodies, offices, and agencies." It is important to stress that the idea of genuine expectation protection is not absolute. Even if it violates the concept of legitimate expectations, the Commission may nonetheless demand the recovery of illegal state aid. However, when formulating its conclusion, the Commission must consider anyways the concept of legitimate expectations.

In conclusion, this paragraph pinpointed the EU principles of law that serve as essential limits to the European Commission exercise of emergency powers in the field of state aid. The EU principles of law are the fundamental values guiding the Union's operations and legal

⁸⁶ Case C-390/06 Nuova Agricast, EU:C:2008:224, para 51; Case T-137/10 CBI, EU:T:2012:584, para 95.

⁸⁷ Case T-137/10 CBI, EU:T:2012:584, para 95.

⁸⁸ C-75/05 P & C-80/05 P, *Kronofrance*, EU:C:2013:458, paras 60–1.

framework. The work has identified those limits both referring to the literature review of the scholarship review and to the settled case law. The principles here included and considered limits to emergency powers in the EU are: proportionality, necessity, transparency, non-discrimination, respect for democratic norms, equal treatment and protection of legitimate expectations. Moreover, this work has included among the limits to emergency powers the Commission's frameworks and guidelines issued over the years. This section has excluded the remaining limit of the balancing test. This will be the case study of this work and the next section will be devoted to understanding if the test can be identified as a limit. Then, only if it is considered a limit, the work will examine if the balancing test is a mandatory or a discretionary limit in the hands of the Commission.

4.3 Case Study: the Balancing Test

In 2020, under the Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak, Sweden notified a loan guarantee scheme adding up to 455 Million EUR. The Commission decided not to object to the contested aid on the grounds that it was consistent with the internal market under Article 107 (3)(b) TFEU, as the aid was issued to repair a substantial disruption in a Member State's economy⁸⁹. The applicant, Ryanair, brought an action for the annulment raising the point that the Commission infringed the obligation to “weigh the beneficial effects of the aid against its adverse effects on trading conditions and the maintenance of undistorted competition”. In *Ryanair v Commission*⁹⁰, concerning the alleged violation by the Commission of the obligation to balance the beneficial effects of the aid against its adverse effects, the General Court rejected this plea, emphasizing that such a balancing exercise

⁸⁹ Commission Decision C(2020) 2366 final of 11 April 2020 on State Aid SA.56812 (2020/N) - Sweden - COVID-19: Loan guarantee scheme to airlines.

⁹⁰ *Ryanair DAC v European Commission*, Judgment of the General Court (Tenth Chamber, Extended Composition) of 17 February 2021, T-238/20, ECLI:EU:T:2021:91.

should not exist in the context of Article 107(3)(b) TFEU, as its outcome is presumed to be positive⁹¹. However, the AG Pitruzzella in his opinions⁹² held that despite the emergency circumstances the balancing test should be exercised by the Commission. In his words “I consider that the Commission should be empowered, within certain limits, to carry out such a general balancing exercise, in instruments which examine the impact of the crisis on the economy of the European Union as a whole and lay down rules and limits to be applied to all State interventions under Article 107(3)(b) TFEU”⁹³. The European Court of Justice will issue its final decision in the case C-209/21 P, however as it can be noticed it is debatable whether the balancing test might be a further limit to the Commission’s exercise of its emergency powers. While the balancing test is presumed to apply with regard to article 107(3)(c) as its wording suggests: “where such aid does not adversely affect trading conditions to an extent contrary to the common interest”; it is still unclear whether the test can be applied to article 107(3)(b) as well. Since this work has identified as emergency power article 107(3)(b) and not its letter “c”, it is particularly relevant to understand if the balancing test applies to letter “b”, otherwise it could not be affirmed that the balancing exercise is a limit to an emergency power. For these reasons, this work uses the debate around the balancing test as its case study. The goal of this section is to clarify if the balancing test can or cannot be considered a limit to the Commission discretion. Elucidating this aspect will improve the list of limits found in the previous section and it will help in making more clear yardsticks that the Commission has to respect when it comes to exercising its discretion pursuant to article 107(3) TFEU. In doing so, this work investigates if the balancing test can be applied also with respect to article 107(3)(b). In other words, this section evaluates the arguments in favor and those against considering

⁹¹ López Piernas, *The COVID-19 State Aid Judgments of the General Court ... Every Man for Himself?*, 20 EUR. St. AID L.Q. 258 (2021).

⁹² Opinion Of Advocate General Pitruzzella delivered on 16 March 2023 (1) Case C-209/21 P , ECLI:EU:C:2023:223.

⁹³ *Ibid.* para. 94.

the balancing test a limit to emergency powers by analyzing the AG Pitruzzella's opinions and the General Court's judgment in the selected Ryanair case.

The balancing test has been applied by the European Commission in a number of cases. In exercising its discretion, the Commission evaluates positive and negative effects of the state aid. In some cases, the Commission has found that the state aid measure was compatible with the EU's competition rules, while in other cases the Commission has found that the state aid measure was incompatible with the EU's competition rules on the grounds that the adverse effects are larger than the positive one. This uncertainty makes the balancing test a complicated legal standard. It's a test for balancing the opposing interests of competition and public policy. It is a critical tool for ensuring that state aid does not distort internal market competition while simultaneously allowing for state involvement to achieve valid public-interest goals. The article by De Pablo argues that the goal of preventing competition harm and internal market fragmentation can arguably only be achieved by conducting a meaningful compatibility assessment of State aid measures, balancing their negative and positive effects, and taking into account, among other things, the principles of proportionality, equal treatment, and the cumulative effect of aid measures⁹⁴. Of course, this assumes that such an ambition remains a priority at a time when the EU is arguably more concerned with geopolitical competition with third nations than with intra-EU rivalry between Member States and between businesses. Going into details, J.J. Piernas López argues that “neither the legislative history of today's Article 107 TFEU, nor the systemic interpretation of Article 107(3)(b) TFEU support the conclusion reached by the General Court. In the opinion of the author the balancing test is required in applying article 107(3)(b) and this conclusion can be inferred from the intentions behind the “Spaak Report”⁹⁵. Indeed, from an historical perspective, the Spaak Report was the document on which the Treaty

⁹⁴ De Pablo L. A., “State Aid’s Stress Test”, 14th February 2023, EU law live’s Competition Corner.

⁹⁵ Communiqué de presse; doc 125/56, 1 (Annexe IV au Doc MAE 126/56).

articles on State aid were decided upon. During the negotiations, the French delegation has proposed to examine the case of aid of “European Interest”. The third paragraph of article 93 (today 107(3)(b)) was not included in the list of aids in the interest of the whole of Europe. For this reason, it does follow that the balancing test may be presumed to be included in article 107(3)(b) since the application of the article is not in the “European Interest” and so the Commission has to weigh the potential negative consequences of the clearance. In this context, during the discussions between the Treaties’ drafters, various exceptions to the principle of incompatibility of State aid were moved from the third to the second paragraph of Article 92 EEC, but not the clause allowing help to rectify a major disruption in a Member State's economy. Indeed, if the Treaty drafters would have considered that “it was a matter of European Interest that one or other of its Member States are able to overcome a crisis which could only have serious consequences for the economy of all or some of the other Member States and therefore for the European Union as a whole”, they would have included the provision of article 107(3)(b) under article 107(2). However, this is not the case since when the Commission acts pursuant to article 107(3) enjoys wide discretion, while with paragraph 2, the aids are deemed automatically compatible without the need for the Commission to assess the positive and negative effects of the State aid.

Moving from the legislative history to the legal interpretation, once again the balancing test seems to be an act that the Commission must deliver in applying article 107(3)(b). Indeed, the General Court held⁹⁶ that “the difference in wording between Article 87(3)(a) [today article 107(3)(a)] and Article 87(3)(c) [today article 107(3)(c)] cannot lead to the conclusion that the Commission should take no account of the Community interest when applying Article 87(3)(a)” and yet the Court stated that the Commission has “to evaluate the impact of the aid on trade between Member States, and in particular to assess the

⁹⁶ Case C-1 13/00 Spain v Commission [2002] EU:C:2002:507, para 67, Judgment of the Court of 19 March 2002, ECLI:EU:C:2002:184.

sectorial repercussions they may have at Community level.”⁹⁷ This case-law, which applies to letter “a”, may be extended to article 107(3)(b) since it is similar in nature to article 107(3)(a) to which the Court referred. On the other hand, in the *Hinkley Point* case, the CJEU contributed to increasing the ambiguity on the need for the balancing test. There, the ECJ concluded that “unlike Article 107(3)(b) TFEU [...] Article 107(3)(c) TFEU does not make the compatibility of aid dependent on its pursuing an objective of common interest.”⁹⁸ Despite that, it should be underlined that in the same judgment, the Court cited the above-mentioned paragraph from *C-113/00 Spain v Commission*. The latter’s judgment view was confirmed in *Breuninger v Commission*, where the Court held that Article 107(3)(b) TFEU does not require the Commission to perform a balancing test and to assess the impact of aid on trade and competition within the EU.⁹⁹ In *Falke v Commission*, the European judges adopted a more restrained approach suggesting that it was not necessary to rule on the question whether, in implementing Article 107(3)(b) TFEU, the Commission was required to strike a balance between the beneficial effects of a contested aid scheme against its drawbacks on competition.¹⁰⁰ With this last sentence, the CJEU decided to suspend its judgment, contributing to uncertainty in this area.

In T-238/20, the General Court minimized the importance of the balancing test (relying on the judgment *Austria v Commission*¹⁰¹) on the grounds that there is a difference in the wording of paragraphs “b” and “c” of article 107, as mentioned before. However, AG Pitruzzella proposed to the Court to overturn the earlier judgment, arguing in favor of reintroducing the balancing act when it comes to applying all the provisions in article 107(3). First, the AG recalls the case *Italy v*

⁹⁷ Case C-1 69/95 *Spain v Commission* [1997] ECLI:EU:C:1997:10, paras 15-17, Judgment of the Court of 14 January 1997, ECLI:EU:C:1997:10.

⁹⁸ Case C-594/18 P *Austria v Commission*, para 20, Judgment of the Court (Grand Chamber) of 22 September 2020, ECLI:EU:C:2020:742.

⁹⁹ Judgment - 21/12/2022 - E. *Breuninger v Commission*, Case T-260/21, ECLI:EU:T:2022:833.

¹⁰⁰ Case *Falke v Commission*, Judgment of the General Court of 21 December 2022, Case T-306/21, ECLI:EU:T:2022:834.

¹⁰¹ Case *Austria v Commission*, T-356/15, Judgment of the General Court (Fifth Chamber) of 12 July 2018 EU:T:2018:439, paragraphs 20 and 39.

*Commission*¹⁰², where the Court, without distinguishing between the provisions laid down in article 107(3), stated that “economic assessments in connection with the application [of that provision] must be made in a Community context, which means that the Commission must examine the impact of aid on competition and intra-Community trade, and that the Commission must ‘during that examination weigh the beneficial effects of the aid against its adverse effects on trading conditions and on the maintenance of undistorted competition.’”¹⁰³ As a result, it can be argued that the Court issued a decision which is at least in contrast with previous case law. Moreover, the AG pinpoints that the Court has introduced a presumption of correspondence with the common interest of the wording “where such aid does not adversely affect trading conditions”. According to the Court, this would mean that when an aid fulfills the requirements set by article 107(3)(b), the Commission should not do the balancing test because it would be redundant. However, the AG argues that when that kind of aid is adopted it is not “necessarily approved in the interest of the European Union”¹⁰⁴. For this reason, as the Commission requested, the EU executive should anyway be free to deliver that balancing exercise. This remark suggests that the decision to deliver the balancing test is a matter of discretion in the bosom of the Commission. Furthermore, the AG argues that in order to not weaken the Commission control over State aid in times of crisis and to not alter the level playing field in which the EU undertakings operate in particular, of companies belonging to countries having greater fiscal capacity, “it is necessary that the balancing also takes into account the effect on trading conditions and on undistorted competition.”¹⁰⁵ This last reasoning recalls the principle of non-discrimination examined in the previous section, in the sense that countries having lower sovereign debts and sound

¹⁰² Case Italian Republic v Commission of the European Communities, Judgment of the Court (Sixth Chamber) of 29 April 2004, C-372/97, EU:C:2004:234.

¹⁰³ Ibid. paragraph 82.

¹⁰⁴ Opinion of AG Pitruzzella delivered on 16 March 2023 (1), Case C-209/21 P, paragraph 87.

¹⁰⁵ Ibid. paragraph 97.

finances can more easily subsidize their companies in comparison to countries with lower fiscal leeway.

To conclude this paragraph, it follows from the AG opinion, from the General Court incoherence with its previous judgments, from the view of the scholarship and from the ensuing reasonings that article 107(3)(b) as well as all the provisions included in article 107(3) require the Commission to deliver the balancing test. As a result, the balancing test can work as a further limit to the Commission's exercise of some (the balancing test is present in applying article 107(3) and not present with paragraph 2 of the same article) of its emergency powers and to the Commission's discretion in applying State aid rules. In this sense, it should be noticed that the balancing test does not apply to the provisions pursuant to article 107(2), among which this work has found that letter "b" is an emergency power. This case study has demonstrated that the legal arguments in favor of exercising the balancing test outweigh the arguments against. As a result, to the limits identified in the previous section it should also be added that for which the Commission is to carry out the balancing test when applying Article 107(3) TFEU.

4.4 Final Remarks

To conclude, the fourth chapter replied to the second part of my research question, which looks for the limits to the European Commission's emergency powers in the field of State aid law. This chapter has found the limits to the Commission's discretion, by a qualitative analysis of the main principles of law and through a case study on the balancing test. It delved into the intricate realm of European Union principles of law that serve as critical boundaries to its powers during crises. These principles, the very cornerstone of the Union's operational and legal framework, have been meticulously unearthed through an analysis of scholarly discourse and well-settled case law. These encompass the principles of proportionality, necessity,

transparency, non-discrimination, respect for democratic norms, equal treatment, and the safeguarding of legitimate expectations. Furthermore, the chapter thoughtfully incorporates the Commission's evolving frameworks and guidelines as instrumental benchmarks. Drawing from the illuminating insights of the Advocate General's opinion, the General Court's nuanced shifts in precedent, scholarly perspectives, and cogent rationales, it becomes evident that Article 107(3)(b) and its companions within Article 107(3) collectively mandate the Commission's engagement with the balancing test. This dynamic element, therefore, adds another layer of scrutiny to the Commission's emergency powers and the application of state aid rules. In synthesizing the discourse surrounding the balancing test, it becomes resoundingly clear that the prevailing legal arguments favor its activation, outweighing any counterpoints. Consequently, to our set of previously identified constraints, we must now append the imperative that the Commission diligently undertakes the balancing test when wielding the authority conferred by Article 107(3) TFEU. The fourth chapter made it possible to reach the goals of this research, whose conclusions will be drawn in the next chapter.

5 Conclusions

The aim of the present research was to analyze the existence and the limits of the EU emergency powers in the field of State aid law. The research question (“what the EU emergency powers are and what their limits are”) has been unpacked through a qualitative analysis of the relevant scholarship, case law, and legislation in the field of EU State aid law. Findings show that not only does the EU possess emergency powers when it comes to applying State aid law, but also that such powers have certain boundaries that the Commission needs to respect. More in detail, this work has identified article 107(2)(b) and article 107(3)(b) as emergency powers, according to which the Commission can act in times of crises. While the first article is more focused on supporting specific projects or addressing specific economic issues of common European interest and the Commission has therein to automatically authorize the aid, under paragraph 3 the Commission enjoys wide discretion in providing state aid to address a broader range of economic disturbances within their territories. Interestingly, this opens the further question of striking a balance between respecting the non discretionary nature of article 107(2) TFEU and applying it to emergency situations. Yet, this thesis has included a wide range of principles of law (proportionality, necessity, transparency, non-discrimination, respect for democratic norms, equal treatment, and the safeguarding of legitimate expectations), the temporary frameworks and the guidelines in the set of limits to the EU emergency powers. However, it is relevant to underline that the limit of the balancing test does not apply to article 107(2)(b) since the aids in those cases are deemed automatically compatible with the interests of the whole EU. The limit of the balancing exercise finds application for the provisions pursuant to art. 107(3). As a consequence, this study strengthens the idea that the State aid rules can be flexible when an extraordinary event occurs and that the Commission’s discretion, despite being wide (especially in applying paragraph 3 of article 107), is anyway confined by boundaries of law. The relevance of this study

for the academic field can be summarized with the following aspects. First, this work contributed to the framing of EU institutions as having emergency powers to apply when exceptional circumstances occur. Second, the work is a contribution to the area of research of “emergency constitution”, a concept that the scholarship has drawn over the years with the aim of describing why European law should create a legal framework for all the emergency power the institutions have. The work also provides important insights into the intention of the drafters of the Treaties, as they were first created and then modified over the years, to grant the European institutions certain emergency powers, by clarifying the way in which article 107 TFEU has been thought by the authors of the Treaties, as emerged from the historical legal analysis given to the interpretation of article 107(3) TFEU. This work has also contributed to the literature on crisis management by providing the boundaries that international organizations have in exercising their discretion to solve crises. Nonetheless, findings can be generalized subject to certain limitations. First, the work has taken into consideration a very specific area of European law, that is the State aid law. Further, an issue that was not addressed in this study was the idea that the European Commission’s exercise of emergency powers is actually emergency politics. And yet, an additional uncontrolled factor is the possibility that the European Court of Justice judgment (that it has still to give) in the case C-209/21 P may add important elements to the reasoning, around the balancing test and the emergency powers of the Commission in general.

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