

Tax treatment of cooperatives and EU State aid policy

Mikel AZCOAGA IBARRA¹

Licenciado en Derecho (UPV/EHU)

Date of entry: 12/09/2013

Date of acceptance: 03/02/2014

Table of contents: 1. Introduction. 2. EU State aid policy. 2.1. Treaty rules. 2.2. Secondary law. 2.3. Soft law. 3. Tax Notice. 3.1. The derogation test. 3.2. Justification by the nature or general scheme of the tax system. 3.3. Compatibility with the internal market and procedure. 3.4. Tax measures and cooperatives. 4. Cases on Cooperatives. 4.1. Spanish case on agricultural cooperatives (Aid C 22/2001). 4.2. The preliminary ruling of the ECJ in *Paint Graphos*. 5. Proposal for amendment of the tax Notice with respect to cooperatives. 6. Conclusions. 7. Bibliography.

Resumen:

En los últimos años, la Comisión Europea y el Tribunal de Justicia de la Unión Europea han puesto diversas medidas fiscales aplicadas a las cooperativas bajo sospecha de ser ayudas incompatibles con el mercado interno. La cuestión principal a responder es en qué casos el tratamiento fiscal especial de las cooperativas constituye ayuda prohibida por el Artículo 107(1) TFUE. Hay una clara contradicción entre el desarrollo de la promoción del modelo cooperativo por parte de la UE y la estricta aplicación del Artículo 107(1) TFUE a las cooperativas y su tratamiento fiscal. Una forma de conseguir seguridad jurídica en esta cuestión sería que la Comisión modificara su Comunicación relativa a la normativa de ayudas estatales y la fiscalidad directa de las empresas, reconociendo la posibilidad de que las medidas fiscales de las cooperativas que actúan en el mercado estén justificadas por la naturaleza o economía del sistema fiscal, bajo ciertas condiciones.

Palabras clave:

Cooperativas, Tratamiento fiscal, Ayudas de estado.

¹ This paper was elaborated in the context of a thesis work for the Master Programme LLM International and European Law, at the Institute for European Studies (Vrije Universiteit Brussel).

Abstract:

In the recent years, the European Commission and the European Court of Justice have brought many tax measures applied to cooperatives under the threat to be declared aid incompatible with the internal market. The key question to be answered is in which cases special tax treatment of cooperatives constitutes prohibited State aid under Article 107(1) TFEU. There is a clear contradiction between the development of the promotion of the cooperative model by the EU and the strict application of Article 107(1) TFEU on cooperatives and their tax treatment. A way of bringing legal certainty on this issue would be that the Commission amended its Notice on State aid rules and direct business taxation, by recognizing that tax measures applied to cooperatives acting in the market may be justified by the nature or general scheme of the tax system, under certain conditions.

Key words:

Cooperatives, Tax treatment, State aid.

Laburpena:

Azken urteotan, Europako Batzordeak eta Europako Batasunako Justizia Auzitegiak kooperatibei aplikatutako hainbat neurri fiskal auzitan jarri dituzte, barruko merkatuarekin bateraezinak direlakoan. Erantzun beharreko galdera nagusia da zein kasutan kooperatiben trataera fiskal bereziak Europako Batasunako Funtzionamendu Tratatuko (EBFT) 107(1) artikulua debekaturiko laguntza diren. Kontraesan nabarmena dago EBk eredu kooperatiboa sustatu eta kooperatibei eta beren trataera fiskalari EBFTko 107(1) artikulua modu hertsian aplikatzearen artean. Gai honetan segurtasun juridikoa lortzeko, Batzordeak Estatuko laguntzei eta enpresen fiskalitate zuzenari buruzko Komunikazioa aldatu zezakeen, merkatan diharduten kooperatiben neurri fiskalak, sistema fiskalaren izaera edo ekonomiagatik justifikatuzat joz, egoera jakin batzuetan.

Hitz Gakoak:

Kooperatibak, Zerga Tratamendua, Estatu Laguntza.

Código JEL

JEL, E62, P13, H29

1. Introduction

According to the International Cooperative Alliance, a cooperative is “*an autonomous association of persons united voluntarily to meet their common*”

economic, social, and cultural needs and aspirations through a jointly-owned and democratically-controlled enterprise".² There are different kinds of cooperatives and as long as they compete in the market with other actors they are considered undertakings, particularly from the perspective of Article 107(1) TFEU. However, all cooperatives have in common that they act in the interest of their members and that they contribute to the community they belong to.

Many EU Member States have introduced legislation on cooperatives, including tax legislation. Reasons for doing so are, among others: their lower capacity to compete on the market because of their inherent obligations and characteristics; avoidance of economic double taxation; promotion of the cooperative model, etc. In some countries, there is a legal recognition (sometimes at constitutional level) of the need to have adequate legislation adapted to cooperatives. However, tax schemes of cooperatives often include benefits for them. Thus, in recent years, the Commission has examined under the scope of the State aid control some tax measures affecting cooperatives, and the ECJ, in *Paint Graphos*, has given some light on the matter.

The following research questions have inspired this paper: do tax measures applying to cooperatives constitute State aid? Are cooperatives in a comparable legal and factual situation to that of profit-making companies? Are such tax measures a selective advantage? Are they justified by the nature or general scheme of the tax system? How can the European Commission, the ECJ and EU Member States improve legal certainty on this issue? The case of cooperatives which act exclusively with their members is less controversial than the case of cooperatives acting with non-members.

This paper does not discuss the illegitimate use of the legal form of cooperatives in order to get a beneficial tax treatment. This paper does not try to do a comparative analysis of cooperative law in different Member States. Finally, it does not aim at discussing the creation, by EU Member States and the EU, of a common legal framework for social economy enterprises, in which cooperatives are included. Although these perspectives of cooperative law are part of the answer to the discussion of cooperatives and State aid policy, this paper aims at searching for possible solutions within the EU State aid policy itself.

2. EU State aid policy

EU State aid policy, as part of EU competition policy, pursues the objective of a functioning internal market, where competition between undertakings is

² <http://ica.coop/en/what-co-op/co-operative-identity-values-principles>

not distorted. An EU State aid policy is necessary to avoid situations where Member States do not allow a level playing field for undertakings within their jurisdictions by granting aid to some undertakings and artificially giving them a competitive advantage. Aid granted by a State to some firms distorts the normal functioning of the market because it is detrimental to the most competitive firms, therefore decreasing overall European competitiveness.³

From a competition perspective, State aid can be seen as adequate to correct market failures in certain activities, when the markets themselves are unable to develop those activities. The competition model follows an effect-based approach, which takes into account economic analysis and the overall positive and negative effects of the aid. If the positive prevail, aid will be considered “good aid” and compatible with the internal market (Kleiner, 2011:4). The competition model only aims at preventing aid that significantly distorts competition, and not every State aid measure.

The Treaty establishing the European Economic Community (EEC Treaty) established within its Article 92(1) the prohibition, with the wording that is still used, of aid which distorts or threatens to distort competition and affects trade between Member States.⁴ Moreover, pursuant to Article 92(2) EEC Treaty, some kinds of aid were considered to be compatible with the internal market, and pursuant to Article 92(3) EEC Treaty, other kinds of aid could be authorized by the Commission. The logic of the initial State aid control was to avoid trade disputes between Member States and collectively wasteful subsidy competition (Coppi, 2011:75).

EU State aid policy has moved from a basic prohibition to a wide set of rules and case-law, with a consequent increase in efficiency and difficulty. State aid control has evolved towards becoming a policy instrument that has been framed in the context of the Lisbon Strategy.⁵ The Commission’s State aid Action Plan of 2005 (SAAP) aimed at changing the direction of State aid policy towards a more efficient approach to the control of aid granted by Member States. The smart use of State aid is related, on the one hand, to using it to counteract market failures, which allows efficiency. On the other hand, it is recognized that objectives such as regional cohesion, sustainable development and cultural diversity can be subject to State aid without the existence of market failures, but are legitimate objectives as

³ Commission Consultation document on State Aid Action Plan COM (2005) 107 final, *par.* 7.

⁴ “*Except where otherwise provided for in this Treaty, any aid, granted by a Member State or granted by means of State resources, in any manner whatsoever, which distorts or threatens to distort competition by favouring certain enterprises or certain productions shall, to the extent to which it adversely affects trade between Member States, be deemed to be incompatible with the Common Market.*”

⁵ Commission Communication, Europe 2020, A strategy for smart, sustainable and inclusive growth COM(2010) 2020.

they result in equity. In fact, State aid should only favour clearly defined objectives of common (European) interest.⁶ The Commission undertakes economic analysis to determine whether State aid exists or whether State aid is compatible with the TFEU. However, the balancing test is only applicable where compatibility guidelines provide for it or where a given State aid does not fall within the scope of existing compatibility guidelines.⁷

The SAAP resulted in the revision of legislative documents with both substantial and procedural aspects. While a wider range of exemptions to the State aid prohibition were recognized in the general block exemption Regulation, the enforcement of the State aid control has become stronger, with the enactment of Commission notices⁸ regarding procedural aspects of State aid.

More recently, the Commission issued a Communication on the EU State Aid Modernisation (SAM).⁹ In line with the Europe 2020 growth strategy, the Commission proposes to modernise State aid policy from the perspective of three interrelated areas: economic growth, prioritisation and procedure. The future guidelines and exemptions will focus on public aid that is efficient, aimed at common objectives and with a significant impact on the single market. However, no reference to objectives related to equity and redistribution of wealth are made in this Communication, which were mentioned in the SAAP.

2.1. Treaty rules

Article 107(1) TFEU establishes a general prohibition of State aid.¹⁰ State aid is a measure which is taken by some public body and which, by means

⁶ Commission Consultation document on State Aid Action Plan COM (2005) 107 final, *par.* 10.

⁷ For a detailed explanation of when the economic assessment is applied, *see* Commission staff paper on Common Principles for an economic assessment of the compatibility of State aid under Article 87.3 [2009], *par.* 5-8.

⁸ Commission Notice on Simplified procedure for the treatment of certain types of State aid [2009] OJ C 136/3; Commission Notice on a Best Practices Code on the conduct of State aid control proceedings [2009] OJ C 136/13; Notice from the Commission: Towards an effective implementation of Commission decisions ordering Member States to recover unlawful and incompatible State aid OJ C 272/4; Commission notice on the enforcement of State aid law by national courts [2009] OJ C 85/1.

⁹ Commission Communication on EU State Aid Modernisation COM(2012) 209 final.

¹⁰ “*Save as otherwise provided in the Treaties, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market.*”

of State resources, directly or indirectly gives a beneficiary undertaking an economic or financial advantage which it would not have had under normal circumstances, and which relieves the beneficiary undertaking of a burden to which its finances would otherwise normally be subject (Vesterdorf and Nielsen, 2008:11).

According to Article 107(1) TFEU, a measure needs to fulfil four cumulative criteria in order to qualify as State aid: (i) State resources have to be involved; (ii) it must give an advantage to undertakings; (iii) the advantage has to be selective; (iv) it has to effectively or potentially distort competition and affect (or threaten to affect) trade between Member States.

A first element of Article 107(1) is that aid has to be “*granted by a Member State or through State resources*”. It implies that there must be a consumption of public financial resources. The concept of donor includes all levels of public authorities. Public entities and institutions, public companies under State control, and private entities directly or indirectly controlled by the State are examples of donors.¹¹

Beneficiaries of State aid are companies, or as Article 107(1) TFEU expresses, “*undertakings or the production of certain goods*”. The prohibition is logically applied to companies acting on the market, because it is the level playing field in the internal market what the competition rules try to ensure. Although the concept of company is undefined in the TFEU, the ECJ gave a definition in *Klöckner*.¹² Like in the case of the donor, the legal nature of the beneficiary is irrelevant. The definition focuses on the fact that undertakings engage in an economic activity.¹³ According to the ECJ, an economic activity consists in offering goods and services on a market.¹⁴ Where an entity carries out both economic and non-economic activities, it is only considered an undertaking with regard to the former.¹⁵

The distinguishing element of Article 107(1) TFEU is that a given measure must confer an advantage to the recipient in order to constitute aid. The Commission looks at many types of aid, for example: grants or interest rate rebates, loan guarantees, accelerated depreciation allowances,

¹¹ ECJ, *Preussen-Elektra AG v Schlesweg AG*, Case C-379/98.

¹² “*An undertaking is constituted by a single organization of personal, tangible and intangible elements, attached to an autonomous legal entity and pursuing a given long term economic aim.*” (ECJ, *Klöckner v High Authority*, Joint Cases 17 and 20/61).

¹³ ECJ, *Pavel Pavlov and Others v Stichting Pensioenfonds Medische Specialisten*, Joined Cases C-180/98 to C-184/98.

¹⁴ ECJ, *Commission v Italy*, Case 118/85, *par.* 7; ECJ, *Commission v Italy*, Case C-35/96, *par.* 36.

¹⁵ Communication from the Commission on the application of the European Union State aid rules to compensation granted for the provision of services of general economic interest, OJ C 8/4, *par.* 9.

capital injections, tax exemptions, the purchase of land at less than the market price, the selling of land at higher than market price, privileged access to infrastructure without paying a fee, the obtaining of risk capital from the State on favourable terms, etc.¹⁶

State aid is only relevant under Article 107(1) TFEU if aid is selective, meaning that it favours certain undertakings, not all of them. In principle, general measures that apply to all sectors of the economy of a Member State and measures of general economic policy are not considered aid. However, if such measures that follow objective criteria and are granted to an indefinite number of beneficiaries have the ultimate effect of favouring certain undertakings or activities, they will be considered selective measures.¹⁷ Yet, differentiations between undertakings may justify that a general measure is only applied to undertakings in the same situation and not to others.¹⁸ The distinction between general measures of economic policy and State aid is often difficult.

Finally, Article 107(1) TFEU requires that State aid distorts or threatens to distort competition, and that it affects (or might affect) trade between Member States. The ECJ considers that when a financial aid strengthens the position of an undertaking in relation to other competing undertakings, it must be assumed that inter-state trade will be affected.¹⁹ The Court looks at the position of the beneficiary before and after receiving the aid and determines whether its position is improved by the aid.²⁰ This automatic assumption of a distortive effect on competition closes the possibility to counterbalance the wide application of selectivity. A narrower approach would perhaps be more adequate, where only undertakings that make use of their stronger position caused by State aid (for example by acquiring market shares previously held by a competitor) would distort or threaten to distort competition.

However, the SAAP 2005 is based, among other elements, in better targeted State aid and an economic approach to State aid policy. Therefore, the Commission will use, “*when relevant*”,²¹ economic analysis before considering that competition is likely to be distorted or that trade between Member States is likely to be affected. According to the balancing test, a

¹⁶ http://ec.europa.eu/competition/state_aid/studies_reports/vademecum_on_rules_09_2008_en.pdf, page 6.

¹⁷ GC, *CETM v Commission*, Case T-55/99, par. 40.

¹⁸ ECJ, *Laboratoires Boiron SA v Urssaf de Lyon*, Case C-526/04, par. 36.

¹⁹ ECJ, *Philip Morris v Commission*, Case C-730/79, par. 11.

²⁰ ECJ, *Italy v Commission*, Case C-173/73, par. 17.

²¹ Commission Consultation document on State Aid Action Plan COM (2005) 107 final, par. 21.

measure should only be declared incompatible with the internal market when its negative effects on competition and trade outweigh its positive effects.

Article 107(2) TFEU provides for cases of State aid that are *de jure* compatible with the internal market. Such aid must nonetheless be notified to the Commission, and must be proportionate (Vesterdorf and Nielsen, 2008:27). Article 107(2)(a) TFEU refers to aid having a social character, granted to individual consumers. The aid cannot have the effect of discriminating products on the base of their origin. The second exception, Article 107(2)(b) TFEU, applies when a Member State grants aid to make good the damage caused by natural disasters or exceptional occurrences. The exception must be interpreted narrowly, which means that there must be a direct causality between the damage caused by the exceptional occurrence and the State aid.²² Lastly, pursuant to Article 107(2)(c) TFEU aid granted to the economy of certain areas of the Federal Republic of Germany affected by the division of Germany is also automatically compatible with the internal market, provided that aid is directed to situations directly created by the border inside Germany before its reunification.²³

Article 107(3) TFEU includes exceptions that do not apply automatically, but the Commission may declare State aid falling under these exceptions compatible with the internal market. The Commission has a wide discretion in this respect.²⁴ Article 107(3)(a) TFEU allows aid to promote the economic development of regions with an exceptionally low standard of living, high underemployment, and of insular regions referred to in Article 349 TFEU. Second, Article 107(3)(b) TFEU provides that aid to promote an important project of common European interest or to remedy a serious disturbance in the economy of a Member State may be compatible with the internal market.

Article 107(3)(c) TFEU allows “*aid to facilitate the development of certain activities or of certain areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest*”. Areas included here are regions in disadvantage if compared to other regions within a Member State, but different from regions that fall under letter (a) of Article 107(3) TFEU.²⁵ Regarding aid to develop certain activities, aid must involve a whole sector of the economy and not only some undertakings acting

²² ECJ, *Giuseppe Atzeni and others v Regione autonoma della Sardegna*, Joint Cases C-346/03 and C-529/03, par. 79; ECJ, *Greece v Commission*, Case C-278/00, par. 81-82.

²³ ECJ, *Germany v Commission*, Case C-301/96, par. 72.

²⁴ GC, *Regione autonoma della Sardegna v Commission*, Case T-171/02, par. 94.

²⁵ ECJ, *Germany v Commission*, Case C-248/84, par. 19.

in that same sector. Because the development of the activity implies the strengthening of the position of some undertakings, different conditions must be ensured, depending on the case, in order to consider that operating aid is not granted,²⁶ such as compensatory measures taken by the recipient of aid,²⁷ being aid linked to initial investment or job creation,²⁸ limited in time, etc.

Aid to promote culture may be compatible under Article 107(3)(d), following its wording, “*where such aid does not affect trading conditions and competition to an extent that is contrary to the common interest.*”

Article 107(3)(e) TFEU gives the possibility to the Council to adopt decisions, on a proposal from the Commission, declaring compatible aid in cases different from the rest on Article 107(3) TFEU. The Council has exercised this possibility in the sectors of shipbuilding and coal.²⁹

Article 108 TFEU contains the basic rules of the State aid control regarding notification and procedure. Under Article 108(1) TFEU, the Commission has the task of reviewing constantly aid systems existing in the Member States. Article 108(2) TFEU gives the Commission the competence to declare the incompatibility of State aid, or the misuse of such aid, and therefore decide that the Member State concerned must abolish or alter such aid within a certain period.

Under Article 108(3) TFEU, Member States have both the obligation to notify to the Commission their intention to grant or alter aid and not to implement it until the Commission takes a final decision. After being notified, the Commission shall either declare aid compatible with the internal market or initiate the procedure laid down in Article 108(2).

Article 109 TFEU allows the Council to issue regulations for the application of Article 107 and 108 TFEU, particularly to establish rules on procedure and declare certain categories of aid exempted from the obligation of the Member States to notify to the Commission. The Council adopted Procedural Regulation 659/1999, and the Enabling Regulation 994/98.

2.2. Secondary law

Council Regulation 659/1999 establishes rules on how Article 108 TFEU is applied. There is a first distinction between existing aid (aid

²⁶ Operating aid is in principle not authorized by Article 107(3)(c) TFEU; ECJ, *Siemens v Commission*, Case C-278/95 P, par. 23.

²⁷ ECJ, *Belgium v Commission*, Case C-75/97, par. 57.

²⁸ Evans, A. 1997. *EC Law of State Aid*. Oxford: Oxford University Press. Page 176.

²⁹ Council Decision of 10 December 2010 on State aid to facilitate the closure of uncompetitive coal mines [2010] OJ L 336/24.

which existed prior to the entry into force of the Treaty in the respective Member States) and new aid (aid that is not existing aid, including alterations to existing aid).

The Commission does a preliminary examination of the notifications, after which it can decide: that the measure does not constitute aid, that there are no doubts about the compatibility of the aid with the internal market (a “decision not to raise objections”), or that it has doubts about its compatibility (a “decision to initiate the formal investigation procedure”). The formal investigation procedure can result in: a decision declaring that the notified measure does not constitute aid; a “positive decision” when the aid is compatible with the internal market; a “negative decision” when the Commission finds that the aid is not compatible with the internal market; or a “conditional decision” when a positive decision includes conditions subject to which aid may be considered compatible with the internal market.³⁰ According to Article 14(1) of Regulation 659/1999, when the Commission takes a negative decision it shall also decide that aid has to be recovered by the Member State from the beneficiary, unless it would go against a general principle of EU law, such as the principle of protecting legitimate expectations,³¹ or if recovery is absolutely impossible.³²

The procedure regarding existing aid consists in a process of cooperation between the Commission and the Member State concerned, as there is no obligation to notify existing aid. If the Commission considers that an existing aid scheme is incompatible with the internal market, it can make proposals to the Member State to introduce changes or to abolish such aid scheme. It can result in a formal investigation procedure, if the Member State does not implement the proposed measures.

As a resort to the non-compliance of a Member State with a decision, the Commission itself or any other interested State may refer the matter to the ECJ directly, pursuant to Article 23 of Regulation 659/1999 and in line with Article 108(2)(2) TFEU.

Some kinds of horizontal State aid are exempted from the obligation of prior notification and Commission approval. The Council issued Regulation 994/98, known as the enabling regulation, which allows the Commission to declare compatible the following categories

³⁰ Regulation (EC) 659/1999 of Council of 22 March 1999 laying down detailed rules for the application of Article 93 or the EC Treaty [1999] OJ L 83/1, Article 7.

³¹ The principle of legitimate expectations has been applied by the Commission only in cases where its own conduct had made businesses or Member States believe that certain measures were compatible State aid.

³² ECJ, *Commission v France*, Case C-214/07.

of aid: small and medium-sized enterprises, research and development, environmental protection, employment and training, regional aid and *de minimis* aid. The Commission gathered the different areas of exempted aid into a general block exemption Regulation (currently Regulation 800/2008, which will remain applicable until 31 December 2013).

The general block exemption Regulation (GBER) gives details on how and to which extent each of the mentioned categories is exempted. The GBER sets up various conditions that aid must meet in order to benefit from the exemption. It also limits the quantities that different types of aid can reach.

A new GBER to be applicable from 2014 onwards has been drafted and has passed its second consultation period. As part of the SAM, the new GBER introduces new provisions aiming at further simplification of the existing rules and extension of their scope, in order to promote the use of “good aid” by Member States.

When the Commission declares that a public measure does not constitute aid, that it is aid compatible or incompatible with the internal market, it does so by way of decisions, addressed to the Member State(s) concerned.

A decision from the Commission on State aid can be challenged through an action for annulment under Article 263 TFEU, by the State granting the aid, by other Member States, by the (intended) beneficiaries and by their competitors, satisfying the requirements of Article 263 TFEU (Craig and De Búrca, 2011:1103). Because of the Commission’s discretionary power, the General Court (GC) and the ECJ can only check if the Commission has respected procedural and legal principles, if the facts are true, if the Commission has incurred in manifest error, or if it has misused its power.³³

2.3. *Soft law*

In the area of State aid, the Commission adopts policy guidelines with different nomenclature and content, which explain how the Commission interprets and applies State aid legislation (Treaty provisions and secondary law), and which are binding on the Commission itself. The ECJ is not bound by these guidelines and therefore it can overrule them, if they

³³ GC, *Regione Autonoma della Sardegna v Commission*, Case T-171/02, par. 97; ECJ, *Philip Morris v Commission*, Case C-142/79, par. 11.

depart from the provisions of the Treaty,³⁴ obliging the Commission to modify them. However, the Commission has discretionary power to apply soft law, for example, when social or economic assessments are needed.³⁵

Informal law texts aim at limiting the wide approach of the prohibition of State aid, while they reduce the margin of action of Member States in giving aid. In contrast, they are adopted without the consent of the Council, and therefore their legal status is below formal legislation.

Guidelines can be used by the Commission to explain when it considers that certain type of aid is compatible with the internal market. Unlike in the case of the general block exemption Regulation, the Commission adopts guidelines when the categories of aid concerned cannot be clearly defined in advance.³⁶

One of the soft law texts on State aid and relevant for this paper is the Commission's Notice on the application of State aid rules to measures relating to direct business taxation, which is analysed below.

3. Tax Notice

Member States are exclusively competent to decide on the configuration of their tax system, but they must exercise their prerogatives consistently with EU law.³⁷ Therefore, Member States cannot introduce tax measures that are prohibited State aid under Article 107(1) TFEU.

In 1998, the Commission issued the Notice on the application of State aid rules to measures related to direct business taxation (Commission tax Notice) after the Council had adopted a resolution on a code of conduct for business taxation (code of conduct), which revised, in the context of harmful tax competition, many tax measures within the Member States. The Commission tax Notice gives examples of fiscal measures that can constitute State aid, develops each of the criteria, the possible justification and compatibilities regarding the qualification of tax measures as aid, and clarifies procedural requirements that Member States must meet.

³⁴ ECJ, *CIRFS v Commission*, Case C-313/90, par. 34-36; GC, *Regione autonoma della Sardegna v Commission*, Case T-171/02, par. 29.

³⁵ ECJ, *Philip Morris Holland BV v Commission*, Case C-730/79, par. 24.

³⁶ Commission Consultation document on State Aid Action Plan COM (2005) 107 final, par. 36.

³⁷ ECJ, *Finanzamt Köln-Alstadt v Schumacker* Case C-279/93, par. 21.

The requirement of State resources being involved is not controversial, and the tax Notice expressly says that “[a] loss of tax revenue is equivalent to consumption of State resources in the form of fiscal expenditure.”³⁸

As explained before, the criterion of distorting competition and affecting trade between Member States is easily met. When a derogation from normal taxation exists, the fact that the aid strengthens the beneficiary’s position compared with that of competitors is automatically assumed.

In a non-exhaustive way, the Commission tax Notice lists the following types of tax measures as possibly providing an advantage: a reduction in the tax base (such as special deductions, special accelerated depreciation arrangements or the entering of reserves on the balance sheet); a total or partial reduction in the amount of tax (such as exemption or a tax credit); a deferment, cancellation or even a special rescheduling of tax debt. Other fiscal measures such as reductions on contributions to social security,³⁹ disparities in the tax rate,⁴⁰ non-taxation⁴¹ or the inactivity of tax authorities⁴² can be included in the list.

The concept of advantage in the Commission tax Notice is wide since it is identified with a reduction in the beneficiaries’ tax burden “*which relieves them of charges that are normally borne from their budgets*”.⁴³ This presupposes that a derogation from a previous situation of normal taxation has been established by a tax measure.

In principle, general tax measures do not constitute State aid because they are part of the general tax system, while fiscal aids are exceptions to this system (Micheau, 2008:277). General measures are measures which are effectively open, on an equal access basis, to all economic agents operating within a Member State, and which do not *de facto* limit this

³⁸ Commission Notice on the application of the State aid rules to measures relating to direct business taxation [1998] OJ C 384/3, *par.* 10.

³⁹ ECJ, *Belgium v Commission*, Case C-75/97, *par.* 38.

⁴⁰ In *GIL Insurance*, although an advantage was identified for operators to which a lower rate for insurance contracts was applied, the question on the justification by the nature and the general scheme of the tax system was answered positively (ECJ, *GIL Insurance Ltd and Others v Commissioners of Customs & Excise*, Case C-308/01, *par.* 78).

⁴¹ In *Laboratoires Boiron SA*, a tax on direct sales was charged on pharmaceutical laboratories and not to wholesale distributors. In this case, an additional proof of overcompensating effect on the wholesale entrusted with a public service obligation was needed (ECJ, *v Union de recouvrement des cotisations de sécurité sociale et d’allocations familiales*, Case C-526/04, *par.* 34-37).

⁴² Due to the lack of diligence of the tax authorities, for example, by not initiating tax collection procedures (ECJ, *Commission v Hellenic Republic*, Case C-415/03, *par.* 5).

⁴³ ECJ, *Portugal v Commission*, Case C-88/03, *par.* 18.

access.⁴⁴ The strict application of this definition would mean that all undertakings within a Member State should be taxed in the same way in all taxes and in all stages of taxation.⁴⁵ However, the comparability test and the justification by the nature or general scheme of the tax system allow some room for differentiation.

The Commission tax Notice mentions two types of general measures, as long as they apply to all undertakings and to the production of all goods: technical measures (for example, setting the rate of taxation, depreciation rules and rules on loss carry-overs; provisions to prevent double taxation or tax avoidance), and measures pursuing general economic policy objectives related to certain production costs (research and development (R&D), the environment, training, employment).

Fiscal technic is closely related to the Member States' tax competences. It is the normal result of primary objectives and inherent principles of the tax system, so measures of fiscal technique are presumed to be general measures.

Measures pursuing general economic policy objectives related to production costs are, in principle, considered general measures and therefore do not qualify as State aid. Member States may use them to direct the behaviour of undertakings towards policy objectives, such as R&D, environmental policies, or labour-intensive industries (Prek and Lefèvre 2012:335). However, the tax reduction must be linked to the production cost concerned, and tax measures are normally not suitable for this purpose, due to the lack of control of the requirements of an exemption once it is approved and because of the perdurable nature of tax measures. Therefore, tax measures are likely to be considered as compensating fixed or variable costs and thus being operating aid.⁴⁶ In conclusion, if it is showed that a tax measure is aimed at indirectly favouring certain undertakings which are in fact the only ones incurring in such costs, the selective nature of the measure concerned will arise (Rossi-Maccanico 2009:71-72).

⁴⁴ Commission Notice on the application of the State aid rules to measures relating to direct business taxation [1998] OJ C 384/3, par. 13.

⁴⁵ In some cases, the application of a measure to all undertakings that comply with objective conditions is not enough for the ECJ to consider it a general measure. In *Spain v Commission*, deductions of 25% on the gross corporate income tax payable granted to certain investments on export related activities were declared incompatible State aid. The only relevant arguments were that the measure could only benefit the category of undertakings carrying out exports and making such investments, and that it had effects on trade (ECJ, *Spain v Commission*, C-501/00, par. 120-125).

⁴⁶ According to ROSSI-MACCANICO, "fiscal preferences are normally forbidden because it is difficult to estimate a link with investments and job creation, or to exclude that tax reductions are being used to reduce a beneficiary's operating costs". (Rossi-Maccanico 2007:93).

3.1. *The derogation test*

A tax measure will normally consist in the establishment of a reduction or an increase in the tax burden of a concrete tax figure, which creates a change in a broader system of reference. This system of reference or benchmark must be identified. As the ECJ declared in *Adria-Wien Pipeline*, a tax measure is selective when, under a particular statutory scheme, it favours certain undertakings or the production of certain goods compared to others, which are in a legal and factual situation that is comparable in the light of the objective pursued by the measure in question.⁴⁷ This means that the objective pursued by the tax measure concerned needs to be identified and, according to it, identify which are the undertakings in a comparable legal and factual situation.

There must be a causal relationship between the objective pursued in the concrete case and the differentiation in treatment. For example, in *Adria-Wien Pipeline*, the ECJ reminded that the fact that a tax measure applies to a large number of undertakings or that those undertakings belong to different and big sectors are not reasons to consider it a general measure of economic policy. The Court held that the ecological considerations underlying the contested State measure did not justify it, because undertakings providing services and undertakings manufacturing goods damage the environment equally, but only the latter were included in the scope of the measure. It was derived from the Court's reasoning that an objective of general economic policy, such as the protection of the environment, could justify a different tax treatment, if all relevant undertakings in a legal and factual situation fell under the scope of the measure.

The difficulty lies, however, in determining the scope of the said objective. In *Netherlands v. Commission*, the General Court interpreted that large industrial facilities should be considered sufficiently differentiated from the rest, so that a measure based on objective criteria that applied to all of them, and which was in accordance with the objective pursued by the measure (the protection of the environment), would not qualify as selective.⁴⁸ The ECJ interpreted, on the contrary, that because restrictions on emission of nitrogen oxides applied to all undertakings in The Netherlands, there was a comparable legal and factual situation, and consequently the advantage of big facilities was selective. This shows the wide approach that the ECJ makes to comparability.

⁴⁷ ECJ, *Adria-Wein Pipeline*, Case C-143/99, par. 41.

⁴⁸ GC, *Netherlands v Commission*, Case T-233/04, par. 95.

The result is that the ECJ has hardly ever concluded that undertakings are not in a comparable situation in the view of the objective of the measure at stake. Even if the ECJ has not classified the circumstances where this possibility may apply, it seems that it would admit it when the factual circumstances are “sufficient” to consider the measure not selective.⁴⁹

The comparability test has some similarities with the principle of equal treatment, although they are different. They both mean that identical situations need to be treated in the same way, and situations that are different need to be treated differently. However, the comparability test directly relates an exception with a benefit, and a discriminatory treatment is presumed unless a justification on the nature or general scheme of the tax system is proofed. The principle of equal treatment is less strict, because it allows differential treatments as long as they are justified by reasonable objectiveness and proportionality in accordance with the objective pursued.

In addition, the tax Notice reminds that the ECJ declared in *Italy v Commission* that Article 107 TFEU (at the time Article 92 EEC) “does not distinguish between the measures of State intervention concerned by reference to their causes or aims but defines them in relation to their effects”.⁵⁰ The effect-based approach has been used to overrule tax measures that pursue non-fiscal objectives, such as social, regional and environmental reasons. In *British Aggregates v Commission*, the ECJ held that Member States’ freedom on environmental policies does not go as far as to allow them to design tax measures that do not apply to all similar activities which have a comparable impact on the environment, because the effects of fiscal measures are relevant, not their objectives.⁵¹

Sometimes the various aspects that a tax measure introduces to the system can constitute a common or normal tax regime, so that the tax measure will itself constitute the reference framework. This does not automatically imply that such a tax measure is of a general nature. In cases where the technical design of a tax scheme gives it an autonomous character (e.g. environmental levies), rather than establishing a derogation from a general measure, the identification of the reference framework

⁴⁹ The ECJ held that “the substantial NOx emissions of the undertakings covered by the measure in question and the specific reduction standard applicable to those undertakings are not sufficient to enable that measure to avoid classification as a selective measure”. A quantitative criterion for establishing a differentiation, such as total installed thermal capacity of more than 20 MWth, “cannot be regarded as inherent to a scheme intended to reduce industrial pollution and, therefore, justified only on environmental grounds.” (ECJ, *Commission v Netherlands*, Case C-279/08, par 76).

⁵⁰ ECJ, *Italy v Commission*, Case C-173/73, par 13.

⁵¹ ECJ, *British Aggregates Association v. European Commission s*, Case C-487/06P, par 86-87.

applying to all comparable undertakings may not be necessary, but then the measure must apply consistently with its objective.

In *Government of Gibraltar v. Commission*, the ECJ went further when it assumed that offshore companies and other companies were in a comparable situation looking at a hypothetical reference framework. The ECJ first reminded that the regulatory technique used by a tax measure is not relevant in the assessment of State interventions under Article 107(1) TFEU.⁵² The Court also recalled that selectivity is not conditional upon having a general tax burden for two kinds of undertakings and a derogating measure applying to one of them. It rather held that a common or normal tax regime itself can constitute a selective advantage if it has the effect of creating a privileged category of undertakings. The ECJ held that because the new general tax regime applicable to all undertakings was based on the sole criteria of the number of employees and the size of the business premises, the effect was to eliminate the tax burden of offshore companies, because they have no employees and they do not occupy business property.⁵³ The judgement has been criticised because the ECJ applied its view on what the tax policy and tax base should be, contrary to the view of the Gibraltar authorities, something for which Member States remain competent. According to the nature of the tax concerned (based on payrolls and property), the situation of offshore companies was different from that of companies that fell under the tax regime, and the only way to consider them comparable would have been to make substantial changes in the tax regime (Lang 2012:807-810).

3.2. *Justification by the nature or general scheme of the tax system*

It derives from the ECJ judgment in *Italy v Commission* that selective tax measures that are justified by the nature or general scheme of the tax system do not qualify as State aid.⁵⁴ The Commission tax Notice defines these measures as the ones deriving “*directly from the basic or guiding principles of the tax system in the Member State concerned*”, or those which “*economic rationale makes them necessary to the functioning and effectiveness of the tax system*”.⁵⁵ A selective fiscal

⁵² ECJ, *Commission & Kingdom of Spain v Government of Gibraltar & UK*, Joined Cases 106/09 P and C-107/09 P, par. 87-88.

⁵³ ECJ, *Commission and Spain v Government of Gibraltar*, Joined Cases 106/09 P and C-107/09 P, par. 102.

⁵⁴ ECJ, *Italy v Commission*, Case C-173/73, par. 15.

⁵⁵ Commission Notice on the application of the State aid rules to measures relating to direct business taxation [1998] OJ C 384/3, par. 16 and 23.

measure can be justified either by the nature of the whole tax system, or by the logic of the scheme which is part of. On the one hand, the inherent logic of the system is normally identified with measures that are a consequence of the basic or guiding principles of a tax system (progressive tax rates, measures to avoid double taxation and to combat tax avoidance,⁵⁶ tax neutrality,⁵⁷ etc.). On the other hand, tax measures that are an adaptation of the general system to meet particular characteristics of a certain sector will be justified by the logic of the scheme (Quigley 2012:114). However, in practice, most of the justifications accepted by the Commission have been based on the intrinsic features of the tax system, and only in a few cases did the Commission declare that a materially selective measure was justified by the general scheme of the system.⁵⁸ It is for the Member State concerned to prove that a tax measure is justified by the nature or general scheme of the tax system.

The GC and the ECJ have applied the justification by the nature or general scheme of the tax system narrowly. Concerning selective tax measures justified by the nature of the overall tax system, both courts only consider measures that are a clear consequence of basic principles of a tax system as possibly justified. As the GC stated in *Territorio Histórico de Álava v Commission*, “the justification of the measures at issue ‘by the nature or overall structure of the system’ refers to the consistency of a specific tax measure with the internal logic of the tax system in general.”⁵⁹ Concretely, the GC held that tax provisions which pursue general objectives of economic policy that are extraneous to the tax system concerned (such as encouraging investment) cannot justify a selective measure.

Regarding tax measures justified by the logic of the tax scheme of which they form part, only differentiations that are inherent to such a scheme are accepted by the Court. As seen in *Netherlands v Commission*, the ECJ held that a tax measure that distinguished undertakings on the basis of their thermal installation capacity was not justified by the nature of a tax scheme intended to reduce industrial pollution.⁶⁰ In *Belgium v Commission*, the ECJ

⁵⁶ In *GIL Insurance Ltd*, a higher rate for some kind of insurance contracts counteracted the practice of avoiding the payment of VAT (*GIL Insurance Ltd and Others v Commissioners of Customs & Excise*, Case C-308/01, 2004, par. 74-78).

⁵⁷ The Commission declared that the change on the legal form was neutral because it did not mean an increase in income or in the capacity to produce income (Commission Decision of 5 June 2002 on State aid granted by Italy in the form of tax exemptions and subsidised loans to public utilities with a majority public capital holding [2002] C(2002) 2006, par 79-81).

⁵⁸ Commission Report on the implementation of the Commission Notice on the application of the state aid rules to measures relating to direct business taxation C(2004) 434, par. 35-36.

⁵⁹ GC, *Territorio Histórico de Álava and others v Commission*, Case T-227 to 229, 265, 266 and 270/01, par. 179.

⁶⁰ ECJ, *Commission v Netherlands*, Case C- 279/08, par. 76-78.

acknowledged that it should be determined whether reductions of social security contributions for workers of certain industrial sectors, aimed at promoting the creation of jobs, was in line with the nature or general scheme of the social protection system.⁶¹ The Court declared that the only effect of the measure was the granting of an economic advantage to the recipient undertakings, and could not therefore be justified by the nature or scheme of the social security system.

The Commission tax Notice distinguishes between external objectives assigned to a particular tax scheme (in particular, social or regional objectives) and objectives inherent to the tax system. Even if the Commission tax Notice does not expressly exclude non-fiscal objectives, it states that “[t]he whole purpose of the tax system is to collect revenue to finance State expenditure.”⁶² Examples mentioned by the Commission tax Notice are the following: the progressive nature of the income tax, methods of calculation of asset depreciation and stock valuation, arrangements for the collection of fiscal debts, objective differences between taxpayers, exemption from profit taxation of non-profit undertakings, exemption on cooperatives that distribute all their profit to their members, taking into account taxes paid in the country where the undertaking is resident for tax purposes, taxation determined on a fixed basis, and specific provisions on the taxation of small and medium-sized enterprises.

3.3. *Compatibility with the internal market and procedure*

The Commission does not consider that State aid in the form of tax measures is different from other forms of aid, such as subsidies or loans. Therefore, the Commission has not issued Compatibility Guidelines for fiscal State aid, while recognizing that it did “not intend to devise specific compatibility criteria for State aid granted in the form of tax measures”.⁶³ The Commission tax Notice indicates that a fiscal measure can be exempted from incompatibility with the internal market on the basis of either Article 107(2) or 107(3) TFEU. It also states that tax measures can qualify under Article 106 TFEU, which allows, under some conditions, to grant aid to undertakings entrusted with the operation of services of general economic interest.

⁶¹ ECJ, *Belgium v Commission*, Case C-75/97, par. 33-34.

⁶² Commission Notice on the application of the State aid rules to measures relating to direct business taxation [1998] OJ C 384/3, par. 26.

⁶³ Commission Report on the implementation of the Commission Notice on the application of the state aid rules to measures relating to direct business taxation C(2004) 434, par. 78.

The Commission tax Notice acknowledges that tax measures hardly relate to specific projects and the precise volume of aid is difficult to calculate. However, fiscal aid which is in accordance with the objective and meets the conditions of one of the existing compatibility guidelines can be declared compatible with the internal market by the Commission.

The Commission tax Notice states that fiscal aid cannot be implemented before the Commission is notified pursuant to Article 108(3) TFEU and a positive decision declares it compatible with the internal market. However, a Member State can implement tax aid measures without the Commission's approval if they fall under one of the categories of the general block exemption Regulation. In case of a negative decision, the amount to be recovered is calculated on the basis of a comparison between the tax actually paid and the amount which should have been paid if the generally applicable rule had been applied.

3.4. *Tax measures and cooperatives*

Regarding tax measures applying to cooperatives, the Commission tax Notice indicates that *“it may also be justified by the nature of the tax system that cooperatives which distribute all their profits to their members are not taxed at the level of the cooperative when tax is levied at the level of their members”*.⁶⁴ This provision comes from the analysis by the Primarolo Group of many tax measures applied in Member States which could affect to a significant extent the location of businesses acting in the EU and therefore be qualified as harmful tax measures under the code of conduct.

The Primarolo Group analysed two French measures concerning cooperatives,⁶⁵ and found that none of them were harmful tax measures. The first measure was a deduction of cooperative dividends, which applied to dividends distributed by consumer, producer and agricultural cooperatives. Dividends are the ones distributed to members *pro rata* from operations undertaken by the cooperative with each of them. The concerned tax provision indicated that cooperatives of which more than 50% of their capital was held by non-cooperative members could not benefit from the deduction.

The second fiscal benefit for cooperatives was the exemption from corporate income tax for agricultural cooperatives, which complied with

⁶⁴ Commission Notice on the application of the State aid rules to measures relating to direct business taxation [1998] OJ C 384/3, *par* 25.

⁶⁵ Report from the Code of Conduct Group on business taxation on 23 November 1999 to the ECOFIN on the Code of Conduct on business taxation SN 4901/99. Pages 126 and 130.

the relevant laws and provisions regarding their articles of association. In addition, agricultural cooperatives needed to have a majority of their capital held by its members, act solely with its members (activities with non-members would not be exempted) and distribute annual profits among members *pro rata* to the operations they had undertaken with the cooperative.

It appears that the Commission tax Notice was only influenced by the first of the mentioned fiscal benefits, recognizing the especial nature of cooperatives' dividends (cooperative return), which are more heavily taxed as this income is included on members' personal income tax. Thus, it can be assumed that Member States can decide not to tax cooperatives when they distribute all their profits to their members, with the certainty that the Commission will not review such measures.

It is questionable that paragraph 25 of the tax Notice requires that cooperatives distribute all their profits to their members, which means that cooperatives which remunerate capital investors which are not members are not under the scope of this provision. This requirement limits unnecessarily the number of cooperatives that could be certain that their tax benefits qualify for a justification. First, avoidance of economic double taxation of dividends is a widely accepted measure for all types of undertakings. Second, members of a cooperative are always remunerated *pro rata* to the activities they carry out with the cooperative, so the tax relief that the cooperative gets in this concept is always limited to the quantity of the returns given to their members. As there is no risk of overcompensation, the fact of having capital investors should not avoid cooperatives deducting the amount of tax paid by their members due to returns received. Paragraph 25 of the tax Notice, on the one hand, allows a full exemption of corporate income tax, and on the other hand, requires sole remuneration to members. This provision would increase its scope of application and would be more adapted to the reality of cooperatives if it allowed the exemption from corporate income tax of the income corresponding to cooperative returns distributed to members, with no other limitation.

The second type of tax incentives, which allow (agricultural) cooperatives⁶⁶ not to be fiscally liable for corporate income tax in respect of the activities carried out with their members as long as they comply with certain constitutive requirements were not considered by the Commission tax Notice. The Commission did not investigate the possible State aid

⁶⁶ The fact that the concerned measure only applies to agricultural cooperatives is only circumstantial, as the French tax legislation exempted these kinds of cooperatives. Thus there is no reason why this argumentation should be only applicable to agricultural cooperatives.

character of the measure. However, the Commission and the Court of Justice have reviewed some tax measures of this type and a settled answer has not been set yet.

4. Cases on cooperatives

Both international and European law have recognized the singular nature of cooperatives. The International Labour Organisation issued Recommendation 193 on the Promotion of Cooperatives, where it encourages States to improve the competitiveness of cooperatives and to adopt specific legislation on them. In addition, Council Regulation 1435/2003 on the Statute for a European Cooperative Society lists in its preamble the common guiding principles of cooperatives. The European Economic and Social Committee issued its Opinion on the diverse forms of enterprise, where it reminded that cooperatives do not relocate, so they continuously answer to the needs of the population, especially where social cohesion and the internal market can be jeopardised. This Opinion further claims that competition and tax rules should provide for the differential costs of enterprises to be regulated in a compensatory manner. The Commission issued the Communication on the promotion of cooperative societies in Europe, where it acknowledged that *“specific tax treatment may be welcomed, but in all aspects of the regulation of co-operatives, the principle should be observed that any protection or benefits afforded to a particular type of entity should be proportionate to any legal constraints, social added value or limitations inherent in that form and should not lead to unfair competition.”*⁶⁷ A common international and European legal framework for cooperatives is thus developing in different areas, such as competition law.

Despite the broad definition of undertaking used by the Commission, in which cooperatives are included, cooperatives have clear distinctive features that make them deserve having a special legal framework. The International Cooperative Alliance enounced some general principles⁶⁸ part of the cooperative identity, but which are not specific enough to form a cooperative legal identity. In European Member States, the legal framework of cooperatives in their company law and tax law aspects is as varied as the diversity of types of cooperatives.

⁶⁷ Commission Communication on the promotion of co-operative societies in Europe COM (2004) 18 final, Page 13.

⁶⁸ The ICA principles are: voluntary and open membership; democratic member control; member economic contribution and control of capital; autonomy and independence; education, training and information; cooperation among cooperatives; concern for community.

Cooperatives are democratically run because members have one vote each irrespective of their contribution to the cooperative's capital. The open character of cooperatives results in their capital variability, which means that the statutes of a cooperative do not need to be amended if new capital is subscribed or taken out. A cooperative is not a non-profit organization, thus it seeks to earn some profit from its economic activity, but at the same time a cooperative is run by its members and in their interest. The main objective of a cooperative may not be to contribute to the community, but their intrinsic nature, mainly their obligation to constitute mandatory indivisible reserves, necessarily raises their social function. Cooperatives are thus obliged to contribute with a substantial part of their benefits to the community.

The obligation of a cooperative to act in the interest of its members raises the questions of whether a cooperative can make transactions with third parties, and whether it can receive capital from third party investors. The answer to these questions depends on each national cooperative law. For instance, some national laws require that a percentage of the activities of cooperatives are done with their members in order to get a special tax treatment (Danish, Italian and Spanish laws), while others let cooperatives the option to foresee in their statutes the possibility to act with third parties, as long as these activities do not acquire more importance than the ones with members (Dutch and Norwegian laws). Some national cooperative laws allow them to have members who are only interested in the return on capital, while others require that all their members are users or workers (Fici 2012:57-58). In any case, remuneration of members for the capital subscribed is always limited. Regarding remuneration of members for transactions carried with them, a cooperative can only distribute returns *pro rata* to the number of these transactions. Due to the reasons given in the previous paragraph and in this one, it is logical that their contribution to the general budget, in the form of taxes, is lower than that of companies that, unlike cooperatives, do not internalize social costs.

The specificity of cooperatives in the ECJ case-law on competition law was recognized in *Gottrup-Klim*.⁶⁹ A Danish agricultural cooperative with a dominant position prohibited its members to join other competitors, and these contractual clauses were alleged to be contrary to the current Articles 101 and 102 TFEU. However, the ECJ held that these agreements were not contrary to competition law. Neither did this cooperative abuse its dominant position in the market. The ECJ admitted that double

⁶⁹ ECJ, *Gottrup-Klim e.a. Grovareforeninger v Dansk Landbrugs Grovareselskab AmbA*, Case C-250/92.

membership was contrary to the objective of the cooperatives concerned of acting for the benefit of their members. The Court held that a restriction to double membership could have procompetitive effects, and could be acceptable as long as they were limited to what was necessary to ensure the contractual power of cooperatives in relation to producers and effective competition, meaning that proportionality must be respected.

In addition to the two cases in which this chapter will focus, it is worth mentioning other cases where the State aid rules were applied to cooperatives. The ECJ judgment in *Centre d'exportation du livre français*⁷⁰ answered to a preliminary question by the French *Conseil d'État* by saying that the aid granted had to be recovered. Previously, three Commission decisions had declared the compatibility of the aid, and the three decisions had been annulled. In this case, the French ministry of culture subsidized a loss-making cooperative which exported books, in order to promote French culture. The possibility of considering this cooperative as a provider of service of general economic interest (the Altmark criteria) had been refused by the Commission.

Within the European Economic Area, the EFTA Surveillance Authority Decision of 23 July 2009 refused the possibility of Norwegian consumer, agricultural, fisheries, forestry and building cooperatives to qualify as providers of services of general economic interest under Article 59.2 EEA Agreement (correlative Article 106 TFEU). The EFTA Authority did not consider that safeguarding cooperatives was a public interest, because there had been no evidence showed by Norway about it.⁷¹ Norway had notified to the Surveillance Authority the proposed amendments to the Tax Act, concretely a tax scheme for the said cooperatives consisting in a tax deduction up to 15% of the annual net income, and made solely from the part of the income deriving from trade with the members of the cooperative.⁷² The selective nature of the deduction made the tax measure qualify as State aid within Article 61 EEA Agreement. The Norwegian authorities argued that the consumer, agricultural, fisheries, forestry

⁷⁰ ECJ, *Centre d'exportation du livre français (CELF) and Ministre de la Culture et de la Communication v Société internationale de diffusion et d'édition (SIDE)*, Case C-1/09.

⁷¹ First, Norway should have showed that a clear entrustment of a public service was given by law to cooperatives. Second, the way in which the compensation was calculated should have been established beforehand. Third, proof of the compensation being only the necessary to cover the cost of the public service should have been given. Fourth, the link between the quantity of the cost and the choice of the entrusted undertaking would not have been a problem to make, because the objective requirement of being a cooperative sufficed.

⁷² EFTA Surveillance Authority Decision of 23 July 2009 on the notified scheme concerning tax benefits for certain cooperatives (Norway) [2009] OJ 158/39. Page 40.

and building cooperatives needed the aid more than other cooperatives, without showing evidence of it. However, the reason to grant the aid was the limited access to equity capital of cooperatives, which all types of cooperatives suffer, thus the measure was selective.

The Surveillance Authority did not bear in mind the conceptual differentiation by which an entity that carries out both economic and non-economic activities is only considered an undertaking in relation to the former. Indeed, when it carries out activities with its members a cooperative acts outside the market. Therefore, a deduction on income coming from members cannot be considered to affect trade between States or to distort competition. However, the Surveillance Authority only admitted that pure mutual cooperatives were not in a legal and factual comparable situation to other undertakings, which was not the case of most of the cooperatives to which the deduction applied. Even if Norwegian cooperatives were obliged to keep separate accounting of transactions made with members and with non-members, the Surveillance authority required that cooperatives acted solely with their members in order to be capable of having such a tax deduction. This decision is highly questionable from the point of view of the ECJ case-law, because it penalizes cooperatives for their legal form, which should be irrelevant when analysing State measures in the light of the State aid policy.

4.1. *Spanish case on agricultural cooperatives (Aid C 22/2001)*

This case concerns a series of fiscal measures to support agriculture following the increase in fuel prices, adopted by the Spanish government, most of which were implemented before being notified to the Commission by letter of 29th September 2000. Among other changes, Royal Decree-Law No 10/2000 of 6 October 2000 on emergency support for agriculture, fisheries and transport, amended Law No 27/1999 of 16 July 1999 on cooperatives and Law No 20/1990 of 19 December 1990 on the tax arrangements applying to cooperatives. It abolished the limit of 50% of turnover that agricultural cooperatives can have from activities with non-member third parties in relation to deliveries of B diesel, without losing their preferential tax treatment. Moreover, it amended Law No 34/1998 of 7 October 1998 on hydrocarbons, allowing agricultural cooperatives to deliver B diesel without the obligation to constitute a separate legal entity to which the general tax regime would be applied. Agricultural cooperatives in Spain had been first able to distribute petroleum products since Order of 31 July 1986 was enacted, but Law No 34/1998 had

introduced the prohibition for cooperatives to carry out such activities, unless they constituted a separate legal entity.

The Preamble of Law 20/1990 recognizes that the special tax regime of cooperatives on corporate income tax is composed by both technical adjustments and tax benefits. Spanish cooperatives are obliged to separate their income coming from members and from non-member third parties, so that the first are taxed at a lower rate, while the second are taxed at the general tax rate. Therefore, it is possible to identify which measures are technical adjustments to disadvantages caused by the attachment of a cooperative to its inherent principles. However, agricultural cooperatives are considered “especially protected cooperatives”, which benefit from a rebate of 50% of the tax payable, which is the sum of both the tax payable from activities carried out with members and third parties. Thus, this measure can be considered as a tax benefit aimed at promoting the cooperative model.

Commission decision of 11 December 2002 declared that the changes made only restored the legal situation and did not alter the tax regime of agricultural cooperatives regarding the selling of petroleum products previous to Law No 34/1998.

Moreover, the Commission acknowledged that tax advantages enjoyed by cooperatives were technical adjustment standards. Namely, cooperatives’ dividends (returns) are subject to double taxation, and members are allowed a lower deduction on their income tax than shareholders of a company.⁷³ Cooperatives are also subject to mandatory reserves, which cannot be distributed even when the cooperative ends to exist. Finally, the Commission stated that tax regime of agricultural cooperatives must be analysed as a whole. Therefore, the measures regarding the distribution of fuel by cooperatives were considered not to constitute an advantage, so no State aid was involved.

On April 2003, two associations of service stations brought an action for annulment against the decision of 2002 before the GC. On 12 December 2006, the Court issued a judgment in Case T-146/03, *Asociación de Estaciones de Servicio de Madrid y Federación Catalana de Estaciones de Servicio v. Commission*. The Commission defended its decision by giving arguments to support that the tax treatment of Spanish cooperatives does not confer them an advantage. First, the Commission stated that mandatory reserves of cooperatives are not equivalent to legal reserves of

⁷³ The Confederation of Spanish agricultural cooperatives argued that “*the advantage that a cooperative might have enjoyed as a result of the company tax rebate is offset by the double taxation on personal income imposed on cooperative members and the increase in their tax burden in this way*” (Commission Decision of 11 December 2002 on the measures implemented by Spain in the agricultural sector following the increase in fuel prices [2002] OJ L 111/24, *par.* 90).

companies.⁷⁴ Cooperative reserves are not in any case distributable. In addition, cooperatives must contribute to them with 25% of benefits from activities with members and with 50% of benefits from activities with non-member third parties. According to the Commission, as cooperatives and capital-based companies are not in a comparable situation, the fundamental element of an advantage was missing, thus it was not possible to further question the existence of aid. The Commission thought, at the time, that tax regime of cooperatives constituted a complete one and not an exception from tax regime of companies, so this could not be considered the normal tax system from which a derogation must be identified.

The Commission stated that even in the case where an advantage for cooperatives was identified, it would be fully justified by the nature or general scheme of the tax system, which requires a different treatment for different realities. Here, the Commission recognized the principles of equal treatment, progressivity and ability to pay, enshrined in the Spanish tax system, as grounds for justification of cooperative tax benefits.

However, the GC annulled the decision due to the Commission's lack of motivation in respect of advantages under the tax on capital transfers and documented legal acts, economic activities tax and immovable property tax. The judgment did not question the Commission's argumentation regarding tax measures of cooperatives on corporate income tax. The GC also held that unless more detailed clarifications were given, the objective of liberalizing the sector of fuel distribution could not amount to a justification by the nature or general scheme of the Spanish tax system.

The Commission issued a new decision on 15 December 2009, with an opposite view in each of the criteria of Article 107(1) TFEU. The Decision goes beyond the General Court's demand of motivation only in respect of taxes on transfer of property and documented acts, economic activities and immovable property. The Commission rather focuses on the corporate income tax of agricultural cooperatives and reconstructs its position.

Regarding corporate income tax of agricultural cooperatives, the Commission states that the advantage must be reviewed at a cooperative level and not at a member level. Therefore, it does not accept the argument by which the different tax treatment compensates double taxation of cooperative returns. This positioning is illogic, because the Commission itself recognizes in the Tax Notice that double taxation of cooperative

⁷⁴ Cooperative reserves increase the ability for creditors of the cooperative to get paid, as a way of compensating the variable character of a cooperative's capital.

returns needs to be taken into account, showing that a general view is necessary.

The Commission further argues that as the only relevant subject of the analysis is the cooperative, with their new situation, cooperatives would avoid the costs of creating a new company. On this basis, the Commission concludes that the requirement of an advantage is fulfilled. However, it does not take into account that, unlike the cooperative, this new company would not have an obligation to contribute with 50% of its results to reserve funds.⁷⁵ The cooperative would avoid the costs of creating a company, but would suffer the fiscal costs that their non-cooperative income is subject to. If considered, this may have mitigated any possible advantage brought by Royal Decree-law 10/2000.

Then, the Commission concluded that only true mutual cooperatives (the ones that act only with their members) are not in a legal and factual situation comparable to capital-based companies, because these cooperatives do not obtain any benefit.⁷⁶ It concluded that agricultural cooperatives and companies are in a comparable situation in respect of mandatory reserves, and therefore in respect of corporate income tax.

Finally, in the light of the exemption of Article 107(3)(c) TFEU, the Commission discussed whether the said advantages of agricultural cooperatives were proportionate to the objective of promoting them and compensate their inherent limitations. Here, the only inherent element of cooperatives used was the principle of mutuality. The direct consequence of this partial appreciation was that only measures affecting tax treatment of cooperative results could be proportionate to their special characteristics. As the measures analysed concerned extra-cooperative results, the Commission could not conclude that aid was given to eliminate inefficiencies in the market or to address other social or equitable objectives.

The Spanish Confederations of Cooperatives and of Social Economy brought an action for annulment on 6 April 2010 against this decision

⁷⁵ Extra cooperative results are subject to a high burden which results in low available benefits coming from these activities for cooperatives. This is because, first, a minimum of 50% of the results from these activities must be destined to the Mandatory Reserve Fund; and second, the remaining benefit is taxed at the general tax rate of 30%. The higher the ratio of extra-cooperative to cooperative results, the larger the amount to be paid into the mandatory reserves, the higher the company tax and the smaller the percentage of available profit, so that the higher the extra-cooperative results, the lower the net amount received by each member. Thus, comparing the situation of extra-cooperative results and results of a company, cooperatives are in a disadvantageous position, due to the stricter commercial requirements they face. (Arana 2012:149).

⁷⁶ Commission Decision of 15 December 2009 on the measures implemented by Spain in the agricultural sector following the increase in fuel prices OJ L 235/1, *par.* 163.

which declares that the measures concerned constitute State aid incompatible with the internal market and orders recovery. The case is currently pending before the GC under the reference T-156/10.

REMARKS

In its first decision, the Commission had concluded that no advantage was conferred to cooperatives on corporate income tax, because the beneficial provisions applying to them had to be considered together with their limitations, and within their whole fiscal regime. However, the GC did not decide on the substance of the case. There is a chance that the Court will annul this second decision, as it deviates from the previous judgment's mandate to motivate on the justification of the measures in respect of other taxes different from corporate income tax. Even if the GC had agreed in most of the points of the first decision, the Commission changed its whole argumentation and changed its view on issues that were settled.

The Commission, in its second decision, disregards the legal, economic and social reality around cooperatives. The Commission's first decision appears to be more logic than the second when it comes to the analysis of technical adjustments (purely fiscal measures) of cooperatives, because it considers the tax system of cooperatives as a whole, together with the treatment of returns received by their members, which are part of the cooperative itself.

In its second decision, the Commission only regarded the principle of mutuality as a relevant characteristic of cooperatives. However, national cooperative laws do not establish the relationship between the mutualistic character of cooperatives and tax incentives in absolute terms. As previously stated, some national laws limit to a certain percentage the activities of a cooperative with third parties. Other national laws require that activities with members are more important than the ones with non-members. In such national laws where specific limits exist for transactions with non-members in relation to the ones with members, exceeding those limits will make the cooperative lose any tax benefit it was entitled to. Therefore, national laws establish mechanisms to control that tax benefits are granted to cooperatives that act in the interest of their members. The Commission introduces a narrower criterion when accepting tax benefits only for purely mutualistic cooperatives, which disregards the fact that cooperatives may need to act in the market in order to compensate their lower capacity to get funding, with the ultimate objective of acting in the interest of their members.

Other limitations such as the difficulty of cooperatives to get funding, their obligation to keep separate accounting and their obligation to allocate

a greater amount to reserves than companies should be as relevant as the mutual character of cooperatives. These limitations influence the ability to pay of cooperatives both as an actor towards its members and third parties.

However, the particular measure introduced by Spain to counteract the increase of fuel price followed an objective external to the tax system itself. In fact, the measure itself may constitute incompatible State aid, but the Commission went too far in assuming that the whole tax scheme of cooperatives could be qualified as State aid. Spanish authorities could have provided evidence of how the tax scheme of cooperatives complies with the constitutional mandate of establishing an adequate tax system and how tax benefits compensate in a proportionate way disadvantages inherent to them. In this case, it could have been reminded that keeping the legal form of a cooperative was not economically more beneficial because of the obligation to contribute with half of the extra-cooperative results to mandatory reserves.

It is difficult to prove that a given tax measure compensates a concrete disadvantage, because of the general character of fiscal measures. One possible way is that tax legislation is designed as to relating a tax relief with a limitation, such as measures to avoid economic double taxation of dividends. Tax legislation can also explain its compensatory nature in its preamble. Nevertheless, the Commission has used alternative methods in cases where it was impossible to calculate the costs of an investment or disadvantage.⁷⁷ Otherwise, it would be necessary to calculate in economic terms the beneficial effect that the tax preferences of cooperatives have as a whole, and compare it with the economic result of the legal limitations they suffer.

4.2. *The preliminary ruling of the ECJ in Paint Graphos*

The Court of Justice answered, on 8 September 2011, to the preliminary questions brought by the Italian *Corte suprema di cassazione*, in the context of three different proceedings (Joint cases C-78, 79, 80/08) regarding the

⁷⁷ For example, in the field of investment aid for environmental protection, the new draft GBER foresees that when the eligible costs of investing in environmental protection cannot be identified neither in the total investment cost as a separate investment nor by reference to a similar investment, the eligible costs will be the total investment costs themselves (Article 30(5) of the Draft GBER Proposal). This changes the current GBER which establishes the obligation to calculate the eligible costs by reference to a counterfactual situation (Article 18(5)-(8) of the current GBER). Even if aid granted to cooperatives is not among the exempted categories, this shows that the Commission can make exceptions to the strict application of the prohibition to grant operating aid, if it is willing to recognize the added value of certain activity.

application of exemptions from various taxes to which producers' and workers' cooperatives were entitled under Italian tax law. According to Article 11 of Decree of the President of the Republic 601/1973 (DPR), producers' and workers' cooperatives were exempted from tax on the income of local persons and local income tax if the total amount of remuneration actually paid to the members who worked for the cooperative on a continuous basis was not less than 60 per cent of the total amount of all the other costs, except from raw materials.⁷⁸ This means that these cooperatives were not purely mutualistic, because they could have part of their activity coming from third parties and still apply the exemption under Article 11 DPR.

There was not much information provided about each of the cases. The first case involved the refusal from Italian tax authorities to the cooperative Paint Graphos of tax exemptions under Articles 11, 12 and 14 of DPR. The second case was about the loss of fiscal benefits by the cooperative Adige Carni, because of invoices for non-existent transactions, which Adige Carni had not computed as income, so that the tax authorities assumed that it had distributed that amount to the members, in breach of Article 11 of DPR 601/1973. In the third case, Mr Franchetto, a member of a cooperative, was subject to an adjustment of his income tax returns, because he acted himself independently on the market and then the cooperative in whose name the purchase and sales invoices were made received a commission, finally distributing the surplus to its members, instead of appropriating it to the reserve fund.

Under Article 14 of the DPR, this exemption only applied to cooperatives governed by the principle of mutuality. A wide concept of mutuality is used under Italian cooperative law, because all the different obligations that cooperatives need to comply with are part of the objective of mutuality. According to Article 26 of Legislative Decree No 1577/1947, cooperatives were neither allowed to distribute dividends exceeding the statutory interest rate applicable to the capital actually paid, nor to distribute reserves to members during the life-time of the cooperative. In case of winding up, they were required to transfer all the assets, after deduction of the paid up capital and any dividends to socially committed associations. If any of these obligations was infringed, the cooperative would no more follow the objective of mutuality and would not anymore be entitled to tax exemptions.

The Italian court asked, in essence, whether tax benefits granted to cooperatives under DPR No 601/1973 constituted selective State aid.

⁷⁸ If the total remuneration was less than 60% of the costs but no less than 40%, the tax was reduced to half.

The referring court also asked if the measures at stake could be regarded as proportionate in relation to the objectives assigned to cooperatives.

AG Jääskinen's Opinion considered that the tax regime of cooperatives constituted an autonomous system. He argued first that the general system of taxation of legal persons is only applicable for cooperative societies for the purpose of regulating the relevant factors in determining the basis of assessment and the calculation of taxable income, but definitive taxation is subject to derogations applicable to all or to certain types of cooperatives. Second, a pure advantage can be equilibrated or justified by other obligations derived from the legal structure of a legal person, in which case it excludes an economic advantage. Tax advantages of producers' and workers' cooperatives had a transversal character and such cooperatives were not in a comparable situation in respect of other profit-making companies or the rest of cooperatives. Thus, Article 11 DPR 601/1973 was not selective. As one of the cumulative criteria of Article 107(1) TFEU was missing, it was not relevant to analyse the rest of the criteria.⁷⁹

The ECJ started by clarifying that its decision should determine the common or 'normal' tax regime applicable, and see whether "*any advantage granted by the tax measure at issue may be selective by demonstrating that the measure derogates from that common regime inasmuch as it differentiates between economic operators who, in light of the objective assigned to the tax system of the Member State concerned, are in a comparable factual and legal situation*".⁸⁰ Here, the concepts of advantage and selectivity were treated as a single one.

Contrary to AG Jääskinen's view, the ECJ held that the corporate tax was the legal system of reference, because "*the basis of assessment of the producers' and workers' cooperative societies concerned is determined in the same way as that of other types of undertaking*".⁸¹ Perhaps the reason why the Court chose this benchmark is that the contested measures in *Paint Graphos* consisted, basically, in the exemption from corporate tax on benefits and local tax on income. Accordingly, the information provided by Italian authorities only related to that measure. However, no other tax measures or obligations inherent to Italian cooperatives were pointed out and thus complete and coherent information was missing about the tax regime of Italian cooperatives.

⁷⁹ Opinion of AG Jääskinen of 8 July 2010 in Joint Cases 78/08 to 80/08, *par.* 73-78 and 111-113.

⁸⁰ ECJ, *Ministero dell'Economica e delle Finanze e.a. v Paint Graphos e.a.* Joint Cases C-78/08 to C-80/08, *par.* 49.

⁸¹ ECJ, *Ministero dell'Economica e delle Finanze e.a. v Paint Graphos e.a.* Joint Cases C-78/08 to C-80/08, *par.* 50.

Then, the general characteristics inherent to cooperatives manifested in Regulation 1435/2003 on the Statute for a European Cooperative Society and in Commission's Communication on the promotion of co-operative societies in Europe, were pointed out by the ECJ. Among their operating principles: the primacy of the individual, the "one man, one vote" rule, the distribution of assets and reserves to another cooperative in case of winding-up, and the objective of mutual benefit of members. Among their disadvantages: none or limited access to equity markets, the limited interest on loan and share capital, with the subsequent lower advantage of investing on them.

In the light of their specific characteristics, the Court held that cooperatives such as the ones involved in the proceedings "*cannot, in principle, be regarded as being in a comparable factual and legal situation to that of commercial companies,*" provided that "*they act in the economic interest of their members and their relations with members are not purely commercial but personal and individual.*"⁸² Considering that the cooperatives within the proceedings acted to some extent with third parties, this statement could mean that the ECJ recognizes that predominantly mutualistic cooperatives are, together with purely mutualistic cooperatives, in a different comparable situation to that of profit-making companies.

However, the Court claimed that "*the nature or general scheme of the tax system in question can provide no valid justification for a national measure if it provides that profits from trade with third parties who are not members of the cooperative are exempt from tax or that sums paid to such parties by way of remuneration may be deducted*".⁸³ Strictly viewed, this would mean that the Italian measure would not be justified by the nature or general scheme of the tax system, because it allowed profits that came from third parties to be exempted. Nevertheless, a corporate tax system such the one of Spanish cooperatives would be justified, because it taxed income coming from third parties at a normal rate.

The ECJ held that the referring court should determine whether producers' and workers' cooperative societies are in practice in a comparable or different situation to that of profit-making companies, and if they are in a comparable situation, it would also be for the referring court to determine whether such an advantageous position forms an inherent part of the essential principles of the tax system, and whether it complies with the principles of consistency and proportionality.

⁸² ECJ, *Ministero dell'Economica e delle Finanze e.a. v Paint Graphos e.a.* Joint Cases C-78/08 to C-80/08, par. 61.

⁸³ ECJ, *Ministero dell'Economica e delle Finanze e.a. v Paint Graphos e.a.* Joint Cases C-78/08 to C-80/08, par. 72.

REMARKS

The ECJ has taken a step forward in the progressive emergence of cooperative principles in competition law. In this way, the EU institutions may become more aware about the fact that cooperatives are not normal companies, but have specific characteristics and deserve special legislative treatment, in order to engage in equitable competition with capital-based companies (Parleani 2012:106-107).

Moreover, it can be said that in *Paint Graphos*, the ECJ, when referring to the national court to take the definitive outcome, might have followed the “rule of reason” approach, by which the measure taken by a Member State may be qualified as general if it pursues a legitimate objective (Prek and Lefèvre 2012:340). Indeed, in accordance with the SAM, this is the path that the Commission is trying to follow in State aid policy. However, in his Opinion, AG Jääskinen proposed to leave for the referring court to solve the matter because of the factual and legal elements in this case. Therefore, it is more likely that the “*limited number of facts made available to the Court and the breadth of the issues to be addressed*”⁸⁴ led the Court to issue a partial answer. In any case, there are consequences that can be steered from this judgement about the Court’s view on the tax regime of cooperatives from the State aid policy perspective.

It is noticeable that the Court, in its conclusion, refers to the task of deciding about comparability as a way of proving that a measure is justified by the nature or general tax system.⁸⁵ This confirms the finding of a justification as the core stone of the assessment of tax measures in the context of Article 107(1) TFEU, while the concepts of advantage and selectivity become more relative. Even if the objective of a tax measure might be exceptionally admitted as a relevant justification, it must be an objective which is inherent to the tax system and complies with the principle of proportionality, which is also a requirement for justifying a State aid. Besides, it is essential to prove that the costs for a Member State of tax advantages, such as the ones benefiting Italian cooperatives, compensate disadvantages caused by obligations inherent to a specific form of legal person. The burden of proof is upon the Member States, while the Commission and the ECJ have showed to have a more flexible view when full information has been provided.

Then, should the national court simply conclude that no State aid exists if it decides that the situation between undertakings compared is identified

⁸⁴ Opinion of AG Jääskinen of 8 July 2010 in Joint Cases 78/08 to 80/08, *par.* 39.

⁸⁵ ECJ, *Ministero dell’Economica e delle Finanze e.a. v Paint Graphos e.a.* Joint Cases C-78/08 to C-80/08, *par.* 81.

as non-comparable? Looking at the relevance that the ECJ gives to objectives inherent to the tax system, it seems that determining that two situations are not comparable cannot stop the analysis under Article 107(1) TFEU.

Finally, Member States which have special tax schemes applying to cooperatives will need to design them in a way that compensates their structural disadvantages. A previous explanation in the national tax provision of how compensation is calculated would be desirable, as it is foreseen, for example in the Communication on Services of General Economic Interest.

5. Proposal for an amendment of the Commission Tax Notice with respect to cooperatives

As it has been mentioned when analysing the Commission tax Notice, paragraph 25 can only be applicable to a very limited number of cooperatives. The exemption of income that is distributed as cooperative returns to members is logic because cooperatives can only remunerate their members *pro rata* to the activities they have undertaken with the cooperative. There is no need of limiting this possibility to cooperatives that do not have capital investors, because even for the ones having capital investors it can be ensured that the exemption from corporate income tax in respect of cooperative returns will only consist in the quantities distributed to members. Therefore, I would propose that paragraph 25 of the Commission tax Notice is amended in the following way:

“It may also be justified by the nature of the tax system that cooperatives are not taxed at the level of the cooperative for the quantities corresponding to distributed cooperative returns when tax is levied at the level of their members.”

Such an amendment of the tax Notice would bring a wider recognition of the special nature of the cooperative return, and would adequate to the economic reality of cooperatives, which are in need of external funding in order to keep their socially committed activities.

Moreover, regarding special tax treatment of cooperatives, it remains uncertain what the ECJ means by “*basic or guiding principles of [the] tax system*” and by “*mechanisms inherent in the tax system*”.⁸⁶ The Court and the Commission in its tax Notice have admitted that the progressive nature of a tax rate and the non-taxation of purely mutualistic cooperatives for the

⁸⁶ ECJ, *Ministero dell'Economica e delle Finanze e.a. v Paint Graphos e.a. Joint Cases C-78/08 to C-80/08*, par. 69.

dividends distributed to their members constitute basic principles of the tax system. In *Paint Graphos*, the ECJ held that prevalently mutualistic cooperatives are in principle not in a comparable situation to other companies. More important is the fact that cooperatives that act to some extent with third parties, the social added value of which is recognized by some national laws, are in need of tax benefits in order to keep acting in the interest of their members. Therefore, it is not enough that the Commission tax Notice refers only to the principle of mutuality. It should also make reference to the other elements inherent to cooperatives already mentioned.

In this context, I would propose that the following sentence is introduced after the first sentence of paragraph 27 of the tax Notice, which gives examples of tax measures that may be justified by the nature and general scheme of the tax system:

“Moreover, tax measures which compensate cooperatives which act in accordance with certain principles (for example, democratic governance, prevalently mutualistic character) and obligations (for example, mandatory reserves, limited access to equity markets) inherent to them may be justified by the nature or general scheme of the tax system concerned, as long as they respect limitations to act with third parties provided by national cooperative laws.”

This recognition would not suppose an automatic exclusion of all tax regimes of cooperatives from their qualification as State aid. Such a tax measure (either a technical adjustment or a tax benefit) still should be in practice one deriving from the basic or guiding principles of the tax system, because Article 107(1) TFEU does not allow tax measures which overcompensate (not proportionate to the objective pursued) limitations inherent to a kind of undertaking. The proposed amendment would create a presumption upon which cooperatives, irrespective of whether they act only with their members or also to some extent with third operators, would be certain that an equilibrated tax scheme that compensates their extra-costs and their competitive disadvantages would be in accordance with EU State aid policy. The change in the Commission tax Notice would bind the Commission in its role of controlling the tax systems of Member States through the prohibition to grant State aid incompatible with the internal market.

The Commission has discretionary power to decide that a concrete measure is selective, overruling the possible justification given by the Member State. This discretion creates uncertainty among Member States about what tax policies they can follow. An amendment of the Commission tax Notice in this line would bring the necessary legal certainty.

6. Conclusions

1) The application of the criteria in Article 107(1) TFEU to tax measures is currently not a settled question. As the criteria of Article 107(1) TFEU are cumulative, it appears that when it is concluded that two situations are non-comparable (therefore no advantage exists), no State aid is involved. However, the analysis would not end here, because comparable situations are viewed in the light of the objective pursued by the measure at stake, and only objectives inherent to the tax system are relevant. This last requirement is already part of the justification on the nature or general scheme of the tax system. Therefore, there must be a justification based on the nature or overall structure of the tax system to decide that two situations are not legally or factually comparable. The criterion of advantage and the justification based on principles inherent to the tax system are interrelated, and thus it cannot be decided that a tax measure is not selective before checking whether it arises from an objective inherent to the tax system.

2) Different Member States provide for special tax treatment of cooperatives. A lower tax burden is granted to cooperatives due to their exceptional contribution to the community. When applying Article 107(1) TFEU to tax measures of cooperatives, the main concern from a competition point of view is whether the measure limits itself to compensating a disadvantage caused by an obligation of the cooperative to contribute to the general interest. If such a measure does not overcompensate the costs of performing that obligation, it cannot be qualified as selective State aid. For example, on the one hand, the Spanish tax benefits on the calculation of taxable income coming from cooperative results are compensating measures, because it only affects income coming from members, outside any economic activity capable of distorting the internal market. On the other hand, the rebate that specially protected cooperatives get from their tax payable could be considered as overcompensating, because they get relief from income coming from both members and third parties. However, as not every tax measure specific of cooperatives can relate to a concrete cost or obligation, it is the task of the Member State concerned to show its tax scheme of cooperatives as a whole system separate from the general system of corporate income tax and which in overall compensates cooperatives for their limitations to act in the market.

3) The ECJ did not clarify what is understood by “*basic or guiding principles of a tax system*” and by “*mechanisms inherent in the tax system*”, in the context of tax measures applying to cooperatives. In *Paint Graphos*, the ECJ held that prevalently mutualistic cooperatives are not, in principle, in a comparable situation to profit-making companies. However, current

guiding principles accepted by the Court, such as the progressivity of the tax rate, are not enough to argue that tax measures of cooperatives are justified. In any case, Member States will have to design their tax scheme for cooperatives in a proportionate way.

4) The Commission should amend the tax Notice in order to adequate it to the economic and legal reality of cooperatives. First, it should widen the scope of the justification of the exemption from corporate income tax of cooperatives which relates to the avoidance of double economic taxation of cooperative returns, changing paragraph 25 in the following way:

“It may also be justified by the nature of the tax system that cooperatives are not taxed at the level of the cooperative for the quantities corresponding to distributed cooperative returns when tax is levied at the level of their members.”

Second, it should add one paragraph as to include tax measures compensating the disadvantages of prevalently mutualistic cooperatives as measures that may be justified by the nature or general scheme of the tax system. The same way it recognized the special character of cooperative returns, the tax Notice should view as positive proportionate tax measures that answer to other limitations inherent to cooperatives, besides mutuality. It is proposed that the following text is introduced:

“Moreover, tax measures which compensate cooperatives which act in accordance with certain principles (for example, democratic governance, prevalently mutualistic character) and obligations (for example, mandatory reserves, limited access to equity markets) inherent to them may be justified by the nature or general scheme of the tax system concerned as long as they respect limitations to act with third parties provided by national cooperative laws.”

5) Prevalently mutualistic cooperatives are the most common type of cooperative and their specificities have been recognized by EU legal instruments. Most of EU Member States that provide for the possibility of cooperatives to act with third parties limit this option to some extent (Gallego 2008:157). The ECJ made reference to these specificities in *Paint Graphos*, and the GC will soon have the opportunity to confirm the favourable position to cooperatives in *Confederación de Cooperativas Agrarias de España y CEPES v Commission*, where it is likely not only that it annuls the decision of the Commission, but also that it analyses the tax scheme of cooperatives as a whole, as more information was provided than in the Italian case. Although being unlikely, if only tax benefits for activities of

the cooperative with its members are admitted, Member States will have to adapt their systems towards exempting only this kind of income.

6) Cooperatives are in need of recognition of their tax treatment from the State aid policy. A balance should be made between the objectives of competition law on State aid and the promotion of the cooperative model within the EU, which consists in democratic governance, workers' participation and social commitment of companies. The softening of the State aid prohibition regarding the special tax treatment of cooperatives would go in line with the SAM, as it mentions that effective public spending consists in using State aid only where it represents a real added-value,⁸⁷ to which cooperatives contribute. A less strict application of State aid policy in this issue would contribute to the objective of less and better targeted aid, together with sustainable economic growth, within the Lisbon 2020 strategy. The SAM indicates that the Commission will revise its main acts and guidelines by the end of 2013. Thus, an amendment of the Commission's tax Notice is possible, which would probably update it to the developing of the case-law of the ECJ and to the objectives of the SAM, and would hopefully recognize of the position of cooperatives from the EU State aid policy perspective.

7. Bibliography

- ARANA LANDÍN, Soñia (2012): *Régimen fiscal de las cooperativas*, Bilbao: Universidad del País Vasco, Servicio Editorial.
- ALGUACIL, P. (2003): "Tratamiento fiscal de las cooperativas a la luz del régimen europeo de Ayudas de Estado", *CIRIEC, Revista jurídica de Economía social y cooperativa*, n.º 14, pp. 131-181.
- BAHÍA ALMANSA, María Belén (2011): "El régimen fiscal especial de las cooperativas y su compatibilidad con la normativa sobre ayudas de Estado", *CIRIEC-España. Revista Jurídica*, n.º 22, pp. 1-69.
- CASADEVALL (2011): *Ayudas de Estado e imposición directa en la Unión Europea*, Cizur Menor: Thomson Reuters/Aranzadi.
- COPPI, Lorenzo (2011): "The role of economics in State aid analysis and the balancing test", in *Research Handbook on European State aid Law*, edited by Erika Szyszczak, pp. 64-89. University of Leicester and Littleton Chambers, Temple, UK: Edward Elgar.
- CRAIG, Paul and DE BÚRCA, Gráinne (2011): *EU Law. Text, Cases and Materials*, Oxford: Oxford University Press.

⁸⁷ Commission Communication on EU State Aid Modernisation COM(2012) 209 final, par. 18.b.

- EHLERMANN, Claus-Dieter (1994): “State Aids Under European Community Competition Law”, *Fordham International Law Journal* n.º 18(2), pp. 410-436.
- EVANS, A. (1997): *EC Law of State Aid*, Oxford: Oxford University Press.
- FAJARDO G., FICI A., HENRY H., HIEZ D., MÜNKNER H.-H., SNAITH I. (2012): “New Study Group on European Cooperative Law: ‘Principles’ Project”, *Euricse Working Paper* 24/12.
- FICI, A. (2012): “Cooperative identity and the law”, *Euricse Working Paper* 23/12.
- GALLEGO SEVILLA, Luis (2008): “Renovación del marco jurídico de las sociedades cooperativas en el contexto europeo”, in *Las entidades de economía social en un entorno globalizado*, edited by Bataller Grau, Juan, pp. 147-165. Madrid: Marcial Pons.
- HINOJOSA TORRALVO, Juan José (2011): “Acerca de la revisión del régimen fiscal de las cooperativas: entre las necesidades internas y las exigencias comunitarias”, *GEZKI, Revista Vasca de Economía Social* n.º 7, pp. 99-110.
- Kleiner, Thibaut (2011): “Modernisation of State aid policy”, in *Research Handbook on European State aid Law*, edited by Erika Szyszczak, 1-27. University of Leicester and Littleton Chambers, Temple, UK: Edward Elgar.
- LANG, John Temple (2012): “The Gibraltar State Aid and Taxation Judgment – A ‘Methodological Revolution?’”, *European State Aid Law Quarterly* n.º 4, pp. 805-812.
- MERINO JARA, Isaac (2010): «El régimen fiscal de las cooperativas ¿respeto el régimen comunitario de ayudas de Estado?», *GEZKI Revista Vasca de Economía Social* n.º 6, pp. 29-57.
- MICHEAU, Claire (2008): “Tax Selectivity in State aid review: a debatable case practice”, *EC Tax Review* n.º 6, pp. 276-284.
- PARLEANI, Gilbert (2012): “La CJUE donne une leçon de droit coopératif”, *Revue de Sociétés* n.º 130(2): pp. 104-109.
- PREK, Miro and LEFÈVRE, Silvère (2012): “The Requirement of Selectivity in the Recent Case-Law of the Court of Justice”, *European State Aid Law Quarterly* n.º 2, pp. 335-345.
- QUIGLEY, Conor (2012): “Direct Taxation and State Aid: Recent Developments Concerning the Notion of Selectivity”, *INTERTAX* n.º 40(2), pp. 112-119.
- ROSSI-MACCANICO, Pierpaolo (2009): “The Gibraltar Judgment and the Point on Selectivity in Fiscal Aids”, *EC Tax Review* n.º 2, pp. 67-75.
- (2007): “The specificity criterion in fiscal aid review: proposals for state aid control of direct business tax measures”, *EC Tax Review* n.º 2, pp. 90-103.
- VESTERDORF, Peter L. and NIELSEN, Mogens (2008): *State Aid Law of the European Union*, Thomson Reuters.