WORKING PAPER

Can the Uncertainty Caused by the Questioning of Tax Measures in Relation to Cooperatives by the ECJ Be Solved?

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Abstract

Different Member States provide for special tax treatment of cooperatives, which in some of them, are constitutionally protected. In some cases, a lower tax burden is granted to cooperatives due to their exceptional contribution to the community. Some of the tax measures applying to cooperatives are technical adjustments, while others are pure tax benefits, the latter seeking the promotion of the cooperative model. Ascertaining in which cases a given legal measure can be considered to be a technical adjustment and can be considered to be fair or when the given measure can be regarded as a State aid is a difficult task, as the ECJ jurisprudence has very often varied its point of view. Throughout this paper, we are going to follow the ECJ jurisprudence on State aid for cooperatives in order to check out if having an Act on Social Economy as the Spanish one may help Social Economy entities in this regard.

Keywords: Social Economy Bill, State aids, Social Economy law, public measures, tax system.

JEL-Codes: K-33, K-34

1. Introduction

Every European MS has different substantive and tax regulations for cooperatives which is seen as a problem in relation to competition law, as it is not always clear when those differences are, strictly speaking, just technical adjustments and when those differences mean a benefit. For instance, national laws require different percentages of the activities of cooperatives to be taken among members in order to get a special tax treatment[2], 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, as it is the case of Holland and Norway. For example, some national cooperative laws allow them to have members who are only interested in the return on capital, while others require all members to be users or workers. In any case, remuneration of members for the capital subscribed is always limited. Remuneration is frequently restricted both in the form of payment for the work carried out by members or workers and in the form of remuneration of the investment. The same happens with internal democracy, as having invested a big amount in a cooperative does not mean having more power than the persons investing little amounts in it because of the principle of one person, one vote. Thus, it is totally understandable the fact that their contribution to the general budget, in the form of taxes, can be lower than that of other sort of undertakings that, unlike cooperatives, do not internalize social costs and contribute to the general interest in the same way.

However, it is also true that in those countries where these requisites are no longer requirements in order to be considered a cooperative a different view must be taken. Where is the borderline between what we can consider to be a true cooperative and a cooperative that does not fulfill the requisites in order to be considered to be so?

The purpose of this paper is to answer the following questions and try to propose measures in order to give stability and certainty to the sector: Can these differences be a sufficient basis for having a distinct tax system or, at least, special provisions for them? Can these differences in the tax treatment of cooperatives mean a harmful tax competition? Can tax measures applying to cooperatives be considered to be State aids? Are these rules the method to tackle these differences? Why should these differences be tackled in the first place? Can tax measures in relation to them be considered as selective advantages? Are they justified by the nature or general scheme of the tax system? What sort of measures can be proposed in order to achieve a certain stability? Can the Spanish 5/2011 Social Economy Act, of 29th March be regarded as a safeguard from the consideration of certain tax measures for cooperatives as State aids?

[2] The cases of Italy, Spain and Denmark.

2. The concept of State aid: a way towards harmonization?

To begin with, we need to highlight an obvious fact, that not for being so it is always born in mind: we tend to concentrate on the requisites of a measure for being considered to be a State aid forgetting the basis: Member States have a fiscal sovereignty in direct taxation. Thus, State aid rules were neither intended to restrict harmful tax competition nor to tend towards a tax harmonization. The only instruments that can be considered to have been designed for the first purpose are the Code of Conduct and the Treaty rules on coordination. However, not surprisingly, these two instruments do not work in practice, the latter because of its limited scope and the Code of Conduct because it is an instrument of soft law, as it cannot be otherwise.

The clear consequence is that there is really no instrument capable of dealing with differences in direct taxation among Member States for special entities, name them cooperatives or any other name, as there is no competence to do so in the matter. What is more, there is no competence to do so for no other kind of normal entity. Therefore, there is no instrument to legislate on direct taxation because neither the Treaty nor the principle of subsidiarity let us do so. It will also be very difficult to be able to do so in the future as there is the principle of unanimity concerning the matter and there are already 28 Member States and the list is growing.

Having made this point clear, the arguments in favor of applying the State aid rules to tackle a special tax treatment or any sort of special measures for cooperatives do not convince me, as this instrument is going to be improperly used for this purpose. For doing so, case law has ended up broadening the meaning of article 107 FTEU far beyond its wording. Even if the State aid rules might be used as a complementary instrument in the work against harmful tax competition they can clearly not be the main method to accomplish reforms of direct taxation.

Not all Member States have a more favorable tax regime for cooperatives. However, we can consider the uncertainty caused by the questioning of the different cases to be a potential risk for other countries too. This uncertainty, particularly at a time of crises can only cause problems. Moreover, the questioning of the Spanish tax system has not been an isolated case as in some Member States in the European Union (such as Spain, France and Italy) certain measures concerning cooperativism have been regarded as potentially suspicious under the light of State aids. The same thing has happened with countries of the European Free Trade Association, such as Norway. At this moment, certain tax measures concerning cooperatives are being carefully delved into by the European Court of Justice in order to ascertain their compatibility with competence regulation, particularly in relation to cooperatives in Italy.

It should be born in mind that the Commission undertakes economic analysis to determine whether State aid exists or whether State aid is compatible with the

Treaty of Functioning of the European Union[3]. 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.

The Commission has recently issued a Communication on the EU State Aid Modernisation. In line with the Europe 2020 Growth Strategy, making a proposal to modernise State aid policy from the perspective of three interrelated areas: economic growth, prioritization and procedure. Thus, it may help Member States design their tax systems reducing distortion of competition. The guidelines and exemptions 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 EU State Aid Modernisation Communication.

Although theoretically speaking the Commission has prevented Member States from maintaining non-efficient sectors, all that glitters is not gold, and art. 107 can be said to have had undesired results for the achievement of the general interest in certain cases, as it is the case of cooperatives as uncertainty is not a good ally for legislating.

Article 107(1) TFEU[4] establishes a general prohibition of State aid. Following this article, a measure needs to fulfill four cumulative criteria in order to qualify as State aid:

- State resources need to be used;
- Providing an advantage to undertakings;
- The advantage has to be selective;
- The measure needs to effectively or potentially distort competition and affect (or threaten to affect) trade between Member States.

a) The first condition: the use of State resources

This requisite implies that there must be a consumption of public financial resources, including all levels of public authorities, regarding the different powers exercised by the executive, legislative, and judicial authorities. Administrative practice of public authorities can also give rise to State aid. From a territorial point of view, any sub-State entity such as regions or local entities can be donor of State aid in the same way as federal or central authorities, as solved in the so-called "*Azores*" case.[5]

[3] Now onwards TFEU.

[4] "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 favoring 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."

[5] CFI, *Territorio Histórico de Álava and others v Commission*, Joint Cases T-227 to 229, 265, 266, and 270/01 *par.* 178.

The legal nature of the institution granting an aid can vary as not only public entities but also agencies, public companies under State control, and private entities directly or indirectly controlled by the State may give the aid.[6]

b) The second condition: providing an advantage to undertakings

The Treaty of Functioning of the European Union does not give a definition of what it considers to be an undertaking, so we need to go to case law in order to have a definition of it. This point is crucial for the purpose of this paper as some Social Economy entities cannot, strictly speaking, be considered to be undertakings. Thus, non-profit entities can be considered to be undertakings for this purpose as the fact that they do not seek economic profit does not exclude them from the State aid control, as far as they carry out an economic activity. In this sense, whenever an entity carries out both economic and non-economic activities, it is only considered an undertaking with regard to the former.

The matter is solved by the European Court of Justice in *Klöckner* where it states that: "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."[7] Thus, what needs to be highlighted is that the legal nature of the beneficiary is irrelevant, or whether it is a public or a private entity. However, we have to make it clear that even though the concept of cooperatives is fully included in the one of undertakings, cooperatives have clear distinctive features that make them different and some of the legal measures adopted in this sense are fully understandable and coherent with the system.

We cannot forget, as it is important for our case what is called "*The Adria Wien Pipeline Principle*"[8] because in this case it was decided that for article 107.1 to apply, it must be determined that the State measure is that as to favor certain undertakings or the production of certain goods as compared to others, which in the light of the objective pursed by the system in question, are in a comparable legal and factual situation. This is going to turn into a key issue as the latest pronouncement by the European Court of Justice as regards cooperatives, in the so-called *Paint Graphos case*, follows this line, opening a new window for true cooperatives as they cannot be considered to be in the same comparable factual and legal situation.

c) The third condition: the selectiveness of the advantage

The measure must confer an advantage to the recipient in order to constitute an aid. This is a very general concept that includes grants or interest rate rebates, loan guarantees, accelerated depreciation allowances, capital injections, tax

[6] ECJ, Helenic Republic v Commission, Case C-57/86; ECJ, *Déménagements-Manutention Transport SA*, Case C-256/97.
[7] See ECJ, *Klöckner v High Authority*, Joint Cases 17 and 20/61.
[8] Case C-143/ 99 *Adria Wien Pipeline* (2001) ERC 1-8365.

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, etc. Summing it up, all possible forms of economic advantages might be included within the concept of "advantage".

However, the advantage becomes only a State aid if it is selective, meaning that it favors certain undertakings and not all of them. Therefore, general measures that apply to all sectors of the economy of a Member State are not considered to be aids, as long as they do not have the ultimate effect of favoring certain undertakings, even if they follow objective criteria and are granted to an indefinite number of beneficiaries.[9]

On the contrary, measures limited to an economic sector are materially selective. Moreover, measures that apply to different or all sectors of economy can also be qualified as selective where they favor certain activities. This is the reason why, under my opinion, the new Spanish 5/2011 Social Economy Act can become a turning point, because it is objectively open to all sort of entities. Therefore, measures taken under this Act could be considered to be general and not selective. Moreover, the need to follow certain principles in order to be qualified as Social Economy makes these entities fulfill the requisites in order to be considered to be true. Other countries could do likewise.

As we said, as the four requisites are cumulative all four conditions need to be fulfilled in order for the measure to be considered as an unlawful State aid. Thus, if the measure is for all SE and being part of SE is something that can be chosen by all sort of entities as we are going to see, strictly speaking, it cannot be considered as a selective aid.

The most important cases in relation to this requisite for our purpose are: *Adria Wien Pipeline*[10], *Dutch Nox*[11]; *Gibraltar*[12] and *Paint Graphos*[13].

d) The fourth condition: it has to distort competition and affect trade between Member States

As a fourth requisite for the existence of a State aid, it needs to distort or at least threaten to distort competition, affecting trade (even potentially) between Member States. However, this requisite ends up being taken for granted because once the selective nature of the aid is declared, the Commission can assume that competition is likely to be distorted and trade is likely to be affected, without showing any kind of evidence.

This automatic assumption of a distortive effect on competition closes the possibility to counterbalance the extremely wide application of selectivity. A narrower approach could consider that a measure does not constitute State aid if

[9] GC, *CETM v Commission*, Case T-55/99, *par.* 40.
[10] (Case C-143/ 99 *Adria Wien Pipeline* (2001) ERC 1-8365).
[11] *Dutch Nox* (T-233/04 (2008) ERC-II 591; C-279/08 P, (2011) ERC-II nyr.)
[12] *Gibraltar* (T-211/04 (2008) ERC II- 3745-nyr).
[13] *Paint Graphos* (C-78/08 and 80/08 (2011) ERC- I- nyr).

it does not effectively affect the position of competing undertakings in comparison with the beneficiaries. Due to the extensive interpretation, beyond the letter of the law, of this last requisite a possible aid will always fulfill this requirement, making it an empty requisite in practice.

3. Case law in relation to State aids for Cooperatives

The specificity of cooperatives in the ECJ case law as regards State aids has been recognized in very different cases. However, there is no clear tendency in the matter. Through the cases the different countries have had, we can see certain statements that can be born in mind not only to check the validity of our systems but also for any future reforms.

a) *Denmark*

One of the oldest cases we can find in relation to competition law, particularly on art. 85 and 86 of the Founding Treaty is *Gottrup-Klim*.[14] In this case, an agricultural cooperative with a dominant position prohibited a certain category of its members to join other competitors, and these contractual clauses were alleged to be contrary to competition law. The national court asked the ECJ for a preliminary ruling about 17 questions, in case the situation was contrary to competition law. However, the ECJ held otherwise. The ECJ admitted that double membership was contrary to the objective of the cooperatives concerned of acting for the benefit of their members. What is interesting in this case is the fact that an action that could have been contrary to competition rules, particularly to articles 85 and 86 because an entity with a dominant position cannot forbid its members to deal with other entities, is not considered to 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. Would the reasoning have been the same if the entities in question had not been cooperatives? The reasoning in this case could show us the fact that cooperatives can be said to be special.

b) France

As regards France, there is also a judgment of the Court of First Instance, of 20 September 2007 also concerning agricultural cooperatives. The case was about the wine production conversion measures known as "*Rivesaltes Plan*". Since the measures were applied without prior authorization or notification to the Commission they fell under the category of non-notified aids. The Commission partly declared these measures to promote the wines as State aids. Only the measures taken between 1 January 1998 and 31 December 2000 as a marketing promotion of "*Rivesaltes*", "*Grand Rousillon*", "*Muscat de*

[14] ECJ, *Gottrup-Klim e.a. Grovareforeninger v Dansk Landbrugs Grovvareselskab AmbA,* (Case C-250/92).

Rivesaltes" and "*Bayuls*" were considered to be compatible with Article 107.3.c UT.

There is also a very interesting case concerning France that shows the steps forward and backward in the matter. The ECJ judgment regarding the *Centre d'exportation du livre français*[15] answered to a preliminary question by the French *Conseil d'État* by saying that an already granted aid had to be recovered. The fact is that, 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; the change of tendency is remarkable.

c) Spain

We are going to concentrate on the case of Spain as can also find a case as regards this country where, although theoretically it should only regard certain measures for agricultural cooperatives in the end the whole system ends up being questioned.

Spain has also a particularity that needs to be considered. After this case an Act on Social Economy was passed, a fact that is worth mentioning as it can have important consequences in the matter.

In this case, there had been a complaint against the distribution of fuel to third parties carried out by agricultural cooperatives. This is to say, agricultural cooperatives were selling fuel to non-members and the competence, The Association of Fuel Companies in Madrid and the Catalonian Federation of Fuel Stations, denounced it as a possible State aid. An initial judgment of the Court of First Instance of 12th December 2006 established the absence of an advantage contrary to competence regulations. However, the CFI annulled Article 1 of the Commission's Decision.[16] The explanation of the following judgment and its possible consequences became a terrible turning point in the matter and I am going to delve into it because I find it is certainly worth it.

The Spanish 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

[15] 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.

[16] The Court declared that Article 1 of Commission Decision of 11 December 2002 on the measures implemented by Spain in the agricultural sector following the increase in fuel prices annulled in so far that it found that the measures to support agricultural cooperatives provided for by Royal Decree Law 10/2000 on emergency support for agriculture, fisheries and transport, did not constitute an aid within the meaning of Article 87 (1) EC.

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.[17] 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 (without the legal form of a cooperative).

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 (apart from those in the Basque Country that have a different system) 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 50% rebate of the payable tax, 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, totally in conformity with the Spanish system as the Spanish Constitution in art. 129 establishes that cooperatives should be promoted. Thus, it needs to be born in mind that measures as regards the promotion of cooperatives are a mandate by the Spanish Constitution of 1978, before Spain's entrance in the EU. Our Constitution, as it is, was accepted and did not pose any problems as regards this article.

1. Commission's first decision of 11 December 2002

The 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 must be seen in the light of technical adjustment standards and the obligations which these impose on cooperatives. Namely, cooperatives' dividends (returns) are subject to double taxation, and members

[17] Commission Decision on Spanish agricultural cooperatives 2002, *par.* 23.

are allowed a lower deduction on their income tax than shareholders of a company.[18] Cooperatives are also subject to mandatory reserves, which cannot be distributed even when the cooperative ends to exist. Finally, the Commission stated that the tax regime of agricultural cooperatives had to be analyzed as a whole. Therefore, the measures regarding the distribution of fuel by cooperatives were considered not to confer an advantage that alleviated the normal tax burden of agricultural cooperatives, so no State aid was involved[19]. It has to be made clear this last point: not only the possible aid was not declared illegal, but the Commission decided that there was no State aid at all.

2. Judgment of the General Court annulling the Commission's decision of April 2003

On April 2003, two different competitors, associations of service stations, brought an action for annulment against the decision of 2002 before the Court of First Instance (today General Court). On 12 December 2006, the Court issued a judgment in Case T-156/03, *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 constitute a possible selective State aid.

The Commission argued that in respect to corporate income tax, the fiscal regime applicable to cooperatives does not confer them an advantage. First, the Commission stated that mandatory reserves of cooperatives are not equivalent to legal reserves of companies. Cooperative reserves are not in any case distributable. In addition, cooperatives must contribute to them with 20% of benefits from activities with members and with 50% of benefits from activities with non-member third parties. Second, the Commission recognized that, even if Royal Decree-law No 10/2000 introduced a less restrictive regime, this did not constitute a derogation which brought an advantage, because cooperatives and capital-based companies are not in a comparable situation. The Commission concluded that the fundamental element of an advantage was missing, thus it was not possible to further question the existence of an aid.[20]

Moreover, the Commission and Spain pointed out the main differential characteristics of cooperatives: the personal relationship of the members with the cooperative and their participation in the cooperative's activities; the equal rights of every member irrespective of the amount of capital they hold; the variable nature of cooperatives' capital; the different nature of distributed benefits. Because of these features, cooperatives require national tax laws

[18] 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" (*Id., par.* 90).
[19] *Id., par.* 148.
[20] *Id., par.* 75.

containing special modalities that take into account the differences between cooperatives and capital-based companies. 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.

Even in the hypothetical case in which the existence of an aid could have been decided, according to the principle set out in *Adria Wien Pipeline*, the inexistence of a comparable situation would have made the possible aid a legal one.

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.[21] 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. What is important is the fact that the judgment did not even question the Commission's argumentation regarding tax measures of cooperatives on corporate income tax. What also needs to be highlighted is the fact that more than 90 per cent of the taxes cooperatives pay belong to this last tax and all the others can be considered to be minor, as most of them (all of them but economic activities, which most enterprises do not usually pay because of a very high exempt minimum and immovable property tax) are only occasional and very low taxes, representing a minor proportion of tax for any sort of entity.

As regards the only tax that is not occasional and most enterprises pay, again more than 95% of this tax comes out of what is called "urban property", being the rural one just a tiny part of this tax. As regards cooperatives, the only benefit that may be conferred to them is only for agricultural cooperatives and only for rural properties of very little amounts. That is to say, we are only referring to a very tiny percentage of what this tax could mean. For most of it, particularly for the important part that means most of its revenue, immovable property tax does not have any sort of specialty for cooperatives, so it could be considered to be a tiny part of a minor tax and fall under the consideration of "de minimis" as aid amounts of up to €200 000 per undertaking over a three year period, are exempted from the State aid procedure. There can be not a single case surpassing this sum as the Spanish benefit falls way under the limit. The tax rebate granted needs to be notified and calculated first, so that there are clear numbers of what it really represents.

[21] *Id., par.* 103.

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.

3. Commission's second decision of 15 December 2009

The Commission issued a new decision on 15 December 2009, with a radically 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. Under what legal basis is it entitled to do so?

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.[22] This positioning is illogic, because the Commission itself recognizes in the Tax Notice that double taxation of cooperative 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, while keeping their beneficial tax treatment in all four taxes to which is subject. 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 compulsory and unreturnable reserve funds.[23] 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 analyzed whether the comparability test was fulfilled. It 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

[22] Commission Decision on Spanish agricultural cooperatives 2009, *par.* 148-149.

[23] 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 (Id., par. 94). 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. (S. Arana 2012, 149).

companies, because these cooperatives do not obtain any benefit.[24] The effect brought by the measures of a change on the fiscal treatment of cooperatives was enough to identify an advantage. In particular, it concluded that agricultural cooperatives and companies are in a comparable situation in respect to mandatory reserves, and therefore in respect to corporate income tax. The comparability test was also positive for the other three taxes, and thus, the measures were declared selective, as they only applied to cooperatives.[25]
The Commission acknowledged that the measures could be justified by proving that they compensated the higher burden caused by economic double taxation of cooperative income, first, through corporate income tax and then, through income tax of members. Information provided by Spain was considered insufficient because it did not prove that this compensation existed. In addition, the objective of the measure (to allow farms to maintain their competitiveness in difficult economic conditions created by the increase in fuel prices) did not result directly from the founding principles or policy of its tax system.

We cannot forget, as it is important for our case what is called "*The Adria Wien Pipeline Principle*"[26] because in this case it was decided that for article 107.1 to apply, it must be determined that the State measure is that as to favor certain undertakings or the production of certain goods as compared to others, which in the light of the objective pursed by the system in question, *are in a comparable legal and factual situation*. Can cooperatives be considered to be in a comparable legal and factual situation as other kind of entities that do not need to contribute to the general interest? In spite of the case law, we have on the matter, determining that they are in such a situation I cannot agree with it. This condition is certainly not fulfilled, as we have seen in the previous Commission's decision.

Finally, none of the compatibility criteria of Article 107 TFEU was thought to be applicable. In particular, 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 the tax treatment of cooperative results could be proportionate to their special characteristics. As the measures analyzed concerned extra-cooperative results, the Commission could not conclude that the 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 which declares that the measures concerned constitute State aid incompatible with the internal

[24] Commission Decision on Spanish agricultural cooperatives 2009, *par.* 163.
[25] *Id., par.* 176.
[26] Case C-143/ 99 *Adria Wien Pipeline* (2001) ERC 1-8365.

market and orders recovery. The case has recently been solved, the 24th January 2014 by the GC under the reference T-156/10. However, even though there were several reasons for annulment of the last decision, the Court has decided only by formal justifications that there was no legitimacy by the confederation of cooperatives in order to bring the action for annulment.

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. It appears that the Court would have admitted that in a case like this, the situation of cooperatives would not be legally and factually comparable to that of companies, and therefore no advantage could have been identified, even if the measures at stake concerned activities of cooperatives with non-member third parties.

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 had already been settled the other way round.

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 one 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. This should be the starting point in the analysis of the existence of an advantage for cooperatives in respect of corporate tax, in order to understand that tax scheme of cooperatives does not distort competition. In its second decision, the Commission only regarded the principle of mutuality as a relevant characteristic of cooperatives.

The Commission tries to ensure that only cooperatives which act in the interest of their members and do not seek economic profit are allowed tax benefits. However, national cooperative laws do not establish the relationship between the mutualistic character of cooperatives and tax incentives in absolute terms, in order to qualify for a special tax treatment. 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.

It is difficult to conclude that the particular measure introduced by Spain to counteract the increase of fuel price is justified by the nature or general scheme of the tax system, because it follows an objective external to the tax system itself. The elimination of the obligation to constitute a third company was not a tax measure, but had an effect on the tax situation of cooperatives. Therefore, any possible relationship between the measure and the costs of a previous disadvantage was difficult. 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 and the impossibility of getting them back, even in the case when the cooperative is extinguished.

However, it is difficult to proof 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.

The fact is that the measures at stake eliminated two restrictions that were contrary to competition standards. In principle, a restriction imposed on undertakings to act with third parties over a certain threshold, and the obligation to establish themselves in different legal forms to be able to act on the market seem contrary to competition law. The rationale of these restrictions comes from the need to ensure cooperatives to follow their inherent principles and that they contribute to the general interest. From the perspective of competition law, if these restrictions are accepted, fiscal State aid aimed at compensating extra costs

for cooperatives for facing such limitations should be also accepted. In this way, competition law would serve the general interest, and not the other way round.

As a general conclusion concerning the Spanish system that could be at stake 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 or not. 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.

An Act of Social Economy has been passed in Spain. The Spanish Social Economy Bill 5/2011, of 29th March, presents itself as a new and huge step towards the definition and protection of Social Economy. The basic purpose of the 5/2011 Social Economy Bill is to create a legal framework that does not aim to replace the current law for each of the different entities in the sector, but recognizes and gives greater visibility to the social economy by giving it a greater legal security through actions to define the social economy, and establishes the principles that should be adhered to by the different entities that are part of it. Based on these principles, it includes all the different entities and enterprises that make up the social economy. It also recognizes that the work of promotion, encouragement and development of the enterprises in the social economy and their representative organizations is a task of general interest. In addition, it includes the importance of dialogue between government and the organizations that represent the enterprises in the social economy, which have distinct legal natures and activities. It highlights the role to be taken by the inter-sectorial confederations of national scope that represent the sector and provides the best possible legal form for the Council for the Promotion of the Social Economy as an advisory and consultative body linked to the Ministry of Labour and Immigration. Thus, it can be considered to be a great advance, marking a turning point in the matter.

However, two years after its birth we can consider it to be a "sleeping beauty" as the different steps to be taken in order for it to become a reality have not seen the light yet.

We have to bear in mind that Spain is a country in which Social Economy is protected and promoted from the maximum legal text: our own Constitution in art. 129.2. However, this compulsory protection and promotion of Social Economy has been peaceful only for a certain term, as during the last decade, our tax system for cooperatives has been questioned by European instances as a possible breach of article 107 Union Treaty[27], thus regarding certain tax measures and the system as it is, as a possible State aid. This has derived into uncertainty, not only for cooperatives, but also for all other entities within Social Economy.

Can we solve the problem by this Act? It certainly has the virtue of leaving an open possibility for all entities to comply with the principles stated in article 5 and thus, form part of the Social Economy, being able to benefit from whatever that might mean in the future. Up till now, no measures have been taken in relation to this Act, this might be because of the uncertainty caused by the commented decisions. Once we have some certainty on the matter new measures could be adopted under this Act.

d) Italy

The country which has probably suffered more this questioning is Italy. Of particular importance is the ruling Paint Graphos, of September 8, 2011, but we are going to go through its roots in order to see the change of tendency in the matter and its real meaning.

The first Italian 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.[28]

There is a second case, 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

[27] Art. 107 regulates State aids as measures which are taken by some public body and which, by means of State resources, directly or indirectly give 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.

[28] *Id., par.* 12.

mutuality.[29] 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, not only the fact that all the activities of the cooperative must be done with its members. 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.[30] If any of these obligations was infringed, the cooperative would no more follow the objective of mutuality. As the *Corte Suprema di Cassazione* admitted, the infringements led tax authorities to establish that the cooperatives in question were not anymore entitled to tax exemptions.[31]

The most important case is the so-called *"Paint Graphos"* one. There had been a preliminary ruling to the Italian Supreme Court (Corte di Cassazione) considering the Italian tax treatment of cooperatives, regardless of the type of cooperative, to be a possible State aid.

The questions that had been referred by the Corte Suprema di Cassazione were the following:

> "Are the tax relief measures for cooperative societies, pursuant to Articles 10,11,12,13 and 14 of Presidential Decree n 601 of 1973, compatible with the rules of competition and, in particular, are they classifiable as state aid within the meaning of Article 87EC, especially given that the system of monitoring and for the prevention of abuse provided for under Legislative Decree N1577 of 1947 is inadequate?
>
> In particular, for the purposes of determining whether the tax relief measures at issue are classifiable as state aid, can those measures be regarded as proportionate in relation to the objectives of cooperative undertakings; can the decision on proportionality take into consideration not only the individual measure but also the advantage conferred by the measures as a whole, with the resulting distortion of competition?
>
> For the purposes of the answer to the preceding questions, taking into account the fact that the system of monitoring has been seriously and further undermined by the reform of company law, above all in relation to cooperatives that are predominantly rather than fully mutual, under Law 311 of 2004, and regardless of whether the tax relief measures in question can be classified as state aid, can the use of the legal form of a cooperative society, even in cases not involving

[29] Opinion of AG Jääskinen of 8 July 2010 in Joint Cases 78/08 to 80/08, par. 9-10.
[30] Id., par. 51.
[31] ECJ, *Ministero dell'Economica e delle Finanze e.a. v Paint Graphos e.a.,* Joint Cases C-78/08 to C-80/08, *par.* 27.

> fraud or deception, be regarded as an abuse of law, where that form is used solely or predominantly in order to achieve a tax saving?"

The Court of Justice answered, on 8 September 2011, to the afore mentioned 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 application of exemptions from various taxes to which producers' and workers' cooperatives were entitled under Italian tax law. Thus, it involved the refusal from Italian tax authorities to the cooperative *Paint Graphos* of tax exemptions under Articles 11, 12 and 14 of DPR.[32]

However, the ruling of the European Court of Justice of 8 September 2011 concerning the Italian tax measures in relation to cooperatives adopts a different view from the previously seen cases and even from the AG opinion. Thus, when dealing with the issue of selectivity it says that for the so called "derogation test" the benchmark taken into account is the Corporation tax. Moreover, it considers that there is an exception on the treatment of cooperatives, opening a new flexible line as it ends up by attending the cooperative principles in order to check out if a cooperative can be considered a true cooperative, more in line with the ICA principles and the EU communication on cooperatives. This way, the general characteristics inherent to cooperatives manifested in Regulation 1435/2003 on the Statute for a European Cooperative Society (SEC Regulation) and in Commission's Communication on the promotion of co-operative societies in Europe (Communication on cooperatives), 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.[33]

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."[34] As we have seen, this was the line previously opened by the *Adria Wien Pipeline* case. 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. An argument in favor of this position is the fact that the

[32] ECJ, *Ministero dell'Economica e delle Finanze e.a. v Paint Graphos e.a*, Joint Cases C-78/08 to C-80/08, *par.* 11.
[33] *Id.*, *par.* 56-59.
[34] *Id.*, *par.* 61.

Court declared that the type of cooperative defined in the SEC Regulation and the Communication on cooperatives fulfilled the objective of mutuality.

This ruling can be considered to be a true step forward, as in the previous AG opinion only the principle of mutuality (and a strict version of it) had been taken into account. Thus, the principle of mutuality had been used both by the AG and the Commission before this ruling. However, the fact that they only understood it for purely mutual cooperatives was of no help.

To determine whether an exception has been made different case law states that the existence of the exception needs to be determined by the effects of the measure and not by its motives or objectives. According to the *Paint Graphos* ruling there needs to be a global consideration of the burdens and advantages of each regime in order to determine whether an advantage exists, this means an open door for cooperatives, and other possible forms of Social Economy, as the ones referred to by the Spanish Social Economy Act, because of their principles.

It is thanks to the comparability test, that cooperatives might find some peace in most of the European Member States, as there are different distinctive features that would differ from other types of business and which would justify a different tax treatment as had been previously highlighted by regulation nº 1435/2003 on the Statute of the European Cooperative Society. According to the new ruling, these features found in cooperatives that would differ from other types of business can justify a different tax treatment. These distinctive features are precisely the principles in which cooperatives are based, that is to say: primacy of the individual, non-distribution of net assets and reserves, democratic principle, mutuality, and sharing of the profits in accordance with the activities carried out with the co-operative.

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".[35] 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, as long as the amount of remuneration to working members was higher than 60% of the other costs of the cooperative.

Nevertheless, a corporate tax system such the one of Spanish cooperatives would be justified, because it taxes income coming from third parties at a normal rate. However, we have to bear in mind the tax rebate for specially privileged cooperatives consisting of a 50% rebate of the due tax. Under the light of the Italian considerations and the insistence in the concept of mutuality, this last measure might end up being considered as a State aid, unless the fact that cooperatives are not under the same comparable situation, as seen in the

[35] *Id., par.* 72.

case of *Adria Wien Pipeline*[36] *and followed by Paint Graphos* is taken into account.

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.

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.

The Court concluded that it is for the national court to determine whether the measures at stake constituted State aid. 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.[37]

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 will still need to 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, whether the ECJ continues the trend of leaving more room for national courts to decide on the different criteria of Article 107(1) TFEU or not, it is essential to proof 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 (which has not been the case of Spain but has been the case of Italy).

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

[36] *Adria Wien Pipeline* (2001) ERC 1-8365.
[37] 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.

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.[38]

Just as a final mention to the cases in Italy there is a current investigation going on for existing aid measures, but they existed before the entry into force of the EC Treaty. However, the result may give guidance to future measures. The main measures concerned by the analysis are: the deduction from the taxable income of the profits allocated to indivisible reserves; the deduction from the taxable income of the cooperative bonuses (*ritorni*) distributed to members; the tax reduction on interest paid to members for short-term deposits. As a preliminary assessment, we find the following:

The Commission considers that if cooperatives, despite their specificity, make profits from dealings with non-members and behave in the market in the same way as profit-making companies, a preferential treatment for cooperatives may entail State aid. Aid may nevertheless be considered compatible if its positive effects linked with the contribution of cooperatives to social objectives outweigh its negative effects on competition and trade. This is considered to be the case for Small and Medium Enterprises (SMEs), which form the vast majority of cooperatives. For that reason, the Commission considers at this preliminary stage that the following may qualify as aid:

i. the deduction from taxable income of prevalently mutual cooperatives of the profits allocated to indivisible or divisible reserves corresponding to revenues generated from non-members of the cooperative. For large cooperatives and non-mutual cooperatives, the totality of the deduction is considered to be aid, because where the members are not really involved in the cooperative the company seems more similar to a profit-making company. These deductions are however considered compatible aid for obligatory indivisible reserves and in the case of SMEs for all indivisible reserves. We have to bear in mind that in Spain, and maybe in some other countries, there exists the same kind of deduction with the following rates: 100% of the profits allocated to the Education Fund and 50% of the profits allocated to the Compulsory Reserve Fund. As both of them are compulsory and indivisible in the Spanish case, no problems should be raised by these measures.

ii. the tax reduction on interest paid to members for short-term deposits because it does not relate to activities with members participating in the cooperative as such. Indeed, in providing interest-bearing loans to the cooperative the members act as third party lenders and are not sharing economic risks with the cooperative. This measure is not considered compatible with the common market at this preliminary stage. We could have in mind that it is a way of financing the cooperative, because these entities do not have an easy

[38] Commission SGEI Communication.

access to capital. Paying interests to members on their deposits is a way of financing the cooperative, so it is a widespread measure. Members pay Personal Income Tax on those interests in Spain.

On the other hand, the deduction from the taxable income of the cooperative bonuses distributed to members would appear not to be aid, in that they are generated only from exchanges between members. If this preliminary view is kept, it may be good news for Spanish cooperatives as we have a similar system.

However, having seen the various decisions and the judgment concerning Spain, we still have to wait for a final judgment in order to have some certainty.

e) The European Economic Area: the case of Norway

There is case concerning Norway, which belongs to the European Free Trade Association. The EFTA Authority declared the proposal to introduce a special tax deduction for certain cooperatives as entailing a State aid incompatible with the State aid rules of the EEA Agreement (23 July 2009). According to the scheme, certain consumer cooperatives, cooperative building societies, agricultural cooperatives and forestry and fisheries cooperatives would have been entitled to deduct allocations to equity capital from their income, thus reducing the basis for their income tax. This scheme would have been an adjustment in order to compensate the cooperatives for the disadvantages they have in relation to access to equity capital.

The Authority did not consider that safeguarding cooperatives was of public interest, because no evidence on the matter had been showed by Norway[39]. The country 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.[40] 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 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 Spanish tax system for cooperatives should draw conclusions out of it, as the tax rebate specially protected cooperatives have has no substantive meaning and could be questioned if compared with other sort of cooperatives.

[39] 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.

[40] EFTA Surveillance Authority Decision 2009.

Thus, according to the Authority, Norway had probably failed to make clear the relationship between the disadvantages cooperatives have as regards to access to equity capital and the correlative tax benefit. What is important here is that 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. Moreover, a cooperative acts outside the market when it carries out activities with its members. Therefore, a deduction on income coming from members cannot be considered to affect trade between States or to distort competition. As I have said before, the last requisite of the concept of State aid ends up being taken for granted. 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 analyzing State measures in the light of the State aid policy.

4. The sleeping beauty: the Spanish 5/2011, of 29th March, Social Economy Act

At a Spanish regional level, several Acts had been passed in order to comply with our constitutional mandate and promote Social Economy in line with the principles that inspire the objectives pursued by it[41].

At a State level and also in line with the Law on the Sustainable Economy, to the extent that the social economy is in some ways a precursor that is committed to the economic model of sustainable development in its three aspects: economic, social and environmental, the 29th March 2011 The Social Economy Act saw the light.

As MONZÓN and CHAVES state[42]: "This law marks a turning point for policies promoting cooperatives and the Social Economy in Spain and Europe in two key areas, firstly, that of recognizing this socioeconomic sector as a social partner in the processes of drafting public policies, and secondly, in the conception of a whole battery of policies for promoting the Social Economy".

[41] For further information, see Chaves, R., and Monzón, J.L. (2013), "Public Policies towards Social Economy: the Spanish case", in Chaves, R. & Demoustier, D. (dir.), *The Emergence of Social Economy in Public Policy*, Peter Lang.
[42] *Ib.* p. 209.

Thus, the 5/2011 Social Economy Bill creates a legal framework that does not aim to replace the current law for each of the different entities in the sector, but recognizes and gives greater visibility to the social economy by giving it a greater legal security through actions to define the social economy, and establishes the principles that should be adhered to by the different entities that are part of it.

Based on common principles, it includes all the different entities and enterprises that make up the social economy, as many enterprises share the guiding principles of the social economy: cooperative societies in their various forms, among them those organized on the basis of pooled work, consumption, housing, agriculture, services, maritime work, credit, education, health and transport insurance; labor societies; associations; foundations; mutual societies; special employment agencies; special employment centers; agricultural production societies; and fishermen's associations. All these entities are reflected directly or indirectly in the articles of the Spanish Constitution referred to above. Their principles give them a specific character that sets them apart from other companies and enterprises in the business world. There is also a thriving crucible of enterprises in the social economy from which new and different special entities emerge to participate in the same principles as the ones mentioned above. Thus the questioning of the tax system for cooperatives could be a starting point in this long list.

The Spanish Social Economy Act covers not only the afore mentioned entities but it also gives a catalogue of potential entities that can join the social economy, but only provided that they fulfill the principles that determine the unique nature of these values and that their specific configuration is perfectly defined. This way, Article 4 of the Social Economy Act presents the four guiding principles[43] that are common to all the entities in the social economy. These are those included in Article 5, either through their direct naming in the terms of section one, or through the procedure included in section two. In this sense, there is a wide open definition of what the Social Economy is, so that

[43] Article 4: *Guiding Principles*
The activity of enterprises in the social economy is based on the following guiding principles:
a) The primacy of individuals and social purpose over capital. This is made clear in the autonomous, transparent, democratic and participative form of management, which prioritizes a decision-making process based more on individuals and the contribution they make with their work and services to the enterprise, than in terms of their contributions to the share capital.
b) Distribution of the results obtained from the economic activity, mainly in accordance with the work contributed and service or activity carried out by members and, if applicable, the social purpose that is the object of the enterprise.
c) Promotion of solidarity within the entity and with society that favors commitment to local development, equal opportunities, social cohesion, the insertion of excluded groups, generation of stable and quality employment and sustainability.
d) Independence with respect to the public authorities.

entities complying with their principles and values are going to be able to be considered as such. In this way Social Economy becomes open and not selective, which can be a shelter against the strict application of competition law, as we have seen, the selectivity of the measures is a must in order to characterize the measures as State aids.

5. Conclusions

Competition law and particularly, State aids in relation to Social Economy entities should be clarified in order to establish a secure legal framework. It is the internal market which should be compatible with the general interest and not the other way round.

Uncertainty is a bad enemy for society and progress and a great ally for the economic crises. With the case law, we have up to day it remains unclear whether some of the regulations that exist in different Member States regarding the tax system for cooperatives could be considered to be against competition law. This fact creates uncertainty so measures should be taken in order to give certainty to the tax laws regarding cooperatives.

The underlying argument behind all the State aid cases has been that differences in a tax regime in relation to other undertakings under the same regime could potentially constitute the basis of a State aid. Needless to point out that all sorts of differences can occur and, do in fact take place, if we bear in mind other regulations which do not belong to the same Member State. Thus, the only differences that might be regarded as potentially considered to be “State aids” are those that derive from a single Member State, as if these undertakings were not under the freedom of movement in the EU space which they are. Therefore the framework for comparison may not always be the right one in order to ascertain the existence of a State aid. It is a contradiction in itself, under the circumstances that exist nowadays. Thus, it should also be revised in order for these considerations to be taken into account.

The fact is that as direct tax matters are a question of each Member State and the European Commission can do nothing about it, the State aid regulation is used in order to counteract its restricted powers in this matter. This indirect way of controlling direct taxation should not only be questioned at any time, but particularly at a time of economic crises when all sorts of aids have been granted in order to guarantee credibility in the market and avoid an economic breakdown.

This way of influencing legislation through the so-called “soft law” should no longer be used in the same way. A more flexible approach would probably be needed at this time. Moreover, State aids should be clarified in order to establish a secure legal framework in which persons and companies would know beforehand the compatibility of the measures.

First, because competition rules should not be applied in a uniform manner to enterprises that have different legal, social and financial structures. Second, because taxation is only a characteristic of certain cooperatives under a particular legislation, but obviously not the main one. Third, because we normally find a special tax regime in order to counteract special requirements on the cooperatives, such as the funds, which can be considered to be a burden for them. Fourth, the application of a more favorable tax regime can be justified as a means to an end: promote equality between cooperatives and investor-owned corporate competitors. In the fifth place, because of the extra-tax aims of the cooperatives, which are contributing to Corporate Social Responsibility, thus creating a better world for us. In the sixth place, because as Corporate Social Responsibility can be regarded as one of the aims of the European Union it can also fall under the category of those that should be disregarded as they are also proportionate to the benefits taken. In the seventh place, because of the new line opened by the Paint Graphos case which makes it clear that cooperatives cannot be considered to be in the same factual and legal position. Last but not least, because it is the internal market which should be compatible with the general interest and not the other way round.

If by relying solely on the public entities it is difficult to obtain quality social and public policies, cooperatives, and other social economy entities, can have a word to say in these matters. In other words, they should be consulted and take a leading role in public policy making. They already play an important role in society; their importance should just be acknowledged and born in mind in order to achieve a common goal. Cooperatives have a very long tradition of acting with great credibility in order to achieve social interests so policymakers will seek out their advice. Co-operation with co-operatives should be just a natural step to take. To a certain extent, this is already taking place in some countries such as the United States and Spain where cooperatives have been heard in the form of an Experts Advisory Committee that has drawn its conclusions on how to change certain public policies such as taxation. Bearing in mind these sensible conclusions is the logical step in order to implement reasonable and long-term public policies.

However, every cloud has a silver lining and if we analyze through the different State aid cases the needed requisites in order to ascertain that a given measure constitutes a State aid, we can observe that there are two issues that do not fit into the system. First, concerning the fulfilment so-called “selectivity criteria”, which is a must. This can only mean that a given measure does not constitute a State aid if this selectiveness is not fulfilled. In this sense, measures open to all sort of entities complying with the criteria and principles established by the mentioned Social Economy Act could not be regarded as selective, thus, they could not be State aids. Second, concerning the comparability test: in this sense, the Italian *Paint Graphos* case has opened a new line in this way: if cooperatives fulfilled the conditions to be considered as true cooperatives they

cannot be considered to be in the same factual and legal position as other companies and so certain exceptions can be made.

On the one hand, Spain should wake up its dormant “Sleeping Beauty” and take measures in order to move from words to action and regulate under the Social Economy Act. Other countries should seek to have similar legislation in order to avoid being questioned under competition law.

On the other hand, EU instances should clarify its tendency admitting the reasoning followed in the Paint Graphos ruling that cooperatives are not always in the same factual and legal position so, they cannot always be compared to other legal forms of business.

Last but not least, Member States should try to regulate cooperatives fulfilling their principles, sticking true to them, thus making them be “true cooperatives”. That is to say, they should comply with the principles set out in paragraphs 56 to 59 of the Paint Graphos ruling: the democratic principle, the mutual principle, posing a limit to operations with non-members, in the sense that most transactions should be conducted with partners.

Bibliography

Alguacil Marí, M.P., *Fiscalidad de cooperativas y ayudas de estado: parámetros para una reforma*, Working Paper 2/11, Instituto de Estudios Fiscales, 2011.

Alguacil Marí, M.P., "Ayudas de Estado", *CIRIEC, Revista jurídica de Economía social y cooperativa*, n 69, pp. 131-181.

Alguacil Marí, M.P., "Tax treatment of cooperatives in Europe under State aid law", *Genossenschaften im Fokus einer neuen Wirtschaftspolitik*, Wien, *2012.*

Arana Landín, S., *Régimen fiscal de las cooperativas*, Bilbao: Universidad del País Vasco, Servicio Editorial, 2012.

Bahía Almansa, M.B., "El régimen fiscal especial de las cooperativas y su compatibilidad con la normativa sobre ayudas de Estado", *CIRIEC-España, Revista Jurídica*, n 69, 2011.

Chaves, R. and Monzón, J.L., "Public Policies towards Social Economy: the Spanish case" in Chaves, R. & Demoustier, D. (dir.), *The Emergence of Social Economy in Public Policy*, Peter Lang, 2013.

Juan Casadevall, J. de, *Ayudas de Estado e imposición directa en la Unión Europea,* Cizur Menor: Thomson Reuters/Aranzadi, 2011.

Cusa, E., "State aids and cooperatives in Europe", *Genossenschaften im Fokus einer neuen Wirtschaftspolitik*, Wien, 2012.

Hinojosa Torralvo, J.J., "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 8, 2011*.

Merino Jara, I., "El régimen fiscal de las cooperativas ¿respeta el régimen comunitario de ayudas de Estado?", *GEZKI, Revista Vasca de Economía Social*, N 7, 2010.

Merino Jara, I., "El vigente régimen fiscal de las cooperativas a la luz de las ayudas de Estado", *CIRIEC-España, Revista de Economía Pública, Social y Cooperativa*, 2009.

Quigley, C., "Direct Taxation and State Aid: Recent Developments Concerning the Notion of Selectivity", *INTERTAX* 40, 2012.

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