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Teilband IV

Länderstudien

1. Europa

1.1 Westeuropa

1.2 Südeuropa

1.2.1 Wirtschaftliche Aspekte

State Aid Law and Cooperatives in Europe

Emanuele Cusa

1. The undertaking's legal forms and the EU law

The law of the European Union (hereinafter *EU law*), right from its beginning, recognizes the presence in the internal market of different undertaking's legal forms, as Article 54 of the Treaty on the Functioning of the European Union (hereinafter *TFEU*, but with the same wording of the repealed Article 58 of the Treaty establishing the European Community, in force from 1 January 1958) demonstrates clearly.

Nevertheless, only in the last decade the EU institutions have put into force law specifically thought for autonomous[1] entrepreneurial forms that are alternative to the traditional for-profit companies. In exact terms, *de iure condito*, only a cooperative model has been laid down by the Council Regulation (EC) No 1435/2003 of 22 July 2003 on the Statute for a European Cooperative Society (hereinafter *SCE Regulation* and *SCE*) and the related Council Directive 2003/72/EC of 22 July 2003 supplementing the Statute for a European Cooperative Society with regard to the involvement of employees; *de iure condendo*,

[1] The European Economic Interest Grouping (hereinafter *EEIG*) – laid down by the Council Regulation (EEC) No 2137/85 of 25 July 1985 (hereinafter *EEIG Regulation*) – is an autonomous legal subject (but without legal personality) that cannot carry on an economic activity autonomously from those of its members; as a matter of fact the purpose of a EEIG « shall be related to the economic activities of its members and must not be more than ancillary to those activities » (Article 3, paragraph 1, EEIG Regulation). As regards EU entrepreneurial forms I remember also the European grouping of territorial cooperation (hereinafter *EGTC*), whose law is the Regulation (EC) No 1082/2006 of 5.7.2006. The EGTC has legal personality, its members can be only entities governed by public law and can exercise economic activities in pursuing its specific objective determined in Article 1, paragraph 2 of the last said regulation (« to facilitate and promote cross-border, transnational and/or interregional cooperation … between its members …. with the exclusive aim of strengthening economic and social cohesion »).

they could be added the European Foundation[2], the European Mutual Society (whose draft statute was proposed in 1992 but withdrawn in 2006[3]), the European Association (whose draft statute was proposed in 1992 too) and the European Social Enterprise[4], whose forms would imply (in the case of the European Mutual Society and of the European Social Enterprise) or permit (in the case of the European Foundation and of the European Association) the exercise of activities qualifiable as enterprises according to EU law.

It is most likely that the main attention of the European Union to the for-profit companies depends not only on the fact that for the most part they correspond to the organizational form of the transnational enterprises in Europe, but also on the fact that national legislators agree on their legal basic characteristics and these characteristics are certainly much more studied by the company lawyers than those of other entrepreneurial models[5].

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[2] On 8 February 2012 the Proposal for a Council Regulation on the Statute for a European Foundation (FE) has been presented; Article 11 of this proposal lays down that « the FE shall have the capacity and be free to engage in trading or other economic activities provided that any profit is exclusively used in pursuance of its public benefit purpose(s) » and that « Economic activities unrelated to the public benefit purpose of the FE are allowed up to 10% of the annual net turnover of the FE provided that the results from unrelated activities are presented separately in the account ».

[3] In the *Report of the Reflection Group On the Future of EU Company Law*, Brussels, 5 April 2011, p. 31 it is written that « the discussions on the creation of a European Mutual Company have so far not been successful. However, there appears to be considerable support from national mutual companies on the appropriateness of a European status which would allow them to extend their activities across Europe and potentially to merge. Mutual companies are increasingly acting as insurance companies but this legal form is not recognized in all Member States. A European Mutual Company could offer this choice to countries where this legal form is absent».

[4] The last two forms above remembered have been mentioned by the European Commission in its communication named Social Business Initiative. Creating a favourable climate for social enterprises, key stakeholders in the social economy and innovation {SEC(2011) 1278 final}, p. 12, where it is written that « the Commission also suggests giving further consideration to … the need for a possible European statute for other forms of social enterprise such as non profit-making associations and/or a possible common European statute for social enterprises ».

[5] As a proof of what I wrote above, see both the following examples: the *European Model Company Act* (EMCA) project (http://law.au.dk/emca/), started in 2007 and based at the Aarhus Universitet, through which a group of legal experts are working on a model company law to serve as a tool box for national regulators and as a benchmark for national laws; the thoughts of some professors (corresponding to R.R. Kraakman, P. Davies, H. Hansmann, G. Hertig, K.J. Hopt, H. Kanda, E.B. Rock, *The Anatomy of Corporate Law. A comparative and functional approach*, Oxford,

In addition it should be pointed out that the EU law on models different from the for-profit companies (at the moment, as said, only the law on SCE) is incomplete and technically poor: incomplete, perhaps because there is not an adequate harmonization among the national laws (even on the ground that the great majority of the European directives on company law applies almost exclusively to the for-profit companies), so that the EU legislator is forced to lay down many references to the law of the Member State where the entrepreneur has his own seat (for the SCE see Article 8 SCE Regulation[6]); technically poor, perhaps because this law is a result of many compromises and because the legislator can used legal reflections (from practitioners and theorists) often undermined from an approach that is still too ideological and not much technical legal.

Lastly, the SCE Regulation (in a near future to be simplified[7]) and the praxis of the European Commission demonstrate that the European Union, in dealing with economic entities different from for-profit entrepreneurs, acts not always with a clear and systematic approach[8].

A crucial point to be scrutinized is which freedom has each EC Member State in promoting specific legal entrepreneurial forms without infringing EU law and, in particular, Article 107 TFEU, the pivotal rule in EU State aid law.

2004), which, in defining company law worldwide, include in such a legal area only the law of for-profit companies.

6 Nevertheless, the law on SCE has determined a voluntary harmonization among the national laws governing cooperatives in the EU Member States, for instance pressing them to introduce in their legal system the figure of the non-user member (named in different way by EU Member States) non only of a SCE with seat in their territory but also of a cooperative governed by their sole national law. On this phenomenon, even on the comparative lawyer perspective, cf. E. Cusa, *Il socio finanziatore nelle cooperative*, Milano, 2006, *passim*, and, as most significant impact of the SCE Regulation on the national law, I mention the important reform, happened in 2006, of the German law on cooperatives (i.e. *Gesetz betreffend die Erwerbs- und Wirtschaftsgenossenschaften vom 1. Mai 1889*, hereinafter *GenG*), that introduced the new *investierende Mitglieder* (cf. Article 8, *Abs.* 2, *GenG,* on which M. Wachter, *Die Investierende Mitgliedschaft bei der eingetragenen Genossenschaft*, Jena, 2011).

7 Report of the European Commission to the European Institutions *on the application of the SCE Regulation*, dated 23 February 2012 [COM(2012) 72 final].

8 As example of a certain conceptual confusion is the European Commission's *Notice on the application of the State aid rules to measures relating to direct business taxation* (98/C 384/03), whose paragraph 25 clarifies: « obviously, profit tax cannot be levied if no profit is earned. It may thus be justified by the nature of the tax system that non-profit-making undertakings, such as foundations or associations, are specifically exempt from the taxes on profits if they cannot actually earn any profits ».

2. The non-profit enterprise

In my opinion the most meaningful judgement of the Court of Justice (hereinafter CJ)[9] for understanding the legal connection between not-profit enterprises and EU State aid law is that of 10 January 2006 (Case C-222/04 Cassa di Risparmio di Firenze and Others)[10].

As a matter of fact, in the said judgment the CJ verified if a certain tax treatment applicable to special non-profit foundations (created by the conversion and the division of each Italian bank of a certain category into two new entities: a for-profit company and a non-profit foundation) could qualified as State aid. Preliminarily the CJ qualified such foundations as undertakings within the meaning of Article 107, par. 1, TFEU, since, on the one hand, at least some of their activities can be qualified as economic activities (not being of « exclusively social nature », using the wording of the CJ) and, on the other hand, the national measure under scrutiny was accorded « on account of the undertaking's legal form » and resulted « from the national legislature's objective of financially favouring organizations regarded as socially deserving ». Therefore, the CJ ruled that the above mentioned special tax treatment had to be considered a selective advantage (« without being justified by the nature or scheme of the tax system of which it forms part » or not being « based on the measure's logic or the technique of taxation ») and so had to be categorised as State aid according to Article 107, par. 1, TFEU.

Hence, from this judgment is it possible to infer the following rule: imposing a non-profit purpose or a socially deserving purpose is not a sufficient legal requirement to distinguish enough one enterprise from another (or to make the enterprises with such purposes incomparable to enterprises without such purposes); consequently, the measure applicable to enterprises with such purposes only is qualifiable as selective and then integrates one of the prerequisites to be considered State aid (« by favouring certain undertakings or the production of certain goods » according to Article 107, par. 1, TFEU).

[9] The Court of Justice of the European Union (hereinafter *CJEU*), which has its seat in Luxembourg, consists of three courts: the above mentioned CJ, the General Court (hereinafter *GC*, created in 1988) and the Civil Service Tribunal (created in 2004).

[10] In ECR, p. 2006, I-325.

3. The state-owned enterprise

In the CJEU case law there is a case (GC 11 June 2009, Case T-222/04, Repubblica Italiana[11]), in which it has been qualified as State aid some tax exemptions applicable only to joint stock companies and limited liability companies respecting the following requirements: a majority public shareholding and a object limited to the management of one or more local public services.

Then, if the legislators (national or local) forces an enterprise to be controlled by public entities, this enterprise will be in a comparable situation to other enterprise with different control and, therefore, a measure applicable only to the enterprise of the first type should be selective, because it favours « certain undertakings or the production of certain goods » (Article 107, par. 1, TFUE).

4. The mutual enterprise and the European Institutions

4.1 The European Commission

The CJEU case law has already clarified that cooperatives, being enterprises according to EU law, must respect the EU competition law; more precisely, in 1992 the Court declared that a cooperative, despite « its particular legal form … does not in itself constitute conduct which restricts competition », « may have an effect on competition in two ways if not more. First, a cooperative society … is liable – by reason of the very principles which govern it – to affect the free play of competition as regards the activity constituting its objects as a society .... Secondly, the obligations imposed on the members of the cooperative … are liable to influence both the economic activity of the cooperative and the free play of competition between its members and vis-à-vis third parties » (TG, 2 July 1992, T-61/89, Dansk Pelsdyravlerforening, paragraphs 51 and 52[12]).

In the same judgement the Court remembered that EU law, in its autonomy, may exclude cooperatives from the scope of application of some rules of EU competition law, as it is the case, for example, in agricultural sector.

[11] In ECR 2009, p. II-1877.

[12] In ECR 1992, p. II-1935.

Nevertheless, such an idea does not seem the actual position of the European Commission, that, in own communication *On the promotion of co-operative societies in Europe* of the 23 April 2004 [COM(2004) 18, hereinafter *2004 Communication*], despite from its consultation process « some confusion and concern regarding the application of competition rules to co-operatives » emerged, clarifies that « there are no grounds for special treatment of co-operatives in the general competition rules; however certain aspects of their legal form and structure should be taken into account on a case-by-case basis, as previous decisions and rulings have demonstrated ».

Following the said opinion, the European Commission began in 2000 to challenge some measures favouring cooperatives, arguing they could be illegal State aids.

As far as I know, on this matter the first case regarded a tax treatment of some categories of Spanish agricultural cooperatives; this treatment, notified by the Spanish authorities on September 2000, was not qualified as State aid by the Commission (with the decision 2003/293/EC of 11 December 2002[13]); nevertheless, this decision was partially annulled by the GC sentence of 12 December 2006[14]; then, the Commission replaced the above mentioned decision with a new one of 15 December 2009 (2010/473/UE, hereinafter *2009 Decision*)[15]. Of the 2009 Decision it is to point out the fact that the Commission, changing radically opinion, decided the said tax treatment was an unlawful State aid, being *inter alia* selective; this selectivity was based on the ground that the related cooperatives could exercise their mutual activity (in this writing, in the sense of activity/activities through which a cooperative pursues its mutual goal/goals) with third parties too (more precisely, mainly with third parties), although the Spanish law (differently from many other national laws) both imposes a separate accounting for cooperatives operating with third parties and taxes profit obtained from the activities with third parties in the same way as profit obtained by for-profit companies. Nevertheless, from the 2009 Decision it should be inferred that the measure under scrutiny would not have been selective, if the more favourable tax treatment was applicable to cooperatives operating only with their members, because such cooperatives would not realise profit at all[16].

[13] In OJ L 111 of 6.5.2003, p. 24.

[14] In ECR 2003, p. II-98.

[15] In OJ L 235 of 4.9.2010, p. 1.

[16] Paragraph 163 of 2009 Decision: « as regards company tax in particular, in true mutual cooperatives the cooperative does not make any profit because it only operates for the benefit of its members. For this reason, the Commission considers that true mutual cooperatives and corporations for profit are not in comparable legal and factual situations with regard to the taxation of profits. Given this situation,

The second case regarded a planned scheme concerning tax exemptions for certain Norwegian cooperatives; this scheme was considered by the EFTA Surveillance Authority[17], with its decision of 23 July 2009, incompatible with the functioning of the EEA Agreement within the meaning of Article 61 EEA (corresponding to Article 107 TFEU)[18]; in particular, the EFTA Surveillance Authority considered selective that scheme, because it was in favour to cooperatives operating not with their members only, but mainly with their members.

On the tax treatment for cooperatives there are two procedures still open before the European Commission: one regards French agricultural cooperatives (Case n. E1/2009) and the other regards Italian consumer and credit cooperatives (Case n. E1/2008). About the latter, from the European Commission press release of 17 June 2008 (IP/08/953[19]) it can be argued that the said authority would consider selective a special tax treatment in favour of cooperatives with mutual activity mainly with their members (*cooperative a mutualità prevalente*), while the same authority could consider an analogous national measure not selective if the recipients of the said treatment were cooperatives with mutual activity only with their members[20].

On the basis of what I wrote in this paragraph, it appears clearly that the European Commission – in the few cases on which it dealt with the requirement of selectivity in controlling national measures applicable to cooperatives only – have found its reasoning on the fol-

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the deduction of the taxable income of true mutual cooperatives does not therefore constitute State aid ».

17 The above mentioned authority has the power (analogous to that of the European Commission) to apply State aid law to States that are members of the European Free Trade Association (EFTA) and have underwritten with the European Union the Agreement on the European Economic Area (EEA); these States, at the present time, are Iceland, Liechtenstein, and Norway.

18 On the role of the above mentioned authority as regards State aid law cf. M. Heidenhain, *General Principles*, in M. Heidenhain (edited by), *European State Aid Law*, München, 2010, p. 5.

19 Put in the context of State aid law by M.P. Negrinotti, Le cooperative e la disciplina comunitaria degli aiuti di Stato, in E. Cusa (edited by), La cooperative-s.r.l. tra legge e autonomia statutaria, Padova, 2008, pp. 708 ff.

20 This possible interpretation can be made from the following passage of the above mentioned press release: « Cooperatives have certain specific features as they operate in the interests of their members and have a specific corporate model. Therefore cooperatives can be distinguished from profit-making companies, especially when they are purely mutual and generate revenues exclusively with members. At this preliminary stage of the procedure it appears also that cooperatives, despite their specificity, may also make profits from dealings with non-members and behave in the market in the same way as profit-making companies. The Commission considers that under these circumstances, a preferential treatment for cooperatives may entail state aid ».

lowing thesis: only cooperatives complying with the « true mutual cooperative model »[21] – that is to say[22], exercising the mutual activity only with their members, corresponding to the default (not mandatory) law, for instance, in Germany (§ 8, Abs. 1, Nr. 5, *GenG*[23]) or in Italy (Article 2521, paragraph 2, civil code[24]) – cannot be compared to for-profit companies; therefore, only a measure applicable to cooperatives respecting such a model (more accurately nameable as 'pure mutual cooperative model') can be qualified as not selective and then can be considered outside the scope of application of the Article 107 TFEU.

However, the pure mutual cooperative model is not the sole to which the Commission (in the 2004 Communication) refers, as the same Commission reasoned wrongly in the 2009 Decision[25]. As a matter of fact, the cooperative model implied into the 2004 Communication is that vaguely (at least for a lawyer) set out in the *Statement on the Co-operative Identity* – approved in Manchester in 1995 by the International Co-operative Alliance (the apex organisation for co-operatives worldwide established in 1895)[26] and then endorsed by the Resolution 56/114 adopted on 19 December 2001 by the General Assembly of the United Nations (UN) and fully incorporated into the Recommendation adopted on 20 June 2002 by the International Labour Organization (ILO) (to be cited as 'the Promotion of Cooperatives Recommendation, 2002') –, as it is clearly stated in paragraph 3.2.4 of the 2004 Communication[27].

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[21] Term coined by the European Commission into the 2009 Decision, paragraph 160, when this authority « calls for a definition of the 'true mutual cooperative model', which can be used to evaluate whether cooperatives are in the same factual and legal situation in the eyes of the Spanish tax system as companies with share capital».

[22] As it can be drawn from paragraphs 159-165 of the 2009 Decision.

[23] That so states: « Der Aufnahme in die Satzung bedürfen Bestimmungen, nach welchen … die Ausdehnung des Geschäftsbetriebes auf Personen, welche nicht Mitglieder der Genossenschaft sind, zugelassen wird ».

[24] The above mention article lays down as follows: « L'atto costitutivo stabilisce le regole per lo svolgimento dell'attività mutualistica e può prevedere che la società svolga la propria attività anche con terzi ».

[25] Cf. paragraphs 159-165 of the 2009 Decision; this decision likely misled the EFTA Authority in its cited decision of 23 July 2009.

[26] On the legal value of the cooperative principles as consolidated by ICA cf., as regards the Italian legal system, E. Cusa, *I ristorni nelle società cooperative*, Milano, 2000, p. 8 ff. and, as regards the EU legal system, E. Cusa, *Die Verwendung des Betriebsergebnisses*, in R. Schulze (edited by), *Handbuch der Europäischen Genossenschaft (SCE)*, Baden-Baden, 2004, pp. 125 f. e 138.

[27] In the paragraph cited above it is possible to read the following passage: « Although laws governing cooperatives are diverse in approach and based on different traditions, they generally respect the co-operative definition, values and principles set out in the "Statement on the Co-operative Identity" adopted by the International Cooperative Alliance (ICA) in 1995 and recently endorsed by a resolution of the U.N.

Hence, according to the worldwide recognized cooperative model, this enterprise form is correctly present not only when the mutual activity is in favour of the sole members; indeed, a cooperative respecting the pure mutual cooperative model is an exception in reality. If anything, the difference among national legislators on this point is to lay down fixed thresholds (as in Italy, where Articles 2512 and 2513 of the civil code ask for the *cooperative a mutualità prevalente* a mutual activity with members at 50% plus one as a minimum requirement) or flexible thresholds of mutual activity with members (as in Germany[28] or in Austria[29], where the mutual activity with third parties is allowed till the limit it remains instrumental to the mutual activity with members).

Due to the diversity of the national laws on the contents of the mutual aim ascertained on the basis of the addressees of the mutual activity, the EU legislator did not take a stand on that, leaving room to the contractual freedom in determining the optimal rule for a specific SCE[30].

Likely, such mistake of the European Commission on the notion of the mutual objective depends on the confusion between the members obligation to be users of their cooperative[31] and the supposed (but not-existent, at least in the general cooperative law) cooperative obligation to exercise the mutual activity solely with its members.

[cited above] and fully incorporated into a Recommendation of the I.L.O [again cited above] ».

[28] According to § 8, *Abs*. 1, Nr. 5 *GenG*.

[29] Where there is § 5a, Abs. 1, Nr. 1, Gesetz vom 9. April 1873, über Erwerbs- und Wirthschaftsgenossenschaften, that establishes as follows: « Der Aufnahme in den Genossenschaftsvertrag bedarf es, wenn die Genossenschaft zulassen will die Ausdehnung des Zweckgeschäfts auf Nichtmitglieder, wobei die sich aus dem § 1 Abs 1 [« Dieses Gesetz gilt für Personenvereinigungen mit Rechtspersönlichkeit von nicht geschlossener Mitgliederzahl, die im Wesentlichen der Förderung des Erwerbs oder der Wirtschaft ihrer Mitglieder dienen (Genossenschaften), wie für Kredit-, Einkaufs-, Verkaufs-, Konsum-, Verwertungs-, Nutzungs-, Bau-, Wohnungs-, und Siedlungsgenossenschaften »] ergebende Beschränkung ausdrücklich aufzunehmen ist ».

[30] As laid down by Article 1, paragraph 4, SCE Regulation; on this rule see E. Alfandari-B. Piot, in R. Schulze (edited by), *Europäische Genossenschaft SCE*, Baden-Baden, 2004, p. 81.

[31] The abovementioned obligation is present already in the Italian general cooperative law (at least according to E. Cusa, *Il socio finanziatore nelle cooperative*, cited, pp. 119 ff., where contrary citations too). Obviously, the fact that all cooperative members become users of the said entity does not guarantee that the mutual activity will be exercised totally or mainly with cooperative members.

In conclusion, if it is undisputed that a cooperative exercises (better, must exercise, at least, according to Italian law[32] and EU law[33]) an enterprise according to Article 107 TFEU (then, cooperatives running no economic activity are consequently inadmissible), there is a clear different position between the European Commission (at least till 2009) and the co-operators (theorists and practitioners) about the addressees of the mutual activity (if only cooperative members or third parties too).

4.2 The Court of Justice and the Paint Graphos Case

4.2.1 Its novelty

In my opinion, for the lawyers dealing with enterprise legal models the CJ sentence of 8 September 2011 (Joined Cases C-78/08 to C-80/08, hereinafter *Paint Graphos Case*)[34] is very important, because, in interpreting the selectivity requirement in order to qualify a national measure as State aid, the Court stated for the first time (as far as I know) the possible incomparability among enterprises on the basis of their legal form[35]; thus, a national measure valid only for enterprises legally incomparable with others, since it could be qualified as not selective, would not be regulated by Article 107, par. 1, TFEU.

More precisely, the Paint Graphos Case declares that cooperatives pursuing « truly » an objective based on mutuality (paragraph 62, here-

[32] As a matter of fact all Italian cooperatives can be included into the super-notion of company valid for the Italian law (corresponding to an autonomous organization exercising one or more economic activities whose each member has done a contribution), as deducible from the Article 2247 of the Italian civil code (on this point cf. E. Cusa, *Il socio finanziatore*, cited, pp. 53, 114, 115, 312, 367 e 368).

[33] Such a conclusion may be inferred from the entire SCE Regulation and specially from its recitals; on the same direction cf. the already cited TG, Case T-61/89, 2 July 1992, paragraphs 52-54.

[34] Not published in ECR yet.

[35] So far as I am aware, almost (there is a mention in W. Schön, in L. Hancher, T. Ottervanger, P.J. Slot, *EU State Aids*[4], London, 2012, p. 356) nobody among the first annotators of the Paint Graphos Case (*ex multis* cf. G. Bonfante, *Aiuti di Stato alle cooperative: la decisione della Corte UE*, in *Cooperative e Consorzi*, 10/2011, p. 5 ff.; V. Contarino, *Cooperative e società di capitali: diversità di scopo e di strutture*, in *Società*, 2012, p. 133 ff.; M. Ingrosso, *La pronuncia pregiudiziale della Corte di Giustizia sulle agevolazioni fiscali alle cooperative italiane*, in *Rass. Trib.*, 2012/2, p. 529 ff.; C. Fontana, *Gli aiuti di Stato di natura fiscale*, Torino, 2012, p. 134 ff.; L. Daniele, *Diritto del mercato unico europeo*[2], Milano, 2012, p. 323) has underlined the novelty (in respect to the previous CJEU case law) described in the above text.

inafter the *True Cooperatives* and, singularly, *True Cooperative*[36], i.e. the cooperatives compliant with the cooperative model outlined into the Paint Graphos Case) « cannot, in principle, be regarded as being in a comparable factual and legal situation to that of commercial companies [i.e. for-profit companies] » (paragraph 61) and therefore the measure addressed to the True Cooperatives, not being selective, does not constitute State aid within the meaning of Article 107, paragraph 1, TFEU.

The Paint Graphos Case comes to the just summarised conclusion on the basis of the following five logic passages.

Firstly, the True Cooperatives are those that « conform to particular operating principles which clearly distinguish them from other economic operators » (paragraph 55).

Secondly, these particular operating principles have been accepted both by the SCE Regulation and by the 2004 Communication (paragraph 55 and 62).

Thirdly, the characteristics of the True Cooperatives (listed in paragraphs 55-62), mostly deducted from the tenth recital of the SCE Regulation, are the following: (*i*) « in the light of the principle of the primacy of the individual » there should be coherent rules « on membership, resignation and expulsion » of the members, the activities of the cooperatives « should be conducted for the mutual benefit of the members, who are at the same time users, customers or suppliers, so that each member benefits from the cooperative's activities in accordance with his participation in the cooperative and his transactions with it » and the cooperatives should « act in the economic interest of their members » and their relations with members should be « not purely commercial but personal and individual, the members being actively involved in the running of the business and entitled to equitable distribution of the results of economic performance »; (*ii*) the « control of cooperatives should be vested equally in members, as reflected in the 'one man, one vote' rule »; (*iii*) during the life of the cooperatives their reserves and assets should be « commonly held, non-distributable » and should « be dedicated to the common interests of members »; (*iv*) « net assets and reserves should be distributed on winding-up to another cooperative entity pursuing similar general interest purposes »; (*v*) shares issued by cooperatives should not be listed; (*vi*) a limitation on financial remuneration on loan and share capital should make « investment in a cooperative society less advantageous » than that in a for-profit company.

Fourthly, the national judge – called to apply Article 107, par. 1, TFEU (respecting the authentic interpretation of the said norm, inferable from the CJEU case law) to verify the absence of State aid in presence of a national measure valid only for cooperatives – must ascertain

[36] Resounding the above mentioned term coined by the European Commission into 2009 Decision, paragraph 160.

whether the cooperative party into the related proceeding has all the characteristics to be qualified True Cooperative. Therefore, this control has to be conducted on the national organizational law of the said entity. If the judge qualifies the party as a True Cooperative according to the CJEU case law, the measure applied to the party is not be State aid, because it is not selective (paragraph 63).

Fifthly, on the contrary, whether the national judge does not qualify the party into the proceeding as True Cooperative, the same authority must also ascertain whether the national measure under scrutiny « first, forms an inherent part of the essential principles of the tax system applicable in the Member State concerned and, second, complies with the principles of consistency[37] and proportionality[38] » (ruling of the Paint Graphos Case)[39]. This second assessment – corresponding to a general rule (deducible from the CJEU case law) to be applied in presence of possible tax State aid – has to be conducted on the basis of related national tax law, trying to read systematically the peculiar tax treatment of the party within the entire tax law of the State interested. If the party and the State interested demonstrate the consistency and the proportionality of the measure in relationship with all tax law of that State, that measure is not selective and thus may not qualified as State aid; otherwise the same judge must both not apply the illegal national law and ask the intervention of the European Commission against the State in the name of which he administers justice. In this situation the said State will be able to claim that its measure is compatible with EU law according to Article 107, par. 2 e 3, TFEU.

[37] So explained at the paragraph 74 of the Paint Graphos Case: « It is therefore for the Member State concerned to introduce and apply appropriate control and monitoring procedures in order to ensure that specific tax measures introduced for the benefit of cooperative societies are consistent with the logic and general scheme of the tax system and to prevent economic entities from choosing that particular legal form for the sole purpose of taking advantage of the tax benefits provided for that kind of undertaking. It is for the referring court to determine whether that requirement is met in the main proceedings. ».

[38] The above mentioned principle is so explained into the paragraph 75 of the Paint Graphos Case: « In any event, in order for tax exemptions such as those at issue in the main proceedings to be justified by the nature or general scheme of the tax system of the Member State concerned, it is also necessary to ensure that those exemptions are consistent with the principle of proportionality and do not go beyond what is necessary, in that the legitimate objective being pursued could not be attained by less far−reaching measures ».

[39] In general, on the above said ascertainment cf. W. Schön, *op. cit.*, p. 321 ff.

4.2.2 Its possible impact on cooperative law

On the basis of the reasons above exposed it is evident the possible impact of the Paint Graphos Case on the European Commission, on the EU Member States and on the EU legislator.

On the Commission, because this judgment introduces some legal principles that, albeit valid directly only for Italian worker cooperatives (i.e. those examined in the Paint Graphos Case), enlighten indirectly the relationship between the EU State aid law and the entire cooperative law (without any distinction on the economic sector or on the mutual transactions of the cooperatives). Therefore, the European Commission, in the still open procedures against France and Italy above cited should respect the Paint Graphos Case, since otherwise this authority would risk the annulment of its decisions (being these last contrary to the EU law, as interpreted by the CJ). Consequently, in my opinion, the Commission will have to abandon its thesis according to that a cooperatives is true only if it carries on its mutual activities solely with their members; in fact, such a constriction does not exist into both the Paint Graphos Case and the two documents (SCE Regulation and 2004 Communication) on which the CJ based its reasoning.

On the Member States, because, if they want to promote cooperatives without infringing EU State aid law, they should conceive a measure applicable to cooperatives only that comply with the True Cooperative model. This model, having considered the not much technical legal wording used by the CJ, has to be transplanted and translated by the national legislators with a certain decree of flexibility, as the European Commission specified already in its 2004 Communication[40] and SCE Regulation implies clearly. So, exemplifying, a cooperative may be compliant with the True Cooperative model if it has members moved by not mutual interest (i.e., not interested in mutual transactions with their cooperative, in Italy named *soci finanziatori*), eventually having the right to exercise more than one vote, provided that the cooperative governance is stably under control of the members moved by mutual interest (i.e., interested in mutual transactions with their cooperative, in Italy named *soci cooperatori*).

[40] More precisely, in its paragraph 3.2.4: « national legislators should be based on the co-operative definition, values and principles when drafting new laws governing co-operatives. In this context however Member States are required also to be sufficiently flexible in order to enable co-operatives to compete effectively in their markets and on equal terms with other forms of enterprise. … The Commission invites Member States to be guided, when drafting national regulations governing cooperatives, by the "definition, values and co-operative principles" of the above mentioned Recommendation [i.e. the ILO Promotion of Cooperatives Recommendation, 2002] but also to be sufficiently flexible in order to meet the modern needs of cooperatives ».

On the EU legislator, because the next reform of the SCE Regulation should be thought having in mind, as main aims, not only a simplier law (considering the failure of the said law, as demonstrated by its low application in reality[41]) and a reduction of references to national laws (getting closer the law applicable to SCEs operating into the Union), but also two different cooperative models, whose one compliant with the True Cooperative model[42]. This last aim, if it pursues, would have the decisive advantage to offer a sufficient degree of legal certainty (that lacks into the Paint Graphos Case) about the cooperatives to be considered incomparable (factually and legally) to for-profit companies and then legitimated for a promotion by the Member States without risking an infringement of Article 107 TFEU. As a matter of fact, the True Cooperative model, if defined into the SCE Regulation, could become a benchmark (almost[43]) sure for national legislators (having to infer that the Council puts into force rules compliant with the TFEU, as interpreted by the CJEU), when these will lay down a national model based on the True Cooperative model in order to promote (for instance, with a special tax treatment) only entities compliant with this last national model.

In closing this writing a clarification is necessary, as a further proof of the importance of the Paint Graphos Case for the cooperative law in Europe.

This judgment does not consolidate or deduce or induce legal rules from the today EU law of cooperatives, on the grounds that the characteristics listed into the said judgment do not delimit the cooperative model derivable from the 2004 Communication and/or from the SCE Regulation.

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[41] As written in the Commission's Report on the application of the SCE, dated 23 February 2012 [COM(2012) 72 final], paragraph 3, « in November 2011, 24 SCEs were registered in the 30 EU/EEA Member States, as follows: five in Italy; seven in Slovakia; one each in France, Liechtenstein, the Netherlands, Spain and Sweden; three in Hungary, two in Germany and two in Belgium. The SCE Regulation was due to enter into force in 2006. However, the large majority of Member States failed to meet this deadline. As of December 2011, three Member States had not yet taken the necessary steps to ensure the effective application of the Regulation ».

[42] An example of this dual system into the European cooperative law has offered by the Italian cooperative law, where there are due cooperative models: a basic one (no named expressly) and a more restrictive one (named *cooperativa a mutualità prevalente*); only the latter is consistent with the Italian constitutional model (so part of the researchers, here represented by E. Cusa, *Il socio finanziatore*, cited, p. 123f.) and, therefore, it should be favoured by Italian tax law (according to Article 223-*duodecies*, transitorial provisions, Italian civil code).

[43] It is possible that the EU model of true cooperative can be judged by the CJ in contrast to EU Law.

On the contrary, the Paint Graphos Case makes new EU law and shows both to the EU institutions and to the EU Member States two desirable guidelines in modernizing cooperative law:

- shaping a cooperative model adequately defined on the basis of the True Cooperative model;
- promoting only cooperatives whose organization is rooted in « the principle of the primacy of the individual » (paragraph 56 of the Paint Graphos Case) or, better, in the principle of primacy of the human person (considered also on his social dimension, since, otherwise cooperatives, against their nature, risk to be rooted in the principle of individualism or of egoism).

The principle of primacy of the human person should be put into practise not only by each True Cooperative but also by the European Union and by each EU Member State, if these institutions respect (as they must do) their constitutional principles in organizing their markets and their economies[44].

[44] About the relationship among State aid, entrepreneurial forms and constitutional principles in Europe cf. E. Cusa, *Aiuti di Stato, polimorfismo imprenditoriale e principi costituzionali*, forthcoming.