OPINION OF ADVOCATE GENERAL JÄÄSKINEN delivered on 8 July 2010[1]

1. In the present cases, the national court has referred to the Court of Justice a number of questions relating mainly to whether the national tax regime providing for the exemption of producers' and workers' cooperative societies is classifiable as State aid within the meaning of Article 87(1) EC.[2]

2. The questions were referred in the context of three disputes concerning, first, the Italian tax authorities' refusal to grant tax exemptions to the cooperative societies Paint Graphos scarl ('Paint Graphos') and Adige Carni scrl (in liquidation) ('Adige Carni') that were accorded at that time to cooperative societies under Italian law and, secondly, the issue of the personal taxation of Mr Franchetto, who challenged the decisions of the national tax authorities to adjust his income tax returns for the years 1984 – 1988.

3. It should be pointed out from the outset that there are serious doubts as to the admissibility of the questions referred. Indeed, one of the major difficulties of the present case lies in the contrast between the limited number of facts made available to the Court and the breadth of the issues to be addressed, since it is required to examine, in particular, the tax regime governing producers' and workers' cooperative societies.

4. However, if the Court were minded to answer the questions, which would have to be reworded, the present proceedings would provide an interesting opportunity to analyse the scope of the concepts of advantage and selectivity in relation to national measures providing for the taxation of cooperative societies. In particular, the issues raised would be the application of the justification test on the basis of the inherent logic of the national regime and the analysis of the choices made by the Italian legislature within the context of the national direct taxation system.

1 — Original language: French.

2 — As the dispute in the main proceedings concerns the interpretation of a decree dating from 29 September 1973, reference will be made to the provisions of the EC Treaty according to the numbering applicable before the entry into force of the Treaty on the Functioning of the European Union.

I — Legal framework

A — *European Union law*

5. Article 87(1) EC provides as follows:

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

6. Article 1 of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 EC (OJ 1999 L 83, p. 1), is worded as follows:

'For the purpose of this Regulation:

(a) "aid" shall mean any measure fulfilling all the criteria laid down in Article 92(1) of the Treaty;

(b) "existing aid" shall mean:

(i) … all aid which existed prior to the entry into force of the Treaty in the respective Member States, that is to say, aid schemes and individual aid which were put into effect before, and are still applicable after, the entry into force of the Treaty;

…'

B — *National law*

7. The fragmentary information on the case file shows that, at the time of the facts in the main proceedings, Italian cooperative societies were subject, first, to the tax on the income of legal persons (l'imposta sul reddito delle persone giuridiche, 'IRPEG') and, secondly, to local income tax (l'imposta locale sui redditi, 'ILOR'). Between 1977 and 2004, the general taxation of capital companies [3] in Italy was based on the principle of single taxation,

3 — In Italy, cooperative societies are also regarded as capital companies and not, as in several other legal systems of the Member States, associations of persons. Originally, before specific rules applicable to cooperatives were adopted in Italy, a cooperative society was classified as a company with variable capital. See Klingberg, W., *Genossenschaften und Genossenschaftsrecht in Italien*, Veröffentlichung des Institut für Genossenschaftswesen an der Philipps-Universität Marburg, Marburg/Lahn, 1957, p. 49-50.

which was reflected in the introduction of a tax credit system for their members. Under that system, a company was taxed on its profits according to the rate applicable to companies, but the profits distributed to members/shareholders were taxed according to the progressive rates applicable to the income of natural persons. Members who were entitled to a tax credit corresponding to the tax due from the company were required to pay the difference between the rate applicable to the company and the progressive rate applicable to their personal income.[4]

8. I should add that, according to the case file, a number of specific tax provisions applicable to cooperative societies are based on the principle of mutuality, which has the effect of restricting the distribution of the profits or funds of those societies to their members.

9. Article 11, entitled 'Producers' and workers' cooperatives', of Decree No 601 of the President of the Republic of 29 September 1973 concerning rules on tax benefits[5] in the version in force from 1984 to 1993 ('DPR No 601/1973'), stated as follows:

'1. The income of producers' and workers' cooperatives and their consortia shall be exempt from the tax on the income of legal persons and local income tax if the total amount of remuneration actually paid to the members who work for the cooperative on a continuous basis, including the amounts referred to in paragraph 3, is not less than 60 per cent of the total amount of all the other costs, excluding those relating to raw materials and supplies. If the total amount of remuneration is less than 60 per cent, but not less than 40 per cent, of the total amount of the other costs, the tax on the income of legal persons and local income tax shall be reduced by a half.

2. In the case of producers' cooperatives, the provisions of the previous paragraph shall apply, on condition that the members satisfy all the requirements laid down for members of workers' cooperatives in Article 23 of Legislative Decree [No 1577] … of the Provisional Head of State of 14 December 1947, as subsequently amended.

3. For the purpose of calculating the income of producers' and workers' cooperatives and their consortia, the sums paid to employee-members by way of earnings supplement may be deducted up to the limit of current salaries, plus 20 %.'

4 — Under to the system currently applicable, capital companies are subject to corporation tax (l'imposta sul reddito delle societa, 'IRES'), which is a proportional tax applied at a fixed rate. Members pay the tax on the income of natural persons (l'imposta sul reddito delle persone fisiche), which is a progressive tax on the dividends or profits distributed to them, their income being taxed at 40 %. A 60 % exemption for members' dividends or profits has therefore been introduced to eliminate a series of charges to tax.

5 — Ordinary supplement to GURI No 268 of 16 October 1973, p. 3.

10. Article 14, entitled 'Conditions under which the benefits apply', of DPR No 601/1973 was worded as follows:

'1. The tax benefits provided for under this Title shall apply to cooperative societies and their consortia which are governed by the principles of mutuality laid down by the laws of the State and are entered in the prefectoral registers or the general register of cooperatives.

2. The requirements for the attainment of the objective of mutuality shall be deemed to be met if the conditions laid down in Article 26 of Legislative Decree No 1577of the Provisional Head of State of 14 December 1947, as subsequently amended, are expressly set out in the society's articles of association, without any possibility of derogation, and if those conditions have in fact been complied with during the tax period and during the preceding five years or during the period which has elapsed since the articles of association were adopted, if less than five years.

3. The tax authorities, in consultation with the Ministry of Labour or other supervisory bodies, shall determine the conditions under which the tax benefits are to apply.'

II — The facts in the main proceedings and the questions referred

A — *Case C-78/08*

11. Following checks carried out by the Guardia di Finanza, the tax authorities of the town of Matera issued a notice of assessment to Paint Graphos, a cooperative society governed by Italian law, adjusting, for 1993, its income chargeable to IRPEG and ILOR. By the same notice, the tax authorities refused to grant Paint Graphos the exemptions provided for under Articles 11, 12 and 14 of DPR No 601/1973. Following a number of appeals lodged by both Paint Graphos and the Ministero dell'Economia e delle Finanze and the Agenzia delle Entrate, the case is currently pending before the referring court.

B — *Case C-79/08*

12. By notice of assessment of 8 June 1999, the Rovigo tax authorities notified Adige Carni, a cooperative society governed by Italian Law, that it was no longer entitled to the tax benefits provided under Article 10 et seq. of DPR No 601/1973, of an upwards assessment of its taxable income for 1993, and

consequent increase in its liability to IRPEG and ILOR. In particular, the tax authorities contested the issue of invoices for non-existent transactions, the sum in question being regarded as income and, moreover, not accounted for as income by Adige Carni, the tax authorities assuming that it had been distributed to the members, in breach of Article 11 of DPR No 601/1973. After a series of appeals, Adige Carni lodged an appeal in cassation, alleging inter alia failure to give any or any adequate reasons for refusing the tax exemptions in question.

C — *Case C-80/08*

13. The Monfalcone tax authorities adjusted the income tax returns filed by Mr Franchetto for 1984 to 1988 on the ground that, as a member of Cooperativa Maricoltori Alto Adriatico r.l., a cooperative society constituted under Italian law, the object of which is the cultivation and sale of shellfish, he had traded independently on the market, whereas the cooperative, in whose name the purchase and sales invoices were made out, received a commission on each sale for each service rendered and distributed the surplus to its members, instead of appropriating it to the reserve established for that purpose.

14. The Ministero delle Finanze is seeking the annulment in cassation of the decision of the Commissione Tributaria Centrale (Central tax Court), which, without entering into the merits of the grounds relied on by Mr Franchetto, considered that the cooperative could not be refused the tax exemptions unless the opinion of the Ministry of Employment – a mandatory requirement – had first been obtained. The Ministero delle Finanze alleges, *inter alia*, infringement of Article 14 of DPR No 601/1973, on the ground that the assessment notice concerned the member of the cooperative and not the cooperative itself, and that the opinion of the Ministry of Employment was not therefore required.

D — *The questions referred*

15. According to the Corte suprema di cassazione (Italy), in order to verify the compatibility with European Union law of the tax advantages granted to cooperative societies as compared with profit-making companies, it is necessary to ascertain whether the fact that the operators in question make tax savings constitutes illegal State aid, which would result, by reason of the direct effect of Article 88(3) EC, in the national authorities, including the courts, being required to disapply the national regime concerned and to order repayment of the aid received. The referring court also questions whether the use of the form of the cooperative society constitutes an abuse of rights.

16. Those are circumstances in which the Corte suprema di cassazione decided to stay the proceedings and to refer the questions to the Court, which are worded as follows:

'(1) Are the tax benefits granted to cooperative societies, pursuant to Articles 10, 11, 12, 13 and 14 of DPR [No 601/1973], compatible with the rules on competition and, in particular, are they classifiable as State aid within the meaning of Article 87 EC, especially given that the system of monitoring and for the prevention of abuse provided for under Legislative Decree No 1577 of the Provisional Head of State of 14 December 1947 is inadequate?

(2) In particular, for the purposes of determining whether the tax benefits at issue are classifiable as State aid, can those measures be regarded as proportionate in relation to the objectives assigned to cooperative societies; can the decision on proportionality take into consideration not only the individual measure but also the advantage conferred by the measures as a whole and the resulting distortion of competition?

(3) For the purpose of the answer to the preceding questions, taking account of 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 No 311 of 2004 [.]

(4) Regardless of whether the tax benefits in question can be classified as State aid, can the use of the legal form of a cooperative society, even in cases not involving fraud or deception, be regarded as an abuse of rights, where that form is used solely or predominantly in order to achieve a tax saving?'

III — The proceedings before the Court

17. The reference for a preliminary ruling was received at the Registry of the Court on 25 February 2008.

18. Written observations were submitted by Paint Graphos and Adige Carni, the Italian, Spanish and French Governments, and the Commission of the European Communities.

19. Paint Graphos, Adige Carni, Mr Franchetto, the Italian, Spanish and French Governments, the Commission and the EFTA Surveillance Authority were represented at

the hearing, which took place on 11 March 2010.[6]

IV — The admissibility of the questions referred

A — *Observations of the parties*

20. Paint Graphos, Adige Carni and the Italian Government propose that the Court should declare the questions referred inadmissible. In the Commission's view, the Court should declare that it has no jurisdiction to answer the questions referred by the national court.

21. Those arguments are based, first, on the lack of sufficient information concerning the legal and factual context of the main proceedings and, secondly, the lack of clear reasons pertaining to the relevance of the questions referred. Indeed, the parties doubt whether a reply by the Court will be helpful for the purpose of resolving the disputes in the main proceedings and refer in this respect to the premature, hypothetical and even fictitious nature of the questions addressed to the Court.

22. In any event, according to the Commission and the Italian and Spanish Governments, the first three questions are inadmissible in that they refer to national provisions that cannot be applied to the disputes in the main proceedings. The same applies, in the Commission's view, to the fourth question, on the ground that the issue of practices designed to obtain advantages under Community law does not arise, since in the present case those advantages are available under national law alone, and the Community principle of abuse of rights is not therefore applicable.

23. Finally, the issue arises as to whether the Commission alone has competence to determine whether State aid is compatible with the common market. Thus, in the Commission's view, the second question is also inadmissible.

B — *Assessment of the admissibility of the questions referred*

24. As a preliminary point, I should point out that considerable doubts arise as to the admissibility of the questions referred to the Court for a preliminary ruling in the present proceedings.

25. First, the succinct wording of the orders for reference does not make it possible to ascertain either the details of the national regime in question or the facts of the disputes

6 — In an annex to the notice to attend the hearing, the parties were requested to focus their oral pleadings on to the question whether and, if so, in what circumstances, tax exemptions such as those in question in the main proceedings are liable to constitute State aid within the meaning of Article 87(1) EC. A question on the matter of existing aid was also addressed to the Italian Government.

in the main proceedings. The information supplied by the national court and the various items of evidence in the case file provided by the parties which have submitted observations have given rise to some confusion as to the substance of the relevant national law. Moreover, the Court has not been given precise information on the taxation of forms of entities other than cooperative societies, even though such information is essential for the purpose of determining whether situations are comparable, implicit in the concepts of advantage and selectivity, which are crucial aspects of the concept of State aid.

26. Secondly, it is even more uncertain whether there is a link between European Union law and the cases brought before the national court. In view of the subject-matter and nature of the disputes in the main proceedings, it is difficult to see exactly how a reply by the Court could be helpful in resolving the disputes pending before the national court. These cases concern the validity of the checks carried out by the tax authorities, whereas the questions relate to how tax advantages might be classified under Article 87 EC. I note, moreover, that Paint Graphos states that the pending proceedings relate to provisions on verification of income, not the nature of tax rates or whether they are compatible with the provisions of Community law.

27. Moreover, as regards the case of Mr Franchetto, it must be recognised that the subject-matter of the dispute in question is not the taxation of the cooperative concerned but Mr Franchetto's personal taxation. Contrary to what is stated in the order for reference, the cooperative society of which Mr Franchetto was a member does not seem to have been a workers' cooperative as referred to in Article 11 DPR No 601/1973 but a small-scale fisheries cooperative governed by Article 10 of the DPR, the scope of which is not explained by the referring court.

28. Thirdly, the referring court raises the issue of the proportionality of the national measures to the objectives assigned to a cooperative society, which appear to be defined under the national legal system. The examination of the criteria for establishing a balance between the interests protected by national tax measures and distortions of competition refers to the examination of the compatibility of possible State aid with the common market.

29. Fourthly, the third question takes the form of a reflection or comment which cannot be regarded as a separate question.

30. Finally, I note that the fourth question referred falls solely within the ambit of national law, so the Court has no jurisdiction to answer it. The national court seeks clarification as to the link between the use of the legal form of a cooperative society and the attainment of tax savings.

31. In view of the difficulties thus identified, it is sufficient to point out that, according to settled case-law, the Court may refuse to rule on a question referred for a preliminary ruling by a national court where it is quite obvious that the interpretation of Community law that is sought bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it. [7]

32. The national court is required to state the precise reasons as to why it has doubts concerning the interpretation and validity of certain provisions of European Union law. Thus, the Court has held that it is essential that the national court should give at the very least some explanation of the reasons for the choice of the Community provisions of which it seeks an interpretation or an assessment as to validity and of the link it establishes between those provisions and the national legislation applicable to the dispute. [8]

33. Moreover, the Court does not have jurisdiction to rule on the compatibility of a national measure with European Union law. [9] Nor can it rule on the compatibility of State aid or an aid scheme with the common market, as the assessment of such compatibility falls within the exclusive competence of the Commission, subject to review by the Court. [10] Nor does the Court have jurisdiction to give a ruling on the facts in an individual case or to apply the rules of European Union law to national measures or situations, since those questions are matters for the exclusive jurisdiction of the national court. [11]

34. In view of the foregoing, the questions referred to the Court should therefore be declared inadmissible in their entirety.

35. However, in the event that the Court considers that it cannot adopt such a radical proposal, I propose to focus this analysis on the first question referred.

36. It seems that the Corte suprema di cassazione proceeds from the proposition that even if the cooperative societies in question were entitled to the exemptions, those societies could not benefit from the tax advantages at issue because they constitute illegal State aid.

7 — Case C-343/90 *Lourenço Dias* [1992] ECR I-4673, paragraph 20, and Case C-314/08 *Filipiak* [2009] ECR I-11049, paragraph 42 and the case-law cited.

8 — Case C-437/97 *EKW and Wein & Co* [2000] ECR I-1157, paragraph 52.

9 — See, inter alia, Case C-118/08 *Transportes Urbanos y Servicios Generales* [2010] ECR I-635, paragraph 23 and the case-law cited.

10 — See Case C-237/04 *Enirisorse* [2006] ECR I-2843, paragraph 23.

11 — See Case C-451/03 *Servizi Ausiliari Dottori Commercialisti* [2006] ECR I-2941, paragraph 69 and the case-law cited.

37. By its order for reference, in particular its first question, the national court therefore seeks to provide the Court with an analysis of the compatibility of the provisions of the national tax rules on cooperative societies with European Union law. In this connection, it discusses at length the development of the Italian tax legislation in question, which is largely inapplicable to the disputes in the main proceedings, and also refers to both the case-law of the Court and the various Commission notices on the application of the rules on State aid to national tax measures.

38. Although the Court has no jurisdiction, under Article 234 EC, to give preliminary rulings on the interpretation of rules pertaining to national law, [12] it may provide the national court with an interpretation of European Union law on all such points as may enable that court to determine the issue of the compatibility of a national measure with European Union law for the purposes of the case before it. [13] As regards State aid, the Court has jurisdiction, inter alia, to give the national court guidance on interpretation in order to enable it to determine whether a national measure may be classified as State aid under European Union law. [14]

39. In the present case, in view of the factual and legal information provided by the referring court, it seems to me prudent to take the view that the Court has a minimum of sufficient evidence to enable it to rule, in part, on the reference for a preliminary ruling, if the first question is reworded [15] to the effect that the Court is asked to rule on the criteria underlying the concept of State aid, in light of the tax regime in question. Following that examination and in the light of the guidance given by the Court, it will be for the referring court to decide whether any tax advantage intended for cooperative societies is liable to constitute State aid within the meaning of Article 87(1) EC.

40. Moreover, in rewording that question, reference should be limited to the national provisions applicable to the disputes in the main proceedings. Since the national court confirms in the three orders for reference that it is producers' and worker's cooperatives which are at issue, I therefore propose to confine the analysis of the first question referred to Article 11 of DPR No 601/1973.

41. Finally, I note that the Court has expressly indicated that, like the Commission, national courts are authorised to interpret the concept

12 — Case C-341/94 *Allain* [1996] ECR I-4631, paragraph 11.

13 — See *Enirisorse*, paragraph 24, and *Transportes Urbanos y Servicios Generales*, paragraph 23, both cited above.

14 — See Case C-140/09 *Fallimento Traghetti del Mediterraneo* [2010] ECR I-5243, paragraph 24 and the case-law cited.

15 — Case C-45/06 *Campina* [2007] ECR I-2089, paragraph 30; Case C-427/06 *Bartsch* [2008] ECR I-7245, paragraph 31; and Case C-350/07 *Kattner Stahlbau* [2009] ECR I-1513, paragraph 24.

of State aid.[16] Therefore, where the national court entertains doubts concerning the interpretation of that concept, it is entitled to make a reference to the Court. However, the cooperation between the national courts and the Court of Justice should not have the effect of disturbing the balance of the powers conferred on the European Union institutions. As regards the examination as to compatibility, the role of a national court remains secondary in relation to the Commission's scope for intervention.

V — Preliminary observations on cooperative societies

A — *The characteristics of cooperative societies and their fiscal treatment*

42. Cooperative societies are groups of natural or legal persons with a highly personal nature which conform to special operating principles, including the principle of democratic structure and control and the fair distribution of the net profits deriving from the activities pursued.[17]

43. The specific nature of cooperatives is characterised by the concept of mutual advantage, which may be attained by two separate means, namely immediate advantage or deferred advantage – in other words a dividend. In cooperative societies, it is also possible to distinguish between income earned through activity involving members and income earned by trading with third parties.[18]

44. In connection with the cooperative society's activities involving its members, income is distributed among the members in two stages. The immediate advantage takes the form of special terms relating to the price paid or of discounts given on the purchases of goods by the member. The deferred advantage is obtained by means of a dividend, which is a sum distributed periodically by a cooperative to its members in proportion to their relationship with the cooperative and the capital subscribed.

45. The tax system for cooperatives is strictly linked to the structure of their capital and the economic system underlying that structure. It is therefore possible to infer from this that

16 — Case 78/76 *Steinike & Weinlig* [1977] ECR 595, paragraph 14; Case C-354/90 *Fédération nationale du commerce extérieur des produits alimentaires and Syndicat national de négociants et transformateurs de saumon* [1991] ECR I-5505, paragraph 10; Case C-39/94 *SFEI and Others* [1996] ECR I-3547, paragraph 49; and Case C-368/04 *Transalpine Ölleitung in Österreich* [2006] ECR I-9957, paragraph 39.

17 — Cathiard, C., 'La société coopérative européenne', *La semaine juridique. Entreprise et affaires.* No 1 (2009), pp. 34-50.

18 — Bassi, A., *Le società cooperative*, UTET, Turin, 1995, p. 30.

cooperative societies operate within a specific legal and economic framework.

46. The complex question of the tax treatment of the income of cooperative societies is illustrated by the variety of approaches adopted in the various Member States. [19] Thus, it has been observed in legal literature that this fiscal 'heterogeneity' reflects their civil 'heterogeneity' and seems to be necessary in order to achieve objectives which, despite the competitive direction that cooperatives have taken, are quite distinct from those of profit-making companies. [20]

47. Hence, under some national schemes, general corporation tax provisions are applied to cooperative societies. [21] Other Member States apply an exemption method reflected, first, in the 'transparency' system, which is based on the sums earned by the cooperative being attributed to the members, and, secondly, in the fact that the exemption applies solely to profits derived from transactions made with members, who are required to pay tax on the income distributed on an individual basis. [22] Some national schemes allow the dividend to be deducted from the taxable amount. [23] Finally, there is the possibility of treating the profits distributed to the members as dividends, to which a lower tax rate is applied. [24]

48. Often, the taxation of cooperative societies is linked to a requirement to adopt behaviour specific to cooperatives. Non-compliance with this requirement has major tax consequences. Thus, it is not always possible to identify the differences between the principles governing taxation of cooperative societies and those governing taxation of capital companies in general, for the purpose of establishing whether those differences are based on the objective of promoting cooperatives or on their particular nature. [25]

49. In Italy, producers' and workers' cooperatives developed, first, as a form of cooperation between artisans – the first in 1855 between glass manufacturers in Altare – and, secondly,

19 — For a survey of taxation of cooperatives in the 12 Member States of the European Union, see Stracke, B., *Besteuerung von Genossenschaften in der Europäischen Union*, Erich Schmidt Verlag, Bielefeld, 1997.

20 — Lolli, R., 'Social Cooperatives in the Context of Recent Italian Regulation', *Droit comparé des coopératives européennes*, Larcier, Luxembourg, 2009, p. 89.

21 — Alguacil Marí, M.P., 'Il trattamento fiscale delle cooperative alla luce del regime europeo degli aiuti di Stato', *Rivista di diritto tributario internazionale (International tax law review)*, 1 (2004), pp. 51-79. The author identifies in this group Ireland and most cooperatives in Austria and Greece.

22 — Alguacil Marí, M.P., *opus cit.*, lists in this category, inter alia, the Portuguese Republic as regards of consumer cooperatives, the Federal Republic of Germany and the Hellenic Republic as regards agricultural cooperatives and the Italian Republic as regards agricultural and fisheries cooperatives.

23 — Alguacil Marí, M.P, *opus cit.*, mentions, in particular, Germany, Denmark, Finland and the United Kingdom.

24 — Alguacil Marí, M.P, *opus cit.*, mentions, inter alia, in this group the Portuguese Republic and the Kingdom of Spain.

25 — See Mannio, L., *Osuuskunnat ja verotus*, Edita, Helsinki, 2004, p. 73.

as a form of organisation bringing together manual workers without special skills. The latter form of cooperative was established – the first one in 1883 in Ravenna – in order to improve access to employment for members subject to structural or seasonal unemployment, originally mainly in the building and construction sector, but more recently in connection with quite a wide range of activities. I note, in this respect, that in Italy there is a distinction between producers' and worker's cooperatives involved in the agricultural or even fisheries sectors and other producers' and workers' cooperatives. [26]

50. In the case in question, the order for reference indicates that, under the provisions of the Italian legal system applicable at the time of the facts in the main proceedings, cooperative undertakings enjoyed total or partial exemption from a whole range of taxes, in the interest of attaining a specific economic objective, which is identified by Article 45 of the Italian Constitution in the social function and mutualist nature of cooperatives.

51. It should be noted that, under Article 26 of Legislative Decree No 1577 of the Provisional Head of State of 14 December 1947 ('the Basevi Law'), the prerequisites for mutuality were deemed to be met if the cooperative society's articles of association contained the following clauses: first, a prohibition on distribution of dividends exceeding the statutory interest rate applicable to the capital actually paid; secondly, a prohibition on distribution of reserves to members during the life-time of the cooperative; thirdly, where the cooperative is wound up, a requirement to transfer all the assets, after deduction of the paid up capital and any dividends, to associations whose purpose is the advancement of socially beneficial objectives, in accordance with the principle of mutuality.

52. As the national court points out, producers' and workers' cooperatives are characterised by the role played by the trader/employee member. In those cooperatives, as in the present case, members pursue their own occupational activity within the cooperative and the surplus generated by their work may be distributed as additional remuneration. [27]

53. According to the information supplied by the parties which submitted observations in the present proceedings, a cooperative society's basis of assessment is determined in

26 — On the history of producers' and workers' cooperatives in Italy, see Klingberg, W., *op cit.*, pp. 21 to 27. The legislation adopted in 1911 provided for a special regime as regards the distribution of the surplus of producers' and workers' cooperatives wishing to participate in public works. *Ibid.* pp. 123 and 124.

27 — According to Stracke, the objective of typical producers' and workers' cooperatives in the Member States of Southern Europe is to improve their members' access to employment. Their special tax treatment is designed to promote the continuity of such cooperatives through the accumulation of common cooperative capital. See Stracke, B., *op cit.*, p. 46.

the same way as that of a non-cooperative undertaking. In principle, a rate is levied on the net profit derived from the undertaking's activities. It should be added that the case file indicates that all undertakings are entitled to deduct remuneration paid from their taxable income.

54. Finally, I note that, in addition to the difficult issues raised by the order for reference, the taxation of cooperative societies has been discussed by the parties from a broader perspective than that relating to the exemptions contained in Article 11 of DPR No 601/1973. The Commission, especially, seems to me to have redefined its position at the hearing, by comparison with that adopted in its written observations, by raising the question of the non-taxation of the undistributable reserves of cooperative societies under Italian law.

55. In that regard, I consider that that question can affect producers' and workers' cooperatives only in so far as the cooperative concerned has not been able to benefit from the exemptions at issue in the main proceedings. The Court's assessment should, in my view, be confined to the question whether the exemptions provided for in Article 11 of DPR No 601/1973 in respect of producers' and workers' cooperatives are liable to satisfy the criteria underlying the concept of State aid within the meaning of Article 87(1) EC.

B — *Article 11 of DPR No 601/1973*

56. According to Article 11(1) of DPR No 601/1973, the income of cooperatives is exempt from tax if the total amount of remuneration is not less than 60 % of the total amount of all other costs, excluding those relating to raw materials and supplies. Such exemption is therefore subject to it being possible to determine the relationship between the contribution, in terms of the work of its members, and the contribution of other production factors – such as the capital and work of third parties – including general expenditure and the costs of goods and equipment. By defining such a parameter, it is possible to monitor the relationship between the remuneration actually paid and the total amount of all the other costs borne by the cooperative society. [28] Where the amount of remuneration paid is between 60 % and 40 %, the aforementioned taxes are reduced by half. [29]

57. Moreover, the tax relief provided for in Article 11(1) of DPR No 601/1973 is applicable only where cooperatives meet the conditions laid down in Article 23 of the Basevi Law.

28 — Stillitani, G., 'La piccola società cooperativa: applicazione delle agevolazioni fiscali', Sistema Leggi d'Italia, Dottrina, 2008. See also Stracke, B., *op cit.*, pp. 180 and 181.

29 — Mathematically, this amounts to an exemption of 50 % of income.

58. Article 11(3) of DPR No 601/1973 provides for the deduction from the cooperative's income of sums paid to employee-members by way of earnings supplements up to a limit of the going rate of pay, plus 20 %, as those amounts are equivalent to dividends, that is the deferred mutualist advantages enjoyed by members. It has therefore been observed in Italian legal literature that such a deduction does not constitute a derogation from the common tax rules applied to commercial companies and entities. [30]

59. In my view, that provision establishes a limitation on the possibility of distributing the surplus of the cooperative society to members in the form of additional remuneration deductible from the cooperative's taxable income.

60. As the Italian Government stated at the hearing, the member receives remuneration for the work done for the cooperative and that income is subject to the progressive tax on income. Tax is deducted in respect of the sums paid to members by way of additional remuneration in that such sums represent income equivalent to that of a salaried worker. Indeed, the employee-member is taxed on such income. [31]

VI — Classification of a tax regime as State aid

A — *General criteria underlying the concept of State aid*

61. The concept of State aid within the meaning of Article 87(1) EC embraces not only positive benefits, such as subsidies, but also measures which, in various forms, mitigate the charges which are normally included in the budget of an undertaking and which, without therefore being subsidies in the strict meaning of the word, are similar in character and have the same effect. [32]

62. It follows that a measure by which the public authorities grant to certain undertakings a tax exemption which, although not involving a transfer of State resources, places the persons to whom the tax exemption applies in a more favourable financial situation than other taxpayers constitutes State aid within the meaning of Article 87(1) EC. [33]

30 — Pistolesi, F., 'Le agevolazioni fiscali per le cooperative', *TributImpresa* No 3/2005.

31 — Article 50 of the consolidated legislation on direct taxes (Testo Unico No 917 of 22 December 1986) indicates that remuneration received by employee-members of producters' and workers' cooperatives, up to the limit of current salaries, plus 20 %, is treated as the income of a salaried worker.

32 — Case C-143/99 *Adria-Wien Pipeline and Wietersdorfer & Peggauer Zementwerke* [2001] ECR I-8365, paragraph 38; Case C-126/01 *Gemo* [2003] ECR I-13769, paragraph 28 and the case-law cited, Case C-501/00 *Spain* v *Commission* [2004] ECR I-6717, paragraph 90 and the case-law cited; Case C-66/02 *Italy* v *Commission* [2005] ECR I-10901, paragraph 77; and Joined Cases C-182/03 and C-217/03 *Belgium and Forum 187* v *Commission* [2006] ECR I-5479, paragraph 86.

33 — Case C-387/92 *Banco Exterior de España* [1994] ECR I-877, paragraph 14, and *Italy* v *Commission*, paragraph 78.

63. With regard to cooperative societies, as is apparent from the Commission Communication of 23 February 2004,[34] some Member States, including the Italian Republic, consider that the restrictions inherent in the special nature of cooperative capital merit special tax treatment. The Commission has therefore called upon the Member States to observe the principle that any protection or benefit afforded to a particular type of entity should be proportionate to any legal constraints, social added value or limitations inherent in that form and should not lead to unfair competition.

64. The Court has held on numerous occasions that the objective pursued by State measures is not sufficient to exclude those measures outright from classification as 'aid' for the purposes of Article 87 EC.[35] Article 87(1) EC does not distinguish between the causes or the objectives of State aid, but defines them in relation to their effects.[36]

65. The adoption of this relatively simple approach nevertheless gives rise to difficulties in the context of taxation of undertakings with varying legal forms. In the case of small- or medium-sized undertakings, virtually identical activities may be exercised in the form of a partnership,[37] a profit-making capital company,[38] a cooperative society or even an individual undertaking without legal personality.

66. In this respect, I note that although the types of the legal forms taken by undertakings is broadly comparable between the Member States, there are significant differences regarding, in particular, the concept of the legal personality, or even the legal capacity,[39] of undertakings.

67. The taxation of different legal forms may be based on the traditional principle of double taxation, where the undertaking and the owner are taxed in respect of the income generated by the economic activity. On the other hand, in single taxation systems, either the undertaking is taxed in respect of all income from such activity, the income distributed to members being exempt from tax, or the member is taxed, in which case the

34 — Communication from the Commission to the Council and the European Parliament, the European Economic and Social Committee and the Committee of the Regions on the promotion of cooperative societies in Europe, COM(2004) 18 final.

35 — Case C-487/06 P *British Aggregates* v *Commission* [2008] ECR I-10505, paragraph 84 and the case-law cited.

36 — *British Aggregates*, cited above, paragraph 85.

37 — General partnership, limited partnership.

38 — Private limited liability company or public limited liability company/joint stock company.

39 — Italian law seems to make a distinction between 'soggettività giuridica' and 'personalità giuridica'. See Magrini, P.P., *Italienisches Gesellschaftsrecht: das neue Recht und seine erweiterten Aufbau- und Finanzierungsformen*, Sellier European Law Publishers, Munich, 2004, p. 8.

undertaking is not liable to tax. Clearly, there are several variants that combine certain aspects of these models.

68. Thus, in identifying the key concepts of advantage and selectivity in the context of the choices made by the national legislature in adopting tax law provisions, there is a certain danger of apparent conceptual clarity, which, in reality, may make the analysis of the difficulty at issue more obscure.

69. Above all, I should like to add that the existence of a justification based on the nature or general scheme of the tax system seems to me to be relevant for the purposes of the consideration of both the concept of advantage and that of selectivity.

70. In both cases in question it is necessary to examine the separate treatment provided for within a tax system by comparing this to a hypothetical situation in which there is no such treatment, including an assessment of the significance of and reasons for such a choice by the national legislature. For reasons of economy of presentation, I have decided to approach the question of the existence of an advantage from a somewhat formal viewpoint and to discuss the aspects which, in themselves, might also call into question the existence of an advantage in the economic sense, in the context of selectivity.

B — *Advantage*

71. It should be noted that an advantage within the meaning of Article 87(1) EC exists only where the measure provides for an alleviation of the tax burden as compared with the normal situation provided for in the tax system. The fundamental concept in determining whether there is an advantage in a tax regime is therefore that of a general system of taxation. [40]

72. In that context, in order to be able to determine whether there is an advantage, the general level of taxation to which legal persons are subject under a national tax system must be identified. As this is a particularly complex task, it is therefore appropriate to examine the situation of the beneficiary undertaking by comparison with other undertakings which are in a legal and factual situation that is comparable, in the light of the objective pursued by the measure in question. [41]

73. Moreover, a distinction should be made conceptually between pure advantage and actual advantage. Although a certain kind of tax advantage may be identified, for example in the form of tax relief, it is necessary to examine whether it is not a means of precluding

40 — Rossi-Macanico, P. 'The specificity criterion in fiscal aid review: proposals for state aid control of direct business tax measures', *EC tax review*, Vol. 16 (2007), issue 2, p. 91.

41 — See, to that effect, *Adria-Wien Pipeline and Wietersdorfer & Peggauer Zementwerke*, paragraph 41; Case C-308/01 *GIL Insurance and Others* [2004] ECR I-4777, paragraph 68 and the case-law cited; and Case C-172/03 *Heiser* [2005] ECR I-1627, paragraph 40.

the application of one tax provision in favour of another. For instance, a tax exemption may steer the taxation of a certain activity towards another regime.[42] The tax benefit may thus be offset or justified by the obligations arising under the legal structure pertaining to a certain form of legal person, which negates any advantage in the economic sense.[43]

74. In the case at issue, Article 11(1) of DPR No 601/1973 wholly or partially exempts the taxable income of a producers' and workers' cooperative according to the amount of work contributed by the members in generating economic value in the context of the cooperative's activities. The extent of the exemption is determined approximately. The aforementioned provision does not govern deductions from the members' remuneration that must actually be paid, as such deductions are governed by the general provisions applicable to the calculation of the taxable income of a legal person.

75. Consequently, if the Court opted for a formal approach, the exemption in question would undoubtedly constitute an advantage. By way of exception to the rule generally applicable to legal persons, the taxable income of the cooperative societies concerned is exempt.

76. However, I wonder whether such a formal approach is justified from the viewpoint of the analysis of the economic effects of the provision in question.

77. Indeed, it goes without saying that the application of uniform rules to the various forms of undertaking is impossible without making arbitrary assumptions concerning the taxation of the economic factors contributing to the generation of income. In the area of fiscal policy, the Member States have considerable scope for discretion as to the choice and extent of taxation of production factors.[44]

42 — This appears to be the case with the exemption provided for by Article 10 of DPR No 601/1973 in respect of agricultural activities. As is apparent from the pleadings of Paint Graphos, according to the general rules for establishing IRES, the actual income of cooperative societies is taxable in its entirety. It follows that a farmer who brings his products to a cooperative would remain subject to the tax on the income of natural persons on the basis of cadastral income, because of the simple fact that he owns agricultural land, like any other farmer, and the cooperative – and through it, the member – would also remain subject to IRES in respect of the income derived from processing, selling, etc. its products, whereas an independent farmer does not pay any tax on that type of income. The function of the exemption in question is therefore to rectify this inequality of treatment which – if it were not corrected – would completely discourage use of the form of the cooperative as a mode of association between farmers. I note, moreover, that the taxation of partnerships is often governed by the aforementioned principle of transparency, whereby the partnership is exempt from tax but the partners are taxed in respect of its income regardless of whether the income has been distributed or not.

43 — Rossi-Macanico, P., *op cit.*, pp. 92 and 93. The author noted that the distinctions that form part of the logic of the tax system are not exceptions and, therefore, do not constitute advantages that have to be justified.

44 — In my view, this scope for discretion exists, for example, in respect of the classification of certain parts of the income of the owner/member of an undertaking as income from work or capital, or in respect of the adoption of various tax scales.

78. Nevertheless, from the economic point of view, the exemption provided for by Article 11(1) of DPR No 601/1973 does not seem to me to constitute an advantage of the kind referred to in Article 87(1) EC. It is apparent from the case-file that the general system of taxation of legal persons is not intended to apply, apart from certain exceptions, to undertakings adopting the principle of mutuality. It seems to me that, where the general rules on taxation of legal persons are applied to cooperative societies, those rules are designed to regulate the relevant factors in determining the basis of assessment and the calculation of taxable income. However, definitive taxation is subject to derogations that apply to all cooperatives, to certain types of cooperatives or to certain sectors. Thus, the general regime would be applicable, in its entirety, to a cooperative society only where such a cooperative did not fulfil the criteria laid down by the strict provisions concerning its mutualist nature, in other words, where it did not act in a manner that is required of cooperatives.

C — *Selectivity*

79. Article 87(1) EC prohibits State aid 'favouring certain undertakings or the production of certain goods', that is to say, selective aid. In order to determine whether a measure is selective, it is necessary to examine whether, in the context of a particular legal system, that measure constitutes an advantage for certain undertakings in comparison with others which are in a comparable legal and factual situation.[45] The condition of selectivity is a constituent factor of the concept of State aid.[46]

80. Although it has a very rich case-law, the concept of selectivity is not unambiguously defined, especially in respect of tax measures.

81. As is apparent from the Commission's notices, the fact that some firms or some sectors benefit more than others from some of these tax measures does not necessarily mean that they are caught by the competition rules governing State aid.[47] The measures may, on the other hand, prove to be selective without

45 — See *British Aggregates*, cited above, paragraph 82.

46 — Case C-88/03 *Portugal* v *Commission* [2006] ECR I-7115, paragraph 54.

47 — Commission notice on the application of the State aid rules to measures relating to direct business taxation, (OJ 1998 C 384, p. 3, paragraph 14, first sentence: 'Thus, measures designed to reduce the taxation of labour for all firms have a relatively greater effect on labour-intensive industries than on capital-intensive industries, without necessarily constituting State aid. Similarly, tax incentives for environmental, R&D or training investment favour only the firms which undertake such investment, but again do not necessarily constitute State aid.'

being formally limited to certain sectors.[48] Thus, measures open to all sectors may, none the less, be regarded as selective where the eligibility criteria for such measures in practice restrict the potential number of recipients.[49]

82. Indeed, according to the case-law, first, aid in the form of an aid programme may concern a whole economic sector and still be covered by Article 92(1) of the EC Treaty (now, after amendment, Article 87(1) EC) and, secondly, a measure designed to give the undertakings of a particular industrial sector a partial reduction of the financial charges arising from the normal application of the general social security system, without there being any justification for this exemption on the basis of the nature or general scheme of this system, must be regarded as aid.[50]

83. According to the wording of Article 87(1) EC, aid favouring certain undertakings or the production of certain goods is incompatible with the common market. However, the Treaty remains silent as to the criterion of the legal form of the legal person.

84. Admittedly, recourse to a certain model of legal person may be characteristic of a specific sector or a specific undertaking. In that case, the criteria of the form of the legal person and the Treaty criteria whereby a measure is prohibited if it favours certain undertakings or certain sectors come together or rather merge into each other.[51]

85. In the case giving rise to the judgment in *Cassa di Risparmio di Firenze and Others*,[52] the Commission maintained that, by favouring certain undertakings on account of their legal form (foundations or legal persons governed by public law) and certain specific sectors (education, public health, etc.) in which they operate, the national legislation prima facie satisfied the criterion of selectivity.

86. The Court pointed out that the measure in question did not apply to all economic operators. It could not therefore be considered to be a general measure of tax or economic policy[53] as the tax advantage concerned was accorded on account of the undertaking's legal form, a legal person governed by public law or a foundation, and of the sectors in which that undertaking carries on its activities. The Court stated that the derogation was not based on the measure's logic or the

48 — See Commission Decision 2003/755/EC of 17 February 2003 on the aid scheme implemented by Belgium for co-ordination centres established in Belgium (OJ 2003 L 282, p. 25).

49 — Report on the implementation of the Commission Notice on the application of the State aid rules to measures relating to direct business taxation.

50 — Case C-75/97 *Belgium* v *Commission* [1999] ECR I-3671, paragraph 33.

51 — For example, there are legal forms of legal person that are limited and specific to certain economic sectors, such as the banking sector and the insurance sector. See paragraph 20 of the Commission notice of 1998.

52 — Case C-222/04 [2006] ECR I-289.

53 — *Ibidem*, paragraph 135.

technique of taxation, but resulted from the national legislature's objective of financially favouring organisations regarded as socially deserving.[54]

87. Such an approach based on the legal form of an undertaking must not therefore be regarded as a rule that brooks no exception. I conclude from this that tax measures geared to the form and structure of the legal person could be classified as non-selective in so far as they are justified by the nature or overall structure of the system.

88. Indeed, the Court has interpreted the concept of State aid as not referring to measures that differentiate between undertakings in respect of charges where that differentiation arises from the nature or the overall structure of the system of charges in question.[55] In that case, classification as State aid can be ruled out.

89. As regards the field of taxation, according to case-law, a measure which creates an exception to the application of the general tax system may be justified by the nature and overall structure of the tax system if the Member State concerned can show that that measure results directly from the basic or guiding principles of its tax system. In that connection, a distinction must be made between, on the one hand, the objectives attributed to a particular tax scheme which are extrinsic to it and, on the other hand, the mechanisms inherent in the tax system itself which are necessary for the achievement of such objectives.[56]

90. In practice, the Commission has accepted that justification may be found in the nature and overall scheme of the system where the tax is progressive in nature, where there is no taxation in the absence of profits, and where non-profit making organisations receive special treatment.[57] This was also the case with agricultural land which benefited from exemptions or tax relief in relation to the land tax regime applicable under ordinary law.[58] Thus, the advantage was justified by the special role of the landowner in agricultural production.

91. The Court has accepted a justification based on the nature and general scheme of the national system of taxation of insurance, in the particular context in which the higher rate of tax was applied to a specific part of insurance contracts previously subject to the standard rate.[59]

54 — *Ibidem*, paragraph 137.

55 — See *British Aggregates*, cited above, paragraph 83.

56 — *Portugal* v *Commission*, cited above, paragraph 81.

57 — Commission notice of 1998, paragraphs 24 to 27.

58 — Decisions N/20/2000 (Netherlands) and N53/99 (Denmark) available on the site of the Commission's General Secretariat. http://ec.europa.eu/competition/elojade/isef/index.cfm?clear=1&policy_area_id=3.

59 — *GIL Insurance and Others*.

92. The difficulty raised by the criterion of the nature or overall structure of the system lies, however, in the fact that, where the Court considers that the measure differs from the general national tax system, the measure is classified as selective. This case-law thus leads to a situation in which no measure can be regarded as justified by the nature or overall structure of the system. [60]

93. What matters in this regard are not, in fact, the objectives of the measure but the inherent logic of the national tax system.

94. Article 11 of DPR No 601/1973 is a complex measure incorporating a number of tax approaches designed to introduce tax treatment that is specific to producers' and workers' cooperatives. [61]

95. Although this measure appears at first sight to constitute a derogation, it clearly does not follow that the tax advantages accorded to producers' and workers' cooperatives are selective. On the contrary, it seems to me that, when one considers the 'transversal' nature of those cooperatives, that is, the variety of sectors in which they may be active, the selective nature of the measure in question is debatable. In any event, on the assumption that the system of exemptions for those societies is a priori selective, it may be justified by the overall structure and nature of the system.

96. In this regard, I note that, according to case-law, [62] the condition of selectivity is satisfied if the measure favours certain undertakings by comparison with others which are in a comparable legal and factual situation, even though the aid covers a whole economic sector.

97. For this purpose, it is necessary, first, to determine whether cooperative societies pursuing an objective based on mutuality and other for-profit undertakings are in a comparable situation. Then, the situation of a producers' and worker's cooperative must be compared, if Article 11 of DPR No 601/1973 were applied, with that of other for-profit undertakings and other cooperative societies.

98. In its written observations, the Commission argued that producers' and workers' cooperatives conforming to the pure mutualist model and for-profit undertakings are not in a comparable legal and factual situation, as

60 — See, to this effect, Lenaerts, K., 'State Aid and Direct Taxation', *EU competition law in context: essays in honour of Virpi Tiili*, 2009, p. 305.

61 — The measure in question seems to implement an objective of more general scope laid down in Italian tax law aimed at promoting capitalisation of cooperative societies and discouraging dividends. See, Stracke, B., *op cit*. pp. 176 to 183.

62 — *Belgium* v *Commission*, *Adria-Wien, Pipeline and Wietersdorfer & Peggauer Zementwerke; Heiser,* and *Italy* v *Commission*.

regards sums paid to employee-members by way of remuneration, including any remuneration supplements.

99. Its view on this point was shared by the French Government, which states that it is logical not to treat companies that distribute their profits to their members in the same way as other entities such as cooperatives which, because of their articles of association, cannot make such distributions.

100. As the representative of Adige Carni pointed out at the hearing, participation by shareholders or members in a capital company is limited to contributing capital. On the other hand, a trading relationship or one based on the principle of mutuality is typical of a cooperative society. The difference in tax treatment is based on the difference between these relationships. Moreover, after pointing out that the issue was not one of double taxation, the representative of Adige Carni stated that, in accordance with the general scheme of the tax system applicable at the time of the facts in the main proceedings, the national regime's objective was single taxation of income, whereby either the cooperative, or the member, was taxed.

101. I note that the exemption provided for by Article 11 of DPR No 601/1973 seems to result in the non-taxation of the exempt income as regards both the members and the cooperative society. The general tax regime for legal persons applies only where the cooperative society does not fulfil conditions specific to cooperatives.

102. Under the rules applicable at the time of the facts in the main proceedings, the essential difference between a for-profit undertaking and a cooperative society lay in the fact that, in the case of a for-profit undertaking, either the member or the undertaking was taxed only in respect of profits, which the shareholders could obtain at a subsequent stage, for example, when the dividends were distributed, when the shares were sold or when the undertaking was wound up. It is therefore reasonable to regard this as a kind of payment on account of income from capital.

103. The ideology underlying the concept of 'shareholder value' as a guiding principle of for-profit capital companies is based on the theory that, in the economic sense, the assets of the company always belong to the members.

104. By contrast, under the rules governing of mutualist cooperative societies, the members of the cooperative society could never obtain that kind of benefit. An advance payment comparable to that which is permissible in respect of capital companies is therefore not possible. The accumulation of capital

within a cooperative society does not benefit the members.

105. As regards, in particular, producers' and workers' cooperatives, I note that, in accordance with the strict conditions requiring compliance with the principle of mutuality, Article 11(1) of DPR No 601/1973 is intended to exclude from the scope of the exemption available under that provision producers' and workers' cooperatives whose taxable income is generated by production factors other than the work of the members who are required to participate in the society's activities by contributing their work on a continuous basis.[63] On the other hand, in so far as the income of a producers' and worker's cooperative society may be regarded as being generated by the work contribution of its members, that income is not taxed.

106. It is difficult to imagine such a situation in the case of profit-orientated legal persons subject to general tax rules since, first, their members are not obliged to work for the undertaking and, secondly, the profits of such an undertaking can be distributed to its members.

107. Finally, I wish to draw the Court's attention to the problematic nature of one aspect of the comparison of the situation of capital companies and that of producers' and workers' cooperatives. This aspect seems to me to be particularly relevant in view of the position adopted by the Commission, which maintained at the hearing that, since the member is not liable to tax, the tax should be levied on the profits of the cooperative in order to avoid the measure in question being classified as State aid.

108. As I remarked above, Article 11 of DPR No 601/1973 attempts to draw a schematic distinction between 'internal' or mutualist income generated by the work of members and 'external' income derived from capital or relations with non-members, the latter not being covered by the exemption. Indeed, surpluses generated by other production factors which correspond to the operating profits actually made by the cooperative society are not covered by Article 11 of DPR No 601/1973.

109. It should be pointed out in this respect that, in most cases, a member's contribution to the capital of a company is not, in a capital company, taxable income for the company, whereas the company is taxed on the profits, such as the yield from that capital. Moreover, a contribution to a company in the form of a contribution in kind, such as work, is

63 — Such an obligation is characteristic of partnerships, which, in several Member States, do not constitute independent taxable entities but whose income is attributed and taxed in the hands of its members even though that income has not been distributed to them. Notwithstanding their separate legal personality, cooperative societies possess several features characteristics of partnerships. See Stracke, *op cit.*, pp. 16 to 19, and Mannio, *op cit.*, p. 69.

normally not taken into account in the case of capital companies.

110. In a producers' and workers' cooperative society, one of the members' main obligations is to contribute work on a continuous basis. The social added value generated by the work of a member of the cooperative society that exceeds the remuneration paid to the member remains with the society. Economically, that part of the surplus which is not paid out and which the member must leave as part of the assets of the cooperative takes the form of a capital contribution. Following this logic, the society must be exempt from tax in respect of that part.

111. In view of all the foregoing, the tax regime for producers' and workers' cooperative societies, as provided for in particular by Article 11 of DPR No 601/1973, cannot be regarded as selective, since those societies were not in a situation comparable with that of for-profit companies or other cooperative societies.

112. In any event, the rules in question can be explained by the nature or general scheme of the national tax system applied in the context of producers' and workers' cooperatives. The tax relief accorded to producers' and workers' cooperative societies seems to me, in fact, to result directly from the basic and guiding principles of the Italian tax system.

113. In my view, as at least one of the criteria underlying the concept of State aid is not met in this case and since those criteria are cumulative in nature, there is no need to examine the other criteria laid down in Article 87(1) EC.

114. On the other hand, if the Court were not minded to adopt my proposal, it would be necessary to study the issues relating to the condition requiring that trade between Member States be affected and the condition requiring possible distortion of competition. In this regard, I consider that the case-law of the Court provides sufficient guidance to the national court.[64] In any event, it will be for the national court to determine, in the light of the guidance on interpretation to be found in the case-law, whether the two aforementioned conditions are met in this case.

115. However, the issue of possible existing aid and that of the applicability of the *de minimis* principle remain to be considered.

64 — See *Cassa di Risparmio di Firenze*, cited above, paragraphs 140 and 141.

VII — The concept of existing aid and the de minimis principle

A — *The concept of existing aid*

116. According to case-law, the concept of State aid, whether existing or new, corresponds to an objective situation. That concept cannot depend on the conduct or statements of the institutions. [65]

117. In their written observations, the Italian Government, Paint Graphos and Adige Carni argued that the special tax measures intended for cooperative societies are 'existing aid', as they were already provided for by the Italian legislation applicable before the entry into force of the Treaty of Rome in 1957. [66]

118. The Italian Government stated that the legislation applicable before the entry into force of the Treaty of Rome in 1957 provided for a tax regime which, in essence, completely exempted cooperative societies from the tax normally applicable to for-profit companies, although the exemption was of course available only to cooperatives pursuing an objective based on mutuality, in accordance with the principle established at that time by the Basevi Law. [67]

119. As the Commission also stated, under the Italian legal system since 1957, cooperative societies have been able to exclude all of the percentage of annual profits from the taxable amount, an advantage which, in overall terms, has steadily diminished since that date. The Commission's departments have also established that the amendments made to the measures in question since the entry into force of the EEC Treaty were designed to introduce technical modifications in order to adapt the tax scheme for cooperatives to the general system of taxation that was amended following the reforms of 1973, 1986 and 2004.

120. At the hearing, Adige Carni, Paint Graphos, the Italian Government and the Commission supported the argument that the measures in question, without prejudice to the possibility that they constitute State aid within the meaning of Article 87 EC, are existing aid within the meaning of Article 1(1)(b)(i) of Regulation No 659/1999.

121. At first sight, it therefore seems reasonable to take the view that, if they fulfil the criteria laid down in Article 87(1) EC, the

65 — Case C-89/08 P *Commission* v *Ireland and Others* [2009] ECR I-11245, paragraph 72.

66 — See Article 1(b)(i) of Council Regulation No 659/1999.

67 — Until 2003, that law governed the tax provisions designed to verify compliance with the mutuality requirements, which was a necessary condition for the application of the special tax measures benefiting cooperative societies.

measures in question are liable to constitute existing aid.

122. However, since, first, the 1954 regime [68] taxed both assets and income and, secondly, the regime established by DPR No 601/1973 taxed only income and there were certain limits to the application of tax advantages to the capital of a cooperative society, I consider that only the national court is in a position to assess, overall, to what extent there may have been continuity between those regimes. In this connection, it will be required to verify, in particular, whether the reduction in the tax burden on the date of entry into force of the Treaty of Rome was comparable with or greater than that introduced by DPR No 601/1973. Only if that were so would there be existing aid in this case.

B — *The de minimis principle*

123. In its written pleadings, Paint Graphos raised the issue of the *de minimis* rule. It referred, in this regard, to the various reports and notices of the Commission produced between 1984 and 1993, [69] and argued that, given, first, the rate of corporation tax and, secondly, the thresholds for applying the *de minimis* principle at the time of the income tax returns at issue, the amount of tax avoided would in any event be lower than the threshold in force during the years affected by the adjustments.

124. It should be borne in mind that the *de minimis* rule is intended to reduce the administrative burden on both the Member States and the Commission, which must be able to concentrate its resources on cases that are genuinely important at European Union level. [70]

125. Even if the *de minimis* rule can be applied to the cooperative societies in question, which, in my view, cannot be ruled out, ascertaining the effect of that principle in this case is not a simple matter, especially from the viewpoint of the application of the law *ratione temporis*.

126. It seems to me that if the national court were to consider that the right to the

68 — 'Law No 603, of 6 August 1954, Istituzione di una imposta sulle società e modificazioni in materia di imposte indirette sugli affari, GURI n° 182, of 11 August 1954.'

69 — See the 14th Report on Competition Policy – 1985, paragraph 203, *in fine*, and the Commission notice of 6 March 1996 on the *de minimis* rule for State aid (OJ 1996 C 68, p. 9).

70 — Case C-310/99 *Italy* v *Commission* [2002] ECR I-2289, paragraph 94.

exemptions was contested and, therefore, the cooperatives in question were not in fact entitled to the tax advantages, the question whether the measure is to be classified as *de minimis* aid should be determined in the light of the criteria in force at the time when it was definitively established that it was State aid, and any tax advantage arising from it for the undertaking is to be calculated in the light of Regulation No 1998/2006.

127. However if the national court were to consider that the cooperatives have already benefited from the exemptions, which, in my view, is not possible because the taxes in question have not become definitive in law, the question whether the measure constitutes *de minimis* aid should be determined in the light of the criteria set out in Commission notices which were applicable at the time of the facts in the main proceedings.

VIII — Conclusion

128. In view of the foregoing considerations, I propose that the Court should:

— declare the questions referred by the Corte Suprema di Cassazione inadmissible;

— in the alternative, declare only the first question referred admissible and answer it to the effect that a tax regime for producers' and workers' cooperative societies which, even though it is based on a broad-brush approach, is intended to exempt income corresponding to the surplus generated by the work of the members, such as the regime provided for by Article 11 of DPR No 601/1973, in so far as it results directly from the basic and guiding principles of the tax rules for cooperative societies, cannot be regarded as State aid within the meaning of Article 87(1) EC.