JUDGMENT OF THE COURT (First Chamber)

8 September 2011 *

In Joined Cases C-78/08 to C-80/08,

REFERENCES for a preliminary ruling under Article 234 EC from the Corte suprema di cassazione (Italy), made by decisions of 29 November and 20 December 2007, received at the Court on 25 February 2008, in the proceedings

Ministero dell'Economia e delle Finanze,

Agenzia delle Entrate

v

Paint Graphos Soc. coop. arl (C-78/08),

Adige Carni Soc. coop. arl, in liquidation,

v

Agenzia delle Entrate,

* Language of the case: Italian.

Ministero dell'Economia e delle Finanze (C-79/08)**,**

and

Ministero delle Finanze

v

Michele Franchetto (C-80/08),

THE COURT (First Chamber),

composed of A. Tizzano, President of the Chamber, J.-J. Kasel (Rapporteur), M. Ilešič, M. Safjan and M. Berger, Judges,

Advocate General: N. Jääskinen,
Registrar: R. Şereş, Administrator,

having regard to the written procedure and further to the hearing on 11 March 2010,

after considering the observations submitted on behalf of:

— Paint Graphos Soc. coop. arl and Adige Carni Soc. coop. arl, in liquidation, by F. Capelli, L. Salvini, L. Paolucci, A. Abate, P. Piva and L. Manzi, avvocati,

— Mr Franchetto, by M. Bianca, avvocato,

— the Italian Government, by I. M. Braguglia, and subsequently G. Palmieri, acting as Agents, and P. Gentili, avvocato dello Stato,

— the Spanish Government, by M. Muñoz Pérez, acting as Agent,

— the French Government, by G. de Bergues, A.-L. Vendrolini and B. Beaupère-Manokha, acting as Agents,

— the European Commission, by R. Lyal, G. Conte and C. Urraca Caviedes, acting as Agents,

— the EFTA Surveillance Authority, by X. Lewis, acting as Agent,

after hearing the Opinion of the Advocate General at the sitting on 8 July 2010,

gives the following

Judgment

1 These references for a preliminary ruling concern the interpretation of Article 87 EC and the principle prohibiting the abuse of rights in tax matters.

2 The references have been made in three sets of proceedings between: (i) the Ministero dell'Economia e delle Finanze and the Agenzia delle Entrate on the one hand, and Paint Graphos Soc. coop. arl ('Paint Graphos') on the other (C-78/08); (ii) Adige Carni Soc. coop. arl, in liquidation, ('Adige Carni') on the one hand, and the Agenzia delle Entrate and the Ministero dell'Economia e dell Finanze on the other (C-79/08); and (iii) the Ministero delle Finanze and Mr. Franchetto (C-80/08) concerning applications for exemption from various taxes to which producers' and workers' cooperatives are entitled under Italian tax law.

Legal context

European Union law

3 On 10 December 1998, the Commission of the European Communities published a Notice on the application of the State aid rules to measures relating to direct business taxation (OJ 1998 C 384, p. 3) ('the notice on direct business taxation'), in which it seeks to clarify certain aspects of State aid in the form of tax measures.

4 Following the adoption of Council Regulation (EC) No 1435/2003 of 22 July 2003 on the Statute for a European Cooperative Society (SCE) (OJ 2003 L 207, p. 1), in its Communication to the Council and the European Parliament, the European Economic and Social Committee and the Committee of the Regions of 23 February 2004 on the promotion of cooperative societies in Europe [COM(2004) 18 final] ('the Communication on the promotion of cooperative societies in Europe'), the Commission

set out the specific characteristics of cooperative societies and measures to promote the development of that form of undertaking in the Member States.

National legislation

5 Article 45 of the Italian Constitution provides as follows:

'The Republic recognises the social function of cooperation for mutual benefit free of private speculation. The law shall assist and promote its development by the most suitable means and shall ensure, by means of appropriate controls, its nature and purposes. The law shall protect and promote craft trades.'

6 Decree No 601 of the President of the Republic of 29 September 1973 concerning rules on tax benefits (Ordinary Supplement to GURI No 268 of 16 October 1973, p. 3), in the version in force at the time of the facts in the main proceedings, that is to say from 1984 to 1993 ('DPR No 601/1973'), provided as follows:

'*Article 10*

(Agricultural and small-scale fishery cooperatives)

1. Income derived by agricultural cooperatives and their consortia from rearing animals fed on feed at least a quarter of which is obtained from members' land and from the handling, processing and sales, within the limits set out at paragraph (c) of Article 28 of Decree … [No 597] of the President of the Republic of 29 September 1973,

of agricultural or livestock products and animals contributed by the members to the extent that their land permits shall be exempt from the tax on the income of legal persons and local income tax.

2. If the activities pursued by the cooperative or its members exceed the limits laid down in paragraph 1 and paragraphs (b) and (c) of Article 28 of the decree referred to in paragraph 1, the exemption shall apply to that part of the cooperative's or consortium's income corresponding to the income from agriculture deriving from the members' land.

3. The income of small-scale fishery cooperatives and their consortia shall be exempt from the tax on the income of legal persons and local income tax. Small-scale fishery cooperatives are defined as those engaged in sea-fishing on a professional basis using only boats falling within categories 3 and 4 set out in Article 8 of Decree No 1639 of the President of the Republic of 2 October 1968 or inland water fishing.

Article 11

(producers' and workers' cooperatives)

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 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 %.

Article 12

(Other cooperative societies)

1. In the case of cooperative societies and their consortia other than those referred to in Articles 10 and 11, the tax on the income of legal persons and local income tax shall be reduced by a quarter.

2. As regards local income tax, the cooperative society or consortium may opt for the deductions provided for in the fourth paragraph of Article 7 of Decree No 599 of the President of the Republic of 29 September 1973 in place of the reduction provided for in paragraph 1. That option must be exercised at the time the annual declaration is made and the list of members affected by the deductions must be appended to the declaration, in default of which it shall be void.

3. In the case of consumer cooperatives and their consortia, without prejudice to the provisions of paragraphs 1 and 2, sums distributed to the members by way of reimbursement of part of the price of goods purchased shall be deductible from income.

Article 13

(Members' finance)

1. The interest paid on sums other than share capital which members who are natural persons pay into the cooperative society and its consortia or which the latter withhold from members shall be exempt from local income tax, on condition that:

(a) sums paid in and sums retained are used solely for the purpose of enabling the social objective of the cooperative to be attained and do not exceed the sum of LIR 40 million for each member. That limit shall be increased to LIR 80 million for cooperatives engaged in the storing, processing and sales of agricultural products and producers' and workers' cooperatives.

(b) Interest paid on the sums in question does not exceed the ceiling for interest payable to holders of postal savings certificates.

…

Article 14

(Conditions under which the benefits apply)

1. The tax benefits provided for under this Title shall apply to cooperatives societies and their consortia which are governed by the principles of mutuality laid down by the laws of the State and are entered in 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 1577 of the Provisional Head of State of 14 December 1947 [introducing cooperative measures (GURI No 17 of 22 January 1948)], as subsequently amended, ("Legislative Decree No 1577/1947") 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 the other supervisory bodies, shall determine the conditions under which the tax benefits are to apply;'

7 Article 26 of Legislative Decree No 1577/1947 is in the following terms:

'For tax purposes, the requirements for the attainment of the objective of mutuality shall be deemed to be met where the cooperative society's articles of association contain the following provisions:

(a) a prohibition on payment of dividends exceeding the statutory interest rate applicable to the capital actually paid;

(b) a prohibition on distribution of reserves to the members during the lifetime of the cooperative;

(c) where the cooperative is wound up, all the assets are to be transferred, after deduction only of paid up capital and any matured dividends, to associations whose purpose is the advancement of socially beneficial objectives, in accordance with the spirit of mutuality.

…'

8 Article 12 of Law No 904 of 16 December 1977 amending the rules on tax on the income of legal persons and the rules on the taxation of dividends and increases in share capital, adjusting the minimum share capital of companies, and laying down other provisions relating to taxation and company law (GURI No 343 of 17 December 1977) provides as follows:

'Without prejudice to the provisions of Title III of Decree No 601 of the President of the Republic of 29 September 1973, as subsequently amended and supplemented, the sums appropriated to non-distributable reserves shall not form part of the taxable income of cooperative societies or their consortia, provided that it is not possible to distribute them to the members in whatsoever form, either during the lifetime of the cooperative or consortium or upon its winding up.'

The disputes in the main proceedings

Case C-78/08

9 Following checks made by the Guardia di Finanza (Financial Investigation Unit), the tax authorities of Matera issued a notice of assessment to Paint Graphos, a cooperative

society governed by Italian law, adjusting its income chargeable to the tax on the income of legal persons ('IRPEG') and local tax ('ILOR') for 1993. By the same notice, the tax authorities refused Paint Graphos the tax exemptions available under Italian legislation for cooperative societies.

10 Paint Graphos appealed against the notice of assessment before the Commissione tributaria provinciale di Matera (Provincial Tax Court, Matera), claiming that it was entitled to those tax exemptions. That court allowed the appeal.

11 The tax authorities appealed against that judgment before the Commissione tributaria regionale della Basilicata (the Regional Tax Court, Basilicata) (Italy), which upheld the judgment at first instance.

12 The Ministero dell'Economia e delle Finanze (Ministry of Economy and Finance) and the Agenzia delle Entrate (Revenue Authority) brought an appeal in cassation against that judgment, alleging inter alia infringement and misapplication of Articles 11 and 14 of DPR No 601/1973.

Case C-79/08

13 By notice of assessment of 8 June 1999, the tax authorities of Rovigo notified Adige Carni, a cooperative society governed by Italian law, that it was no longer entitled to the tax benefits provided under Articles 10 et seq. of DPR No 601/1973 and of an upward assessment of its taxable income for 1993 and consequent increase in its liability to IRPEG and ILOR. The tax authorities stated inter alia that certain expenditure was

non-deductible, in so far as it was not documented or did not relate to the tax period in question. Relying on a report drawn up by the Guardia di Finanza, they also contested the issue of invoices by the company Italcarni Srl for non-existent transactions, the sum in question being regarded as revenue. As that sum had not been accounted for by Adige Carni as income, the tax authorities regarded it as having been distributed to the members, in breach of Article 11 of DPR No 601/1973.

14 Adige Carni appealed before the Commissione tributaria provinciale di Rovigo, which annulled the contested notice of assessment.

15 The tax authorities appealed against that judgment before the Commissione tributaria regionale, which confirmed the notice of assessment and that Adige Carni was no longer entitled to the tax exemptions.

16 Adige Carni lodged an appeal in cassation, alleging inter alia failure to give any or any adequate reasons for the decision refusing the tax exemptions in question.

Case C-80/08

17 The tax authorities of Monfalcone (Italy) adjusted the income tax returns filed by Mr Franchetto, an Italian national, for 1984 to 1988 because, as a member of the cooperative society Cooperativa Maricoltori Alto Adriatico rl ('the Cooperativa

Maricoltori'), the object of which is the cultivation and sale of shellfish, he had traded independently on the market, as had other members, while the cooperative, in whose name purchase and sales invoices were made out, received a commission on each sale for each service rendered and distributed the surplus to the members, instead of appropriating it to the appropriate reserve.

18 The Cooperativa Maricoltori's entitlement to exemption from IRPEG granted in respect of 1984 and 1985 was challenged and the corresponding sums were recovered by the Monfalcone tax authorities. The appeal lodged by the cooperative in respect of the 1985 tax year was rejected by the Commissione tributaria di primo grado di Trieste (Tax Court of First Instance, Trieste), since the 1984 tax year had been covered by an amnesty.

19 Mr Franchetto challenged the notice of assessment concerning him personally before the Commissione tributaria di primo grado di Trieste, arguing that it could not be disputed that the conditions for conferring the status of a cooperative on the Cooperativa Maricoltori were satisfied as the opinion of the Ministry of Employment, required under Article 14 of DPR No 601/1973, had not been obtained on this point.

20 The Commissione tributaria di primo grado di Trieste granted Mr Franchetto's application.

21 However, after the Monfalcone tax authorities lodged an appeal, Mr Franchetto initiated a second set of proceedings, since the Commissione tributaria di secondo grado (Tax Court of second instance) took the view that the objectives pursued by the Cooperativa Maricoltori were those of a consortium, not those of an entity governed by the principle of mutuality.

22 Seised by Mr Franchetto, who claimed that his position was that of a worker-member of a cooperative declared as such by its articles of association, the Commissione tributaria centrale di Roma (Central Tax Court, Rome), without entering into the merits

of the grounds relied on by Mr Franchetto, held that the Cooperativa Maricoltori could not be denied the tax exemptions unless the opinion of the Ministry of Employment – a mandatory requirement - had first been obtained.

23 The Ministero delle Finanze seeks the annulment in cassation of the judgment of that court, alleging inter alia infringement of Article 14 of DPR No 601/1973, on the ground that the notice of assessment concerned the member of the cooperative society, not the cooperative as such, and that the opinion of the Ministry of Employment was not therefore required.

24 By order of the President of the Court of 31 March 2008, Cases C-78/08 to C-80/08 were joined for the purposes of the written and oral procedure and of the judgment.

The questions referred

25 After stating that the disputes before it concern the entitlement to total or partial exemption from various taxes made available under Italian law only to cooperative societies because of the specific objective pursued by such societies, recognised by Article 15 of the Italian Constitution, which seeks to promote the development of the social function and essentially mutualist nature of that kind of undertaking, the Corte suprema di cassazione expresses the view that, in order to determine whether those benefits are consistent with European Union law, it is necessary to ascertain first whether and, if so under what conditions, the fact that the cooperative societies in question make tax savings, which are often considerable, constitutes aid incompatible with the common market within the meaning of Article 87(1) EC. Owing to the direct effect of Article 88(3) EC, if those benefits were found to be incompatible, the

national authorities, including the judicial authorities, would be obliged to disapply DPR No 601/1973.

26 Similarly, if the choice by the undertakings concerned of the form of a cooperative constituted an abuse of rights capable of distorting market rules, free competition and the principle of equal treatment, the effect in the present case would be that the legal form of a cooperative society could not be relied on against the tax authorities, which could then tax those undertakings under the normal tax regime applicable to profit-making companies. According to the Corte suprema di Cassazione, it is necessary to examine whether the tax benefits in question may be justified and are proportionate, in view of not only the size and market share of certain cooperative societies but also the shortcomings of the system of checks provided for under national law.

27 The referring court states that it is only as a result of steps taken by the polizia tributaria (tax police) that it was possible to establish that the cooperative societies in question in the main proceedings did not pursue an objective based on mutuality, contrary to what they claim and what is declared in their articles of association, while the bodies entrusted with checking compliance with the conditions laid down in Italian legislation concerning the pursuit of an objective based on mutuality were not in a position to identify that anomaly. Such shortcomings in the monitoring system were liable to facilitate abuse in the application of the rules under which cooperative societies are entitled to more advantageous tax treatment.

28 It is on that basis that the Corte suprema di cassazione decided to stay proceedings and to refer the following questions to the Court, which are identical in each case:

'[(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 1577/1947] 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 answers to the preceding question, 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)] [R]egardless 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 primarily in order to achieve a tax saving?'

Admissibility of the references for a preliminary ruling

29 Paint Graphos, Adige Carni and the Governments which have submitted written observations to the Court, with the exception of the French Government, as well as the

Commission, have raised doubts as to the admissibility of the present references for a preliminary ruling or, at the very least, of one or other of the questions referred. It is therefore only in the alternative that they have adopted a substantive position.

30 First, it should be recalled that, in proceedings under Article 267 TFEU, it is solely for the national court before which the dispute has been brought, and which must assume responsibility for the subsequent judicial decision, to determine in the light of the particular circumstances of the case, both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court. Consequently, where the questions submitted concern the interpretation of European Union law, the Court is in principle bound to give a ruling (see, inter alia, Joined Cases C-395/08 and C-396/08 *Bruno and Others* [2010] ECR I-5119, paragraph 18 and the case-law cited).

31 According to settled case-law, questions on the interpretation of European Union law referred by a national court in the factual and legislative context which that court is responsible for defining and the accuracy of which is not a matter for the Court to determine, enjoy a presumption of relevance. The Court may refuse to rule on a question referred for a preliminary ruling from a national court only where it is quite obvious that the interpretation of European Unon 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 (Joined Cases C-222/05 to C-225/05 *van der Weerd and Others* [2007] ECR I-4233, paragraph 22; Joined Cases C-188/10 and C-189/10 *Melki and Abdeli* [2010] ECR I-5667, paragraph 27; and *Bruno and Others*, paragraph 19).

32 It is therefore only in exceptional circumstances that the Court is required to examine the conditions in which the case was referred to it by the national court (see, to that effect, Case C-379/98 *PreussenElektra* [2001] ECR I-2099, paragraph 39). The spirit

of cooperation which must prevail in preliminary ruling proceedings requires the national court for its part to have regard to the function entrusted to the Court of Justice, which is to contribute to the administration of justice in the Member States and not to give opinions on general or hypothetical questions (Case C-112/00 *Schmidberger* [2003] ECR I-5659, paragraph 32 and the case-law cited).

33 As regards the present references for a preliminary ruling, the national court asks, by its first two questions, whether the tax benefits granted under the domestic law concerned to cooperative societies are compatible with European Union law, in particular whether those benefits may be classified as State aid within the meaning of Article 87(1) EC.

34 It is settled case-law that, although the Court may not, in proceedings under Article 267 TFEU, rule upon the compatibility of a provision of domestic law with European Union law or interpret domestic legislation or regulations, it may nevertheless 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 compatibility for the purposes of the case before it (see, inter alia, Case C-292/92 *Hünermund and Others* [1993] ECR-I-6787, paragraph 8, and Joined Cases C-285/99 and C-286/99 *Lombardini and Mantovani* [2001] ECR I-9233, paragraph 27).

35 In particular, it has already been held that the Commission's powers for the purpose of determining whether aid is compatible with the common market do not preclude a national court from referring to the Court of Justice a question on the interpretation of the concept of aid (Case C-256/97 *DM Transport* [1999] ECR I-3913, paragraph 15). Accordingly, the Court has jurisdiction, inter alia, to give the national court guidance on interpretation of European Union law to enable it to determine whether a national

measure may be classified as State aid under that law (Case C-140/09 *Fallimento Traghetti del Mediterraneo* [2010] ECR I-5243, paragraph 24 and the case-law cited).

36 It follows that the fact that the first two questions are worded as relating to the compatibility of DPR No 601/1973 with the relevant provisions of European Union law does not render those questions inadmissible.

37 The same is true of the fact that the first of those two questions also refers to Articles 10 and 12 of DPR No 601/1973, which concern cooperative societies other than producers' and workers' cooperatives, even though the Corte suprema di cassazione classified the cooperative societies at issue in the main proceedings as producers' and workers' cooperatives within the meaning of Article 11 of the decree. The first two questions referred must be held to be admissible to the extent that they relate to the situation of producers' and workers' cooperatives as it stands in the light of Article 11 of DPR No 601/1973, in conjunction, where appropriate, with Articles 13 and 14 of that decree.

38 In the light of the foregoing, the first two questions, which it is appropriate to examine together, must be understood as asking, in essence, whether, and if so to what extent, the tax benefits enjoyed by producers' and workers' cooperative societies such as those at issue in the main proceedings under national legislation such as that set out in Article 11 of DPR No 601/1973 may be classified as State aid within the meaning of Article 87(1) EC.

39 As regards the third question, it is clear that the Corte suprema di cassazione refers in that question to legislative amendments made after the time of the facts in the main proceedings. The reference to Law No 311 of 2004 in that question therefore has no relevance to the outcome of the disputes pending before the referring court. The third question is therefore inadmissible.

40 With regard to the fourth question referred by the Corte suprema di cassazione, concerning a possible abuse of rights on the part of the cooperatives at issue in the main proceedings, it should be noted that, according to the Court's established case-law, European Union law cannot be relied on for abusive or fraudulent ends (see, inter alia, Case C-255/02 *Halifax and Others* [2006] ECR I-1609, paragraph 68, and Case C-16/05 *Tum and Dari* [2007] ECR I-7415, paragraph 64).

41 However, it is not disputed that the benefits granted under DPR No 601/1973 to the cooperative societies at issue in the main proceedings were introduced solely by Italian domestic law, not European Union law. There is thus no question in the present case of infringement of the principle prohibiting the abuse of rights under European Union law.

42 Accordingly, since the fourth question does not concern the interpretation of European Union law, the Court does not have jurisdiction to rule on it.

The questions referred

43 In order to answer the first two questions, as reformulated at paragraph 38 above, it is necessary to provide the referring court with the requisite guidance for interpreting the conditions for categorising a national measure as State aid under Article 87(1) EC, namely: (i) the financing of that measure by the State or through State resources; (ii) the selectivity of that measure, and; (iii) the effect of that measure on trade between Member States and the distortion of competition resulting from the measure. It is therefore appropriate to examine those three conditions one by one.

The condition requiring that the measure be financed by the State or through State resources

44 Article 87(1) EC covers 'any aid granted by a Member State or through State resources in any form whatsoever'.

45 According to settled case-law, the definition of aid is more general than that of a subsidy because it includes not only positive benefits, such as subsidies themselves, but also measures which, in various forms, mitigate the charges which are normally included in the budget of an undertaking and which thus, without being subsidies in the strict sense of the word, are similar in character and have the same effect (see, inter alia, Case C-143/99 *Adria-Wien Pipeline and Wietersdorfer & Peggauer Zementwerke* [2001] ECR I-8365, paragraph 38; Case C-501/00 *Spain* v *Commission* [2004] ECR I-6717, paragraph 90, and the case-law there cited; and Case C-222/04 *Cassa di Risparmio di Firenze and Others* [2006] ECR I-289, paragraph 131).

46 Consequently, a measure by which the public authorities grant certain undertakings a tax exemption which, although not involving the transfer of State resources, places the recipients of the exemption in a more favourable financial position than that of other taxpayers amounts to State aid within the meaning of Article 87(1) EC. Likewise, a measure allowing certain undertakings a tax reduction or to postpone payment of tax normally due can amount to State aid (*Cassa di Risparmio di Firenze and Others*, paragraph 132).

47 It must therefore be held that a national measure such as that at issue in the main proceedings involves State financing.

The condition requiring that the disputed measure be selective

48 Article 87(1) EC prohibits aid which 'favours certain undertakings or the production of certain goods', that is to say, selective aid.

49 In order to classify a domestic tax measure as 'selective', it is necessary to begin by identifying and examining the common or 'normal' regime applicable in the Member State concerned. It is in relation to this common or 'normal' tax regime that it is necessary, secondly, to assess and determine whether any advantage granted by the tax measure at issue may be selective by demonstrating that the measure derogates from that common regime inasmuch as it differentiates between economic operators who, in light of the objective assigned to the tax system of the Member State concerned, are in a comparable factual and legal situation (see, to that effect, Case C-88/03 *Portugal* v *Commission* [2006] ECR I-7115, paragraph 56).

50 It is apparent from the information available to the Court, first, that, for the purpose of calculating corporation tax, the basis of assessment of the producers' and workers' cooperative societies concerned is determined in the same way as that of other types of undertaking, namely on the basis of the amount of net profit earned as a result of the undertaking's activities at the end of the tax year. Corporation tax must therefore be regarded as the legal regime of reference for the purpose of determining whether the measure at issue may be selective.

51 Second, it should be noted that, by way of derogation from the rule generally applicable to legal persons, the taxable income of the producers' and workers' cooperative societies concerned is exempt from corporation tax. Those cooperative societies therefore enjoy a tax benefit to which profit-making companies are not entitled.

52 It follows from Article 11 of DPR No 601/1973 that a benefit such as that at issue in the main proceedings is not available to all economic operators but is granted on the basis of the undertaking's legal form, namely whether or not it is a cooperative society (see, to that effect, *Cassa di Risparmio di Firenze and Others*, paragraph 136).

53 It should also be noted that aid may be selective in the light of Article 87(1) EC even where it concerns a whole economic sector (see, inter alia, Case C-75/97 *Belgium* v *Commissio*n [1999] ECR I-3671, paragraph 33).

54 It is therefore necessary to determine whether tax exemptions such as those at issue in the main proceedings are liable to favour certain undertakings or the production of certain goods by comparison with other undertakings which are in a comparable factual and legal situation, in the light of the objective pursued by the corporation tax regime, namely the taxation of company profits.

55 Cooperative societies, the form taken by the legal entities at issue in the main proceedings, conform to particular operating principles which clearly distinguish them from other economic operators. Both the European Union legislature, in adopting Regulation No 1435/2003, and the Commission, in its Communication on the promotion of cooperative societies in Europe, have highlighted those particular characteristics.

56 As stated in particular at recital 8 in the preamble to Regulation No 1435/2003, those characteristics essentially find expression in the principle of the primacy of the individual, which is reflected in the specific rules on membership, resignation and expulsion. Moreover, recital 10 in the preamble to that regulation states that net assets and reserves should be distributed on winding-up to another cooperative entity pursuing similar general interest purposes.

57 Cooperative societies are not managed in the interests of outside investors. According to recitals 8 and 10 in the preamble to Regulation No 1435/2003 and section 1.1 of the Communication on the promotion of cooperative societies in Europe, control of cooperatives should be vested equally in members, as reflected in the 'one man, one vote' rule. Reserves and assets are therefore commonly held, non-distributable and must be dedicated to the common interests of members.

58 As regards the operation of cooperative societies, in the light of the primacy of the individual, their activities – as stated in particular at recital 10 in the preamble to Regulation No 1435/2003 and section 1.1 of the Communication on the promotion of cooperative societies in Europe – 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.

59 Moreover, as stated at section 2.2.3 of that communication, cooperative societies have no or limited access to equity markets and are therefore dependent for their development on their own capital or credit financing. That is due to the fact that shares in cooperative societies are not listed on the stock exchange and, therefore, not widely available for purchase. Moreover, as is also made clear by recital 10 in the preamble to Regulation No 1435/2003, there is limited interest on loan and share capital, which makes investment in a cooperative society less advantageous.

60 As a consequence, the profit margin of this particular kind of company is considerably lower than that of capital companies, which are better able to adapt to market requirements.

61 In the light of those special characteristics peculiar to cooperative societies, it must therefore be held that producers' and workers' cooperative societies such as those at issue in the main proceedings cannot, in principle, be regarded as being in a

comparable factual and legal situation to that of commercial companies – provided, however, that they act in the economic interest of their members and their relations with members are 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.

62 Producers' and workers' cooperative societies with characteristics other than those normally associated with that type of society would not truly pursue an objective based on mutuality and would therefore have to be distinguished from the model described in the Commission's Communication on the promotion of cooperative societies in Europe.

63 In the final analysis, it is for the referring court to determine, in the light of all the circumstances of the disputes on which it is required to rule whether, on the basis of the criteria set out at paragraphs 55 to 62 above, the producers' and workers' cooperative societies at issue in the main proceedings are in fact in a comparable situation to that of profit-making companies liable to corporation tax.

64 If the national court concludes that, in the disputes before it, the condition set out in the preceding paragraph is in fact met, it will still be necessary to determine, in accordance with the Court's case-law, whether tax exemptions such as those at issue in the main proceedings are justified by the nature or general scheme of the system of which they form part (see, to that effect, *Adria-Wien Pipeline and Wietersdorfer & Peggauer Zementwerke*, paragraph 42).

65 Thus, a measure which constitutes an exception to the application of the general tax system may be justified if the Member State concerned can show that that measure results directly from the basic or guiding principles of its tax system (see *Portugal* v *Commission*, paragraph 81).

66 In that context, it is appropriate to provide the referring court with the following guidance with a view to enabling it to give an effective ruling in the disputes before it.

67 First, 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 (see, inter alia, Case C-487/06 P *British Aggregates* v *Commission* [2008] ECR I-10505, paragraph 84 and the case-law cited).

68 Article 87(1) EC does not distinguish between the causes or the objectives of State aid, but defines them in relation to their effects (*British Aggregates* v *Commission*, paragraph 85 and the case-law cited).

69 It should also be recalled that a measure which creates an exception to the application of the general tax system may be justified if it results directly from the basic or guiding principles of that tax system. In that context, a distinction must be made between, on the one hand, the objectives attributed to a particular tax regime and which are extrinsic to it and, on the other, the mechanisms inherent in the tax system itself which are necessary for the achievement of such objectives (see, to that effect, *Portugal* v *Commission*, paragraph 81).

70 Consequently, tax exemptions which are the result of an objective that is unrelated to the tax system of which they form part cannot circumvent the requirements under Article 87(1) EC.

71 Next, as is apparent from paragraph 25 of the notice on direct business taxation, the Commission takes the view that the nature or general scheme of the national tax system may properly be relied on as justification for the fact that cooperative societies which distribute all their profits to their members are not taxed themselves as cooperatives, provided that tax is levied on the individual members.

72 Finally, as submitted in its written observations, the Commission also takes the view that the nature or general scheme of the tax system in question can provide no valid justification for a national measure if it provides that profits from trade with third parties who are not members of the cooperative are exempt from tax or that sums paid to such parties by way of remuneration may be deducted.

73 Moreover, it is necessary to ensure compliance with the requirement that a benefit must be consistent not only with the inherent characteristics of the tax system in question but also as regards the manner in which that system is implemented.

74 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.

75 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.

76 It is in the light of all the guidance on interpretation of European Union law provided by the Court at paragraphs 64 to 75 above that the referring court must determine whether the tax benefits provided for the producers' and workers' cooperatives at issue in the main proceedings are justified in the light of the nature and general scheme of the tax system concerned.

The conditions relating to the effect on trade between Member States and the distortion of competition

77 Article 87(1) EC prohibits aid which affects trade between Member States and distorts or threatens to distort competition.

78 For the purpose of categorising a national measure as State aid, it is necessary, not to establish that the aid in question has a real effect on trade between Member States and that competition is actually being distorted, but only to examine whether that aid is liable to affect such trade and distort competition (Case C-372/97 *Italy* v *Commission* [2004] ECR I-3679, paragraph 44; Case C-148/04 *Unicredito Italiano* [2005] ECR I-11137, paragraph 54; and *Cassa di Risparmio di Firenze and Others*, paragraph 140).

79 In particular, when aid granted by a Member State strengthens the position of an undertaking compared with other undertakings competing in intra-Community trade, the latter must be regarded as affected by that aid (see, inter alia, *Unicredito Italiano*, paragraph 56 and the case-law cited, and *Cassa di Risparmio di Firenze and Others*, paragraph 141).

80 It is not necessary that the beneficiary undertaking itself be involved in intra-Community trade. Where a Member State grants aid to an undertaking, internal activity may be maintained or increased as a result, so that the opportunities for undertakings established in other Member States to penetrate the market in that Member State are thereby reduced. Furthermore, the strengthening of an undertaking which, until then, was not involved in intra-Community trade may place that undertaking in a position which enables it to penetrate the market of another Member State (*Unicredito Italiano*, paragraph 58, and *Cassa di Risparmio di Firenze and Others*, paragraph 143).

81 It must therefore be held that a tax benefit such as that at issue in the main proceedings is liable to affect trade between Member States and distort competition within the meaning of Article 87(1) EC.

82 Having regard to all the foregoing considerations, the answer to the questions referred, as reformulated at paragraph 38 above, is that tax exemptions, such as those at issue in the main proceedings, granted to producers' and workers' cooperative societies under national legislation such as that set out in Article 11 of DPR No 601/1973, constitute State aid within the meaning of Article 87(1) EC only in so far as all the requirements for the application of that provision are met. As regards a situation such as that which gave rise to the disputes before the referring court, it is for that court to determine in particular whether the tax exemptions in question are selective and whether they may be justified by the nature or general scheme of the national tax system of which they form part, by establishing in particular whether the cooperative societies at issue in the main proceedings are in fact in a comparable situation to that of other operators in the form of profit-making legal entities and, if that is indeed the case, whether the more advantageous tax treatment enjoyed by those cooperative societies, 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 and proportionality.

Costs

83 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (First Chamber) hereby rules:

Tax exemptions, such as those at issue in the main proceedings, granted to producers' and workers' cooperative societies under national legislation such as that set out in Article 11 of Decree No 601/1973 of the President of the Republic of 29 September 1973 concerning rules on tax benefits, in the version in force from 1984 to 1993, constitute State aid within the meaning of Article 87(1) EC only in so far as all the requirements for the application of that provision are met. As regards a situation such as that which gave rise to the disputes before the referring court, it is for that court to determine in particular whether the tax exemptions in question are selective and whether they may be justified by the nature or general scheme of the national tax system of which they form part, by establishing in particular whether the cooperative societies at issue in the main proceedings are in fact in a comparable situation to that of other operators in the form of profit making legal entities and, if that is indeed the case, whether the more advantageous tax treatment enjoyed by those cooperative societies, 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 and proportionality.

[Signatures]