EUROPEAN TAXATION OF COOPERATIVES: AN EXAMINATION OF THE POSSIBILITIES OFFERED BY THE NEW CONCEPT OF LIMITED PROFITABILITY

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Abstract

Cooperatives are today a very important economic sector in the EU, especially in their small and medium-sized version, in whose business fabric they are heavily involved and account for a significant proportion of employment in Europe. However, European cooperative law expressly excludes taxation from its statute, despite the fact that tax policy is a basic pillar of European integration.

On the other hand, the national laws of many Member States have established specific tax regimes for co-operatives in order to compensate for the inferior position in which they find themselves compared to capital companies.

For years, the cooperative sector has also been calling for decisive intervention by the EU in support of these tax regimes, which have been continually challenged under State aid rules, because, in the dichotomous conception of forms of enterprise that prevails in EU law, cooperatives are excluded from the group of non-profit companies and are included among the rest of the capitalist companies.

This work will analyze the state of the art of the contribution of European law to the construction of social cooperativism, emphasizing the taxation of cooperative societies and the role that the concept of "limited profitability”" can play in this contribution.

SUMMARY

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Law on Cooperatives? V.- CONCLUSIONS AND PROPOSALS. – REFERENCES AND BIBLIOGRAPHY

I.- INTRODUCTION: EUROPEAN TAXATION LAW AND COOPERATIVE SOCIETIES

1.- State of the Art of European Taxation Law of Cooperative Societies.

The basic law on the European Cooperative Society expressly excludes taxation (Council Regulation of the European Commission (EC) 1435/2003, 22 July 2003, on the *Statute for a European Cooperative Society* (SCE)[2].

Nor is there a specific tax regime for social economy entities which, for the rest, constitute a diffuse concept for the European law. Indeed, the current art. 54 of the *Treaty on the Functioning of the European Union* (TFEU) - before 48 - has drawn a binary system of types of enterprises: companies or firms - expressly including cooperative societies - and other legal persons that do not pursue profit[3].

Consequently, cooperatives are assimilated to for-profit companies, which means that European tax law does not distinguish cooperatives from capitalist forms of business in the strict sense included in the regulation of the right of establishment. In any case, it is relevant that Art. 45 of TFEU is included in the regulation of the right of establishment.

However, the economic agents that promote social enterprises - particularly cooperatives - and a large part of the national political powers agree in stating that these types of entities cannot be assimilated to traditional capitalist enterprises. In fact, these companies are based exclusively on the principle of profit and of its distribution or distribution to the participants and shareholders, precisely because those companies - cooperatives and other social enterprises - are not based on that principle or, at least, not exclusively or as a priority[4].

Therefore, the individual Member States have had to create the specific regulations of the tax regime of their own cooperative societies, as in the cases of Spain, Italy and Portugal. There are certainly the intrinsic limitations of these tax regimes within each of the States and the internal controversies over them, but they exist.

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[2] W. 16: "This Regulation does not cover other areas of law such as taxation, competition, intellectual property or insolvency. The provisions of the Member States' law and of Community law are therefore applicable in the above areas and in other areas not covered by this Regulation".

[3] "Companies or firms formed in accordance with the law of a Member State and having their registered office, central administration or principal place of business within the Union shall, for the purposes of this Chapter, be treated in the same way as natural persons who are nationals of Member States.
Companies or firms means companies or firms constituted under civil or commercial law, including cooperative societies, and other legal persons governed by public or private law, save for those which are non-profit-making".

[4] An overview of cooperatives and social economy entities from the fiscal point of view can be found at CALVO ORTEGA, R. (dir) and ALGUACIL MARÍ, P. (coor) (2005): *Fiscalidad de las entidades de economía social: cooperativas, mutuas, sociedades laborales, fundaciones, asociaciones de utilidad pública, centros especiales de empleo, empresas de inserción socia*l, ed. Aranzadi, Cizur Menor (Navarra). For the analysis of SCE: VARGAS VASSEROT, C. (2014): "Situación y perspectivas de la Sociedad Cooperativa Europea", in *Rev. Deusto Estudios Cooperativos*, n. 4.

The mere existence of these regimes was submitted to the judgment of European law before the Commission - EC - (matter of the benefits taxation of hydrocarbons for agricultural cooperatives in Spain, for example[5]). Later, before the Court of Justice of the European Union (CJEU) regarding the tax regime of Italian cooperatives (CJEU Judgment 09-08-2011, cases C-78 to C-80 in relation to the possibility of considering these schemes as aid granted by State aid or not, in the sense of art. 107 TFEU (previously art. 87).

Finally, the CJEU, attending to singularities of cooperative societies, concluded that the tax exemptions in question would only constitute prohibited AGS if they were selective and were not justified by the nature or general economy of the national tax system, not being so in opposite case.[6] The judgment in question was a confirmation of the adaptation to European law of the national tax laws on cooperatives and, in a certain sense, forced the intervention of the EC, which drew up in 2016 a *Communication* on the concept of State aid in accordance with the provisions of the art. 107.1 of the TFEU. This document recognized that non-profit entities can also offer goods and services in the market (par. 7 to 10)[7] and, in particular with regard to cooperative societies, it recognized that they are governed by unique operating

[5] In the *Decision on the measures implemented by Spain in the agricultural sector following the increase in fuel prices* of 11 December 2002 (2003/293/EC), the EC linked the tax benefits granted to Spanish cooperatives to the nature and economy of the system. This position was also consistent with the *Commission Notice on the application of the State aid rules to measures relating to direct business taxation* (OJEC C 384, 10 December 1998), which had established that these advantages constituted an exceptional benefit to the general scheme excluded from Article 107 TFEU (before 87 TEC). This 2002 Decision was appealed before the European jurisdiction, initiating a procedure (T-146/03), which concluded on December 12, 2006, with a judgment of the Court of First Instance (CFI) declaring that the Spanish provisions did not constitute State aid. However, the final decision, dated 15 December 2009, was contrary to Spain. This decision was appealed against by the General Court, which opened the case T-156/10, falsely closed by the Order of January 23, 2014 for formal reasons of standing of the applicants. For more details, see HINOJOSA TORRALVO, J.J. (2017): "La incidencia de la jurisprudencia y la política comunitaria en la fiscalidad de la economía social", in *Reflexiones jurídicas sobre cuestiones actuales*, ed. Thomson Reuters Aranzadi, Cizur Menor (Navarra) and AGUILAR RUBIO, M. (2016): El régimen fiscal de las cooperativas y el Derecho de la Unión Europea, in *Boletín de la asociación Internacional de Derecho Cooperativo – International Association of Cooperative Law Journal*, nº 50.

[6] "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" (82).

[7] "(7) The Court of Justice has consistently defined undertakings as entities engaged in an economic activity, regardless of their legal status and the way in which they are financed. The classification of a particular entity as an undertaking thus depends entirely on the nature of its activities. This general principle has three important consequences. (8) First, the status of the entity under national law is not decisive. For example, an entity that is classified as an association or a sports club under national law may nevertheless have to be regarded as an undertaking within the meaning of Article 107 of the Treaty. The same applies to an entity that is formally part of the public administration. The only relevant criterion is whether it carries out an economic activity. (9) Second, the application of the State aid rules does not depend on whether the entity is set up to generate profits. Non-profit entities can also offer goods and services on a market. Where this is not the case, nonprofit entities remain outside the scope of State aid control. (10) Third, the classification of an entity as an undertaking is always relative to a specific activity. An entity that carries out both economic and non-economic activities is to be regarded as an undertaking only with regard to the former."

principles that prevent their comparison of fact and law with commercial companies, which could justify preferential tax treatment[8].

This achievement cannot hide the reality of the absence of a general European regulation on the taxation of cooperatives, but it implies an express recognition and great value of the uniqueness of cooperatives and, in a certain sense, paves the way for subsequent work of other institutions and bodies of the European Union (EU).

Indeed, since the middle of the last decade there have been some working documents that point directly or indirectly to the need to decisively address a comprehensive regulation of social enterprises in general and cooperatives in particular.

Some of them recognized the desirability of adopting a tax framework adapted to social enterprises as a means of rewarding the social impact of these companies. This was already the case in 2013 in the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions entitled *Entrepreneurship 2020 Action Plan. Reigniting the entrepreneurial spirit in Europe*, COM (2012) 795 final, 9th January 2013.[9] Later, it was the European Parliament that underlined the important role of this kind of companies in the development of social rights in Europe in the resolution of 19 January 2017 *A European Pillar of Social Rights* (2016/2095(*Own-Initiative Procedure* INI)).[10]

However, one of the most relevant documents of recent years (the communication from the Commission to the European Parliament and the Council *An Action Plan for Fair and Simple Taxation supporting the Recovery Strategy* as a result of the Coronavirus Disease 2019 (COVID-19) pandemic - COM (2020) 312 final, of July 15, 2020 -) does not mention either in its text nor in its *Annex of actions and measures* either cooperatives or social enterprises. Thus, a great opportunity to highlight the value of cooperatives has been missed.

[8] *Ibidem*, 157 to 160.

[9] (3.1) "Social economy actors and social enterprises are important drivers of inclusive job creation and social innovation. While they face similar problems as most SMEs, they may encounter additional difficulties, accessing finance which the Commission addressed in the future *Programme for Social Change and Innovation (PSCI*) as well as in the Structural Funds regulations".
(3.2) Among SMEs, some companies, such as social enterprises, often have specific business models requiring dedicated support schemes. Grouping SMEs may lead to an increase in competitiveness. Therefore, Member States could consider whether their tax regimes could be improved to allow for more such SME groups. And therefore, *the Commission will identify and promote Member States best practices with a view to create a more entrepreneur-friendly fiscal environment*."

[10] (Whereas F): "… whereas social economy enterprises, such as cooperatives, provide a good example in terms of creating quality employment, supporting social inclusion and promoting a participatory economy;"
(20) "… highlights the important role of well-equipped and well-staffed public sector providers and of social enterprises and not-for-profit organizations in this context, given that their primary objective is a positive social impact; points also to the important role of social economy enterprises in providing these services and making the labour market more inclusive;".

II.- THE NEED TO ESTABLISH AN "APPROPRIATE" REGULATORY FRAMEWORK FOR COOPERATIVES

2.- The binary (dual) Model of Company Forms in European primary Law: an obsolete and unrealistic Conception of Business Development.

In the previous section, attention was drawn to the binary concept of company forms based on Article 54 TFEU, according to which there are: on the one hand, companies (companies or firms) incorporated under civil or commercial law and other legal persons under public or private law, and, on the other hand, non-profit companies. This dual concept is a "simplistic vision"[11], which leaves no room for other business manifestations. In particular, the so-called Social Economy Enterprises (SEEs) would fall outside this classification, because they are neither profit-making capitalist entities in the strict sense of the term, nor are they economically disinterested entities.

The *Opinion* of the European Economic and Social Council (EESC) entitled *Towards an appropriate European legal framework for social economy enterprises* (2019/C 282/01, of June 19), puts on the table the perverse effects of the severely applied principle of neutrality and proposes a third category of economic agents: those who voluntarily limit the benefits in exchange for other purposes (p. 2.2.15).

In this way, the concept of limited profit (limited profitability) is advanced as an axis on which a different category of company can be built from the two included in art. 54 of the TFEU. This concept should have effects on a wide range of legal aspects, including taxation, whose favorable tax framework should begin to be discussed to better reward the social impact of companies in terms of social, environmental and territorial cohesion (p. 3.2.4). The EESC thus follows up, albeit in a more concrete way, the call made in 2018 by the European Parliament to the Commission in its *Resolution on a statute for social and solidarity-based enterprises* (P8_TA (2018) 0317) of 5 July 2018.

In the case of cooperatives, the situation is very paradoxical because *de facto* are social economy enterprises (this is in accordance with almost all national legislations), but Art. 54 TFEU expressly mentions them among the "companies or firms constituted under civil or commercial law"; note that it is the only type of company mentioned by name. Therefore, cooperatives are part of the group of profit-making companies or, at least, are excluded from the group of non-profit-making enterprises.

The EESC's 2019 *Opinion* regrets that EU law does not take into account the intrinsic characteristics of the social economy; and further regrets that neither the European Commission in its decision-making practice nor the case law of the CJEU have shown sufficient interest in these companies. This is so despite the fact that they are entities with a different ownership and governance structure and a very different relationship to profits than

[11] *Opinion* of the European Economic and Social Council (EESC) entitled *Towards an appropriate European legal framework for social economy enterprises* (2019/C 282/01, of June 19, p. 2.2). The same applies to other official translations: "conception simplificatrice", "concepción simplificadora", "concezione semplicistica", "conceçao simplista".

other capitalist companies (1.4). This aspect has already been discussed in the previous section.

This closed dual conception of company forms does not correspond to today's reality. A revision of this obsolete scheme is necessary. It is often said that Article 54 TFEU only allows for the identification of capitalist companies - including cooperatives - and charitable-social companies, which are not for profit, and that this binary model would close the door to an autonomous recognition of social economy entities (including cooperatives and not capitalist companies, since a reform of the TFEU for this purpose is not foreseeable).

Aware of this, the EESC proposes another route that could be equally effective: that of including a protocol on different types of enterprise as an annex to the TFEU that includes social economy entities as a third category of enterprises (1.5 last paragraph and 2.2.15). But this route is neither easier to implement nor quicker, since the inclusion of annexed protocols in the TFEU requires the same requirements as the amendment of the Treaty.

While it is true that the normative route is the best and most direct, it is also true that the interpretative route should not be abandoned. Let us see how.

Art. 54 TFEU is part of the chapter on freedom of establishment (right of establishment) and aims to put companies (corporations and firms) on an equal footing with natural persons who are nationals of a Member State for the purposes of the right of establishment (Art. 54.1). The second paragraph - which is the controversial one because the dual conception of company types has been based on it - clarifies the concept of corporation or firm (company) that has the right of establishment. Also it states that corporations and firms are to be understood as civil or commercial companies, cooperatives and public or private legal persons, except if these entities (any of them) are non-profit-making.

In other words, from a rule that seeks to identify the right of establishment in the European Union from a subjective point of view, we have moved on to establishing a distinction between forms of enterprise that has been taken for granted over the years.

The whole EU law has been built around this duality which has had - and is still having - some very important effects on European law and on some Community policies, sometimes by inclusion (social economy enterprises and cooperatives as capitalist companies in areas or community policies in which they do not fit) and other times by exclusion (lack of specific regulation in areas in which it would be desirable to have differentiated legislation).

This is the case, for example, in the very important area of competition law, where the dual conception is taken to the limit to consider apodictically that the companies bound by the rules of competition are those that act in the market exercising an economic activity. Therefore, it is irrelevant what their nature or legal status is: if they act in the market, they are subject to the rules of competition without distinction (2.2.7). As will be seen, this statement can also be challenged.

Therefore, the problem generated by Art. 54.2 TFEU consists in not having distinguished between companies on the basis of their nature, their characteristics, their purpose and, above all, their legal status, and in having focused exclusively on whether they are profit-making or not. But in fact, this article has done no more than equate the right of establishment of legal persons with the right of natural persons who are nationals of a Member State (Article 54.1).

Nevertheless, the identification in the second paragraph of the companies that enjoy this right is not conclusive for all purposes. Indeed, although it can be denied that non-profit-making entities have the right of establishment[12], it cannot be concluded that the forms of company permitted by European law in any of its manifestations must be exclusively those two.

In other words, and in conclusion: the expression "companies or firms constituted under civil or commercial law, including cooperative societies, and other legal persons governed by public or private law" (art. 54.2) allows all possible forms of enterprise to be included, even if they are of different nature, purpose and legal status. It would follow that there would be no legal impediment to admitting other types of company in the EU and attributing different legal regimes to them if deemed appropriate.

3.- The pernicious Confusion between Social Economy Enterprises and Social Enterprises.

The lack of autonomous recognition of social economy enterprises as enterprises distinct from capitalist enterprises has much to do with the lack of a clear distinction between social enterprises and social economy enterprises.

The former - social enterprises - have an exclusively social, solidarity, philanthropic or humanitarian purpose; they are completely non-profit entities, which operate with the exclusive support of public or private aid and generally do not adopt social business forms, but other forms, such as foundations or associations.

The latter - social economy enterprises - are enterprises whose essential purpose is not profit and which are not profit-driven, but which operate in the market and which, in fact, sometimes make profits that are not, however, intended for distribution to their members or participants. They often take other social forms, such as cooperatives, worker-owned companies, mutual societies and the like.

In fact, when art. 54.2 TFEU refers to companies or firms "save for those which are non-profit-making", it seems to be referring to so-called social enterprises, not to social economy enterprises and therefore excludes cooperatives from this type of company or firm and includes them among civil or commercial law companies of a capitalist type, because they are

[12] Entities sometimes have to make significant regulatory detours in order to exercise this freedom ("Freedom of establishment is a real issue for certain types of SEE. Because legal forms vary widely between Member States, exercising this freedom in most cases obliges enterprises, when they set up in a Member State, to adopt a form there that is at odds with the rules of operation laid down in their Member State of origin." *Towards an appropriate…* wh. 3.2.13).

clearly not non-profit-making companies and act in various areas of the market for the production and distribution of goods and services.

This way has been strictly followed by the European legislator - who has issued a *Statute for a European Cooperative Society (SCE)*[13], but has not developed specific legislation on other social economy enterprises - and also by other institutions, such as the European Parliament, the Commission and the Council. The last, when advocating the development of the social economy, seems to refer to social enterprises, not to all social economy enterprises, thus in fact unduly reducing the social economy to social enterprises.[14]

What has just been explained shows that, with regard to other social economy enterprises that are not cooperatives, the silence is almost absolute and they are practically hidden under the umbrella of small and medium-sized enterprises, the figure to which one must turn to find the European policies that can or should be applied to social economy enterprises.[15]

On the other hand, European legal systems do make distinctions between them; it is true that sometimes it is not very easy to identify them, but in most cases it is. Thus, for example, in Spain they speak of social economy "entities" and within this we can find: on the one hand, social economy "enterprises", which operate in the market for the production of goods and services with a clearly non-capitalist purpose; and on the other hand, entities that completely disregard the profit factor and the slightest profit-making purpose; these are normally social utility entities, which are expressly declared as such by means of the appropriate administrative proceedings.[16]

In the Spanish legal system, cooperatives are considered social economy enterprises and there are laws that regulate them, including an old law that regulates their tax regime.[17] In some countries, they also have constitutional recognition. All of them refer to their mutual nature in the contribution of resources and in meeting the needs of their members, to the absence of a profit-making purpose and to the linked use of their profits. Without going any further into characteristics which are well known, it can safely be said that cooperatives are not capitalist companies. It follows that their immediate and main purpose is not to make a profit and, in accordance with the laws governing them and their articles of association, the use of any profits they may make is limited or conditional.

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[13] COUNCIL REGULATION (EC) No 1435/2003 of 22 July 2003 on the Statute for a European Cooperative Society (SCE).
[14] "Moreover, while the European Parliament (EP), Council and Commission have announced that they will focus on the development of the social economy as a whole, their various actions are tailored to social enterprises and do not apply to all SEEs; similarly, these actions are liable to propagate a narrow vision of the social economy as being limited to activities with a social purpose" (*Towards an appropriate…* 2.2.3).
[15] Cfr. HINOJOSA TORRALVO, J.J. (2017): "La promoción de las PYMES en el Derecho Financiero de la Unión Europea", in *As pequenas e médias empresas e o Direito*, ed. Instituto Jurídico, Coimbra.
[16] In Spain: Law 49/2002, of 23 December 2002, on the tax *Regime for non-profit entities and tax tax regime for non-profit organizations and tax incentives for patronage* and *Law 5/2011, of 29 March, on Social Economy*. Cfr. ALGUACIL MARÍ, P. (2017): "Impact on tax and grant matters of the Spanish declaration of social enterprises as providers of economic services of general interest", in *Lex social: revista de los derechos sociales*, vol. 7 n. 2.
[17] In Spain: Law 20/1990 of 19 December 1990 on the Tax Regime for Cooperatives.

It is therefore possible and necessary to distinguish between social economy enterprises and social entities or enterprises, but also to distinguish between social economy enterprises and capitalist enterprises. Cooperatives are social economy entities but not capitalist entities.

4.- Basis - also "constitutional" in accordance with EU Law - for Recognition of other Forms of Enterprise.

The binary conception of companies, insofar as it requires them to be distinguished according to whether or not they are profit-making, is insufficient to cover the variety of companies operating in the European Union. In fact, it leads to the recognition that there is only one model of company, the profit-making company, since non-profit-making companies are not in question. On the other hand, a more open conception of corporate categories can find support in European constitutional law.

One of the supports for this claim is to be found in the principle of neutrality of property regimes in the Member States, identified in Art. 345 TFEU ("The Treaties shall in no way prejudice the rules in Member States governing the system of property ownership")[18].

The idea behind this is that, while it is not the competence of EU law to determine the system of corporate ownership, it is also the case that EU rules should not bind the ownership systems of States. Neutrality would act here like a coin whose two sides reflect the integrity of its value, so that not only should the European Union refrain from regulation, but also respect European law for internal regulations. This second side of the coin is obscured, erased, loses its value, if EU law prevents the development of the enormous potential of all forms of enterprise[19].

This understanding of the principle of neutrality of the property regime is of a negative nature: it obliges to refrain from acting and to respect the internal regimes of the members, but not to do, not to act. In the EESC's view "… when neutrality leads to non-recognition of whole swathes of the economy and allows a certain type of enterprise to be imposed as the reference standard or model for law-making, the principle in question is being misapplied"[20].

But perhaps we should go further and recognise a positive aspect of the principle of neutrality in order to affirm that it also requires providing the channels for different forms of enterprise to develop in accordance with European law, and this is only possible if it acts in favour of their recognition[21].

[18] *Towards an appropriate…* 2.2.10.
[19] *Ibidem…* 1.4.
[20] *Ibidem…* 2.2.12.
[21] This positive aspect could perhaps be found in whereas 3.1.5 of the aforementioned *Opinion*: "However, EU law must also provide for the existence of entities that adopt these particular types of enterprise and must allow them to develop within the internal market" and 2.2.14: "The entire legal order of the EU needs to be revised to better incorporate the specific role and operating methods of enterprises that have a general interest purpose and whose use of the revenue generated by their activities is strictly in line with the pursuit of social objectives."

5.- The Category of limited Profitability, a Concept to be defined. Elements that justify its Adoption and some Notes on its Characteristics.

The EESC has launched a proposal to create a separate category of European enterprises, social economy enterprises, based on the concept of limited profitability[22]. This figure should serve as a criterion for identifying social economy enterprises, so that entities with such limited profitability could be included in that category.

For the time being, the concept of limited profitability is not defined, and the EESC therefore calls on the European Commission to carry out a study to define it, which should make it possible to identify the business models of the different Member States that are in line with it.[23]

Nevertheless, the EESC *Opinion* advances the general conceptual framework that should govern limited profitability, "which would apply to all enterprises that can make a profit but do not intend to distribute that profit to their owners, as their purpose is based on solidarity or the general interest".[24]

This last point should be clarified to avoid confusion between social economy enterprises and social enterprises (entities).

Solidarity or general interest are indeed characteristic of the activities of social entities (foundations, associations and other social forms), but the same cannot be said - or at least not in the same way - of social economy enterprises, which carry out economic activities in the interest of their own members, although they do so in economic sectors of general interest or solidarity.

On the contrary, their activities have a certain general interest - even if limited to a social or territorial sector - and, in a broad sense, they aim to achieve solidarity or collective interest goals, and the use of their profits is not free, but is conditioned (limited) by regulations, precisely because of the social function they fulfill.

However, certain points must be made clear when it comes to shaping the concept of limited profitability.

First of all, it should be noted that social economy enterprises carry out economic activities in the strict sense of the term. When, as social economy enterprises, a solidarity bank lends money, an agricultural processing company produces wine or a worker cooperative provides care services for the elderly, they are undoubtedly carrying out activities of a solidarity nature and of general interest, and the profits they can obtain are limited in their application.

[22] The expression is not the same and does not mean the same thing in all languages. In Spanish it has been translated as "beneficios limitados" to refer to the limited availability of profits from business activity; however, the expressions in the official translation into each of these languages are: "lucrativité limitée", "lucro limitato" and "lucro limitado"; they mean the same thing, but emphasize the limitation of profit - in Spanish "lucro" refers to the profit that is obtained from something; business profits are not profit in the strict sense).
[23] *Towards an appropriate...* 1.5 second paragraph.
[24] *Ibidem*, 1.5 first paragraph.

However, at the same time, they are carrying out activities that are also carried out by profit-making commercial enterprises for which the social purpose of their activity is not so relevant and for which there is no limitation on the distribution of their profits. The difference between the two forms of companies is not so much in the type of activity, but rather in the way it is carried out and its purpose, but both circumstances are difficult to regulate; hence the need for the figure of limited profitability.

Moreover, limited profitability should be an easily identifiable criterion, common to all social economy enterprises and sufficient to distinguish social economy enterprises from capitalist enterprises[25]. But it should also distinguish social economy enterprises that operate in the market from social entities that do not, otherwise they would end up being confused again, when the point is to identify them separately.

And, finally of course, the limitation on the application of profits of social economy enterprises must be clearly established in national laws and be of such a degree or level as to allow them to be clearly separated from capitalist enterprises. European law should require clarity in the definition of the conditions limiting the application of profits that will allow companies to be classified as social economy enterprises.

In this sense, statements such as "SEEs do not pursue the objective of maximisation of profits or return on capital, but rather a social objective" or "qualifying an entity as limited-profit makes profitability a means and not the objective of its operation"[26] are part of the argument in favour of the figure of limited profitability, but they are not elements or criteria that add value to its regulatory configuration.

In other words, it is necessary to establish as clearly as possible the material and quantitative criteria for the application or distribution of profits, i.e. the nature and quantification of the destination of the profits: improvement of the company's own activities, the entity's own funds, legal reserves, company returns, distribution of profits to shareholders and others.

6.- The cross-cutting nature of limited profitability: the General Interest of their effects on EU policies

As conceived, the figure of limited profitability should be cross-cutting, because it should affect the right of establishment, the freedom to provide services, and public procurement and free competition, all of which are essential policies for the European Union.

The right of establishment is limited, but only for some social economy entities, not for social economy enterprises in general and not for cooperatives, for example, but the EESC understands that companies within the concept of limited profitability could solve some of

[25] *Ibidem…* 3.1.
[26] Ibidem… 2.26 and 3.1.1.

the problems of some entities, especially social entities. However, some philanthropic foundations, for example, are based in several Member States. [27]

The current difficulties of social economy enterprises in the area of public procurement are mainly factual, i.e. there is no regulatory exclusion, but in reality the possibilities of this type of enterprise, which is usually of medium or small size, places it, in fact, outside the public procurement circuit. This is also the case for a large number of cooperatives due to their size, especially those providing care services. [28]

Apart from the procurement reserves, which are very limited by the Member States[29], the problems of access to public contracts are also due to the difficulties that social economy enterprises have in accessing financing that would allow them to bid on equal terms.

A couple of preliminary notes will serve to introduce the ideas I intend to convey.

On the one hand, the financing difficulties of co-operative societies are well known in comparison with those of a capitalist nature, whether or not they are competitors in the market. In addition, given the structural limitations to which they are subject, these are entities whose representative securities do not usually have access to the secondary market (stock markets), nor is the possibility of obtaining resources on the primary markets (issuing debt capital or venture capital, shares and bonds, for example) very feasible or agile. Parallel markets are not considered a solid alternative, given their informality and the high-risk component they incorporate. And, finally, the actions of so-called ethical banking or

[27] *Towards an appropriate…* 3.2.1.3. From the same institution, EESC: *Opinion of the European Economic and Social Committee on 'European philanthropy: an untapped potential* (exploratory opinion requested by the Romanian Presidency) (2019/C 240/06), 6.3. "Facilitate cross-border philanthropy: the free flow of capital is at the core of the EU's single market. Ensure the legal and practical application of this fundamental freedom coupled with the non-discrimination principle to facilitate cross-border philanthropic activity. Cross-border investments by philanthropic organisations are key. Supranational legal forms to facilitate philanthropic engagement should also be considered."

[28] According to the *Directive 2014/24/EU* of the European Parliament and of the council of 26 February 2014 *on public procurement and repealing Directive 2004/18/EC*, it is true, however, that there is a possibility of reserving participation in the procurement of certain social, cultural and health services in favour of certain organisations, provided that they meet the conditions laid down in Article 77.2 of the Directive, which, it must be said, correspond quite closely to the profile of organisations with limited profitability or non-profit-making, namely: (a) its objective is the pursuit of a public service mission linked to the delivery of the services referred to in paragraph 1; (b) profits are reinvested with a view to achieving the organisation's objective (where profits are distributed or redistributed, this should be based on participatory considerations); (c) the structures of management or ownership of the organisation performing the contract are based on employee ownership or participatory principles, or require the active participation of employees, users or stakeholders; and (d) the organisation has not been awarded a contract for the services concerned by the contracting authority concerned pursuant to this Article within the past three years. Contracts must have a maximum duration of three years. The services concerned may be: health, social and related service; administrative social, educational, healthcare and cultural services; other community, social and personal services including services furnished by trade unions, political organisations, youth associations and other membership organisation services; other administrative services and government services; provision of services to the community. In Spain, the transposition of this directive was carried out by Law 9/2017, of 8 November, on Public Sector Contracts, whose D.A. details the reservation of these contracts and Annex VI lists them.

[29] In Spain, the transposition of this directive was carried out by *Law 9/2017, of 8 November, on Public Sector Contracts*, whose D.A. details the reservation of these contracts and Annex VI lists them. The reservation is made in favour of Special Employment Centres of social initiative and insertion companies regulated, respectively, in the revised text of the *General Law on the rights of persons with disabilities and their social inclusion*, approved by Royal Legislative Decree 1/2013, of 29 November, and in *Law 44/2007, of 13 December, for the regulation of* the *Regime of insertion companies*. Both entities are social economy entities, very close to the field of social enterprises.

solidarity banking present, along with many advantages, the disadvantage of their limited quantitative capacity.[30]

On the other hand, although private funding is necessarily the main source of resources for social economy organizations, public funding is, at present, irreplaceable. In almost all countries there are or have been public financial institutions whose clients are cooperatives. This model is certainly recommendable and, in those countries where they do not exist, have ceased to exist or have played a secondary role, there is a demand for their creation, reinstatement or reconversion.

However, fiscal policy can also be an effective instrument of financing for social economy organizations and, in particular, for cooperatives. This is improper or indirect financing, of course, insofar as it results in tax savings for the entity. The most recent analyses show that this type of policy, if well-articulated, is appropriate and proportionate to the economic impact and social dimension of Small and Medium Enterprises (SMEs), cooperatives and third sector entities. At the same time, it can be an effective mechanism to compensate for the internalization of social costs within them, as well as to encourage their creation and development.[31]

Limited profitability can also play an important role in competition law, although the EESC's starting position is primarily a desideratum ("at the point of applying the rules adjustments could be made so as to take account of certain specific features of SEEs") more than just evidence ("only criterion for falling within the scope of competition rules is that an entity operates a business in a market"). [32]

These last two areas, financing and competition, have a lot to do with the taxation of cooperatives and, to a certain extent, of other forms of social economy enterprises. These are

[30] A mixed model, of public origin - because it was financed from the General Budget of the European Union, but also privately managed - has been the microcredit project for employment and social inclusion called "Progress", aimed at facilitating access to microfinance (Decision 283/2010/EU of the European Parliament and of the Council of 25 March establishing a European Microfinance Facility for Employment and Social Inclusion - Progress). Regulation 1296/2013 of the same institutions of 11 December 2013 on a *European Union Programme for Employment and Social Innovation (EaSI)* amended it and for the period 2014-2020, this initiative has now been included in the EaSI. But its minimal character is induced not only by its very name, which seems reasonable, but also by its maximum amount (€25,000) and its targeting of micro-enterprises (those employing less than 10 workers, including self-employed workers, and with a turnover of no more than €2 million per year). On the other hand, it is not certain that it helps that it does not finance enterprises directly, but allows a few microcredit providers to extend loans by issuing guarantees, thus sharing the risk of losses. More topical in the Commission's thinking is another bank financing mechanism that is inevitably recurring these days: crowdfunding. Indeed, the working document entitled *Crowdfunding in the EU Capital Market Union*, SWD (2016) 0154 final, highlights the crucial role of this financing instrument as a new way to increase and diversify the resources of European companies in order to improve growth and job creation in Europe. For the Commission, this micro-finance provides a small but rapid development and considers that if well regulated, it will potentially be a key source of funding for SMEs (most cooperatives are SMEs).

[31] Despite this, it is only in 2016 (Parliament Resolution of 15 September, cited above) that European regulations or initiatives have shown a firm and forceful decision to favour the application of fiscal policy to promote the development of SMEs. However, some documents (such as the *Report of the European Economic and Social Committee on the different forms of enterprises*, 1454/2009, 1 October 2009, or the *Report for the drafting of a law to promote the social economy*, Ciriec-Spain, December 2009, the *Single Market Act - Towards a Single Market Act. For a highly competitive social market economy*, 27-10-210, later transformed into the Single Market Act. Twelve priorities to stimulate growth and boost confidence: "Together for new growth", 13 April 2011; *EESC Opinion on Cooperatives and agri-food development*, 11-7-2011), have done so.

[32] *Towards an appropriate…* 3.2.2.2.

aspects of cooperativism which I have had occasion to deal with in other studies and it can be said that the situation is no better now than it was a few years ago.

III.- LIMITED PROFITABILITY AND TAX MEASURES FOR COOPERATIVES

7.- The Limited Profitability on the European Cooperatives Law

The importance of the figure of limited profitability lies in identifying a group of companies to which to attribute a specific legal regime, in particular, a regime that takes into account their deficits because these deficits are motivated or caused by circumstances that are considered to be socially useful: their social interest and their non-primarily profit-making purpose, among others. [33]

Limited profitability is a logical consequence of its non-primarily profit-making character and at the same time a distinguishing factor with respect to capitalist companies and completely non-profit entities which, by definition, do not have profits derived from their economic activity that can or should be limited.

As discussed above, cooperatives are social economy enterprises that would potentially benefit from the configuration of a limited profitability concept. In fact, the only type of social economy enterprise to which the EESC *Opinion* refers expressly in several passages is the cooperative. However, a cooperative is a company which serves, for example, to make it clear that the concept of limited profitability does not exclude the existence of profits from the cooperative economic activity or the possibility of distribution ("part of their surplus to their members in the form of dividends or interests, but only a limited portion of the surplus may be distributed, and that amount theoretically depends on member's transactions rather than share of the capital")[34].

This characteristic of limited profitability is perfectly identifiable in European cooperatives, whose *Statute* foresees, in addition to the allocation of legal reserves (art. 65) and the cooperative returns or dividends (art. 66), if there is a surplus balance available, the surplus, in the order and proportions laid down in the statutes may be allocated providing "a return on paid-up capital and quasi-equity, payment being made in cash or shares" (art. 67 *Statute* of SCE).[35]

Whatever the concept of limited profitability, therefore, it is clear that European cooperative societies have these characteristics, in accordance with their legal regime.

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[33] The EESC "urges the Commission to launch a study on the concept of limited profitability and on business models that operate in this way, in order to identify more precisely what is required, in terms of legal, financial and tax frameworks, for cultivating the competitive strengths of these enterprises and ultimately, where appropriate, to prescribe good practice" (*Towards an appropriate…* 1.5 second paragraph). About the social nature of cooperative acts, see VARGAS VASSEROT, C. (2020): "El acto cooperativo en Derecho español", in *CIRIEC-Revista Jurídica Española de Economía Social y Cooperativa*, n. 37.

[34] *Towards an appropriate…* 3.1.3.

[35] For the Spanish case, ALGUACIL MARÍ, P. (2020): "El fondo de educación y promoción y su impacto en la tributación de las cooperativas", in *Revista Técnica tributaria*, n.131.

8.- Requirements arising from the Limited Profitability of Cooperatives from a Tax Law Perspective: State Aids and other Tax Law Measures for the Cooperatives.

One of the legal fields on which the consequences of limited profitability should be projected is Tax Law.[36] From the point of view of the EESC's *Opinion* of 2019, an appropriate delimitation of the concept of State aid that favours its achievement without contravening European law would help considerably, as it would allow, along the lines already initiated, special tax regimes or tax measures in favour of cooperatives to be definitively brought into line with European law. In addition, however, specific measures would have to be taken in the various national taxes to help the position of cooperatives, which is diminished by their limited profitability.

Professor CALVO ORTEGA (2005) has put forward three compelling reasons that would support favourable taxation for cooperatives and other social economy enterprises. Firstly, he highlights the constitutional obligation of the competent European institutions to implement a social policy and to seek economic and social cohesion. Secondly, he points out that the activities of social economy entities fall within those purposes and, therefore, they are in the general interest. Thirdly, he highlights, too, the limitations on the management and disposal of these entities' own assets with respect to commercial companies. [37] As can be seen, these reasons are perfectly linked to limited profitability.

The relationship between cooperatives and State aid within the meaning of Art. 107 TFEU (before Art. 87) is one of love and hate, of back and forth.

Cooperatives have had, and continue to have in many countries, a specific and allegedly beneficial tax regime compared to other enterprises.

The justification for such favourable discrimination has been based on many reasons, all of them related to the role of these entities in productive sectors of special social value and to the limitations that their own business structure and internal functioning have placed on their development and expansion possibilities, as well as on the uniqueness of their capital and social benefits. Although it is true that today some grouped cooperatives have managed to overcome these difficulties and have expanded in an extraordinary way, the cooperative as a primary source or source of employment is still a reality and those fundamentals are still valid. This role of cooperatives and also these limitations have been repeatedly recognised in several texts issued within the European Union. [38]

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[36] "The model of a capitalist-type, for-profit company pervades all of European law. Thus, despite the general interest benefits from such entities' existence in the EU Member States, and with the exception of the identification of services of general economic interest, neither association and company law, nor public procurement law, nor tax law distinguish between SEEs and other types of enterprise." (*Towards an appropriate*… 2.2.8).

[37] CALVO ORTEGA, R. (2005): *Fiscalidad de las entidades de economía social: cooperativas, mutuas, sociedades laborales, fundaciones, asociaciones de utilidad pública, centros especiales de empleo, empresas de inserción socia*l, ed. Aranzadi, Cizur Menor (Navarra).

[38] Thus, in the document *Cooperatives in Enterprise Europe* of 7 December 2001, the Commission already understood that there were significant differences between cooperatives and typically capitalist companies, differences which were justified

As is well known, State aid is aid granted to certain companies, entities or persons by means of State funds, either directly (subsidies) or indirectly (tax benefits). Such aid may be compatible or incompatible with the Treaty; it is incompatible if it in any way distorts or threatens competition by favouring certain undertakings or the production of certain goods.

The Commission has for a long time maintained a maximalist position and a very broad conception of the selective nature of the measures, which has ultimately seriously undermined the expectations initially raised about the compatibility of certain special tax regimes and European law.

The case of the actions taken in the first decade of this century against some specific tax regimes for cooperatives is possibly the example that can most paradigmatically illustrate the situation that a favourable tax regime for cooperatives has to face, because it also shows the change in the Commission's approach. This was because the legislation of some EU Member States (notably Belgium, Italy, Portugal and Spain) contains taxation for all or some cooperatives that is generally more favourable than that of capital companies.

The Commission argued in its preliminary analysis that the specific tax system of Spanish cooperatives should be considered, by definition, as State aid.[39] However, it must also be said that the Commission decision was sympathetic to a differentiated treatment of mutual operations (between the member and the cooperative), which could be compatible with the Treaty provided that the cooperatives could be characterised as small or medium-sized enterprises (SME).

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in Council Regulation (EC) 1435/2003 of 18 August 2003 on *the Statute for a European Cooperative Society*, to the extent that in the *Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions on the promotion of cooperatives in Europe* of 23 February 2004, the Commission itself understood that such differences could justify specific tax treatment, provided that in all aspects of cooperative legislation, the principle was respected that any protection or protection of cooperatives could justify specific tax treatment, as long as the principle was respected in all aspects of cooperative legislation, of 23 February 2004, the Commission itself took the view that such differences could justify specific tax treatment, provided that, in all aspects of cooperative legislation, the principle that any protection or benefit granted to a specific type of entity must be proportionate to the legal constraints, social value added or limitations inherent in that corporate form must be respected and must in no case be a source of unfair competition. On 1 December 2009, the European Economic and Social Council (EESC) adopted the above-mentioned *Opinion on various types of enterprise*, in which it called most strongly for the introduction of sectoral tax measures to compensate such enterprises on the basis of their proven public utility or their proven contribution to regional development. On 7 July 2012, the EESC adopted a document entitled *Cooperatives and agri-food development*, which contains proposals on taxation. Paragraph 44 of *Parliament's resolution of 15 September 2016*, cited above, is also very clear and direct. It would appear that Parliament has taken an initiative here which, if recognised and followed up, should lead to a major rethink of Member States' tax policies on the taxation of SMEs, including cooperatives.

[39] The questioning of the tax regime for cooperatives in Spain before the European Union began in 2000, as a result of the complaint filed by two associations of service station businessmen (from Madrid and Catalonia) against certain measures introduced by Royal Decree-Law 10/2000 of 6 October; in particular, this RDL eliminated the prohibition hitherto in place on the distribution of B diesel to non-member third parties by agricultural cooperatives. The controversy centred on the possibility for any cooperative to supply or distribute petroleum products - a possibility that had been forbidden since Law 34/1998 of 7 October 1998 - unless the cooperative concerned formalised this distribution through a company outside the cooperative itself; this requirement would not have been significant were it not for the fact that this automatically meant that this branch of its activity would be subject to the general rate of corporation tax. On the other hand, now that the requirement to set up a special purpose vehicle has been removed, it is possible to maintain the privileged tax regime for cooperatives despite the fact that they carry out this activity. Vid. ALGUACIL MARÍ, P. (2010): "Condicionantes del régimen de ayudas de estado en la fiscalidad de cooperativas", *CIRIEC-España. Revista de economía pública, social y cooperativa*, n. 69.

Finally, in a 2009 decision, it opted for the criterion of "pure mutuality" to justify favourable measures, i.e. only such favourable measures are acceptable in respect of the activities of cooperatives with their own members, without establishing percentages in respect of transactions with third parties and eliminating any reference to the cooperative's status as a small or medium-sized enterprise as an indicator justifying the measure's compliance with European law. In transactions which are not purely mutual from this mutualist point of view, the cooperative - the Decision says - acts like other companies and should therefore not be treated favourably in terms of company taxation. The proceedings continued with an appeal to the General Court, which did not resolve the central issue, because the challenge was rejected for lack of standing of the claimants. [40]

Three joined cases (C-78/08 to C-80/08) were brought before the CJEU against the Italian tax benefits for cooperatives, in force from 1973 to 2004 at the request of the Italian *Corte di Cassazione,* which questioned before the European Court whether the Italian scheme for cooperatives constitutes unlawful state aid requiring repayment and whether the use of the cooperative legal form constitutes an abuse of law, bearing in mind also that Italian cooperatives are considered capital companies under Italian law. The judgment of the CJEU of 8 September 2011, handed down in these cases, departed from the Advocate General's approach (the latter had first suggested that the questions should be rejected as inadmissible), although not exactly from his conclusions, since it ends by implying that although they may not be State aid, it leaves that decision to the Italian national court.[41]

Beyond these hesitations, the fact is that the Commission reacted and, in a hitherto unusual gesture, issued the *Regulation (UE) 651/2014 COM, of 17 June, declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty,* in which it recognised the uniqueness of SMEs and their specific handicaps, which led it to establish that different basic forms of aid and tax relief could be applied.[42]

But the Commission has not stopped there and on 17 July 2016 it published its *Commission Notice on the notion of State aid as referred to in Article 107(1) of the Treaty on the Functioning of the European Union (2016/C 262/01).*

In this extensive *Notice*, the Commission takes up its own doctrine adopted in successive decisions, but above all it echoes the case law of the ECJU. This is not the time to gloss over its dense content, but to make a few notes that are of interest for the purpose of this study.

Indeed, in the 2019 *Opinion*, which advocates the introduction of the figure of limited profitability, the EESC, aware of the importance that the concept of State aid has in the area of taxation, "urges the Commission to continue the efforts it indicated in its communication

[40] Case T-156/10, O. 23 January 2014. For a more detailed analysis, consult HINOJOSA TORRALVO, J.J. (2017): "La promoción de las PYMES en el Derecho Financiero de la Unión Europea", in *As pequeñas e médias empresas e o Direito*, ed. Instituto Jurídico, Coimbra.

[41] For an in-depth analysis of these cases, consult the CJEU judgement of 8 september 2011 in INGROSSO, M. (2012): "La pronuncia pregiudiziale della Corte di Giustizia sulle agevolazioni fiscali alle cooperative italiane", in *Rassegna Tributaria* 2/2012, p. 529-550.

[42] *Regulation (UE) 651/2014 COM*, arts. 17 a 23.

on the classification of State aid with regard to cooperative societies, by extending the relevant provisions to all SEEs" (p. 1.5, fourth paragraph).

These relevant provisions translate into the following: "In the light of these particular features,[43] cooperatives can be regarded as not being in a comparable factual and legal situation to that of commercial companies, so that preferential tax treatment for cooperatives may fall outside the scope of the State aid rules provided that: they act in the economic interest of their members; their relations with members are not purely commercial, but personal and individual; the members are actively involved in the running of the business; they are entitled to equitable distribution of the results of economic performance". [44]

These characteristics, especially the last one, are very close to the idea behind the concept of limited profitability, although the latter should go further and establish clearly and specifically under what conditions a company (including a cooperative) is in a situation of limited profitability. They should also establish gradations of the limitation and determine in which cases and to what extent the limitation could be modified without this entailing the loss of the status of a limited profitability company.[45]

There are, of course, other demands from the cooperatives, other measures that could be implemented and that would only encourage the cooperative model. The category of limited profitability can help to encourage its acceptance. In this regard, the 2019 EESC's *Opinion* concludes with a heading entitled "Taxation", in which it argues that there should be a discussion about a preferential tax framework that offers a more generous reward for the social impact of all enterprises with regard to social, environmental and territorial cohesion.[46]

In particular, measures such as the recovery of non-deductible input VAT (Value Added Tax), incentives for innovative investment or compensation of social costs are being considered. One of the most worrying issues is the impossibility of recovering input VAT for a large number of entities carrying out tax-exempt activities. This is particularly true for activities of a health or welfare nature, which are increasingly common in the cooperative

[43] *Commission Notice on the notion of State aid…* p. 157: "In principle, genuine cooperative societies conform to operating principles which distinguish them from other economic operators. (232) In particular, they are subject to specific membership requirements and their activities are conducted for the mutual benefit of their members, (233) not in the interest of outside investors. In addition, reserves and assets are non-distributable and must be dedicated to the common interest of the members. Finally, cooperatives generally have limited access to equity markets and generate low profit margins."

[44] *Commission Notice on the notion of State aid…* p. 158. "If, however, the cooperative society under examination is found to be comparable to commercial companies, it should be included in the same reference framework as commercial companies and undergo the three-step analysis as set out in paragraphs 128 to 141. The third step of that analysis requires an analysis of whether the tax regime in question is justified by the logic of the tax system" (p. 159).

[45] *Commission Notice on the notion of State aid…* The above-mentioned article contains an assumption that is striking and could be relevant to the definition of the concept of limited profitability: "For this purpose, it should be noted that the measure needs to be in line with the basic or guiding principles of the Member State's tax system (by reference to the mechanisms inherent to that system). A derogation for cooperative societies in the sense that they are not taxed themselves as cooperatives can, for example, be justified by the fact that they distribute all their profits to their members and that tax is then levied on those individual members. In any event, the reduced taxation must be proportionate and not go beyond what is necessary. Moreover, appropriate control and monitoring procedures must be applied by the Member State concerned" (p. 160). This hypothesis is of interest because it shows that limited profitability is a legal situation that goes beyond the limitation of profit distribution, and extends to the obligation to set aside funds or reserves, to their application to specific needs of the company or to remunerate the services of the shareholders, for example.

[46] *Towards an appropriate…* 3.2.4

sector. The situation is all the more distressing if we bear in mind that these activities, insofar as they are promoted and encouraged by the public sector, are normally contracted with the competent public administrations on a flat-rate basis.

The impossibility of recovering VAT is a very significant cost for these cooperatives. It is true that there are many aspects to this issue that cannot be dealt with at this stage, but it is not less true that their consideration as companies with the right to deduct would alleviate this cost to a large extent. Therefore, this seems to be more a question of a political than a technical issue, since European VAT legislation provides for cases of the right to deduct for certain exempt transactions, since it seems that waiving the exemption would significantly harm the beneficiaries of the exemption, i.e. the service providers.[47]

The issue of investment and development incentives must also be considered from the perspective of cooperatives and other similar enterprises.

Nevertheless, current reality is that public support measures for private R&D&I investment activities (Research plus Development plus Innovation), as they are now structured, mainly favors large companies, because they have the greatest capacity and possibilities to carry them out. This creates competitive disadvantages for small companies. For this reason, the EESC *Opinion on Different forms of enterprise* calls for the introduction of special tax breaks for multiple R&D&I investments, refunds in the event of non-existent profits or losses.[48]

On the other hand, compensation for the social costs of their activity is an area where decision-making is as difficult as it is necessary.

The above-mentioned EESC *Opinion* is aware of this and approaches it by excluding questions of distortion of competition. Indeed, competition law also has to be fair, which means that there is no single model to ensure free competition. In fact, some competition policies are not exactly neutral and this calls for differentiating measures of a fiscal nature, among others.[49]

In this context, it is also important not to forget the cost for some of these companies, in particular cooperatives, of mandatory funds which are neither distributable nor recoverable in

[47] In Spain, the issue was discussed in administrative proceedings and the Central Economic Administrative Court (TEAC) denied the possibility of waiving the exemption provided for in Article 20.1.12 of the Spanish VAT Law 3771992, according to the interpretation of Article 13.1.A.1 of the then applicable Sixth Directive (TEAC Resolution of 29 March 2006).

[48] However, by far the most important impact of these programs is the way in which they can support the development of small and medium-sized enterprises specializing in R&D during the early years of their existence (EESC opinion on *Different forms of enterprise*, 1 December 2009, para. 4.5.2 in fine). Recently, see this comparative analysis of the taxation of profits in AGUILAR RUBIO, M. (2021): "Models for direct taxation of cooperatives under comparative law", in this *IJCL* number. The Spanish version can be found in "Los modelos de imposición directa de las sociedades cooperativas en Derecho comparado", en *Responsabilidad, economía e innovación social corporativa*, Marcial Pons, Madrid, 2021.

[49] On the basis of the consideration that some companies are subject to situations of competitive inequality for reasons unrelated to the production processes themselves and arising from market allocation failures, i.e. situations in which the market itself is inefficient, allocating resources in a sub-optimal way, the EESC "requests the Commission to encourage Member States to study the possibility of granting compensatory measures to enterprises on the basis of their confirmed public value or their proven contribution to regional development(p. 4.5.1).

the event of transformation, an obligation which is not incumbent on any other legal form of company.[50]

IV.- NEW WORKS AND PROJECTS ON COOPERATIVE LAW IN THE EUROPEAN UNION

9.- Can Something be expected for the European Tax Law on Cooperatives?

In recent months, the EESC has continued its activity with opinions and communications that tangentially affect cooperatives. The Commission, on the other hand, in its most important document in times of pandemic (the Communication *An Action Plan for Fair and Simple Taxation supporting the Recovery Strategy* of 15 July 2020), makes not the slightest mention of cooperatives. The scope of this work remains to be seen and will depend on the Commission's attitude in the coming months.

The EESC's *Opinion* on the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - *Sustainable Europe Investment Plan - European Green Deal Investment Plan* (COM(2020) 21 final) - makes only two mentions: a very brief one regarding the social economy in general, advocating coordination between the action plan foreseen in 2021 for these enterprises and the *Sustainable Europe Investment Plan* to involve social economy investment in the implementation of the *Just Transition Mechanism;*[51] the other one on the desirability of providing appropriate tax treatment for collective micro-finance to complement the stimulus policy.[52]

The next relevant document is the opinion *Strengthening non-profit social enterprises as an essential pillar of a socially equitable Europe*, INT/906,[53] in which the EESC calls for the specific strengthening and support of social enterprises and other social economy organizations, in particular those that reinvest their profits entirely in public interest or non-profit tasks, as set out in their statutes, and for their visibility across Europe to be enhanced.

On the other hand, the *Opinion* insists that a Protocol on the diversity of types of enterprises should be annexed to the TFEU, along the same lines as Protocol 26 on Services of General Interest (SGI), including a separate definition of non-profit social enterprises, and then the EESC also calls on Member States to include this review in the forthcoming reform agenda;

[50] In addition, from scientific sectors close to the social economy, other measures of no little importance are being suggested. Thus, for example, the *Report for the drafting of a law to promote the social economy,* produced by Ciriec-Spain, proposed, among other measures, the following: a) a tax policy to promote the incorporation of social economy entities (exemption or relief from tax on corporate transactions); and b) tax policies during the life of these entities (freedom of amortization, reduction of tax rates on company profits, among others). It also rejects that such tax policies have a negative impact on competition.

[51] *Opinion* on the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - *Investment Plan for a Sustainable Europe - A European Investment Plan for a Green Deal* (COM(2020) 21 final), p. 4.7.4.

[52] Ibidem, p. 1.14.

[53] Exploratory opinion, rapporteur Krzysztof Balon, plenary 18 September 2020.

finally, the document recommends raising the current threshold of the de minimis Regulation for state aid to EUR 800,000 per three-year period.[54]

At the end of 2020, in the Opinion *Industrial transition towards a green and digital European economy: regulatory requirements and the role of social partners and civil society*,[55] the EESC expresses the resilience of the social economy in the COVID-19 pandemic and claims its role in the way out of the crisis; recommends that the EU takes up its initiative on the large digital business tax, the financial transaction tax and the common consolidated corporate tax base; and calls for tax incentives for companies that invest in green initiatives with a social impact.[56]

The tax measures have been proposed by the December 2020 European Council. Some impact has also been made by suggestions regarding the social economy, which has already been the subject of a Commission roadmap under the name European action plan for social economy.

Recently the EC has published the document Business taxation for the XXI Century, which does not make any mention of cooperatives or the social economy. Although it is true that it is rather aimed at large companies, it cannot be forgotten that it is really a planning document for future European taxation.[57]

So, nothing new can be expected at this stage. Perhaps the most important thing now is to clarify the concept of limited profitability and to relate it to State aid. Other VAT and corporate taxation objectives are still to be achieved.

V.- CONCLUSIONS AND PROPOSALS

1st. For European law, cooperatives are included among capital companies, as opposed to non-profit entities. This dichotomy of forms of enterprise - established in the TFEU for the purposes of the right of establishment - does not correspond to the reality of the forms of enterprise known in Europe, nor does it guarantee the principle of neutrality of forms of ownership also recognised in the Treaty. Cooperatives should also be distinguished from purely social entities or enterprises, which are completely non-profitmaking.

2nd. Cooperatives are subject to statutory limitations which place them in a situation of inferiority compared to capitalist companies. This inferiority should be corrected through measures which, while recognising the value of this type of enterprise and the role it plays in society, allow them to reasonably balance their position.

[54] EESC Opinion *Strengthening non-profit social enterprises as an essential pillar of a socially equitable Europe, INT/906*, p. 1.1, 1.3 and 1.6.
[55] EESC Exploratory Opinion, rapporteur Lucie STUDNIČNÁ, adopted at plenary on 2 December 2020.
[56] *Ibidem*, p. 1.3, 2.8, 4.3, 9.3 y 9.5
[57] Communication from the Commission to the European Parliament and the Council: *Business Taxation for the 21st Century*, COM (2021) 251 final, 18.5.21

3rd. Any special tax regime applied to a sector or a group of companies will always be subject to review and will be continually called into question. European law, under Article 107 TFEU, is an unavoidable reference framework in this regard. The Commission's efforts to characterize the concept of state aid are commendable, as is the desirability of further developing it.

4th. In general, cooperatives are conditioned by a legal regime which places them at a disadvantage compared to capitalist companies. If cooperatives manage to achieve high levels of competitiveness with other economic operators, the current state of development of the European Union will only allow them to comply with the requirements of neutral competition. In a scenario of neutral competition, the limitations inherent in the very essence of the legal and economic regimes specific to these entities would have to be reconsidered, as it would be difficult for those that currently regulate them to provide them with the agility required to compete on a level playing field.

5th. The limited profitability category is a reasonable alternative to provide social economy enterprises and cooperatives once and for all with a legal and fiscal regime that distinguishes them and that is sufficiently clear and precise to be accepted peacefully and not continually called into question. Therefore, its general interest is evident and it should be defined and developed normatively without delay.

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