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CRITICAL PROFILES OF THE TREATMENT OF SOCIAL COOPERATIVES IN THE ITALIAN TAX SYSTEM

Maria Grazia Ortoleva

Abstract

Under Italian law, social cooperatives governed by Law no. 381 of 8 November 1991 benefit from particularly advantageous fiscal rules, which have been specifically conceived in accordance with that provision's "mutualistic" purpose. The reform of the third sector also introduced rules on social cooperatives. Specifically, such entities are classified as social enterprises ope legis and are also referred to as third sector entities. However, it is not clear whether that classification will have any consequences for the tax regime applicable to them. The aim of this paper is first and foremost to verify whether any aspects of the legislation on social cooperatives, including provisions on tax, have been affected by the reform mentioned above, and if so which ones. Secondly it will also seek to establish whether the tax regime applicable to social cooperatives is consistent with the role performed by them within the third sector.

1. Introduction

The social cooperative has always been regarded as the *trait d'union* between the world of enterprises (albeit in cooperative form) and that of non-profit organisations. Indeed, from the time it was first introduced into Italian law, it has been defined within authoritative commentaries in the literature as the primordial form of the social enterprise.[1]

In redrawing the limits to the overall domain of non-profit entities, the reform of the third sector laid down by Legislative Decree no. 117/2017 (hereafter, the Third Sector Code or TSC) and Legislative Decree no. 112/2017 on social enterprises[2] also made provision in relation to social cooperatives (hereafter SC). In particular SC – which were already regarded *ex lege* as non-profit social utility organisations (hence the Italian acronym "Onlus" [*organizzazioni non lucrative di utilità sociale*])[3] – are not only classified as a "social enterprise *ope legis*" but are also designated as third sector entities. These are private entities that have been established in order to pursue "civic, solidarity and social utility purpose[s] without any profit motivation" by "carrying out, either exclusively or on a predominant basis, any activity or activities of general interest through voluntary action or the provision without consideration of cash, goods or services, mutual action, or the production or exchange of

[1] Cf. Fici A., *Impresa sociale* (entry), in *Dig. disc. priv.*, *Sez. civ., agg.*, Turin, 2007, 12 et seq., 13.

[2] Those decrees were issued in order to implement Law no. 106 of 6 June 2016, by which Parliament granted authority to the Government to regulate the overall non-profit sector from a private law and tax law perspective with the specific purpose, "giving effect to Articles 2, 3, 18 and 118(4) of the Constitution", of sustaining private initiatives aimed at satisfying essential public interests and realising objectives guaranteed under the Constitution.

[3] According to the combined provisions of Articles 102(2) and 104(2) of the TSC, the tax classification of Onlus will be revoked with effect from the tax period following that in which the new tax provisions laid down in Title X of the TSC enters into force. During the transition period, an entity included in the register of Onlus may continue to apply the tax provisions laid down by Legislative Decree no. 460 of 1997, provided that it fulfils the formal and substantive prerequisites specified in that Decree.

goods or services, provided that the entity has been included in the single national register for the third sector".[4]

However, it is not clear whether that classification, which appears to be consistent with the role that SC have performed within the Italian economic and social fabric, and in particular, from 2008 onwards, within welfare policy,[5] will have any consequences for the tax regime applicable to them. In fact, in contrast to the previous legislation laid down in Legislative Decree no. 155/2006, Legislative Decree no. 112/2017 on the "new" social enterprise introduced a specific tax regime[6] for entities with the status of social enterprise.[7]

This paper is intended first and foremost to verify whether any aspects of the legislation on social cooperatives, *including* provisions on tax, have been affected by the reform mentioned above and, if so, which; and secondly, to establish whether the tax regime applicable to SC is consistent with the role performed by them within the third sector. With this in mind, it is necessary to start by identifying the defining characteristics of SC from a private law perspective, with reference to which they have been granted "favourable" tax status since the outset.

2. The characteristics of social cooperatives

The institute of the social cooperative was established in the Italian legal system by Law no. 381 of 8 November 1991. This Law is regarded as a precursor for a line of legislation which, over the past thirty years, has pursued the purpose of promoting organisations active in sectors considered to be of "general interest".[8] This has culminated most recently in the reform of the third sector and, insofar as relevant for our present purposes, in the classification of SC as third sector entities (hereafter TSE) as social enterprise *ope legis*.

The enactment of Law no. 381 was a key development since, in making provision for SCs, the law recognised for the first time the compatibility of corporate status with a purpose rooted in solidarity,[9] or a purpose that is neither dictated by profit nor mutual.

The distinguishing feature of this institute compared to the model of a cooperative company provided for under the Civil Code is in fact the purpose that it pursues. The purpose of such an entity is not "mutual" in a strict sense (i.e. service management for the members), but consists in the pursuit of the "general interest of the community in human promotion and the social integration of citizens".[10] The law expressly provides that this interest must be

[4] Cf. Article 1(1) of Law no. 106 of 6 June 2016 and Article 4 of Legislative Decree no. 117/2017.
[5] Cf. Bancone V., *Le cooperative sociali, al tempo del Coronavirus, meritano dignità*, in *Cooperative e enti non profit*, 2020, 5, 13 et seq.
[6] This tax regime has not yet entered into force, pending authorisation by the European Commission pursuant to Article 108(3) TFEU.
[7] Eligibility for the regime is specifically granted to all private entities (including those established in partnership form) and moreover the "nature" whether commercial or not) of the activity carried out that generates income is immaterial for the purpose of taxation.
[8] Cf. Marasà G., *Imprese sociali, altri enti del terzo settore, società benefit*, Turin, 2019, 81.
[9] Cf. Martinelli L. - Lepri S., *Le cooperative sociali*, Milan 1997, 17 et seq, who define social cooperatives as an initial typical codified form of social enterprise.
[10] On this point see Court of Cassation, Employment Division, judgment no. 8916 of 11 May 2004 in which the court – relying on the fact that the notion of cooperative mutuality must ordinarily be deemed to include also "*external mutuality*", that is a form of mutuality "*che trascende (...) gli interessi immediati dei soci*" – argues that social cooperatives on the one hand "*perseguono, al pari di ogni altra società cooperativa, lo scopo mutualistico*", although

realised alternatively[11] through: a) the "management of social, health and educational services", the scope of which activities was clarified within the context of the reform of the third sector, and include for example "non-school education aimed at preventing school dropout, achieving success within school and training, preventing bullying and combatting educational poverty"[12] (known as "type A" cooperatives); b) the conduct of various activities (agricultural, industrial, commercial or services) aimed at job promotion for disadvantaged persons as defined under Article 4 of Law no. 381 (known as "type B" cooperatives).

In particular, the legislation identifies two different models for social cooperatives which, whilst sharing the same institutional purpose and whilst being regulated in part by the same core legislation,[13] differ in functional and structural terms owing to the differences between their social objects.[14]

SC from type A are considered to be more distant from the standard civil law model as they may in some cases entirely lack a mutual purpose. According to the prevailing interpretation, since the recipients of health and social services are not identified by the law, which refers to the category of "members", they may be – even exclusively – non-members.[15]

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on the other hand "*perseguono o concorrono a perseguire ... l'interesse generale della comunità alla promozione umana e all'integrazione sociale dei cittadini*". See for the same argument Court of Cassation, judgment no. 17252 of 27 June 2019, holding that "*la cooperativa sociale è una società a mutualità prevalente, ossia che svolge la sua attività soprattutto con il lavoro e i beni dei soci e a favore soprattutto dei soci. Lo scopo quindi è quello della solidarietà sociale e per questo hanno diritto alle agevolazioni fiscali previste dalla legge*". This thesis is criticised by Salamone L., *Cooperative sociali e impresa mutualistica*, in *Riv. soc.*, 2007, 2-3, 500, who argues that "*la formula 'mutualità esterna' − nell'accezione e nell'uso argomentativo della Cassazione − è del tutto vuota di significato*". According to the author, "le cooperative sociali seguono *tanto il modello organizzativo quanto il modello funzionale della cooperativa del codice civile".* It is argued that the SC is "*una impresa mutualistica esercitata in forma di società cooperativa, poiché sia le cooperative comuni sia le cooperative sociali hanno per scopo la gestione di una impresa con programma mutualistico*"; the values of social inclusion − which enter into play as special criteria for managing the undertaking − constitute *the political basis justifying beneficial status for tax purposes (Article 7 l. 381/1991; Article 111*-septies *of the Provisions implementing the Civil Code and Transitory Provisions) as well as for social security purposes (Article 2(3) and Article 4(3) of Law 381 of 1991)*; and finally that "*la 'mutualità esterna' delle cooperative sociali, per usare la formula enfatica della Cassazione, vale a dire la utilità che i non soci possono ritrarre dall'attuazione del rapporto sociale in una società cooperativa, resta estranea al codice civile e guarda, al vertice, all'art. 45 Cost.; esattamente come vi guarda il sistema dei fondi mutualistici per la promozione e lo sviluppo della cooperazione, istituito dalla l. 59/1992*".

[11] It has been provided that social cooperatives may only operate in one of the following sectors. This rule does not apply in the event that the two activities are functionally related to each other; in such cases however, it is necessary to report the accounts relating to the two activities separately in the financial statements. Cf. Employment Ministry circular no. 153 of 8 November 1996.

[12] Cf. Article 17(1) of Legislative Decree no. 112/2017, which provides that social, health and educational services also include those (activities) of general interest provided for under Article 2(1)(a), (b), (c), (d), (l) and (p) of Legislative Decree no. 112/2017. That amendment has formally expanded the scope of the activities that may be carried out by type A cooperatives. Specifically, it amounts to an "update" of those activities in order to take account of the evolution of activities involving the provision of social, health and educational services. On the other hand, the operational scope of type A cooperatives was expanded under previous special legislation, for example in the area of social agriculture (Article 2(4) of Law no. 141 of 2015) as well as on the re-purposing of assets confiscated from organised criminals, which may be allocated to social cooperatives according to Article 48 of Law no. 159 of 2011.

[13] This core is comprised in part of the provisions of the Civil Code, which are applicable to all SC as entities from the cooperative genus, and in part of the special provisions enacted by Law no. 381 and the implementing regional legislation.

[14] Cf. Bano F., *Cooperative sociali* (entry), in *Dig. disc. priv., sez. comm.*, IV, Turin, 2000.

[15] On this point it has been noted in the literature that "*la legge nulla dice circa i destinatari dei servizi, ma deve ad ogni modo ritenersi che le cooperative si rivolgano, in linea di massima, a soggetti terzi*". Cf. Bano F., *Cooperative sociale* (entry), cit., who also points out that this aspect has called into question the mutual purpose of SC and the equivalence granted to cooperatives the purpose of which is to satisfy the special needs of non-members. According to the author by contrast, the special characteristic of SC consists in the "*tipizzazione legale di finalità altruistiche quale componente essenziale, ancorché non esclusiva, della causa del contratto. In questo senso si parla spesso delle c.s. come di 'imprese sociali' ove la buona gestione ed il profitto non rappresentano il fine, bensì la condizione per massimizzare l'utilità sociale*".

On the other hand, type B cooperatives are similar to production and labour cooperatives, except as regards the obligation to promote the entry of disadvantaged persons into the world of employment. In fact, they may carry out any type of activity whatsoever (and thus may be agricultural, craft, industrial or commercial), provided that the "disadvantaged persons" (for example, former prison inmates or former drug addicts, disabled persons, persons suffering from psychiatric illness, etc.)[16] account for at least 30% of the cooperative's workers. In actual fact however, type B cooperatives may also operate for the benefit of non-members, albeit to a lesser extent, since the "disadvantaged persons" who benefit from the activity carried out must also be members of the cooperative only where compatible with their individual status (i.e., essentially, where they are of sound mind).[17] Effectively some of those who benefit from the activities carried out may not be members[18].

Owing to the possibility of conducting activities for the benefit of non-members, there were initial doubts as to the legitimacy of this type of cooperative, in particular in relation to type A cooperatives, due to the absence of any mutual purpose.

Those doubts proved to be clearly unfounded since, as has been pointed out in the literature, the social function of cooperatives, which is recognised and protected first and foremost by Article 45 of the Constitution,[19] "may prove to be even greater where the cooperative is designed in order to pursue the general interest of the community".[20]

Proof of this can be found in the fact that, since the reform of the Civil Code in 2003, SC have been regarded as equivalent to cooperatives that operate predominantly for the benefit of their members (known as "predominantly mutual cooperatives", hereafter PMC). As a result, they have been considered eligible for the tax benefits provided for in relation to PMC. This is the case in particular under Article 111-*septies* of the Provisions implementing the Civil Code, according to which – subject to compliance with the requirements laid down by Law no. 381 of 1991 – social cooperatives are considered to be PMC irrespective of the prerequisites stipulated under Articles 2512 and 2513 of the Civil Code.[21] In other words,

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[16] On this point see Marasà G., *Cooperative e ONLUS*, in *Studium iuris*, 1998, II, 913, especially 919, who argues that, whilst type A cooperatives are "*vere e proprie cooperative di solidarietà sociale che ... producono servizi (socio-sanitari ed educativi) destinati a soggetti diversi dai cooperatori al fine di realizzare l'interesse generale della comunità*", the latter pursue "*l'obiettivo ..., tipicamente mutualistico, di favorire le occasioni di lavoro per particolari soggetti, cioè persone svantaggiate*" and can essentially be classified under the category of production and labour cooperatives. Owing to these characteristics, the "*realizzazione di qualsiasi finalità economica da parte dei cooperatori*" must be excluded for the former, whereas it is possible to envisage some remuneration, subject to pre-determined limits, on the capital of the latter.

[17] Cf. Pepe F., *La fiscalità delle cooperative. Riparto dei carichi pubblici e scopo mutualistico*, Milan, 2009, 255 et seq; Id., *Note in tema di società cooperative, cooperative sociali e regime fiscale Onlus (con cenni alla neonata "impresa sociale")*, in *Riv. dir. trib.*, 2007, I, 827 et seq, especially 838, where the author clarifies that "*il secondo modello di SC prescinde dalla gestione mutualistica del rapporto di lavoro, ben potendo sussistere una SC che assume esclusivamente persone svantaggiate-non socie, senza per questo perdere tale qualifica"*, since *"non necessariamente, ..., essi debbono essere soci della cooperativa, ma solo ove ciò sia compatibile con il loro status psico-fisico*".

[18] To sum up, whereas the class of persons who benefit from the activities of type A cooperatives may be comprised entirely of non-members, this cannot be the case for type B cooperatives.

[19] It should be recalled that this provision "*riconosce la funzione sociale della cooperazione a carattere di mutualità e senza fini di speculazione privata*" and reserves the task of promoting and favouring it to ordinary legislation.

[20] See Fici A., *Funzione e modelli di disciplina dell'impresa sociale in prospettiva comparata*, in *Jus civile*, 2015, 9, 473 et seq, especially 498, who argues that "*Chi a quel tempo in Italia cercava una forma giuridica per l'impresa sociale poté dunque facilmente rintracciarla nella forma cooperativa, di cui solo andava modificato legislativamente lo scopo*".

[21] This is not the only exception to the rule according to which a prerequisite for classification as a predominantly mutual cooperative is that activities must be carried out predominantly for members in accordance with Articles 2512 and 2513 of the Civil Code This also applies for agricultural cooperatives (Articles 2513(3) of the Civil Code and Article 111-septies of the Provisions implementing the Civil Code), for cooperative lending banks (Articles 28(2-bis)

they have this status irrespective of whether they in actual fact operate predominantly for the benefit of their members as required under those provisions[22] or not. The reasons for the result of this provision may be identified, on the one hand, in their specific structural characteristics[23] and, on the other hand, in the purposes pursued through the conduct of the predominant activity.[24]

Moreover, further definitive confirmation of the social function inherent to SC may be found within the reform of the third sector. On that occasion, lawmakers in fact provided, first of all (i.e. in Legislative Decree no. 112/2017), that "social cooperatives and their consortia … shall have *as of right* the status of social enterprises",[25] and secondly (i.e. in TSC) that they form part of the third sector and therefore must be included in the single national register (abbreviated in Italian to RUN [*registro unico nazionale*]) in the section for "social enterprises".[26]

This reform did not actually entail any substantive change to the characteristics typical of SC since, under this legislation, social cooperatives *only* qualify as social enterprises *ope legis* upon condition that they respect the specific legislation set forth in Law no. 381; it is not therefore necessary to verify whether the essential prerequisites for acquiring that status are fulfilled by them, as by contrast occurs for all other types of bodies.

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and 150-bis(4) of the Consolidated Finance Act) and for agricultural consortia. Lawmakers have moreover provided for the power of ministers to allow exceptions from the criteria of predominance laid down by Article 2513 of the Civil Code (Article 111-undecies of the Provisions implementing the Civil Code). This legislative choice has been criticised by Marasà G., *L'odierno significato della mutualità prevalente nelle cooperative,* in *Giurisprudenza commerciale*, 2013, 5, 847, according to whom "*In sintesi, quello che avrebbe dovuto essere uno degli obiettivi qualificanti della riforma, cioè restringere l'ambito di applicazione delle agevolazioni fiscali, subordinandole non più, come in passato, alla presenza delle sole clausole statutarie 'antilucrative' ma anche ad una verifica in punto di fatto, di un adeguato livello di mutualità, inteso come gestione dell'impresa prevalentemente in direzione dei soci, è stato parzialmente svuotato di significato nello stesso momento in cui è stato introdotto e ciò a causa della previsione di numerose eccezioni*".

[22] However, this is without prejudice to the requirement to include within its articles of association the clauses provided for under Article 2514 CC (the overall purpose of which is to establish a profit distribution constraint). These clauses include a prohibition on the distribution of reserves amongst the cooperative members as well as the duty to distribute all of the cooperative's assets to mutual funds for the promotion and development of cooperation in the event that the cooperative is wound up. In addition, Article 2514 CC provides that the articles of association must include a prohibition on the distribution of dividends in an amount exceeding the maximum interest rate on interest-bearing postal savings bonds, increased by two and a half percentage points, on the capital actually paid up as well as a prohibition on remunerating financial instruments subscribed to by cooperative members by more than two points in excess of the maximum limit stipulated for dividends.

[23] Cf. the report on the Legislative Decree no. 6/2003, which asserts that, since the structure of SC may differ from the protected model generically construed by virtue of the way in which the prerequisite of predominance applies under it, there is a need for their classification to be established by law, as is the case for PMC.

[24] On this point, see Fici A., *Cooperative sociali e riforma del diritto societario,* in *Riv. dir. priv.,* 2004, 75 et seq spec. 79 et seq, who argues that, in enacting this provision, the lawmakers adopting the reform embraced the notion of the SC as a "special" cooperative that is profoundly different from the civil law model as it is no longer directed at the members as such, but rather at a particular category of persons. The author states in particular that, in contrast to ordinary cooperatives, SC are causally characterised by "external" mutuality and that this special feature of theirs, which operates on a causal level, has established a specific legitimation for SC on a normative level , which would not otherwise be admissible under the provisions contained in the Code. On the meaning of the provision under examination see also Marasà G., *L'odierno significato della mutualità prevalente nelle cooperative*, cit., 850, who stresses that, as a result of that provision, this classification also applies to social cooperatives provided for under Article 1(1)(a) of Law no. 381 of 1991, which do not manage any services for the benefit of members but rather provide social, health and educational services for non-members.

[25] See Article 1(4) of Law no. 112/2017.

[26] Specifically the TSC refers to SC first and foremost in Article 4)(1) and Article 46(1)(d) in order to clarify what can already be inferred from their status as social enterprises.

More specifically, according to the majority doctrine, by virtue of this rule the social cooperative should not be regarded as equivalent to a social enterprise.[27] Thus, all SC should *automatically*, as such, also have the status of social enterprises.[28]

This thesis appears to be supported by the implementing provisions contained in the Ministerial Decree of 16 March 2018, Article 3 of which provides that "*social cooperatives and their consortia pursuant to Article 1(4) of Legislative Decree no. 112 of 2017 shall have as of right the status of social enterprises by the exchange of data between the register of social cooperatives and the register of companies*". Essentially, on account of that provision, all social cooperatives included in the register of cooperatives are thus entered *ex officio* into the special section of the register of companies reserved for social enterprises, without having to wait for the entity to state its intention to avail itself of the new provisions.

However, as has been noted in some particularly sharp analysis within the literature, if the provision under examination is interpreted in this manner, it means that this status is not acquired "as of right" but rather "as an obligation".[29] It has been argued that this interpretation is at odds with the "promotional", as opposed to "authoritative", nature of the provisions governing social enterprises, and more generally the wider law on TSE.[30] Based on these observations, it would perhaps have been more appropriate to subject the acquisition of status as a social enterprise to the presentation by the SC of an application for inclusion in the RUN in the section intended for social enterprises.[31] This is because such registration now has the effect of establishing classification as a third sector body.

Leaving aside these considerations, it is clear that the reform has consolidated, and in some respects "expanded", the favourable treatment of social cooperatives that had been provided for in the past, *inter alia*, within the provisions on Onlus and social enterprises.

Legislative Decree no. 460/97 laid down the tax rules applicable to Onlus – in an analogous manner to Legislative Decree no. 112. Specifically, it foresaw that Onlus are "automatically" be classified as SC (Article 10(8) providing that "The social cooperatives

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[27] See Cusa E., *Le cooperative sociali come imprese sociali di diritto*, *Studio del Notariato 205-2018/I*, 2 et seq., in https://www.notariato.it.

[28] See further Fici A., *La nuova impresa sociale*, in *La riforma del terzo settore e dell'impresa sociale,* edited by Fici, Naples, 2018, 343 et seq, spec. 354 where the author asserts that there is no requirement in relation to social cooperatives for "*un'apposita iscrizione al RUN, poichè i relativi dati transiteranno verso quest'ultimo registro dal registro delle imprese presso il quale, in quanto società cooperative, sono tenute ad iscriversi*", also stressing that this provision is "*in linea con quanto previsto nella legge delega*" and in particular that it was the "*intenzioni del legislatore delegante che ha voluto migliorare la situazione delle cooperative sociale rispetto alla previsione di cui all'Article 17, comma 3, dell' abrogato Legislative Decree 155/2006 che riservava 'di diritto' la qualifica di imprese sociali alle sole cooperative sociali che osservassero le disposizioni … sull'obbligo di redazione del bilancio sociale e sul coinvolgimento di lavoratori e destinatari dell'attività*".

[29] See Marasà G., *Imprese sociali, altri enti del terzo settore, società benefit*, cit., 87-88, who argues that the opposite interpretation is not supported by the literal wording of the law.

[30] Cf. De Giorgi M.V., *Note introduttive*, in *La nuova disciplina dell'impresa sociale, Commentario al d.lgs. 24 Marzo 2006, n. 155*, edited by De Giorgi M.V., Milan, 2007, 2 et seq. According to the author, the most important characteristic of the legislation enacted in order to provide support for cooperatives is "*l'assenza di carattere autoritativo, nel senso che la condotta non è imposta ma suggerita: ciò che qualifica la legislazione promozionale è la libertà di rinunziare all' utilizzazione della norma senza subire conseguenze civili penali o amministrative*".

[31] See further Marasà G., *op. ult. loc. cit.*, who argues that "*la richiesta dell'iscrizione si configura per gli enti che aspirano alla qualifica come un onere dal cui assolvimento dipende, qualora l'iscrizione sia conseguita, la possibilità per l'ente di fruire della disciplina di favore che discende dalla qualifica di ente del terzo settore*". According to the author, Article 1(4) does not permit "*una conclusione diversa per le sole cooperative sociali ma avrebbe soltanto il significato di esonerare le cooperative sociali da quella verifica in ordine alla sussistenza dei requisiti di qualificazione propri delle imprese sociali, cui sono invece sottoposti tutti gli altri enti*".

provided for under Law no. 381 of 8 November 1991 … shall *under all circumstances* have the status of Onlus, having regard to their structure and purposes"[32]), although the effects were relevant exclusively for tax purposes.

On the other hand, Legislative Decree no. 155/2006 (which, as mentioned above, regulated social enterprises) did not enable SC to acquire that *status* automatically, although it did allow it subject to conditions that were less onerous compared to those applied to other bodies. Specifically, it subjected the acquisition of that status solely to two prerequisites, both of which pertained to the issue of the corporate social responsibility. In particular, the charters of social cooperatives had to provide both for the preparation of social accounts and the filing of those accounts with the register of companies (Article 10(2)) as well as the "involvement" of workers and beneficiaries of activities (Article 12(2)).

In keeping with the guidelines laid down by the parent statute, the provisions contained in Legislative Decree no. 112/2017 are thus more favourable for SC, as these last-mentioned conditions would appear to be no longer applicable.[33] It should be reiterated that, as a result of the amendment, the acquisition by SC of the status of a social enterprise is not conditional upon the fulfilment of any obligation, including those relating to the object and purpose of the social enterprise. In particular, the scope of permitted activities remains that set out by Article 1 of Law no. 381 (as amended by Legislative Decree no. 112) and under other special legislation,[34] and as a result only overlaps in part with the scope of the activities of general interest listed in Article 2 of Legislative Decree no. 112, which must as a general rule be conducted by entities that wish to acquire the status of social enterprise.[35] As regards the purpose, or rather the absence of the purpose of distributing profits, the provisions of Article 2514 of the Civil Code that are applicable for social cooperatives are essentially equivalent to those laid down by Article 3 of Legislative Decree 112 for IS, and only differ in marginal respects. However, this does not imply that the conduct of a social enterprise in the form of an SC is entirely equivalent to the conduct of the same enterprise according to a different corporate structure. In fact, as a result of the refund mechanism provided for under Article 2545-*sexies* of the Civil Code, the pecuniary benefits for members of SC may nonetheless be greater than those obtained by the members of other types of social enterprise, including the members of cooperatives other than SC. This is because these cooperatives should not be subject to the provisions laid down by Article 3(2-*bis*) of Legislative Decree no. 112, which expressly provides that the prohibition on distribution does not apply to distributions to members *only* of refunds resulting from the conduct of activities of general interest as well as from the part of activities that has been conducted on a mutual basis.[36] Essentially, in contrast

[32] There was not even any requirement to register in the single register of ONLUS in order for ONLUS to qualify as SC.
[33] In fact, doubts remain as to whether there is an requirement to draw up social accounts.
[34] See note 5.
[35] Cf. Article 1(4), second paragraph, of Legislative Decree 112 of 2017, which expressly provides that the provisions on SC are without prejudice to "*l'ambito delle attività di cui all'articolo 1 della citata legge n. 381 del 1991, come modificato ai sensi dell'Article 17, comma 1*".
[36] Cf. Article 3(2-bis) of Legislative Decree 112/2017, which was introduced by Legislative Decree no. 95/2018 provides that "*non si considera distribuzione, neanche indiretta, di utili ed avanzi di gestione la ripartizione ai soci di ristorni correlati ad attività di interesse generale di cui all'articolo 2, effettuata ai sensi dell'art. 2545-sexies del codice civile e nel rispetto di condizioni e limiti stabiliti dalla legge o dallo statuto, da imprese sociali costituite in forma di società cooperativa, a condizione che lo statuto o l'atto costitutivo indichi i criteri di ripartizione dei*

to the rule laid down by paragraph 2-*bis* for other social enterprises operating in cooperative form, social cooperatives may distribute refunds pursuant to Article 2545-*sexies* without being subject to any further limitation.[37]

That conclusion is supported by the provision that Legislative Decree no. 112 is applicable to SC "subject to the specific legislation on cooperatives and insofar as compatible".[38]

In enacting that provision, lawmakers appear in fact to have established a kind of hierarchy between sources that are valid only for SC. At its apex stands Law no. 381/1991, which without doubt prevails over Legislative Decree no. 112/2017, as is confirmed by Article 40(2) TSC.[39] In view of the literal wording of the provision, and in particular the reference to the legislation on cooperatives, second place in that hierarchy is taken by the legislation common to predominantly mutual cooperatives (which is largely contained in the Civil Code). This is followed in third place by the provisions on social enterprises in Legislative Decree 112. The application of the above legislation is moreover subject to the precondition that the rules provided for thereunder must not be incompatible either with those contained in Law no. 381 or with those laid down by the Civil Code. Accordingly, the legislation is *de facto* applicable only as regards those aspects that are not foreseen under the law on cooperatives, provided in all cases that they are compatible with the special legislative system applicable to cooperatives. Finally, in last place are the provisions of the TSC, which according to Article 3(1) apply, "unless set aside and insofar as compatible, also to categories of third sector entity[ies] that are subject to special legislation".[40]

In conclusion, in the light of this tiered applicability of the legislation the literature is, generally speaking, substantially in agreement in asserting that the provisions of Legislative Decree 112, which set out rules for classifying social enterprises, are not applicable to SC,[41] and that accordingly the object, purpose and structure of SC are those provided for under Law no. 381. In other words, as has been succinctly put in the relevant literature, if "the 'soul' of SC is one of a social enterprise, its 'body' remains that of a cooperative".[42]

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ristorni ai soci proporzionalmente alla quantità e alla qualità degli scambi mutualistici e che si registri un avanzo della gestione mutualistica".

[37] Cf. Marasà G., *op. ult. cit.*, 92, note 25.

[38] Cf. Article 1(4), second paragraph, of Legislative Decree 112/2017.

[39] Provision is also made to this effect by Article 40(2) of Legislative Decree no. 117 of 2017, according to which "*le cooperative sociali e i loro consorzi sono disciplinati dalla legge 8 novembre 1991, n. 381*".

[40] For the sake of completeness, it should be pointed out that the hierarchy of sources applicable to cooperatives that acquire the status of a social enterprise is different. According to Article 1(5) of Legislative Decree no. 112 of 2017, these are governed in the first instance by Legislative Decree no. 112 of 2017, then by the provisions of the TSC that are compatible with Legislative Decree no. 112, and finally, "*in mancanza e per gli aspetti non disciplinati*," by the provisions of the Civil Code and the related implementing provisions on cooperatives.

[41] It must however be pointed out that it is not entirely clear which provisions have that status.

[42] Cf. Fici A., *Funzione e modelli di disciplina dell'impresa sociale in prospettiva comparata*, cit., 499 et seq . According to the author, leaving aside the features that are common to all social enterprises (including in particular the full or partial constraint on the distribution of profits and the disinterested allocation of the residual assets in the event of dissolution), a social enterprise with cooperative status also operates as a democratic social enterprise.

3. The income tax framework for SC

The characteristics of social cooperatives described above have had direct implications on the tax regime applicable to them since the enactment of legislation providing for this type of entity.

Starting from the premise that social cooperatives do not compete with non-profit-making companies and that they play an important role in implementing the principle of subsidiary, lawmakers have granted and continue to grant preferential tax treatment compared to other types of PMC. In fact, they qualify for all arrangements provided for in relation to PMC without however, as mentioned above, being subject to any requirement of predominance foreseen under Articles 2512 and 2513 of the Civil Code. Moreover, depending on their actual operations and provided that specific prerequisites are met, SC are eligible to benefit from the more favourable tax arrangements foreseen under Articles 11 et seq of Decree of the President of the Republic no. 601/73.[43]

Focusing the analysis specifically on the measures provided for in relation to PMC, it should be noted that SC, as is the case for all cooperative companies, are subject to corporate income tax (imposta sul reddito delle società, abbreviated to IRES[44]) and calculate their taxable income as a rule (i.e. unless specified otherwise[45]) according to the ordinary criteria applicable for determining the corporate income of resident capital companies. Specifically, they are subject to the rules both on taxation of profits and the deductibility of interest payments on loans provided by members, as well as on the tax treatment of rebates.[46]

As far as the treatment of operating profits is concerned, with the specific purpose of promoting the self-financing and capitalisation of cooperatives, under Article 12 of Law no. 904/1977 lawmakers initially provided a complete exclusion from taxation for any profits allocated to non-distributable reserves, foreseeing that "it is not possible to distribute them amongst the members in any form, either during the lifetime of the entity or following its dissolution".[47]

That provision takes full account of the effective allocation of profits by cooperatives, also in view of the constraints imposed by the law. However, its scope has been progressively reduced over time not only in order to take account of changes to the system for taxing corporate entities,[48] but presumably also in the conviction that the detaxation of reserves

[43] See for instance the exclusion from IRES granted to production and labour cooperatives and consortia thereof, upon condition that "*l'ammontare delle retribuzioni corrisposte ai soci*" is not "*inferiore al 50% dell'ammontare complessivo di tutti gli altri costi tranne quello relativo alle materie prime e sussidiarie*". If this percentage falls between 50% and 25%, IRES is reduced by half (Article 11 of Decree of the President of the Republic 601/1973). There is no need for the social employment cooperative to fulfil the prerequisite that the work of the members must account for a predominant share of the total cost of labour pursuant to Article 2513(1)(b) CC because, as mentioned above, SC are still regarded as PMC under the law.

[44] Cf. Article 73 of Decree of the President of the Republic no. 917/86 (hereafter TUIR); in addition, according to Article 3(1)(a) of Legislative Decree no. 446/97, they are liable to the regional production tax (*imposta regionale sulle attività produttive*, IRAP) at an ordinary rate of 3.90% (which may be increased by the regions by up to a maximum of 0.92%), the taxable base for which (the "net value of production") is different from that used for IRES.

[45] Cf. Article 75(1) TUIR.

[46] These are amounts that are allocated to members by way of the ex post allocation of mutual benefits.

[47] A clause must therefore be included within the Charter or in the Memorandum (if comprised within one single instrument) prohibiting the distribution of reserves in any manner, both during the lifetime of the entity and following its liquidation.

[48] See the reform of the TUIR provided for under Legislative Decree no. 344/2003, which introduced the new corporation tax (IRES) to replace the previous income tax for legal persons (imposta sul reddito delle persone giuridiche, IRPEG).

amounted to "favourable treatment liable to alter the competitive equilibrium between enterprises with different legal status".[49]

These changes thus only applied to SC to a limited extent.

With effect from 2012,[50] those bodies become liable to a 10% tax on any portion of the profits allocated to the legal reserve; the amount allocated must not be lower than thirty percent of the net annual profits "irrespective of the value of the legal reserve".[51] On the other hand, under the terms of an express statutory provision,[52] the further restrictions on the detaxation of profits allocated to non-distributable reserves, which were provided for in relation to PMC in general under the finance laws for 2005 and 2009[53] do not apply to SC. These finance laws foresaw that Article 12 should only apply to a specific portion of the annual profits, which varies depending on the type of activity carried out by the PMC.

In addition, the share of the net annual profits that must be paid to mutual funds for the purpose of promoting and developing cooperative relations is deductible in full.

Therefore, in contrast to other PMC – except in relation to the 10% taxation of the share of the net annual profit allocated to the mandatory minimum reserve[54] – SC continue to benefit from the full exclusion from income tax foreseen under Article 12 in respect of any amounts allocated to un-distributable reserves. They also benefit, where the prerequisites are met, from the exclusion provided for under Decree of the President of the Republic no. 601/73.

As regards interest payable on loans from members, which are regarded as capital contributions paid by members to cooperatives and usually repayable over the short to medium term ("social loans"), this interest is not deductible in full for cooperatives – as is the case for capital companies – but only in part. However, the provisions laid down for cooperative companies differ entirely from those applicable to capital companies.[55] This difference in treatment is because the provisions are based on the premise (which has moreover been departed from following the reform of company law) that the cooperative is

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[49] See Paladini R. - Santoro A., *Il ruolo economico delle riserve indivisibili*, in *La disciplina civilistica e fiscale della "nuova" cooperativa*, edited by Uckmar-Graziano, Padua, 2005, 158. This is also supported by the heading to Article 6 of Decree-Law no. 63/2002, entitled "*Progressivo adeguamento ai principi comunitari del regime tributario delle società cooperative*".

[50] Cf. Article 6(1) of Decree-Law no. 63, as amended by Article 2(36-*ter*) of Decree-Law 138/2011 (introduced upon conversion into Law no. 148 of 2011). In particular, whilst the original wording of Article 6 provided for the application of Article 12 of Law no. 904 of 16 December 1977, i.e. the exclusion from taxation "under all circumstances" of the portion of the net annual profits allocated to the mandatory minimum reserve, following the amendments introduced by paragraph 36-ter, the law now provides that the deduction from taxable income "*non si applica alla quota del 10% degli utili netti annuali destinati alla riserva minima obbligatoria*".

[51] Cf. Article 2545-quater CC

[52] Cf. Article 1(463) of Law no. 311/2004.

[53] Cf. Article 1(460)-(462) of Law no. 311/2004; Article 22(28) of Law no. 133/2008. As mentioned above, this legislation limited the scope of Article 12, by providing for an exclusion from taxation in respect of a percentage portion of the net annual profits, which varies depending upon the type of cooperative. In particular, as regards CMP, the minimum quota of taxable profits is: i) 65% for consumer cooperatives; ii) 20% for agricultural cooperatives and small fishing cooperatives; and iii) 40% for other cooperatives and consortia of cooperatives.

[54] According to the tax authorities, cooperatives (including social cooperatives) may benefit from tax provisions establishing the detaxation of any amounts allocated to un-distributable reserves as well as the tax deductibility of any payments made to mutual funds only in respect of the share of the net profits *in excess* of the part that must be subject to tax under all circumstances pursuant to Article 1(460) of Law no. 311/2004. Cf. Revenue Agency circular of 15 July 2005, no. 34/E.

[55] Cf. Article 96 TUIR, which provides that, as a general rule, interest due and equivalent charges are deductible during each tax period up to the amount of interest earned and equivalent revenues. The excess thereby arising is then deductible up to a maximum of 30 percent of the gross operating result earned from ordinary operations.

an entity that is "closed" to the capital markets[56] In particular, it is stipulated that, provided that the conditions laid down under Article 13 of Decree of the President of the Republic no. 601/1973 are met, interest on sums loaned by resident individual members to a cooperative company is non-deductible for the part that exceeds "the amount payable as interest to the holders of interest-bearing postal savings bonds increased by 0.9 percent".[57]

Finally, as far as refunds/transfers are concerned (amounts assigned to members for the "final" allocation of the mutualistic advantage), from a tax point of view these represent a cost that can be deducted in full by all cooperatives for the purposes of determining the taxable income for IRES.[58] This deductibility is subject to the condition that these sums paid do not exceed the surplus resulting from mutual management.[59] Therefore, on the basis of that rule, on the one hand deductibility is not dependent on the manner in which those amounts are allocated to members,[60] whilst on the other hand a transfer/refund can only be paid if the operations that the cooperative conducts with its members have generated a surplus. Essentially, it is possible to pay back as a refund any documented surplus from operations generated exclusively through transactions concluded with members, but not also from transactions concluded with non-members.[61] That aspect is particularly important above all for SC from type A, whose members may not be able to benefit from transfers due to a lack of mutual operations.

Furthermore, according to the analysis set out above, it is apparent that the favourable treatment granted to SC for the purposes of IRES consists in the different (and not insignificant) level of taxation of profits allocated to un-distributable reserves. Presumably due to the inherent social vocation of SC, these profits are currently taxed at a rate of 10%. Otherwise, the rules applicable to SC reflect those governing PMC.[62]

The introduction of the tax regime for Onlus and the allocation of that status to SC *ope legis* do not appear to have had any implications for the taxation of the income of SC. This is the position taken by the tax authorities, according to which the special regime provided for in relation to Onlus under Article 150 (previously Article 111-*ter*) TUIR is not applicable to SC. In this regard, it is noted that, in providing in paragraph 1 for the classification as "non-commercial" of the institutional activity of Onlus, this provision expressly excludes

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[56] On this issue see Montanari F., *Il finanziamento dei soci nelle società cooperative: profili tributari*, in *Riv. dir. trib.*, 2009, 4, 437.

[57] Cf. Article 1(465) and (466) of Law no. 311/2004. It is important to clarify that this tax regime applies both to PMC and to those that lack this fundamental prerequisite (CMNP).

[58] Cf. Article 12 of Decree of the President of the Republic no. 601 of 1973 (as amended by Article 6 of Law no. 388 of 2000), which identifies the regime as being applicable to all cooperatives, including those that are not predominantly mutual.

[59] It should be recalled that, according to Article 2545-*sexies* CC, amounts resulting from mutual exchange with members must be reported separately within the financial statements from those earned from relations with third parties pursuant to Article 2545-*sexies* CC and, prior to this, refunds are divided between the members in proportion with the quantity and quality of the mutual exchanges concluded with the company according to the criteria set out in the memorandum. Therefore, capacity as a member is a necessary prerequisite for the right to a refund; however, its amount is dependent upon the financial transactions actually concluded between the individual member and the cooperative.

[60] These amounts may be allocated "directly" to members in the form of a restitution of part of the price of goods or services purchased by the members (consumer cooperatives), of increased payment for produce furnished (production cooperatives) or in the form of remuneration for the salaries of the members (work cooperatives); or b) are recognised as capital pursuant to Article 2545-sexies CC and thus allocated to each member in the form of a proportional increase in their respective shares or through the issue of new shares or financial instruments.

[61] Cf. Revenue Agency Circular no. 53/E of 18 June 2002

[62] This is subject, as mentioned above, to the provisions of Decree of the President of the Republic 601.

"cooperative companies" from its scope, and does not draw any distinction between cooperative companies in general and SC[63]. Therefore, based on a literal interpretation of the provision, these should not be able to benefit from the detaxation provided for Article 150 (1) for income resulting from "institutional" activities.[64] The position is no different as regards the exclusion from taxation for income resulting from the conduct of directly related operations under Article 150(2). Although that provision does not indicate which entities are eligible to benefit from it, a systematic, logical interpretation suggests that the entities to which it applies are those expressly referred to in paragraph 1, and that cooperative companies, including SC, cannot therefore benefit from it.

In conclusion, SC cannot infer any beneficial rules in terms of income tax from their automatic status as Onlus, as they are not subject to the special rules provided for in relation to Onlus by Article 150 (previously Article 111-*ter*) TUIR.

In the light of the repeal of the provisions governing Onlus and the enactment of the third sector reform, it is now necessary to identify the tax consequences associated with the acquisition by SC of the status as social enterprises.

4. The implications of Legislative Decree no. 112 on the taxation of SC

In contrast to the previous legislation on social enterprises, Article 18(1) and (2) of Legislative Decree no. 112 establishes a specific tax regime for the income earned by entities with that status[65].

A solution must be identified starting from the hierarchy of sources laid down by Article 1(4) of Legislative Decree no. 112 which, as mentioned above, recognises the pre-eminence of special sectoral legislation, allowing for the application of the provisions laid down by Legislative Decree no. 112, although only where compatible. It is therefore necessary to establish whether or not the measures provided for in relation to social enterprises are

[63] Authoritative doctrine supports a different position. Cf. Fedele A., *La disciplina fiscale delle Onlus*, in *Rivista del Notariato*, 1999, 537 et seq, where he states that "*la possibilità di ONLUS 'strutturalmente' commerciali risulta limitata alle sole cooperative sociali … per l'operare di una norma (art. 111-ter Tuir) che 'decommercializza' tutte le attività degli enti che abbiano i requisiti richiesti per le ONLUS*". See also Ficari V., *Onlus* (entry), in *Enc. dir.*, Milan, 2000, 2; Pepe F., *Note in tema di società cooperative, cooperative sociali e regime fiscale Onlus (con cenni alla neonata "impresa sociale")*, cit., 837 et seq, who states that "*lo spettro delle agevolazioni concesse alle SC dalla normativa sulle Onlus è più ampio rispetto a quello previsto per le ordinarie cooperative. Esso infatti comprende, oltre agli incentivi operanti nel settore delle imposte indirette (Iva, registro, bollo, ecc .. ..), anche il citato art. 150 Tuir. L'operatività di quest'ultimo, infatti, non esclude le SC alle quali, quindi, il relativo regime di de-commercializzazione si applica appieno*".

[64] Leaving aside the literal wording of the provision, the underlying philosophy that characterises this regime, according to which the exclusion from taxation of income would appear to be strictly conditional upon an absolute prohibition on any distribution of profits, even indirectly, would appear to preclude the applicability of Article 150 to SC. In other words, the exclusion of SC would be a consequence of the fact that those companies, as Onlus according to law, "*nel rispetto della loro struttura e della loro finalità*", retain the ability to distribute operating profits according to Article 2514 CC, albeit on a limited scale. It should also be considered that the legislation expressly mentioned SC within Legislative Decree no. 460/97 when putting in place a special regime for them.

[65] Although this regime reflects the body of rules applicable to cooperatives in terms of its structure, it is not entirely equivalent to it. On this issue see Boletto G., *Le imprese del terzo settore nel sistema di imposizione dei redditi: tra sussidiarietà orizzontale e concorrenza*, Milan, 2020, *passim*; Castaldi L., *La disciplina fiscale dell'impresa sociale. Spunti di sistema?*, in *Analisi giuridica dell'economia*, 2018, 1, 175 et seq.; Girelli G., *Il regime fiscale del terzo settore*, in *Il Codice del Terzo settore, Commento al Decreto legislativo 3 luglio 2017, n. 117*, edited by Gorgoni M., Pisa, 2018, 393 et seq.; Ficari V., *Prime osservazioni sulla fiscalità degli enti del Terzo settore e delle imprese sociali*, in *Riv. trim. dir. trib.*, 2018, 1, 57 et seq.; Ortoleva M.G., *La valorizzazione dell'utilità sociale nella normativa tributaria*, in *Diritto e processo*, 2020, 3, 497 et seq.

compatible with the system of taxation for SC sketched out above, and as a preliminary matter whether they concern aspects not already provided for under that system.

As regards the first paragraph, it provides for the de-taxation not only of "amounts intended for the payment of the contribution for inspection activities pursuant to Article 15" but also of profits that must be allocated to un-distributable reserves intended for the conduct of activities provided for under the charter, or for increasing assets.[66] Since these reserves must be regarded as un-distributable according to the combined provisions of Articles 3 and 12, as a result of that provision essentially only profits or surpluses that are distributed in some form are subject to tax, subject to the limits set. On the other hand, those allocated to un-distributable reserves are entirely exempt from tax.

However, the legislation on SC contains other specific provisions concerning profits – Article 12 of Law no. 904/77 in conjunction with Article 6(1) of Decree-Law no. 63/2002 – which, from 2012 onwards, has provided for taxation at a rate of 10% of the annual profits allocated to the mandatory minimum reserve, which is un-distributable according to law.

Taking account of the provisions laid down in relation to the hierarchy of sources, this distinguishing feature is capable of exempting SC from the scope of Article 181(1), as that legislation must be regarded as incompatible with that on SC.

As regards the rule laid down in the last indent of Article 18(1) along with Article 18(2), these essentially reiterate the provisions on cooperatives.[67] The former – Article18(1) – essentially foresees that un-distributable reserves may be used to cover any losses and this utilisation does not entail any forfeiture of the "benefit" of tax relief, although a prohibition remains on distributing any further profits until the reserves have been reconstituted. The latter – Article 18(2) – is intended to avoid the so-called effect of "tax on tax" arising as a result of the changes provided for under Article 83 of the TUIR and in particular as a consequence of the fact that the portion of the profits allocated to un-distributable reserves (that is exempt from tax) is comprised not of taxable income but rather of profit after tax allocated to reserves.[68]

In view of these considerations, in a nutshell it does not appear that the provisions governing of social enterprises can be regarded as primary and overriding compared to the special provisions laid down for SC,[69] the tax regime for which should not therefore be affected.[70]

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[66] Cf. Article 18(1) of Legislative Decree no. 112/2017, as amended by Article 7(1)(a) of Legislative Decree no. 95/2018. That provision enhances the functional constraint applicable in relation to the allocation of income: the obligation to allocate the profits from operations or the operational surplus to the conduct of activities provided for under the Charter or to increase the assets is now offset by the detaxation of profits (or the operational surplus) allocated to the un-distributable reserves of a social enterprise.

[67] Cf. respectively Article 3(1) of Law no. 28/1999 and Article 21(10) of Law no. 449/97.

[68] Article 18(2) provides that "*Non concorrono altresì a formare il reddito imponibile delle imprese sociali le imposte sui redditi riferibili alle variazioni effettuate ai sensi dell'articolo 83 del testo unico delle imposte sui redditi, approvato con decreto del Presidente della Repubblica 22 dicembre 1986, n. 917. La disposizione di cui al periodo precedente è applicabile solo se determina un utile o un maggior utile da destinare a incremento del patrimonio ai sensi dell'articolo 3, comma 1*". In short, the income taxes corresponding to the increases in taxes on the statutory profit according to Article 83 Tuir (due, for example, to the non-deductibility from tax of some costs) are disregarded from taxable income, on condition that the resulting fall in the taxable income results in a profit, or an increase in profit, that is allocated to the indivisible reserves.

[69] No question of incompatibility arises in relation to the measures provided for under Article 18(3) to (5), the direct beneficiaries of which are natural and legal persons who invest in social enterprises, including those organised as operatives, that

However, that conclusion, which is based on a rigorous application of the tiered applicability of the provisions laid down by Article 1 of Legislative Decree no. 112, raises some perplexities from a systematic viewpoint.[71]

If one starts from the assumption that the de-taxation of the profits that must be allocated to un-distributable reserves on the grounds that they are intended for operations of general interest does not constitute tax relief, but is rather premised on a reduced or otherwise different capacity to pay tax,[72] then it must be concluded that a similar constraint applies in relation to SC. These cooperatives have always been considered to be capable of satisfying broad, general interests likely to be regarded as beneficial from a public law perspective, as they are required by law to carry out activities with social purposes. Moreover, in a similar manner to social enterprises, they cannot distribute dividends on the capital actually paid in at a higher rate than interest-bearing postal savings bonds, increased by two and a half percentage points.[73] It is admittedly true that, as an effect of the operation of refunds, members of cooperatives with the status of social enterprises may derive greater pecuniary benefits compared to, for instance, members of capital companies with the status of social enterprises. However, it is also the case that – as mentioned above – refunds may in tangible terms end up being of marginal relevance for SC (above all for those in type A) due to the negligible extent (if not the outright absence) of activities that have been conducted on a mutual basis.

Finally, further doubts result from the fact that, in view of the different hierarchy of sources of law provided for in relation to them under Article 1(5), cooperatives (other than social cooperatives) that acquire the status of social enterprises would appear to be eligible to benefit from the provisions on taxation of income laid contained in Article 18(1).

5. Conclusion

In the light of the above arguments, it would appear that the difference in the law applicable to amounts allocated to un-distributable reserves is a relic of a conception of cooperatives that has now been superseded. It is not firmly rooted in any capacity to pay tax of SC that is different from that of other social enterprises. The third sector reform could have

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have acquired the status of a social enterprise within the last five years. These provisions, which (as is clear) apply indirectly to SC, allow - within specific limits - for a deduction from tax (or respectively a tax allowance) equal to thirty percent of the amount invested in respect of gross income tax payable by natural persons and the taxable income of entities liable to IRES.

[70] See Cusa E., *Le cooperative sociali come imprese sociali di diritto*, cit., 6, who argues that "*alle cooperative sociali si applica la disciplina tributaria di cui all'art. 18, commi 3-5, d.lgs. 112/2017, non essendo essa incompatibile con la disciplina delle cooperative sociali e delle cooperative tout court".* A different position is taken by Fici A., *La nuova impresa sociale*, in *La riforma del terzo settore e dell'impresa sociale*, cit., 357, who argues that Article 18 is applicable in full since "*non hanno natura di norme di qualificazione della fattispecie*".

[71] The same applies in relation to the beneficial provisions in the area of indirect taxes and local taxes provided for under Article 82 TSC in relation to TSE, including social enterprises and SC, but not also other cooperatives. See also Article 89(11) TSC on the provisions applicable to "*soggetti che effettuano erogazioni liberali agli enti del Terzo settore non commerciali di cui all'articolo 79, comma 5, nonché alle cooperative sociali*".

[72] Cf. on the concept of capacity to pay tax as the aptidude to pay tax and not mere economic capacity, see Zennaro R. - Moschetti F., *Agevolazioni fiscali* (entry), in *Dig. Comm.*, Turin, 1987. This thesis appears to be endorsed by Gianoncelli S., *Regime fiscale del terzo settore e concorso alle pubbliche spese*, in *Riv. dir. fin. sc. fin.*, 2017, 3, 295 et seq, especially 301 et seq. On this issue see Boletto G., *Le imprese del terzo settore nel sistema di imposizione dei redditi: tra sussidiarietà orizzontale e concorrenza*, cit., 169 et seq.

[73] Cf. Article 2514 CC.

been embraced as an opportunity to reorganise the law applicable to SC which, as argued above, is currently fragmented and disjointed as a whole. This is a result of the various layers of legislation enacted over time along with the adoption of legislation dictated by concerns that have in part been resolved, coupled with pressure and vetoes from stakeholders directly involved.

The hope is that the legislator will intervene as soon as possible to "bring some order" into the overall taxation regime of SC, eliminating the aporias created by the stratification of legislative provisions and the changes in the regulatory framework provided for in relation to third sector entities.

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