



EUROPEAN COMMISSION
DIRECTORATE-GENERAL FOR COMPETITION

State aid: General Scrutiny and Enforcement
Unit H5: Fiscal Aid & Aggressive Tax Planning

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**Subject: Comfort Letter for the Terzo Settore PN
Case (SA.63927)**

Dear Mr Ghiggia,

Following our internal discussion, we are now in a position to revert to you with our findings on the so called Terzo Settore Reform (hereinafter, also, Third Sector Reform) tax rules you pre-notified to us contained in the Third Sector Code (TSC: D.Lgs 117/2017) and Social Undertaking Code (SUC: D.Lgs 112/2017).

Firstly, based on your explanation (lastly with the documentation provided on 23 July 2024), the Reform concerns various types of Third Sector Entities (TSE: foundations, associations, cooperatives, etc) which, all share a common trait which allows them to be differentiated from for profit undertakings ordinarily subject to corporate tax: they pursue Activities of General Interest (AGI) and all their proceeds must be destined to said pursuit. They are not free to make profit and, more importantly, they do not have discretion to use said profit to remunerate equity capital, even in the exceptional circumstances foreseen in art. 79(2-bis) TSC). As long as they keep their non-commercial status, TSEs can opt for a flat tax scheme for ancillary commercial activities (art. 80 and art. 86 Third Sector Code).

Secondly, Social Undertakings (SU) are only exempted from income taxation provided that their proceeds are allocated to reserves legally bound to the pursuit of activities of general interest (art. 18(1) SUC). Instead, profits are fully subject to ordinary income tax rules when allocated to (1) distribution of profits to equity shareholders (which is limited to no more than 50% of profits and the equity is remunerated no more than postal bonds interest remuneration + 2.5%), or (2) to increase of SU equity value up to the inflation index (art 3(3)SUC).

Thirdly, the documentation provided highlights that Italian legislation defines the taxable event (“presupposto del tributo”) of both personal and corporate income tax in Italy as the

“possession of income” (art. 1 ITC for personal income tax and art 72 ITC for corporate tax).

We understand from the above that the common trait of both TSE and SU is that profit linked to economic activities is either untaxed (art. 18 SUC) or can benefit from the flat tax scheme (art. 80 and art. 86 Third Sector Code) only when said profit is bound to be allocated to the pursuit of the public benefit activity. In other words, the TSE special tax rules only apply to income that can never be destined to remunerate equity capital and therefore is not truly “possessed”¹.

Based on the information provided, the Commission services are therefore of the preliminary view that, consistent with the *Paint Graphos* ECJ judgment², read in the light of the more recent ECJ judgments underlining the tax sovereignty of the Member States (in particular, *Fiat*³, *Engie*⁴, *Apple*⁵), the above-mentioned specific features of TSEs and SUs seem to put them in a legally and factually different situation from ordinary for profit undertakings in light of the objective of the income tax system.

In the light of these considerations, the pre-notified measures related to income taxation (art. 79(2-bis), art. 80 and art. 86 TSC, art. 18(1) SUC) do not seem to be selective and therefore would not seem to constitute State aid within the meaning of Article 107(1) TFEU.

As regards measures in the reform that aim to provide TSEs and SUs with easier access to equity (art. 18(3)(4)(5) SUC) and debt (art. 77 TSC) capital, we invite you for further discussions at short notice.

Please note that the above considerations do not constitute a definitive position of the Commission, but only a preliminary assessment by the services of DG Competition based on the information provided to us by your authorities. Should you have any further requests on this, do not hesitate to get back to us.

Kind Regards,

e-signed

Harold NYSSSENS
Head of Unit

¹ In case of TSE, a distribution of profits is never possible. In this regard, it is noteworthy that profits can only be an exceptional temporary occurrence and even when they occur, they cannot be distributed. In case of SU, the exempted profits are only those allocated to reserves bound to be used for the public benefit activities (the limited amount that can be distributed as a minimal, capped, remuneration of equity, is fully taxed).

² Joined Cases C-78/08 and C80/08, *Paint Graphos and Others*, ECLI:EU:C:2011:550, paragraphs 55 to 61. 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, paragraph 158 and paragraph 134 on the taxable event as part of the reference framework.

³ Joined Cases C-885/19-P and C-898/19-P, *Fiat Chrysler Finance Europe*, ECLI:EU:C:2022:859, paragraph 69.

⁴ Joined Cases C-451/21 P and C-454/21 P, *Engie*, ECLI:EU:C:2023:948, paragraphs 112 and 118 on the taxable event as part of the reference framework.

⁵ Case C-465/20 P, *Apple*, ECLI:EU:C:2024:724, paragraphs 75-81.