SOCIAL SERVICES IN THE EU LEGAL SYSTEM: BALANCING COMPETITION AND THE PROTECTION OF NATIONAL-SPECIFIC PUBLIC INTERESTS

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Abstract

This paper investigates the reorientation processes implemented by public authorities in EU Member States with regards to social services management. The paper focuses on welfare services, although a wider range of social services (health, education, work, social security) are taken into account where relevant. Current reorientation involves a shift in welfare policies, from the traditional approach based on solidarity, towards a view that emphasizes economic relevance of social services. As a result, organization and management of social services are subject to free competition, and might therefore potentially collide with the non-economic peculiarities of social services; services where personal and human factors have a major relevance and impact, both on their performance and on their legal denomination. Such reorientation has triggered a not yet concluded process characterized by the tentative balance of opposing needs: the needs of social services users and the need for free competition between the agencies supplying such services.

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1. Introduction

This study aims at illustrating the modified perspective that characterises the sector of social services within the European Community legal system. This sector is experiencing an ongoing evolutionary process. This evolution has distanced social services from the traditional view focused on the logic of solidarity and lacking economic relevance, towards a view that brings the activities being examined closer to the concept of services of general economic interest, thus marking the beginning of a "contamination" process of social services by the principles of free competition, especially in matters related to organisation and management. Hence, the purpose of this paper is to shed light on the aforementioned shift in welfare policies and related legal scholarship by investigating the implementation status of this process in the EU legal system.

As to the object of this study, we should firstly point out that the focus is mainly on social services in the strict sense of the term, that is, welfare services. All activities belonging to a wider concept of social services, such as services for individuals (*e.g.*, health, education, work, and social security), will be investigated only with respect to contributions and studies that add significant elements to the main topic of our discussion, namely social assistance.

From this viewpoint, we are able to detect a significant change in perspective. This change is the result of an original indifference of the social welfare sector to market laws, and it is leading towards a view that will include social services within the scope of economically relevant ones; these very functions are the specific recipients of a system of norms based on the protection and promotion of competition. The result is a radical transformation of social welfare management, with its undoubted and recognised peculiarity that characterises the supply of services related to social welfare, wherein personal and human elements acquire unquestionable and unique value; a value which must be adequately taken into account as it is absent in the fields of other services characterised by economic relevance.

The greatest difficulty here lies in finding a balance between opposing needs. On the one hand, there is the self-evident need to protect and promote competition between economic players delivering social services within current welfare system. On the other hand, there is the equally unavoidable need to preserve the traditional peculiarities of this sector, based on both knowledge and the ability to interpret the users' personal needs; a sector that traditionally applies a human and solidarity approach as to the principles guiding the assignment of such services, thereby favouring local operators. Such practice often fails to reach a sufficient level of competition promotion which is intended to ensure a more efficient allocation and use of the resources involved.

To achieve, or at least come close to, a satisfactory coexistence of such opposing objectives the concept of social services must be brought closer to the more general concept of services of general economic interest, as defined by the European Community. Accordingly, this work attempts at exploring to what extent the regulatory system governing services of economic interest may be applied to the sector of social services (the latter being a sector which has traditionally been protected from such "economic" contamination as that recently imposed by the current financial situation). In doing so, this work will also take into consideration the specific features of social services which discourage an approach aimed at the indiscriminate extension to them of rules primarily associated with economic relevance.

2. Services of Public Interest and Social Services within the Original EC Legal System and in the Framework of the EU Institution's Initiatives

The notion of service of general interest does not appear in the original EC Treaty, which only contained a more narrow definition of the concept of service of general economic interest that is particularly relevant within the European construction, at least as it was originally conceived. This definition has a rather blurred connotation, probably deriving from the need to reconcile the different experiences in this field as occurred to various Member States[1].

The distinction between this last concept and that of service of general interest is relevant within the European Community legal system because inclusion in one category versus the other implies that there should be compliance with a different set of rules. In fact, if non-discrimination and free-circulation principles were applied to any kind of services, then, conversely the freedom to provide services, the right of establishment, the norms on competition and State aid would apply only to so-called economic activities.

From this point of view, the traditional statement declaring that any activity implying the offer of goods and services to a

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[1] On this point, see G.M. Racca, *I servizi pubblici nell'ordinamento comunitario*, 2 Dir. Amm. 201 (1994); D. Gallo, *I servizi di interesse economico generale. Stato, mercato e welfare nel diritto dell'Unione europea*, Milan (2010). For a comparative view of the experiences in different European countries see E. Ferrari (ed.), *Attività economiche ed attività sociali nei servizi di interesse generale*, Turin (2007). See also, M. Freedlandand, S. Sciarra, *Public Services and Citizenship in European Law: Public and Labour Law Perspectives* (1998); K. Laenerts-A. Verhoeven, *Towards a legal framework for executive rules making in the EU*? 3 Comm. Mark. Law Rev. 645 (2000); A. Héritier, *Market Integration and Social Cohesion: the Politics of Public Services in European Regulation*, 5 Journ. Eur. Publ. Pol. 825 (2001); M. Marti, M. Schmidt, U. Springer, *Libéralisation des Services publics: y a-t-il une Convergence en Europe?*, 24 L'Économie politique, 75 (2004); M. Onnée, L. Ghékiere, *Social Services of General Interest in the Internal Market of the 21st Century - The Reform Treaty: The New State of Affairs* (2007); S. Van de Walle, *What Services are Public? What Aspects of Performance are to be Ranked? The Case of "Services of General Interest"*, 3 Int. Publ. Manag. Journ. 256 (2008).

certain market constitutes an economic activity appears to be too simplistic. As a matter of fact, technological, economic, and social evolution impacted the range of services available on the market in a way which has led to the traditional distinction between economic and non-economic activities. Nevertheless, these activities have indisputably acquired a dynamic and evolving nature which makes it therefore impossible to crystallize the above said distinction *a priori*[2]. In this context, the European Community legal system assigns to national judges the task of assessing the circumstances and conditions in which the service is supplied, taking into account certain symptomatic indicators, such as the absence of a mainly lucrative purpose, the non-assumption of risks related to the activity and the possibility of obtaining public financing for it (provided it is aimed at covering costs and not at remunerating investments)[3].

Essentially, a service can be defined as of economic relevance when it is offered on the market against suitable payment that covers costs and remunerates capital. On the contrary, a service is not economic when it is offered with a non-lucrative purpose for mutual assistance, or when its costs are covered through general taxation or user fees for participation that do not cover the costs.

In other words, the difference between economically relevant services and services that do not have this relevance must be looked for in the impact of the activity on the competition scenario and on its profitability aspect. We can thus say that a

[2] For doctrinal comments on the pending references, see also D. Sorace, *I servizi "pubblici" economici nell'ordinamento nazionale ed europeo alla fine del primo decennio del XXI° secolo*, 1 Dir. amm. 1 (2010); L. Bertonazzi, R. Villata, *Servizi di interesse economico generale*, in *Trattato di diritto amministrativo europeo*, G. Greco, M.P. Chiti (eds.) (2007) 1805 et seq.; see also P. Sandevoir, *Les vicissitudes de la notion de service public industriel et commercial* (1974); A.S. Mescheriakoff, *L'arrêt du Bac d'Eloka. Légende et réalité d'une gestion privée de la puissance publique*, 4 Rev. Dr. Pub. 1059 (1988); G. Guglielmi-G. Koubi, *Droit du service public* (2000); L. Dubouis, *Missions de service public ou missions d'intérêt général*, janv-fév Rev. Gén. Collect. Territ. 588 (2001); E. Fatome, *La determination du caractère des établissements publics*, 3 Act. Jurid. Dr. Adm. 222 (2001); J.F. Lachaume, *L'identification d'un service public industriel et commercial: la neutralisation du critère fondé sur les modalités de gestion du service*, 1 Rev. Franç. Dr. Adm. 119 (2006); J. Clifton, F. Comín, D. Diaz Fuentes, *Privatizing Public Enterprises in the European Union 1960-2002: Ideological, Pragmatic, Inevitable?*, 5 Journ. Eur. Pub. Pol. 736 (2006).

[3] See also, among others, Court of Justice EC, 22 May 2003, in law suit C-18/2001, in *Foro amm. CdS*, 2003, 1498.

service is economically relevant if it belongs to a sector that is characterised, at least potentially, by a certain profitability and therefore by competitiveness that also allows for the fulfilment of objectives that are in the public interest. On the other hand, residual services that, by their very nature or because of the constraints imposed on the relevant management, do not generate any competition can be considered as not having economic relevance and irrelevant for the purposes of competition[4].

As to services of general economic interest, article 86, paragraph 2 of the EC Treaty, now article 106 TFUE, has stated undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly are subject to the rules contained in the Treaties, in particular to the rules on competition, provided that the application of such norms does not hinder the *de jure* or *de facto* fulfilment of the specific mission assigned to them.

From the EU Law point of view, additional indications on this issue have been provided, however restricted to *soft law* and, therefore, whose meaning is more descriptive than prescriptive. On top of that, paragraph 3 of the above-mentioned article 86 has entitled the Commission to watch over the application of the relevant provisions giving the Member States, where necessary, appropriate instructions and decisions, and also by other documents issued by European Community institutions for various reasons[5].

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[4] For doctrinal comments on the pending references, see also M. Giorello, *Gestions* in house, *entreprises publiques et marchés publics: la CJCE au croisement des chemins du marché intérieur et des services d'intérêt économique général'*, 1 Rév. Dr. Un. Eur. 23 (2006); S. Monzani, *Controllo "analogo" e* governance *societaria nell'affidamento diretto dei servizi pubblici locali* (2009) p. 121 et seq.; R. Sermier, D. Epaud, *Nouvelle règle pour le in house: mettre fin au contrat en cas d'ouverture du capital de l'entreprise exécutant le marché*, 40 Dr. Adm. 2227 (2009); H. Wollmann, G. Marcou, *The provision of public services in Europe: between state, local government and market* (2010); G. Terrien, *Le développement des sociétés publiques locales*, 10 Dr. Adm. 7 (2010); P.M. Probst, *Anforderungen an die Vergabe eines Auftrags an eine öffentliche Aktiengesellschaft - In-house-Gestaltung erneut auf dem Prüfstand*, 2 Eur. Law Rep. 53 (2010); S. Bernard, *Réflexions sur l'apport de la création de la société publique locale au droit des entreprises publiques*, 3 Rev. Dr. Pub. 587 (2011); B. Delaunay, *L'exception* in house *aux exigences du droit de l'Union européenne en matière de mise en concurrence*, 3 Rev. Dr. Pub. 717 (2011).

[5] For a comment on the documents issued by EC institutions, with particular reference to the profiles that are more meaningful for the subject being treated, see also D. Edward, M. Hoskins, *Article 90: deregulation and EC law. Reflections arising from the*

As a matter of fact, the Commission itself has expressed its opinion on this issue on several occasions. The first opinion was a Communication on "Services of Public Interest in Europe" dated September 26th 1996. The document distinguished between: 1) services that, provided against or with no consideration, are considered by public authorities to be of general interest and therefore subject to specific public service obligations; and 2) services of general economic interest that, provided against consideration, fulfil missions of general interest and are subsequently subject to specific public service obligations, as well as to European Community rules on the protection and promotion of competition, as long as the latter do not hinder the fulfilment of the specific mission assigned to them.

Specifically, the above-mentioned communication refers to services of public interest as "veritable social rights" because they contribute significantly to social-economic cohesion and to the construction of the European model of society for which these services, aimed at satisfying primary needs, represent a sort of "cement"; "cement" that goes beyond the basic level of material worries by acquiring a symbolic dimension able to both offer stable reference points for the community and enhance the citizens' feeling of belonging to that same community, hence representing an element of cultural identity for all European countries "even in acts of daily life".

However, the European Community's processing of this issue, as we can see from the above mentioned Communication dated 26/09/1966 appears to still be at an early stage, as the Commission, although recognising — as we have just seen — the social function of services of public interest, does not include this dimension in the Community's field of activity, leaving to the

XVI FIDE conference, 32 Comm. Mark. Law Rev. 159 (1995); K. Van Miert, *Les missions d' intérêt économique générale et l'article 90 par. 2 du Traité CE dans la politique de la Commission*, 2 Dir. Econ. 277 (1997); R. Cameli, *La categoria giuridica dei servizi sociali tra ordinamento nazionale e ordinamento europeo*, 4 Dir. amm. 903 (2006); G.F. Cartei, *Servizi sociali e regole di concorrenza*, 3-4 Riv. It. Dir. Pubbl. Com. 627 (2007); F.A. Cancilla, *Servizi del* welfare *e diritti sociali nella prospettiva dell'integrazione europea* (2009) p. 280 et seq.; S. Civitarese Matteucci, *Servizi sanitari, mercato e "modello sociale europeo"*, 1 Mercato, concorrenza, regole 179 (2009); G. Guiglia, *I servizi sociali nel processo di integrazione europea: dalla distinzione alla regolazione*, 3 Jus 457 (2009); V. Molaschi, *I servizi sociali*, in S. Mangiameli (ed.), *I servizi pubblici locali* (2008), 363 ss.

Member States the discretion to identify the missions of general interest that allow them to dodge competition principles (provided that the criterion of proportionality is complied with) and to determine with the same freedom the managerial and organisational framework in charge of providing said services. This usually happens in the Community's indifference for the nature of the subjects that carry out missions of general interest, although combined with a shy attention for anti-competition behaviours[6].

In conclusion, in this first stage, substantial absence of the European Community dimension in social services was the result of a typical approach by the original EC legal system. This system is based on the priority assigned to economic integration in the belief that political and social integration might also be generated from such economic integration, as stated in article 2 of the EC Treaty. The Treaty has, among others, the purpose of achieving a high rate of employment and social protection however through the creation of a common market together with an economic and monetary union[7]. In other words, the category of social services, in

[6] T. Prosser, *The limits of competition law markets and public services* (2005); A. Rhys, G.A. Boyne, J. Law, R.M. Walker, *Organizational strategy, external regulation and public service performance*, 1 Pub. Adm. 185 (2008); J. Broadbent, J. Guthrie, *Public sector to public services: 20 years of "contextual" accounting research*, 2 Accounting, Auditing & Accountability Journal 129 (2008); F. Bulmer, *A new model for public services*, in *Economic affairs* (2008).

[7] With regard to the discussion concerning the social services, see E. Menichetti, *I servizi sociali nell'ordinamento comunitario*, in *Servizi di assistenza e sussidiarietà*, A. Albanese, C. Marzuoli, (ed.) (2003) p. 83 et seq. and also, Id., *I servizi sociali e servizi economici di interesse generale*, in *Solidarietà, mercato e concorrenza nel* welfare *italiano* S. Sciarra (ed.) (2007) p. 109 et seq.; J. Alber, *A Framework for the Comparative Study of Social Services*, 2 Journ. Eur. Soc. Pol. 131 (1995); J. Buttler, *Towards convergence in European personal Social Services?* 8 Cuad. Trab. Soc., 75 (1995); A. Antonnen, J. Sipila, *European social care services: is it possible to identify models?*, 6 Journ. Eur. Soc. Pol. 87 (1996); H. Anheier, *Social Services in Europe: Annotated Bibliography*, Frankfurt: Observatory for the Development of Social Services in Europe (2000); A. Héritier, *Market integration and social cohesion: the politics of public services in European regulation*, 5 Journ. Eur. Pub. Pol. 825 (2001); B. Munday, *European social services: A map of characteristics and trends, Strasbourg*, Council of Europe (2003); M. Threlfall, *European Social Integration: Harmonization, Convergence and Single Social Areas*, 2 Journ. Eur. Pub. Pol. 121 (2003); H. Anheier, *Social services in Europe: an annotated bibliography.* Frankfurt, Observatory for the Development of Social Services in Europe (2003); S. Van de Walle, *The impact of public service values on services of general interest reform debates*, 2 Pub. Manag. Rev. 183 (2006); P. Herrmann, A. Brandstaetter, C. O'Connell, *Defining Social Services in Europe: Between the Particular and the General* (2007); B. Enjolras, *Between Market*

the perspective of the original European Community treaties, was identified "by elimination", that is by exemption from application of the European Community competition rules based on the idea that the right to assistance was not to be guaranteed by the supranational level and, more simply, did not entail the functioning of the EU single market.

In this context, the first documents issued by the Commission on this topic reconnected the exclusion of social rights from the application of European Community rules to both their economic irrelevance and to the nature of providers, as they were mainly driven by social goals rather than in pursue of profits[8].

Later, however, European Community institutions started to show greater sensitivity and awareness for the issue of social cohesion and inclusion, which has appeared more and more clearly as an objective of the economic integration EC policy [9].

In this view, we should consider the addition of a new provision to the EC Treaty, by the 1997 *Amsterdam Treaty*, which was adopted under the impulse of the Commission's aforementioned Communication. Article 16 has acknowledged that "considering the importance of services of general economic interest within the scope of the Union's shared values as well as their role in promoting social and territorial cohesion, the Community and the Member States, insofar as it pertains to them and within the field of application of the Treaty, will arrange for such services to function based on principles and conditions that allow them to carry out their tasks".

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and Civic Governance Regimes: Civicness in the Governance of Social Services in Europe, 3 Int. Journ. Vol. Nonprofit Org. 274 (2009).

[8] In this sense see A. Albanese, *Servizi sociali*, in *Trattato di diritto amministrativo europeo*, G. Greco, M.P. Chiti (eds.) (2007), 1907 ss.

[9] With regard to this, see G. Napolitano, *Towards a European legal order for services of general economic interest*, 11 Eur. Pub. Law 572 (2005), where it says: "Community law 'unbundles' general interest linked to services. In this way, it establishes which ones are important and deserve protection at a European level. Only such interests can justify derogation from the European order's other laws and principles. The European model therefore introduces a profound break with the tradition of many European countries. Services no longer constitute an element of State legitimacy. Nor may they yet freely be used for purpose of social and economic policy other than those related to their own spread. On the other hand, offering services is now a private activity subject to common market and antitrust law rather than to the rules governing the actions of public authorities".

Furthermore, the *Charter of Fundamental Rights of the European Union*, adopted by the European Council (Nice, 2000) has introduced an entire chapter dedicated to solidarity, which has been recognised binding effects by virtue of article 6 of the new Treaty on European Union, according to the Lisbon Treaty, which has given the Charter the same legal value as Treaties. Article 34 of the Treaty on European Union, states that the European Union, in order to promote social and territorial cohesion, recognises and respects access to services of general economic interest although, once more, in compliance not only with the Treaty that founded the European Community, but also with the provisions of national laws and practices[10].

Urged by Lisbon's European Council to update its previous Communication on "Services of Public Interest in Europe", the Commission, in a subsequent issue dated 19th January 2001, although it maintained the same direction as the previous one and assigned to competent local, regional, or national public authorities, the task of defining, in full transparency, the missions of general interest and the ways to fulfil them. It finally poses "new questions about the boundaries of some services that, in the past, were supplied following mainly non-competition criteria but that presently attract, or might attract, possible competitors" who: (i) are willing to investigate the growing tension between traditional operators and public authorities on the one hand; (ii) support the persistent need to protect the mechanisms for the supply of services of general economic interest from the application of EC laws and, on the other, private sector competitors; (iii) and, *vice versa*, denounce, that the existing agreements would be unfairly unfavourable to the operator in charge, thus taking a position contrary to EC laws[11].

In particular, through the document being discussed, the

[10] See N. Boerger, *Solidarity and EC competition law*, 32 Eur. Law Rev. 339 (2007).

[11] On this point, see C.D. Ehlermann, *The contribution of EC competition policy to the single market*, 2 Comm. Mark. Law Rev. 257 (1992); N. Belloubet-Frier, *Service public et droit communautaire*, 4 Act. Jur. Dr. Adm. 270 (1994); R. Kovar, *Droit communautaire et service public: esprit d'orthodoxie ou pensée laiciste*, 2-3 Rev. Trim. Dr. Eur. 215 and 493 (1996); D. Caldirola, *La dimensione comunitaria del servizio pubblico ovvero il servizio d'interesse economico generale e il servizio universale*, in L. Ammannati, M.A. Cabiddu, P. De Carli (eds.), *Servizi pubblici, concorrenza, diritti* (2001); T. Prosser, *Competition law and public services: from single market to citizenship rights?*, 11 Eur. Pub. Law 543 (2005).

Commission, by confirming the national freedom to define services of general economic interest, also emphasises the application of the principle of proportionality, according to which "the means used for missions of general interest must not generate distortions which are not indispensable for the exchanges", thus assuming compliance with the provisions of the EC Treaty, with special reference to the ones referring to competition and the internal market as, in general, these "[are] perfectly compatible with the supply of services of public interest"[12].

Yet, the text being examined does not deny the existence of a category of services of public interest whose functions are mainly social, which do not make profits and do not aim at carrying out any industrial or commercial activity[13].

To this purpose, the opinion given by the Economic and Social Board on "non-profit private social services in the context of services of public interest in Europe" dated 12th September 2001, deals, for the first time, with the issue of non-profit operators who work in the field of social services in both the healthcare sector and in the sector which is the object of this study, namely social assistance.

This document, starting from the objective to turn the European Union into something more than an economic and monetary construction equipped with its own market, or into a place of freedom, safety and justice, comes to consider the role of *non-profit* subjects, whose virtuous and fundamental function of creating, or reclaiming, the social fabric is emphasised, without limiting their actions to the supply of services, thus developing a concept of network connection and stimulating civil solidarity on a volunteer and consensual basis. Accordingly, it is hoped that the opening of this sector to competition will not dim the peculiarity of the sector-operators but that, on the contrary, it will take place in full compliance with the social and cultural environment where the various activities are performed. This should avoid an indiscriminate extension of the rules typical of commercial

[12] For an approach to this, see M. Monti, *Services of General Interest in Europe*, Europäische Zeitschrift für Wirtschafsrecht, 161 (2001).

[13] See P. Wang, R. Cavallo Perin, D. Casalini, *Addressing purchasing arrangements between public sector entities–what can the WTO learn from the EU's experience?*, in S. Arrowsmith, R.D. Anderson (eds.), *The WTO Regime on Government Procurement. Challenge and Reform* (2011), 252 ss.

operators to the activities of non-profit operators, though without forgetting that non-profit private bodies also do not refrain from carrying out economically relevant actions connected to their corporate and commercial purpose.

Lastly, the document being examined clearly highlights the issue that is destined to pervade this study, that is, the need to identify a balance point between compliance with competition rules and protection of the specific characteristics of the commercial activities performed within the sector of social services of public interest.

The Green Paper on services of social interest presented by the Commission on 21st May 2003 takes up the abovementioned dichotomy. In fact, the document acknowledges, on the one hand, that for some services of public interest, the market cannot ensure an optimal allocation of resources, and, on the other hand, an awareness of the ongoing evolution in organisational forms through which social services are supplied in Member States. More and more often social services are being assigned to private subjects, thus determining an evolution of the role of public authorities from a managerial position into a regulatory one, in a more, although only potentially, competitive scenario.

Insisting on the idea that the economic or non-economic relevance of certain activities cannot be defined *a priori* and in a static way, the Commission confirms that it is impossible, or inappropriate, to give a single and complete European definition of services of public interest, even if it highlights that EC norms regarding universal services include a number of common elements which reflect the basic notion of public service. Because universal service obligations identify such specific requirements as continuity, quality of service, fee accessibility and protection of users' and consumers' rights, they provide a workable EU definition of public service delivery. In more details, according to the Commission, these common elements define Community values and objectives that have been turned into obligations in the respective norms for achieving objectives of economic efficiency, social or territorial cohesion, and social safety for all citizens which, if necessary, when integrated with more specific obligations related to the characteristics of the different sectors,

may also be applied to social services[14].

The *White Paper on services of public interest* presented by the commission on 12th May 2004, acknowledges the "significant interest aroused by the *Green Paper* among operators of the social services sector", which are required, by focusing on the single individual in order to ensure citizens a high degree of protection and reinforce social and territorial cohesion, to play a specific role as an integral part of the European model of society since. With this view, the Commission realises the need to overcome the traditional disinterested approach in order to deal, at least to a certain extent, with the problems related to the social services sector. From this latter point of view, although the definition of functions and objectives of public services is left to the competence of the Member States, it is recognised that EC rules can (and must) influence the ways in which the said services are provided and financed: contributing to clarifying the possibility of modernising traditional managerial organisational *formulae* on the one hand, and to preserving, on the other, the peculiarities of this sector, such as solidarity, volunteer services and inclusion of vulnerable categories. In other words, in the aforementioned document the Commission expresses the opinion that it would be useful to develop a systematic approach capable of identifying and recognising the peculiarities of services of public interest in order to clarify the framework within which they can be managed and modernised.

The Commission's Communication entitled "Implementing Lisbon's Community program: Social services of public interest in the European Union" of 26th April 2006, definitively marks the shift from the European Community's *quasi*-indifference toward social services — grounded on the Member States' reserve on the subject of social policies and on the non-economic nature of the services in question — to the acknowledgement of their importance for the construction of a European citizenship, so as to leading the Commission to specify their characteristics and study

[14] S. Giubboni, *Cittadinanza e mercato nell'Europa sociale*, in *Le scommesse dell'Europa*, G. Bronzini, F. Guarriello and V. Piccone (eds.), 345 (2009); E. Spaventa, *The Constitutional Impact of the Union Citizenship*, in *The Role of the Courts in Developing a European Social Model*, U. Neergaard, R. Nielsen and L. Roseberry (eds.) (2010), 141 ss.

their relationship with the European Community legal system[15].

The Communication now being considered represents a further step towards a more systematic view of the specificity of social services on a European level, and towards a clarification of European Community rules that can be applied to them.

The definition of social services that is relevant for purposes of the aforementioned document, excluding healthcare services, includes services connected to social security as well as those, more interesting for our purpose, concerning other basic services which are provided directly to the citizens and which play a preventive and social cohesion function, providing personalised assistance aimed at facilitating integration in society and guaranteeing the enjoyment of fundamental rights such as dignity and integrity.

In its Communication, the Commission also enucleates the organisational characteristics of social services providers within their mission of general interest. The Commission declares the fact that: 1) their actions are based on solidarity principles and have a global and personalised character, 2) they do not pursue any profits, 3) they include the participation of volunteers, and 4) they are strongly rooted and connected to local cultural traditions. All of this translates into the proximity of the service provider and its beneficiary, so that the ability to understand the need and reliance on the financial participation of third parties is maximised.

That being said, it should be recognised that social services are an expanding sector, both in economic terms and in terms of job creation. As noted by the Commission, the unprecedented tensions that have emerged in relation to such characteristics as universal dimension, quality and, above all, financial sustainability, urged all Member States to start modernisation processes. This modernisation is occurring regardless of territorial specificities, according to general criteria which in the document are defined as follows: the introduction of "*benchmarking*" practices, quality control, and users' participation in management; de-centralization of the services organization at the local or regional level; outsourcing of public sector tasks to the private sector, with public authorities taking on a regulatory role, to ensure "controlled competition" and effective organisation on a

[15] A. Albanese, *Servizi sociali*, cit., *supra* at note 7, 1908-1909.

national, local or regional scale; the development of public/private partnerships and the use of other forms of financing complementary to public financing.

According to the Commission, this context, seen as a more competitive environment, together with the consideration of specific needs of each individual, creates conditions that favour a "social economy", distinguished by the relevant role of those who provide non-profit services, but without forgetting, in doing so, the need for effectiveness and transparency.

The most meaningful conclusion, for the purposes of this study, drawn by the Commission in the abovementioned Communication, is the one based on the assumption that economic activity refers to service provision that is not necessarily paid by the ultimate beneficiary. If this is how things are, it can be inferred that "almost all of the services supplied in the social sector must be regarded as an economic activity" or, in other words, that "a growing part of social services in the European Union, until now directly managed by public authorities are, or must be, disciplined by Community rules on internal market and competition", thus outlining an original level of European involvement as a vehicle of modernisation of social services thanks to greater transparency and better efficiency in the organisation of financing operations[16].

Nevertheless, concerns related to the indiscriminate opening of the social services sector to competition have not been silenced, since the European Parliament was induced to adopt the Resolution of March 14th 2007 on social services of public interest in the European Union. The Resolution argues against an approach to the above said services that juxtapose, on the one hand, norms concerning competition, State aid and the internal market and, on the other hand, the concepts of public service of general interest and social cohesion. On the contrary, a positive synergy between economic and social elements should be pursued. From this point of view, concerns have been expressed regarding the attempts to apply to social services of public interest regulations and principles typical of services of general economic

[16] The issue has been investigated successively also in the "*Guide for the quality and efficiency of services of public interest*" dated December 7, 2010 edited by the European Commission, where it is specified how the term "social" applied to an activity is not sufficient *per* se to exclude the economic relevance of such activity.

interest, without considering distinctive features of each sector.

Actually, in parallel with the emergence of social services as activities equipped with economic relevance, the peculiarities of those services that should be preserved have also been defined.

In fact, in the Communication on "Services of public interest: a new European commitment" dated 20th November 2007, while investigating the specific situation of social services more in-depth, the Commission also insists on organisational objectives and principles, emphasising their inclusion in the European Community's original legal system (together with services of general economic interest), thanks to the Protocol on services of public interest enclosed within the *Treaty of Lisbon*[17]. In this sense, it was pointed out that social services are aimed at the individual and intended to satisfy basic human needs, particularly the needs of vulnerable subjects, providing protection from life's general and specific risks and helping individuals overcome difficulties or personal crises. Such services are also provided to families in the context of changing relationships, helping them as they care for children and the elderly, as well as for the disabled, compensating for any inability of the family to do so, thus becoming crucial for the protection of basic human rights and dignity. It should also be considered that social services play an important role in prevention and social cohesion for the entire population, regardless of their capital or income. Furthermore, these services contribute to non-discrimination, gender mainstreaming, protection of human health and improvement in the level and quality of life, as well as to guaranteeing equal opportunities for all, thus increasing the individual's ability to fully participate in society.

From the point of view of organisational, implementation and financing modes, the Commission - referring to and further specifying the content of the previous Communications - insists that, in order to satisfy the many needs of individuals, social services must be both global and personalised, conceived and developed in an integrated way, often implying a personal relationship between the receiver and the provider so as to be able to properly consider the users' diversity. It is also pointed out that

[17] See W. Kowalsky, *ETUC perspective on public services in the light of the new Treaty of Lisbon Transfer*, 2 Eur. Rev. Lab. Res. 351 (2008).

as they respond to the needs of vulnerable users, social services are often characterised by an asymmetric relationship between providers and beneficiaries, which is different from the commercial relationship between supplier and consumer.

Furthermore, given that the services in question are often rooted in local cultural traditions, the Commission recommends the adoption of solutions suited to the specificity of the local situation in order to ensure proximity between providers and users, at the same time, providing equal accessibility to the service throughout the territory. The Commission also deems necessary the supposition that providers need broad autonomy that allows them to respond to varied and evolving social needs. Finally, it is acknowledged that these services are usually motivated by the principle of solidarity and strongly depend on public financing, aimed at guaranteeing equal accessibility regardless of capital or income, within the scope of which non-profit operators and volunteers often play an important role as they express civic ability and contribute not only to social cohesion of local communities, but also to inter-generational solidarity.

On the other hand, the Commission has also emphasised that the modernisation process that concerns the social services supply system, in relation to changes in the structural framework —affected by the progressive ageing of the population combined with a context of economic straits —have imposed the adoption of new organisational patterns, and a progressive increase in social services referring to the application of EC rules, with regards to their acquired economic relevance. To this purpose, in fact, it is pointed out that in order to consider a certain service as an economic activity within the application of rules on internal markets, it must be provided against remuneration, regardless of whether such remuneration is paid directly by the beneficiary or by a public authority (as often occurs with social assistance services). As a result, it also seems irrelevant whether the provider aims to generate profit or not. Moreover, it is underlined that the economic nature of a service does not depend on the legal *status* of the provider nor on the nature of the service itself, but rather on the service supply and the organisational and financing method of a tangible activity. This means that a single individual can carry out economic activities as well as activities that are economically irrelevant, remaining, as a result, subject to competition rules for

the relevant part of his or her range of actions.

Therefore, through the inclusion of many, though not all, social services in the EC environment — after they had been excluded altogether from this contamination — the Commission has offered to "guarantee common rules whilst respecting diversity", thinking that, according to what has been stated before, the objectives for the development of accessible and affordable high-quality services of general economic interest on the one hand, and services connected to the open and competitive internal market on the other, are compatible. Better still, these two aspects may be complementary, provided that the possibility of maintaining specific provisions to ensure a balance, through the proportional application of the protection clause contained in article 86, paragraph 2 of the EC Treaty, is maintained.

Specifically, the Commission invites national authorities to clarify the correspondence between the charges and the obligations connected to missions of public interest and market access limitations deemed necessary to allow service providers to function.

Also, the organisational modes of the most frequently provided social services are examined, namely: 1) proxy, meaning the decision to assign the social mission of public interest to an external *partner,* in which case at least transparency principles, equal treatment, and proportionality, in addition to more tangible obligations set by the rules on public tenders are to be complied with; 2) institutionalised private-public partnership, that is, the management of such services by a mixed company; 3) use of a public financial compensation that is intended to cover expenses resulting from the mission and that would not be borne by an organisation operating exclusively on the basis of economic criteria; and, last but not least, 4) market regulation, which can legitimately imply the requirement to possess proper authorisation to provide social services, provided that this measure is based on objective, non-discriminatory criteria, communicated in advance, and also that the measure is proportioned, and that the option to refer to an objective and impartial body is recognised.

Leaving behind the normative trend arising from non-binding documents issued by EC institutions, with no real prescriptive value, and entering the field of binding rules

expressed by the (derived) EC norms, we find a higher degree of caution and signs of persistent uncertainty. An example of this is given by the directive related to services in the internal market (2006/123/EC), dated 12th December 2006 (implemented in Italy through legislative decree (d.lgs.) on 26th March 2010 (no. 59), which, although it aims at achieving "an internal market for services, with the right balance between market openness and preserving public services and social and consumer rights" does not contribute (in a decisive way) to clarifying the applicable rules for those activities that are the main object of this paper.

In fact, the directive expressly excludes from its field of application services of public interest (article 2, paragraph 2, letter a) as well as the social services referred to council houses, assistance to children and support to families and individuals who are temporarily or permanently in need, either provided by the State, or by lenders appointed by the State or by charitable associations recognised as such by the State (article 2, paragraph 2, letter j).

Yet, the directive does not specify what is meant by services of public interest, and simply leaves it up to the reader to infer this concept, *a contrario*, through the concept of general economic interest, which refers to services provided against economic considerations (without further explanations given, instead, as we have previously seen, in different places, where it was clarified that for purposes of economic relevance of a certain activity, the remuneration does not have to necessarily be paid directly by the beneficiary). Furthermore, the 27th section of the directive, referring to services essentially related to social assistance, uses a not so reassuring conditional when it states that the directive "should not" be applied since they are essential services which guarantee the basic rights of human dignity and integrity, representing an expression of the principles of social cohesion and solidarity.

From this standpoint, the formulation of the directive seems to represent a step backward compared to the acquisitions contained in documents issued by European Community institutions and, as we will see below, in the rulings of the Court of Justice. As mentioned before, such rulings state that the economic relevance of a certain activity, and therefore its subjection or non-subjection to community rules, does not depend

on the nature of the services provided, but rather on the tangible characteristics according to which the activity is performed.

Differently, it would have been desirable for the directive to state that the social services in question are excluded from its scope only to the extent in which, due to their specific organisational and managerial configuration, they are not provided against actual remuneration (direct, from the beneficiaries, or indirect, from public authorities), thus taking into account the new organisational schemes currently in use in the field being investigated, which have expanded the area of their economic relevance to the social domain[18].

3. Social Services and European Community Regulations in the Judiciary System of the Court of Justice

3.1. The Organisation of Social Services amid Competition, Solidarity, and the Economic-Financial Balance of National Systems

After trying to frame the phenomenon of social rights within the European Community legal system, and having acknowledged that the most innovative acquisitions are contained in acts issued by European Community institutions which are not directly prescriptive and that, instead, delving deeper into the more literally prescriptive field, the EC's positions become more covert and shy in taking sovereignty away from the States. Because the one being discussed is a delicate matter, it would be appropriate to look for some hints that are useful for the purposes of this paper also in the Court of Justice's jurisprudence, whose rulings, issued within the exercise of its institutional function of even-handedly interpreting the EC rules, as it is known, are laws that apply for all intents and purposes[19].

As we will illustrate below, the approach adopted by the EC judges in their creative activity of interpreting the law appears extremely important for our purposes, also given the aforementioned shyness, both original and acquired, in their standardisation activity, that affects national social protection

[18] See F.A. Cancilla, cit., supra at note 5, 290 ss.

[19] On this, please see F.A. Cancilla, cit., *supra* at note 5, 191 ss.; S. Gobbato, *Diritto comunitario della concorrenza e servizi di interesse generale di carattere sociale. Note a margine della giurisprudenza della Corte di giustizia*, 4 Dir. Un. Eu., 798 (2005).

systems, especially in matters concerning the organisational profile, in the name of protection and promotion of competition or, in other terms, in the name of the extension, at least to a certain extent, of the related EC rules also to the sector being examined.

From this point of view, we should point out that, to date, the attention of the EC judges has been mainly aimed at issues basically ascribable to health issues or labour doctrines, rarely taking a position in relation to the sector that is the focus of our observations, that is, social assistance in the strict sense of the term, wherein the human element in the supply of the service acquires special value. Yet, it is possible to find certain useful elements in the Court's jurisprudence, with special reference to the core issue inherent to the margins of application to the social sector of EC rules on competition. From this point of view, as we will illustrate, we can easily find, in the rulings of the EC judges, the main thread of this dissertation, that is, that the tension generated during the organisational moment of social services (in the broader sense of the word) between the opposing needs of opening to competition — with the aim of improving efficiency and cost-effectiveness —and the protection of the peculiarities that characterise the activities being examined, with reference to a two-fold reading key related, on the one hand, to the vocation of solidarity that pervades this sector and, on the other, to the need to preserve the economic balance of the national systems of social protection.

In other words, it is clear by now, also from the perspective that we are about to take, that the European Community is abandoning the sense of disinterest for the phenomenon of social services — given their importance, not only economic but also related to the European model of society — although continuing to deal with in the relevant scenario, special circumstances that allow legitimate exceptions to the full expression of the basic freedoms that underlie the EC construction. What is important, however, is that notwidthstanding the complexity of this topic, yet to be completely defined, the rule to be adopted as customary is not the irrelevance of this matter for the European Community's purposes, but quite the opposite, unless there are exceptions that appear to be justified in light of the concept of proportionality and of the need to preserve principles of equal dignity, all the above, while respecting the principles of promotion and protection of

competition in a view of subsidiary collaboration between EC institutions and national sovereignty.

3.2. Irrelevance of non-profit nature of providers, and the concepts of Enterprise and Economic Activity. The Reimbursement Issue

One of the most interesting aspects investigated by EC judges for the purpose of this study is the relevance of the operators' *non-profit* nature in terms of the need to use, for the assignment of social services, public procurement procedures, in compliance with EC rules, with the subsequent verification of the specific circumstances referred to the national framework of each Member State, whose existence justifies, on the other hand, possible exemption from the application of the rules enacted on the European level in relation to the promotion of suitable competition[20].

In a first ruling, the Court of Justice stated that the European Community legal system is not opposed to a Member State allowing only private operators who do not pursue profits to participate in implementing a social assistance system through special agreements that entitle them to reimbursement from the State of costs incurred for health-related social assistance services[21].

[20] For an approach on this issue, see B. Gidron, R.M. Kramer, L.M. Salamón, *Government and the third sector: emerging relationships in welfare states* (1992); J. Kendall, H.K. Anheier, *The third sector and the European Union policy process: an initial evaluation*, 6 Journ. Eur. Pub. Pol. 283 (1999); J. Kendall, *The third sector and the development of European public policy: a framework for analysis?* Civil Society Working Paper series, 19. Centre for Civil Society, London School of Economics and Political Science (2001).

[21] EC Court of Justice, 17 June 1997, in C-70/95, *Sodemare*, 3 Riv. It. Dir. Pubbl. Com. 683 (1998), with a note by A. Cacace, *Associazioni non profit e concessione di pubblici servizi. Note critiche ad una sentenza della Corte di giustizia.* See also M. Fuchs, *Free Movement of Services and Social Services: Quo Vadis?* 8 Eur. Law. Rev. 536 (2002); K. Lenaerts, T. Heremans, *Contours of a European Social Union in the Case-Law of the European Court of Justice*, 2 Eur. const. law rev. 101 (2006); L. Hancher, W. Sauter, *One step beyond? From Sodemare to Docmorris: The EU's Freedom of Establishment Case Law Concerning Healthcare*, 1 Comm. Mark. Law Rev. 117 (2010).

The ruling of EC judges currently being examined originates from the situation of a for-profit company based in Luxembourg that established several for-profit firms in Italy with the purpose of managing facilities for the elderly. The company complained about the inaccessibility of the Italian social security system due to the fact that it is based on special agreements with *non-profit* subjects.

In the end, the Court found that the condition of the provider being a non-profit organisation was related to the characteristics of the social assistance system established by an Italian regulation aimed at: 1) promoting and preserving health, by integrating health and social assistance services, and 2) taking actions in favour of non self-sufficient subjects who do not have a family, or whose family members are unable to take care of them, by implementing or favouring their integration in suitable European Community families or environments. More specifically, according to the judges' view, this kind of social assistance system, whose implementation is basically assigned to the State, is based on solidarity which translates into the truth that it is primarily intended for the assistance of those who are in need because of insufficient family income, total or partial lack of autonomy or alienation and, only secondarily, for the assistance of other individuals who are capable to bear, proportionally to their income, the related costs which are calculated at fixed fees (due to the limited capacity of facilities along with the restricted availability of people willing to assist).

The Court of Justice has concluded that a Member State has the power, within its competence in this matter, to confirm that the admission of private operators as providers of social assistance services necessarily implies the condition that they are non-profit, as this characteristic is highly consistent with the exclusively social purposes typical of the system. It would also ensure that such operators are not influenced by the need to gain benefits but are, instead, focused mainly on the pursuit of the social purposes themselves. Moreover, this decision was made belying the conclusions expressed by the Advocate General, which might have been viewed by the judges as being excessively invasive of the competences jealously claimed by the Member States.

In this regard, the conclusions made by the Advocate General stated that the condition of privilege for *non-profit*

organisations would not have any valid justification, as it has not been shown that these subjects provide better services than others and that the limitation to access of non-profit subjects, all of them present in the territory, would affect the European Community's freedom to provide services and the right to establishment. Thus, the conclusion drawn by the Advocate General found no correspondence in the ruling. According to such conclusion, the European Community legal system requires compliance with the provision of the Treaty by the national social protection systems whenever, regardless of the fact that they pursue social purposes, they affect economic activities through modes that do not pertain to the fulfilment of social objectives or whenever the restrictive measures of competition are disproportionate with respect to the goal to be achieved[22].

Nevertheless, looking closely at the ruling, it can be said that the European Community's compatibility of the preference granted to *non-profit* subjects is not due, *a priori*, to the structural and ontological peculiarities typical of such operators. Accordingly, they can be recognised, in general, as holding a privileged position in the field of social assistance, though that privileged position is associated with specific characteristics of the reference social system focused on the solidarity principle. Moreover, the Court's position was also based on the consideration that, in the case examined, limiting access to non-profit subjects only has not influenced the internal market, given that the agreements with these operators, in the system where the controversy originated, only entitled them to reimbursements associated with social-health services which, furthermore, do not belong to the European Community's concept of service, since they are not provided in exchange for real payment.

With a critical approach towards the judges' conclusions, it was found that the social assistance system being referred to, as stated by the National Law, is based on the concept of production of services to the extent that the responsible subjects have been defined as "businesses" (*i.e.*, "local health business"), evoking competition concepts such as efficiency and effectiveness, with the result that it would be difficult to grasp the meaning of a statement that says that the assignment of social assistance

[22] On this issue, please see again F.A. Cancilla, cit., *supra* at note 5, 241-242.

activities to third parties — only because it involves health-related services — would dodge market rules, and therefore rules of public tenders, since the activity can basically qualify as service subcontracting[23].

On a subsequent occasion, the EC judges returned to the issue of health transportation services that were assigned directly, without following a public procurement procedure, to certain non-profit associations. In this specific case, the Court confirmed its position, already claimed, taking another step towards the application of competition rules to the social domain[24].

In particular, according to the first point of view, it was emphasised that the absence of profit-seeking does not exclude volunteers' associations from carrying out an economic activity and creating companies as described in the provisions of the Treaty on competition. Meanwhile, according to the second point of view, the EC judges have further studied the issue of reimbursements given to operators by public authorities. To this purpose, while in the previous jurisprudence examined above, the fact of sums being received as reimbursement had excluded the classification of the related activity as being performed in exchange for payment. In the ruling in question, the Court, after considering that the onerous character of a contract refers to the counter-service provided by the public authority interested in fulfilling the supply of the services that are the object of the contract, delves into the specific characteristics of the reimbursement in the specific case. This analysis showed that if the work carried out by people engaged in health-related transportation was not remunerated, it resulted in the amount of the payments budgeted by the involved public authorities being

[23] A. Cacace, cit, *supra* at note 5, 693.

[24] EC Court of justice, 29 November 2007, in C-119/06, *Commissione c. Repubblica italiana*. See also C.H. Bovis, *Financing services of general interest in the EU: how do public procurement and state aids interact to demarcate between market forces and protection?*, 1 Eur. Law Journ. 79 (2005); A. Albanese, *L'affidamento di servizi socio-sanitari alle organizzazioni di volotariato e il diritto comunitario: la Corte di giustizia manda un monito agli enti pubblici italiani*, 6 Riv. Dir. Pubbl. Com. 1453 (2008); A. Di Matteo, *Sull'affidamento diretto di servizi di trasporto sanitario ad associazioni di volontariato*, 2 Rass. Avv. St., 162 (2008); C.H. Bovis, *Developing public procurement regulation: jurisprudence and its influence on law making*, 43 Comm. Mark. Law Rev., 461 (2006); V. Hatzopoulos, *Public procurement and state aid in national health care systems*, in *Health Systems Governance in Europe*, E. Mossialos (ed.), 379 (2010).

greater than the simple reimbursement of the expenses incurred to provide the health transportation services in question, because such amounts were previously fixed in lump sums based on tables annexed to a framework agreement. As a result, according to the Court, the stipulated agreement produces a contract of services delivered against compensation, which is consequently subject to EC rules (of course, in the case that it exceeds the relative relevance threshold related to economic value).

From this point of view it should be observed that according to the Court of Justice's jurisprudence, the concept of "remuneration", decisive for the purpose of configuring a certain activity as a service in the scope of article 50 of the EC Treaty, refers to compensation for the supply performed[25] that can be paid indifferently by the receiver of the service or by a third party, such as a public authority, without any consequence in terms of classification of the category. This last aspect has been highlighted in a case decided by the Court relative to the Dutch health insurance fund. The Dutch national system is founded on the criterion of supply "in kind", which guarantees its members the availability of free healthcare services through structures based in the Netherlands that have stipulated a special agreement[26]. That being said, in their decision on a case where some patients had gone to a different Member State to receive health care without obtaining previous authorisation to do so, but who nonetheless were asking their National healthcare system to reimburse them for their expenses, the EC judges decided that authorisation can be refused for lack of a real medical necessity only when an identical treatment, or an equivalently effective one, can be promptly obtained at an institute that has an agreement with the patient's healthcare fund, so that in the national territory a sufficient, balanced and permanent offer of hospital care is maintained, thus ensuring the financial stability of the insurance system. Yet, as far

[25] EC Court of Justice, 27 September 1988, in C-263/86, *Humbel*. E. Hennis, *Access to Education in the European Communities*, 3 Leid. Journ. Int. Law 35 (1990).

[26] EC Court of Justice, 12 July 2001, in C-157/99, *Smits e Peerbooms*. On this, see also EC Court of Justice, 13 May 2003, in C-385/1999, *Muller Faurè e Van Riet*. See also, Gareth Davies, *Health and Efficiency: Community Law and National Health Systems in the Light of Müller-Fauré*, 1 Mod. Law Rev. 94 (2004); E. Spaventa, *Public services and European law: looking for boundaries*, 5 Cambridge yearbook of European legal studies 271 (2004); G. Chavrier, *Etablissement public de santé, logique économique et droit de la concurrence*, mars-avril Rev. Dr. Séc. Soc. 274 (2006).

as the profile being the object of our interest, the Court, in its argumentative process, has judged as irrelevant, for the classification of hospital health treatments as actual services as stated by the Treaty, the circumstance that these are financed directly by health insurance funds, based on pre-established fees and special agreements. The Court also stated that, on one hand, the original European Community law system does not prescribe that the service must be paid for by those who directly receive it and that, on the other hand, payments made by the health fund within an agreement between the latter and the providers of health care, though on a lump-sum basis, certainly represent remuneration for hospital services and have an undoubtedly retributive character for the beneficiary hospital which performs an economic activity that must be identified, therefore, by the freedom of service supply stated by the Treaty, although tempered by the legitimacy of subordinating such activity to the achievement of a preventive authorisation as indicated above to guarantee the good functioning of the national health system in the patient's home country[27].

For the purposes of this study, some interesting elements may be found in environments that are not immediately referable to assistance but are nonetheless connected with social services in the widest meaning of the term. With regards to healthcare systems based on an ordinary reimbursement mechanism, we can find positions taken by the Court of Justice whereby, even if the national prerogative to organise its own system of social protection is not denied, the sector of healthcare is not excluded from the application of EC rules, particularly with reference to the non-discrimination principle, the freedom to circulate and to provide services.

From the point of view described above, EC judges claimed that the Luxembourg laws are detrimental to the mentioned principles because they deny reimbursement of medical expenses incurred in another Member States without previous authorisation, which, according to the Court, would induce

[27] On this, see also EC Court of Justice, SEZ. III, 10 March 2011, in C-274/09, *Stadler*, that says that in case of a contract on the supply of services, the circumstance that the contractual counterpart is not remunerated directly by the adjudging administration, but is entitled to receive its consideraton from a third party, is sufficient to integrate the concept of "remuneration".

Luxembourg citizens to only use their own national structures[28], in the same way the refusal of reimbursement of expenses borne in another Member State to buy goods of health-related value has been judged prejudicial to the free circulation of goods. In both cases, this view is based on the assumption that reimbursement should be given in compliance with the pre-established fees valid in Luxembourg, so as to not risk altering the financial balance of healthcare systems.

In brief, the Court recognises that, as it appears more clearly below, the financial stability of the national social protection systems can also, in principle, justify restrictions upon the patients' options to receive services abroad, since a hypothetical crisis would be detrimental to the entire community. However, according to a proposed reflection, in general terms, at the beginning of this jurisprudential analysis, a Member State can rightfully claim the above argument only by demonstrating the concreteness and authenticity of the risk, since it is not possible, *vice versa*, to state that any deviation from the national healthcare plan can provoke a serious danger to the economic stability of the system as a whole[29].

This approach, adopted for healthcare issues[30], might as well be applied to the field of social assistance, which could be considered as not excluded *a priori* from the application of European Community norms aimed at protecting and promoting competition. It would then be necessary to justify exceptions to the norms in sight of the defence of equally relevant values and principles (such as the economic balance of the reference system).

3.3. Derogations to the Application of General Rules on Competition. The Necessary Economic-financial Balance of the Management Systems of Services of General Economic Interest

[28] EC Court of Justice, 28 April 1998, in C-158/96, *Kohll*. D.S. Martinsen, *The Europeanization of Welfare-The Domestic Impact of Intra-European Social Security*, 5 Journ. Comm. Mark. Stud., 1027 (2005); A. Kaczorowska, *A Review of the Creation by the European Court of Justice of the Right to Effective and Speedy Medical Treatment and its Outcomes*, 3 Eur. Law Journ., 345 (2006).

[29] F.A. Cancilla, cit., *supra* at note 5, 227-228.

[30] For more details on this issue see V. Molaschi, *Le disuguaglianze sostenibili nella sanità*, in F. Astone, M. Caldarera, F. Manganaro, A. Romano Tassone, F. Saitta (eds.), *Le disuguaglianze sostenibili nei sistemi autonomistici multilivello* (2006), 3 ss.

A further jurisprudential thread worthy of consideration concerns the possibility, stated in article 106 TFUE, to limit or exempt from application of competition rules, subjects appointed to provide a service of general economic interest if the rules would hinder the fulfilment of the mission to which they have been assigned.

This rule, at first, was placed at the heart of a reserve of national sovereignty on public services, and based on this, the definition of missions of general interest corresponding to national public interests — considered to be prevailing with respect to those put under the care of Community institutions — was thought to be assigned to the specific competence of each Member State[31].

At a later stage, due to the repeatedly mentioned phenomenon of overcoming the European Community's total lack of interest for national decisions concerning the institution and organisation of public services, the interpretation of the abovementioned article 86 was that the application of norms on competition represents the rule that has been set in view of the achievement of the fundamental objective to create a single European market. This rule also proves valid for services of general economic interest, while the system of derogations to free competition appears to be an exception, justified only in that it allows the fulfilment of the specific mission of public interest that has been assigned to the company. In particular, the Court of Justice has strongly considered the possibility of derogating as it is described in article 86 of the EC Treaty, claiming that the application of free competition rules could be disregarded only after demonstrating that a different solution would have caused, unavoidably, the impossibility to accomplish the public service mission, judging as non-sufficient, for this purpose, the circumstance that the application of the rules on competition might make it more difficult to carry out the mission of public interest[32].

[31] On this, please see EC Court of Justice, 30 April 1974, in C-155/73, that recognized an unquestionable profile of discretion to Member States with reference to the definition of missions of public interest, as well as to the decisions concerning the organization and the legal status of the related services.

[32] EC Court of Justice, 13 December 1991, in C-18/88, *Regie des telegraphes et de telephones*; EC Court of Justice, 19 March 1991, in C-202/88, *Repubblica francese c.*

Later, in conjunction with the opening of the European Community legal system to issues of a social nature and as already pointed out, interests for major public services have started to appear and not only in relation to the protection of free competition principles, as pertaining to the European Community, but also for their growing importance for the functioning of the European economic system as well as, above all, for their primary importance in relation to the satisfaction of fundamental collective needs that underlie the European model of society[33]. Thus, the Court of Justice also began to consider non-economic motivations, paving the way for an approach that it may also adopt in the field of assistance services, wherein the supply of purely social services is often combined with the performance of activities of economic relevance that, as such, should be subject to rules on competition. Unless, in line with the innovative foundation being described, the exclusive attribution of "profitable" activities proves to be necessary in order to compensate for the prescription of precise public service obligations, in order to ensure the economic balance of the system[34].

The leading case within this doctrine is represented by the monopoly of the Belgian postal service[35], in which the Court had the opportunity to point out that such services respond to a fundamental need of the community, through the obligation of ensuring transportation and distribution of mail all over the country at standardised fees with equal quality conditions,

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Commissione. P. Bauby, J.C. Boual, *Pour une citoyenneté européenne: quels services publics?* (1994); A. Verhoeven, *Privatisation and EC Law: Is the European Commission "Neutral" with Respect to Public Versus Private Ownership of Companies?* 4 Int. Comp. Law Quart. 861 (1996); L. Flynn, *European union regulation of the telecommunications industry*, 1 Int. Rev. Law, Computers & Technology, 9 (1996); J.L. Clergerie, *Europe: L'Union européenne et les services publics*, 305 Rev. Adm. 639 (1998).

[33] E. Scotti, *Il pubblico servizio tra tradizione nazionale e prospettive europee* (2003), 163.

[34] See P. Wang, R. Cavallo Perin, D. Casalini, *Addressing purchasing arrangements between public sector entities–what can the WTO learn from the EU's experience?*, in S. Arrowsmith, R.D. Anderson (eds.), *The WTO Regime on Government Procurement. Challenge and Reform* (2011), 252 ss.

[35] EC Court of Justice, 19 May 1993, in C-320/91, *Corbeau c. Regie de postes*. T. von Danwits, *Die Liberalisierung der Postmärkte in Europa*, Der Staat des Grundgesetzes – Kontinuität und Wandel, 857 (2004); D. Hurstel, *Intérêt général et gestion privée: partenaires incompatibles?*, 13 Pol. Manag. Pub. 142 (1995); see also, W. Consult, *The Evolution of the Regulatory Model for European Postal Services* (2005), 46 ss.

regardless of whether or not the service costs are covered by the price paid by users. This standardisation system requires the existence of a legal monopoly. In the absence of such a monopoly, a so-called "cream skimming" effect would arise. This effect, based merely on economic considerations, implies enucleating within the service both: a) a profitable activity subjected to the rules of competition, and b) a non-profitable activity, identified with a general economic service, that would legitimate a monopoly regime. Yet, according to what has been found by the Court in the aforementioned case, the subject that has the duty of providing the service to all users in conditions of equity regardless of territorial or other factors, must be given the possibility to compensate for lower profits, if not losses, generated by this sector, with income generated by remunerative activities proceeding in parallel with the same service. Under these conditions, the opening of the profitable segment to the market alone would impede such compensation, hindering the fulfilment of the service of public interest. Such an action would lead to the abandonment of the principle of indispensability for the justification of a derogation to the rules of free competition in favour of a need-based criterion aimed at ensuring not only the survival of the company, but also its economic-financial balance.

A similar approach has been followed by a following ruling of the Court[36] concerning an issue that is of great interest to our study. On that occasion, the judges were called upon to consider the European Community compatibility of one law of a German *Land* that assigned the task of authorising non-profit healthcare organisations to a public authority in order to provide patient transportation, both in emergencies and in normal situations, provided that they were able to guarantee a permanent service. The norm also allowed the public authority to deny the authorisation of transporting ordinary patients to other operators in case it jeopardises the economic sustainability of the emergency

[36] EC Court of Justice, 25 October 2001, in C-475/99, *Ambulanz Glockner*. On this issue, see A. Argentati, *Diritti speciali ed esclusivi e regole comunitarie di concorrenza* 4 Giorn. Dir. Amm., 399 (2002); F. Ferraro, *Efficienza dei servizi di interesse economico generale*, 1 Dir. Pubbl. Comp. Eu., 376 (2002); T. Prosser, *Competition Law and Public Services: From Single Market to Citizenship Rights?*, 4 Eur. Pub. Law, 543 (2005); J.W. van de Gronden, *Financing Health Care in EU Law: Do the European State Aid Rules Write Out an Effective Prescription for Integrating Competition Law with Health Care?*, 1 Comp. Law Rev., 5 (2009).

service. Based on this norm, the German *Land* involved had refused authorisation to provide the service of ordinary transportation to a commercial company that had applied for it, claiming that this would have caused a prejudice to the emergency transportation service provided by non-profit organisations.

The Court involved in this issue maintained the observation that, within the EC rules on competition, the notion of "enterprise" includes any organisation that performs an economic activity, regardless of its legal status or the type of financing it receives, and that "economic activity" includes any activity that offers goods or services to a certain market[37]. The court came in abstract terms to the conclusion, respectively, that the non-profit vocation does not prevent organisations like those involved in the case from being considered according to EC rules on competition and that the subjection to public service obligations does not impede, *per se*, consideration of the supply of services like those described as an economic activity. This conclusion was based on the perspective that compliance with such obligations was not found to be decisive in making the services supplied by a given organisation less competitive than those offered by other operators not bound by the same limits[38].

In short, the Court clarified that the non-profit nature of an organisation is not incompatible with its qualification in terms of enterprise, and that there is no incompatibility between the existence of a market for a certain service and the payment of the related performance by public subjects separate from the service users[39].

Even so, the EC judges began considering that the organisation involved could certainly claim to be appointed for a service of public interest — that is, the obligation to ensure a

[37] Also EC Court of Justice, 12 September 2000, in C-180/98 and 184/98, *Pavlov*. E. Ales, *Occupational Accidents from an EU Perspective: Is There a Place for the Principle of Freedom of Choice?*, 1 Eur. Law Journ., 110 (2005).

[38] Meaning that the social purpose of an organization is not *per se* sufficient to exclude the economic nature of its activity *a priori* and that the absence of profit seeking, either, cannot assume this value, see also EC Court of Justice, 16 November 1995, in C-244/94, *Fédération française des sociétés d'assurance*. C. Deliyianni-Dimitrakou, *Négociation collective et règles communautaires en matière de concurrence*, 3 Rev. Int. Dr. Comp 795 (2006); E. Theurl, *Der Sozialstaat an der Jahrtausendwende: Analysen und Perspektiven* (2008); J.W. van. de Gronden, *Social Services of General Interest and EU Law* (2011), 123 ss.

[39] On this point See A. Albanese, *Servizi sociali*, cit., *supra* at note 8, 1915.

permanent service of emergency transportation for sick or injured people throughout the national territory, at the same fees and equal conditions, regardless of individual situations or economic conditions, and to question themselves on the applicability to the specific case of article 86, paragraph 2 of the above mentioned EC Treaty[40]. From this standpoint, the Court gave its opinion in compliance with previous jurisprudence, which requires an assessment whether competition needs to be restricted in order to allow the holder of an exclusive right to carry out its function of public interest. Economically acceptable conditions might indeed imply the possibility of compensation between the sectors of profitable activities and those of less profitable ones, thus justifying a restriction of the competition in the first sector.

In the end, the EC judges found that the extension of exclusive rights of healthcare organisations to manage the non-emergency transportation (profitable in itself) allows them to carry out the service of public interest of emergency transportation (not profitable in itself because it is subject to specific public service obligations) under conditions of economic balance, also considering the difficulty sometimes inherent in separating the two activities that have common characteristics. On the other hand, opening up to competition has been considered, in the case decided by the Court, as a potential danger with respect to the guarantee of quality and reliability of the service according to specific obligations of universality and uniformity required in emergencies, regardless of profitability.

In essence, from the above-described rulings it can be once again inferred a case-law trend with respect to social services, based on a case-by-case approach whenever an assessment is to be made before application of the economic relevance criterion, without forgetting to measure the actual incidence on the market or to consider potential peculiarities connected to the specific mission of public interest assigned by the national norm, as well as to the need to guarantee adequate performances.

3.4. The Fulfilment of a Mission of Public Interest and the

[40] On this issue see also EC Court of Justice, 19 May 1993, in C-320/91, cit., *supra* at note 35.

Concepts of State Aid and Abuse of a Dominant Position. The Criterion of Tangible Activity Performed

Another parameter assumed by the Court as a confrontation ground between extending competition rules to the social sector, and protecting the specific prerogatives associated with the supply of services in this sector is that of State aid and abuse of a dominant position.

Following an approach similar to the one mentioned above, also from the point of view being examined, the EC judges have taken into account the need to favour, in certain cases, the social needs that lie behind the fulfilment of the mission of public interest with respect to the protection of competition, evaluating the legitimacy of derogatory provisions of the Treaty with reference to the above context.

In more details, it has been observed that the financial advantages granted by a State to a company that is required to supply a public service do not represent an "aid", but can be viewed as "compensation" for the service provided, if the entity of such advantages does not exceed the costs associated with the public service obligations[41]. In other words, the State's intervention does not fall within the scope of State aid legislation if it is carried out as compensation for the duty to fulfil the public service obligation. This is because the beneficiary companies, in this case, do not actually receive a financial advantage suited to giving them a favourable competitive position on the market[42].

[41] EC Court of Justice, 22 November 2001, in C-53/00, *Ferring*. K.P. Purnhagen, *Services of General Economic Interests in Competition Law: From Procureur de la République/Adbhu Until la Poste - The Raise and Fall of the State Aid Approach and its Consequences*, 10 Eur. Law Rep., 337 (2009).

[42] EC Court of Justice, 27 November 2003, in C-34/01, *Enirisorse*; EC Court of Justice, 24 July 2003, in C-280/00, *Altmark*. On this, see R. Cavallo Perin, B. Gagliardi, *Doveri, obblighi e obbligazioni sanitarie e di servizio sociale*, in *I diritti sociali come diritti della personalità*, R. Cavallo Perin, L. Lenti, G. Racca, A. Rossi (eds.), 22 (2010); F. De Cecco, *Politiche sociali e divieto di aiuto di Stato*, in *Solidarietà, mercato e concorrenza nel* welfare *italiano*, cit., *supra* at note 6, 75 ss.; N. Travers, *Public service obligations and State Aid: is all really clear after Altmark?*, 3 *Eur. St. Aid Law* 387 (2003); P. Nicolaides, *Compensation for Public Service Obligations: The Floodgates of State Aid?*, 11 Eur. Comp. Law Rev. 561 (2003); A. Sinnaeve, *State Financing of public service: the Court's Dilemma in the Altmark Case*, 3 Eur. St. Aid Law 358 (2003); B. Rapp-Jong, *State Financing of Public Services – The Commission's New Approach*, 2 Eur. St. Aid Law 205 (2004); J.L. Buendìa Sierra, *An Analysis of Article 86(2) EC*, in M.S. Rydelski (ed.), *The EC State Aid Regime: Distortive Effects of State Aid on Competition and Trade* (2006).

Yet, in relation to banking foundations operating in sectors of public and social interest, we need to make distinctions between the activities performed by these entities[43]. In fact, according to the Court, a legal body configured as a banking foundation cannot be qualified as a "company" for the purposes of the Treaty, if its activities are limited to paying contributions to non-profit organisations. In this case, its operations have an exclusively social nature that is not performed in a context of market competition with other operators. In other words, in performing this activity, a banking foundation is behaving as a charitable organisation and not as an enterprise. On the other hand, again in the reconstruction offered by the Luxembourg judges, when a banking foundation, acting directly in sectors of public interest and social utility, uses the authorisation received from the national lawmakers to carry out financial, commercial, property, and real estate transactions which are necessary and adequate to achieve its stated goals, it can offer goods or services on the market in competition with other operators in sectors such as scientific research, education, art, or health. In this hypothesis, according to the Court, this kind of subject must be considered as an enterprise because it performs an economic activity, despite the fact that its offering of goods and services is not powered by a profit-seeking reason, because the same offering competes with offerings of operators who pursue profits instead, with the subsequent and rightful application of European Community rules on State aid.

Social security is an area examined by the Court, in which it seems to be particularly clear that we need to investigate the specific and practical activities carried out by a certain subject,

[43] EC Court of Justice, 10 January 2006, in C-222/04, *Cassa di risparmio di Firenze s.p.a*. In the sense that a specific subject can be engaged, on the one hand, in non-economic administrative activities and, on the other, in purely commercial activities. Please also see EC Court of Justice, 24 October 2002, in C-82/01, *Aeroports de Paris*. T. Eilmansberger, *How to distinguish good from bad competition under Article 82 EC: In search of clearer and more coherent standards for anti-competitive abuses*, 42 Comm. Mark. Law Rev., 139 (2005); M. Sánchez Rydelski, *The EC state aid regime: distortive effects of state aid on competition and Trade*, 83 (2006); D. Geradin, N. Petit, *Price discrimination under ec competition law: another antitrust doctrine in search of limiting principles?*, 3 Journ. Com. Law Ec., 479 (2006); A. Moreira Mateus, T. Moreira, *Competition law and economics: advances in competition policy enforcement in EU and North America* (2010), 392 ss.

regardless of its nature[44].

In this regard, a rule emerged which states that if the indicators related to the activity performed point to a prevalence of the solidarity element with respect to other economic factors, then, according to the EC judges, the activity does not belong to the concept of enterprise, and this non-inclusion has consequences in terms of applicable norms.

According to reasoning above, the non-entrepreneurial nature of two French health insurance funds has been highlighted, based on the consideration that they aimed to guarantee health insurance coverage to all workers in a category, regardless of their economic or health conditions, given that employee contributions were proportional to the employee incomes, with exemptions for lower class workers, and that the price of the performance was not influenced by the amount of the private contributions[45].

Similarly, following the same practical and case-based approach, the economic nature of the exclusive management of Italian insurance for workplace accidents managed by INAIL was excluded[46], based on the consideration that this social security system aims mainly at satisfying solidarity principles defined by the Court through the following elements: 1) the insurance system is financed through contributions whose rates are not systematically proportional to the insured risk; 2) the contributions are calculated based not only on the risk connected to the business activity involved, but are also on the income of the insured individuals; 3) the amount paid for the performance,

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[44] On this, see G. Ricci, L. Di Via, *Monopoli previdenziali e diritto comune* antitrust, in *Solidarietà, mercato e concorrenza nel* welfare *italiano*, cit., *supra* at note 6, 39 ss.; S. Giubboni, *Solidarietà e concorrenza: "conflitto" o "concorso"?*, in *Mercato concorrenza regole* (2004), 75 ss.

[45] EC Court of Justice, 17 February 1993, C-159/91 and 160/91, *Poucet e Pistre*. A. Supiot, *Vers un ordre social international?* 11 L'Économie politique 10 (2001); G. Coron, *Le prisme communautaire en matière de retraites: la diffusion à travers le droit européen de la théorie des piliers*, Retraite et société, 6 (2007); G. Ricci, L. Di Via, *Monopoli previdenziali e diritto comune antitrust*, in *Solidarietà, mercato e concorrenza nel welfare italiano*, S. Sciarra (ed.) (2007), 39 ss.

[46] EC Court of Justice, 22 January 002, in C-218/2000, *Cisal*, 2 Foro Amm. CdS 327 (2002), with a note by F. De Leonardis, *La Corte di giustizia e il principio di solidarietà nei regimi previdenziali*. On the same subject see also O. Bonardi, *Solidarietà* versus *concorrenza: la Corte di giustizia si pronuncia a favore del monopolio INAIL*, 2 Riv. It. Dir. Lav., 462 (2002); V. Ferraro, *Il rapporto tra le nozioni di impresa ed ente pubblico nella giurisprudenza comunitaria: una riflessione sulla base della decisione della Corte di giustizia nel caso INAIL-CISAL-Battistello*, 4 Riv. It. Dir. Pubbl. Com., 802 (2002).

conversely, is not necessarily proportional to the person's income; 4) the lack of a direct link between the contributions paid and the service supplied implies a solidarity between the better paid workers and those who, considering their low income, would be disadvantaged if this direct link did in fact exist; 5) the activities carried out by INAIL, assigned by law with the management of the above-described system, are subject to State control, and the amounts of its performance fees and contributions are, in the end, determined by the State; 6) the services must be supplied independently from the contributions paid and from the financial results of the investments made by INAIL; and, finally, 7) the mandatory registration that characterises this system is indispensable for the financial stability of the system itself and for the implementation of the solidarity principle. Meanwhile, if the activities of a public body are found to have the typical features of a private business, its non-profit nature and social purposes would not prevent this activity from being subject to the rules on competition[47].

In this context lies the decision of the Court which, taking as a reference the Dutch social security fund, has brought back, at least in theory, to the notion of enterprise, relevant for the purposes of applying EC laws, a social security fund reserved for trade association members with obligatory membership whose functioning is based on the principle of capitalisation, where the services supplied by the fund to each retired member depend on the financial results of investments made with the contributions paid by each member, as occurs in private insurance companies[48].

[47] EC Court of Justice, 16 November 1995, in C-244/94, *Fédération française des sociétés d'assurance*, where the economic nature of the activity carried out by a French public organization in charge of the management of a facultative social security fund was claimed, based on the principle of capitalization, (that says that the amount of services provided depends on the amount of contributions paid), and this brought the community judges to assimilate this activity to the typical private insurance service, with subsequent dominance of the economic element with respect to the solidaristic one.

[48] EC Court of Justice, 21 September 1999, in C-67/96, *Albany International*, with reference to profiles that are of particular interest to our work, see: A. Andreoni, *Contratto collettivo, fondo complementare e diritto della concorrenza: le virtù maieutiche della Corte di giustizia (riflessioni sul caso* Albany*)*, 4 Riv. Giur. Lav. Prev. Soc., 981 (2000); M. Pallini, *Il rapporto problematico tra diritto della concorrenza e autonomia collettiva nell'ordinamento comunitario e nazionale*, 2 Riv. It. Dir. Lav., 225 (2000). On this, see also EC Court of Justice, 12 September 2000, in C-180/98 and 184/98, *Pavlov*; EC Court of Justice, 21 September 2000, in C-222/98, *Van der Woude*. See also, L. Idot, *Droit social et droit de la concurrence: confrontation ou cohabitation*

Although they supported the economic nature of the activity carried out by the fund, which should expose it to market rules, the EC judges did not forget to consider that the pursuit of relevant social functions, like those related to social security, can justify the attribution of a monopolistic position, to exclude the existence of an illegitimate situation of an abuse of power. Furthermore, the Court did not limit itself to affirming a principle, but further performed an analysis of the practical case in search of specific needs to derogate the ordinary EC rules on competition, realising that, from that point of view, if the companies involved were not required to subscribe to the social security fund indicated by the national collective contract, then some of them, namely those whose staff are not exposed to particular risks, could look for (and find) more advantageous insurance conditions with private companies. This circumstance may cause a dangerous "leakage" from the system of those with simpler situations, while those with the most complicated situations, exposed to greater risks, would remain concentrated in the program which would, in the judges' opinion, presumably result in increased premiums, with the subsequent risk of irregular contributions from companies and the subsequent potential prejudice for the financial stability of the fund and, therefore, the proper fulfilment of the social function involved.

In conclusion, it can be inferred that, based on the Court's jurisprudence, the adoption of the capitalistic method in a social security fund, in principle, implies the existence of a market, real or potential, that makes the activity performed look like an enterprise. However, the provision of numerous obligations for solidarity issues, coupled with the need to maintain a certain economic balance in the fulfilment of a social function, can justify the attribution of exclusive and special rights that place the funds in a different position from that of private companies supplying

(à propos de quelques développements récents), 11 Europe, 4 (1999); B Suárez Corujo, *Derecho social versus derecho de la competencia: querencia neoliberal de la jurisprudencia del Tribunal de Justicia de las Comunidades Europeas. A propósito de la STJCE 21 de septiembre de 1999, caso Albany Borja Suárez Corujo*, 32 Rev. Min. Trab. Inmigr., 217 (2001); A.C.L. Davies, *The Right to Strike Versus Freedom of Establishment in EC Law: The Battle Commences*, 1 Ind. Law Journ., 75 (2006); C. Semmelmann, *The Future Role of the Non-Competition Goals in the Interpretation of Article 81 EC*, 1 Glob. Antit. Rev., 15 (2008).

similar services[49].

With reference to a decision on the legitimacy of the exclusive system established in Germany in favour of public social security funds, the Court has more recently and more firmly emphasised the strictly derogatory nature, with respect to "general / common rules" on the protection of competition, of measures similar to those examined; measures, which were adopted by national authorities whose organisational decisions relating to the social sector have a better chance for unionisation within the European Community[50]. In this specific context, in fact, the social meaning instead of the economic one, has been recognised for the described social security funds, so as to exclude their entrepreneurial character; this view is based on the usual indicators that show the solidarity nature of the system (indicators given by: a) financing through contributions whose percentage is not systematically proportional to the covered risk, b) the fact that the value of the supplied service is not necessarily proportioned to the insured subject's wages and c) the observation that the activity in question is carried out under the control and protection of the State within precise legal provisions).

The Court has clarified that a new national legal system which, like the one examined above, establishes a system of mandatory insurance against workplace accidents and occupational diseases pursuing a social goal through an implementation system of the solidarity principle and under the State's control, can imply, in theory, a restriction to the free supply of services, because it hinders or makes less attractive, or even blocks, directly or indirectly, the exercise of such freedom by the providers of insurance services based in other Member States. However, such regulation can be justified by imperative reasons of public interest aimed at ensuring the financial stability of a social security sector, as has been found to occur in the real world, where the obligation to subscribe and ensuring the grouping in risk communities of all the enterprises for which such system is

[49] F.A. Cancilla, cit., *supra* at note 5, 207.

[50] EC Court of Justice, 5 March 2009, in C-250/07, *Kattner*. L. Azoulai, *The Court of Justice and the Social Market Economy: the Emergence of an Ideal and the Condition for its Realization*, 45 Comm. Mark. Law Rev., 1342 (2008); M. Fuchs, *Monopoli dell'assicurazione contro gli infortuni in Germania e libera prestazione di servizi in Europa*, 4 Giorn. Dir. Lav. Rel. Ind., 715 (2009).

applied, allows the solidarity principle to be implemented.

In summary, in the reconstruction offered by the Court, the Treaty provisions do not contradict a set of norms as described above, provided that, and here we find some emphasis, this system does not go beyond what is needed to achieve the objective of guaranteeing the financial stability of a social security sector in circumstances whose verification, though declared as belonging to the national judge, has been the object of the Court's consideration in the ruling.

It is understandable, then, why the Court, on the said occasion, more than in previous cases, adopted a strict construction on legitimate derogations to competition, based on verification of the need for protection of a primary public interest (namely, the economic-financial balance of the national social security system), outside of which, instead, EU regulation on the promotion and protection of competition must be re-expanded[51].

Therefore, solidarity is conceived as a strictly interpreted exception to the principles of free competition as claimed by the Court and emphasised in the last ruling examined. If, on the other hand, one considers the need to exclude certain sectors from the application of market rules, as soon as an entity abandons the narrowly-defined space within the boundaries of indispensability, it could not be considered in the same way with respect to the principles of competition and the specific needs that characterise services to the individual[52]. This concept was illustrated much more clearly in the documents of the previously examined *soft law*. From this standpoint, this sort of consideration in giving a clear alternative between sectors governed by free market rules, and in the exceptional situations where this occurs, would not allow adequate contemplation of the social services production and supply mechanisms in existence. Such consideration also avoids outlining and recognising the special role played by tertiary sector subjects, which would be strangled by the attitude of indifference

[51] For a comment on the ruling examined above see also M. Lottini, *La concezione "statica" e la concezione "dinamica" dell'attività economica: una recente sentenza della Corte di giustizia in materia di servizi sociali*, 6 Riv. It. Dir. Pubbl. Com., 1551 (2009); S. Giubboni, *Previdenza sociale e libertà di mercato in Europa dopo il caso* Kattner. *Una breve introduzione*, 124 Giorn. Dir. Lav. Rel. Ind., 707 (2009).

[52] On this, see S. Giubboni, *Solidarietà e concorrenza: conflitto o concorso?*, cit., supra at note 34, 87 ss.

previously highlighted by the Court.

Thus, we would support the re-emergence of the repeatedly mentioned risk of relegating the management and organisation of solidarity functions to a merely derogatory space with respect to the promotion of fundamental freedoms initially included in the original EC legal system, without taking into due account the fact that the most recent evolution has led to inclusion into this domain of issues of a social nature which should consequently be subjected to greater balance compared to other values which are not (no longer) super-ordinated to them.

3.5. Social Protection of Workers with Respect to the Freedom to Provide Services and the Right of Establishment

There is an additional jurisprudence issue that, although it does not pertain to the main focus of this study (which is dedicated to social services in the strict sense of the word), seems to be able to provide some useful elements to understand the phenomenon of balancing between fundamental freedoms at the basis of the EU foundation and the need of protection of national interests related to social protection in the EU legal system. Further, this issue seems to confirm the (temporary) conclusions expressed above concerning the Community scenario and the so-called detachment of labour as regulated by Directive 96/71/EC, which refers to the temporary activity of a worker in the territory of a Member State other than the one he or she normally works in.

In particular, the profile examined and specified by the EC judges concerning this issue, relevant to our present work, addresses the juridical treatment to be applied to workers going from one Member State to another in relation to the norms of the host country[53].

[53] For a complete overview of the issue, see B. Bercusson, *The Trade Union Movement and the European Union: Judgment Day*, 3 Eur. Law Journ., 283 (2007); S. Sciarra, *Servizi nel mercato interno e nuove dimensioni della solidarietà*, in *Solidarietà, mercato e concorrenza nel* welfare *italiano*, cit., *supra* at note 6, 13 ss.; N. Vascello, *Libertà di stabilimento e limiti all'autotutela collettiva di rango comunitario*, 2 Dir. Rel. Ind., 589 (2008); M. Colucci, *L'Unione europea in un delicato equilibrio fra libertà economiche e diritti sindacali nei casi* Laval *e* Viking*: quando il fine non giustifica i mezzi*, ivi, 239; A. Lo Faro, *Diritti sociali e libertà economiche del mercato interno: considerazioni minime in margine ai casi* Laval *e* Viking, 1 Lav. Dir., 63 (2008); S. Sciarra, Viking *e* Laval*: diritti collettivi e mercato nel recente dibattito europeo*, ivi, 245; A. Dashwood,

On the first occasion, the Court of Justice examined the case of a Finnish ferry-boat worker who decided to change the flag on one of his boats, registering it in Estonia, through an Estonian-controlled company with the aim of reducing the crew's labour cost thanks to the subsequent possibility of applying Estonian standard salaries, which are lower than Finnish ones, in order to be able to compete with Estonian ferries that were offering, at lower prices, the same maritime route (between the Finnish and Estonian capital cities). In reaction to this, the Finnish Union of maritime workers started a strike, asking that, even in case of a flag change, the crew continue to be employed under the conditions set out by Finnish laws and that the collective contract remain in force. Following this initiative, the Court of Justice, upon the action of the ship-owner company, concluded that a collective action such as the one described above has the effect of discouraging, if not cancelling, the ship-owners' ability to exercise their freedom of establishment, because it prevents the latter, as well as its Estonian-controlled company, from benefitting, in the host country, from the same conditions applied to other economic operators in that same State[54].

In a subsequent circumstance, the Court was forced to take a stand in a situation where a Latvian company had placed some workers in Sweden to carry out some construction projects through a subsidiary company operating in Sweden. The lack of an agreement being stipulated concerning the Swedish builders' national collective contract (which contains specific norms for the

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Viking and Laval: Issues of Horizontal Direct Effect, 10 The Cambridge Yearbook of European Legal Studies, 525 (2008); A.C.L. Davies, *One Step Forward, Two Steps Back? The Viking and Laval Cases in the ECJ*, 2 Ind. Law Journ., 126 (2008); O. Edstom, *The free Movement of services, Industrial Action and the Swedish Industrial Relation Model – the Legal structure and actors' acting in the Laval Case* in *Law and Society*, P. Wahlgren, (ed.), 432 (2008); K. *Damages claims against trade unions after Viking and Laval*, 1 Eur. Law Rev. 147 (2009); R. Eklund, *Free business movement and the right to strike in the European Community: two views - A Swedish Perspective on Laval*, 4 Comp. Labor Law Policy Journ., 569 (2008); R. O'Donoghue, B. Carr, *Dealing with Laval and Viking: From Theory to Practice*, 11 Cambridge yearbook of European legal studies, 159 (2009); F. Dorssemont, *The right to take collective action versus fundamental economic freedoms in the aftermath of Laval and Viking: foes are forever!*, *European Union internal market and labour law*, M. De Vos, (ed.), Intersentia, 45; S. Monzani, *Distacco infracomunitario di manodopera e appalti pubblici*, 9 Amm. It.. 1130 (2010); S. Deakin, *La concorrenza fra ordinamenti dopo Laval*, 3 Lav. Dir., 467 (2011).

[54] EC Court of Justice,11 December 2007, in C-438/05, *Viking*.

various aspects of the jobs that define specific economic commitments for the employers) induced the Swedish union to block the activities at the worksite. On this issue, the Judges have clarified that Member States are not allowed to subordinate the services provided in their territories to comply with working conditions that are different from those enjoyed by workers in their Member State of origin, although the imperative minimum protection regulations should be observed[55].

Even more specifically, the Court held that an additional economic charge, in this case represented by the workers being granted the right to receive the minimum wage in force, which is higher than the minimum wage in the workers' country or origin. According to the Court, the situation would be likely to impede, hinder, or make the supplier's performance less attractive in the host country, thus representing an illegitimate restriction to the freedom to supply services that cannot be justified, according to the Court, not even under the objective of worker protection[56].

Finally, in the same context lies the ruling with which the Court of Justice has clarified that the possibility of imposing upon domestic enterprises and other Member States' enterprises special working and occupational conditions, when doing so involves public policy provisions, "represents an exception to the basic principle of the freedom to supply services, in its restrictive sense, and whose relevance cannot be determined unilaterally by the Member States without any control of the European Community's institutions"[57]. Based on this principle, the Court judged certain

[55] EC Court of Justice, Grande Sezione, 18 December 2007, in C-341/05, *Laval*.

[56] EC Court of Justice, section II, 3 April 2008, in C-346/06, *Ruffert*. B. Veneziani, *La Corte di Giustizia e il trauma del cavallo di Troia (Corte di Giustizia Ce, 3 aprile 2008, causa C-346/2006)*, 2 Riv. Giur. Lav. Prev. Soc., 301 (2008); P. Chaumette, *Les actions collectives syndicales dans le maillage des libertés communautaires des entreprises*, 4 Dr. soc., 210 (2008); G. Orlandini, *Viking, Laval e Rüffert: i riflessi sul diritto di sciopero e sull'autonomia collettiva nell'ordinamento italiano*, *Il conflitto sbilanciato. Libertà economiche e autonomia collettiva tra ordinamento comunitario e ordinamenti nazionali*, A. Vimercati (ed.) (2009).

[57] EC Court of Justice, 19 June 2008, in C-319/06, *Commissione c. Granducato del Lussemburgo*, 4 Dir. Rel. Ind., 1223 (2008), with a note by D. Venturi, *L'ordine pubblico e la disciplina dei controlli di vigilanza nello Stato ospitante: limiti ed effetti sulla libera circolazione dei servizi*. For doctrinal comments on the pending references, see also S. Orlandini, *Un possibile equilibrio tra concorrenza leale e tutela dei lavoratori. I divieti di discriminazione*, 1 Lav. Dir., 125 (2008); C. Joerges, F. Rödl, *Informal Politics, Formalised Law and the 'Social Deficit' of European Integration: Reflections after the Judgments of the ECJ in Viking and Laval*, 1 Eur. Law Journ., 1

provisions of a Luxembourg law to be incompatible with the EC legal system: the law set different requirements upon companies that place foreign workers in their territory in the name of preserving social peace", and qualified the provisions as norms of "public order". These provisions were subsequently judged capable of "threatening, in consideration of the inherent restrictions, the exercise of the freedom to supply services by those companies that intend to place workers in Luxembourg".

In conclusion, it seems clear that, also in this field, which is nonetheless related to the social dimension, there is a significant acknowledgement by EC judges of the basic freedoms sanctified in the Treaty. Once a minimum level of worker protection has been guaranteed and achieved, these freedoms have been judged to be prevailing with respect to the further demands of a social nature. In other words, in the Court of Justice's jurisprudence on the issue being investigated, we can see a confirmation of the predominance of the freedom of establishment and freedom to supply services, although in a relative and not absolute way, since limited exceptions, after strict verifications of appropriateness and proportionality carried out directly by the EC judges, have been admitted[58].

Therefore, the application of EC laws on competition is once again seen as the rule in the social sector as well. Otherwise, any other solution represents an exception requiring a precise and strict justification.

4. Conclusions: the emergence of the concept of "social services of general economic interest"

In conclusion, the analysis carried out so far unquestionably

(2009); C. Barnard, *UK and Posted Workers: The Effect of Commission v Luxembourg on the Territorial Application of British Labour Law Case C-319/06 Commission v Luxembourg*, Judgment 19 June 2008, 1 Ind. Law Journ., 122 (2009); S. Prechal, S. de Vries, *Seamless web of judical protection in the internal market?*, 34 Eur. Law Rev., 5 (2009); F. Angelini, *L'Europa sociale affidata alla Corte di Giustizia CE: "sbilanciamento giudiziale" versus "omogeneità costituzionale"*, in *Scritti in onore di Vincenzo Atripaldi* (2010).

[58] A. Pizzoferrato, *Libertà di concorrenza e diritti sociali nell'ordinamento Ue*, 10 Riv. It. Dir. Lav., 543 (2010). For more details on the relationship between competition rules and national labour law systems see S. Giubboni, *Diritti sociali e mercato* (2009), 16 ss.

confirms the assumption of interest by the European Union legal system toward social rights. This in particular takes place under a dual profile consistent with the birth and development process of the EC's intervention in national policies: the first aspect is associated with the organisational supply and management modes of said services, in which scope we consider the involvement of the basic freedoms set out in the Treaty on the subject of protection and promotion of the competition; the second aspect, on the other hand, pertains to the human and solidarity aspect that naturally and inevitably denotes the services referable to the sector being examined, in a view of cohesion and social inclusion on a European scale that must complete the process of purely economic integration. In fact, economic integration by itself does not seem capable of determining the construction of a veritable European citizenship, perceived and acknowledged as such, not only formally, but also in the conscience of the populations involved.

To this end, in the framework of the European Community legal system, this study presented various positions, more or less prudent depending on the institution they come from, confirming an evolutionary process that is still ongoing with respect to the initial position of indifference by the EC legal system for the sector in question, which was left exclusively to the decision of the Member States. From this standpoint, the more mature position concerning the complexity and dual nature of social services is the one that emerges from the soft law instruments adopted by the Commission. These documents identify, on the one hand, the need to modernise the systems used to manage and supply services to the individual, on the other hand, the need to maintain the specific needs of the single individual, for the purpose of safeguarding basic human rights and human dignity, was kept in mind. In a different way, the derived European Community legal system has so far not been able to satisfactorily settle the issue, probably a result of the residual resistance by the Member States to turn over their sovereignty in such a delicate sphere, while the work of the Court of Justice seems to be, to a certain extent, biased in favour of traditional requests for free competition and to the advantage of solidarity needs, still seen in terms of a strictly interpreted exception to the unfolding of traditional basic freedoms.

Nevertheless, apart from the different approaches followed,

a gradual and common awareness seems to be emerging from the various European regulatory levels of the need to confirm a new category of services positioned at the boundary between the concepts already considered by the European community: we are talking about a category that may be defined as "social services of general economic interest".

Specifically, this last definition refers to the need to adapt, within the scope of the sector in question, the competition approach typical of the initial European Community construction with a more mature, and consequently, aware view of the solidarity and "human" aspect that has to characterize the social protection system, especially in the field of assistance, without this resulting in useless, distortive and non-transparent mechanisms that would ultimately produce undoubted inefficiency in achieving these objectives related to the protection of social rights.

To this end, in the writer's opinion we need to find suitable intermediate forms of combination and balancing between the aforementioned opposing needs, through a weighted dosing of the application of competition rules that are desirable in view of the implementation of efficiency values, transparency, equal treatment, pluralism, and freedom of choice, to a sector that does not appear to be slavishly referable to strict market logics, but which nonetheless can continue to follow the traditional purely journalistic approach, given increasing proof of the services provided in the presently studied sector being on the public expense budget (necessarily decreasing in the last period) and, more generally, depending on the economic and occupational context.

This result can be achieved, for example, devising, within public procurement procedures, selection criteria of individuals to whom to assign the management of social services that take into account different and additional "social" parameters compared to mere economic indicators[59], for example by enhancing the value of volunteering or cooperation-based organizations, or in any event of subjects not operating for profit, however making sure that the existence of said characteristics in the candidate managers does not lead to any form of solicitation of the competition (which, for example, may only be possible with reference to competitors

[59] On this, see cfr. A. Albanese, *Servizi sociali*, cit., *supra* at note 7, 1920.

possessing certain characteristics capable of ensuring a suitable approach with respect to the services to be supplied).

In conclusion, we are talking about promoting competition also in the sector of social services, but in terms regulated by the public authority, as the representative of the people's sovereignty, and within a framework that ensures the peculiarities of this sector in order to safeguard the basic values of the individual. In other terms, we need to find a balance capable of achieving what was defined by the Commission as a "social economy", where the needs of effectiveness and efficiency, increasingly important in the field of social services as well, are combined with the needs of a persona, human and solidarity approach, and not merely market-related and entrepreneurial. Specifically, the first ones will have to refer to the organizational apparatus, called to achieve an efficient allocation of resources, whilst the second ones refer to the moment in which the service is supplied, to be performed by considering and respecting the user's personal situation and his or her own specific needs, which cannot be standardized or type-approved in an approach that is the same for everyone, as for other services of a general economic interest that do not pertain to rights directly ascribable to the personal sphere and to human dignity.