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SOCIAL SECURITY AND HEALTH SERVICES IN EU LAW: TOWARDS CONVERGENCE OR DIVERGENCE IN COMPETITION, STATE AIDS AND FREE MOVEMENT?

Daniele Gallo

EUROPEAN UNIVERSITY INSTITUTE, FLORENCE
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DANIELE GALLO

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Abstract

With this paper I maintain that the regulation of social security and healthcare in EU law revolves around the quest for a right balance between conflicting interests, involving the issues of social rights, State and Market, distribution of competences.

In particular, the analysis of the way in which the ECJ legally frames the so called public/private divide permits to underline the emergence of relevant dissonances in the jurisprudence concerning the three sectors of competition, free movement and State aids.

The rationale behind some of such divergences pertain to the existence of natural asymmetries on which evolve and take shape the constitutive elements of the European economic and social constitution. In this sense, the lack of convergence is not undesirable per se. On the contrary, it depends on the different role and function exercised by the solidarity principle on one hand and on the relevance of the public financing of social services on the other hand, in their interplay with the choice between abandon or revaluation of a (more or less) idealtpic public/private dichotomy. At the centre of the analysis is the full incorporation or, alternatively, attenuation, in the field of social security and healthcare, of the functional approach adopted in relation to the notion of economic activity.

Some other divergences, however, are not justifiable. That is to say that in some cases there seems to emerge a need for a rapprochement between competition, free movement and States aids. This concerns the concept of general (economic?) interest and its potential intervention as a method of positive market and rights integration.

Finally, the paper intends to highlight that at the core of the EU discourse is the pursuit of (and the quest for) a "healthy" interaction and relationship between individual free movement rights, social rights and State redistributive autonomy for the management of national social security and healthcare systems. In this respect, I will underline role, function and potentialities of Art. 106.2 TFEU as the appropriate sedes materiae to balance public interest's aims and values with market principles and demands, both considered as constitutive elements, respectively, of the EU social and economic constitution.

Keywords

EU Law – ECJ – Social security – Health services – Services of general interest – Competition Law – Free Movement – State Aids – Social solidarity

1. Public/private divide, social security and healthcare: EU and the Welfare State[*].

1.1. EU and the Welfare State, between internationalism and constitutionalism.

The regulation of social security[1] and healthcare is naturally apt to raise issues transcending the national, regional or international nature of the legal system considered. This does not mean that such an issue has an identical impact in all legal systems. There seems to be in fact a relationship of direct proportionality between the degree of economic, social, political and juridical integration of a system and the relevance for the latter of social security and healthcare policies. The greatest is the degree of integration, the greatest is the relevance engaged by redistributive policies.

In brief, the regulation of social security and health services, even more than that one of "traditional" public economic services (for instance network industries) and similarly as other welfare activities (for instance education), raises issues which tend to pertain more to constitutional rather than international legal orders[2]. The degree of positive market and rights integration on which the EU is founded – and the incidence of EU legal order on the social, as well as economic, constitution of Member States[3] – is not certainly comparable to the relationship established between Member States and other international organizations. This is even more evident when the issue at stake is the regulation of public goods, such as social security and healthcare, which has a strong incidence on allocative choices and national distributive policies of Member States[4], on their autonomy and discretionary power in the regulation of economy and welfare[5].

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[*] This paper has been presented at the Seminar "*The New Public Law in a Global (Dis)Order – A Perspective from Italy*", held on September/19-20/2010 at the Jean Monnet Center on International and Regional Economic Law and Justice, New York University, organized by the Jean Monnet Center, directed by Prof. Joseph H. H. Weiler, and IRPA (*Istituto di Ricerche sulla Pubblica Amministrazione*), directed by Prof. Sabino Cassese. It constitutes the result of a period of research carried out, as Jean Monnet Fellow, at the Robert Schuman Center for Advanced Studies (2008-2009), subsequently developed, as European Union Fulbright Schuman Scholar, at Fordham Law School (2010). I am grateful to the participants to the NYU Seminar for their comments, in particular Miriam Aziz, Sabino Cassese, Matthias Goldmann, Dennis-Jonathan Mann, Giulio Napolitano and Cesare Pinelli.

[1] The immediate legal meaning of health service does not raise any particular problems. The same cannot be said with regard to the notion of social security, whose content seems to be wider and more historically and geographically determined. According to ECJ case law, social security refers to social insurance, i.e. to a system where people receive benefits or services in recognition of contributions to an insurance scheme. As to the categories of social security established in EU member States, they are: health insurance; long-term care insurance; pension insurance; unemployment insurance; work accident insurance. Therefore the concept of social security, whenever implies the supply of medical benefits, often overlaps with the notion of health service/healthcare, as it is clear from the analysis of the ECJ case law carried out in this paper.

[2] On this issue see, *inter alia*, P. ALSTON, H. J. STEINER, *International Human Rights in Context: Law, Politics, Morals,* Oxford, 1996, 1279.

[3] On the concept of european constitutionalism see, in particular, J. H. H. WEILER, M. WIND, *European Constitutionalism beyond the State*, Cambridge, 2003; K. LENAERTS, P. VAN NUFFEL, R. BRAY, *Constitutional Law of the European Union*[2], London, 2004; A. VON BOGDANDY, J. BAST (eds.), *Principles of European Constitutional Law*, Oxford, 2009.

[4] Furthermore, from a human rights perspective the question at stake is the function that the Public power must undertake in assuring the exercise, by users/citizens, of prerogatives, interests, juridical subjective situations implied by the notion of social rights, in relation to the positive supply of (and the access to) essential services. On the interplay between the two concepts of citizen and user in the law of public services see G. NAPOLITANO, *Servizi pubblici e rapporti di utenza*, Padova, 2001. On the relationship between social rights and essential services in EU law see, among others, M. FREEDLAND, S. SCIARRA (ed. by), *Public Services and Citizenship in European Law*, Oxford, 1998; M. FREEDLAND, *The Marketization of Public Services*, in C. CROUCH, K. EDER, D. TAMBINI, *Citizenship, Markets, and State*, Oxford, 2000, 90 ff.; A. LYON-CAEN, V. CHAMPEIL-DESPLATS, *Services publics et droits fondamentaux dans la construction européenne*, Paris, 2001; O. DE SCHUTTER, *L'accès aux services économiques d'intérêt général: un nouvel instrument de promotion des droits économiques et sociaux dans le cadre du marché intérieur – résumé de l'intervention d'Olivier De Schutter*, in

In this respect, the increasing intervention of EU law in national policies concerning both sectors of social security and healthcare is the clearest demonstration of EU's originality, in between internationalism and constitutionalism.

1.2. EU Member States and the blurring of the private/public divide in social security and healthcare.

The effects produced by the current economic crisis on the relationship between State and Market have induced EU institutions to reduce to a great extent their political aspirations and subsequently adopt a minimalistic approach in the regulation of core sectors of Member States' economy and welfare. A proof of this phenomenon is represented by public services. This is even more problematic and disappointing if we consider that the amendments introduced by the Lisbon Treaty confer upon EU institutions new competences in this field.

The case of the new version of Art. 14 TFEU is striking.

Article 14, in fact, by requiring the adoption of a horizontal and transversal regulation on services of general economic interest, according to Art. 289 TFEU, introduces a new legal basis in order to permit EU institutions to legislate on this issue. Now, as in many other fields, in spite of the legal changes inserted at a primary normative level by the Lisbon Treaty, the concrete response offered by EU institutions, in the sector of public services, has not been at all satisfactory. In particular, the issue of the adoption of a horizontal regulation, as required by Art. 14, seems to be disappeared from the EU's agenda.

For what concerns social security and health services, despite the lack of relevant new policies[6], the situation seems to be extremely dynamic since the ECJ's intervention in such sectors in the last years was and is still consolidating. This consolidation is the result of the interaction of privatization and liberalization, which in turn entails the abandon of the assumption that the State pursues in any case interests and carries out activities of non economic nature, differently from private actors that would always aim at achieving commercial values.

At the core of such phenomenon are the overlap between public and private spheres in the market and welfare of Member States, the retreat of the State from the economy and the new function exercised by private operators in sectors originally delivered by public authorities. In this respect, the ECJ's reasoning vis-à-vis social security and healthcare is paradigmatic in order to underline the problems raised by the need to legally frame in the EU legal order the abovementioned economic and social transformations occurred, although with different degree and intensity, in all Member States.

In this context, the paper aims at answering two main questions.

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Les Services publics en Europe. Académie de droit européen – Trèves, 24-25 janvier 2002. Documentation de base, 42 ff.; M. MARESCA, *L'accesso ai servizi di interesse generale, de-regolazione e ri-regolazione del mercato e ruolo degli Users' Rights*, in *Il Diritto dell'Unione europea*, 2005, 441 ff.; T. PROSSER, *Competition Law and Public Services: From Single Market to Citizenship Rights?*, in *European Public Law*, 2005, 550 ff.; S. GIUBBONI, *Social Rights and Market Freedom in the European Constitution. A Labour Law Perspective*, Cambridge, 2006; P. NIHOUL, *Droit européen, consommateurs et services d'intérêt économique général*, in J.-V. LOUIS, S. RODRIGUES (sous la direction de), *Les Services d'intérêt économique général et l'Union européenne*, Bruxelles, 2006, 163 ff.; D. GALLO, *I servizi di interesse economico generale. Stato, Mercato e Welfare nel diritto dell'Unione europea*, Milano, 2010, in particular 714-830.

5 On the need to consider the issue of social rights always from a redistributive perspective see M. S. GIANNINI, *Stato Sociale: una nozione inutile*, in *Aspetti e tendenze del diritto costituzionale. Scritti in onore di C. Mortati*, I, Milano, 1977, 141 ff.

6 Including the phase of standstill which characterizes European Commission's proposal for a patients' rights directive (COM(2008) 414); on this issue see W. SAUTER, *The Proposed Patients' Rights Directive and the Reform of (Cross-Border) Healthcare in the European Union*, in *Legal Issues of Economic Integration*, 2009, 109 ff.

The first is what kind of approach has been adopted by the ECJ in order to understand and define economic, social and legal changes produced by the abandon of an idealtipic public/private dichotomy in the regulation of the market and Welfare State[7]. That is to ask how did the Court deal with the problems raised by the chamaleontic function undertaken both by the State and the Private sector in the sectors of social security and healthcare[8]. To this end, it must be stressed that the ECJ's approach is characterized in the first place by the end of the *institutional* approach, according to which the choice between private and public represents the precondition for the intervention or, alternatively, exclusion of EU law. This phenomenon also entails the formulation of a *functional* approach, based on the idea that EU law can intervene on condition that the activity undertaken by the subject is qualified as economic, it doesn't matter whether public or private[9]. From this originates the blurring and transformation of the so called *public/private divide*[10], which shows itself clearly in the jurisprudence on "traditional" public economic services.

The second question is to what extent did the ECJ contribute to blurring such public/private divide in order to successfully reach a right balance between interests of the State and interests of the Market. The said blurring seems, in fact, to develop differently in the case law on social security and healthcare compared to other sectors. This means that the functional approach applied to the notion of economic activity does not follow in any case, in the two fields of social security and healthcare, the traditional free market principles which instead orient the ECJ's reasoning in the rest of its jurisprudence.

In this respect I will firstly identify the emergence of divergences in the interpretation of the notion of "economic" between different competition cases. Where at stake is the State's intervention, the ECJ, in some cases, does not leave aside the public nature of the subject, thus attenuating the functional/abstract approach followed in other sectors of the economy. Secondly, I will show that from a confrontation of competition case law as a whole with free movement cases there seem to emerge relevant divergences between these two areas: a more statalistic/institutional conception under

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7 On the "new" economic constitution see, in particular, G. AMATO, *La nuova costituzione economica*, in G. NAPOLITANO, G. DELLA CANANEA, *Per una nuova Costituzione economica*, Bologna, 1998, 11 ss.; M. POIARES MADURO, *We, the Court – The European Court of Justice and the European Economic Constitution*, Oxford, 1998; C. JOERGES, *What is left of the European Economic Constitution? A Melancholic Eulogy*, in *European Law Review*, 2005, 461 ff.; S. CASSESE, *La nuova Costituzione economica*[3], Roma-Bari, 2007.

8 The first acting as a commercial operator and the second as an actor intervening in the regulation of welfare activities, carried out on the basis of redistributive and social demands. On this topic see, in general, M. POIARES MADURO, *L'État-caméléon. Formes publique et privée de l'Homo Economicus*, in *Mélanges en l'honneur de Philippe Léger. Le droit à la mesure de l'homme*, Paris, 2006, 79 ff.

9 On this issue see, in particular, J. BAQUERO CRUZ, *Between Competition and Free Movement. The Economic Consitutional Law of the European Community*, Oxford, 2002; O. ODUDU, *The Boundaries of EC Competition Law. The Scope of Article 81*, Oxford, 2006; E. SZYSZCZAK, *The Regulation of the State in Competitive Markets in the EU*, Oxford-Portland, 2007; W. SAUTER, H. SCHEPEL, *State and Market in European Union Law. The Public and Private Spheres of the Internal Market before the EU Courts*, Cambridge, 2009; D. GALLO, *op. cit.*, 234-362.

10 In general, on this public/private dimension see, among others, C. HARLOW, *Public and Private Law: Definition and without Distinction*, in *Modern Law Review*, 1980, 241 ff.; G. BORRIE, *The Regulation of Public and Private Power*, in *Public Law*, 1989, 552 ff.; C. GRAHAM, T. PROSSER, *Privatising Public Enterprises – Constitutions, the State and Regulation in Comparative Perspective*, Oxford, 1991; E. SCHMIDT-AßMAN, *Öffentliches Recht und Privaterecht: Ihre Funktionen als wechselseitige Auffangordnungen*, in ID., W. HOFFMANN-RIEM (Hrsg.), *Öffentliches Recht und Privaterecht als wechselseitige Auffangordnungen*, Baden-Baden, 1996, 7 ff.; P. CRAIG, *Public Law and Control over Private Power*, in M. TAGGART (ed. by), *The Province of Administrative Law*, Oxford, 1997, 196 ff.; N. BAMFORTH, *The Public Law-Private Law Distinction: A Comparative and Philosophical Approach*, in P. LEYLAND, T. WOODS (eds.), *Adiministrative Law Facing the Future: Old Constraints and New Horizons*, London, 1997, 136 ff.; D. OLIVER, *Common Values and the Public-Private Divide*, London, 1999; J. FREEMAN, *The Private Role in Public Governance*, in *New York University Law Review*, 2000, 534 ff.; ID., *Extending public law norms through privatization*, in *Harvard Law Review*, 2003, 1285 ff.; G. NAPOLITANO, *Pubblico e privato nel diritto amministrativo*, Milano, 2003; M. FREEDLAND, J.-B. AUBY (eds.), *The Public Law/Private Law Divide: une entente assez cordiale?*, Oxford, 2006; M. RUFFERT (ed. by), *The Public-Private Law Divide: Potential for Transformation?*, London, 2009.

competition rules and a more neo-liberalistic conception under free movement rules. I will then clarify the rationale behind such dissonance, with regard both to the concept of economic activity and that one of general (economic?) interest. Finally I will make a very (brief) comparison with the US legal system, with reference to the current debate on social security and healthcare.

2. The concept of economic activity in social security and healthcare.

2.1. Public/private divide and competition: reformulation (and attenuation) of the functional approach and relevance of the public funding system.

2.1.1. The thin and dynamic boundary between services of general interest, services of general economic interest and social services of general economic interest.

As clarified by the European Commission, the term "service of general interest" covers "market and non market services which the public authorities class as being of general interest and subject to specific public service obligations"[11]. Market services are services of general economic interest[12], i.e. public economic services[13], while non market services are equivalent to social services of general interest[14]. Being the public service obligation a constitutive element of both categories, the

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[11] See para. "Definitions of terms" of the Communication on Services of General Interest (COM 443/1996) and more recently para. 2.1 of the Communication "Implementing the Community Lisbon programme: Social services of general interest in the European Union" (SEC(2006) 516).

[12] See annex I of the White Paper on Services of General Interest (COM(2004) 374).

[13] Among those who have studied and underlined the new features characterizing the legal regime of services of general economic interest see, in the wide literature, J. L. BUENDIA SIERRA, *Exclusive Rights and State Monopolies Under EC Law*, Oxford, 1999; H. SCHWEITZER, *Daseinsvorsorge, "service public", Universaldienst. Art. 86 Abs. 2 EG-Vertrag und die Liberalisierung in den Sektoren Telekommunikation, Energie und Post*, Baden-Baden, 2001, 83-226 and 377-426; E. SZYSZCZAK, *Public Service Provision in Competitive Markets*, in *Yearbook of European Law*, 2001, 35 ff.; F. MUNARI, *La disciplina dei cd. servizi essenziali tra diritto comunitario, prerogative degli Stati membri e interesse generale*, in *Il Diritto dell'Unione europea*, 2002, 27 ff.; V. ROJANSKI, *L'Union européenne et les services d'intérêt général*, in *Revue du Droit de l'Union européenne*, 2002, 735 ff.; G. E. BERLINGERIO, *Studi sul pubblico servizio*, Milano, 2003, 289-39; M. ROSS, *The Europeanization of Public Services Supervision: Harnessing Competition and Citizenship?*, in *Yearbook of European Law*, 2004, 303 ff.; J. BAQUERO CRUZ, *Beyond Competition: Services of General Interest and European Community Law*, in G. DE BÚRCA (ed. by), *EU Law and the Welfare State. In Search of Solidarity*, Oxford, 2005, 169 ff.; G. F. CARTEI, *I servizi di interesse economico generale tra riflusso dogmatico e regole di mercato*, in *Rivista italiana di diritto pubblico comunitario*, 2005, 1219 ff.; G. NAPOLITANO, *Regole e mercato nei servizi pubblici*, Bologna, 2005, 33-54 and 145-178; ID., *Towards a European Legal Order for Services of General Economic Interest*, in *European Public Law*, 2005, 565 ff.; T. PROSSER, *The Limits of Competition Law. Markets and Public Services*, Oxford, 2005, 1-38, 121-173 and 235-246; J. MAILLO GONZÁLEZ-ORÚS, *Article 86 EC. Services of General Interest and EC Competition Law*, in G. AMATO, C.-D. EHLERMANN (eds.), *EC Competition Law. A Critical Assessment*, Oxford, 2007, 591 ff.; M. MARESCA, *Regole del mercato e servizi di interesse generale*, in F. BESTAGNO, L. G. RADICATI DI BROZOLO (a cura di), *Il mercato unico dei servizi*, Milano, 2007, 151; E. MOAVERO MILANESI, *I servizi di interesse generale e di interesse economico generale*, in F. BESTAGNO, L. G. RADICATI DI BROZOLO (a cura di), cited above, 89 ff.; M. ROSS, *Promoting Solidarity*, cited above; E. SZYSZCZAK, *The Regulation of the State*, cited above, 1-44 and 211-260; G. CAGGIANO, *La disciplina dei servizi di interesse economico generale. Contributo allo studio del modello sociale europeo*, Torino, 2008; F. GIGLIONI, *L'accesso al mercato nei servizi di interesse generale. Una prospettiva per riconsiderare liberalizzazioni e servizi pubblici*, Milano, 2008, 163-315; M. KRAJEWSKI, *Providing Legal Clarity and Securing Policy Space for Public Services through a Legal Framework for Services of General Economic Interest: Squaring the Circle?*, in *European Public Law*, 2008, 377 ff.; the contributions in ID., U. NEERGAARD, J. VAN DE GRONDEN, *Introduction* (eds.), *The Changing Legal Framework for Services of General Interest in Europe*, The Hague, 2009; W. SAUTER, H. SCHEPEL, *op. cit.*, 27-128 and 164-193; D. GALLO, *op. cit.*

[14] On the issue of social services in EU law see, in particular, E. MENICHETTI, *I servizi sociali nell'ordinamento comunitario*, in A. ALBANESE, C. MARZUOLI (a cura di), *Servizi di assistenza e sussidiarietà*, Bologna, 2003, 79 ff.; P. Costanzo, S. MORDEGLIA (a cura di), *Diritti sociali e servizio sociale. Dalla dimensione nazionale a quella comunitaria –*

discriminatory element between the two kinds of activities is represented by their (more or less) economic nature.

It is precisely around the concept of "economic" that a further (sub) category takes shape and develops, integrating the "cabala"[15] already present in the EU secondary law. I am referring to the notion of social services of general economic interest[16], or activities linked with social and redistributive aims, earlier delivered in almost all Member States by the public sector outside market mechanisms or by no profit organizations, nowadays increasingly provided by economic private actors on the base of a mixture of commercial and extra-commercial principles. In this respect, the ECJ, through a case-by-case approach, based on a description of activities and their enumeration rather than on an individuation of general principles and criteria[17], has identified the mission of general interest in numerous cases, comprising social services in the category of public economic services[18].

2.1.2. The constitutive elements of economic activity.

According to the functional and objective[19] – rather than institutional and subjective[20] – interpretation of economic activity under competition law, the ECJ considers (in principle) irrelevant the following elements: the legal status of the entity; the way in which it is organized; the way in which it is financed; the absence of a lucrative aim[21]. Despite the several positions in the literature and the numerous contradictions in the case law, it seems possible to conclude that the constitutive and cumulative elements of "economic" are two: the offer of goods or services (concrete test); the

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Atti della Giornata di studio, Genova, 25 maggio 2004, Milano, 2004; G. DE BÚRCA, B. DE WITTE, *Social Rights in Europe*, Oxford, 2005; A. ALBANESE, *Servizi sociali*, in M. P. CHITI, G. GRECO (a cura di), *Trattato di diritto amministrativo europeo*, IV, Milano, 2007, 1897 ff.; P. HERRMANN, A. BRANDSTÄTTER, C. O'CONNELL (eds.), *Defining social services in Europe: between the particular and the general*, Baden-Baden, 2007; E. MENICHETTI, *Servizi sociali e servizi economici di interesse generale*, in S. SCIARRA (a cura di), *Solidarietà, mercato e concorrenza nel welfare italiano. Profili di diritto interno e comunitario*, Bologna, 2007, 109 ff.

15 In this sense G. E. BERLINGERIO, *op. cit.*, 114.

16 The expression is used, *inter alia*, by W. SAUTER, H. SCHEPEL, *op. cit.*, 174.

17 As U. NEERGAARD, Services of General Economic Interest: The Nature of the Beast, in M. KRAJEWSKI, U. NEERGAARD, J. VAN DE GRONDEN (eds.), The Changing Legal Framework for Services of General Interest in Europe, The Hague, 2009, 19, points out, "[t]he classification of various services, as for instance either 'market services', 'services of general economic interest', 'non-economic services of general interest', or 'exercise of public authority', is […] of huge importance", given that "the legal consequences vary quite a lot depending on which concept is involved".

18 In this regard see, *ex multiis*, V. CHAMPEIL-DESPLATS, *Services d'intérêt économique général, valeurs communes, cohésion sociale et territoriale*, in *L'Actualité juridique – Droit adiministratif*, 20 décembre 1999, 959.

19 For a general perspective on the functional approach adopted by the ECJ see, among others, J. L. BUENDIA SIERRA, *Exclusive Rights*, cited above, 46-63; J. MAILLO GONZALEZ-ORUS, *Beyond the Scope*, cited above, 387-392; V. LOURI, *'Undertaking'*, cited above, 143 ff.; M. DE DOMINICIS, *Concorrenza e nozione d'impresa nella giurisprudenza comunitaria*, Napoli, 2005; D. CHALMERS, C. HADJIEMMANUIL, G. MONTI, A. TOMKINS, *European Union Law. Text and Materials*, Cambridge, 2006, 1134-1136; O. ODUDU, *The Boundaries*, cited above, 23-56; J. L. BUENDIA SIERRA, *Article 86-Exclusive Rights and Other Anti-Competitive State Measures*, in J. FAULL, A. NIKPAY, *The EC Law of Competition*[2], Oxford, 2007, 598-601; P. CRAIG, G. DE BÚRCA, *EU Law. Text, Cases and Materials*[4], Oxford, 2007, 952-953; J. FAULL, A. NIKPAY, *Article 81*, in ID. (ed. by), *op. cit.*, 187-193; W. SAUTER, H. SCHEPEL, *op. cit.*, 75-83.

20 O. ODUDU, *The Boundaries*, cited above, 25; see also W. P. J. WILS, *The undertaking as subject of E.C. competition law and the imputation of infringements to natural or legal persons*, in *European Law Review*, 2000, 101.

21 See, in particular, *Höfner* of 23 April 1991, Case C-41/90, ECR I-1979; on the notion of economic activity in social security and healthcare see *Poucet et Pistre* of 17 February 1993, Cases C-159-161/91, ECR I-637, para. 17; *FFSA* of 16 November 1995, Case C-244/94, ECR I-4013, para. 14; *Albany* of 21 September 1999, Case C-67/96, ECR I-5751, para. 77; *Brentjens'* of 21 September 1999, C-115-116 and 118/97, ECR I-6025, para. 77; *Drijvende Bokken* of 21 September 1999, C- 219/97, ECR I-612, para. 67; *Pavel Pavlov* of 12 September 2000, Case C-180-184/98, ECR I-6451, para. 74; *CISAL* of 22 January 2002, Case C-218/00, ECR I-691, para. 22; *AOK Bundesverband* of 16 March 2004, Cases C-264, 306 and 354-355/01, ECR I-2493, para. 46; *FENIN* of 11 July 2006, Case C-205/03 P, ECR I-6295, para. 25; *Kattner* of 5 March 2009, Case C-350/07, ECR I-1513, para. 68.

potential to make profit without State intervention, i.e. the existence of a market in which private undertakings could, at least in principle, perform lucrative activities (abstract test).

As regards the notion of offer, the ECJ's reasoning is quite cryptic. However, its basic and cumulative elements seem to be two: remuneration and assumption of economic and financial risks by the operator.

As regards the abstract test, it must be stressed that the profit-making motive is employed only to define the activities of actual or potential competitors. It thus intervenes in hypothetical terms: in line with the functional approach, in fact, it must be recalled once again that it is not necessary for the undertaking actually to make profit, nor is it necessary to have a profit-making motive.

The economic character of the activity depends, precisely, on the presence of the aforementioned conditions. It is sufficient that one of them is not present to exclude the economic nature of the activity and consequently entail the application of EU rules.

Once established the economic character of the service, it is possible for the ECJ to verify if the conditions foreseen by the derogation contained in Art. 106(2) TFEU are fulfilled. In the affirmative, EU rules would not apply so long as the conditions foreseen by such norm are respected and the economic activity is considered as a service of general economic interest.

2.1.3. The issues and risks raised by the application of the functional approach in social security and healthcare.

How did the ECJ have applied the functional approach in the field of social security and health services, from a competition law perspective[22]?

The relevance of the issue for the regulation of healthcare is underlined by Advocate general M. Poiares Maduro in his opinion delivered on 10 November 2005 in the *FENIN* case: "[i]n seeking to determine whether an activity carried on by the State or a State entity is of an economic nature, the Court is entering dangerous territory, since it must find a balance between the need to protect undistorted competition on the common market and respect for the powers of the Member States". More specifically in respect to Art.106(2) TFEU, Maduro observes that "[i]t is true that to introduce a requirement of competition in sectors which have no market characteristics would be meaningless. That would risk imposing a requirement on Member States to justify their position under Article 86(2) EC [now Art. 106(2) TFEU] as a matter of course and would represent an unlimited extension of the scope of competition law"[23].

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[22] See M. MCKEE, E. MOSSIALOS, R. BAETEN, *The impact of EU law on health systems*, Bruxelles, 2002; E. MOSSIALOS, M. MCKEE, *EU Law and the Social Character of Health Care*, Brussels, 2002, 165-191; P. J. SLOT, *Applying the competition rules in the healthcare sector*, in *European Competition Law Review*, 2003, 580 ff.; V. HATZOPOULOS, *Health Law and Policy: The Impact of the EU*, in G. DE BÚRCA (ed. by), *op. cit.*, 111 ff.; A. JACQUEMIN, *Le droit de la concurrence et les systèmes de soins de santé*, in P. NIHOUL, A.-C. SIMON (sous la direction de), *L'Europe et les soins de santé*, Bruxelles, 2005, 263 ff.; P. KOUTRAKOS, *Healthcare as an Economic Service under EC law*, in M. DOUGAN, E. SPAVENTA (eds.), *Social Welfare and EU law*, Oxford, 2005, 105 ff.; D. WYATT, *Community Competence to Regulate Medical Services*, in M. DOUGAN, E. SPAVENTA (eds.), *op. cit.*, 131 ff.; D. CHALMERS, C. HADJIEMMANUIL, G. MONTI, A. TOMKINS, *op. cit.*, 1138-1141; F. IPPOLITO, *I servizi sanitari tra servizi di interesse economico generale e servizi di interesse generale*, in *Diritto e Politiche dell'Unione europea*, 2007, 19 ff.; E. MENICHETTI, *Servizi sociali e servizi economici di interesse generale*, cited above, 120-127; W. SAUTER, *Services of general economic interest (SGEI) and universal service obligations (USO) as an EU law framework for curative health care – TILEC Discussion Paper*, 2007, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1136105##, 11-33; A. CYGAN, *Public Healthcare in the European Union: Still a Service of General Interest?*, in *International and Comparative Law Quarterly*, 2008, 529 ff.; E. SZYSZCZAK, *Modernising Healthcare: Pilgrimage for the Holy Grail?*, in M. KRAJEWSKI, U. NEERGAARD, J. VAN DE GRONDEN (eds.), *op. cit.*, 191 ff.

[23] See paras. 26 and 27 of the conclusions.

Hence, the main problem raised by a full interpretation, application and transposition of the functional approach in welfare sectors is the risk that the State would be deprived of its primary function, i.e. the one to put in place systems for redistribution and exercise its power in the political sphere, being subject to democratic control. The control assured by competition rules applies, on the contrary, when the State acts as an economic operator: in such cases, the public authority must observe the same rules of private undertakings. It is therefore crucial to establish the criterion which permits to understand when competition rules must apply, i.e. when the redistributive function is more a pretext in order to avoid economic actors being subject to EU rules, or when State intervention is compatible with EU law.

2.1.4. Healthcare and the functional approach: the *Ambulanz Glöckner* case.

Starting from the healthcare sector – and then focusing on social security –, as to the first element of economic activity, that is to say the offer of goods or services on a market[24], in *Ambulanz Glöckner* – the leading case in the field of healthcare, here used as an example – the ECJ establishes that medical aid organizations to which the competent public authorities have delegated the task of providing the public ambulance service carry out economic activities mainly (but not only) because they receive remuneration from users[25]. This counts, according to the ECJ, both for emergency transport services and patient (traditional) transport services.

In brief, in this case the ECJ finds that both conditions of remuneration and assumption of risks are fulfilled.

As to the second element of economic activity, i.e. the potential to make profit, the ECJ incorporates the abstract test, stating that the right criterion consists in considering whether activities have always been, or are not necessarily, carried on by such organizations or by public authorities[26]. By applying this test, the ECJ states that this was the case in respect to the *Ambulanz* case and consequently establishes the economic nature of the activity.

Therefore, in the opinion of the judges the fact that public service obligations may render the services provided by a given medical aid organization less competitive than comparable services rendered by other operators not bound by such obligations cannot prevent the activities in question from being regarded as economic activities[27].

However, in order not to adopt a too market oriented approach, the ECJ decides to base its reasoning on Art. 106(2) TFEU. The Court states that medical aid organizations which perform emergency services are entrusted with a task of general economic interest. This task consists in the obligation to provide a permanent standby service of transporting sick or injured persons in emergencies throughout the territory concerned, at uniform rates and on similar quality conditions, without regard to the particular situations or to the degree of economic profitability of each individual operation. In order to ensure the performance of this tasks, the ECJ states that not only the exclusive right conferred on this market, but also the one attributed on the parallel market of "traditional" patient transport services, must be justified according to Art. 106(2)[28].

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[24] See *Pavel Pavlov*, para. 75; *Ambulanz Glöckner* of 25 October 2001, Case C-475/99, ECR I-8089, para. 19; *CISAL*, para. 23.

[25] See *Ambulanz Glöckner* , paras. 18-22.

[26] See *Ambulanz Glöckner*, para. 20.

[27] See para. 21 of *Ambulanz Glöckner*.

[28] See paras. 55-56 of *Ambulanz Glöckner*.

By doing so, the judges transfer in the field of healthcare the reasoning developed with regard to network industries and traditional public economic services, in line with the *RTT*[29] and *Corbeau*[30] cases, concerning, respectively, telecommunications and posts. Hence the cross subsidization between lucrative and lucrative sectors seems to constitute the only way by which ensuring, on the base of Art. 106(2), the performing of the medical function by undertakings operating simultaneously in sectors guided both by general and private interests.

Now, even though the ECJ does not say it in an express way, what can be inferred by the analysis of the judgment is that the main reason for the justification of the exclusive rights and the subsequent distortion of competition lies in the way in which the service is financed. In fact, since the public ambulance service is financed ultimately either through taxes or through health insurance contributions there would have been, should Art. 106(2) did not apply, a serious risk that the inevitable losses of the public ambulance service would have been socialized, whilst its potential profits would have gone to the independent operators.

In *Ambulanz* the ECJ does not leave aside neither the functional approach nor the tendency to blur the public/private divide. In fact, the relevance attributed to the public nature of the funding system occurs in a phase – subsequent to the inquiry of the notion of economic activity – in which at stake is the interpretation of Art. 106(2). It doesn't occur, on the contrary, in the definition of such a notion.

2.1.5. Healthcare and the functional approach: the *FENIN* case.

Does the reasoning adopted in *Ambulanz*, as to the notion of economic activity and the choice to apply Art. 106(2) TFEU, count for the whole logics which orients the EU jurisprudence on healthcare, even when the entities involved have public law character? That is to ask whether the functional approach is entirely followed in the healthcare sector.

The case *FENIN* is particularly interesting in this regard.

The issue at stake is the purchasing activity of medical goods from private undertakings undertaken by the Spanish public organizations managing a national health system. The ECJ underlines that it is the offer of goods and services on a given market the constitutive element of the economic activity, not the business of purchasing as such. Thus, it would be incorrect, when determining the nature of the upstream activity, to dissociate it from the subsequent use to which the purchased goods are put in. This activity is economic on condition that the downstream activity amounts to an economic activity as well. Consequently, an organization which purchases goods ─ even in great quantity ─ not for the purpose of offering goods and services as part of an economic activity, but in order to use them in the context of a different activity, such as one of a purely social nature, does not act as an undertaking simply because it is a purchaser in a given market.

Is that the case? That is to ask an additional question, i.e. whether the medical benefits given by the Spanish organizations to the patients do constitute economic activities. On this issue, the ECJ excludes their economic activity because they operate according to the principle of solidarity in that they are funded from social security contributions and other State funding and provide services free of charge to their members on the basis of universal cover[31]. As a consequence, whilst an entity may wield very considerable economic power, it nevertheless remains the case that, if the activity for which that entity purchases goods is not an economic activity, such entity is not acting as an undertaking for the purposes of EU competition law and is therefore not subject to the prohibitions laid down in Articles 101 and 102 TFEU.

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[29] See paras. 22 e 23 of the judgement of 13 December 1991, Case 18/88, ECR I-5941.

[30] See paras. 14-21 of the judgement of 19 May 1993, Case C-320/91, ECR I-2533.

[31] See para. 39 of the judgment of the General Court and paras. 25-29 of the judgment of the ECJ.

The main point to be stressed is that in *FENIN* the ECJ tends to strongly relativize the functional approach elaborated in the competition case law, also employed in *Ambulanz*. In fact, instead of considering the activity as economic and then applying the derogation laid down in Art. 106(2), the ECJ chooses to base its reasoning on the concrete criterion represented by the financing of the service, rather than on a purely abstract approach. A strict functional approach would have required the ECJ to consider the public financing of the service as a remuneration, given that the way in which such service is funded must be in principle considered irrelevant for the application of EU rules. Moreover, an abstract approach, such as the private investors' principle criterion, would have required the ECJ to determine whether the State, with a view to adopting a policy of redistribution by entrusting that activity exclusively to State bodies which would be guided solely by considerations of solidarity, intended to exclude it from all market considerations. As pointed out by Advocate General M. Poiares Maduro, event though the Spanish organizations are obliged to guarantee universal cover to all its members free of charge, the General Court's judgment, confirmed by the ECJ, did not state whether the requirements of the market are entirely satisfied by public bodies or whether private organizations having the characteristics of an undertaking take part, at least in theory, in it as well[32].

With *FENIN* the ECJ leaves open the possibility for Member States to limit the application of EU rules through a concretization of the functional approach to be pursued, in the field of public healthcare, on the basis of a public funding system criterion. As a result, the ECJ opts for a revalorization of the public/private divide, unlike what happens in *Ambulanz* whereby the public financing of the service provided by private undertakings is a factor considered in the framework only of Art. 106(2) and not of the qualification of economic activity.

Finally, it must be stressed that the choice not to consider dissociable the upstream market from the downstream market produces, as a consequence, that the State, whenever intervenes as commercial actor in the field of healthcare, buying goods and services from other private competitors, tends to be always naturally immune from the application of competition rules. Without venturing too much in this analysis, it is clear that this kind of approach gives rise to several problems that the ECJ has to confront with in the next years. It is sufficient to think of situations, like the one examined in *FENIN*, characterized by the exercise of a strong economic power by the public entity, capable of giving rise to serious distortions of competition like those produced by a monopsony, as was it the case precisely in *FENIN*.

2.1.6. Social security and the functional approach.

Starting from the assumption that "EU law does not detract from the powers of the Member States to organize their social security systems"[33], the ECJ, in the great majority of its case law, tends to consider purely social and non economic the service provided by the national organizations charged with the management of a social security scheme.

At the core of the ECJ's reasoning is the principle of solidarity. The judges use in fact such principle, also recalled in *FENIN*, as the discriminatory element to affirm or, alternatively, exclude the economic nature of the activity.

The analysis of ECJ case law permits to identify three forms of solidarity[34], with different degree and intensity. Whenever at least one of such manifestations occurs, the activity must be considered non economic[35].

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[32] See paras. 50-53 of the conclusions.

[33] See, *inter alia*, *Poucet et Pistre*, para. 6 and *Kattner*, para. 37.

[34] For some general observations on the principle of solidarity see, *inter alia*, C. BARNARD, *EU Citizenship and the Principle of Solidarity*, in M. DOUGAN, E. SPAVENTA (eds.), *op. cit.*, 157 ff.; T. PROSSER, *Regulation*, cited above, 364 ff.;

The first is the redistributive solidarity[36]. It entails the redistribution of income between those who are better off and those who, in view of their resources and state of health, would be deprived of the necessary social cover. This way, the funds are intended to provide cover for all the persons to whom they apply, against the risks of sickness, old age, death and invalidity, regardless of their financial status and their state of health at the time of affiliation.

The second is the financial solidarity. According to this principle, there is solidarity between the various social security schemes, in that those in surplus contribute to the financing of those with structural financial difficulties.

The third is the intergenerational solidarity. It is based on the consideration that the contributions paid by the workers in active employment are directly used to finance the benefits paid to the pensioners. Enduring solidarity is thus created between the different generations of workers, according to a rationale which is very different from that prevailing in private insurance schemes based on capitalization in which, by contrast, as noted by Advocate General Jacobs in its conclusions to *Albany*, the insurance contributions are used for financial investments which later yield a life annuity or a capital sum[37].

The fact that there isn't any possibility that without State intervention private undertakings could offer on the markets a pension scheme based on the redistribution principle because nobody would be prepared to pay for the pensions of others without a guarantee that the next generation would do the same, renders necessary to introduce such schemes, managed or at least protected by the State.

In brief, the two conditions to be integrated in order for the solidarity to be present and for the offer of goods and services to be excluded are that the schemes providing insurance against accidents at work, occupational diseases, etc., must provide compulsory social protection for all workers, on one hand, and, on the other hand, that the benefits paid are statutory benefits bearing no relation to the amount of the contributions (even when the contributions due have not been paid). The solidarity principle, in fact, requires the existence of a social function, that is the non lucrative aim of the service. This means that, notwithstanding the acceptance of an abstract approach applied to the notion of intergenerational solidarity, also in the field of social security there seems to happen a further attenuation of the functional approach.

A second attenuation is represented by the control of the State. If the funds' degree of latitude in order to lay down the factors that determine the amount of contributions and benefits is established and strictly delimited by law, the activity carried out by them is not economic, even though they can fix the minimum or maximum amount of the contributions.

What about the case of pension schemes operating on the basis of the capitalization principle and generated by the market? In respect to such activities, the ECJ states, first of all, that the fact that the activities of such schemes, like those of many other insurance activities, are regulated by the legislator for the benefit of consumers and investors does not deprive those activities of their economic character; secondly, that restrictions on these activities may fall to be assessed under Art. 106 (2). This is precisely what happened in *FFSA*, *Pavel Pavlov*, *Albany*, *Brentjens'* and *Drijvende Bokken*[38].

(Contd.)

N. BOEGER, *Solidarity and EC Competition Law*, in *European Law Review*, 2007, 319 ff. As noted by O. ODUDU, *The Boundaries*, cited above, 38, "[t]he feature unifying activities of 'solidarity' is that they are redistributive".

35 See para. 9 of *Poucet Pistre*; para. 36 of *AOK*; paras. 36-42 of *Cisal*; para. 54 of *Kattner*.

36 On the concept of redistributive solidarity as opposed to the one of competitive solidarity see W. STREECK, *Il modello sociale europeo: dalla redistribuzione alla solidarietà competitiva*, in *Stato e Mercato*, 2000, 3 ff.

37 See para. 338 of *Albany*.

38 See in particular paras. 88-123 of *Albany*.

2.2. Public/private divide and free movement: full acceptance of the functional approach and irrelevance of the public funding system.

2.2.1. The remuneration as the constitutive element of the notion of economic activity.

Once underlined that the analysis of the concept of economic activity carried out by the ECJ in the field of competition can imply an attenuation of the functional approach when at stake are social security and/or health services issues, it must be seen what happens in the ECJ case law on free movement in order to understand if it is more in line with the functional and abstract approach elaborated by the ECJ in competition law with regard to sectors other than social security and healthcare or with the peculiar and more concrete interpretation developed under competition rules in the case law on such two sectors.

I will first focus on how the concept of economic activity has been shaped in general terms and then concentrate on its content in social security and healthcare.

The main issue is the notion of remuneration, which constitutes the nodal point of the ECJ's reasoning[39]. While in competition law such notion represents one condition, together with the assumption of economic and financial risks, of one of the two elements defining the concept of economic activity – being the potential to make profit in a market the other element –, under free movement law its presence constitutes a sufficient condition capable to absorb all other criteria. Whenever the service is remunerated, the activity is economic according to free movement rules, with no necessity to apply the abstract test constituted by the private investors' criterion, unlike what happens in competition, whereby the presence of remuneration does not exclude that the activity can be considered deprived of its economic character, as is it the case in *Poucet et Pistre*.

2.2.2. Healthcare, social security and the functional approach.

The case law on social security and healthcare permits to understand how and to what extent the ECJ interprets and extends the notion of remuneration with the aim to include as many activities as possible in the scope of free movement rules[40].

In a first phase, it is affirmed that the supply of medical benefits, for which there is a compensation by patients who receive the treatment, is economic[41]. Subsequently, the ECJ acknowledges that Art. 56 TFEU applies also to medical services delivered outside public hospitals in the framework of a social security system which assures the reimbursement, by the Member State of origin, for the costs incurred in other Member States[42]. Finally, the great novelty in relation to the concept of remuneration consists in the acknowledgment that all treatments provided by hospitals are economic according to Art. 57 TFEU. This counts not only for the treatment in private hospitals[43] but also for the one delivered in public hospitals, independently from the way how it is organized and financed. This concerns systems providing benefits in kind based on a reimbursement criterion (Germany,

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39 See also the definition supplied by the so called "Services" Directive 2006/123/CE of 12 December 2006 (ECR L 376 of 27 December 2006, 36), para. 17.

40 V. HATZOPOULOS, T. UYEN DO, *The case law*, cited above, 946; in the same vein P. KOUTRAKOS, *Healthcare*, cited above, 112, states that "[i]t is that notion of remuneration which renders medical care within the scope of the freedom to provide services".

41 See, in particular, *Luisi and Carbone* of 31 January 1984, C-286/82 and 26/83, ECR 377, para. 16.

42 See, in particular, para. 21 of the judgment *Kohll* of 28 April 1998, Case C-158/96, ECR I-1931 and para. 25 of the judgment *Decker* of 28 April 1998, Case 120/95, ECR I-1831.

43 See *Shöning* of 15 January 1998, Case C-15/96, ECR I-47, para. 25 and *Stamatelaki* of 19 April 2007, Case C-444/05, ECR I-3185, para. 19.

Netherlands, Austria, Luxembourg, France and Belgium)[44] or in the framework of a national health system (UK, Ireland, Italy, Spain, Portugal, Greece, Sweden, Finland, Denmark)[45].

All of the above means that, even though medical services are founded by the State and there isn't any compensation given by the patients, EU rules must apply. The opinion of EU judges is that free movement rules apply in spite of the absence of a link between the patient and the entity which provides the service.

A strict interpretation of the functional approach is evident in *Watts*, whereby the ECJ reaffirms that the manner in which the financing of the service is arranged is as such irrelevant for deciding whether or not a given transaction comes within the scope of the Treaty. Without considering the social and redistributive function implied in the public character of the funding, the ECJ, taking inspiration from the previous case law on health services provided by the sickness funds, establishes that the National Health System is merely instrumental in relation to the main transaction between the patient and the hospital. By doing so, the ECJ applies and develops in the field of social security and healthcare the reasoning already outlined in the previous case law[46], extending the notion of remuneration, from a bilateral (patient-entity) to a triangular (patient-entity-third payer) relationship[47], also in relation to social security systems completely based on a public funding. It means that a remuneration occurs not only when the subject who funds the service is private, but also when such subject is public[48].

As a consequence, unlike in competition law, under free movement rules the functional approach is strictly followed and the public/private divide legally blurred.

In this respect the divergence with *FENIN* and the public character of the financing is striking. This divergence is even more evident if we consider that while the ECJ, in *FENIN*, states that it is necessary to consider jointly upstream (the purchase of goods from private operators) and downstream (the deliver of medical services to the patients) activities, the Court itself prescinds from this reasoning in its case law on free movement[49]. In fact, as it will be subsequently clarified, in this sector the EU judges seem to dissociate the downstream supply of the treatments received abroad from the upstream healthcare and social security system of the Country of origin of the patient.

The reasoning of the ECJ is even more problematic if compared with the approach elaborated in another sector of general interest like the public education. It is in fact surprising that the ECJ, without clearly confronting with the issue, has adopted an opposite approach in such sector. In *Humbel* the ECJ affirms that the essential characteristic of remuneration lies in the fact that it constitutes consideration for the service in question, and is normally agreed upon between the provider and the recipient of the service[50]. In *Wirth*[51] and *Commission v. Germany*[52] the ECJ admits that courses given

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44 See *Smits and Peerbooms*, paras. 53-59; *Vanbraekel* of 12 July 2001, Case C-368/98, ECR I-5363, para. 41; *Müller-Fauré* of 13 May 2003, Case C-385/99, ECR I-4509, para. 38; *Inizan* of 23 October 2003, Case C-56/01, ECR I-12403, para. 16.

45 See *Watts* of 16 May 2006, Case C-372/04, ECR I-4325, para. 86.

46 See for instance paras. 14-16 of the judgment *Bond* of 26 April 1988, Case 352/85, ECR 2085.

47 See also O. ODUDU, *Economic Activity as a Limit to Community Law*, in C. BARNARD, O. ODUDU, *The Outer Limits of European Union Law*, Oxford-Portland, 2009, 235-236.

48 On this issue see the comments made by V. HATZOPOULOS, Killing *National Health and Insurance Systems But* Healing *Patiens? The European Market for Health Care Services after the Judgments of the ECJ in* Vanbraekel *and* Peerbooms, in *Common Market Law Review*, 2002, 683 ff., in particular 692-693.

49 See A. CYGAN, *op. cit.*, 550.

50 See *Humbel* of 27 September 1988, Case 263/86, ECR 5365, para. 2 of the maxim.

51 See the judgment of 7 December 1993, Case C-109/92, ECR I-6447, para. 15.

52 See the judgment of 11 September 2007, Case C-318/05, ECR I-6957, paras. 70-76.

in a national establishment financed essentially out of private funds other that those of the patients constitute services within the meaning of Art. 56, but it is also clear in stating that the same conclusion cannot be reached in the case of an institution financed by the State. The State, in fact, through the establishment and management of such a system, is not seeking to engage in gainful activity but is fulfilling its duties towards its own population in the social, cultural and educational fields. This finds its rationale and logics in the fact that the system is funded from the public purse. Well, the reason why this reasoning is not followed in the healthcare sector is obscure; it thus urges a clear position of the Court on such issue.

Another proof of the divergence between a more market oriented approach adopted in free movement and another one more respectful of State sovereignty in the field of social security is the reasoning in *Kattner*.

In the latter case, in fact, the ECJ, after having excluded the application of competition rules with regard to compulsory affiliation to a body providing a social and health, affirms that the fact that a national legislation such as that at issue in the main proceedings concerns only the financing of a branch of social security, that is to say insurance against accidents at work and occupational diseases, by providing for compulsory affiliation of undertakings covered by the scheme at issue to the employers' liability insurance associations entrusted by the law with providing such insurance, does not exclude the application of the Treaty rules, in particular those relating to freedom to provide services[53]. From this can be inferred that the discretionary power of Member States in areas in relation to which the principle of solidarity operates in a significant way, though permitting to public authorities to act outside antitrust restrictions, does not renders them immune from free movement rules.

Moreover, since the ECJ does not explicitly establish the economic character of the activity, from the analysis of *Kattner* it could be even deduced that in the opinion of the ECJ the economic nature of the activity is not always a precondition for the application of free movement rules, with the result not only to dissociate the concept of economic activity depending on the sector considered (competition or free movement), but even to question the assumption – on which the European economic and social constitution is based – that EU law applies only to economic activities[54].

2.3. Public/private divide and State aids: the notion of universal service and its interplay with the one of service of general economic interest.

In order for State aids rules to apply it is necessary to demonstrate that the activity for which the State delivers the aid is economic.

In relation to the notion of economic activity the approach adopted by the ECJ with regard to state aids does not raise any particular issues. More interesting is the interpretation of the notion of service of general economic interest in cases concerning the compatibility with EU law of State measures financing undertaking entrusted with the operation of public service obligations. The *BUPA* case[55] on a risk equalization scheme, introduced by Ireland, on the private medical insurance market, is striking and paradigmatic because permits to understand the constitutive elements of such notion and its potentialities in the field of social security and healthcare, with the result to extend and specify the reasoning developed in *Ambulanz* and *Albany*.

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53 See para. 75 of the judgment.

54 O. ODUDU, *The Boundaries*, cit., 47-50 and 52-54; ID., *Economic Activity*, cit., 237-242. *Contra* J. W. VAN DE GRONDEN, *Rule of Reason and Convergence*, cit., pp. 80-81; A. GYGAN, *Public Healthcare*, cit., 533-539; L. HANCHER, W. SAUTER, *op. cit.*,11-12.

55 See the judgment of 12 February 2008, Case T-289/03, ECR II-81.

The problems raised by such case are numerous. They pertain especially to the distribution of competences between Member States and EU. However, I will focus on just one issue which has a strong relevance for the regulation of social security and healthcare. It concerns the notion of universal service, in the light of its interplay with the concept of service of general economic interest.

The General Court states that it does not follow from EU law that, in order to be capable of being characterized as a service of general economic interest, the service in question must constitute an universal service in the strict sense. In effect, the concept of universal service, within the meaning of EU law, according to the Court, does not mean that the service in question must respond to a need common to the whole population or be supplied throughout a territory. As a consequence, the fact that the public service obligations in question have only a limited territorial or material application or that the services concerned are enjoyed by only a relatively limited group of users does not necessarily call in question the universal nature of a public service mission.

Moreover, the Court observes that, even if the compulsory nature of the service is an essential condition of the existence of a mission of general economic interest, the binding nature of such a mission does not presuppose that the public authorities impose on the operator concerned an obligation to provide a service having a clearly predetermined content. In effect, the compulsory nature of the "SGEI mission" does not preclude a certain latitude being left to the operator on the market, including in relation to the content and pricing of the services which it proposes to provide. In those circumstances, a minimum of freedom of action on the part of operators and, accordingly, of competition on the quality and content of the services in question is ensured, which is apt to limit, in the EU interest, the scope of the restriction of competition which generally results from the attribution of a mission of general economic interest, without any effect on the objectives of that mission. It follows that, in the absence of an exclusive or special right, it is sufficient, in order to conclude that a service is compulsory, that the operator entrusted with a particular mission is under an obligation to provide that service to any user requesting it, that is to say an obligation to contract.

Therefore, with regard to a private social security scheme, for the first time in such a clear way, the Court first admits that the notion of universal service is in principle included in the one of service of general economic interest and then more importantly that there are two kinds of universal service, distinguished between them on the basis of to what extent are they binding and universal. From this flows that the concept of universal service can partly overlap with the notion of service of general economic interest, while in other cases they completely identify with each other. What can be inferred by the analysis of the judgment is that when the social security system is private, a more flexible conception of universal service must apply, whereas when the social security system is public or in any case the product of an exclusive right, the criteria are different, in the sense that a stricter and more traditional conception of universal service applies.

The result is a reaffirmation of the public/private divide, similarly to what happens in competition, according to which different concepts of universal service and service of general economic interest apply depending on the public or private nature of the service provider. This is clear when the Court expressly states that an activity provided by a private undertaking, in order to be capable of being characterized as a service of general economic interest, is not obliged to carry out an universal service in the strict sense, "such as the public social security scheme"[56].

Finally, in the future it will be necessary to verify first of all whether this dissociation between two notions of universal service developed in the field of social security shall be followed by the EU judges when confronted with other sectors of the economy or welfare of Member States, such as public economic services. Secondly, it shall be established if this approach on the role of Art. 106(2) can be transposed from State aids to other areas of EU law like competition.

[56] See para. 186 of the judgment.

2.4. Physiological or pathological divergences in ECJ case law?

The above analysis has shown that the way in which the ECJ has legally framed the phenomenon of the blurring of the public/private dimension, occurred in Member States' economy and welfare, is different in competition and State aids from what happens under free movement rules.

In State aids, two concepts of universal service seem to emerge depending on the public or private nature of the subject providing the service. This is done notwithstanding the principle, laid down in Art. 345 TFEU, that EU law is neutral vis-à-vis the legal status of the subject.

In competition, as to healthcare, the functional approach intervenes differently depending on the cases submitted to the ECJ.

From the analysis of *FENIN* emerges that the abstract private investor's criterion, differently from what happens in other sectors of the economy, is not always applied in the field of social security and healthcare. Instead, unlike what should be required by the adoption of the functional approach, the public nature of the funding permits to deny the economic character of the activity carried out by public hospitals, that is the provision of medical services to patients. At the core of the Court's reasoning is a strict interpretation of remuneration, since the latter concept doesn't occur when the funding system of the services is public, that is to say founded through taxes. From this flows a revaluation of the public/private divide and consequently a greater relevance of the role and function of the State.

The solution in *Ambulanz*, on the contrary, is perfectly in line with a strict incorporation of the functional approach. Here again the public funding of the system represents a fundamental criterion; nevertheless, it is not employed in order to define the concept of economic activity, as done *ex ante* in *FENIN*. It is applied *ex post* in the framework of Art. 106(2), which is aimed, as known, at giving regulatory freedom to Member States and simultaneously subject them to a strict control by EU institutions[57].

As to social security, the principle of social solidarity is the fundamental criterion in order to distinguish between "economic" and "non economic". The concretization of the functional approach is clear since the pursuit of a social function and the supervision by the State are considered constitutive and essential elements by the ECJ.

In the free movement case-law the approach is different.

The EU judges, by extending the concept of remuneration and interpreting it differently from competition law, consider irrelevant the public nature of the funding system in order to exclude the qualification of economic in relation to the service provided by the health establishments. This is striking considering that an apposite approach has been adopted in the sector of public education.

As demonstrated with reference to the *Kattner* case, it can even be affirmed that free movement could apply independently from the economic nature of the subject. If this is the case, such rules shall operate similarly to the principle of non discrimination and the rules of EU citizenship, whose application, as it is well known, extends itself in order to comprehend both economic and non economic activities[58].

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[57] This regards the respect of the conditions laid down in such a derogation, among which are included the two principles of necessity and proportionality.

[58] On the transversal relevance of EU citizenship rules, regardless of the economic or extra-economic nature of the services considered, and more in general on their interplay with the national Welfare State, see, *inter alia*, E. SPAVENTA, *Seeing the Wood Despite the Trees? On the Scope of Union Citizenship and Its Constitutional Effects*, in *Common Market Law Review*, 2008, 13 ff.; M. DOUGAN, *Expanding the Frontiers of European Union Citizenship by Dismantling the Territorial Boundaries of the National Welfare States?*, in C. BARNARD, O. ODUDU (eds.), *op. cit.*, 119 ff.; N. N. SHUIBHNE, *The Outer Limits of EU Citizenship: Displacing Economic Free Movement Rights?*, in C. BARNARD, O. ODUDU (eds.), *op. cit.*, 167 ff.

From all has been written so far it can be inferred that divergences between different areas of EU law can occur. Now, the core question is whether the fact that they both seek to attain the common objective of the completion of the internal market is sufficient to affirm that the divergences between them are pathologies to be treated and eventually eliminated or the product of natural asymmetries to be considered as legitimate.

The ECJ does not confront clearly with such an issue.

Only in *Meca Medina*[59], a case concerning the regulation of sport, the ECJ, reversing the General Court's judgment, implicitly admits the possible dissociation between competition and free movement in relation to the concept of economic activity. More clearly, Advocate General Maduro, in his conclusions in *FENIN*, states that, even though it appears desirable to adopt the same solution in the field of the freedom to provide services and in that of freedom of competition, the scope of freedom of competition and that of the freedom to provide services are not identical[60].

It is thus necessary to verify if the said divergences are legitimate[61]. That is to ask whether the situations examined by EU judges have been rightly legally framed being physiological differences respondent to the constituent rationale which orients the Treaty and therefore justified in the light of the EU rules, or pathological dissonances susceptible to put into question the coherence of EU law with regard to a delicate and sensitive issue like the one represented by the balance between the State and Market. To this end I will focus on the relationship between competition and free movement rules and then concentrate on State aid rules.

2.5. (Contd.): The rationale behind the divergences, or the existence of natural asymmetries between competition and free movement rules.

The main question is why the approach adopted in free movement is more market oriented than the one under competition rules.

It is here submitted that the reason lies in the existence of natural and institutional asymmetries in the relationship between State's intervention and Market in the regulation of the economy.

Firstly, antitrust law is naturally addressed to private actors, while free movement rules are destined to public authorities. The two phenomena of "publicisation" of antitrust rules – i.e. application of competition to public actors as in *INNO*[62] and *Cipolla*[63] – and "privatization" of free movement – i.e. application of free movement to private actors as in *Bosman*[64], *Viking*[65] and *Laval*[66] – do occur but constitute an exception to the principle, even though are more and more frequent[67]. As a result,

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59 See the judgment of 18 July 2006, Case C-519/04 P, ECR I-6991, para. 33; see also, in the field of competition and tax law, the conclusions presented by Advocate General Kokott on 7 September 2006 in the judgment *T-Mobile Austria* of 12 February 2008, Case C-284/04, ECR I-5189, para. 61, in which it is written that "[c]ompetition law and the Sixth VAT Directive are […] based on differing concepts of economic activity.

60 See para. 51.

61 See D. GALLO, *op. cit.*, 351-371.

62 See the judgment of 16 November 1977, Case 13/77, ECR 2115.

63 See the judgment of 5 December 2006, Case C-94/04, ECR I-11421.

64 See the judgment of 15 December 1995, Case C-265/95, ECR 6959.

65 See the judgment of 11 December 2007, Case C-438/05, ECR I-10779.

66 See the judgment of 18 December 2007, Case C-41/05, ECR I-11767.

67 On the blurring of the public/private dived examined from this point of view see, among others, G. MARENCO, *Le Traité CEE interdit-il- aux Etats membres de restreindre la concurrence?*, in *Cahiers de droit européen*, 1986, 285 ff.; P. PESCATORE, *Public and Private Aspects of European Competition Law*, in *Fordham International Law Journal*, 1987, 418 ff.; E.-J. MESTMÄCKER, *Zur Anwendbarkeit der Wettbewerbsregeln auf die Mitgliedstaaten und die Europäischen*

competition rules are designed to protect the market from its own excesses, such as monopoly. Free movement rules, destined to public actors, on the contrary, protect the market from excessive State intervention, whose criteria respond to political and distributive choices. A market oriented system like the EU order is naturally apt to intervene more in order to protect the market from its own than to give States powers and competences to the detriment of free market principles[68].

Secondly, while competition rules pursue the aims of market liberalization and economic efficiency, the free movement rules prescind institutionally from such two elements. Such rules, in fact, apply only on the condition that the activity has a cross-border effect.

Thirdly and most importantly, free movement rules, unlike antitrust law, confer upon individuals fundamental economic rights which permit them to freely circulate in the Member States and, as is it the case in social security and healthcare, have access to cross-border medical services.

The combination of all these asymmetries seems to justify the adoption of a more free market approach in free movement rather than in competition, that is to say a wider application of EU law in the former than in the latter sector.

The problem in the two sectors of social security and healthcare is that the individual rights to obtain treatment in other Member States must be balanced with Member States' autonomy to organize and deliver a universal healthcare service within finite resources on the basis of the social solidarity principle. At the core of this balance are serious issues of equality and democracy, which are strongly linked to the management of Member States' financial resources and budget, in particular when at stake is a national health system like the one in force, for instance, in UK.

The process to allocate resources is the product of a legitimate choice of the State, democratically approved, put in place in function of patients' rights and needs, which "presupposes a community commitment to create and distribute a fund of resources by which such rights should be recognized"[69]. The ECJ, by stating that the patient has the right to a reimbursement from the country of origin, without an authorization to the competent authorities of the latter country in the case of cross-border services provided by private entities or prior to a request of authorization in the case of treatments delivered by public hospitals, tries to find the right balance, in order to allow EU citizens to have access to healthcare without undermining the principle that nationals participate collectively to the financing of their welfare state[70].

By reinforcing the notion of EU citizenship and stating that patients have a right to full reimbursement, however, the ECJ seems to excessively erode and blur the concepts of social solidarity and social cohesion which orient the regulation of services of general interest and govern Member States' healthcare systems. This is true nowadays and will be even more evident in the future when the issue of patient mobility will probably become an even stronger reality.

(Contd.)

Gemeinschaften, in J. BAUR, P.-C. MÜLLER-GRAF, M. ZULEEG (Hrsg.), *Europarecht, Energierecht, Wirtschaftsrecht – Feitschrift für Bodo Börner zum 70. Geburtstag*, Köln, 1992; J. BAQUERO CRUZ, *Free Movement and Private Autonomy*, in *European Law Review*, 1999, 603 ff.; R. STREINZ, S. LEIBLE, *Die unmittelbare Drittwirkung der Grundfreiheiten*, in *Europäische Zeitschrift für Wirtschaftsrecht*, 2000, 259 ff.; F. CASTILLO DE LA TORRE, *State Action Defence in EC Competition Law*, in *World Competition*, 2005, 407 ff.; R. LANE, *The internal market and the individual*, in N. N. SHUIBHNE (ed. by), *Regulating the Internal Market*, Cheltenham, 2006, 245 ss.; J. BAQUERO CRUZ, *State Action. The State Action Doctrine*, in G. AMATO, C.-D. EHLERMANN (eds.), *EC Competition Law. A Critical Assessment*, Oxford, 2007, 568 ff. ; D. GALLO, *op. cit.*, 5-77.

[68] See also P. LINDH, *The Influence of Competition Law on Free Movement Rules*, in H. KANNINEN, N. KORJUS, A. ROSAS (eds.), *EU Competition Law in Context: Essays in Honour of Virpi Tilli*, Oxford-Portland, 2009, 18.

[69] In these terms see C. NEWDICK, *Citizenship, Free Movement and Health Care: Cementing Individual Rights by Corroding Social Solidarity*, in *Common Market Law Review*, 2006, 1647.

[70] Those of the country in which the service is delivered and those of the country where the patient is affiliated.

Hence the approach adopted by the ECJ, naturally oriented to give precedence to free market freedoms over Member States' autonomy in the great majority of its case law, seems to lead to far-reaching liberalization difficult to reconcile with the sovereignty of the Member States[71].

Consequently the next step of this analysis consists in trying to identify the legal tool to be used in order to pursue a more balanced relationship between individual economic rights and Member States' discretionary power than the one adopted so far by the ECJ.

The answer to this question seems to lie in a reinterpretation of the notion of general economic interest, that is to say in the use of public interest derogations and justifications under free movement rules, in comparison with antitrust rules.

3. The concept of general (economic?) interest under free movement rules in social security and healthcare and its rapprochement with competition law.

3.1. The need for a revitalization of general interest exceptions in free movement and the emergence of divergences with the interpretation developed under competition law.

Once considered the activity as economic under competition rules, the ECJ can use and interpret in a flexible way Art. 106(2) TFEU in order to impede the application of such rules, as is it clear from the incorporation of the principles elaborated in the *Corbeau* case in *Albany* and *Ambulanz*. "Flexibility" means a more extensive interpretation of the conditions laid down in such a derogation, with particular regard to the principles of necessity and proportionality.

On the contrary, under free movement rules, the ECJ, with the exception of *Smits and Peerbooms* and *Müller Fauré*, did not find fulfilled the respect of the necessity and proportionality principles neither according to Articles 52 and 62 TFEU nor to the *Cassis* clause. This entails an additional divergence between the two areas of EU law which, instead of concerning the qualification of the activity considered above (more or less economic), pertains to the interpretation and application of the general interest derogations/justifications.

As to the individuation of the general interest clauses invoked by the States, in addition to the protection of public health *ex* Art. 52 the ECJ has identified the following overriding reasons in the general interest: maintaining the infrastructure and the financial equilibrium of the system of agreements in such a way as to keep the costs, volume and quality of care under control; making healthcare accessible to everyone; ensuring an adequate number of doctors, facilities and hospital beds by striking a balance which avoids both waiting lists (which result in a restriction on access to healthcare) and the wasting of financial resources (which are very limited in the health sector), the achievement of which requires the regulation of access to hospitals; limiting the number of patients who go abroad for treatment and to avoid a large influx of foreign patients, on account of the disruption this would create in the use of hospital facilities.

The problem is that the ECJ, though considering these reasons potentially applicable, through an extremely rigid application of both the proportionality and necessity principles, *de facto* excludes their applicability in almost all free movement cases. Without venturing too much into the description of the specific problems raised by the case law[72], it seems necessary to clarify that the reasoning on the

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[71] See for instance C. NEWDICK, *op. cit.*, 1645; A. CYGAN, *Public Healthcare in the European Union: Still a Service of General Interest?*, in *International and Comparative Law Quarterly*, 2008, 529 ff; F. COSTAMAGNA, *Servizi socio-sanitari. Concorrenza e Libera circolazione dei servizi nel diritto dell'Unione europea*, Napoli, 2009, 117-191; see also the interesting observations in the *Report* rendered by the *European Union Committee* of the *House of Lords*, *HL Paper 48*, 2007, entitled *Cross Border Health Services in the European Union*.

[72] See D. GALLO, *op. cit.*, 544-630.

notion of economic activity cannot follow the same lines of the one on the concept of general interest. If it is true, as underlined by Advocate General Maduro, that "Member States may withdraw certain activities from the field of competition if they organize them in such a way that the principle of solidarity is predominant", while the same cannot be done under free movement rules because "the way in which an activity is organized and financed at the national level has no bearing on the application of the principle of the freedom to provide services"[73], it must be clear that this conclusion counts for the notion of economic activity, but not for the interpretation and application of the general interest exceptions established in the Treaty or formulated by the ECJ in its jurisprudence. The opposite conclusion, in fact, would entail the loss by Member States of their legitimate autonomy and discretionary power in the management of their health policies. The "cross-border element" cannot prevail in any case on the Member States' autonomy in the regulation of welfare and economy, whose efficacy depends precisely on the way in which social services are financed and organized.

3.2. The overlap of economic considerations with non economic considerations in competition and free movement exceptions of general interest.

As is it well known, the doctrine generally affirms that, on the basis of the jurisprudence, only considerations of economic nature can be used under competition rules, including Art. 106(2), to justify restriction of competition law, while only considerations of non economic consideration could penetrate in free movement derogations and justifications[74]. Nevertheless, from an analysis of ECJ case law this opinion seems to have lost much of its topicality[75]: there seems to emerge in fact a cross-fertilization and progressive rapprochement between general interest exceptions.

As to antitrust law, the most evident proof of this phenomenon is the extension of objective limits to the application of Art. 101 TFEU. In the leading cases *Albany*, *Pavel Pavlov*, *Wouters* and *Meca-Medina*, in fact, the ECJ builds up rules of reasons which can operate under competition rules in order to admit a derogatory treatment to trade unions, medical associations, Bar associations and sport organizations for non economic and social considerations[76].

In free movement it is precisely the case law on social security and healthcare to admit, above all, the penetration of economic considerations. As it has been already recalled, the ECJ admits the financial equilibrium of the social security system (of Member States whose nationals go abroad to

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73 See para. 51 of the conclusions to *FENIN*.

74 See, as an example, *Syndesmos ton en Elladi Touristikon kai Taxidiotikon* of 5 June 1997, Case C-398/95, ECR I-3091, para. 23; on this issue see, *inter alia*, L. DEFALQUE, in J. MEGRET, J. LOUIS, D. VIGNES, M. WAELBROECK, *Le droit de la Communauté économique européenne*, Bruxelles, 1970, 236; M. VAN DER WOUDE, *Article 90: Competing for Competence*, in *European Law Review*, 1992, 63; A. WACHSMANN, F. BERROD, *Les critères de justification des monopoles*, in *Revue trimestrielle de droit européen*, 1994, 56-58.

75 On the complementarity between antitrust and free movement rules see J. STUYCK, *Libre circulation et concurrence: les deux pilliers du Marché commun*, in *Mélanges en hommage à Michel Waelbroeck*, Bruxelles, 1999, 1477 ff.; A. F. GAGLIARDI, *United Stated and European Union Antitrust versus State Regulation of the Economy: is there a better test?*, in *European Law Review*, 2000, 353 ff.; K. J. M. MORTELMANS, *Towards Convergence*, cited above, 637; J. W. VAN DE GRONDEN, *Rule of Reason and Convergence in Internal Market and Competition Law*, in A. SCHRAUWEN (ed. by), *op. cit.*, 9 ff.; J. SNELL, *Economic Aims as Justification for Restrictions on Free Movement*, in A. SCHRAUWEN (ed. by), *Rule of Reason – Rethinking another Classic of European Legal Doctrine*, Amsterdam, 2005, 37 ff.; N. A. GEORGIADIS, *Derogation Clauses: The Protection of National Interests in EC Law*, Athènes-Bruxelles, 2006, 199-203; C. BARNARD, *Derogations, Justifications and the Four Freedoms: Is State Interest Really Protected?*, in C. BARNARD, O. ODUDU (eds.), *op. cit.*, 279-280.; L. HANCHER, W. SAUTER, *One foot in the grave or one step beyond? From Sodemare to DocMartin: the EU's freedom of establishment case law concerning healthcare – TILEC Discussion Paper*, 2009, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1429315, 11-15; O. ODUDU, *Economic Activity*, cited above, 232-243; D. GALLO, *op. cit.*, in particular 62-77 and 544-571.

76 I.e. workers' protection rights in *Albany* and *Pavel Pavlov*; professional ethics, supervision and liability, sound administration of justice in *Wouters*; fight against doping in *Meca-Medina*.

have access to treatment and then ask for a reimbursement) as being a possible justification capable to derogate to the application of free movement rules[77].

The problem is that it does not seem that such a justification has been used in free movement as the ECJ should have done, that is to say on the basis of a more flexible interpretation, such as the one developed in *Corbeau*, according to which it is not indispensable for Art. 106(2) to apply that the intervention of EU rules puts in question the financial equilibrium, being sufficient that the services could be delivered under "economically acceptable conditions"[78].

It is therefore surprising that the ECJ, by elaborating the financial equilibrium criterion, on one hand incorporates a classical principle formulated under Art. 106(2) and competition law but on the other hand does not incorporate the flexibility which orients such derogation. It is here submitted that the overtaking of the so called doctrine of non economic considerations could represent a right way for the ECJ to better exploit the reasoning on which is founded the "financial equilibrium criterion".

In line with Advocate General Tesauro's opinion in the cases *Decker* and *Kohll*, economic aims are indeed justifiable where, far from being an end in themselves, are crucial to the operation of the social security system or "affect interests of vital importance to the State"[79]. This means that the preservation of the financial stability of the social security system is not an end in itself but a means which contributes to providing insured persons and patients with services of a certain standard in terms of both quantity and quality. If the financial balance of the system were upset[80], the level of health protection could deteriorate with obvious and inevitable adverse repercussions, particularly for insured persons belonging to the weakest strata of society.

Differently from Tesauro's approach, the ECJ in its case law on free movement does not seem to give the appropriate relevance to this structural interaction between economic and non economic aims.

Finally, it must be stressed that the penetration of economic considerations in free movement exceptions does not require in any case the same degree of flexibility. On the contrary, the risk that national industries may put pressure on their respective governments in order to neutralize the impact of the internal market for protectionist purposes is extremely high, with the consequence that the economic benefits of integration would never be realised. From this flows the need for the ECJ to opt for a more flexible approach when the issue at stake is the regulation of services with redistributive aims such as health services and social security, compared to a more rigid interpretation to be used when the economic considerations invoked by the State are potentially more dangerous for the completion of internal market.

3.3. The function of Art. 106(2) TFEU and the quest for a right balance between State and Market in social security and healthcare.

If the ECJ, in its jurisprudence on social security and healthcare, refuses to exploit the potential contained in free movement exceptions, it is here submitted that Member States, instead of using free movement exceptions and simply being inspired by the rationale behind Art. 106(2), could explicitly rely on the latter norm in order to use a more adequate approach to the balance between general interest and free market.

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77 See *Decker*, para. 39; *Kohll*, para. 41; *Leichtle*, paras. 44-49; *Smits and Peerboms*, para. 72; *Müller-Fauré*, para. 67; *Watts*, para. 103; *Stamatelaki*, para. 30; *Kattner*, para. 85.

78 See para. 16 of the judgment.

79 See para. 15 of the conclusions.

80 As could be derived from a massive – even if temporary – "migration" for health purposes or from the admission of a reimbursement even in situations where the patient might have received the treatment in its own country free of charge.

The legal premises which permit to use such derogation under free movement rules case law on social security and healthcare are the following:

- by stating that "[u]ndertakings entrusted with the operation of services of general economic interest […] shall be subject to the rules contained in the Treaties, *in particular to the rules on competition*", Art. 106(2), although placed in the Chapter "Rules on competition", admits in an express the possibility to apply outside antitrust law;
- Art. 106(2), although placed in the Section "Rules applicable to undertakings", is addressed mainly to public authorities, like is it the case with free movement rules;
- Art. 106(2) has already been employed in some free movement cases, like *Corsica Ferries II*, concerning "traditional" public economic services.

From a combination of these premises with the reasoning previously developed on the interplay between economic and non economic in public services' exceptions under competition and free movement rules derives the possibility and even the need for a revaluation of Art. 106(2)[81], not only in competition law, but also in free movement, in the field of social security and healthcare as it might happen in other sectors of the economy and welfare[82]. In this sense Art. 106(2) should operate as "basis of convergence"[83] between competition and free movement law.

4. The public and private spheres in the EU economic and social constitution and the principle of social solidarity.

The concept and principle of solidarity is the main criterion employed by the ECJ to examine social security and healthcare in EU Member States. The problem is that EU institutions, including the ECJ, shape the notion of social solidarity depending on which rules are at stake, i.e. competition, free movement or State aids.

The parcelling out of such a notion and its divergent interpretation in ECJ case law on social security and healthcare is the result of the way in which the public/private divide has been legally framed by EU judges, in relation both to the concepts of economic activity and general interest.

Is the divergence between different areas of EU law justifiable?

In this paper I maintained that it is legitimate that under competition rules the constitutive elements of the notion of economic activity are different than those foreseen under free movement rules and that, in the specific field of social security and healthcare, the remuneration criterion, seen from the point of view of the public funding, operates differently depending on the area considered. Such divergences are the product of natural asymmetries, according to which free movement rules must be, in principle, interpreted more extensively than antitrust law. What the ECJ should do, however, is clarifying why, in what sense and to what extent such divergences can occur.

For what concerns role, function and interpretation of the notion of general interest, on the contrary, I tried to demonstrate that the divergences between competition and free movement are more pathological than physiological. In this respect, a possible rapprochement and even convergence could

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81 On the relevance of Art. 106(2) in areas of EU other than antitrust law see E. MALARET GARCIA, *Public Service, Public Services, Public Functions, and Guarantees of the Rights of the Citizens: Unchanging Needs in a Changed Context*, in M. FREEDLAND, S. SCIARRA (ed. by), *op. cit.*, 57 ss., in particular 78-79; J. MAILLO GONZÁLEZ-ORÚS, *Beyond the Scope*, cited above, 397-400; D. CHALMERS, C. HADJIEMMANUIL, G. MONTI, A. TOMKINS, *op. cit.*, 1136.

82 It is sufficient to think of the cases on golden shares, like *Commission v. Belgium* of 4 June 2002, Case C-503/99, ECR 4809, paras. 34-35 and 55-56 and *Commission v. Spain* of 13 May 2003, Case C-463/00, ECR I-4581, paras. 80-83, or in-house providing, such as *Asemfo* of 19 April 2007, Case C-295/05, ECR I-2999, in which the ECJ, expressly or implicitly, has admitted the use of Art. 106(2) in such sectors in the framework of free movement rules.

83 K. MORTELMANS, *Towards Convergence*, cited above, 648.

be better reached through a revaluation of Art. 106(2) in free movement rules, in line with what happened also in State aids and with the principle of effectiveness of a provision which operate as a derogation to competition and internal market principles but also as a positive method (and symptom) of market and rights integration.

Art. 106(2) consequently permits Member States to pursue social aims in the frame of a quest for a right balance between their competences and EU's control over national autonomy in the regulation of the economy and welfare. Through such a revaluation EU institutions would contribute to defining the notion of general interest, transposing interest, aims and values from national to EU level[84].

In this sense it is here submitted that a wider application of Art. 106(2) would produce a more coherent and ordered approach, best able to attenuate the current minimalism which characterizes the EU economic and social policy and to reconcile market demands with general interest values.

[84] See also E. SZYSZCZAK, *The Regulation of the State*, cited above, 8-13.

Author contacts:

Daniele Gallo

Luiss University

Law Faculty

Via Parenzo 11

00198 Rome

Italy

Email: daniele.gallo@eui.eu


European
University
Institute
European University Press