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Title of the paper: *The organisation of social services in the European welfare market* by **Manuela CONSITO**

Keywords: social assistance, services of general interest (SGI), services of general economic interest (SGEI), social services of general interest (SSGI), social services of general economic interest (SSGEI), solidarity, philanthropy, charities, not-for-profit corporations, voluntary organizations, social enterprise, competition, public procurement, concessions, public-private partnerships (PPPs), European Union law

Abstract

The aim of this paper is to give a brief overview of the organisation and functions of entities involved in the provision of social services in the welfare market. Public and private not for profit bodies are involved in planning and collaborating on the provision of the welfare system. In the particular field of social services of general interest, the constant evolution of European law is perceived as a source of uncertainty, given that the focus is on the concept of “economic activity”. The European Court of Justice has stated that for a given service to qualify as an economic activity under internal market rules the essential characteristic is that it must be provided for remuneration. The economic nature of a service depends not on the legal status of the service provider (such as a non-profit making body) nor on the nature of the service, but rather on the way a given activity is actually provided, organised and financed. Under EU law, this means that social services can be considered as economic activities to which internal market rules apply, with no regard for the legal status of the provider, which can be a local authority or a ‘for-profit’ or ‘not-for-profit’ organisation whereas only a truly charitable organisation would avoid being bound by European law .

1. Introduction. 2. Voluntary organisations and the contracting out of social services: a comparison between the Italian and the European regulatory systems. 3. The conduct of a non-economic activity: the case of charities. 4. Conclusions.

1. Introduction.

As clarified by the European Commission, services of general interest cover a wide spectrum of activities, ranging from large corporations in such sectors as energy, telecommunications, transport, postal services and education to social and health services.

These services are regarded as essential to the daily lives of individuals, performing an important role in promoting the social, economic and territorial cohesion of the European Union, as highlighted by the Treaty on the functioning of the European Union¹.

Despite the considerable differences, these are services – economic and non-economic – on which the public authorities impose specific public service obligations and which they classify as ‘of general interest’, to use a term recently employed in a specific Protocol of the Treaty of Lisbon². The authorities may decide to carry out the services themselves or to entrust them to other undertakings, public³ or private, which may act either for-profit or not-for-profit⁴, with suppliers that operate in partnership with the public administration being required to comply with the regulations laid down by the EU Treaty and by secondary European law⁵.

¹ EC Treaty, art. 14 (ex art. 16 TEC).

² Protocol n° 26 on Services of General Interest, Treaty of Lisbon, 2007/C 306/0; Commission White Paper on Services of General Interest, COM (2004) 374; Communication from the Commission on the Social Agenda, COM (2005) 33; Commission Green Paper on Services of General Interest, COM (2003) 270; the Commission Report to the Laeken European Council, Services of General Interest, COM (2001) 598; Communication from the Commission on Services of general interest in Europe, COM (580) 2000; Communication from the Commission on Services of general interest in Europe, COM (96) 443.

³ Among public entities there are the ‘in-house providing’ companies: Cavallo Perin R. & Casalini D. (2009), *Control over In-house Providing Organisations*, Public Procurement Law Review, 5, 227-241.

⁴ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions accompanying the Communication on ‘A single market for 21st century Europe’ Services of general interest, including social services of general interest: a new European commitment, COM (2007) 725.

⁵ Commission Green Paper on public-private partnerships and Community law on public contracts and concessions, COM (2004) 327.

69th Annual National Conference

Services of general interest may thus be separated into two sub-categories, depending on the economic or non-economic nature of the activity they perform. The key difference is between services ‘of general economic interest’ and ‘non-economic’ services: the supply and organisation of the former services are subject to the provisions of the EU Treaty on the internal market and competition, since the activity performed is of an economic nature; providers of the latter services are not governed by a specific European discipline and, in general, are not subject to the rules of the EU Treaty regulating competition and the market, although they must still abide by other provisions such as the principle of non-discrimination.

It is not always easy to distinguish between the two sub-categories since, as the European Commission itself points out⁶, these are often specific situations that vary from one Member State to another, even from one local authority to another.

This is the case of social services in particular, which can sometimes be regarded as not being bound by market and competition rules because they are provided by bodies acting solely out of a spirit of solidarity (charities, for example, and voluntary associations). The Court of Justice of the European Union has clarified, however, that it is the actual manner of performance, organisation and operation of a given activity that serves to qualify a service as economic.

Within the sphere of services of general interest, then, social services too may be economic or non-economic in nature. The distinction does not depend on whether the providers are for-profit bodies, not-for-profit undertakings or voluntary associations, which cannot, solely for this reason, avoid having to comply with the laws on competition, as will be discussed in this paper.

2. Voluntary organisations and the contracting out of social services: a comparison between the Italian and the European regulatory systems.

With particular regard to social services of general interest, it should be stressed that the European rules on public procurement do not require public authorities to outsource them. As the European Commission correctly pointed out on the basis of the case law of the Court of Justice of the European Union, they are free to decide to provide the services themselves, directly or in-house. They may also decide to provide the service in cooperation with other public authorities under the conditions laid down by case law.

⁶ COM (2007) 725, *supra*.

69th Annual National Conference

The European rules on public procurement/concession apply only if a public authority decides to entrust the provision of a service to a third party in return for payment⁷.

Under European regulations, for a given service to be regarded as an economic activity according to the rules of the internal market (on the free movement of services and freedom of establishment), it must be provided against payment. Nevertheless, that service need not necessarily be paid for by the beneficiaries. The economic character of a service depends not on the legal status of the provider (which may also be a not-for-profit body), nor on the nature of the service, but on the actual methods of provision, organisation and funding of a given activity⁸.

The Italian rules governing social services have still, as of this date, not made a clear distinction between the autonomous initiative of social groupings for the provision of private social services of general interest and the contracting out of social services of general economic interest to third party organisations receiving remuneration for the services they deliver⁹.

It has frequently been affirmed that there exists a 'preferential assignment' to not-for-profit bodies, for example to social cooperative societies, which have come to be seen as of significance in that they are organisations whose structure and economic capacity are suited to social services¹⁰. Certain social services, on the other hand, are provided on the basis of a non-professional relationship with the public administration, without provision for remuneration for their services. The local authorities may enter into 'conventions' with voluntary organisations¹¹, which often provide services on their own account within the framework of subsidiarity and private autonomy. In these cases, the 'convention' has charitable, fiduciary and coordinating characteristics, and is not a source to which a service of general economic interest is contracted. This

⁷ Guide to the application of the European Union rules on state aid, public procurement and the internal market to services of general economic interest, and in particular to social services of general interest, SEC(2010) 1545, December 7th 2010.

⁸ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions accompanying the Communication on 'A single market for 21st century Europe'; 'Services of general interest, including social services of general interest: a new European commitment' COM (2007) 725; ECJ, Cases C-357/06, *Frigerio Luigi & C. Sncv v. Comune di Triuggio*; C-244/94, *Fédération française des sociétés d'assurance*; C-180/98 and C-184/98, *Pavlov*; C-264/01, C-306/01, C-354/01 and C-355/01, *AOK Bundesverband*.

⁹ For a brief overview of the Italian legal system see: Caia G. (2004), *I servizi sociali degli enti locali e la loro gestione con affidamento a terzi. Premesse di inquadramento*, Sanità pubblica privata, 355; Cavallo Perin R. (1998), *La struttura della concessione di servizio pubblico locale*, Turin; for an overview of the relations between accreditation, public procurement and concession see: Consito M. (2009), *Accreditamento e terzo settore*, 33 et seq.

¹⁰ Law 381, 8.11.1991, *Disciplina delle cooperative sociali*.

¹¹ Law 266, 11.8.1991, *Legge quadro sul volontariato*, art. 7.

69th Annual National Conference

is how the conclusion of ‘conventions’ without recourse to competitive procedures for their award is justified, since the EU Treaty does not ‘preclude a Member State from allowing only non-profit-making private operators to participate in the running of its social welfare system by concluding contracts which entitle them to be reimbursed by the public authorities for the costs of providing social welfare services of a health-care nature’¹².

In certain Italian case-law¹³ it has been held that voluntary associations are in a special position, that of an aid to public administration, without in any way being assimilated to market logic. The result is that they cannot take part in tender procedures or be awarded concessions against payment for the services to be performed, since the financial resources from which they may legitimately benefit are restricted to the reimbursement of the expenses they incur. An invitation to tender for public contracts that is addressed both to undertakings operating on the market and to voluntary organisations is therefore not held to be possible, since the latter may only supplement the potential offered by the former by means of the above-mentioned system of direct contractual arrangements with reimbursement by the authorities.

According to this interpretation of the law, when a public authority intends to contract out social services it is required to issue a public call for tenders only from professional organisations, to the exclusion of voluntary associations. In Italy, therefore, it is commonly held that these associations are not market operators as they are bound by their self-imposed constraints of social solidarity, so that their activities are conducted outside the competitive sphere in that they are not profit-making.

As found at European level, however, the fact that such associations do not aim to make a profit does not preclude them from engaging in an economic activity and, in this respect, they constitute undertakings within the meaning of the rules of the Treaty as they pertain to competition¹⁴. The associations in

¹² ECJ, Case C-70/95, *Sodemare SA*; Interpretative Communication of the Commission on the Community Law applicable to Public Procurement and the possibilities for integrating social considerations into Public Procurement COM(566) 2001; the leading case is: ECJ, Case C-31/87, *Beentjes BV*.

¹³ Italian Authority for the Supervision of Public Contracts for works, services, and supplies, Opinion 17.12.2008, n. 266; Cons. Stato, sez. V, 10.5.2005 n. 2345; TAR Campania, sez. I, 2.4.2007, n. 3021; TAR Piemonte, sez. II, 12.6.2006, n. 2323; TAR Piemonte, sez. II, 31.3.2006, n.1604; TAR Campania, sez. I, 21.3.2006, n. 3109; TAR Piemonte, sez. II, 18.4.2005, n. 1043; TAR Veneto, sez. I, 3.3.2004, n. 481; TAR Basilicata, 29.11.2003, n. 1022; TAR Lombardia, sez. III, 9.3.2000, n. 1869.

¹⁴ ECJ, Cases C-41/90, *Höfner and Elser*; C-244/94, *Fédération française des sociétés d'assurance et al.*; C-67/96, *Albany*; C-115/97-C-117/97, *Brentjens' Handelonderneming*; C-219/97, *Maatschappij Drijvende Bokken*; C-180/98-C-184/98, *Pavlov et al.*; C-264/01, C-306/01, C-354/01 and C-355/01, *AOK Bundesverband et al.*; C-222/04, *Cassa di risparmio di Firenze*; C-119/06, *EU Commission v. Italian Republic*; C-305/08, *Consorzio Nazionale Interuniversitario per le Scienze del Mare (CoNISMa) v. Regione Marche*; C-49/07,

69th Annual National Conference

question, then, may engage in an economic activity in competition with other professional operators, insofar as it is the existence of payment for the service that establishes the economic nature of the services delivered (irrespective of whether that payment is made by the users of the public service, by the awarding authority or by parties extraneous to the principal public service relationship between the provider and user).

According to the European Court of Justice, the fact that the organisations in question can submit tenders at prices appreciably lower than those of other, unsubsidised, tenderers, since those who work for them act on a voluntary basis, does not prevent them from taking part in a procedure for the award of public procurement contracts¹⁵. It is the existence of remuneration in return for the service that reveals the existence of the award of a public contract or a concession and, therefore, of an economic service of general interest, so that the public body intending to contract out the performance of social service is then subject to the European Union regulations on public procurement for the protection of competition. This applies even when the potential providers enjoy a legal capacity that, for other purposes, qualifies them as initiatives of citizens, whether individuals or in partnership, for the provision of non-economic services of general interest (see Italian Constitution, article 118(4)).

A party, then, may compete with other operators for part of the activities it performs and at the same time be engaged in non-economic activities in which it acts as a welfare or charitable body¹⁶.

3. The conduct of a non-economic activity: the case of charities.

From their very origins, social services have established themselves as providers of aid to combat poverty or to alleviate the situations of need and difficulty that people may encounter in the course of their lives. It was philanthropy that inspired the earliest social welfare measures, the feature of which was the co-existence of public and private initiatives¹⁷. These were the expressions of a spirit of civic voluntarism, something regarded as peculiar to the New World in particular¹⁸, which were later to develop into the 'private social sector'.

Motosykletistiki Omospondia Ellados NPID (MOTOE); C-475/99, *Ambulanz Glöckner*. Recently Italian case law began to follow the European case law: Cons. Stato, sez. I, 31.3.2010, n. 1278; Cons. Stato, sez. VI, 16.6.2009, n. 3897; see also Italian Authority for the Supervision of Public Contracts for works, services, and supplies, Opinion 21.10.2010, n. 7.

¹⁵ ECJ, Case C-94/99, *ARGE*.

¹⁶ ECJ, Cases C-222/04, *Cassa di risparmio di Firenze*; C-118/85, *Commission v. Italy*.

¹⁷ Heilborn S. E. (2008-2009), *Book review: The Faithless fiduciary and the quest for charitable accountability, 1200-2005*, 43 *Real. Prop. Tr. And Est. L. J.*, 797.

¹⁸ De Tocqueville A. (1848), *De la Démocratie en Amérique*, Paris, 214.

69th Annual National Conference

It was in this context that the distinction originated between not-for-profit and non-profit entities; this has arisen from the gradual affirmation of organisations with the shared objective of deriving no personal profit for members and administrators and therefore not pursuing a monetary goal¹⁹. These are parties that do not operate for pecuniary profit, the distinctive feature of which is the ‘non distribution constraint’²⁰.

The qualification of an organisation as not-for-profit does not imply an absolute prohibition on engaging in activities that are, to a certain extent, profitable. Earnings, profits and net incomes are not forbidden in themselves, provided that profit is not the main reason for setting up the organisation and that provision is made for the devolution and redeployment of profit towards the pursuit of activities of social value, in accordance with the organisation’s statutes.

The prohibition on using the organisation for direct financial gain, in other words the pursuit of a monetary goal, is the element on which the distinction from for-profit or business corporations is based²¹.

A not-for-profit body is regarded as preferable to its for-profit parallel, which is created for the pursuit of a business purpose as its main object, since it may be less prone to exploiting the lack of evaluation capacity among potential recipients (‘information asymmetry’)²².

The not-for-profit category covers widely differing entities that may or may not be entrepreneurial in nature. The examples that come to mind are hospitals, universities, research institutes, symphony orchestras, sports clubs, voluntary associations, cooperative societies, museums, healthcare units, care homes or day nurseries, to quote just a few. Their shared element is that their main intention is to pursue a socially useful goal without a pecuniary goal, which should not be confused with the exclusion of a possible entrepreneurial character of the organisations concerned.

Within the not-for-profit ‘genus’, then, numerous organisational ‘species’ may be discerned, and these can be differentiated by the objectives of social

¹⁹ Schoenfeld M. (1970), *Federal Taxation and Non-Profit Organizations*, 19 Clev. St. L. Rev., 290, 291.

²⁰ Hansmann H.B. (1980), *The role of nonprofit enterprise*, 89 Yale L.J., 838.

²¹ The basic question to be asked in determining whether a corporation is “nonprofit” is whether the corporation is being exploited for direct monetary gain: *People v. Arnold*, 37 Colo. App. 414, 553 P2d 79; *Fletcher Cyclopedia of the Law of Corporations*, § 68.05.

²² Rose Ackerman S. (1996), *Altruism, Nonprofits, and Economic Theory*, J. Ec. Lit., 716, 722, 723; Hansmann H.B., *The role of nonprofit enterprise*, *supra*, 847, 872; James E., Rose Ackerman S. (1986), *The Nonprofit Enterprise in Market Economies*, Chur: Harwood Academic Press, 20-23; Steinberg R., Gray B. H. (1993), ‘*The role of Nonprofit Enterprise in 1993: Hansmann revisited*’, *Nonprofit and Voluntary Sector Quart.*, 22, 297 *et seq.*; Salamon L. M. (2002), *The State of Nonprofit America*, Washington, D.C.: Brookings Institution Press.

69th Annual National Conference

value at which they aim, their organisational structure and the presence or absence of the nature of an enterprise.

As has been pointed out, the fact of not pursuing monetary gain should not be confused with the conduct or non-conduct of an economic activity. In the same way, the non-distribution of profits and operating surpluses and their channelling towards the performance of the organisation's stated activity or towards increasing its assets should not be confused with its lack of an economic nature.

Although, in ontological terms, enterprises pursuing pecuniary goals cannot be attributed to the 'genus' in question, there are nonetheless organisations structured in the form of an enterprise as well as organisations that are not so structured, in which there is a shared goal of social value, that are an expression of that 'genus'²³.

Since the common factor in the category is the particular object pursued, the procedures whereby it is intended to pursue that object can become a useful element in making an internal distinction.

Entities can thus be identified the main part of whose funds, if not the whole of their funding, comes from donations and subsidies of varying kinds; others may operate on a basis of mutuality, through payment of enrolment fees or subscriptions or prices.

Within the confines of this paper it would not be feasible to extend the analysis of the possible models, although these could be separated into two categories depending on the whether or not the entities concerned are entrepreneurial in nature.

Certain not-for-profit entities can thus be defined as social enterprises, in that they are engaged principally and in a stable manner in an organised economic activity for the purpose of the production or exchange of goods and services of social value in order to attain objectives of general interest.

Beside these, there are organisations that pursue the same objectives of social value in a non-economic manner and that, as such, have no entrepreneurial character since they do not intend to produce goods or services directed towards the market.

²³ The border between not-for-profit and for-profit is not always clear-cut, if attention is directed only towards the activity performed, since operators can be found in the same sector that belong to one category or the other. An example is the case of hospitals, which came into being as institutions 'where the poor could come to die' (charitable bodies) but which at the end of the twentieth century also developed into a for-profit format: Fishman J. J. (2008), *Wrong Way Corrigan and recent developments in the nonprofit landscape: a need for new legal approaches*, 76 *Fordham L. Rev.* 569; Kenney E. D. (1994), *Private accreditation as a substitute for direct government regulation in public health insurance programs: when is it appropriate?*, 57 *Law & Contemp. Probs.* 50.

69th Annual National Conference

In this respect, there is a re-awakening of interest in a proposal to qualify welfare bodies or charities²⁴ as separate non-profit bodies and as a sub-category²⁵ of the broader not-for-profit sector.

Although the two terms (not-for-profit and non-profit) are often confused and used as synonyms, according to this different profile a distinction that is sometimes proposed between bodies that are 'merely not-for-profit' and 'non-profit' bodies becomes of interest; adopting this distinction, the latter category would come under the heading of charities in a narrow sense²⁶.

The semantic difference has been taken up at certain historic moments, for instance by the US legislator in differentiating between cases in which a profit is possible, even though it is not the main purpose pursued by an organisation, and other cases in which, on the other hand, the purpose is exclusively charitable, almost as if it is wished to assert, in the latter assumptions, the impossibility of performing activities of an economic nature and defining only these bodies as 'truly charitable corporations'²⁷.

From this is derived a functional classification that is sometimes discussed: whereas not-for-profit can also be incorporated for business purposes, although the purpose must not be for pecuniary profit or financial benefit, other entities are coming into being to pursue non-economic objectives in that they are public or charitable purposes (i.e. not-for-business).

²⁴ Furnishing board, lodging and nursing to needy persons is among the most familiar and useful of charities, and that which constitutes such an institution as a charity is that it does not furnish these things for profit: *Gooch v. Association for Relief of Aged Indigent Females*, 109 Mass. 558, 567 (1872). The terminology referring to charities and not-for-profit organisations is complicated: Hansmann H. B. (1980), *op. cit.*, 835.

²⁵ Charities are a sub-category of the genus not-for-profit and not all not-for-profits are charities: Gary S.N. (1999), *Regulating the management of charities: trust law, corporate law, and tax law*, 21 U. Hawai'i L. R. 593; *Kirby v. Columbian Institute*, 101 NJ Super 205, 243 A2d 853 N.J.Co (1968); *Presbyterian Homes of Synod of New Jersey v. Division of Tax Appeals*, 55 NJ 275, 261 A2d 143, NJ (1970).

²⁶ Oleck H.L. (1970), *Non-profit types, Uses, and abuses: 1970*, 19 Clev. St. L. Rev., 207, 212; a not for profit corporation *can* make a profit. The point is that is not organized for the *purpose* of making a profit: Pasley R. S. (1970), *Organization and Operation of Non-Profit Corporations - Some General Considerations*, *ibid*; Weeks J. K. (1970), *The Not-for-profit Business Corporation*, *ibid.*, 303.

²⁷ V. the Ohio Revised Code, now abrogated, made a distinction between a 'corporation which is not formed for the pecuniary gain or profit of, and whose net earnings or any part thereof are not distributable to, its members, trustees, officers, or other private persons; provided, however, that the payment of reasonable compensation for services rendered and the distribution of assets on dissolution as permitted by services rendered and the distribution of assets on dissolution (...) shall not be deemed pecuniary gain or profit or distribution of earnings» and «charitable corporation (...) organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or for the prevention of cruelty to children or animals': Sec. 1702.01, C and D.

69th Annual National Conference

Charities in the traditional sense can be related to this latter hypothesis, understood as being ‘non-profit’ entities²⁸.

Here the point at issue is the actual nature of the charitable activities, since they are directed towards ends such as education, health and social welfare, which it is considered cannot always be effectively pursued through normal recourse to the market, since these are often activities that are not economically oriented²⁹.

Even if it is not the intention that organisations dedicated to charitable purposes should be limited to the sole purpose of serving the poor³⁰ by offering services, food, shelter and means of subsistence, such organisations that deliver services and benefits to users in impoverished conditions or in difficulties do not become market operators, since no supply and demand relationship exists that would mean that they could be qualified as such operators.

The potential gratuitousness of the services and goods offered becomes a distinctive element of the activity performed, where the costs for their delivery are covered by funding, whether public³¹ or private (grants, legacies or donations³²), that is non-refundable and therefore cannot be defined as remuneration for the service offered.

²⁸ These are bodies for which it is not sufficient that the profit motive is a subordinate goal, but where the organisation needs to eliminate from its basic aims any intention whatsoever to make a profit.

²⁹ Weeks J. K. (1970), *op. cit.*, 313.

³⁰ Fishman J.J. (2008), *op. cit.*, 570, 574, 578 nt. 55; Colombo J. D. (2006-2007), *Federal and State Tax Exemption Policy, Medical Debt and Healthcare for the Poor*, 51 St. Louis U. L.J. 433; Abrams S. Y. (1998-1999), *Devolution’s discord: resolving operational dissonance with the UBIT exemptions*, 17 Yale L. and Pol’y Rev. 886, 890; Zollmann C. (1924), *American Law of Charities*, Milwaukee, 121. On the differing role performed by private organisations in a welfare state and in a liberal state, see Whitman J. Q (1991), *Of Corporatism, Fascism, and the First New Deal*, 39 Am. J. Comp. L., 747.

³¹ Questions arise in the face of possible tensions between public funding and the acts of discrimination sometimes committed by ideologically oriented charities; for the U.S. see Brennen D. A. (2001), *Tax Expenditure, Social Justice, and Civil Rights: Expanding the Scope of Civil Right Laws to Apply to Tax-Exempt Charities*, BYU L. Rev., 167; Brennen D. A. (2000), *The Power of The Treasury: Racial Discrimination, Public Policy and ‘Charity’ in Contemporary Society*, 33 U.C. Davis L. Rev., 389.

³² Charities are encouraged to generate income through donations, government grants, and the implicit tax subsidy of the “income exemption”: Abrams S. Y. (1998-1999), *op. cit.*, 885; Hansmann H. B. (1980), *op. cit.*, 835, 836-837. The exemption was important because private contributions were the largest single source of revenue for not-for-profit charitable organisations: Weeks J. K. (1970), *op. cit.*, 309. It has been suggested that the category in question be redefined by limiting it to organisations receiving a given amount of their budget from gifts and donations: Fishman J.J. (2008), *op. cit.*, 570; Hall M.H., Colombo J.D. (1991), *The Donative Theory of the Charitable Tax Exemption*, 52 Ohio St. L. J. 1379.

69th Annual National Conference

These are organisations whose activity is bound by a constraint, perhaps structural, implying an obligation not to operate for the market; in other words, the activities they perform should by preference be directed towards the poor, the needy and those in difficulties, with the performance of even collateral for-profit activities being prohibited³³.

As of this date it is not clear if that preclusion is a constraint that is unavailable for *truly charitable corporations* which, unlike not-for-profit organisations, would find it hard to justify commercial activities that could be qualified as ‘substantially correlated’³⁴ to the main activity. Only entirely occasional and *negligible* commercial activities may be permitted, as in the case of the sale of small artefacts hand-made by the residents in a sheltered home for the disabled. In such circumstances, the industrial – in that it is standardised – nature of the collateral activity does not affect the non-entrepreneurial nature of the organisation, and therefore the non-economic character of the activity performed.

Non-profit organisations may sometimes be intended for only the indirect performance of socially significant activities through the distribution of incomes derived from the administration of their own assets and donations received for that end³⁵. Here again, this hypothesis does not appear to cast doubt on the absence of any qualification as market operators, since the activity performed may be to support the demand – including support by donations to the users – in a market operated by others.

4. Conclusions.

³³ Malani A., Posner E. A. (2007), *The case for for-profit charities*, 93 Va. L. Rev. 2017; see also Schill M. H. (1983-1984), *The Participation of Charities in limited Partnerships*, 93 Yale L.J., 1355.

³⁴ The continuance of the qualification as a charity calls for a substantive relationship to be demonstrated between the service offered/sold and the object of social value to be attained; the outcome of such a demonstration is rarely satisfactory for a charity in the strict sense of the term, but rather it often leads to its not-for-profit status being revoked and therefore to the loss of its tax exemption. See Abrams S. Y. (1998-1999), *op. cit.*, 885, nt. 62 and 63; Brennen D. A. (2007-2008), *The Commerciality Doctrine as Applied to the Charitable Tax Exemption for Homes for the Aged: State and Local perspectives*, 76 Fordham L. rev. 833; Colombo J.D. (2007-2008), *Reforming Internal Revenue Code Provisions on Commercial Activity by Charities*, *ibid.*, 667.

³⁵ This could be the hypothesis of the *United Charities*, whose object is raising and handling funds: *Notes - United Charities and the Sherman Act*, 91 Yale L.J. 1593, 1981-1982; Rose Ackerman S. (1980), *United Charities: An Economic Analysis*, 28 Pub. Pol'y 323; see also Abrams S. Y. (1998-1999), *op. cit.*, 887. For an Italian example see: Legislative Decree 207, 4.5.2001, *Riordino del sistema delle istituzioni pubbliche di assistenza e beneficenza, a norma dell'articolo 10 della legge 8 novembre 2000*, n. 328, art. 15, which relates to Italian charitable institutions called *Istituzioni pubbliche di beneficenza ed assistenza*.

69th Annual National Conference

It has been pointed out that an economic activity or enterprise within the meaning of the EU Treaty is such that the intervention of the State is strictly regulated by the competition laws, or even prohibited outright³⁶, and for the purpose of its qualification the legal status of the service provider is not relevant.

For truly charitable corporations, on the other hand, State aid is customary, provided that it does not dissimulate the remuneration of a service of general economic interest but rather serves as a favour, support and backing for non-economic activities regarded as of social value and of interest to the community³⁷.

A uniform definition of the not-for-profit and non-profit sector as a 'social enterprise' does not seem to be possible, given that the enterprise within the meaning of the EU Treaty presupposes an economic activity, the existence of a market and therefore an exchange of services whose essence and ultimate aim is to guarantee the continued existence of one of the parties on the market itself (the consumers) as a condition for the existence of the other (the enterprise).

Such a presumption cannot be held to be true of purely non-profit bodies, whose aim on the other hand is gradually to overcome the individuals' situations of need and difficulties, and thereby to remove the reasons for the existence of the organisation and to wind up its activities.

For example, the elimination of the category of the poor is expressed as the affirmation of a goal whose attainment would simultaneously do away with the objects of the organisation for which it has been set up, which it accompanies by the objective of implementing the equal protection clause, in other words the creation of the conditions for the full development of the human person and the safeguarding of human dignity.

³⁶ The EC Treaty generally prohibits State aid: art. 107 (ex art. 87 TEC).

³⁷ In this connection, of possible interest is the U.S. *Personal Responsibility and Work Opportunity Reconciliation Act 1996*, § 104, known as *welfare reform*, which inserts what it calls 'charitable choice', 'a provision allowing states to direct their share of federal dollars to religious organizations, including houses of worship. Under charitable choices, states can contract with religious organizations to deliver welfare benefits; states also give individual vouchers that can be redeemed for benefits at private, including religious entities. The statute also allows states to contract with for-profit companies to administer their welfare programs': Minow M. (2003), *Partners, Not Rivals. Privatization and the Public Good*, Boston, 1 *et seq.* On the broad meaning of the term 'contract' referred to here, see Freeman J. (2000), *The Private Role in Public Governance*, 75 N.Y.U. L. Rev. 595, 596; for an overview on Government-Nonprofit relations: Salamon L. M. (1995), *Partners in Public Service: Government-Nonprofit Relations in the Modern Welfare State*, Baltimore: The Johns Hopkins University Press; Johns Hopkins Center for Civil Society Studies (2003), *Policy Tools and Government Performance*, Baltimore: The Johns Hopkins Center for Civil Society Studies; for a recent reading see also Freeman J., Minow M. (2009), *Government by Contract: Outsourcing and American Democracy*, Harvard University Press.