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## **Building a European Community: social service provision between inclusion and economic interests**

*community building; European social model; inclusion; services of general economic interest; social services of general interest; welfare states*

*Inclusion and the associated provision of social services is a central fundamental right in the European Union. Social services of general interest are based on the principles of an inclusive welfare state enshrined in EU primary law. However, the European Commission tends to interpret these social services rather economically. This paper shows that the way in which these services are provided in the Member States is decisive for the categorization of an economic or non-economic activity by the European Commission. Whether social services are to be classified as being related to economic activities and, therefore, subject to the competition and internal market rules depends on their organization and structure.*

### **1. Introduction**

This paper examines the importance of inclusion and the related provision of social services in the European Union. The way in which social services are provided in the Member States is the determining factor in the classification of an economic or non-economic activity by the European Commission. The paper studies the inherent link between inclusion and community building and answers the question as to when and why social services are subject to economic interest.

The paper has five parts. In the first part the concept of inclusion in caring communities is defined. The second part gives a short overview about the European social model. In the third part the connection between community building and inclusion is described. The fourth part is focused on the concept of (social) services of general interest in the European Union to generate inclusion in a welfare community. The final part gives an outlook on the diversity of ideas of inclusion in welfare societies regarding the different conditions of health services in Europe.

### **2. The Concept of Inclusion in Welfare States**

Inclusion is a counter-model to the exclusion of individuals from societies or partial societies. It is a comprehensive term for the various forms of involvement and membership of persons in social systems. Social inclusion is an anthropological paradigm of philosophy of law related to

the ontology of personhood. From a sociological perspective, it endeavors to go beyond social structures of center and periphery in society (Schulz-Nieswandt 2016, p. 29).

Inclusion is an intra-societal process with regard to extra-societal actors. Insofar, the individuals in a community are interdependent: one cannot exist without the other. According to this existentialist understanding, the individual should be understood in context, that is, in the community among others. This means that a society also has a social responsibility towards its individual members.

Inclusion as a model of thought has been adopted by the United Nations (UN), the European Union (EU) and national laws. It is defined by the UN in its catalogue of basic social rights and by the EU in its treaties. Inclusion relates to European social policy in accordance with national laws (Schulz-Nieswandt 2016, p. 9).

Inclusion as an integral part of European community building is anchored in various European Treaty articles. As can be seen in Article 1 a TEU of 26 October 2012 (Official Journal of the European Union, C 326/1), the principles of the UN<sup>1</sup> are adopted in the European treaties. At European level, a treaty is a binding agreement between EU Member States. It sets out the objectives, the rules applicable to the EU institutions, the decision-making process and the relations between the European Union and its Member States. The Treaty on European Union stipulates in Article 2 that the European Union “is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail”.

A similar tenor exists in Article 2 (3) of the Treaty of Lisbon of 13 December 2007 (Official Journal of the European Union, 2007/C 306/01): “[The Union] shall combat social exclusion and discrimination, and shall promote social justice and protection, equality between women and men, solidarity between generations and protection of the rights of the child. It shall promote economic, social and territorial cohesion, and solidarity among Member States.”

The European Union’s key tasks therefore include combating social exclusion and discrimination. Social exclusion and discrimination act as a counter-model to the concept of inclusion explained here. The meaning and character of inclusion is the guarantee of the inviolability of individual dignity as enshrined in Article 1 of the German Basic Law. This principle is an important precondition for a modern welfare state. In this sense, inclusion entails more than the concept of social integration: Social solidarity depends on providing as many participants in society as possible with the necessary resources, while respecting and appreciating their diversity. This social solidarity therefore does not require assimilation in order to belong to society, which is the concept of integration.

The European understanding of inclusion is connected to the topic of child welfare and well-being proclaimed by the UN. The legal framework of the UN – especially the UN-Convention on the Rights of the Child and the UN-Convention on Rights of Persons with Disabilities – or

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1 These principles, among others, are enshrined in the preamble of the Convention on the Rights of the Child, in which “the dignity and worth of the human person” and the willingness to promote social progress and better standards of life are proclaimed.

ganizes the perspectives along the developmental challenges of the whole lifecycle between the birth and death of human beings. Therefore, inclusion is related to different stages of development during the lifespan of individuals (Schulz-Nieswandt 2016, p. 29 f.). In this lifecycle, there are individual lifespans where measures of inclusion must be implemented – be it as a child, senior citizen or a person suffering from physical or mental illness. (The latter is subsequently described as *homo patiens*).

To include the *homo patiens*, the society needs an answer to the question as to how to cope with (chronic) illness or disabilities. It is crucial not only to define the type and scope of social services, but also to have a coherent approach to the integration of the *homo patiens* into society. A decisive characteristic of an inclusive society is thus the dismantling of boundaries and restrictions. This requires a reduction of fears and reservations in favor of a positive sense of values in a society. What is needed, therefore, is a social community of values that includes every individual (Schulz-Nieswandt 2016, p. 29 f.).

The previously mentioned legal framework of inclusion defines such a social community. This framework is a *conditio sine qua non* to generate social change through pareto optimal solutions (Schulz-Nieswandt 2016, p. 5). Successful inclusion is a process of social change understood as cultural transformation. A political intervention must be implemented in legal regimes for successful inclusion (Schulz-Nieswandt 2016, p. 25). A transformation into an inclusive society requires openness, civil courage and willingness related to radical cultural change and moral economy of redistribution. In this sense, inclusion is reliant on social policy to build networks on regional and local levels, in urban and rural areas.

### 3. The European Social Model

The European Union is a close, permanent link between sovereign states. The public authority of the European Union is based on treaties, whose basic order is solely subject to the decree of the Member States and in which the citizens of the Member States are the subjects of democratic legitimation. The Member States are “Masters of the Treaties”, while the European Commission is the “Guardian of the Treaties” (Schulz-Nieswandt, 2010, p. 31 f.). The European political system is a hybrid structure of horizontal treaties and vertical constitutional order (Schulz-Nieswandt 2016, p. 35).

The European integration process is the result of various historically grown ideas and interests by the Member States. It is based on a broad set of theories and approaches. Therefore, there is a deep and complex interdependence of polity, politics, and policy at the European level. This means that processes of political decisions (*politics*) producing political outcomes with societal relevance (*policy*) are embedded in the institutional framework for governance (*polity*), and then again defined as multi-level network-configurations of actors as a multi-central structure of agenda-setting and policy-making (Schulz-Nieswandt 2016, p. 35).

## 4. Community Building and Inclusion

The idea of local and regional community-building is the essential result of the logic of inclusion from the perspective of the social capital theory. In this logic, community building is a means and precondition of inclusion. Community is a network that generates social capital, while social capital is the outcome of this network (Schulz-Nieswandt 2016, p. 25).

Inclusion in the European Member States is strongly determined by the framework of the European Union. On a meta-level, the inclusive approach, which is intended to lead to community building, is characterized by a subsidiary approach. This subsidiarity should be based on as much harmonization as necessary with as little central influence as possible. In concrete terms, this means that all activities of the European Union are based on treaties that have been adopted by all EU Member States on a voluntary and democratic basis.

Binding acts of the European Union can only be adopted if the treaties empower the institutions of the European Union to do so. If a policy issue is not enshrined in a treaty, the European Commission cannot present a legislative proposal on that issue. Nevertheless, the EU can act at an operational level through the “Open Method of Coordination”. If the Commission or the Council wants to intervene in policy issues where the European Union has no competence, the Open Method of Coordination (OMC) often applies. The OMC is an EU policy-making process or regulatory instrument. It promotes cooperation, exchange, best practice and agreement on common objectives and guidelines between Member States, sometimes supported by Member States’ action plans, as in the case of employment and social exclusion (Prpic, 2014). In the social sector in particular, this methodology is used as a basis for action approaches and policy advice for the Member States. However, there is no obligation for the Member States to adopt these policies.

One characteristic of the European Union is that it sets the standards enshrined in the treaties, but simultaneously creates a (theoretical) scope for all European Member States to shape inclusion. However, it is precisely in the fields of health care and social services that this room for manoeuvre of the Member States is increasingly restricted. Historically developed forms of provision of these services by the Member States are standardized in terms of internal market and competition rules (Schulz-Nieswandt 2016, p. 9). According to the European Commission, harmonization is to be made in as many areas of the European internal market as possible as is apparent in the above-mentioned Article 2 (3) Treaty of Lisbon and in other European treaty articles.

The inclusion of further treaty objectives in the Amsterdam Treaty and then in the Lisbon Treaty separated European law and economics. Nevertheless, fundamental freedoms continue to play an important role in the realization of a transnational, uniform European economic area. This forms the basis for a comprehensive exchange of goods within the meaning of Article 26 (2) TFEU of 7 June 2016 (Official Journal of the European Union C 202/59). At the same time, non-economic aspects have become increasingly important. The internal market, which serves as a central point of reference, is itself supplemented by social and environmental aspects in Article 3 (3) TEU.

## 5. The Concept of (Social) Services of General Interest

(Social) services of general interest ((S)SGIs) are a means of inclusion in the European community building process. (S)SGIs are part of EU law. A service of general interest exists if it is provided in the public interest and is therefore subject to specific public service obligations by the Member States. The general interest does not have to be pan-European but can only relate to the interests of the Member States.

Services of general economic interest are governed by Articles 14 and 106 (2) of the TFEU and by Protocol No. 26 TFEU. The Commission defines services of general interest as economic activities which serve the general interest and which, without state intervention, could not be provided in the market at all or could only be provided to different standards in terms of quality, safety, affordability, equal treatment or universal access. The public service obligation is imposed on the service provider by means of a contract. This includes a public service component, to ensure that the service is provided under conditions which enable the service provider to fulfil its mission (European Commission 2013, p. 21 f., para. 2).

Services of general interest are implemented and provided differently by the authorities of the Member States at the national, regional or local level. The service provided must be classified as being of general interest and subject to specific public service obligations. Their practical implementation is the responsibility of the Member States (European Commission 2013, p. 21, para. 1). Schulz-Nieswandt (2016, p. 31) argues that social services of general interest should be evaluated from the perspective of criteria based on availability, accessibility, awareness and quality-related acceptability, which are criteria of spatial planning and process-oriented quality management. This is in contrast to the usual focus in free market-oriented societies on profit maximisation.

Member States are, in principle, free to decide what constitutes a service of general interest – unless this obligation is enshrined in the European legal system. Services of general interest (SGIs) are indeed an autonomous concept in the Union's legal order. However, there is also a wide margin of manoeuvre for Member States. The control of the European Commission and the Court of Justice of the European Union is limited to the investigation of an abusive application in individual cases (European Commission 2013, p. 23, para. 4). This corresponds to the systematic interpretation of Article 106 (2) TFEU. The legal concept of services of general interest in Article 14 TFEU summarizes the responsibility of Member States. In addition, Article 36 of the Charter of Fundamental Rights of 26 October 2012 (Official Journal of the European Union C326/391) postulates the access of EU citizens to services of general interest as a subjective right of participation. Various decisions of the Court of Justice of the European Union have emphasized the specific characteristics of services of general economic interest compared to other economic activities.<sup>2</sup>

2 Judgment of the CJEU of 10 December 1991, *Merci Convenzionali Porto di Genova SpA/Siderurgica Gabrielli SpA*, C-179/90, Slg. 1991, I-5889, paragraph 27; Judgment of the CJEU of 17 July 1997, *GT-Link A/S/De Danske Statsbaner (DSB)*, Slg. 1997, I-4449, paragraph 53; Judgment of the CJEU of 18 June 1998, *Corsica Ferries France SA/Gruppo Antichi Ormezzatori del porto di Genova Coop. arl, Gruppo Ormezzatori del Golfo di La Spezia Coop. arl, Ministero dei Trasporti e della Navigazione*, Slg. 1998, I-3949, paragraph 45.

Social services of general interest without effect on trade between Member States are not subject to European competition policies. They are governed solely by the general EU principles of transparency, non-discrimination, equal treatment and proportionality. Nor are they subject to specific procedural rules. However, they are increasingly influenced by the rules on State aid and public procurement (European Commission 2013, p. 19 f.).

While SSGIs ordinarily fall under the criterion of general interest, SGIs are subject to restrictions and are consequently part of European competition and internal market rules. Schulz-Nieswandt (2010) argues that the European Commission has a high interest of in regulating the markets of social and health care services, which implies a tendency to define these services as ones of general economic interest.

Although SGIs are firmly anchored in international, European or national treaties, their role and importance are not irrefutable. The EU's free trade policy can be cited as an example: In recent years, the EU has negotiated so-called new generation trade agreements, which include an ambitious WTO agenda to remove non-tariff barriers to services and investment. These deal simultaneously with regulatory requirements, public procurement and competition rules. The trade agreements also usually include normative issues such as human rights and sustainable development. In free trade agreements with Canada or Singapore, for example, provisions on investment protection are included in addition to the liberalization of services and investment. New generation trade agreements could have an impact on public services and (social) services of general interest by advancing the liberalization of services, access to public procurement markets and competition rules and by restricting State aid (CEEP 2016). Thus, even if the constitutions give high priority to services of general interest, the monitoring of these principles is still relevant. Other mechanisms are often used to relativize these principles in favor of liberalization approaches in competition policy.

## 6. The (Non-) Economic Character of Social Services

The willingness of the European Union to integrate SSGIs in its internal market leads to increased competitiveness within these services. Nevertheless, SSGIs are based on the principles of an inclusive welfare state enshrined in primary law. The decisive factor in determining whether a social service is subject to internal market rules is the distinction at EU level between economic and non-economic activities. In order to clarify this distinction, the Court of Justice of the European Union has consistently held in its case-law that any activity involving offering goods and services on a market constitutes an economic activity.<sup>3</sup>

The answer to the question of whether a market exists for certain services may depend on how these services are organized in the Member States and may therefore vary from one state to an-

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3 Judgment of the CJEU of 16 June 1987, *Commission v Italy*, 118/85, ECLI:EU:C:1987:283, paragraph 7; Judgment of the CJEU of 18 June 1998, *Commission v Italy*, C-35/96, ECLI:EU:C:1998:303, paragraph 36; Judgment of the CJEU of 12 September 2000, *Pavlov and others*, Joined Cases C-180/98 to C-184/98, ECLI:EU:C:2000:428, paragraph 75.

other.<sup>4</sup> Furthermore, the classification of a particular activity may change as a result of political decisions or economic developments. Services that do not currently constitute an economic activity could develop into such an activity and vice versa.

Whether social security systems are classified as being related to economic activities depends on their organization and structure. Case law distinguishes between systems based on the principle of solidarity and economic systems. Solidarity-based social security systems which do not involve any economic activity generally have the following characteristics: membership of the system is compulsory;<sup>5</sup> the system is purely social,<sup>6</sup> it is a not-for-profit system;<sup>7</sup> the benefits must be provided;<sup>8</sup> the benefits provided are not necessarily proportional to the income of the insured person;<sup>9</sup> and the system is supervised by the state.<sup>10</sup>

Such solidarity-based systems must be distinguished from systems that involve an economic activity.<sup>11</sup> Economic-oriented systems usually have the following characteristics: they are based on optional membership;<sup>12</sup> they are capitalized;<sup>13</sup> and they are profit oriented.<sup>14</sup> Some systems have characteristics of both categories. In such cases, the classification of the system depends on the analysis of different elements and their respective importance.<sup>15</sup>

According to the European Commission, SSGIs can be either economic or non-economic depending on the characteristics of the activity concerned. In accordance with the case law of the Court of Justice the classification of an activity as “social” is not sufficient to exclude an economic interest.<sup>16</sup> SSGIs that are understood as being economic are covered by the concept of SGEIs (European Commission 2013, p. 22, para. 3).

The health system serves as a good example of the EU’s approach: Health systems in the EU differ considerably from one Member State to another. Whether, and to what extent the various

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- 4 Judgment of the CJEU of 17 February 1993, *Poucet and Pistre*, joined cases C-159/91 and C-160/91, ECLI:EU: C:1993:63, paragraphs 16 to 20.
  - 5 Judgment of the CJEU of 17 February 1993, *Poucet and Pistre*, joined cases C-159/91 and C-160/91, ECLI:EU: C:1993:63, paragraph 13.
  - 6 Judgment of the CJEU of 22 January 2002, *Cisal/INAIL*, C-218/00, ECLI:EU:C:2002:36, paragraph 45.
  - 7 Judgment of the CJEU of 16 March 2004, *AOK Bundesverband*, joined cases C-264/01, C-306/01, C-354/01 and C-355/01, ECLI:EU:C:2004:150, paragraphs 47 to 55.
  - 8 Judgment of the CJEU of 17 February 1993, *Poucet and Pistre*, joined cases C-159/91 and C-160/91, ECLI:EU: C:1993:63, paragraphs 15 to 18.
  - 9 Judgment of the CJEU of 22 January 2002, *Cisal/INAIL*, C-218/00, ECLI:EU:C:2002:36, paragraph 40.
  - 10 Judgment of the CJEU of 17 February 1993, *Poucet and Pistre*, Joined Cases C-159/91 and C-160/91, ECLI:EU: C:1993:63, nr. 14; Judgment of the CJEU of 22 January 2002, *Cisal/INAIL*, C-218/00, ECLI:EU:C:2002:36, nr. 43 to 48; Judgment of the CJEU of 16 March 2004, *AOK Bundesverband*, Joined Cases C-264/01, C-306/01, C-354/01 and C-355/01, ECLI:EU:C:2004:150, paragraphs 51 to 55.
  - 11 Judgment of the CJEU of 16 November 1995, *FFSA and others*, C-244/94, ECLI:EU:C:1995:392, paragraph 19.
  - 12 Judgment of the CJEU of 21 September 1999, *Albany*, C-67/96, ECLI:EU:C:1999:430, paragraphs 80 to 87.
  - 13 Judgment of the CJEU of 16 November 1995, *FFSA and others*, C-244/94, ECLI:EU:C:1995:392, paragraphs 9 and 17 to 20; Judgment of the CJEU of 21 September 1999, *Albany*, C-67/96, ECLI:EU:C:1999:430, paragraphs 81 to 85; Judgment of the CJEU of 21 September 1999, *Brentjens*, Joined Cases C-115/97 to C-117/97, ECLI:EU:C:1999:434, paragraphs 81 to 85; Judgment of the CJEU of 21 September 1999, *Drijvende Bokken*, C-219/97, ECLI:EU:C:1999:437, paragraphs 71 to 75; Judgment of the CJEU of 12 September 2000, *Pavlov and others*, Joined Cases C-180/98 to C-184/98, ECLI:EU:C:2000:428, paragraphs 114 and 115.
  - 14 Judgment of the CJEU of 21 September 1999, *Brentjens*, joined cases C-115/97 to C-117/97, ECLI:EU:C:1999:434, paragraphs 74 to 85.
  - 15 Judgment of the CJEU of 5 March 2009, *Kattner Stahlbau*, C-350/07, ECLI:EU:C:2009:127, paragraph 33.
  - 16 Joined Cases C-180/98 to C-184/98 *Pavlov* [2000] ECR I-6451, paragraph 118; Case C-218/00 *INAIL* [2002] ECR I-691, paragraph 37; and Case C-355/00 *Freskot* [2003] I-5263.

health care providers compete, depends on national characteristics. In some Member States public hospitals are a central part of the national health system. They are often based almost entirely on the principle of solidarity.<sup>17</sup> Such hospitals, as for example in Spain, are financed directly by social security contributions and provide their services free of charge in accordance with the principle of universal health care.<sup>18</sup> The EU courts have confirmed that wherever such a structure exists, the organizations concerned are not of a general economic interest.<sup>19</sup> This non-economic categorization only applies where Member States do not charge for the services: In many EU Member States, hospitals and healthcare providers offer their services for a fee paid either directly by patients or by their insurance companies.<sup>20</sup> In such systems, there exists competition between hospitals for the provision of health services. In this case, the fact that a health service is provided by a public hospital is not sufficient for the EU to classify the activity as non-economic.

## 7. Conclusion

In the European Union inclusion and the provision of social services are fundamental rights. Inclusion as a counter-model to the exclusion of individuals from societies or partial societies is a comprehensive term for the various forms of involvement and membership of persons in social systems. Furthermore, the European Social Model is based on treaties as well as on a broad set of theories and approaches. As such, there is a deep and complex interdependence of polity, politics and policy at the European level.

Community building functions as a means and precondition of inclusion in consideration of the European Social Model. This model aims at achieving as much harmonization as necessary with as little central influence as possible. In this context, (social) services of general interest play an essential role for an inclusive society. The way in which these services are provided in the Member States is decisive for the categorization of an economic or non-economic activity.

In the example of the health sector, the variety of SSGIs becomes apparent, with the organization and structure of social services being the most important indicators. Consequently, in contrast to what is often assumed, the service as such is not decisive for its classification as economically – or socially motivated. The crucial factor is rather whether the service complies with the requirements of a public good, in that the membership of the system is compulsory, the system is purely social, it is a not-for-profit system, the benefits must be provided, the benefits provided are not necessarily proportional to the income of the insured person and the system is supervised by the state.

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17 Judgment of the CJEU of First Instance of 4 March 2003, FENIN, T-319/99, ECLI:EU:T:2003:50; Judgment of the CJEU of 11 July 2006, FENIN, C-205/03 P, ECLI:EU:C:2006:453, paragraphs 25 to 28.

18 Depending on the general characteristics of the system, charges that cover only a fraction of the actual cost of the services do not necessarily alter the classification of a system as non-economic.

19 Judgment of the CJEU of First Instance of 4 March 2003, FENIN, T-319/99, ECLI:EU:T:2003:50, paragraph 39; Judgment of the CJEU of 11 July 2006, FENIN, C-205/03 P, ECLI:EU:C:2006:453, paragraphs 25 to 28.

20 Judgment of the CJEU of 12 July 2001, Geraets-Smits and others, C-157/99, ECLI:EU:C:2001:404, paragraphs 53 to 58.

## Kurzfassung

*Die Bildung einer Europäischen Gemeinschaft: soziale Dienstleistungen zwischen Inklusion und wirtschaftlichen Interessen*

*Dienstleistungen von allgemeinem wirtschaftlichem Interesse; Europäisches Sozialmodell; Gemeinschaftsbildung; Inklusion; Sozialdienstleistungen von allgemeinem Interesse; Wohlfahrtsstaaten*

*Inklusion und die damit verbundene Bereitstellung von sozialen Dienstleistungen sind zentrale Grundrechte in der Europäischen Union. Sozialdienstleistungen von allgemeinem Interesse basieren auf den im EU-Primärrecht verankerten Prinzipien eines inklusiven Wohlfahrtsstaates. Trotzdem werden diese Sozialdienstleistungen durch die Europäische Kommission vornehmlich in einem ökonomischen Sinne verstanden. Der Aufsatz zeigt, dass die Art und Weise, wie diese Dienstleistungen in den Mitgliedsstaaten erbracht werden, ausschlaggebend für die Einstufung einer wirtschaftlichen oder nichtwirtschaftlichen Tätigkeit durch die Europäische Kommission ist. Ob soziale Dienstleistungen den wirtschaftlichen Tätigkeiten zuzuordnen sind und damit den Wettbewerbs- und Binnenmarktregeln unterliegen, hängt folglich von ihrer individuellen Organisation und Struktur ab.*

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