



The Global Initiative
for Economic, Social and Cultural Rights

Public services and a just transition to realise economic, social and cultural rights in Europe

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A submission by the Global Initiative for Economic, Social and Cultural Rights to the UN Special Rapporteur on extreme poverty and human rights Olivier de Schutter ahead of his visit to the European Union

The Global Initiative for Economic, Social and Cultural Rights (GI-ESCR) is an international human rights non-governmental organisation. Together with partners around the world, GI-ESCR works to advance the realisation of economic, social and cultural rights, tackling the endemic problems of poverty, social justice and inequality through a human rights approach.

Introduction

1. Europe is at a crossroads. Beyond the immediate crisis of the COVID-19 pandemic, it faces the challenges of rising economic inequality, social unrest and the growth of nationalist and populist movements, and the climate emergency.
2. European Union (EU) Member States remain bound by their obligations under UN human rights treaties, irrespective of whether the powers relevant to the implementation of these obligations fall within the scope of the EU's competences.¹ The EU is itself also bound by human rights obligations under international human rights law and must take positive steps to fulfil these obligations within its spheres of competence.² This submission focuses on the human rights obligations of the EU and Member States relating to public services and climate change.

Public services

3. International human rights law requires that States ensure that social services essential for the realisation of economic, social and cultural rights (ESCR), such as health care and education, be provided in a democratic and non-commercial way, with public control, for the public good.³ United Nations human rights treaty bodies and special procedures experts have in a number of instances explicitly stated that

¹ United Nations Human Rights Office of the High Commissioner Regional Office for Europe 'The European Union and International Human Rights Law' (OHCHR Regional Office for Europe, 2012)

https://europe.ohchr.org/Documents/Publications/EU_and_International_Law.pdf, accessed 7 December 2020.

² Tawhida Ahmed and Israel de Jésus Butler, 'The European Union and International Human Rights: An International Perspective' (2006) 17 EJIL 771.

³ Sylvain Aubry and Sarah Jameson, 'States' Human Rights Obligations Regarding Public Services: The United Nations Normative Framework' (The Global Initiative for Economic, Social and Cultural Rights, 19 October 2020) <https://bit.ly/38HpM7q>, accessed 27 November 2020.

States have an obligation to provide public services, both generally and in relation to specific ESCR.⁴ They have also in many cases made an instrumental case for public services, regarding them as necessary for the realisation of ESCR, particularly, though not exclusively, for marginalised groups.⁵ Public services are required by human rights law to be accessible to all, without discrimination, of a sufficient quality, responsive to the needs of those they serve, accountable, and adequately funded.⁶

4. In accordance with their extraterritorial obligations under international human rights law, the European Union and its members must apply the same principles beyond their borders, in particular through development aid and cooperation.
5. The EU is further bound by its internal commitments. These include the EU Charter of Fundamental Rights, which recognises many of the same rights as the international human rights framework, and the European Pillar of Social Rights, which was adopted in 2017. The latter states at Principle 20 that “[e]veryone has the right to access essential services of good quality, including water, sanitation, energy, transport, financial services and digital communications” and reaffirms other specific economic and social rights that require public services, such as housing⁷ and health.⁸
6. A number of the measures driven by the EU have however had a negative impact on public services, in particular by weakening the capacity of Member States to invest in public services. In particular, the debt ceiling and budget deficit rules imposed by the Stability and Growth Pact have constrained governments’ borrowing and spending abilities. The reduction of public spending has been a consistent feature of country-specific recommendations made by the European Commission to Member States through the European Semester over the past few years.⁹
7. In addition, the European Commission has directly called for or actively encouraged governments to privatise or cut spending on healthcare services.¹⁰ The European Commission has also driven the privatisation and marketisation of services traditionally provided by the State through competition policy instruments that constrain Member State involvement in the delivery of certain services,¹¹ directives that explicitly seek to open specific sectors (such as electricity,¹² gas,¹³ telecommunications¹⁴ and rail¹⁵) to competition, and decrees that Member States must introduce efficiency incentives for providers of State-funded public services.¹⁶
8. The combined effect of this has been the diminished quality, availability and accessibility of services, and their growing commercialisation, that has undermined economic, social and cultural rights. Research has shown, for instance, that austerity

⁴ *ibid.*

⁵ Aubry and Jameson, *op. cit.*

⁶ *ibid.*

⁷ European Pillar of Social Rights, principle 19.

⁸ European Pillar of Social Rights, pillar 16.

⁹ Emma Clancy, ‘Discipline and Punish: End of the road for the EU’s Stability and Growth Pact?’ (Martin Schirdewan MEP, 2020) <https://emmaclancy.files.wordpress.com/2020/02/discipline-and-punish-eu-stability-and-growth-pact.pdf>, accessed 7 December 2020.

¹⁰ This demand features in 63 of the recommendations made by the European Commission to Member States between 2011 and 2018. See Clancy, *op. cit.*

¹¹ For a detailed discussion, see Niamh Dunne, ‘Liberalisation and the pursuit of the internal market’ (2018) 43 *European Law Review* 803.

¹² Directive 2009/72/EC concerning common rules for the internal market in electricity [2009] OJ L211/55.

¹³ Directive 2009/73/EC concerning common rules for the internal market in natural gas [2009] OJ L211/94.

¹⁴ Commission Directive 2002/77/EC on competition in the markets for electronic communications networks and services [2002] OJ L249/21

¹⁵ Directive 2012/34/EU establishing a single European railway area [2012] OJ L343/32.

¹⁶ European Commission communication on the European Union framework for State aid in the form of public service compensation [2012] OJ C8/15 at [39]-[43].

measures have negatively impacted on access to healthcare services throughout Europe.¹⁷ Since 2010, when austerity measures began to take effect, there has been a rise in 'self-reported unmet medical need' - whereby people believed that they needed healthcare services but were unable to access them.¹⁸

Climate change

9. Five UN expert human rights treaty bodies have recognised that '[i]n order for States to comply with their human rights obligations, and to realize the objectives of the Paris Agreement, they must adopt and implement policies aimed at reducing emissions, which reflect the highest possible ambition, foster climate resilience and ensure that public and private investments are consistent with a pathway towards low carbon emissions and climate resilient development.'¹⁹
10. NextGenerationEU and its "centrepiece", the Recovery and Resilience Facility (RFF), ought to be welcomed as an historic step towards implementing the objectives of the European Green Deal. However, the "green" credentials of the recovery are in danger of being undermined after an amendment to exclude all fossil fuels from the RRF was removed by MEPs on the Budget and Economic Affairs Committees.²⁰ This decision paves the way for spending to be based on the EU Commission's draft "taxonomy" rulebook (rulebook on green investments), which comprises watered-down criteria that classify gas, bioenergy and hybrid cars as "sustainable", despite the fact that each are extremely damaging to the climate, with gas now accounting for more of Europe's greenhouse emissions than coal.²¹

Recommendations

11. Strong universally accessible quality public services are at the core of the European fabric. They are crucial to respond to crises such as the current COVID-19 pandemic and its consequences, as well as more fundamentally to address extreme poverty and inequalities. We propose that the European Commission:
 - 11.1. Support and encourage Member States to invest in public services that correspond to the enjoyment of human rights. While the continued suspension of the Stability and Growth Pact throughout the COVID-19 recovery period is welcome, fundamental reform of the economic governance framework is required to give Member States the fiscal space to invest in public services in the long term, for instance by removing public services from the debt rules.
 - 11.2. Facilitate a rights-aligned fiscal environment by:

¹⁷ David Stuckler, Aaron Reeves, Rachel Loopstra, Marina Karanikolos and Martin McKee, 'Austerity and health: the impact on the UK and Europe' (2017) 27 *European Journal of Public Health* 21.

¹⁸ *ibid.*

¹⁹ UN Committee on the Elimination of Discrimination Against Women, Committee on Economic, Social and Cultural Rights, Committee on the Protection of the Rights of All Migrant Workers and Members of their Families, Committee on the Rights of the Child, Committee on the Rights of Persons with Disabilities, 'Joint Statement on Human Rights and Climate Change' (16 September 2019) <https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=24998&LangID=E>, accessed 7 December 2020.

²⁰ Eoin Bannon, 'Parliament Must Act after MEPs Refuse to Ban Fossil Fuels from Recovery Fund' (European Federation for Transport and Environment, November 2020) <https://www.transportenvironment.org/press/parliament-must-act-after-meps-refuse-ban-fossil-fuels-recovery-fund>, accessed 8 December 2020.

²¹ Greenpeace European Unit, 'Burning Gas and Trees Labelled as 'Green' in EU Commission's Sustainable Investment Rulebook' (Greenpeace European Unit, November 2020) <https://www.greenpeace.org/eu-unit/issues/climate-energy/45302/taxonomy-burning-gas-and-trees-labelled-green-by-eu-commission>, accessed 8 December 2020.

- a) Enabling progressive corporate tax on multinationals across EU and effective taxation of capital and wealth, in particular offshore wealth.
 - b) Taking effective action against tax evasion and avoidance. Large amounts of revenue that could be invested in public services are lost each year to corporate tax abuse and offshore tax evasion.²² For instance, the annual amount of revenue lost by Portugal this year is estimated to be \$1,046,072,964, which equates to 7.63% of its public health expenditure.²³
 - c) Coordinating fair and progressive taxation across the European Union. The EU should consider playing a leading role in applying a higher corporate tax rate to large corporations in oligopolised sectors with excess rates of return; setting a minimum effective corporate tax rate of 25% to stop base erosion and profit shifting; promoting the introduction of progressive digital services taxes on the economic rents captured by multinational firms in this sector; requiring publication of country-by-country reporting for all corporations benefiting from state support; and requiring EU Member States to publish data on offshore wealth to enable all jurisdictions to adopt effective progressive wealth taxes on their residents and to be able to better monitor effective income tax rates on highest income taxpayers.²⁴
 - d) Supporting gender-responsive tax systems, for instance by implementing impact assessments to ensure that EU tax policies do not negatively impact on progress towards gender equality.
- 11.3. Explicitly recognise that services that correspond to the enjoyment of economic, social and cultural rights are non-economic services of general interest and are therefore not subject to the European internal market and competition rules. These services include health care, education, food, water, sanitation, transportation and energy. For these services, the focus should be on encouraging collaboration and solidarity, rather than on fostering competition.
- 11.4. Play an active role in coordinating efforts for public services. This includes supporting municipalities who have been at the forefront in developing and providing public services and in promoting social and ecological transformation.
12. The EU and its Member States must ensure that their development cooperation is focused on strengthening public services and does not lead to their privatisation or commercialisation. We propose that the European Commission:
- 12.1. In line with and building on the European Parliament resolution of 13 November 2018 on EU development assistance in the field of

²² Alex Cobham, Javier Garcia-Bernardo, Miroslav Palansky, Mark Bou Mansour, 'The State of Tax Justice 2020' (Tax Justice Network, November 2020) <https://www.taxjustice.net/reports/the-state-of-tax-justice-2020/>, accessed 7 December 2020.

²³ *ibid.*

²⁴ The Independent Commission for the Reform of International Corporate Taxation (ICRICT), 'The Global Pandemic, Sustainable Economic Recovery, and International Taxation' (ICRICT, May 2020), <https://static1.squarespace.com/static/5a0c602bf43b5594845abb81/t/5ee79779c63e0b7d057437f8/1592235907012/ICRICT+Global+pandemic+and+international+taxation.pdf> accessed 8 December 2020.

- education,²⁵ commit not to fund or support commercial for-profit providers of public services through development cooperation.
13. The EU and its Member States must also act in accordance with their international obligations regarding climate change. The European Commission must:
- 13.1. Ensure that public funds do not continue to be used to support polluting activities. As a starting point, the fossil fuel industry must be excluded from the scope of the EU recovery funds.
 - 13.2. Review and amend the draft taxonomy to ensure that gas plants, hybrid cars and biomass energy (beyond that derived from the burning of waste and residues) are not classified as “sustainable”.

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²⁵ European Parliament Resolution on EU development assistance in the field of education, 13 November 2018, P8_TA(2018)0441.