



**Global  
Exchange**  
on Migration & Diversity

# The European Union and migrants with irregular status: opportunities and limitations in EU law and policy for European local authorities providing assistance to irregular migrants

Report for the 'City Initiative on  
Migrants with Irregular Status in Europe'  
(C-MISE)

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## Context

This paper aims to provide European cities participating in the ‘*City Initiative on Migrants with Irregular Status in Europe*’ (the C-MISE initiative) with an analysis of relevant European Union (EU) legislation and policies in relation to irregular migrants. Organised with support from the Open Society Initiative for Europe, the C-MISE Initiative is a working group of European cities aiming to share learning, over a period of two years, on policies and practices of municipalities in Europe in relation to the social needs of migrants with irregular immigration status in their area. The Global Exchange on Migration and Diversity – the learning-exchange arm of the Centre on Migration, Policy and Society (COMPAS) at the University of Oxford – is supporting the working group in its goals of building a strong body of evidence on municipal initiatives in this field, and in developing a shared, city perspective on ways in which irregular migrants could be mainstreamed into EU policy agendas. In view of the latter objective, this paper in particular aims to support participating cities in spelling out the areas of EU law and policy that might prove problematic or instead offer opportunities in relation to their intentions to adopt initiatives responding in an inclusive manner to the social challenges brought by irregular migrants. It ultimately aims to support C-MISE member cities in formulating their position vis-à-vis relevant EU policy and legislation in the immigration *acquis*, the EU regulatory framework in the area of funding, and EU policies in the social domain, in order to develop a conversation with EU institutions on how to mainstream irregular migrants into EU policy agendas, and ensure that cities’ interests in relation to the inclusion of irregular migrants are heard at EU level.

This paper shall be read in conjunction with (and complements the content of) other research outputs produced for the C-MISE initiative, including the background report ‘*European Cities and Migrants with Irregular Status: Municipal initiatives for the inclusion of irregular migrants in the provision of services*’<sup>1</sup> which outlined the cities’ reasons to implement inclusive practices and described initiatives identified in Europe to include irregular migrants in the provision of services; and the upcoming C-MISE guidance for municipal authorities on the provision of services for irregular migrants in their communities.

## Introduction

Managing migration and responding to the presence of migrants is typically a matter of national policy, but it is one that requires the involvement of authorities at *all* levels of governance. In Europe, the *supranational level of the European Union* (EU) has been playing a central role since the end of the 1990s when EU Member States devolved a level of competency over immigration policies to the Union. In about 20 years, the EU has produced a rich body of law and policy in the area of immigration and asylum with the aim of developing a EU common immigration policy. Today, this legal and policy framework shapes some of the choices of policy makers at national level, but also has direct impacts on sub-state actors that respond daily to the presence of migrants at local level. *The sub-state level of regions and municipalities* does not normally have formal competences on immigration policies *stricto sensu*, meaning that they cannot participate in the decisions concerning who can migrate and reside regularly in the EU (‘policies on immigration’).

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<sup>1</sup> Delvino N. (2017a), *European Cities and Migrants with Irregular Status: Municipal initiatives for the inclusion of irregular migrants in the provision of services*, Oxford: COMPAS, available at: [www.compas.ox.ac.uk/2017/european-cities-and-migrants-with-irregular-status](http://www.compas.ox.ac.uk/2017/european-cities-and-migrants-with-irregular-status)

However, local authorities often have a role in implementing national and EU measures on immigration, particularly in relation to the integration of legally-residing non-EU migrants and refugees. Additionally, managing immigration *sensu lato* (in a broader sense) involves different policy dimensions, including policies and measures responding to the social challenges and human rights' needs of migrants living in Europe ('policies on migrants'). In their proximity to the local population and with their duties in the socio-economic area, European cities cannot overlook (and need to respond to) the social challenges brought by migrants' presence in their territories, including *beyond* (and sometimes in apparent contradiction to) what they are normally required to do by EU and national immigration policies. The multilevel nature of migration governance and the different dimensions of policies on migrants, indeed, engender spaces of contradiction and clash between law, policy and practice at different levels of governance. This paper is one attempt to find spaces for conciliation and partnership between the EU supranational and the municipal sub-state levels of migration governance in relation to policies on irregular migrants.

It is with regard to *migrants with irregular immigration status*, indeed, that contradictions are most evident. The presence of irregular migrants in Europe brings along social challenges (for both the local population and the migrants themselves) that cities need to face. This often requires municipalities to adopt measures that are to an extent inclusive of irregular migrants, in contrast with EU and national policy trends often fostering an exclusionary approach vis-à-vis this category of migrants. As previous research has shown, there are several reasons for European municipalities to be inclusive of irregular migrants,<sup>2</sup> but the framework offered by EU and national immigration law and policy may curtail their margins of manoeuvre. By aiming at combating irregular migration, EU policies tend to neglect the need to include irregular migrants that instead drive the initiatives of 'inclusive cities'.

As we shall see, in fact, instances of openness towards irregular migrants can be found in EU laws and policies on immigration and in EU official documents in the social policy domain recognising the need to uphold fundamental rights, and at times acknowledging the need to tackle the social problems faced by this specific group of migrants or the social impacts which their exclusion can have. Similarly, despite recent instances of increasing exclusion (and a political rhetoric emphasizing the need to marginalise irregular migrants to favour their voluntary departure) previous research has shown that national legislations also increasingly recognise the need to include irregular migrants in the provision of fundamental services.<sup>3</sup> These instances in EU law and policy, however, are exceptional and limited in scope, and previous findings on the practices of local authorities suggest that municipalities have an interest in providing services to irregular migrants beyond what is provided by EU and national policy.<sup>4</sup>

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<sup>2</sup> Spencer S. (2013), *City Responses to Migrants with Irregular Status*, in Integrating Cities Conference, Tampere (Finland) 9 - 10 September 2013, available at: [www.compas.ox.ac.uk/media/PB-2013-034-City\\_Responses\\_Irregular\\_Migrants-1.pdf](http://www.compas.ox.ac.uk/media/PB-2013-034-City_Responses_Irregular_Migrants-1.pdf); Delvino N. (2017a), *op. cit*

<sup>3</sup> Spencer S. & Hughes V. (2015a), *Outside and in: Legal Entitlements to Health Care and Education for Migrants with Irregular Status in Europe*, Oxford: COMPAS, available at: [www.compas.ox.ac.uk/media/PR-2015-Outside\\_In\\_Mapping.pdf](http://www.compas.ox.ac.uk/media/PR-2015-Outside_In_Mapping.pdf); the findings of the project are also summarised in Spencer S. & Hughes V. (2015b), *Fundamental Rights for Irregular Migrants: Legal Entitlements to Healthcare and School Education Across the EU28*, in *European Human Rights Law Review*, Issue 6, 604-616.

<sup>4</sup> Delvino N. (2017b), *The challenge of responding to irregular immigration: European, national and local policies addressing the arrival and stay of irregular migrants in the European Union*, Oxford: COMPAS, available at: <https://www.compas.ox.ac.uk/wp-content/uploads/AA17-Delvino-report-FINAL-1.pdf>

EU policies are based on the general assumption that irregular migrants should not be present in European cities and shall be instead returned to their countries of origin or regularised, but tend to overlook that irregular migrants' presence stays a reality in the EU. Because of this, lower tiers of governance may perceive the neglect at higher levels of governance itself as the cause of the social challenges related to irregular migrants' presence. In addition, EU rules can be perceived as hindering local authorities' possibility to respond (or obtain funding to respond) to those challenges with the inclusive practices they deem necessary.

In this paper, different policy domains will be analysed to identify opportunities and limitations in EU law and policy in relation to the possibility of including irregular migrants in the provision of some services. After an initial analysis of the general EU legal and policy framework on immigration and on the challenges faced by European municipalities in relation to irregular migrants, this paper looks in detail at existing EU legislation in the Justice and Home Affairs policy area. Subsequently, it looks at the EU regulatory framework on funding opportunities, and finally at EU policies in the social domain. Based on the arguable assumption that a wider inclusion of these migrants in the official channels of service provision would lessen the burden on European municipalities, for each analysed policy area this paper discusses possible propositions to EU policy makers to support cities in responding to the presence of irregular migrants.

## Setting the scene: irregular migrants, the EU and European cities

### Migrants with irregular status and the EU: what is the EU legal and policy framework responding to irregular migration?

The EU has had legislative competences on immigration since 1999 when the Treaty of Amsterdam entered into force.<sup>5</sup> In primary EU law, Articles 79 and 80 of the Treaty on the Functioning of the EU (TFEU) represent the EU's *legal basis* on immigration, establishing that policies and legislation on migration (both regular and irregular)<sup>6</sup> and integration<sup>7</sup> are a 'shared competence' of the Union and its Member States. Art. 79 TFEU states that the EU "*shall develop a common immigration policy aimed at [...] the fair treatment of third-country nationals residing legally in Member States, and the prevention of, and enhanced measures to combat, illegal immigration.*" The EU's legal basis itself therefore imposes a policy approach focused on preventing and combatting irregular migrants' stay, rather than allowing for their inclusion. Accordingly, the EU has been developing a body of legislation and a common immigration policy structured on an intentional disjunction between policies of inclusion for regular migrants and policies of exclusion for those with irregular immigration status.<sup>8</sup> However, regular and irregular status are not 'waterproof' categories, migrants may live a wealth of conditions of semi-legality. Thus, legality or irregularity should not be

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<sup>5</sup> Already in 1993 the Treaty of Maastricht had introduced cooperation in the fields of Justice and Home Affairs (JHA) within the then-known "third pillar" of the EU, without, however, providing the institutions of the EU with legislative competences, and rather limiting policy making in the JHA area to intergovernmental coordination. It is only with the Treaty of Amsterdam that asylum and immigration affairs became a 'shared competence' of the EU and its Member States.

<sup>6</sup> Article 79, para. 1, 2 and 3.

<sup>7</sup> Article 79, para. 4.

<sup>8</sup> Gilardoni G., D'Odorico M. and Carrillo D. (eds.) (2015), *KING - Knowledge for INtegration Governance - Evidence on migrants' integration in Europe*, Milan: Fondazione ISMU, available at: [http://king.ismu.org/wp-content/uploads/KING\\_Report.pdf](http://king.ismu.org/wp-content/uploads/KING_Report.pdf)

considered two opposites, but two extremes on a continuum of several different situations in-between.<sup>9</sup> A stark distinction in law and policy between regular and irregular migrants can therefore mismatch with the social reality of migration, and omit regulating the inclusion of people in a condition of semi-legality, or whose irregularity is not a temporary, but a chronic condition that requires inclusive measures.

The legal framework of secondary EU law on *irregular immigration* set up by the EU focused on the prevention and enforcement side of immigration policies, and is based on the core principle that Member States cannot tolerate the presence of a migrant with irregular status, and should instead act for their swift removal. This framework is formed of several pieces of legislation, including:

- The Return Directive<sup>10</sup> (adopted in 2008), which introduced the cardinal principle of EU legislation on irregular migration, *i.e.* that Member States are obliged to (“*shall*”) issue a return decision to any third-country national staying illegally on their territory (Art. 6), unless they are willing to offer the individual a residence permit for humanitarian, compassionate, or other reasons. The directive lays down the common standards and procedures to be applied in Member States for returning irregular migrants, including on the use of coercion, detention, re-entry bans and on the guarantees and rights of migrants involved in a removal procedure.
- The Facilitation Directive<sup>11</sup> (2002), which provided a common definition of the crime of facilitating unauthorised entry, transit and residence. The directive was accompanied by a Framework Decision (2002/946/JHA) that required Member States to adopt criminal sanctions for such crime. In order to combat the facilitation of irregular migration, in 2004 the EU also adopted Directive 2004/81/EC allowing for the issuance of residence permits to third-country nationals who are victims of trafficking in human beings or who have been the “subject of an action to facilitate illegal immigration”, and cooperate with the competent authorities.
- The Employers’ Sanctions Directive<sup>12</sup> (2009) prohibited the employment of migrants with irregular immigration status in the EU and imposed sanctions for employers who do so.
- The Carrier Sanctions Directive (2001/51/EC) required carrier personnel to control third country nationals’ documentation at points of embarkation, and deny boarding to irregular migrants.

It is amply noted that EU policies have developed a control-oriented approach primarily aimed at enforcing the removal of irregular migrants found on EU territory; reinforcing the surveillance of the EU’s external borders to avoid irregular border crossings; and imposing administrative and criminal sanctions for third parties, who – either as facilitators, employers, or carriers – have in some form facilitated the entry or stay of an irregular migrant. The EU has developed this approach in line with national authorities’ rights to decide who can enter and reside in their territory, and to remove those who are unauthorised to stay. The policy focus on control can be better understood in the context of an increasing concern over EU countries’ prerogatives in regulating entry and enforcing removals, as EU borders have been witnessing an increase in irregular migration flows

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<sup>9</sup> Triandafyllidou A. & Bartolini L. (2017), *Irregular Migrants and Rejected Asylum Seekers: Conceptual and Policy Challenges for Europe*, Oxford: COMPAS, available at: [www.compas.ox.ac.uk/wp-content/uploads/AA17-Triandafyllidou-Bartolini-report-FINAL.pdf](http://www.compas.ox.ac.uk/wp-content/uploads/AA17-Triandafyllidou-Bartolini-report-FINAL.pdf)

<sup>10</sup> Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals.

<sup>11</sup> Council Directive 2002/90/EC

<sup>12</sup> Directive 2009/52/EC of the European Parliament and of the Council of 18 June 2009 providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals.



and secondary movements, while the successful removal rate of EU Member states stayed well below satisfying levels.<sup>13</sup>

On the other side – with the exception of the Return Directive which sets out a number of safeguards for migrants pending their removal process – EU *immigration* policies and legislation have not been accompanied by measures addressing the other policy dimension of irregular migration: that is, the one that deals with their treatment in the EU as holders of fundamental rights<sup>14</sup> and as persons in a condition of vulnerability that requires measures of protection and inclusion. It is those areas of policy that are of greatest concern to municipalities. They fall within the purview of EU policy objectives in the *social* domain, including the need to combat exclusion and poverty (see below). All of the Union’s multiannual policy programmes, starting with the *Tampere European Council Conclusions*<sup>15</sup> (1999) until the most recent Council’s ‘*Strategic guidelines for legislative and operational planning within the Area of Freedom, Security and Justice*’ for the period 2014-2020<sup>16</sup> persistently reasserted that the EU should ensure the integration of lawfully resident third country nationals *only*, while irregular migration is dealt with only in view of combating and stopping it. No mention of irregular migrants is made under the chapters dedicated to the protection of migrants’ rights.<sup>17</sup> Besides the aforementioned safeguards for people pending removal, other provisions protecting irregular migrants’ rights are scarce in any area of EU law, but can be found in relation to victims of severe labour exploitation, trafficking, and victims of crime more generally. However, concerns are expressed in relation to their implementation (see more below). Policy and academic literature has repeatedly criticised EU policies for missing the fundamental rights component (and a strategy towards its delivery) that should accompany policies of prevention and enforcement.<sup>18</sup>

It should be noted, however, that following the entry into force of the Lisbon Treaty in 2009, the *Charter of Fundamental Rights of the European Union* assumed the same legal value as the founding Treaties, and thus constitutes primary EU law; and that the majority of the rights and principles enshrined in the Charter are accorded to *everyone* irrespective of nationality or migration status. The Charter, however, only applies to the EU institutions, and to EU Member States only insofar they implement EU law (Art. 51); certain Charter provisions are restricted to citizens or lawful residents; and certain rights (e.g. on social security or on healthcare) only apply ‘*in accordance with the rules laid down by Union law and national laws and practices*’ which in practice could curtail irregular migrants’ chances to enjoy certain rights. Yet, the Charter has the same legal value as the aforementioned legal basis of the EU’s immigration competencies, and therefore

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<sup>13</sup> Delvino N. (2017b), *op. cit.*

<sup>14</sup> Merlino M. & Parkin J. (2011a), *Irregular Migration in Europe: EU policies and the Fundamental Rights Gap*, Brussels: Centre for European Policy Studies (CEPS).

<sup>15</sup> European Council (1999), *Presidency Conclusions of the Tampere European Council of 15-16 October 1999*.

<sup>16</sup> Council of the European Union (2014), *26/27 June 2014 - Conclusions*, EUCO 79/14, available at <http://register.consilium.europa.eu/doc/srv?l=EN&f=ST%2079%202014%20INIT#page=2>

<sup>17</sup> Delvino N. (2017b), *op. cit.*

<sup>18</sup> Merlino M. & Parkin J. (2011a), *op. cit.*; Carrera S. & Merlino M. (2010), *Assessing EU Policy on Irregular Immigration under the Stockholm Programme*, in *CEPS Papers on Liberty and Security in Europe*, Brussels: Centre for European Policy Studies (CEPS); R. Cholewinski (2004), *European Union Policy on Irregular Migration*, in Bogusz B., Cholewinski R., Cygan A. and Szyszczak E. (eds.), *Irregular Migration and Human Rights: Theoretical, European and International Perspectives*, Leiden: Martinus Nijhoff Publishers, p.182; Guild E., Carrera S. & Faure Atger A. (2009), *Challenges and Prospects for the EU’s Area of Freedom, Security and Justice: Recommendations to the European Commission for the Stockholm Programme*, CEPS Working Document No. 313 – April.



measures aimed at protecting the rights of irregular migrants should find their space in EU legislation and policy next to measures aimed at combating and preventing irregular migration.

### **Migrants with irregular status in European cities: what are the issues at stake for municipalities?**

While the EU shares significant prerogatives with the national level in establishing immigration policies *stricto sensu*, sub-state authorities in most cases have no power to influence the decisions concerning who can migrate and reside regularly in their territory. Local authorities, in general, have no (or very limited)<sup>19</sup> legal or political competency over the status of third country nationals living in European cities and cannot rule on the legal entitlements of those who do not comply with EU and national immigration rules. The legal and policy framework on how to address the presence of irregular migrants are therefore set for European cities, even though the strongest social impacts of such presence are most strongly felt at local level. Migration is a markedly urban phenomenon<sup>20</sup> and irregular migrants are a reality that European cities, in their proximity to the population, cannot ignore. It is estimated that they represent between 3% and 6% of the population in cities like Ghent, Genoa and Rotterdam,<sup>21</sup> reaching numbers as high as 440,000 people in London.<sup>22</sup>

As seen above, EU immigration policies focus on enforcing the removal of irregular migrants and deny access to the labour market for these migrants. National policies regulate irregular migrants' entitlements to a larger extent than EU legislation, but they tend to adopt a similarly restrictive approach. They normally limit irregular migrants' access to services to basic health care treatment and compulsory education for minors (although recent national reforms indicate a direction of travel of some national governments towards the expansion of certain services to irregular migrants).<sup>23</sup> The exclusionary approach adopted by EU and national policies restricting irregular migrants' access to both employment and social services leaves them in a situation of marginalisation with few rights and resources to sustain themselves which is intended to encourage their (voluntary) return. This approach is based on the assumption that all irregular migrants are in an exceptional and temporary condition preceding their return. They tend to apply, however, to people whose irregularity is often a long-enduring and in some cases chronic condition which cannot be solved through removal (see below). The marginalisation of a relatively stable section of the population has negative social consequences for both the migrants and the wider local population (e.g. in terms of public order, public health or social cohesion) which are particularly difficult to manage for European municipalities.

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<sup>19</sup> In some cases, local authorities might be assigned formal prerogatives with regard to migrants' regularisation, as in Spain, where national law provides municipalities with the possibility of proving a migrant's 'social rooting' (*arraigo social*) in Spanish society, which allows – after three years of residence and in view of a positive 'social rooting report' – irregular migrants to obtain a regular status. See Delvino N. (2017a), *op. cit.*

<sup>20</sup> Globally, nearly half of the total population of international migrants resides in ten highly urbanized countries, of which five are in Europe. See UNESCO (2016), *Cities Welcoming Refugees and Migrants: Enhancing effective urban governance in an age of migration*, Paris: United Nations Educational, Scientific and Cultural Organization (UNESCO), available at: <http://unesdoc.unesco.org/images/0024/002465/246558e.pdf>

<sup>21</sup> Dirk Gebhardt (2010), *Irregular migration and the role of local and regional authorities*, in Carrera S. & Merlino M. (eds.), *Assessing EU Policy on Irregular Immigration under the Stockholm Programme*, Brussels: Centre for European Policy Studies (CEPS).

<sup>22</sup> GLA Economics (2009), *Economic impact on the London and UK economy of an earned regularisation of irregular migrants to the UK*, London: Greater London Authority, available at:

[https://www.london.gov.uk/sites/default/files/gla\\_migrate\\_files\\_destination/irregular-migrants-report.pdf](https://www.london.gov.uk/sites/default/files/gla_migrate_files_destination/irregular-migrants-report.pdf)

<sup>23</sup> Spencer S. & Hughes V. (2015a), *op. cit.*

Although lacking decision powers on the status and rights of migrants, municipalities have a range of prerogatives and duties in the socio-economic area related to the provision and management of services at local level, including education, social assistance, health, housing, police, caring services, and public transport.<sup>24</sup> To different extents in different EU countries,<sup>25</sup> these competences allow local authorities some margin of manoeuvre in addressing the social challenges deriving from the marginalisation of their irregular residents. This often means adopting municipal measures that, by facilitating the inclusion of irregular migrants in the provision of a service, aim to mitigate to an extent the marginalising aspects of EU and national immigration rules. One reason for local authorities to be more inclusive than the national and EU level is of a legal nature. Local authorities indeed have legal duties of care towards the most vulnerable individuals in need in their communities, and these may include marginalised irregular migrants.<sup>26</sup> Although such duties are normally established (explicitly or implicitly) by national legislation, by being inclusive of people with irregular or semi-regular immigration status, European municipalities risk to be seen as acting against the letter or spirit of EU and national rules on immigration.<sup>27</sup>

For European municipalities, all this implies many challenges on how to respond to the presence and the social needs of migrants with irregular status in their territory:

- One first challenge is a *legal dilemma*. Cities have to struggle between the need to respect EU and national immigration rules on the one hand (which may *e.g.* require local providers to refuse services to irregular migrants, or to report their clients with irregular status to law enforcement authorities) and, on the other, to respect constitutional and international obligations on irregular migrants' entitlements, and domestic legal responsibilities in the socio-economic sphere<sup>28</sup> (which instead may require inclusive actions beyond what is explicitly allowed by immigration law).<sup>29</sup> It is imaginable that if the EU dealt with the enforcement side of immigration policies and the human rights of irregular migrants in a more balanced way (rather than providing an extensive legal framework only for the first), local authorities could find themselves with more legal clarity on how to ensure the fundamental entitlements of irregular (or semi-regular) migrants, while respecting immigration legislation.

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<sup>24</sup> European Commission (2015), *Self-rule Index for Local Authorities (Release 1.0)*, available at:

[http://ec.europa.eu/regional\\_policy/en/information/publications/studies/2015/self-rule-index-for-local-authorities-release-1-0](http://ec.europa.eu/regional_policy/en/information/publications/studies/2015/self-rule-index-for-local-authorities-release-1-0)

<sup>25</sup> Cities enjoy differing levels of autonomy in countries across Europe (categorised in the European Commission's 'self-rule index', see *ibidem*), and therefore their room for manoeuvre in taking approaches that diverge from national positions differs in different countries. Even within the same country, cities can enjoy different degrees of autonomy: the *Stadtstaaten* (City-States) of Berlin, Hamburg, Bremen and Bremerhaven and Vienna, for instance, are at the same time municipal entities and federal states, and as such have significantly more powers than other European cities.

<sup>26</sup> Spencer S. (2013), *op. cit.*

<sup>27</sup> Delvino N. (2017a), *op. cit.*

<sup>28</sup> Carrera S. and Parkin J. (2011), *Protecting and Delivering Fundamental Rights of Irregular Migrants at Local and Regional Levels in the European Union*, Brussels: Committee of the Regions, available at:

<http://cor.europa.eu/en/documentation/studies/Documents/protecting-fundamental-rights-irregular-migrants.pdf>

<sup>29</sup> In some national contexts, contradictions are particularly evident where, for instance, national legislation explicitly requires local authorities to provide a service to all clients, irrespective of migration status, but excludes that municipalities can be recompensed for services provided to irregular migrants. See Price J. & Spencer S. (2015), *Safeguarding children from destitution: local authority responses to families with 'no recourse to public funds'*, Oxford: COMPAS.

- Beyond a *risk that local authorities breach international and European human rights law, ethical imperatives* are strongly involved when implementing exclusionary rules in a strict manner. Medical ethics are an argument often used by authorities to motivate their initiatives in the field of health care, and the humanitarian argument is also widely used to justify cities' initiatives to ensure migrants' access to education, justice and protection against violence.<sup>30</sup> Inclusive initiatives are sometimes implemented in the framework of municipal strategies aimed at ensuring the respect of human rights in the city.<sup>31</sup>
- A number of other negative consequences of exclusionary EU and national policies on European cities and their communities take the form of *social problems* deriving from the marginalisation of a section of the population, to which European cities need to respond in a pragmatic (and often inclusive) way.
  - Irregular migrants' marginalisation can *e.g.* instil concerns on *public health*,<sup>32</sup> if irregular migrants refrain from reaching out to medical staff for deportation fears.
  - Municipalities can be concerned for the impacts on *public order and safety*.<sup>33</sup> Their condition of marginalisation creates situations of destitution that facilitate the growth of *homelessness, street-sleeping and irregular squatting* that 'inclusive cities' aim to address by facilitating migrants' access to shelters or other accommodation, and by supporting voluntary returns and regularisations. Migrants' marginalisation also provokes risks in terms of an *increase in crime*: with no right to work for long periods of time and left in a condition of enduring destitution, non-returnable migrants may end up committing criminal offences.<sup>34</sup> Moreover, their condition of marginalisation exposes irregular migrants to several forms of criminal exploitation, as sexual or other labour exploitation in informal economies. EU and national legislation in most cases does not provide specific mechanisms for irregular migrants who are victims or witnesses of crime to safely report it to the police without being scared off by risks of detection and expulsion. Cities therefore may undertake autonomous initiatives aimed at reassuring undocumented victims and witnesses from the risk of removal when they report a crime, and thus combat crime-underreporting at local level.<sup>35</sup>
- Having to exclude a specific category of clients from the provisions of services can also create *efficiency problems in the the management of service provision*<sup>36</sup> and *problems in terms of cost effectiveness, or data accuracy*.<sup>37</sup> For instance, excluding irregular migrants from accessing certain non-emergency health care services can provoke a situation of congestion in local

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<sup>30</sup> Delvino N. (2017a), *op. cit.*

<sup>31</sup> The City Council of Utrecht, for instance, has made a public commitment to making Utrecht a 'Human Rights City', and it is within this framework that local initiatives in support of rejected asylum seekers have been adopted; see Municipality of Utrecht (2011), *Human Rights in Utrecht: how does Utrecht give effect to international Human Rights Treaties?* [online] available at: [www.utrecht.nl/fileadmin/uploads/documenten/bestuur-en-organisatie/internationale-zaken/2015-10-Human-Rights-Utrecht.pdf](http://www.utrecht.nl/fileadmin/uploads/documenten/bestuur-en-organisatie/internationale-zaken/2015-10-Human-Rights-Utrecht.pdf)

<sup>32</sup> Spencer S. (2013), *op. cit.*

<sup>33</sup> *Ibidem.*

<sup>34</sup> Vanderbruggen M., Phelps J., Kovats A. & Pollet K. (2014), *Point of no return: the futile detention of unreturnable migrants*, available at: [www.ecre.org/wp-content/uploads/2014/01/pointofnoreturn.eu\\_wp-content/uploads/2014/01/Point\\_of\\_no\\_return.pdf](http://www.ecre.org/wp-content/uploads/2014/01/pointofnoreturn.eu_wp-content/uploads/2014/01/Point_of_no_return.pdf)

<sup>35</sup> Delvino N. (2017a), *op. cit.*

<sup>36</sup> Spencer S. (2013), *op. cit.*

<sup>37</sup> Delvino N. (2017a), *op. cit.*

hospitals that have to hospitalise irregular patients needing medical attention, instead of referring them to appropriate and less costly treatments.<sup>38</sup>

In the following sections, this paper will identify specific aspects of EU policies and law that are particularly relevant for the aforementioned challenges faced by European municipalities in relation to irregular migrants. It aims to identify aspects of EU law and policy that offer opportunities or legal obstacles for local authorities aiming to lessen the marginalisation of irregular migrants with a view to reducing the negative impacts of such marginalisation on local communities.

## EU legislation in the Justice & Home Affairs domain

### Return policies and non-returned migrants

The main piece of legislation regulating the condition of migrants with irregular status at EU level is the Return Directive,<sup>39</sup> which lays down the common standards and procedures to be applied in Member States for returning irregular migrants, including providing certain rights and guarantees for them (but only insofar they are involved in a removal procedure). The removal of irregular migrants is the backbone of EU policies on migration and asylum. EU law indeed does not allow Member States (and associated countries)<sup>40</sup> to simply ‘tolerate’ the presence of irregular migrants on their territories: they must act to either remove the migrants or offer them a regular status.<sup>41</sup> The leading principle of the Directive is its Article 6(1)’s obligation on Member States to issue a return decision to *any* third-country nationals staying irregularly on their territory. Art. 6(4), however, leaves the door open for Member States to instead regularise these migrants, at the States’ discretion, by granting them a residence permit or other authorisation ‘for compassionate, humanitarian or other reasons’. The Directive subsequently provides a rich body of rules regulating the procedures and standards for removals, including on the use of coercion, detention, re-entry bans and on the rights of migrants involved in a removal procedure. On the other side, though, the directive abstains from providing any further standards or guidance on the condition of migrants who are not returned.

The setup of the Directive is based on the assumption that – thanks to swift and effective detection and removal procedures – irregular migrants shall not be present on EU territory, a situation that in theory would prevent the emergence of the social problems denounced by European cities and related to irregular migrants’ presence. The reality, however, is different and return procedures are far less effective than desirable. The European Commission recently communicated that the rate of effective returns to third countries was as low as 36.6% in 2014, and further dropped to 36.4% in 2015. Moreover, if return to the Western Balkans is disregarded, the EU’s return rate drops further

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<sup>38</sup> *Ibidem*

<sup>39</sup> Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals.

<sup>40</sup> The UK and Ireland are not bound by the Return Directive, while Denmark decided to implement it in its national law, and Switzerland, Norway, Iceland and Liechtenstein are bound by it on the basis of their association agreements.

<sup>41</sup> The Court of Justice of the European Union (CJEU) in 2015 clarified that, in force of the Return Directive, measures other than enforcing a removal or allowing the regularisation of irregular migrants (*e.g.* imposing a fine) are not allowed by EU law; see CJEU, C-38/14 *Zaizoune*, ECLI:EU:C:2015:260.

to 27%.<sup>42</sup> At the same time, the number of people ordered to leave in 2015 increased and amounted to 533,395, compared to 470,080 in 2014, data that could suggest that the enforcement based approach taken by EU policies has also not proven effective from a 'prevention' or 'deterrence' perspective.<sup>43</sup> There are several reasons explaining Member States' low return rates, and they include legal/humanitarian and practical/administrative barriers to the implementation of removals, as well as obstacles due to Member States' policy choices.<sup>44</sup>

#### OBSTACLES TO RETURNING IRREGULAR MIGRANTS

Removals can be hindered by migrants' resistances to return (e.g. in the form of physical resistance, self-injury including hunger striking, absconding and the presentation of multiple asylum applications to prevent removal), but oftentimes challenges to return are not caused by migrants' behaviours and return is an unviable option because of lack of cooperation from the authorities of the countries of return; shortcomings of the returning state (such as administrative and organisational challenges, the state's inability to cover expenses for the implementation of the return or to establish contact with the authorities of the country of origin); difficulties in the acquisition of travel and identity documents; medical obstacles rendering travel difficult or impossible; and so forth. Legal and humanitarian challenges include the fragile security situation in countries of origin; human rights law considerations in relation to migrants' family unity; the risk of detention in the country of return and a related general risk of breaching the principle of *non-refoulement* (particularly for rejected asylum seekers). See European Migration Network (2016), *The Return of Rejected Asylum Seekers: Challenges and Good Practices*.

With return rates dropping and the number of detected irregular migrants on the rise in Europe, there is a growing population of '*non-removable migrants*': that is, those whose presence in the territory is known to the immigration authorities, but who, for a variety of reasons [...] are not removed).<sup>45</sup> Challenges to return often persist for the long term, meaning that non-returned migrants might be left in an enduring legal limbo. As we shall see below, EU law does not establish an alternative to return for these people and most of them remain in an irregular situation – even when they are 'unreturnable' irrespective of their behaviour – with no real prospects of regularisation or of returning to their country of origin. They often have no opportunity to sustain themselves: without the right to work, they are often at risk of destitution and homelessness, and they have no or limited access to social welfare.<sup>46</sup> This creates a particularly concerning situation for local authorities who aim to address problems related to homelessness and destitution and to ensure the respect of human dignity in their cities, but have limited possibility to offer a service and interact with migrants in an irregular condition. The issue today assumes an increasingly alarming dimension considering that the European Commission estimates that the EU will soon have to return more than 1 million rejected asylum seekers,<sup>47</sup> that legal obstacles to return often concern rejected asylum applicants, and that prospected reforms of the common European asylum system

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<sup>42</sup> European Commission (2017), *Communication from the Commission to the European Parliament and the Council on a more effective return policy in the European Union - A renewed action plan*, COM(2017) 200 final, available at <http://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:52017DC0200>

<sup>43</sup> *Ibidem*.

<sup>44</sup> See FRA (2017), *Fundamental rights of migrants in an irregular situation who are not removed*, FRA note [online], available at: <http://fra.europa.eu/en/Non-removed-migrants-rights>; Weatherhead K. T. (2016), *Removing non-removables*, in *Forced Migration Review Online*, [online], available at: [www.fmreview.org/sites/fmr/files/FMRdownloads/en/destination-europe/weatherhead.pdf](http://www.fmreview.org/sites/fmr/files/FMRdownloads/en/destination-europe/weatherhead.pdf)

<sup>45</sup> FRA (2011), *op. cit.*

<sup>46</sup> Vanderbruggen M., Phelps J., Kovats A. & Pollet K. (2014), *op. cit.*

<sup>47</sup> European Commission (2017), *Communication from the Commission to the European Parliament and the Council on a more effective return policy in the European Union - A renewed action plan*, COM(2017) 200 final, available at <http://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:52017DC0200>

might even increase the number of rejected applications.<sup>48</sup>

The Return Directive does not provide clear guidance on how to respond to conditions of non-removability and related legal limbo. Its Recital 12 explicitly states that the “*situation of third-country nationals who are staying illegally but who cannot yet be removed should be addressed*”, yet the Directive deals with their condition only marginally and suggests instead that ‘*their basic conditions of subsistence should be defined according to national legislation*’. Article 9 only provides for the possibility (or in certain cases the obligation)<sup>49</sup> for Member States to postpone the return in certain situations when the return proves impossible to implement. The Directive, though, does not provide on the status of people whose return is postponed nor on their possibility to regularise or to otherwise put an end to situations of protracted legal limbo deriving from enduring non-removability. Article 14 instead provides a minimum set of guarantees for people pending a removal procedure (including the right to family unity, emergency and essential health treatment, and basic education for minors) and provides that the special needs of vulnerable people are ‘taken into account’. Yet, as denounced by the Fundamental Rights Agency of the EU (FRA), these safeguards do not reflect all human rights to which migrants in an irregular situation are entitled to, and *e.g.* do not mention important rights such as the right to access justice or to be registered at birth. The issue of how to deal with non-returnable people was considered during the negotiations for the Return Directive,<sup>50</sup> but it was considered too ‘politically sensitive’ and was therefore deferred to the national level.<sup>51</sup>

As a result of the lack of a clear legal framework on the issue, a study commissioned by the European Commission on the situation of third-country nationals pending removal found that 31 very divergent approaches have been adopted at national level by the different EU Member States and Schengen Associated Countries vis-à-vis the rights granted to non-returned migrants, their chances of obtaining a regular status and to receive accommodation pending removal.<sup>52</sup> The study reported in 2013 that in 12 countries<sup>53</sup> *certain* non-returnable migrants could be granted an official postponement, usually under the form of a “tolerated stay” or “*Duldung*”, which allows them a specific status with additional rights beyond the ones granted by the return order. These however do not equate with the same rights enjoyed by regular residents, and the right to work is not always provided, or is subject to restrictions.<sup>54</sup> In 21 countries,<sup>55</sup> no official postponement providing

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<sup>48</sup> FRA (2017), *op. cit.*

<sup>49</sup> When return would violate the principle of non-refoulement, or when the competent authority suspends the return as a consequence of the migrants’ appeal to the return decision (Art. 9, para. 1)

<sup>50</sup> A 2005 Commission proposal suggested that minimum standards for the conditions of stay of irregular migrants ‘who cannot (yet) be removed should be addressed’ by applying the same standards recognised to asylum seekers by the Reception Conditions Directive; see European Commission (2015), *Proposal for a Directive of the European Parliament and of the Council on common standards and procedures in Member States for returning illegally-staying third country nationals*, COM (2005) 391 final, Recital 8.

<sup>51</sup> Keytsman E. (2014), *Factsheet: unreturnable migrants in detention, in EU law and policy*, available at: [www.pointofnoreturn.eu/wp-content/uploads/2013/12/PONR\\_Factsheet\\_EU\\_2\\_HR.pdf](http://www.pointofnoreturn.eu/wp-content/uploads/2013/12/PONR_Factsheet_EU_2_HR.pdf)

<sup>52</sup> European Commission (2013), *Study on the situation of third-country nationals pending return/removal in the EU Member States and the Schengen Associated Countries*, available at: [https://ec.europa.eu/home-affairs/sites/homeaffairs/files/e-library/documents/policies/irregular-migration-return/return-readmission/docs/11032013\\_sudy\\_report\\_on\\_immigration\\_return-removal\\_en.pdf](https://ec.europa.eu/home-affairs/sites/homeaffairs/files/e-library/documents/policies/irregular-migration-return/return-readmission/docs/11032013_sudy_report_on_immigration_return-removal_en.pdf)

<sup>53</sup> AT, CH, CZ, DE, EL, LI, LU, NL, PL, RO, SI, and SK

<sup>54</sup> Seven countries (CH, EL, LU, NL, PL, RO and SK) offer access to the labour market to non-removed migrants with an official postponement, but do not offer the same rights to other categories of third-country nationals pending return. The access can be full or restricted, and it is usually granted under certain conditions. In other countries access to the labour market can be granted to some third country nationals pending return, but not as an additional right granted as

additional rights was provided by law, but four states allowed regularisation for migrants who proved non-returnable *for technical reasons* through the granting of temporary residence permits (similar to those granted for humanitarian concerns).<sup>56</sup> However, situations where neither official postponement or no distinct rights are granted were found in up to 23 countries.<sup>57</sup> In these cases, non-returnable third-country nationals linger in a situation of limbo without any rights other than those enjoyed by all migrants in an irregular situation, representing a significant challenge for authorities responsible for tackling destitution, homelessness and other social problems locally.

The social challenges for European cities stemming from the presence of migrants with irregular status are exacerbated in relation to non-returnable migrants, especially in those countries where their non-removability is not formally recognised, as their condition of marginalisation endures indefinitely. The project “A Face to the Story”<sup>58</sup> reported on the experiences of non-removable migrants who have no access to healthcare, housing, education and work, and end up in situations of destitution and dire physical and mental health. Non-removable migrants often end up sleeping rough in the streets of European cities, become very vulnerable victims of local criminal networks (labour and sexual exploitation, trafficking, etc.), live in chronic situations of destitution and homelessness. The personal accounts collected by the “A Face to the Story” project also showed how leaving non-removable migrants without the right to work often leads them to committing criminal offences, thus fuelling the risk of crime in European municipalities.<sup>59</sup>

### ***Which EU actions could improve the situation for local authorities?***

The logic of limiting access to rights and services in order to discourage irregular stay and encourage return cannot be applied to non-returnable migrants whose non-removability does not depend on their resistances to removal. Instead, their lack of access to a regular status, to the right to work, or the right to receive social services, often results in the creation of enduring social problems in European cities.

On one side, effective efforts to overcome the obstacles to removals (if ultimately help increase effective return rates within the respect of migrants’ rights, including the right to asylum, the principle of *non-refoulement*, or the right to family unity) would imply a reduction in the number of people in a condition of ‘non-returnability’, and thus in a condition of marginalisation. Local authorities have a strong interest in terminating conditions of irregularity in their communities, and several municipalities in Europe have undertaken initiatives to support the regularisation or indeed alternatively the voluntary return of irregular residents. These initiatives, through activities of

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a consequence to the official postponement. In Germany, for example, all third-country nationals who cooperate on the return can be granted access to employment after one year, irrespective of whether they have been granted “Duldung” status or not. See European Commission (2013), *op. cit.*

<sup>55</sup> BE, BG, CY, DK, EE, ES, FI, FR, HU, IE, IS, IT, LT, LV, MT, NO, PT, SE, and UK

<sup>56</sup> FI, SE, MT, IS

<sup>57</sup> AT, BE, BG, CH, CZ, DK, EE, EL, ES, FR, IE, IT, LT, LU, LV, NL, NO, PL, PT, RO, SI, SK, UK

<sup>58</sup> “A Face to the Story: The issue of unreturnable migrants in detention” was an awareness-raising project which involved qualitative research based on the stories of 39 unreturnable migrants with experiences of detention in Belgium, France, Hungary or the United Kingdom. The project was run from September 2012 to February 2014 by a collaboration between *Flemish Refugee Action* (Belgium), *Detention Action* (UK), *France terre d’asile* (France), *Menedék – Hungarian Association for Migrants*, and *The European Council on Refugees and Exiles* (ECRE). See Vanderbruggen M., Phelps J., Kovats A. & Pollet K. (2014), *op. cit.*

<sup>59</sup> Vanderbruggen M., Phelps J., Kovats A. & Pollet K. (2014), *op. cit.*



individualised legal counselling and monetary support, often proved highly successful.<sup>60</sup> Local authorities may thus welcome the actions taken or proposed by the European Commission to improve the return rate of EU Member States<sup>61</sup> and overcome obstacles to migrants' removal, as EU authorities may welcome the successes of local authorities in supporting migrants in their way out of irregularity through regularisation or return. EU and national institutions may learn from the experience of local authorities that have dealt with individualised counselling to people accepting support for voluntary return. In particular, building on their experience of dealing directly and individually with prospective returnees, local authorities may encourage EU and national measures fostering the 'sustainability of returns', *i.e.* measures that look at the individual situation of migrants with irregular status to assess whether indeed return is an adequate and sustainable solution to their condition of irregularity. A blind system that does not recognise that the individual circumstances of migrants (*e.g.* the presence of migrants' strong family and social ties in Europe) may lead them to re-enter irregularly upon removal is a system that risks lacking of sustainability and pragmatism.

On the other side, almost a decade after the entry into force of the Return Directive, practice has shown that reaching a 100% effective return rate is hardly likely. EU and national legislation shall take into account situations of non-removability more comprehensively, and provide for alternatives to removal for those people whose return is not a feasible or viable option. EU and national institutions should provide legal clarity on the situation of non-returned migrants, as local authorities in European countries struggle in understanding how to deal with non-returned migrants with long-standing social needs. A clear legal framework on the treatment and rights of non-removed migrants (regulating in particular their right to work and receive social assistance) would relieve a stable section of the migrant population from marginalisation and destitution, for the benefit of the migrants and local communities. As the Return Directive did not regulate the condition and rights of non-returnable migrants and delegated it to national legislation, local authorities should encourage the introduction of EU or national guidance on how to deal with the social needs of non-removable migrants.

In the lack of a perfectly functioning removal system, EU institutions together with local authorities should encourage the adoption of national regulations providing migrants who cannot be returned with a way out of marginalisation and destitution, allowing them the right to work and/or receive social services to avoid situations of destitution, homelessness and vulnerability. When removal is not possible on technical/administrative reasons or other grounds making removal unviable, the Return Directive only provides the *possibility* to issue permits or recognise an official status. Paths to regularisation through the granting of a residence permit, or otherwise official recognition of non-removability allowing the right to work and/or access social services reduce the risks of homelessness, crime, and destitution in European cities; ensure a better protection of non-returned migrants' human rights; and endow cities with the possibility to better interact with these migrants and prevent the creation of situations of marginalisation and irregularities. Local

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<sup>60</sup> Delvino N. (2017a), *op. cit.*

<sup>61</sup> See European Commission (2015), *Communication from the Commission to the European Parliament and to the Council - EU Action Plan on return*, COM(2015) 453 final, available at: [https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/proposal-implementation-package/docs/communication\\_from\\_the\\_ec\\_to\\_ep\\_and\\_council\\_-\\_eu\\_action\\_plan\\_on\\_return\\_en.pdf](https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/proposal-implementation-package/docs/communication_from_the_ec_to_ep_and_council_-_eu_action_plan_on_return_en.pdf); European Commission (2017), *Communication from the Commission to the European Parliament and the Council on a more effective return policy in the European Union - A renewed action plan*, COM(2017) 200 final, available at <http://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:52017DC0200>

authorities should thus work with EU institutions to make sure that the provisions of the Return Directive are complemented by EU guidance addressing the situation of legal limbo, and providing alternative pathways out of irregularity, such as regularisation, or an otherwise official status recognition that allows the right to work or to obtain welfare support. Similarly, local authorities together with EU institutions should promote national regulations allowing more possibilities for migrants with irregular or semi-regular statuses who may have grounds to obtain a residence permit (*e.g.* family grounds) to apply for a regular permit, and allowing for in-country switching of status in order to solve situations of often protracted irregularity.

### **EU measures protecting irregular migrants who are victim of crime: residence permits for victims of trafficking and labour exploitation and the ‘Victims Directive’**

Notwithstanding the overall control-oriented approach of EU policies and a general paucity of protective measures for migrants with irregular status in EU legislation, there are in EU law fragmented instances of protection for this category of migrants. Except for the aforementioned safeguards for migrants pending removal, the other protective measures provided by EU law to irregular migrants concern situations of migrants’ victimisation. In particular, these measures are included in three EU directives: Directive 2004/81/EC on the residence permit for victims of human trafficking;<sup>62</sup> the Employers Sanctions Directive;<sup>63</sup> and the ‘Victims Directive’.<sup>64</sup>

An irregular immigration status exposes an individual to a high risk of becoming victim of exploitation and crime, and at the same time entails specific barriers to access justice, as irregular migrants fear being arrested and deported when reaching out to authorities to seek protection and justice. For this reason, irregular migrants mistrust law enforcement authorities, which translates in high levels of underreporting of crime from migrant victims and witnesses and, as a consequence, in impunity of perpetrators and, *potentially*, could lead to an increase in crime in European cities. In this sense, the presence of irregular migrants brings about significant challenges for local authorities worried about the proliferation of crime in their territories – a circumstance that some municipalities in Europe and in the USA have well taken into account with the adoption of innovative initiatives that make sure undocumented migrants can report a crime to the local police without fearing immigration deportation.<sup>65</sup> In relation to the serious crimes of labour exploitation and trafficking, the Italian Region of Puglia – a territory known for experiencing exploitation of migrant workers in the agricultural sector – approved specific legal provisions to support victims of crime and labour exploitation, and actively intervened in criminal proceedings against migrant workers’ exploiters to uphold the Region’s institutional goals in relation to the respect of fundamental rights.<sup>66</sup> Cities like Utrecht or Gothenburg have *e.g.* implemented specific initiatives to ensure that undocumented women who are escaping violence can access emergency shelters. Concerned by the high levels of crime underreporting and limited access to intel from diaspora

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<sup>62</sup> Directive 2004/81/EC on the residence permit issued to third-country nationals who are victims of trafficking in human beings or who have been the subject of an action to facilitate illegal immigration, who cooperate with the competent authorities

<sup>63</sup> Directive 2009/52/EC providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals

<sup>64</sup> Directive 2012/29/EU establishing minimum standards on the rights, support and protection of victims of crime

<sup>65</sup> Delvino N. (2017a), *op. cit.*

<sup>66</sup> Delvino N. and Spencer S. (2014), *Irregular migrants in Italy: law and policy on entitlements to services*, Oxford: COMPAS, available at [www.compas.ox.ac.uk/2014/pr-2014-irregular\\_migrants\\_italy](http://www.compas.ox.ac.uk/2014/pr-2014-irregular_migrants_italy)

communities in Amsterdam, the local police developed practices specifically aimed at avoiding the disclosure of immigration status by individuals who reach out to the police in order to ensure the reporting of crime from irregular migrants.<sup>67</sup> In the USA, cities' concern over undocumented migrants' victimisation and their access to crime reporting have led to widespread municipal practices, including the issuance of municipal ID cards enabling identification to, *inter alia*, the local police without displaying information on their immigration status.<sup>68</sup> As US federal legislation allows certain victims of crime (who are helpful to law enforcement or government officials in the investigation or prosecution of criminal activities) to access special residence permits (the U and T visas), city administrations such as New York have invested in initiatives to assist migrant crime victims in obtaining such permits.<sup>69</sup>

To the extent that the protective measures in the mentioned EU directives support the fight against crime (and the protection of victims' fundamental rights) the implementation of these measures will be welcomed by European municipalities as valuable tools to reduce criminal activities (and ensure justice) in their territory. However, as we shall see in this section, there are serious issues concerning the scope of application and the effective implementation of these EU measures in several Member States.

### ***Residence permits for victims of labour exploitation and trafficking***

The EU directive 2004/81/EC and the Employers Sanctions Directive provide the possibility for Member States to issue special residence permits for undocumented victims of trafficking and severe labour exploitation respectively. The issuance of residence permits for victims with irregular status is a powerful tool to fight crime and ensure justice, as offering such residence permits means reassuring irregular victims from the risk of expulsion if reporting a crime,<sup>70</sup> enabling them to contribute to investigations and participate in criminal proceedings against their perpetrators. However, EU provisions have limitations and suffer problems in implementation.

In particular, with regard to *labour exploitation* the Employers Sanctions Directive criminalises some forms of illegal employment of irregular migrants (Art. 9) and provides Member States with the possibility to grant, on a case-by-case basis, permits of limited duration to third-country nationals involved in cases of exploitation. However, this possibility does not cover every case of labour exploitation and is limited to situations where the workers were minors, or subject to particularly exploitative working conditions resorting to a criminal offence (Art. 13). In addition, the permits are only valid for the duration of relevant proceedings, meaning that in many cases access to justice and redress for irregular victims remains only theoretical. Moreover, less than half of EU Member

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<sup>67</sup> Delvino N. (2017a), *op. cit.*

<sup>68</sup> *Ibidem.*

<sup>69</sup> Mostofi B. (2017), *The Right Balance: Smart Policing and Inclusive Immigration Policies in New York City*, [presentation] in Autumn Academy 2017: Strategic Approaches to Migrants with Irregular Status in Europe, held in Oxford 18-22 September 2017.

<sup>70</sup> In a study on labour exploitation conducted by FRA, 58 % of the interviewed respondents indicated that workers did not come forward to report exploitations because they feared having to leave the country where they were working, and 46% did not do so because they feared losing their job. FRA thus concluded that workers' irregular status was the cause preventing victims from having real and practical access to justice; see FRA (2015a), *Severe Labour Exploitation: Workers Moving Within or Into the European Union – States' Obligations and Victims' Rights*, Luxembourg: Publications Office of the European Union, available at: <http://fra.europa.eu/en/publication/2015/severe-labour-exploitation-workers-moving-within-or-european-union>

States have introduced the possibility to issue residence permits under the Directive,<sup>71</sup> and research shows that even where legislation is in place, it is only rarely applied.<sup>72</sup> As a result, the FRA reported that “*access to justice is the absolute exception for exploited workers, as criminal, civil, labour and administrative proceedings largely remain out of reach*”.<sup>73</sup> This situation is acknowledged by the European Commission, which denounced it as counterproductive for the fight against illegal employment.<sup>74</sup>

As for victims of *trafficking*, Directive 2004/81/EC provides stronger protections, as it *requires* Member States to allow for a reflection period during which the victim cannot be expelled, and to consider issuing a residence permit for victims if they cooperate with the authorities after the expiry of the reflection period.<sup>75</sup> EU law also requires that assistance and support measures must be provided before, during and after the conclusion of criminal proceedings.<sup>76</sup> Research shows that the fight against trafficking has attracted more attention than the one against severe labour exploitation.<sup>77</sup> However, only around a third of all Member States do make use of special residence permits for trafficking victims,<sup>78</sup> others do not make any use of this measure and 19 Member States in 2013 granted less than 6 such residence permits each.<sup>79</sup> Moreover, the possibility offered by Directive 2004/81/EC has limitations: for instance, where proceedings against the traffickers are not envisaged or the victim has not cooperated with any investigation, there is no requirement to grant a residence permit; in some cases, these permits are not released on the trafficked person’s request, but on the authorities’ initiative, which may jeopardise migrants’ trust in reporting the crime.

### ***The Victims Directive***

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<sup>71</sup> Those that have done so include Germany, Greece, Hungary, Italy, Luxembourg, Slovakia, Slovenia, Spain and Sweden. See FRA (2015a), *op. cit.*, p. 79.

<sup>72</sup> FRA reported that in 2013, the residence permits issued on the basis of national provisions implementing Article 13(4) of the Employer Sanctions Directive were only 28 in Italy and 4 in Germany, while the residence of one victim in Slovakia was ‘tolerated’. In all these cases, the victim’s residence was conditional on their willingness to cooperate with law enforcement authorities. No other residence permits issued in favour of victims of severe labour exploitation in the sense of Art. 13 Employer Sanctions Directive were identified by FRA in other Member States. FRA (2015a), *op. cit.*

<sup>73</sup> *Ibidem*.

<sup>74</sup> The European Commission reported that, although “*access to justice and facilitation of complaints constitute the core of the [Employers Sanctions] directive [...] it is this part of the directive that could raise concerns because Member States’ transposition efforts have often resulted in weak or non-existing mechanisms to facilitate the enforcement of the irregular migrants’ rights*”. The Commission concluded: ‘*In general, the lack of specific mechanisms in many Member States to remedy the difficulties that irregular migrants may face in having access to justice and enforcing their rights may be counterproductive to the fight against illegal employment*’; see European Commission (2014), *Communication from the Commission to the European Parliament and the Council on the application of Directive 2009/52/EC of 18 June 2009 providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals*, COM(2014) 286 final, available at: <http://ec.europa.eu/transparency/regdoc/rep/1/2014/EN/1-2014-286-EN-F1-1.Pdf>

<sup>75</sup> Directive 2004/81/EC (Articles 6 and 8)

<sup>76</sup> Directive 2011/36/EU (Article 11)

<sup>77</sup> See FRA (2015a), *op. cit.*

<sup>78</sup> FRA reports that in 2013, special residence permits for trafficking victims were issued ‘*in a third of all EU Member States, namely Belgium (79), the Czech Republic (23), France (38), Germany (83), Greece (38), the Netherlands (212), Spain (81) and Sweden (19)*. By far the most permits were issued in Italy; however, the precise number is not clear. A total of 147 residence permits were issued in Italy for victims of trafficking as a measure of ‘social protection’. In addition, 1.277 residence permits were issued for ‘humanitarian reasons’ (recipients included but were not limited to victims of trafficking)’; see FRA (2015a), *op. cit.*

<sup>79</sup> *Ibidem*.

Directive 2012/29/EU establishing minimum standards on the rights, support and protection of victims of crime (Victims Directive) was a landmark piece of EU legislation in relation to irregular migrants' access to justice in Europe, as for the first time it introduced legal entitlements (including to services), explicitly mainstreaming irregular migrants in their scope of application. The rights set out in the Directive apply to *all* victims of crime, *irrespective of their residence status*.<sup>80</sup> It provides victims with a wide range of entitlements, including *e.g.* the right to be informed of their rights and their case in a way they understand; to make a complaint in a language they understand;<sup>81</sup> and the right to free interpretation and translation of essential information in criminal proceedings.<sup>82</sup> Of particular relevance for migrants with irregular status, all victims are given the right to participate in criminal proceedings to the extent permitted by national law,<sup>83</sup> and the right to access support services and specialist support services,<sup>84</sup> which Member States are required to provide in a free and confidential way (an extremely rare example, in the EU legislative landscape, of an entitlement to a *service* applying to irregular migrants).<sup>85</sup> These services as a minimum shall include shelters for victims in need of a safe place to avoid the repetition of a crime and targeted, integrated support for victims with special needs. Considering the barriers irregular migrants face in accessing shelters and public services, the latter right has particular significance for victims with irregular status.<sup>86</sup> FRA reported that in 2015 police and victim support services were available only in 19 EU Member States to victims of crime irrespective of their nationality, country of origin or legal status; and that special measures might be in place only for certain categories of (irregular) victims, such as victims of trafficking.<sup>87</sup> The Directive applies for any criminal offence and therefore constitutes a cross-cutting tool for the protection of (irregular) victims. However, *the directive does not regulate the*

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<sup>80</sup> Art. 1 states that: '*The rights set out in this Directive shall apply to victims in a non-discriminatory manner, including with respect to their residence status*'. The official guidance note accompanying the Directive specifies that "*The application of the Directive in a non-discriminatory manner also applies to a victim's residence status. Member States should ensure that rights set out in this Directive are not made conditional on the victim having legal residence status on their territory [...]. Thus, third country nationals and stateless persons who have been victims of crime on EU territory should benefit from these rights. This may be of particular importance in the context of [...], crime against irregular migrant women and girls who are particularly exposed to various forms of gender-based violence (such as physical violence, sexual exploitation and abuse, female genital mutilation, forced marriages and so-called 'honour crimes') and trafficking in human beings*'. See European Commission (2013), *DG JUSTICE guidance document related to the transposition and implementation of Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA*.

<sup>81</sup> Articles 3, 4, 5, 6 & 7, and Recitals 26 & 34.

<sup>82</sup> Article 7.

<sup>83</sup> Articles 10, 13 & 14, and Recitals 34 & 47.

<sup>84</sup> Articles 8 and 9; these services should include: information, advice and support on the rights of victims, including accessing national compensation schemes; information about or referral to relevant special support services; emotional and psychological support; advice on financial and practical issues arising from the crime; and, advice on the risk and prevention of repeat victimisation, intimidation and retaliation.

<sup>85</sup> Given the high level of underreporting of crime among irregular migrants, it is particularly important to note that all victims of crime, whether or not they have reported the crime to the police, have the right to support services.

<sup>86</sup> In the UK, for instance, 389 women were denied safe accommodation in 2014 for not qualifying for public assistance. See PICUM (2015a), *Guide to the EU victims' directive: advancing access to protection, services and justice for undocumented migrants*, Brussels: Platform for International Cooperation on Undocumented Migrants (PICUM), available at: [http://picum.org/picum.org/uploads/publication/VictimsDirective\\_EN.pdf](http://picum.org/picum.org/uploads/publication/VictimsDirective_EN.pdf); Women's Aid (2015), *Women's Aid Annual Survey 2014*, available at: <https://www.womensaid.org.uk/research-and-publications/annual-survey-2015/annual-survey-2014>

<sup>87</sup> See, FRA (2015b), *Victims of crime in the EU: the extent and nature of support for victims*, Luxembourg: Publications Office of the European Union, available at: <http://fra.europa.eu/en/publication/2014/victims-crime-eu-extent-and-nature-support-victims>

*possibility to issue special permits* for crime victims, nor openly ensures that undocumented migrants reporting a crime will not be apprehended and deported.<sup>88</sup>

### ***Which EU actions could improve the situation for local authorities?***

Local authorities aiming to support access to protection for victims of crime and thus increasing reporting and prosecution of the crime happening in their territories may welcome the presence in EU law of measures that, upon transposition and proper implementation at the national level, allow them to interact with victims with irregular status and provide them with essential support services. However, as seen, the existing protective measures have limitations in scope and suffer significant deficiencies in relation to their implementation in several EU Member States. With regard to problems in terms of implementation of the existing tools, local authorities may support the European Commission in denouncing the lack, or weak implementation, in EU Member States of the mechanisms provided by EU law.<sup>89</sup> They may, in particular, encourage the Commission to more strictly monitor the implementation of the EU provisions allowing the issuance of residence permits for both victims of labour exploitation and trafficking, particularly in those countries where few or no permits are issued, doing so in contrast with the spirit of EU legislation and thus exposing the state to potential infringement procedures.

As the Victims Directive mainstreams irregular migrants in the provision of services often managed at the local level, representing as such one very rare example of EU law providing access to services for a category of individuals with irregular immigration status, local authorities shall, on one side, facilitate within their competences the provision at the local level of the services provided by the Directive. On the other side, they shall encourage the Commission to dedicate, in its monitoring activities on the implementation of the Victims Directive, particular attention to ensuring that Member States have properly transposed the Directive's requirement to provide protection and services to victims irrespective of residence status by providing measures or mechanisms ensuring effective access to the rights recognised by the Directive for victims with irregular status.

Extending the chances to obtain a residence permit for victims of crime beyond cases of labour exploitation and trafficking would be a way to allow local service providers and law enforcement authorities to interact with (regularised) victims in a more structured and regulated manner, and would increase the number of victims reporting crime. As we have seen, though, the Victims Directive – which applies to all victims of crime – did not provide for the issuance of residence permits for victims of any crime. Given that the Victims Directive was relatively recently negotiated and adopted, finding EU-wide political support to EU legislation expanding the scope of application of such residence permits to all crime victims is, at the moment, unlikely. However, the Directive did not exclude such possibility either, and the Commission's monitoring of the Victims Directive's implementation at the national level could suggest the issuance of special residence permits as a way to ensure access to the rights and protection offered by the Directive. The national legislations of several EU Member States in the 2010s have introduced an increasing number of opportunities

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<sup>88</sup> Recital 10 of the Directive specifies that: "*Reporting a crime and participating in criminal proceedings do not create any rights regarding the residence status of the victim*"

<sup>89</sup> See European Commission (2014), *Communication from the Commission to the European Parliament and the Council on the application of Directive 2009/52/EC of 18 June 2009 providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals*, COM(2014) 286 final, available at: <http://ec.europa.eu/transparency/regdoc/rep/1/2014/EN/1-2014-286-EN-F1-1-Pdf>



to obtain special residence permits for victims of crimes (although restricted it to categories of victims of specific crimes) and in 2011 the Istanbul Convention required the issuance of such permits for victims of gender-based violence.<sup>90</sup> Local authorities may encourage the further introduction, at the national rather than the EU level, of more and more opportunities to issue residence permits for victims (or witnesses) of crime in order to tackle underreporting of crime from migrants with irregular or semi-regular status. They similarly might invite the Commission (DG HOME and DG JUST) to release guidance for Member States encouraging the adoption of measures allowing the issuance of special residence permits for victims of crime. EU and national policy makers could also be invited to reflect on the possibility of extending the scope of application of the special residence permits offered by the Employers Sanctions Directive and Directive 2004/81/EC.

## **The EU regulatory framework on funding: the asylum, migration and integration fund and EU funds in the social domain**

Legal limitations restricting the possibility of using public funds for services benefitting non-legally residing third country nationals represent one of the biggest challenges in responding to irregular migrants' presence in an inclusive way, as local authorities' lack resources to do so. Such legal restrictions tend to disregard local authorities' and public interests in providing services for irregular migrants, and they may be in force even when it is national law itself explicitly requiring cities to provide a service for migrants irrespective of status. This is, for instance, the case of the UK, where children's legislation requires local authorities to provide a safety net for destitute children and families excluded from mainstream support because of their immigration status, but local authorities are not reimbursed by the national government for that provision.<sup>91</sup>

EU funds offer a vast set of opportunities to support financially local and regional authorities and non-governmental actors in the management of migration, the provision of reception and integration services for asylum seekers and migrants, the fight against destitution, poverty and marginalisation in the Union, and so forth. However, the possibility of using EU funds to provide services for migrants with irregular status are restricted, either by EU regulations themselves or by Member States' national rules on how to make use of EU funds. In this section, different EU funding opportunities will be analysed to expose the limitations that local authorities may encounter in using EU funds to implement initiatives for the inclusion of irregular migrants.

Together with limitations, EU law provides some flexibility on the use of EU funds, which may leave the door open to some opportunities, as we shall see below, to use the funds for the benefit of irregular migrants. Yet, as the framework offered by EU regulations often delegates to national governments the task of specifying the actions to be funded under EU resources, the possibility of using EU funds for services for irregular migrants is usually disregarded by national authorities. Given the vast landscape of funding opportunities offered by the EU regulatory framework and the different national regulations on the use of such funds, this analysis cannot pretend to be exhaustive and is only meant to show how European municipalities might find it challenging to identify ways to fund their inclusive initiatives amongst the opportunities offered by the EU. Moreover, it is noteworthy that EU funding is never intended to compensate for the lack of national

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<sup>90</sup> Delvino N. (2017b), *op. cit.*

<sup>91</sup> Price J. & Spencer S. (2015), *op. cit.*



funding, but rather to complement national resources. A study of national funding opportunities is, however, out of the scope of this paper.

Two areas of EU funding are particularly relevant for this analysis within the current Multiannual Financial Framework (MFF) 2014-2020: EU funds relating to migration management, and EU funds in the area of social intervention. The next sections focus on the funding system as established for the MFF 2014-2020 and on the lessons that it has been offering to cities, while some recent proposals presented by the European Commission in May 2018 for the next MFF 2021-2027 will be briefly commented on in the text box following this section.

### ***The Asylum, Migration and Integration Fund (AMIF)***

With regard to funding opportunities in the area of migration management, the main financial instrument offered by the Union in the current MFF is represented by the *Asylum, Migration and Integration Fund (AMIF)*. Established with EU Regulation 516/2014 (the AMIF regulation), the fund amounts to EUR 3.137 billion for the period 2014-20 and has the objectives of strengthening and developing the Common European Asylum System; supporting legal migration to EU States and promoting the effective integration of non-EU nationals; enhancing fair and effective return strategies to contribute to combating irregular migration; and enhancing solidarity amongst EU Member States on migration and asylum. The AMIF regulation provides for the use of the Fund to finance the provision of services and measures of assistance to asylum seekers and refugees (Chapter II) and migrants (Chapter III and IV).

In particular, Chapter III is dedicated to the integration of third country nationals and legal migration, and provides (Art. 9) that *'the Fund shall support actions [...] taking into account the integration needs of third-country nationals at local/or regional level'*. Yet, it is established that *'the Fund shall support, in particular [...] actions focusing on third-country nationals who are residing legally in a Member State or, where appropriate, who are in the process of acquiring legal residence in a Member State'*. The wording of Article 9 (*'focusing on'*) and its reference to migrants in the process of acquiring legal residence, therefore present a level of flexibility that, in theory, could allow for the use of the Fund for actions that include migrants with irregular or semi-regular status – in particular those who are in the process of resolving their immigration status and perhaps related to that process itself. However, its focus on regular migrants paves the way for Member States to restrict the use of the Fund for regular migrants *only*. It is indeed important to note that the AMIF regulation only offers a flexible framework, and it is then the responsibility of Member States to produce National Programmes (subsequently approved by the European Commission) which define, within that framework, the specific actions (and beneficiaries) to which the Fund will be finally devoted. In this programming phase, national authorities may disregard the opportunity of using part of the funds for the integration of third-country nationals for local actions that target *all* migrants, irrespective of their regular status.<sup>92</sup>

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<sup>92</sup> National programmes may explicitly restrict the possibility of using of funds under Art. 9 of the AMIF regulation to providing services to *only* legally residing third country nationals; for example, the Greek National Programme specifies that desirable outcomes from integration activities should include *'improved knowledge of the Greek language, daily life issues and Greek culture, institutions and values for legally residing TCNs'*; *'Improved knowledge of rights and obligations and better access to public services and goods for legally residing TCNs'*; *'Greater interaction of legally residing TCNs with the Greek society'*; and so forth. The Italian National Programme identifies 'recipients' for each action proposed in the programme, and specifies *e.g.* that migrants shall be *'regularly residing'* to be recipients of certain services (as those related to access to the labour market), but does not specify the migration status of the

The Chapter of the AMIF regulation focusing more specifically on irregular migration is Chapter IV, which regulates the funding of activities for the return of irregular migrants, including *inter alia* removal operations (Art. 12, let. d) or assisted voluntary return measures (let. c). This Chapter of the AMIF regulation also offers an important funding opportunity for activities of assistance to irregular migrants under Art. 11 dedicated to ‘*Measures accompanying return procedures*’. Although framed in the context of return, this article also targets non-returnable migrants, as it explicitly refers to migrants with no right to stay whose return has been postponed (Art. 11, sub-para. 1, let. c). Relevant measures that can be funded under Art. 11 include the provision of social assistance, information or help with administrative and/or judicial formalities and information or counselling; the provision of legal aid and language assistance; specific assistance for vulnerable persons; the establishment, maintenance and improvement of accommodation, reception or detention infrastructure, services and conditions. Again, the specifications on how to use the Fund at national level are set in National Programmes that may disregard the opportunity offered by Art. 11, and prevent local authorities from obtaining funding for providing assistance to non-returned migrants or migrants with irregular status in general. Accompanying measures are often only intended by National Programmes as measures to improve detention and pre-removal facilities, but disregard the possibilities to e.g. offer assistance or linguistic services that include people whose return has been postponed.<sup>93</sup>

### ***EU funds in the social domain***

With regard to EU funding in the area of social intervention, the main financial instruments in this domain are framed within the development of the EU’s internal labour market and are therefore aimed at supporting the employment and living standards of workers in the European Union. As irregular migrants do not have the right to work in the EU, interventions responding to the social needs of irregular migrants are generally out of the scope of these EU funds.

In particular, irregular migrants are generally excluded from the scope of support of the *European Social Fund (ESF)*, an EU Structural Fund with a budget of EUR 84 billion (for the period 2014-20), and the main EU financial instrument for actions of social intervention, including for promoting social inclusion, and combating poverty and discrimination. As the general mission of the ESF, as defined by the TFEU,<sup>94</sup> is the improvement of standards for people with access to the labour market, ESF resources in theory shall not be destined to individuals with no right to work, including asylum seekers before they are given the right to work<sup>95</sup> or migrants with irregular status. However,

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‘Young individuals below the age of 25’ who can benefit from actions supporting ‘successful education’. see Greek Ministry of Interior (2014), *Greece National Programme AMIF*, available at: <http://www.ypes.gr/UserFiles/f0ff9297-f516-40ff-a70e-eca84e2ec9b9/AMIF-Programme.pdf>; see Italian Ministry of Interior (2014), *Italian AMIF National Programme*, pag. 15, available at: [http://www.interno.gov.it/sites/default/files/allegati/programma\\_nazionale\\_fami\\_2014-2020\\_0.pdf](http://www.interno.gov.it/sites/default/files/allegati/programma_nazionale_fami_2014-2020_0.pdf)

<sup>93</sup> National Programmes accessed for this research include the Belgian, British, French, Greek Italian, Irish, Polish, and Spanish National Programmes.

<sup>94</sup> Art 162 TFEU (‘*In order to improve employment opportunities for workers in the internal market and to contribute thereby to raising the standard of living, a European Social Fund is hereby established in accordance with the provisions set out below; it shall aim to render the employment of workers easier and to increase their geographical and occupational mobility within the Union, and to facilitate their adaptation to industrial changes and to changes in production systems, in particular through vocational training and retraining*’)

<sup>95</sup> European Commission (2016), *Support to asylum seekers under the European Social Fund and the Fund for European Aid to the Most Deprived*.

it is worth noting that irregular migrants are not excluded *explicitly* by the ESF implementing regulation, and flexibility can be observed in the use of other EU funds in the area of employment and social inclusion.<sup>96</sup> For instance, the European Commission Department responsible for Employment, Social Affairs and Inclusion (DG EMPL) is the main funder of the Platform for International Cooperation on Undocumented Migrants (PICUM) to which DG EMPL has granted funds under the EU Programme for Employment and Social Innovation (EaSI),<sup>97</sup> which similarly to the ESF is an EU financing instrument to promote employment, guaranteeing adequate and decent social protection, combating social exclusion and poverty, and improving working conditions.

An EU fund in the area of social intervention that is not linked to the labour market (which could therefore be used to implement initiatives aimed at avoiding the worst forms of marginalisation for irregular migrants) is represented by the *Fund for European Aid to the Most Deprived (FEAD)*. The Fund was established with the specific objective to alleviate the worst forms of poverty in the EU (Art. 3 FEAD Regulation)<sup>98</sup> such as homelessness, child poverty and food deprivation and in this way contribute to eradicating poverty in the Union in line with the Europe 2020 strategy (see more below). The assistance to be provided under the FEAD may take the form of food and/or basic material assistance (Operational Programme I), or forms of '*social inclusion of the most deprived persons*' ('Operational Programme II'), which the FEAD regulation defined as 'activities *outside active labour market measures*, consisting in non-financial, nonmaterial assistance, aimed at the social inclusion of the most deprived persons'.<sup>99</sup> It is important to note that the specific target groups for the use of FEAD funds are identified at national level (Art. 2, para. 2) through the production of National Operational Programmes. Therefore, the eligibility of irregular migrants depends on the way Member States define the type of assistance and who may benefit from this fund.<sup>100</sup> Considering that irregular migrants are generally out of the scope of financial instruments which are linked to the internal labour market (the ESF *in primis*), the existence of a fund like the FEAD aimed at targeting individuals whose assistance is not covered by those financial instruments might considerably alleviate the challenge of European municipalities to find financial resources for measures of basic assistance to their residents with irregular status. Ensuring that migrants with no other recourse to public funds are targeted by national criteria identifying the most vulnerable may therefore be crucial, and EU guidance to Member States on the need to target this specific category of individuals could strongly support the needs of European municipalities in this area.

### ***Which EU actions could improve the situation for local authorities?***

European municipalities would highly benefit from the possibility of using EU funds to support inclusive initiatives responding to the social challenges brought by the presence of irregular migrants living in their territory. The national criteria set for the use of EU funds have been disregarding the opportunities offered by EU regulations, or even adding further limitations by explicitly denying the possibility of using EU funds for the benefit of these migrants. Considering that such possibility is currently limited by both EU and national rules, it would be crucial that the next MFF for the period 2021-2027 pays specific attention to the financial needs of local authorities

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<sup>96</sup> Merlino M. and Parkin J. (2011b), *Fundamental and Human Rights Framework: Protecting Irregular Migrants in the EU*, Brussels: Centre for European Policy Study (CEPS).

<sup>97</sup> PICUM (2016), Annual Report 2016, Brussels: PICUM.

<sup>98</sup> Regulation (EU) No 223/2014 (FEAD Regulation)

<sup>99</sup> Art. 2(6).

<sup>100</sup> Green European Foundation (2016), *Guide to EU Funding on Migration and Asylum*, Brussels: GEF, available at: [http://gef.eu/wp-content/uploads/2017/01/The\\_Guide\\_to\\_EU\\_Funding\\_on\\_Migration\\_and\\_Asylum.pdf](http://gef.eu/wp-content/uploads/2017/01/The_Guide_to_EU_Funding_on_Migration_and_Asylum.pdf)

in relation to the provision of essential services for irregular migrants and non-returnable migrants in particular.

More generally in relation to funding on migration and integration beyond the more specific situation of irregular migrants, the Partnership on Inclusion of Migrants and Refugees (established with the Pact of Amsterdam by European Ministers responsible for Urban Matters in May 2016) has found that against a plethora of EU funding opportunities, cities encounter a number of challenges in accessing EU funds and, as also described in this section, the *'root of most problems'* is that *'the decisions on allocation of relevant EU funds are made by national or regional authorities [...] with little or no involvement of local authorities in the programming phases and/or in decision-making [...], especially in the AMIF-situation'*.<sup>101</sup> The Partnership recommended more direct access to EU funds for European cities, including providing the possibility for cities most in need to *apply for funding directly* to the Commission under the AMIF framework, without the intermediation of national authorities; and to form a pilot group of cities endowed with such possibility to demonstrate the potential impacts of direct funding. The Partnership also called for an improvement in the alignment of EU funds to the needs of local authorities through multilevel partnerships and greater involvement of local authorities in the activities of planning and decision-making on EU funds, including requiring the endorsement of local authorities for the approval of national operation programmes.<sup>102</sup> While not formulated in relation to irregular migrants, these recommendations would be equally relevant to the considerations made for the use of EU funds for the inclusion needs of migrants with irregular status.

As the analysis made in this section suggests, municipalities would welcome more flexibility concerning the possibility of using EU funds devoted to support the management of migration, such as the AMIF, for the financing of measures assisting irregular and non-returned migrants. Local authorities could advocate for a major involvement in the preparation and implementation of national programmes; and encourage the Commission to provide guidance to Member States aimed at making sure that the possibility of using EU funds to finance initiatives that target or mainstream the social needs of irregular migrants is not excluded by national programmes. Local authorities might offer the valuable contribution of their direct experience on this issue to their national governments, while also inviting the Commission to require the consultation of local authorities in the drafting process of National Programmes. As the European Commission ultimately approves the National Programmes prepared by Member States, in this phase the Commission should make sure that the voice of local authorities is included, and that the needs of the growing population of non-returnable people in Europe are taken into consideration.

Also in the social domain, local authorities, together with the European Commission, should engage in making sure that the operational programmes adopted by national governments do not exclude irregular migrants from the scope of use of funds, like FEAD. In the area of funding for social intervention, municipalities have been benefitting from the existence of the FEAD fund as a tool to reach out to meet the basic assistance needs of those who do not have access to the labour market. These may include migrants with irregular status (if Member States did not exclude such an opportunity in their operational programmes). However, given the limited kind of assistance

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<sup>101</sup> Partnership on Inclusion of Migrants and Refugees (2018), *Recommendations for improving cities' use of and access to EU funds for integration of migrants and refugees in the new programming period*, available at:

<https://ec.europa.eu/futurium/en/inclusion-migrants-and-refugees/recommendations-improving-cities-use-and-access-integration-funding>

<sup>102</sup> *Ibidem*.

provided under the FEAD fund, local authorities would highly benefit from additional funding opportunities to deal with the wider assistance needs of irregular migrants. Municipalities should welcome flexibility on the allocation of funds in the area of employment and social inclusion, and that funds like the EU Programme for Employment and Social Innovation have been destined to projects dedicated to irregular migrants. Local authorities shall denounce to their national governments and EU institutions their lack of resources to tackle the social challenges brought by irregular migrants' presence, and may ask the Commission to show more flexibility in the allocation of funds in the area of employment and social inclusion. In particular, the Commission should be invited to take into consideration the assistance needs of irregular migrants, including workers in the informal economy with irregular immigration status, in the post-2020 regulatory framework on the ESF and other funds in the social domain.

### Proposals for the 2021-2027 Multiannual Financial Framework

The considerations made in the current Multiannual Financial Framework (MFF) may offer a lens to analyse the European Commission's recent proposals (May 2018) on the new MFF for the period 2021-2027. The Commission proposed significant changes and innovations, a full analysis of which is however out of the scope of this paper, also considering that the proposals are still in the beginning of the legislative procedure and will likely be subject to several amendments. As they stand, though, the current proposals could significantly impact on the possibilities for local authorities to use EU funding for the provision of services to irregular migrants. Some relevant innovations include:

- The transfer of funding for medium and long-term integration for third-country nationals from funds in the migration domain to funds in the social domain, and in particular the new European Social Fund PLUS (ESF+). The Asylum, Migration and *Integration* Fund will indeed be replaced by a new fund, which will be simply renamed *Asylum and Migration Fund* (AMF). This may be a welcome innovation for local authorities aiming to use EU funds to finance inclusive initiatives targeting or mainstreaming irregular migrants, to the extent that the ESF+ covers the integration of third country nationals without restricting its scope to regular residents only.
- The ESF+ will be much wider in scope than the previous ESF in that it incorporates under one expanded fund all funding in the social domain, including funding for activities previously targeted by the FEAD. This should, in theory, foster increased flexibility in the allocation of funding to activities targeting the social needs of individuals outside of the labour market, including irregular migrants. At the same time, though, in the current proposal establishing the fund, '*the scope of support for ESF+ is aligned with the European Pillar of Social Rights*',<sup>103</sup> and (as we shall see below) the Pillar excludes irregular migrants from its scope of application. European cities aiming to use the ESF+ for initiatives inclusive of irregular migrants could advocate for the ESF+'s targets to go beyond the limited scope of the Pillar, reflecting the wider commitment of the EU towards social rights.
- The proposals of the European Commission aim to strengthen the participation of Member States' social partners, including local authorities, in the preparation and implementation of national strategies. The newly proposed 'Common Provision Regulation' (CPR) which will govern the use of both ESF+ AMF funds states that in accordance with the multi-level governance principle, Member States shall involve social partners, including local

<sup>103</sup> COM (2018) 382 final, Explanatory Memorandum, p. 8.

authorities, in the preparation of Partnership Agreements and throughout the preparation and implementation of programmes.<sup>104</sup> The Annexes to the CPR proposal go even further in that they require – as an ‘enabling condition’ for the use of the ESF+ and the European Regional Development Fund (ERDF) – that Member States set up a National strategic policy framework for social inclusion and poverty reduction with the goal of ‘*increasing the socio-economic integration of marginalised communities, migrants and disadvantaged groups, through integrated including housing and social services*’.<sup>105</sup> To fulfil this condition, national authorities must prove that arrangements for ensuring that the design, implementation, monitoring and review of this policy framework are conducted in close cooperation with social partners, including local authorities. These new opportunities may be used by local authorities to expose their need for national programmes to allocate resources for (and not disregard) initiatives that target or mainstream the social needs of irregular migrants

- The proposal for a new AMF fund also includes more opportunities for direct funding from the European Commission to local authorities. Under the current proposal, only 60% of the fund will be allocated through national programmes, while the remaining 40% will be destined to a “Thematic facility” which will be governed by the Commission with more flexibility, and will include opportunities for direct, indirect and shared management of the funds.<sup>106</sup> The “Thematic facility”, by offering more flexibility and allowing more opportunities for direct management of funds from the Commission could reduce the restrictions, usually imposed by national programmes, to the use of the funds for local initiatives targeting or mainstreaming irregular migrants. Local authorities may encourage the Commission to take into specific consideration the social needs determined by the presence of irregular migrants, especially if non-removable, when allocating funding to local authorities under the Thematic Facility. At the same time, though, the new AMF proposal does not provide an explicit requirement on Member States to consult local authorities for the devising of national programmes or in cases of shared management of the fund.

## EU policies in the social domain

In contrast to immigration policies where EU legislative competences have allowed for the production of a rich body of legislation forming the *EU immigration acquis*, social policy still largely falls within the competence of the Member States. The EU has limited powers in relation to social policies, and has no competences at all to introduce legislation modifying national regulations on e.g. health care<sup>107</sup> or homelessness. The EU’s ‘social dimension’ has developed from the creation of the Union’s single market and is accordingly mostly framed around the promotion of employment, improving working conditions and developing social protection systems for workers in the single market. As irregular migrants do not have the right to work, they are generally excluded from (or

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<sup>104</sup> Art. 6 (2), *Proposal for a Regulation of the European Parliament and of the Council laying down common provisions on the European Regional Development Fund, the European Social Fund Plus, the Cohesion Fund, and the European Maritime and Fisheries Fund and financial rules for those and for the Asylum and Migration Fund, the Internal Security Fund and the Border Management and Visa Instrument*, COM(2018) 375 final.

<sup>105</sup> Enabling condition 4.3, COM(2018) 375 final, Annex IV.

<sup>106</sup> Articles 8 and 9, *Proposal for a Regulation of the European Parliament and of the Council establishing the Asylum and Migration Fund*, COM(2018) 471 final

<sup>107</sup> Article 168 TFEU only states that a “*high level of human health protection shall be ensured in the definition and implementation of all Union policies and activities.*”



simply disregarded by) EU measures addressing working conditions or social protection systems developed for (authorised) workers. Moreover, in recent policy developments related to the creation of a 'European Pillar of Social Rights' (see below), EU policy makers showed a clear pattern of exclusion for irregular migrants from inclusive policies in the social domain, which instead focus on EU citizens and legally-residing third country nationals.

The EU's social dimension, however, has been expanding throughout the years to cover – within the Union's limited prerogatives – potentially every area of social policy.<sup>108</sup> *The combating of exclusion*' is one objective of EU competencies in relation to social policies, as regulated by Art. 151 and 153 TFEU (without restrictions to citizens or legally residing migrants). According to Art. 153 TFEU, the EU *'shall support and complement the activities of the Member States'* in this area, even though it is not endowed with any legislative power to introduce binding acts to foster the objective of combating exclusion.<sup>109</sup> In this area, the EU can only adopt exhortative measures in the form of 'soft-law' (non-binding) instruments encouraging cooperation and facilitating harmonisation between Member States. EU institutions have thus developed a process known as the 'Open Method of Coordination' (OMC)<sup>110</sup> simply to coordinate the social policies of Member States in the fight against exclusion. The OMC method largely consists of setting common objectives (agreed by Member States and adopted within the European Council) for national actions in the social domain, and for regularly monitoring and evaluating the actions of Member States against those objectives. The EU subsequently issues country-specific recommendations. The role of the European Commission (in practice DG Employment, Social Affairs & Inclusion) in this area is therefore limited to activities of monitoring and releasing non-binding recommendations, but that is not without impact.

The current and most relevant EU policy process developed through the OMC method in relation to social policies is the *'Europe 2020 strategy'*<sup>111</sup> (the EU's agenda for growth and jobs for the decade 2010-20) which set five headline targets<sup>112</sup> for the EU, including an objective to reduce poverty in Europe by lifting 20 million people out of poverty. The strategy set in motion a ten-year long process which was welcomed by civil society because it established a specific focus on addressing poverty and social exclusion (although the strategy was criticised for having a strong emphasis on economic growth and austerity policies).<sup>113</sup> The European Commission monitors Member States' actions against the strategy's targets, and regularly issues country-specific recommendations in the

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<sup>108</sup> Threlfall M. (2007), *The Social Dimension of the European Union - Innovative Methods for Advancing Integration*, in *Global Social Policy*, Vol 7, Issue 3, pp. 271 - 293

<sup>109</sup> Similarly, in relation to health, EU action *"shall complement national policies"* and *"be directed towards improving public health, preventing physical and mental illness and diseases, and obviating sources of danger to physical and mental health"* (Art. 168 TFEU)

<sup>110</sup> European Parliament (2014), *At a glance: The Open Method of Coordination*, available at: [www.europarl.europa.eu/EPRS/EPRS-AaG-542142-Open-Method-of-Coordination-FINAL.pdf](http://www.europarl.europa.eu/EPRS/EPRS-AaG-542142-Open-Method-of-Coordination-FINAL.pdf)

<sup>111</sup> See European Commission (2010), *Communication from the Commission - Europe 2020: A strategy for smart, sustainable and inclusive growth*, Brussels, COM(2010) 2020, available at: <http://ec.europa.eu/eu2020/pdf/COMPLET%20EN%20BARROSO%20%20%20007%20-%20Europe%202020%20-%20EN%20version.pdf>

<sup>112</sup> The five headline targets include: reaching an EU *employment* rate of 75% for workers aged 20-64; investing 3% of the EU's GDP in *research and development*; the 20/20/20 *climate/energy* targets; in *education*, the reduction to less than 10% of early school leavers and the increase to more than 40% of the younger with a tertiary degree; the reduction by 20 million of people at risk of *poverty*; see *ibidem*.

<sup>113</sup> PICUM (2015b), *Undocumented migrants and the Europe 2020 strategy: making social inclusion a reality for all migrants in Europe*, Brussels: PICUM, available at: <http://picum.org/news/picum-news/undocumented-migrants-and-the-europe-2020-strategy-making-social-inclusion-a-reality-for-all-migrants-in-europe>



context of the process called the ‘European Semester’.<sup>114</sup> Migrants, as a specific vulnerable group, have been assuming increasing importance within OMC plans in the social area, with Member States reporting important gaps between third country nationals and EU citizens as regards poverty, income, health, employment and education.<sup>115</sup> The Europe 2020 strategy mentions migrants (with no reference to their status), although no specific attention or particular focus is offered by the Strategy itself.<sup>116</sup> Similarly, the European Commission’s country-specific recommendations regularly issued to Member States often mention the needs of (regular) migrants or people with migrant background.<sup>117</sup> However, the decision on whom to target with actions of social intervention in line with the strategy ultimately rests on Member States’ responsibility.

The specific situation of migrants with irregular status within the processes set in motion by the Europe 2020 strategy is not clearly defined. Irregular migrants are not explicitly excluded in the anti-poverty target, yet the ‘integrated guidelines’ (proposed by the Commission and adopted by the Council) for the delivery of the strategy (and in particular ‘Guideline 10’ dedicated to promoting social inclusion and combating poverty’) only made mention of ‘legal migrants’ and disregarded irregular migrants.<sup>118</sup> Yet, the specific vulnerabilities of migrants with irregular status are mentioned in following official documents prepared by the Commission in the framework of the ‘Social Investment Package’<sup>119</sup> – a 2013 initiative of the European Commission to revive Member States’ social investment within the overarching framework of Europe 2020’s targets.<sup>120</sup> These documents include the Commission’s Staff Working Document *Confronting Homelessness in the European Union* which stated that “the rising proportion of migrants, especially those who are undocumented, among the homeless is alarming” and suggested that “guaranteeing basic rights and improving access to work and basic services can prevent homelessness among undocumented migrants”.<sup>121</sup> Similarly, the Commission’s Recommendation against child poverty called to “Devote

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<sup>114</sup> The European Semester is a cycle of economic and fiscal policy coordination between Member States led by EU institutions, and includes coordination in the area of social protection and cohesion. Its name derives from the circumstance that the cycle focus is on the 6-month period starting from the beginning of each year. For more information, visit: [https://ec.europa.eu/info/business-economy-euro/economic-and-fiscal-policy-coordination/eu-economic-governance-monitoring-prevention-correction/european-semester\\_en](https://ec.europa.eu/info/business-economy-euro/economic-and-fiscal-policy-coordination/eu-economic-governance-monitoring-prevention-correction/european-semester_en)

<sup>115</sup> Merlino M. & Parkin J. (2011b), *op. cit.*

<sup>116</sup> In relation to the poverty target, the strategy mentions the “*development of a new agenda for migrants’ integration to enable them to take full advantage of their potential*” as one of the suggested ways to achieve the target. See European Commission (2010), *op. cit.*

<sup>117</sup> E.g. European Council (2013), *Council Recommendation on the National Reform Programme 2013 of Belgium and delivering a Council opinion on the Stability Programme of Belgium, 2012-2016*; European Council (2013), *Council recommendation on the National Reform Programme 2013 of Austria and delivering a Council opinion on the Stability Programme of Austria, 2012-2017*; European Council (2017), *Council Recommendation on the 2017 National Reform Programme of Germany and delivering a Council opinion on the 2017 Stability Programme of Germany*; European Council (2017), *Council Recommendation on the 2017 National Reform Programme of Italy and delivering a Council opinion on the 2017 Stability Programme of Italy*; European Council (2017), *Council Recommendation on the 2017 National Reform Programme of the Netherlands and delivering a Council opinion on the 2017 Stability Programme of the Netherlands*.

<sup>118</sup> European Council (2010), *Council Decision on guidelines for the employment policies of the Member States*, 14338/10, available at: <http://register.consilium.europa.eu/doc/srv?!=EN&f=ST%2014338%202010%20INIT>

<sup>119</sup> See European Commission (2013), *Social investment: Commission urges Member States to focus on growth and social cohesion*, press release of 20 February, available at: <http://ec.europa.eu/social/main.jsp?langId=en&catId=1044&newsId=1807&furtherNews=yes>

<sup>120</sup> See PICUM (2015b), *op. cit.*

<sup>121</sup> European Commission (2013), *Commission staff working document - Confronting Homelessness in the European Union Accompanying the document Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions towards Social Investment for Growth and*

special attention to [*inter alia*] undocumented or non-registered children” to ensure that all children can make full use of their universal right to health care.<sup>122</sup> The position of EU institutions acting to promote the development of European social policies vis-à-vis migrants with irregular status within the overarching context of the Europe 2020 strategy has therefore been unclear and has swung between stances of inclusion and exclusion.

Most recently, however, EU institutions and European leaders embedded in the political negotiations for the future of the EU’s social dimension have taken a stand towards the exclusion of irregular migrants by restricting the scope of application of the recently-proclaimed ‘*European Pillar of Social Rights*’ to EU citizens and legally resident third-country nationals. With the Pillar, the EU established 20 principles and rights in the social domain divided in three categories: equal opportunities and access to labour market; dynamic labour markets and fair working conditions; and public support, social protection and inclusion. These include everyone’s right to preventive and curative healthcare and childhood education, and – of particular relevance for European municipalities aiming to tackle homelessness and destitution – protection from poverty for children, the right to housing for those in need, the right to shelters and assistance for the homeless, and everyone’s right to access essential services. It is noteworthy that the rights and principles enshrined in the Pillar do not have a legally binding nature, but rather represent political commitments made by EU institutions and European leaders. The Pillar, however, aims to serve as a guide for the development of Member States EU policies on social rights. Its adoption as a joint-proclamation by the Council, the Parliament and the Commission, on November 17<sup>th</sup> 2017 represented one of the most ambitious goals of the European Commission led by Jean-Claude Juncker, and the most relevant in the social domain. Its political significance is therefore particularly high, and it is expectable that the upcoming actions of the European Commission in the social domain will be highly inspired by the text of the Pillar. Against this backdrop, irregular migrants are bluntly excluded by the scope of application of the Pillar by its Preamble 15 which states that ‘the principles enshrined in the European Pillar of Social Rights concern Union citizens and third-country nationals with legal residence’.<sup>123</sup>

### ***Which EU actions could improve the situation for local authorities?***

Municipalities in Europe with an interest in preventing conditions of homelessness and destitution in their territory – including when the people at risk do not have a regular migration status – can highly benefit from EU policies against social exclusion and poverty to the extent that they foster concrete actions by national authorities. EU policies in the social domain could serve a crucial role in mitigating the marginalising aspects of immigration policies and related social challenges. Although deprived of a strong legislative power, EU initiatives in the social domain that take into consideration the poverty risks of irregular and non-returned migrants may incentivise national authorities to take action to tackle the social difficulties lived by migrants with irregular status and subsequently address the related social problems faced by hosting communities. For these reasons, European cities could encourage the EU and its institutions to adopt clear positions mainstreaming

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*Cohesion - including implementing the European Social Fund 2014-2020*, SWD/2013/042 final, available at: <http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:52013SC0042>.

<sup>122</sup> European Commission (2013), *Commission Recommendation of 20/02/2013, Investing in Children: Breaking the Cycle of Disadvantage*, C(2013) 778 final, available at: [http://ec.europa.eu/justice/fundamental-rights/files/c\\_2013\\_778\\_en.pdf](http://ec.europa.eu/justice/fundamental-rights/files/c_2013_778_en.pdf)

<sup>123</sup> European Parliament, European Council and European Commission (2017), *European Pillar of Social Rights*, available at: [https://ec.europa.eu/commission/publications/european-pillar-social-rights-booklet\\_en](https://ec.europa.eu/commission/publications/european-pillar-social-rights-booklet_en)

the needs of irregular migrants in their policies combatting exclusion and poverty. A step in this direction would require a clarification from the Commission on its stance vis-à-vis the inclusion of irregular migrants in the actions proposed under the framework of the OMC in the social domain. The European Commission could be encouraged, for instance, to take into specific consideration the condition of irregular migrants in the various national contexts when formulating country-specific recommendations to Member States in the context of the 'European Semesters' in the framework of the Europe 2020 strategy. European municipalities could applaud mentioning the needs of migrants with irregular status in the official documents of the European Commission on the delivery of the strategy, and may equally be critical of the Commission's documents that instead suggest the inclusion of regular migrants only.

On the other side, the exclusion of irregular migrants from the scope of application of the principles and rights included in the European Pillar of Social Rights, given its high political significance, brings along the risk of favouring the development of future EU social policies that disregard the social needs of irregular migrants. European municipalities may be critical of the choice taken, and denounce the social problems they face that derive from the marginalisation and exclusion of irregular migrants, to ensure that future EU strategies in the social domain following the expiration of the Europe 2020 strategy do not equally pursue policies disregarding or excluding irregular migrants. European municipalities shall, instead, encourage the European Commission to develop a post-2020 social strategy that mainstreams the social needs of people with irregular migration status

## Conclusions

This paper was produced for the '*City Initiative on Migrants with Irregular Status in Europe*' (the C-MISE initiative) with the aim of providing the participating municipal authorities with an analysis of EU laws and policies hindering or facilitating their intentions to respond in an inclusionary manner to the presence of migrants with irregular status in their territory. The marginalisation of irregular migrants operated by immigration policies restricting both their right to work and access to welfare support have strong impacts on local realities. Cities are concerned by social problems affecting irregular migrants, including homelessness, destitution, and crime, and the related risks in terms of public order, safety and health. Legal limitations on local authorities' possibility to provide assistance to people with irregular immigration status (and thus tackle the aforementioned problems in an inclusive manner) often clash with cities' legal duties in the social sphere and their intention to act in full respect of international and constitutional standards on human rights. Municipalities therefore find themselves in a legal dilemma, feel the frustration of having to deal with social problems with limited powers and resources in an unclear legal framework, and can be critical of higher levels of governance for the social consequences of their policies. EU policies with a control and enforcement oriented approach may be perceived as neglecting the social problems denounced by European municipalities. This is particularly true because of the low return rates of EU Member States and in relation to the increasing population of non-removable migrants whose return is a not a viable solution for the social problems mentioned in this paper.

With the aim of providing a clear picture on how EU policies in particular address (or neglect) the social challenges brought by irregular migration, this paper analysed relevant areas of EU law and policy including policies in the areas of immigration and justice, the EU regulatory framework in the area of funding and EU policies in the social domain. For each policy area, this paper discussed

potential developments in EU policy to improve the situation on the assumption that a greater inclusion of irregular migrants might partly relieve cities of their concerns over the marginalisation of irregular migrants in their communities. The ultimate goal was supporting C-MISE cities in developing a shared perspective on ways in which irregular migrants could be mainstreamed into EU policy agendas.

This analysis showed that against a general legislative setup fostering exclusion, the EU framework occasionally does acknowledge the need to tackle the social and human rights dimension of irregular migration. However, the EU tends to respond in an ambiguous way, or delegates the regulation of 'sensitive' issues to the national level. It does so, for instance, in the area of returns, where the Return Directive states that the situation of non-removable migrants '*should be addressed*', but delegates to national legislation the definition of their basic conditions of subsistence. Similarly, EU regulations on funding in the area of migration management do offer opportunities to finance *e.g.* social assistance measures for irregular migrants whose return has been postponed, but this opportunity is often disregarded by National Programmes implementing the AMIF regulation. In the social domain ambiguities can be observed in the official documents of the Commission in the framework of the Europe 2020 strategy, where at times the specific vulnerabilities of irregular migrants who are homeless or minors are mentioned, while on other occasions only legal migrants are taken into consideration. In these cases, rather than EU regulations and policy representing a limitation to the possibility of being inclusive of irregular migrants, it is the lack of clear and specific rules that leaves the door open to restrictive national policies. The approach taken by the EU in these cases, rather than allowing for flexibility fostering inclusive national policies, in most cases leads national authorities simply to disregard (or at times explicitly exclude) the possibility of including migrants with irregular status. This is evident, for example, in relation to non-returnable migrants considering that, for instance, in 21 countries no official postponement of return that provides additional rights to them is provided by law; or in the case of the opportunities offered by the AMIF regulation but subsequently ignored by National Programmes.

In other cases, EU law does provide rules upholding the rights of irregular migrants and requiring the implementation of inclusive measures and policies. It is the case, for instance, of Art. 14 of the Return Directive providing a set of rights for irregular migrants pending return, and even more in the case of the special residence permits for victims of labour exploitation and trafficking, and the protective measures provided by the Victims Directive. However, the protections provided by EU law have limitations, and even so they are not fully implemented by Member States in most cases. This is for example the case for the special residence permits for victims of labour exploitations which have only been introduced in the national legislation of less than half of the Member States; or for the permits for trafficking victims, where more than two-thirds of Member States have issued fewer than 6 permits each per year. In these cases, EU law offers (limited) opportunities for inclusion, and it is often the lack of implementation by national authorities that limits their relevance.

This paper has shown that, against a general legislative setup that excludes irregular migrants, EU law and policy offer spaces for inclusion in a number of instances, and that EU institutions may at times share the view of local authorities on the need to include irregular migrants. Rather than the responsibility of the EU, limitations and exclusions are often attributable to national positions, whether in implementation or in the negotiation itself (when an issue is 'too politically sensitive') of EU policies. This suggests that there are spaces for common understanding between the

supranational level of the EU and the sub-state level of municipalities, and that once the cities in the C-MISE initiative develop their shared, city perspective on ways in which irregular migrants could be mainstreamed into EU policy agendas, they may well find some positive responses by EU institutions.

EU instances of openness towards including migrants with irregular status are, however, limited in scope, and EU policies and rules may be ambiguous vis-à-vis their situation. Moreover, the recent choice of excluding *a priori* irregular migrants from the scope of application of the rights included in the European Pillar of Social Rights shows that the path of exclusion fostered by the EU legislative setup on immigration is now being confirmed in the most recent policy developments in the social domain. In addition, the main critics moved to the currently negotiated proposals to reform the Common European Asylum System argue that more restrictive EU regulations (rather than directives) on asylum will lead to more asylum applicants being rejected, and subsequently to more irregular migrants in Europe together with an increase in the related social challenges described in this paper. All this suggests that there are ample spaces for influencing EU policies towards solutions that take more into consideration the social problems stemming from the marginalisation of migrants with irregular status. Municipalities may play a key role in highlighting those problems and recommend solutions that foster a reconciliation between the different tiers of governance in this field.



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