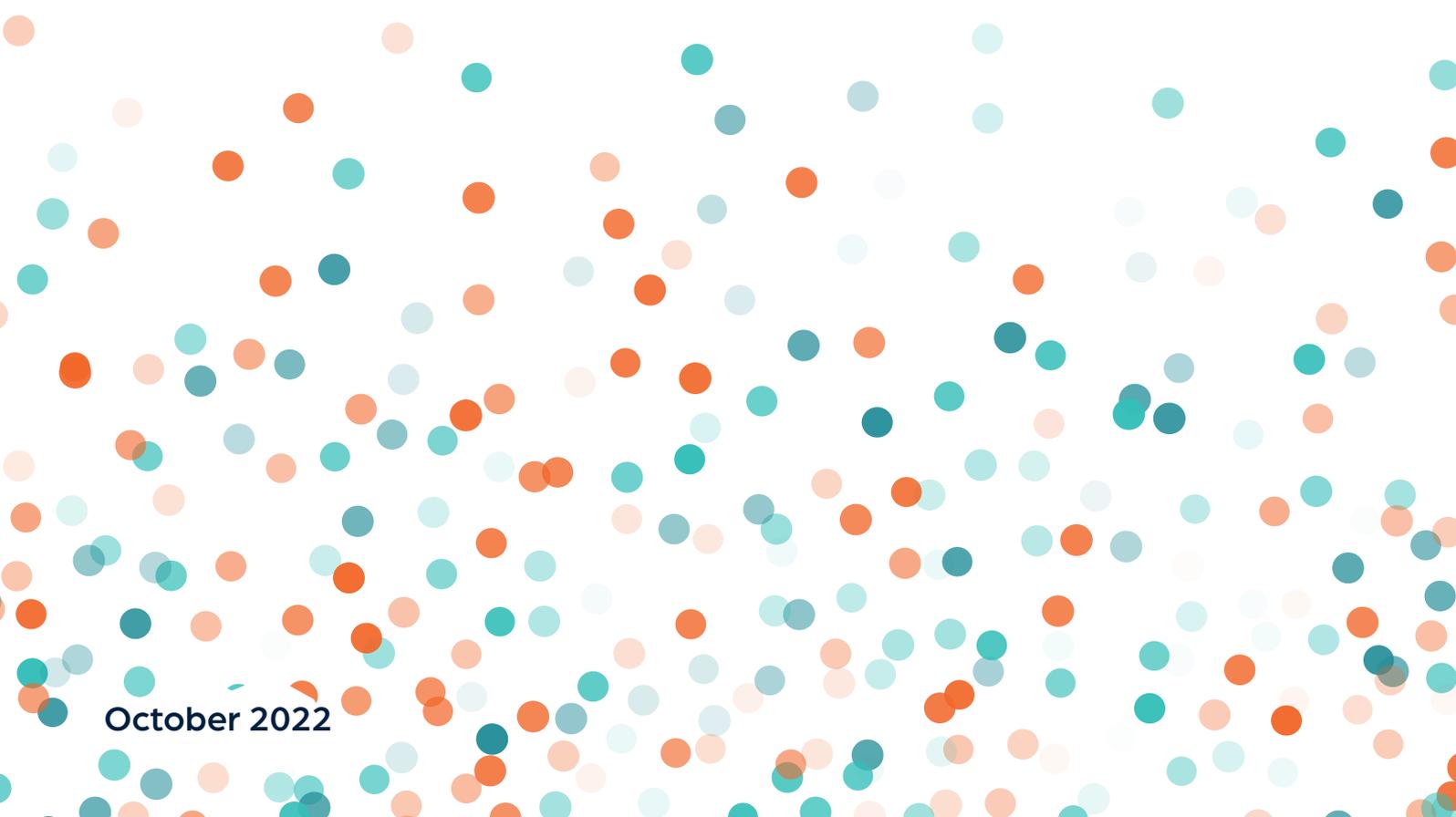


Migrants with Irregular Status in Europe

A DECADE OF COMPAS RESEARCH AND KNOWLEDGE-
EXCHANGE ON ACCESS TO RIGHTS AND SERVICES IN
EUROPEAN, NATIONAL AND LOCAL POLICIES (2012 – 2022)

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Introduction

A series of studies at [COMPAS](#), University of Oxford, has explored the law, policy and practice across Europe in relation to the rights of migrants with irregular immigration status. Focusing on access to welfare services and to 'safe-reporting' for victims of crime, it has explored the reasons behind a complex pattern of entitlements and restrictions, at European, national and local level; and the tensions in multi-level governance that can emerge where national, regional and municipal priorities in this respect do not coincide.

This briefing summarises the key findings of that work, citing the reports and journal articles that have explored their implications. The methodology for the studies, and the research literature on which they draw, can be found in those publications.

This briefing also highlights the engagement with European and North American policy makers to which the research has led, under the auspices of COMPAS' knowledge-exchange arm, the [Global Exchange on Migration and Diversity](#).

Context

Migrants in Europe have restricted entitlements to access public services, the pattern of restrictions depending on their immigration status. People with irregular status (including those who entered without authorisation or remained after their permission to stay expired) have the fewest entitlements and are among the most vulnerable among Europe's residents. Exclusion from mainstream services is the norm.

National policy frameworks restricting access to services need to be seen in context. The presence of migrants with irregular status is a structural phenomenon not a temporary challenge that can be addressed through enforcement alone. Demographic pressures, global economic disparities, sectoral demands of European labour markets for cheap labour and geo-political conflicts are among the causes of irregular migration and of regular migrants choosing to remain without authorisation (Spencer and Triandafyllidou 2020; 2022). Enforcement action against those with irregular status is not notably effective for many reasons including logistical barriers to removal, and enforcement measures can prove counterproductive. The consequence is the continuing presence of irregular migrants in Europe.

Governments have responded to the enforcement gap by using restrictions on welfare provision to remove any perceived incentive to migrate or remain without permission. Those restrictions, however, have negative consequences that impact on other government commitments such as international human rights standards, social and economic policy objectives and meeting the sectoral need for migrant labour – requiring governments to implement mitigating welfare measures. At a time of retrenchment of European welfare states, of negative perceptions of the deservingness of migrants to welfare support, and an emphasis in policy on enforcement action, we thus see European governments granting a level of access to public services to these migrants: exclusion and inclusion side by side. The pursuit of one policy objective is here constrained by the need simultaneously to pursue other policy goals. Thus the formal exclusion of irregular migrants is paradoxically joined by their formal inclusion – if only to a minimal extent in most cases (Spencer 2020).

While immigration control is largely a national competence, welfare policies are a shared responsibility in which regional and local authorities, to varying degrees across Europe, have a level of autonomy in how they interpret and administer national policies. It is at the local level where the impact of exclusion is most keenly felt. While some sub-state authorities have shown little inclination to be inclusive of these migrants, in other cases they provide greater access than national governments require or in some cases allow. This can lead to tensions in multilevel migration governance and to apparent contradictions between law, policy and practice.

The central questions which a series of studies at COMPAS has explored are:

- When is it legitimate to grant migrants fewer social rights than other residents as a condition of their immigration status?
- Why do European governments restrict but also allow a level of access to services for migrants with irregular status?
- What is the actual pattern of entitlements in national laws to healthcare and education across the European Union, and what may explain it?
- What role does the European Union play in influencing the level of access to services at national and local level?
- Do some European cities take a more inclusive approach, providing more services than required by national law, and if so – what do they provide, why, and how?
- What are the implications of this for the relationship between national and local tiers of government?
- Are there comparable practices in North America which throw light on evolving practices in Europe?

Tension between restrictions on rights and the equality principle

Equality has moral, economic and social benefits and the principle is enshrined in international and European human rights law. Exceptions are permitted but only where objectively justified by a competing policy objective. [Sarah Spencer](#) and [Jason Pobjoy](#) explored the extent to which, in law, governments can restrict migrants' rights as part of their right to manage their borders and when that capacity should be constrained by norms of equality and non-discrimination. Their question, 'on what grounds is it justified to exclude?' contrasted with the question more commonly found in the literature: 'on what grounds should migrants acquire equal rights?' (Spencer, 2014a).

The study (supported by ESRC core funding to COMPAS) mapped the restrictions in UK national law on migrants' rights to enjoy a series of civil and social rights and the rationales which had been given by government for those restrictions. It found that different categories of migrant are variously excluded, as a matter of domestic law, from the right to family reunion, free healthcare, education and social housing in a highly complex pattern of restrictions based on immigration status, nationality and length of residence.

A core theme that emerges is that the context for each decision on the allocation or denial of a right is conflicting policy objectives. A series of recurring themes emerged in the rationales that had been cited for restricting rights: immigration control (to deter arrival and encourage irregular migrants to leave); economic objectives (protection of the labour market and of public expenditure); and social policy objectives (addressing tensions arising from public attitudes towards migrants and their access to scarce resources such as social housing). The rationales were however not always spelt out and were poorly supported by evidence. There were also recurring themes in reasons given by the government for granting rights, including social policy objectives such as public health. Consideration of the equality implications of granting or restricting a right had, however, rarely been mentioned. Migrants have also been marginal to debates on equality law (Spencer, S. 2015a)

Pobjoy and Spencer argue that international and regional human rights law, and in particular provisions relating to non-discrimination, provide a structured framework – an operational yardstick – to consider the extent to which any differential treatment between citizens and migrants, or between different categories of migrants, is justified: in essence, where the power of the state to limit migrants' rights as part of immigration control should end and the principle of equality between individuals begin. While governments are under a series of conflicting pressures that may provide a reasonable and objective basis in law for differential treatment, it is necessary to set out explicitly the justification for those restrictions, and the evidence underpinning it, given the moral, social and economic consequences of inequality, and legal requirements in relation to the equality principle. Governments need to show that each restriction is a proportionate means of achieving a legitimate aim; a 'culture of justification' which would in turn

require effective tools to assess the impact of restrictions on equality of opportunity and outcomes (Spencer & Pobjoy 2011; Pobjoy & Spencer 2012).

Implications of restrictions on the rights of family migrants with regular status

A contribution towards addressing that evidence gap in relation to migrants with regular status was made by an international team led by [Caroline Oliver](#) into the implications of restrictions on the entitlements of family migrants in four countries: Germany, the Netherlands, Spain and the UK. The research (supported by the European Fund for the Integration of Third Country Nationals) found significant variations in the extent to which admissions-related restrictions on access to jobs, public services, welfare benefits and voting exist for family migrants across the four countries; that these were most significant in relation to welfare benefits, social housing, voting and post compulsory education (including access to language classes); and that there is a creeping escalation in conditionality of access to services and of complexity in the rules. It found a tension between increasing expectations towards the integration of family migrants and simultaneous restricting of their access to the services and benefits that facilitate participation in society. Where restrictions are substantial, there are indications that they do act as barriers to integration. Where rights are granted (such as relatively open access to the labour market) this alone is not sufficient to ensure access. A number of informal barriers impede the exercise of rights in practice (Oliver 2013).

Uneven geography of entitlements in national laws across EU

A study undertaken by Spencer and [Vanessa Hughes](#) (under the auspices of an Open Society Fellowship and ESRC core funding) mapped the differing entitlements, in national laws, to two core services, healthcare and education for children, across the (then) 28 Member States of the EU. The [report](#) on the findings (Spencer & Hughes 2015a) was accompanied by a separate [Annex](#) setting out the findings for each country in tabular form.

All EU Member States have ratified the principal UN human rights instruments which provide protection for social rights including health care and education. Except where migrants without legal residence are expressly excluded from such provisions, they share the protection they afford – but the extent to which access should be provided to a particular service is not explicit. The mapping revealed (2015) that there was a complex pattern of entitlements across the EU with a polarity between states granting minimum entitlements to irregular migrants and those allowing greater access to services.

In relation to healthcare, for instance, while there were six Member States (MS) in which irregular migrants were entitled only to emergency health care, there were ten States in which they were entitled to some primary and secondary care services, albeit nullified in some cases by a requirement to pay a significant part of the cost. Fifteen MS allowed access to screening for HIV and of them ten allowed access to treatment.

There remained 11 countries where irregular migrants were not entitled to screening or treatment for any infectious diseases.

The entitlements for children were often greater than for adults. In eight MS, for instance, children had the same entitlements to healthcare as children who were nationals of that country. In contrast, in five countries, children (unless unaccompanied in some cases) were entitled only to emergency care. In most but not all MS, children with irregular status were entitled to attend school.

While in some cases entitlements are explicitly provided for in law or regulations (as in 10 states in relation to the right to attend school) in other cases the entitlement is only implicit in a universal provision from which those with irregular status are not excluded. There are instances in recent years of access being further restricted in some states but also significant instances of legal entitlements being extended, as in the UK in 2012 in relation to treatment for HIV AIDS, and in Sweden in 2013 in relation to healthcare and education. European and domestic courts, NGOs and health professionals have contributed to that trend.

The differing timescale for the legal framework in each country, among other factors, limited the extent to which the pattern of entitlements could be explained, but it did not appear to correlate with potential explanatory factors such as the national wealth of a country, the size of its irregular migrant population, or whether irregular stay is a criminal (rather than administrative) offence. The study explored entitlements in law, not the range of barriers which can in practice limit access to the service (such as cost, and proof of address), other than the requirement in some states that service providers report service users with irregular status to the immigration authorities (Spencer & Hughes 2015a; Spencer & Hughes 2015b).

Italy exemplifying some broader European trends

Meanwhile, [Nicola Delvino](#) and Spencer conducted a deep-dive into the entitlements and restrictions on entitlements in the national law and policy of one country, Italy (supported by an Open Society Fellowship Action Grant). The aim was to explore in more depth the history, including the role of the courts and of regional and municipal authorities, in the pattern which emerged. The study explored access not only to healthcare and education but to shelter and accommodation, welfare payments, protection for victims of crime, and access to birth certificates and to marry.

It found that Italy's experience highlights developments that the wider study was identifying in other parts of Europe: the diverging responses of some regional and local authorities to national government policies and the significant tensions (and some litigation) to which that has given rise; the role of the courts in ensuring that the law conforms to domestic, constitutional and European legal standards; the lack of clarity in entitlements (notwithstanding government circulars intended to resolve it) and the role of health professionals and civil society in securing some inclusive policy outcomes. Italy also proved of particular interest because a period, post 1990,

in which rights were extended was followed by a greater focus on security and enforcement, culminating in criminalisation of irregular entry and stay and tighter restrictions on access to services. The resulting exclusion led in turn to social consequences that government, at national, regional and local levels, found it had to address. A series of measures to modify the impact of exclusionary measures were introduced, but a decision to de-criminalise irregular entry and stay has not yet been implemented (Delvino & Spencer 2014).

Diverging practices at municipal level

Municipalities across Europe have differing mandates, ranging from cities that are also federal states to small authorities with a more limited mandate. Municipalities also enjoy differing levels of autonomy from national governments so that their scope for policy responses that diverge from national policy frameworks vary. A shift in the balance of responsibility on migration related issues in recent years to sub-state tiers, has nevertheless widened the scope for policy divergence. In some cases that has facilitated an inclusive 'local turn' – municipalities developing their own distinct approaches, moving away from historically-rooted national integration policies. In relation to irregular migrants this has in some cases meant going beyond delivery of services that are required by, or in line with, national policy (Spencer 2020).

A key focus of study has been these diverging practices at the local level, particularly in Europe's larger cities. It revealed that in some European cities access is variously provided to a range of public services, in spite of and to a degree mitigating, restrictive national legal frameworks. These are, most commonly, access to shelter and longer term accommodation; legal advice (relating to regularisation and return); healthcare; school and pre-school education for children. Municipalities also take measures to reduce the practical and procedural barriers individuals can face in accessing services to which they are entitled. Some cities provide access to civic documentation such as birth certificates, or facilitate a means for victims of crime to report their experience to the police without being detained; and there is interest in exploring measures such as municipal identity cards for all residents as a means to facilitate access to some services regardless of status. These municipal measures denote an urban citizenship that attaches rights to the individual's residence in the city rather than to the 'legality' or length of their stay. There are instances where municipal practices have informed, or been adopted as, policy at the national level.

Municipalities provide these services directly or through external service providers, usually NGOs, which are funded to provide a service with, or separately from, a municipal service. Funding an NGO service is a particularly common practice in the areas of healthcare, shelter, and provision of legal advice. Provision in this way can reflect the expertise that the NGO brings, the greater confidence that migrants may have in approaching an NGO, and that this arms-length approach removes from the municipality any responsibility to report those with irregular status to the immigration authorities (Delvino 2017; Delvino & Spencer 2019a).

A separate study led by [Jonathan Price](#) (supported by the Open Society Foundation At Home in Europe programme) compared the approach of two cities faced with very different legal and policy frameworks, financial constraints, models of welfare state and patterns of migration: Berlin and Madrid. It identified the categories of migrant in need of services and welfare benefits, including irregular migrants; how support is (or is not) provided; and whether the municipal support systems had adapted to address the particular situation of residents subject to limitations on their access to welfare support. The study found that irregular migrants were excluded from the safety-net of non-contributory benefits in Spain while in Germany safety-net support was compromised by the implications for migrants of being reported to the immigration authorities. While irregular migrants were largely excluded from access to accommodation, in both cities winter shelters and support for those fleeing domestic violence was available, demonstrating that some safeguarding risks can trump the priority otherwise attached to welfare restrictions in the service of immigration control.

Where access to a service was permitted, the study found significant variations in practice within each city, including officials withholding information and using bureaucracy as a gatekeeping tool. Variations in practice reflected differing perceptions of deservingness, complex legal and policy frameworks, lack of staff training and, in Madrid, financial constraints. This imposed time consuming administrative requirements on those NGOs assisting migrants to secure support.

Attitudes. At the end of the day it's your personal influence, who you are as a person, the law is there and they shift it somewhat to look for solutions or they say 'we can't help' and leave the person there'. NGO worker, Madrid

Capacity to hold public authorities to account was significantly greater in Berlin than in Madrid, but appeared to have little impact on initial case decisions. For those migrants who fell through the gaps in safety net support the implications could be severe, including destitution. A cushion was provided for some by social and community networks, an insecure and unpredictable form of support that could also lead to safeguarding risks for vulnerable people. NGOs were in some cases funded to address the consequences of exclusion, for instance with temporary housing and subsistence support (Price & Spencer 2014).

Municipal reliance on NGO service providers to meet some of the needs of residents with an irregular status was also a key finding of the later [LoReMi project](#) (Local Responses to Migrants with Precarious Status: Frames, Strategies and Evolving Practices in Europe). NGOs can have greater expertise on migrants' circumstances and an ability to secure the trust of those who fear public authorities. NGOs can nevertheless lack secure long-term funding and the capacity to meet the level and range of needs for support. The project investigated the differing approaches of three city councils, Cardiff, Frankfurt and Vienna, to migrants with a precarious legal status: that is, those with an irregular status and those at risk of losing their temporary residence status. Despite the differing contexts of

the three cities, the study, conducted with research partners in Germany and Austria, found many common issues beyond a reliance on NGOs. The cities lack an agreed, corporate approach towards this vulnerable group of residents so that the responses of each council department towards them differs. The complexity of national regulations governing the migrants' entitlements to services means that neither staff nor migrants are clear which services they are allowed to access. Entitlements to services such as healthcare are undermined by individuals' fear that their contact details will be passed on to the immigration authorities because of the absence of data 'firewalls' preventing such transfers. Lack of access to legal advice and representation was found to be a factor leading to precarious status and in prolonging it because of errors and delays in applications for change of status. Women with precarious status face distinct vulnerabilities. There are examples of good practices in the municipalities' services, not least in their inclusive responses during the Covid pandemic, from which other cities can learn

Municipal activism on irregular migrants – the reasons explained

Research focused significantly on the reasons *why* municipalities provide services. The aim was to establish the reasons behind inclusion as a matter of policy, not simply the exercise of discretion of an individual service provider. Interviews and documentary evidence revealed, as expected, that part of the reasons given for municipal activism in this regard is to comply with domestic legal duties, such as responsibilities for child protection or to address homelessness, and to uphold European human rights legal standards. A broader concern for human rights, and humanitarian concern for all, also play a part.

What was striking, however, was the extent to which the exclusion of irregular migrants was perceived as undermining core municipal objectives such as the prevention of crime, protection of public health, community cohesion, and addressing exploitation in housing and employment, as well as the need to ensure the efficient administration of public services. Inclusion within public services was thus not simply or mainly to meet the needs of the irregular migrant population but to ensure that the municipality could meet its responsibilities towards other residents. Further reasons given included the professional ethics of their staff; to assuage public concern at visible manifestations of irregularity (such as street homelessness); and the implications of the public image of the city for tourism and business interests.

'The underlying reason why we are involved in these activities with irregular migrants is that we don't want trouble, social disorder For politicians in the city, though, the humanitarian reason for helping irregular migrants is the most important'. Dutch city official

Rather than simply ameliorate the most extreme manifestations of irregularity, some cities have a problem-solving approach, seeking to reduce irregularity through provision of legal advice to resolve the individuals' immigration status (Delvino & Spencer 2019a).

Policy frames

The reasons cited by policy makers for decisions do not give us definitive evidence on the factors that are driving policy but rather on how those reasons are framed. Agenda setting at the local level is shaped to an extent by political and institutional factors, but in particular by municipal policy makers' perception of the problems that they face, and of the role of the municipality in relation to them. Such framing is selective, highlighting aspects of a situation and binding the highlighted features into a coherent narrative that identifies what needs to change. Framing of a problem by national policy makers may differ from that at the local level (and between government departments with differing mandates) (Spencer 2018a).

'We are more concerned with cohesion than control.

While the migrants are living here we want them to learn our language and not to live separately from us.' Spanish regional official

Spencer and Delvino developed a typology of six policy frames used by municipal makers, categorised on the basis of the intended beneficiaries and the policy's stated aims: *a security frame* (the protection of city residents, including those with irregular status); *humanitarian frame* (concern for vulnerable individuals); *a human rights frame* (to protect fundamental rights); *deserving workers' frame* (deserving on the basis of contribution to the city); *socio-economic frame* (to avoid the economic and social harm caused by exclusion); and an *efficiency frame* (efficient and cost effective public administration). The typology is presented in tabular form, indicating which services are justified in those terms (Spencer & Delvino 2019b).

Children

Spencer looked further into policy makers' reasoning in relation to children, finding that perceptions of the deservingness of children relative to adults contribute to the uneven geography of entitlements across the EU. It is in relation to children that the logic of immigration control faces the greatest, competing, social and humanitarian imperatives at the national and the local level. That tension reflects the social construction of these children as both 'illegal' and vulnerable. Vulnerability, however, is only one of the criteria on which their greater deservingness was based. Deservingness is a moral register, in contrast to rights which have a formal legal standing. Judgement on relative deservingness to welfare support has been found by scholars to rest not only on perceptions of vulnerability and levels of need but on whether the individual is felt to be responsible for their situation, whether 'one of us,' on their attitudes, and on reciprocity.

The research into the rationales for granting entitlements to services at national and local level found that children with irregular status were considered more deserving than adults because of their vulnerability but also because they were not responsible for the decisions taken by their parents.

'Education is a basic human right. And it was not the children who decided to come here. It was their parents' decision.'

Ministerial advisor, Greece

They were, however, less deserving than other children because of their immigration status (not 'one of us'). Perceptions in relation to those two criteria of deservingness, level of need and responsibility, thus to an extent counter the negative perception of their irregular immigration status.

Policy makers more regularly cited ethical and humanitarian reasons to justify service provision for children, as well as legal duties, than they did in relation to adults. On the latter there was a stronger emphasis on the authority's broader policy objectives and efficient management of public services. There was reference, nevertheless, to the socio-economic implications of children growing up without access to education and other basic services if they were likely, in practice, to remain in the country (Spencer 2016a).

'It is not only better for the children, it is not a healthy situation where you have children going underground with their parents with no interaction outside the home and not developing their education. We don't want to have a child reach their teens completely unable to read or write... It would be an undesirable outcome.' National government official, Ireland

The mapping of national legal provisions on access to health care had found that entitlements for children are usually more extensive than for adults, particularly for those who are unaccompanied, but highly polarised nevertheless. While in eight EU Member States they are granted the same level of access as children who are citizens of that country, at the other end of the scale there are countries which only allow the minimal emergency care available to their parents. Access to school education is equally polarised, with further variation in whether attendance brings an entitlement to school meals or a leaving certificate. States with the most restrictive entitlements for children were found to be among those with relatively few irregular migrants and include some that had recently begun to review their approach (Spencer & Hughes 2015a; Spencer & Hughes 2015b). Restrictions on access to healthcare and education have been challenged with some success by regional and local authorities, in some countries.

Local perceptions of 'deservingness'

Local officials have some discretion in developing the approach which their municipality takes towards irregular migrants. Not all policies are discussed at the political level and where they are it is usually raised by officials rather than originating as a concern among elected representatives. Officials also have discretion in relation to individual cases and this was explored in a UK study led by Price (supported by the Nuffield Foundation). It focused on local authority practices in relation to children and families with 'no recourse to public funds.' While this restriction on accessing support from the welfare state applies to most migrants in the UK, it impacts most significantly on irregular migrants who are not entitled to work and can become destitute. The study, as in much of this work, explored the tension between two areas of policy, immigration control and welfare policy, but here focusing on children and in particular a provision in the Children Act 1989 (s17) that requires local authorities to safeguard and promote the welfare of any child 'in need'. Denying these families access to mainstream

welfare benefits while relying on local authorities to provide a safety net, albeit at a minimal level, effectively shifts the cost of supporting them from central to local government. The study provided evidence on the circumstances in which families were living before they asked local authorities for this support; the process through which their cases were assessed and the nature of any accommodation and subsistence payments received.

Significantly, the study found divergent practices across local authorities in the way in which individual family's cases were handled by staff. While some gave primacy to the needs of the child when deciding whether or not support should be given, others gave greater weight to the immigration status and credibility of the parents. Part of the context for these decisions was found to be the complexity of the legal provisions, and the cost to the authority of a decision to provide support at a time of significant constraints on local expenditure.

'Within the initial assessment it is very much needs led for myself. I like to keep it that way. I think when you look through the lens of immigration, that's when you start to be the gatekeeper and you start to label people as deserving or undeserving... I think that's not the purpose of an assessment of children in need'. Social Worker, UK

Three factors were, however, found to explain variations in practice between authorities: whether advocacy support for families was available in that area; whether the authority had a dedicated team of officials handling these cases; and the perspectives of caseworkers on the relative deservingness of this group of parents. In particular that focused on what was felt to be their poor immigration decisions, this being the context in which exclusion from services was felt to be appropriate. Other staff were more likely to focus on the needs of the child, as intended by s17, independently of their views on the merit of decisions parents had made (Price & Spencer 2015).

Safe-reporting of crime

A separate project on [safe reporting of crime](#) led by Delvino explored the law, policy and practices surrounding one particular area of interactions between migrants and public authorities: measures to enable victims and witnesses to report crime to law enforcement authorities without exposing themselves to immigration enforcement. The work (supported by the Open Society Initiative for Europe) looked at national and local 'firewall' measures to facilitate 'safe reporting' in the USA (Delvino 2019) and, through national experts, in four European countries: Belgium, Italy, Spain and the Netherlands. It assessed the legal and political "replicability" of relevant experiences from the USA in the different constitutional, legal and institutional settings in Europe.

In a [blog](#) summarising the findings overall, Delvino reports that the most common solution adopted in national laws to facilitate safe reporting is relief from immigration enforcement for victims of certain crimes, by issuing special visas or the suspension of immigration enforcement proceedings. 'Victim visas' are, however often restricted to limited circumstances, such as victims of trafficking; and in most cases in Europe are used as a law enforcement tool: victims cannot apply but

depend on prosecutors' discretion to request a visa. In contrast, in the USA, victims of a comprehensive list of qualifying crimes can apply for a 'U visa' – a measure that in the last decade has enabled at least 85,000 victims to find the confidence to cooperate with the police.

In other cases, safe reporting is operated through 'firewalls': measures preventing those responsible for receiving crime reports from communicating the details of victims to immigration enforcement authorities. Only the Netherlands has a national 'free in, free out' policy, but local municipalities have established strict firewalls between local police and national immigration enforcement in the USA: a 'don't ask, don't tell and/or don't enforce' approach. In North America and Europe, cities have adopted other non-firewall initiatives to support safe reporting, often in partnership with NGOs, such as facilitating access to 'victim visas', brokering contact with the police, and providing shelters for victims escaping abusive situations. While some countries and municipalities have thus taken proactive steps to ensure irregular migrant victims' access to justice, there were significant challenges for irregular migrants to report crimes in all of the countries studied.

Tensions in relationships with national governments

When governments selectively exclude categories of migrants from welfare protection they do so as a form of immigration control: to deter and remove an incentive to remain. Where access to services is permitted and requirements attached to access, individuals can be monitored pending removal. This selective access to welfare thus also contributes to immigration control.

Governments may, however, provide access to services to meet a different policy objective, such as protecting public health. Here providing access may run counter to the priorities of immigration control – an instance of the tensions and trade-offs seen in other areas of immigration policy. These tensions can equally be seen in the relationships between national and sub-state tiers of government where those authorities provide greater access to services for irregular migrants than national law provides (Spencer & Delvino 2019b).

Where the framing by national and local policy makers of the challenges posed by irregular migrants differ, national tiers may seek to resolve this by top-down policy coordination. Municipalities, however, may claim a degree of local autonomy to address the issue in accordance with their own perception of what needs to be done. The scope for local divergence differs across Europe: municipal tiers have differing mandates and levels of autonomy; and national rules on irregular migrants' access to services can differ not only in how restrictive they are but in how specifically those restrictions are defined.

The research found cases where institutional arrangements had facilitated negotiation between tiers of governance to resolve policy differences: multi-level governance arrangements finding a negotiated solution. Elsewhere, differing frames had led to a 'decoupling' of the relationships, with overt political disagreement and instances of litigation (as in the Netherlands

and Italy) to resolve the degree of autonomy a local or regional tier could exercise. A phase of disagreement could over time be resolved through a negotiated solution, or court judgement. In each case, local administrations were regularly supported by non-governmental actors concerned to ensure access to services (Spencer 2018a).

Shadow politics: provision below the radar

In migration policy making, inclusive policies are more likely to be found where a low visibility reform can be made, minimising the risk of blame for an unpopular decision: shadow politics in contrast to the sunshine politics of measures to restrict immigration. Spencer found, in relation to irregular migrants, that municipalities may find a low visibility means to provide access to a service so that government can overlook, or potentially be unaware of, the ways in which its rules have been stretched or circumvented. There were differing creative forms that this shadow politics could take: in the way in which decisions were taken and in the mode of provision. An authority could simply allow access for irregular migrants among other users (asking no questions on immigration status); or, where a targeted approach was needed, employ staff to work with irregular migrants but avoid drawing attention to it by having no policy, budget or debate. Where immigration status had to be recorded, officials could delay passing on the details of the service user to the immigration authorities. Provision could alternatively be made at arms-length through funding NGOs to deliver the service, distancing the authority from responsibility for it.

‘There is no policy. We have tried to be acknowledged but while everyone in the city administration knows the two of us and the work we are doing there is no visible recognition of it This is the biggest challenge in my job, acceptance and non-acceptance’. Danish city homelessness worker

Thus the form of multi-level governance that emerges is not only a consequence of differing framing of the issue by national and local authorities and of mechanisms for its resolution. Rather, the mode of governance in turn helps to explain the particular way in which authorities provide the service. The dynamic of multi-level-governance thus is itself one part of explaining the nature of local responses to the challenge that the presence of irregular migrants can present (Spencer 2018a).

National and local policy aims may nevertheless align

The tensions in the multi-level governance of this issue, and the use by municipalities of low visibility means of service provision, suggest that inclusive local responses are perceived, at national and local level, to run counter to national policy objectives. There is, however, some evidence to suggest that these divergent approaches are in fact more coherent than the tensions between them suggest.

Some municipal measures, notably the availability of shelter linked to provision of legal advice, facilitate the regularisation of immigration status, voluntary return and compliance with national return procedures, while other measures contribute

to shared social and economic objectives such as tackling domestic violence, expanding pre-school education and, through the provision of shelter, facilitate a supply of seasonal agricultural workers.

If the challenge facing immigration control is to find the right balance between effective law enforcement and practical toleration policies, that balance is perhaps emerging in complementary strategies of the national and local state. Rather than the local state acting autonomously, however, migration theory suggests that the national state may use the local state to extend its capacity to manage migration; shifting the institutional location of policy making to achieve its own outcomes while distancing itself from potential criticism of unpopular measures. Municipal activism would thus not represent a *loss* of national control but a *reinvention* of it at the local level.

That potential synergy between national and local policy objectives raises the question, however, why national governments do regularly challenge inclusive municipal measures. Spencer suggests there are four potential explanations.

First, notwithstanding that the semi-inclusion of irregular migrants is to an extent authorised by national governments and some municipal measures contribute toward government objectives, there is a fear that these measures may act as an incentive to migrants to come or remain with irregular status. Second, the fact that municipalities are challenged by national governments may reflect the primacy of immigration control objectives over social and employment policies, and of Interior Ministries over less powerful domestic policy departments. Third, the primacy given by municipalities to the need to regulate their local population in its entirety, through inclusive measures, may for national governments be a lower priority than that of immigration control because of the high political salience of that issue at the national level. A significant irregular foreign population risks being seen by the public as an operational failure and challenge to state sovereignty that cannot be ignored. Finally, government challenges may be more symbolic than substantive: a desire to be *seen* to be giving primacy to immigration control while less publicly acknowledging the need for a level of inclusion. Further investigation is needed to establish which of these drivers of government push-back may apply – not least whether there is any justification for the fear that migrants are attracted by the service provision on offer rather than choosing to come or remain for other reasons (Spencer 2020a).

How much access should be provided?

Where national and local tiers do agree on the need to deliver a level of services to people with irregular status the question arises how far they should go. If irregular migrants are not to enjoy the same level of access to welfare services as other migrants or indeed citizens, what level of inclusion is appropriate? That decision will need to take account not only of the need to protect the rights of irregular migrants and the impact of their exclusion at the local level but also of the impact of inclusive measures on a legitimate policy aim, the

management of migration. Thus, understanding the impact of municipal measures on national policy objectives will be fundamental to resolving what the extent of irregular migrants' access to services should be (Pobjoy and Spencer 2012; Spencer 2020a).

Constraints and opportunities in EU law and policy

It has not only been national legal frameworks that have constrained the capacity of cities to respond effectively to irregular migrants. Delvino explored the EU legal and policy framework to identify opportunities and limitations in EU law and policy in relation to the inclusion of irregular migrants in municipal services. The context includes the low return rates through enforcement action of irregular migrants from EU Member States and the population of non-removable migrants whose return is recognised not to be a viable option.

EU policies are nevertheless based on the general assumption that irregular migrants should not be present in European cities and will be returned to their countries of origin or regularised. Focusing on policies overseen by DG Home, on the regulatory framework governing funding opportunities, and on EU policies in the social domain, the study considered ways in which EU policy could be adapted to enable municipalities to respond more effectively to the presence of irregular migrants in their area.

Delvino found that, while the overarching framework of law and policy was one of exclusion, emphasising enforcement, the EU framework does occasionally acknowledge the need to tackle the social dimension of irregular migration, and the fundamental rights of irregular migrants, as in the Returns and Victims Directives. However, it tends to delegate the detail of implementation to Member States. Similarly, regulations on funding do offer opportunities to finance social assistance or integration measures for some categories of irregular migrant but this is often disregarded by the national programmes of Member States using those funds. While there are occasions when the specific vulnerabilities of irregular migrants, such as those who are homeless or children, are mentioned in policy priorities, elsewhere only migrants with regular status are considered. Nevertheless it is often 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 that could foster 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.

Space for agreement between EU and local authorities

The study concluded that, against a general legislative setup that excludes irregular migrants, EU law and policy offer spaces for inclusion in a number of instances. EU institutions may indeed at times share the view of local authorities on the need to include irregular migrants within service provision. Rather than the responsibility of those institutions however, limitations and exclusions are often attributable to national positions, and

national implementation. This suggests that there are spaces for common understanding between the supranational level of the EU and the sub-state level of municipalities. EU instances of openness towards inclusion of migrants with irregular status are, nevertheless, limited in scope, and EU policies and rules remain ambiguous vis-à-vis their situation (Delvino 2018).

Counter-trend to 'Fortress Europe'

The study of both EU policies and national legislations in Europe responding to the presence of irregular migrants in Europe allowed Delvino to review their evolution (Delvino 2020). Besides the development of the EU immigration acquis, it explored national developments in policy domains other than immigration legislation, including criminal law and social policies, aimed at marginalising irregular migrants to encourage their departure. The paper described how the legal and policy responses at EU and Member State level have evolved around a predominantly 'exclusionary approach' towards irregularly-staying migrants that has contributed to building 'Fortress Europe'. However, it also showed that, as exclusionary policies have not succeeded in their final goal of ending the presence of irregular migrants, European countries have partially re-thought their approach to take account of that presence and the social needs arising from it. Against an over-arching, continuing exclusionary focus in law and policy, the analysis identified a more recent counter-trend of policies in Europe slowly but increasingly showing instances of inclusion of irregular migrants, such as instances of de-criminalisation of irregular migration, extension of access to services, and victim support for migrants with irregular status (Delvino 2020).

Responding to COVID-19

That trend has been evident in national responses to COVID-19, the subject of research by [Marie Mallet-Garcia](#) and Delvino, who reviewed national and local responses in Europe during the pandemic. They report that the pandemic highlighted old and new challenges for national and local authorities, extending beyond the public health implications to impacts on agricultural production, destitution, homelessness and voluntary returns, impacts exacerbated by digital exclusion. National governments had variously taken measures to increase access to healthcare, welfare benefits and shelter, to reduce detention and increase access to regularisation of status; in turn facilitating more inclusive approaches by cities which are now exploring ways in which they can maintain that greater level of provision (Mallet-Garcia & Delvino 2020).

Knowledge exchange with policy makers

Prior to Spencer initiating the study of policy responses to irregular migrants in 2012, European cities had not come together to discuss this aspect of their work, in contrast to regular engagement in city networks on integration of regular migrants. There was little visibility of service provision and political sensitivities inhibited open discussion.

Access to city officials for the initial research was secured through the [Migration and Integration Working Group](#) of EURO-CITIES, the network of Europe's larger cities. The research provided an opportunity for the cities in the Working Group

to discuss the topic for the first time, at their meeting in Riga in 2013 and subsequently at a workshop at their *Integrating Cities* conference in Tampere later that year at which some initial research findings on city practices and rationales was presented (Spencer 2013). The following year Barcelona offered to co-host a two day [roundtable](#) with COMPAS, engaging 11 cities from eight countries and legal experts, to facilitate a longer discussion. The [report](#) of the meeting notes the conclusion that a more extended initiative was needed to share learning and to raise awareness of, the ways in which cities have responded to the challenges this poses.

In order to facilitate that dialogue, COMPAS (under the auspices of its knowledge-exchange arm, the Global Exchange on Migration and Diversity), secured funding (from the Open Society Initiative for Europe) for a two-year knowledge exchange project, the [City Initiative on Migrants with Irregular Status in Europe \(C-MISE\)](#).

C-MISE, in its first phase (2017– 2019) supported a working group of 11 European cities, meeting over a two year period, to:

- Build a stronger body of evidence on city practices in relation to migrants with irregular immigration status
- Share learning on policy and practices in relation to service provision to adults and children
- Develop and disseminate guidance material on key areas of service provision, including a short video, relevant to municipalities across Europe
- Develop a shared, city perspective on ways in which irregular migrants could be mainstreamed into EU policy agendas

The working group, which had its first meeting in Utrecht, in June 2017, was comprised of cities from ten European countries: Athens, Barcelona, Frankfurt, Ghent, Gothenburg, Lisbon, Oslo, Stockholm and Utrecht (Chair), with Helsinki and Zurich as Associate members. The body of evidence secured during that period enabled C-MISE to produce [guidance](#) for municipalities across Europe (Delvino & Spencer 2019b), with an executive summary in six languages, and a short documentary video: [‘Irregular migrants in European cities: How to respond?’](#) with five short clips from it on individual cities: Amsterdam, Barcelona, Frankfurt, Ghent and Utrecht. These outputs have been widely circulated including by the Council of Europe’s Congress on Regional and Local Authorities (CRLA 2019) and the Intercultural Cities network. The engagement continues in C-MISE II with a wider range of cities. The functions and impact of the C-MISE network has been analysed by Spencer (Spencer 2022).

There has been a number of further ways in which the research team has engaged with policy makers to share the findings and their implications. These include presentations and briefings for city policy makers (Spencer 2013), for those engaged in crime prevention (Spencer 2014b) and with EU policy makers (Spencer 2016b), as well as further research and engagement by Delvino for OHCHR on [healthcare](#) (OHCHR 2019).

In 2018 Spencer and the city chair of C-MISE, Jan Braat

(Utrecht), led a webinar for the Canadian based global network of cities, Cities of Migration: [Inclusion of Migrants with Irregular Status: a Role for Cities](#). The issue was used as a Cities of Migration ‘Building Inclusive Cities’ Case Study, supplemented by examples from European and North American cities (Spencer 2018b); was highlighted in their ‘Review of Good Ideas’ in January of that year ([How is your city responding to irregular migrants?](#)) and again in [June](#).

The implications of the research findings on safe-reporting of crime were presented at a round table in Brussels in 2019 at which US and European stakeholders, including representatives of national governments, EU institutions, local authorities, law enforcement, academia and civil society, discussed the promising practices that had emerged and their potential of replication. In March 2020 Delvino (with funding from Research England’s Strategic Priorities Fund) organised a further roundtable between the European Commission (DG JUST and DG HOME), the experts involved in the safe reporting project and Brussels-based NGOs to discuss drafting of the a new strategy on victims’ rights for the EU, including how the findings of the safe reporting project could support the inclusion of victims with irregular migration status. Citing the research (S10, footnote 74) the [EU Strategy on Victims’ Rights \(2020–2024\)](#) that emerged commits the European Commission to explore legislative proposals by 2022 on access to support for irregular migrants who are victims of crime; and urges EU Member States ‘to ensure that all victims, including migrant victims have access to justice independently of their residence status’. The impact of the knowledge exchange and the research on which it was based was recognised in the researchers being given [two awards](#) in 2021.

Contradictions in current policies are unsustainable

COMPAS devoted its annual Autumn Academy symposium to [‘Strategic Approaches to Migrants with Irregular Status in Europe’](#) in 2018, (supported by the Social Change Initiative), with background papers summarising key contextual and policy issues. A [report](#) on the discussions was published along with [video interviews](#) with presenters /and a paper highlighting what was learnt from the four days of discussion: [What did we learn?](#)

‘The contradictions in current policies towards irregular migrants are unsustainable, but there are some indications that this is at last being recognised.’ Autumn Academy 2018: ‘What did we learn?’

The discussions highlighted the conflicting interests and priorities within states in relation to managing irregular migration and that the contradictions in current policies are unsustainable, but found some indications that this is at last been recognised in dialogue at European and international level. The current narrative on ‘illegal’ immigration is, however, counterproductive for constructive policy dialogue. The background papers and presentations inspired an edited collection on evolving conceptual and policy challenges in the field (Spencer & Triandafyllidou 2020).

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CITY INITIATIVE ON MIGRANTS WITH IRREGULAR STATUS IN EUROPE (C-MISE)

The City Initiative on Migrants with Irregular Status in Europe (C-MISE) is a knowledge-exchange programme supporting European cities in sharing knowledge on city practices and policies responding to the presence of irregular migrants in their territory. C-MISE is facilitated by researchers at the Global Exchange on Migration and Diversity at COMPAS, University of Oxford, is chaired by the City of Utrecht, and partners with the Eurocities Working Group on Migration and Integration. It is informed by extensive research carried out at COMPAS before and during the project, on national, regional and municipal policy and practice in this field.

www.cmise.web.ox.ac.uk

THE GLOBAL EXCHANGE ON MIGRATION AND DIVERSITY

The Global Exchange on Migration and Diversity is an ambitious initiative at the Centre on Migration, Policy and Society (COMPAS), University of Oxford, opening up opportunities for knowledge exchange and longer term collaboration between those working in the migration field.

www.compas.ox.ac.uk/global-exchange

ABOUT

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