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Granting Rights through Illegalisation: EU Citizens' Contested Entitlements, Actors' Logics and Policy Inconsistency in Belgium

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Although Member states have increasingly relied on welfare policies to control intra-EU migration in the last decade, they often grant additional social rights to EU citizens who do not comply with residency requirements set by EU law, revealing a gap between declared restrictive aims and actual inclusive measures. Based on document analysis and semi-structured interviews in Belgium, this article analyses the interests and logics of the plurality of institutional and civil society actors on the welfare-EU migration nexus, suggesting that policy inconsistency resulted from the struggle of these – conflictive - logics. In doing so, the paper also reveals how the category of 'illegal EU migrants' has been institutionally produced 'from below', with healthcare providers, welfare bureaucracies and pro-immigrant organisations – rather than 'the State' - taking the lead in that process.

EU citizens are deemed to have extensive residency and social rights when compared to other non-EU migrant groups (Ruhs 2015). According to Directive 2004/38/EC (the so-called Citizenship Directive), all EU citizens have the right to enjoy freedom of movement within the Union and equal treatment with the nationals of a host Member state (MS). However, after an initial period of stay of three months, during which the host country is not obliged to grant social assistance to those EU citizens who do not qualify as workers, only the right to entry and exit remain unconditional for everyone. On the contrary, the right to continuous residence and to access welfare and healthcare benefits become conditional on regular economic activity (Bauböck 2011).

Awareness that EU citizenship was designated primarily as a tool to facilitate workers' mobility in the single market is by no means new. Free movement of EU

citizens has always been conditional upon working status, structuring a hierarchy of mobility-related deservingness to which a stratified framework of social rights is attached. As a result of this, EU migrants' residency and social rights are potentially precarious, particularly in times of permanent austerity and significant unemployment. Since the early 2010s, in fact, several MSs have invoked and even introduced restrictions concerning EU migrants' access to social benefits. These measures have targeted in particular 'unwanted EU migrants', that is, those EU citizens who do not qualify as workers and thus may constitute a welfare burden for a host MS (Heindlmaier and Blauberger 2017; Amelina et al. 2020).

Regardless of declared intentions, however, MSs often guarantee access to social rights for 'unwanted EU migrants', suggesting the existence of a gap between restrictive policy aims and actual inclusive measures (Lahav and Guiraudon 2006). In the healthcare domain, in particular, several MSs guarantee more than urgent care to EU migrants who neither fulfil the conditions for statutory healthcare coverage in a host MS nor are insured abroad, including Belgium, Greece, Italy, the Netherlands, Poland, Portugal, Spain and Sweden (Lhernould et al. 2010; Author A).

While the transposition scholarship has extensively addressed the issue of compliance of MSs to EU law (Vollaard and Sindbjerg Martinsen 2014), policy inconsistency concerning EU migrants' social rights within countries, i.e. between MSs' declared goals and actual measures, has received little attention so far. By focusing on the case of Belgium, this article explores the apparent contradiction that exists between proclaimed restrictive aims and inclusive social assistance measures for EU migrants with precarious residency status. This category refers to those EU migrants who do not fulfil yet/anymore the conditions for 'lawful residence' according to the Citizenship Directive. To do so, it shades light on the interests and logics of the multiple

institutional and civil society actors participating in the field, suggesting that it is in the struggle of these claims - both in actors' discourses and actual courtrooms – that an explanation of policy inconsistency can be found. As it will be detailed in the following sections, the Belgian system features a puzzling complexity of actors participating in the definition and provision of social assistance benefits for EU migrants with precarious residency status, including the federal government, sickness funds, healthcare providers, welfare bureaucracies and pro-immigrant organisations. Therefore, it constitutes an appropriate case for the research purpose, allowing for the analysis of different actors' claims in the welfare-EU migration arena.

Moreover, it appears a representative case of policy inconsistency. Among the MSs vocally calling for stricter controls on EU migration, Belgium stands out as having implemented various restrictive initiatives raising the attention of a vast audience, including the EU Commission, politicians and media of several home MSs (Caldarini 2016; Lafleur and Stanek 2017; Mantu 2017). At the same time, however, it guarantees to EU migrants with precarious residency status access to *aide médicale urgente* (AMU). AMU is a state-funded social assistance measure that covers the costs of an extended basket of health services for non-EU migrants with irregular status and EU migrants with precarious residency status, for which the federal state assumes the role of a sickness fund (Lhernould et al. 2010).

In other words, EU migrants who should not qualify for social assistance in Belgium according to the Citizenship Directive are nevertheless entitled to additional benefits than EU law requires. How and why can this inclusive measure coexist with the country's proclaimed objective of stopping 'unwanted EU migration' through welfare? As the following sections will indicate, this apparent contradiction resulted from a judicial struggle promoted by healthcare providers and pro-immigrant organisations

against a measure adopted by the federal government to restrict social assistance rights for this EU migrant group. At the end of this struggle, the Constitutional Court recognised EU migrants with precarious residency status as owners of the right to AMU. Yet, it did so by acknowledging their 'deportability', that is, by turning them into 'illegal EU migrants'.

In analysing this process, the paper aims at contributing to the debates on policy inconsistency and migrant 'illegality'. On the one hand, it engages in the discussion on the existence of potential gaps between declared restrictive aims and formal inclusive measures by shifting the focus from immigration policies and international migration to welfare policies and EU migration. On the other hand, it contributes to the debate on 'migrant illegality', showing that it is not only 'the State' and its immigration policies that produce 'illegal (EU) migrants'. Rather, a plurality of institutional and civil society actors, from different logics and in pursuing different goals, may contribute to - and even claim - its institutionalisation 'from below'.

EU Citizenship and Social Rights: Contestation, Inconsistency and Deportability in the Union

Freedom of movement is core to EU citizenship: without movement, there would be no need for supranational laws to regulate EU migrants' social rights in the territory of another MS. According to the Citizenship Directive, all EU migrants have the right to move and stay in another MS for at least three months, subject only to the condition of not posing a threat to public policy, public security, or public health. During this period, the host MS is not obliged to grant social assistance benefits to those EU migrants who do not qualify as workers (Article 24, Directive 2004/38/EC). After three months, EU migrant workers retain their residency and social rights in the host MS on the same conditions as nationals of that MS. If they do not qualify as workers, they may reside in

the host MS provided that they have 'sufficient economic resources for themselves and their family members not to become a burden on the social assistance system of the host Member State, and have comprehensive sickness insurance cover' (Article 7, Directive 2004/38/EC). After five years of 'lawful residence' in another MS, EU migrants are unconditionally entitled to all rights accruing to nationals of that country.

As 'lawful residence' is the precondition for welfare entitlements, the theoretical debate on EU migrants' social rights has focused on the ways in which this criterion is regulated by supranational laws, interpreted by the Court of Justice of the European Union, and implemented by MSs (Martinsen and Vollaard 2014; Thym 2015; Amelina et al. 2020). In doing so, scholars have usually referred to 'workers', 'job-seekers', 'students' and 'economically inactive EU citizens' to assess and compare EU migrants' residency and social rights in a host MS, assuming (legal) administrative categories as a fact rather than contingent and reversible statuses (Maas 2009). In addition, as mentioned above, this debate has largely focused on MSs' restrictions in EU migrants' social rights (Heindlmaier and Blauberger 2017; Mantu and Minderhoud 2017; Martinsen and Thierry 2019; Amelina et al. 2020), paying less attention to existing opposite dynamics and internal contradictions between MSs' declared goals and actual measures.

Overlooked by this scholarship, policy inconsistency has been a key topic for international migration scholars since the early 1990s (Cornelius, Martin and Hollifield 1994). Dealing with gaps between States' attempts of stopping irregular migration and the presence of migrants with irregular status entitled to (limited but important) social rights in destination countries, research has highlighted the existence of significant contradictions in this domain (Chauvin and Garcés-Mascareñas 2012; 2014).

According to this scholarship, policy inconsistency may result from power struggles taking shape along the different dimensions of the multi-level governance of the welfare-migration nexus. On the vertical axis, national governments' priority of migration control may conflict with sub-national administrations' imperatives towards inclusion, leading to 'decoupling' in policy framing and responses between governments at the local, regional and national levels (Scholten 2013; Scholten and van Ostaijen 2018). On the horizontal axis, policy priorities may conflict due differences in the logics and goals between immigration authorities and national administrations responsible for social policy domains, such as healthcare or education (Portes, Light, and Fernández-Kelly 2009; Spencer 2016).

Next to conflicts between distinct tiers of government, several studies have emphasised the fundamental role of other institutional and civil society actors in promoting migrants' social rights against restrictive frameworks, including professional and pro-immigrants organisations, welfare bureaucracies and courts (Guiraudon 2002; van der Leun 2006; Castañeda 2013; Ambrosini and van der Leun 2015). As research suggests, these actors often rely on multiple venues to contribute to the formal inclusion of migrants with precarious status into the society and its welfare institutions (e.g. mobilising the public opinion, judicialising the issue). By addressing the ways in which these actors challenge existing articulations of citizenship beyond 'legal membership', these studies highlight the key role of these actors in sustaining and giving visibility to migrants with precarious status as citizens, that is, as political claimants of rights (van Baar 2017).

Relying on the literature on irregular migration to understand policy inconsistency in relation to EU citizens' social rights may appear striking at first sight. EU citizens enjoying freedom of movement are deemed not to be 'illegal' within the

Union. As De Genova (2002, 439) notes, in fact, 'illegality is the product of immigration laws'. By creating different migrant categories to differentiate citizens from non-citizens, and developing an entire apparatus of control centred on the practice of deportation, immigration laws produce 'illegal migrants' to ensure a cheap and flexible workforce in destination countries (De Genova 2002; Calavita 2005). From this perspective, '"Illegality" (much like citizenship) is a juridical status that entails a social relation to the state', it 'is a pre-eminently political identity' (De Genova 2002, 422).

Legally speaking, there is no legislation that formally stipulates the existence of this status in the case of EU migrants. However, a debate is emerging on their 'deportability'. This concept refers to the possibility – rather than the concrete event - of being removed from the space of the nation-state (De Genova 2002, 439; Paoletti 2010). Those individuals who could be - but who are not necessarily – deported are rendered 'illegal': it is the threat of deportation that sustains precariousness of status and of rights. Therefore, 'deportability' – regardless of actual deportation - represents the dividing line between citizens and non-citizens: as various rights that were traditionally associated with citizenship have been extended to non-citizens, the certainty of not being deportable remains one of the few distinctive signs of citizenship status (Lafleur and Mescoli 2018, 484).

In the case of EU citizens, for instance, Kate Hepworth (2012) analyses the construction of Romanian Roma as 'abject European citizens' in Italy, a process that occurred not only through the act of expulsion, but through the condition of deportability induced by the threat of expulsion. Likewise, Liz Fakete (2014) identifies similar patterns of State-sponsored practices of removal of Roma communities in Southern, Eastern and Western Europe. Shifting the focus to Southern EU migrants, Jean-Michel Lafleur and Elsa Mescoli (2018) address the experiences of those Italian

migrants who received a deportation order after applying for welfare benefits in Belgium, but who were technically not-deportable also due to contestations by Italian politicians and media.

Therefore, if we acknowledge the 'deportability' of EU migrants, then the essence of EU citizenship, and the idea of a core difference between EU and non-EU citizens, seem to fall apart. This calls for a critical analysis of the process by which the law and the welfare state interplay to produce 'illegal EU citizens' and the actors participating in it.

Methods

The data presented in this article derives from document analysis and face-to-face, semi-structured interviews conducted with key field actors in Belgium. Documents analysed include legislative texts, policy documents and administrative guidelines issued at the federal level in the period 2000-2019. They also include publically-available documents issued by sickness funds and civil society organisations that clarify criteria and procedures regulating EU citizens' access to social assistance benefits (and AMU in particular), as well as relevant judgments of the Constitutional Court, which provided detailed information on field actors' positioning and claims on this issue.

Eighteen semi-structured interviews were conducted between February and May 2019. Using different entry points in the field, such as immigrant organisations and the author's academic network in Belgium, face-to-face interviews were conducted with four representatives of CAAMI (*Caisse auxiliaire d'assurance maladie-invalidité*, the Belgian sickness fund responsible for the coordination of social security systems across MSs and for the reimbursement of health treatments in the framework of AMU), twelve welfare bureaucrats in charge of assessing migrants' eligibility to AMU at six CPAS (*Centre Publique d'Accion Sociale*, the welfare offices in Belgium), and two

representatives of pro-immigrant organisations (indicated by 'PIO' next to interview excerpts) concerned with social rights issues in general, and healthcare entitlements in particular. Therefore, this article takes on the perspective of the institutional and civil society actors that participate in the regulation, financing and provision of AMU, and not that of EU migrants themselves.

The geographical area in which interviews were conducted includes six Belgian municipalities: two in Flanders (indicated by 'F.1' or 'F.2' next to interview excerpts), two in Wallonia (indicated by 'W.1' or 'W.2') and two in Brussels-Capital region (indicated by 'B.1' or 'B.2'). When inviting actors to participate in the research, a consent form was send to thoroughly explain them the aim of the research, timing, techniques and the way personal data would have been treated anonymously.

These primary and secondary data were coded and analysed by themes to compare the narratives, positioning and claims of the multiple institutional and civil society actors operating in the field, paying particular attention to actors' different framings of 'illegal EU citizens' and rationales for excluding/including them as AMU beneficiaries.

Throughout the ensuing text, the term 'illegal' between quotes will be consistently deployed as a general analytic practice on my part, in order to problematise the ways in which actors' discourses stressed the 'deportability' of EU migrants with precarious residency status, and thus contributed to the construction of 'illegal EU migrants' from below.

Actors' Logics in the Belgian Healthcare System: an Institutional Map

Entitlement to healthcare in Belgium is based on the principle of social insurance with no selection of risk: it depends on people's actual or past professional activity, and sickness funds cannot discriminate people according to their health status. People who

cannot be insured in a sickness fund and who lack sufficient economic resources, however, can apply for state-funded non-contributory social assistance benefits (social integration income). When it comes to migrants, however, residency status represents an additional criterion to be evaluated in the process of granting such benefits.

For what specifically concerns EU migrants, those residing in the country for more than three months and less than five years according to the Citizenship Directive but who do not have sufficient resources to cover the cost of treatments they need may be granted a social aid (*aide médicale*). Nevertheless, when residency conditions are not fulfilled yet (EU migrants pending for a decision about their residency application) or not fulfilled anymore (when the residency application is rejected or when the residency right is removed), EU migrants can be eligible for AMU.

Introduced in 1996 for non-EU migrants with irregular status (Royal Decree 12 December 1996), this means-tested social assistance measure grants the person almost the same healthcare coverage as Belgian nationals, including any preventive and curative care, delivered either in hospital or ambulatory settings, as well as drug prescription. In procedural terms, welfare bureaucrats at CPAS verify applicants' compliance with AMU eligibility criteria (no lawful residence; lack of sufficient economic resources; lack of health insurance abroad). If the person is declared eligible for AMU, the federal government will reimburse hospitals and health professionals for the treatment provided via the CAAMI. If not, she/he will have to pay the full cost of the treatment received.

Therefore, EU migrants who should not qualify for social assistance according to the Citizenship Directive, and who have been vocally targeted by the federal government's restrictive measures in the last decade, are nevertheless entitled to additional social assistance schemes than EU law requires. As mentioned before, this

apparent contradiction results from a judicial struggle that took place between 2012 and 2014, confronting the multiple institutional and civil society actors directly involved in this field - i.e. the federal government, sickness funds and healthcare providers, welfare bureaucracies and pro-immigrant organisations – whose claims and logics for action are analysed in the following sections.

Federal Government: Immigration Control in a Closed Welfare System

Limiting social rights according to immigration status represents a key tool of post-entry migration control (Bommes and Geddes 2000; Ataç and Rosenberg 2018), by which national governments attempt preventing 'unwanted migrants' entering – or at least settling – in the country (van der Leun 2006).

While this topic has traditionally been analysed in relation to restrictions on the social rights of non-EU migrants, similar dynamics are increasingly taking shape in the case of Union citizens. As mentioned in the Introduction, this trend has become highly visible in Belgium, particularly when the 2008 Great Recession deployed its dramatic social consequences in concomitance with the lifting of transitional measures delaying the free admission of Central and Eastern EU workers. In this context, political elites have increasingly described EU migrants as competing downwards with native citizens and as 'welfare shoppers' (EMN 2012). As expressed in a deliberation of the Ministry for Social Integration issued in 2011 (Deliberation No 11/044 of June 7, 2011, 4-5),

> the Ministry for Social Integration is aware of the fact that, after obtaining their Annex 19 [certifying the application for residency for more than three months from a EU migrant], certain people go to CPAS and are granted social aid, [meaning that] they do not actually comply with the residency criteria they declare they do. […] Therefore, it is important that the Immigration Office could dispose of data from CPAS about social aid granted to these people in order to deny them the right to residence.

Accordingly, in the years 2009-2011 the federal government adopted several deliberations allowing the automatic exchange of information between welfare offices and the national Immigration Office to detect those EU citizens who did not qualify as workers but applied for social assistance benefits, to serve them with a deportation order (Lafleur and Stanek 2017). Then, on January 2012, a new provision was introduced in Law of July 8, 1976 regulating the activities of CPAS. Transposing Article 24 of the Citizenship Directive, the new measure provided that all EU migrants who did not qualify as workers had not right to social assistance for the first three months after the residency application (Article 12, Law of January 19, 2012). In detailing the restriction, the Ministry of Social Integration explicitly included AMU among the measures these EU migrants had to be excluded from (Ministry of Social Integration, Circular letter of March 28, 2012).

Brought to the Constitutional Court by health providers and pro-immigrant organisations, the federal government revealed a double yet converging rationale to justify the restriction concerning AMU. On the one hand, it called upon the first dimension of the welfare-migration nexus, interpreting the new measure as a tool to safeguard its welfare state's boundaries. Accordingly, it appealed to reasons of 'general interests' to guarantee equilibrium between EU migrants' residency rights and 'the need to preserve the general level of social protection in our territory', considering that EU citizens 'can benefit from the welfare state of their home country.' (Council of Ministries, justification to the amendment; Constitutional Court, sentence No. 95/2014, 13). In the government's perspective, social rights were thus deeply related to national sovereignty and societal membership, which demarcate the 'community of legitimate receives of welfare state benefits' (Geddes 2003, 150). Accordingly, it clearly invoked the relationship between the welfare state and its (contributing) members:

> Next to public order, public safety or public health [as provided by the Citizenship Directive], another interest of MSs should be considered, that is, the possibility to finance their welfare regimes: due to migration inflows, a disequilibrium could appear between the degree at which certain people contribute in the financing of the welfare state and the degree at which certain people benefit from the advantages of this system (Council of Ministries, justification to the amendment; Constitutional Court, sentence No. 95/2014, 43).

On the other hand, it explicitly interpreted this restriction as a remote instrument of migration control, primarily intended to deter certain intra-EU inflows. Conceiving its welfare system as a magnet for 'unwanted immigration', the decision to lower – or rather erase - the level of social assistance for precarious EU migrants was seen as tool to reduce Belgium's 'attractiveness': '*because* our rules are softer than the ones of our neighbour EU countries, we are currently confronted with a massive influx of EU citizens to our territory' (Council of Ministries, justification to the amendment; Constitutional Court, sentence No. 95/2014, 43; italics of the author). Starting from this assumption, a restriction in social entitlements was the logical response to deter (unproductive) EU migrants to enter the country: limited rights would reduce these EU citizens' willingness and possibility to move and settle in Belgium.

Therefore, in a context in which traditional tools of border controls are ineffective towards the mobility of EU citizens, the policy priorities of the Ministry for Social Integration converged to - rather than conflicted with (Spencer 2016) - the goals and underlying logics of immigration authorities. It used welfare as a remote instrument of EU migration control, excluding EU citizens with precarious residency status from the community of legitimate beneficiaries of State's protection.

Healthcare Providers: Economic Interests in the Intra-EU (Un)Coordinated System

Insurance constitutes the key entitlement principle in the Belgian healthcare system (Gerkens and Merkur 2010). Although prohibiting selection of risk, healthcare is conceived as a service to be paid for in the market, in which a consumer (via the sickness fund s/he is affiliated to) will eventually pay the provider in exchange for a treatment received. As detailed before, EU migrants with precarious residency status and non-EU migrants with irregular status are only entitled to AMU, through which hospitals and health practitioners are compensated by the federal government for the treatments provided to these patients. Bearing in mind the founding principle and funding mechanisms of the Belgian healthcare regime, the 2012 restrictive measure implied that healthcare providers would not be reimbursed anymore for the services provided to EU migrants with precarious residency status, due to the exclusion of this group from AMU.

Several empirical studies have emphasised the role of healthcare providers in claiming for extensive healthcare rights for migrants, often portraying them as committed actors who seek to open healthcare trajectories for the vulnerable ones on the basis of professional, ethical or humanitarian principles (Dwyer 2015; Fernández-Kelly 2012; Marrow 2012). Far from any 'Hippocratic Oath', however, the main argument behind the opposition of healthcare providers against the 2012 federal provision was grounded on pure economic considerations.

Taking the 2012 provision to the Constitutional Court, in fact, representatives of health practitioners and hospitals argued that the new measure created a 'financial damage' for their constituency, which ran 'the risk of not being reimbursed for the treatments provided to EU migrants during their first three months of residence in the

country' (healthcare providers, opposition to the amendment; Constitutional Court, sentence No. 95/2014, 15).

Accordingly, despite EU migrants who do not qualify as workers should demonstrate having sickness coverage during their stay in another MS according to the Citizenship Directive, interviews with representatives of CAAMI portrayed a different story. Accordingly, among the almost 4,000 requests for information send by CAAMI on the insurance status of EU migrants to their home MSs in 2018, only 1,600 resulted in a positive response (i.e. the person is insured in her/his home country), allowing for the transfer of invoices from the Belgian system to the competent insurance body of the home MS. In the remaining cases, responses were negative (meaning that the person is not insured in her/his home country) or were never provided by the competent authority of the home MS. In addition, response time to CAAMI's requests varied largely among MSs, between a minimum of two weeks for the Netherlands to a maximum of nine months for France.

To cope with this situation of (un)coordination between MSs' social security systems, until 2012 the pragmatic solution adopted by the federal government while pending for a response from other MSs was to cover the costs of the treatments provided to these EU migrants through AMU. As a representative of CAAMI contended, 'At the end, the ultimate, fundamental question for us is: who pays for that treatment?' (interview CAAMI).

Therefore, it becomes clear why healthcare providers initiated a judicial action against the 2012 restriction. As a consequence of that policy change, the treatments they provided to these EU migrants would have remained unpaid without the intervention of the federal government through AMU. In presenting their argument, in fact, they contended that the federal government justified the measure for reasons of 'general

interest', but it 'did not consider the actual [financial] interests of its healthcare providers' in the EU social security arena. From their economic-based perspective, 'the only people affected by the 2012 amendment are not EU citizens and their family members, but healthcare providers and hospitals who are professionally obliged to care for these people without getting reimbursed' (healthcare providers, opposition to the amendment; Constitutional Court, sentence No. 95/2014, 16).

Particularly, they stressed the potential discrimination that the measure would create 'between healthcare professionals and structures providing treatments to non-EU migrants with irregular status [whose treatments would have been reimbursed by the government under AMU] and those caring for these EU migrants', in respect of which treatments would remain unpaid (healthcare providers, opposition to the amendment; Constitutional Court, sentence No. 95/2014, 16). In other words, they grounded their legitimate claim to get paid for the services provided to EU citizens with precarious residency status. They did so by equating these EU citizens with non-EU migrants with irregular status.

Pro-Immigrant Organisations and Welfare Bureaucracies: Human Dignity for (Deserving) EU 'Sans-Papiers'

'Right' represents one of the most frequent concepts mobilised by pro-immigrant organisations contesting the 2012 federal restriction. Invoking human rights principles, they claimed that the new provision would infringe the Belgian Constitution: specifically Articles 10 and 11 setting the principles of equality and non-discrimination before the law, and Article 23 on 'the right of everyone to lead a life in keeping with human dignity'. Likewise, they referred to international obligations signed by Belgium, including the 1966 International Covenant on Economic, Social and Cultural Rights and the 1961 European Social Charter.[1,2]

The role of civil society actors like pro-immigrant organisations and welfare bureaucracies in the contestation and change of restrictive immigration and welfare policies is a well-known phenomenon (Guiraudon 2002; Geddes 2003; Castañeda 2013; Ambrosini 2015; Ambrosini and van der Leun 2015; Borrelli and Lindberg 2018). As these studies point out, these actors may challenge the course of action established by decision-makers through multiple venues (Author A), grounding their claims on the basis of human rights, social justice or humanitarian principles.

Soon after the adoption of the 2012 federal restrictive measure, local pro-immigrant organisations engaged in 'judicialising the issue', bringing the new measure to the Constitutional Court. In their arguments, they pointed out the lack of data confirming the 'massive influx' and 'unreasonable burden' arguments presented by the Council of Ministries to legitimate the 2012 restriction, repeatedly – yet (unsurprisingly) unsuccessfully - calling the federal government to prove its argument.

Then, they highlighted the discriminating nature of the 2012 federal provision, converging with the argument of healthcare providers while grounding it on a human-rights perspective. From their standpoint, in fact, the new measure discriminated between non-EU migrants staying irregularly in the country, entitled to AMU, and 'certain categories of EU citizens who are irregularly living in the country', excluded from AMU (pro-immigrant organisations, opposition to the amendment; Constitutional Court, sentence No. 95/2014, 13).

Accordingly, Article 1 of the 1976 Law on CPAS states that 'everyone has the right to social aid' to 'lead a life in keeping with human dignity', the latter being a State prerogative enshrined in Article 23 of the Belgian Constitution. As mentioned before, when it comes to foreign citizens with irregular status, the 1976 Law delimits social aid to AMU, which is granted by CPAS after assessing applicants' compliance with three

eligibility criteria (unlawful residence, lack of healthcare coverage, and indigence status), which do not include the one of nationality. As one of the welfare bureaucrats participating in the research clearly explained, 'In Belgium, we do not distinguish between European *sans-papiers* and *sans-papiers* from third countries. A *sans-papiers* is a *sans-papiers*, it's the same thing.' (interview CPAS-W.2). Until the 2012 restriction, in fact, the 1976 Law recognised the – limited but important – entitlement to AMU for any migrant residing 'illegally' in the country, implicitly including the ones coming from EU countries. Hence, while the juridical category of 'illegal EU migrants' was not conceived by any official law, EU migrants with precarious residency status had always been considered as beneficiaries of this measure as a result of them residing 'illegally' in Belgium.

Differently from the framing of the federal government, these EU citizens were often interpreted as 'victims' of the system, shifting the blame for 'illegality' from the individual to structural distortions homeland and abroad. From the perspective of pro-immigrant organisations, 'illegal EU migrants' often did work in Belgium, they were contributing members of the society. However, the employment conditions they were subject to did not allow them regularising their residency and insurance statuses (interview PIO-B).

Similarly, welfare bureaucrats working at CPAS were in favour of the right to AMU for those 'illegal EU migrants' who settled in Belgium on a long-term perspective and worked in demanding and low-paid jobs without formal job contracts. As a social worker pointed out, 'Theft, drug dealing… that's a real minority. The majority of them are exploited in the construction sector, or work at local markets, or as care workers.' (interview CPAS-W.1). From this standpoint, precarious working conditions made it impossible for these EU citizens to affiliate in a Belgian sickness fund (interview

CPAS-W.2), while portability of healthcare entitlements was limited, particularly in the case of citizens originating from Eastern MSs (interview CPAS-F.2). In their narratives, these EU migrants would have preferred not to migrate, or they would have complied with rules on portability of healthcare entitlements, if only their home country had allowed that. As claimed by one of the interviewees, 'they have nothing down there, there is nothing to transfer, so they enjoy their right of free movement. Everyone would do that.' (interview CPAS-F.2). As these interview extracts suggest, these actors mobilised the typical frames that define the "irregular but deserving [non-EU] migrants" (Chauvin and Garcés-Mascareñas 2014), between deservingness based on economic integration and contribution as actual residents, regardless of juridical status, and deservingness based on vulnerability considerations.

This association of EU citizens with precarious residency status to non-EU migrants with irregular status became evident during the juridical struggle. Accordingly, pro-immigrant organisations explicitly referred to the absence of 'any objective justification for establishing this difference of treatment between non-EU and EU migrants with irregular status' (pro-immigrant organisations, opposition to the amendment; Constitutional Court, sentence No. 95/2014, 13). As a representative of these organisations affirmed during the interview,

> In the Law on CPAS, we affirm that everyone living in Belgium has the right to social aid. People who are staying here on a temporary basis, they are not entitled to such right, as they are considered do not actually living here, they are the so-called 'tourists'. On the contrary, EU citizens who apply for residency, *whether they obtain it or not*, they come here to stay, they actually live here, they want to remain here and work here. So they should be entitled to AMU at least (interview PIO-B; italics of the author).

As this extract indicates, EU citizens applying for residency should be entitled to AMU as 'deserving workers', regardless of whether their application is accepted or refused by immigration authorities. Therefore, these actors claimed for the right to AMU for these EU citizens by invoking their 'deportability' (De Genova 2002), that is, the possibility for them to be deported as a consequence of their precarious residency status.

Granting Rights through Illegalisation: Outcomes of a Struggle

The Belgian system is composed of multiple actors with opposite interests and claims on the social rights of EU migrants with precarious residency status. While the federal government relied on welfare to enforce EU migration control, healthcare providers invoked their legitimate interest of being paid for the treatments provided. In between, welfare bureaucracies carried out their protective function of guaranteeing 'human dignity' for vulnerable individuals, under the support of pro-immigrant organisations upholding human-rights principles. Ultimately, each actor reveals a different conceptualisation of healthcare: as a tool to delimit the legitimate members of the polity while stopping unwanted intra-EU movers, for the federal government; as a service to be paid for, for healthcare providers; as a right to live a life of dignity, for pro-immigrant organisations and welfare bureaucracies. It is in their struggle that the apparent contradiction between declared restrictive aims and actual inclusive measures tool shape.

Two years after the submission of the appeals by healthcare providers and pro-immigrant organisations, in fact, the Constitutional Court invalidated the 2012 federal provision excluding EU migrants with precarious residency status from AMU, affirming that 'there is not reasonable justification for the difference in treatment between EU and non-EU citizens staying illegally in the country' (Constitutional Court, sentence No. 95/2014, 54). In detailing its decision, it argued that it cannot be excluded that some EU

citizens living in Belgium have neither a Belgian insurance nor healthcare coverage from their home country. In these cases, therefore, they violate the conditions set by the Citizenship Directive for staying and lawfully residing in another MS. Hence,

> The moment at which they refer to the welfare system, their right to reside in the country *can* be removed […] and they *may* receive a deportation order […]. Consequently, their situation does not fundamentally differ from the one of illegal third-country nationals in the Kingdom (Constitutional Court, sentence No. 95/2014, 52; italics of the author).

After recognising the possibility for EU migrants with precarious residency status to be deported, the Court sentenced that they had to be equated with non-EU migrants with irregular status in both the risks deriving from it (refusal/removal of residency rights and consequent deportation order), and in their – limited – social entitlements (AMU). Along this process, it replicated the arguments - and labels - provided for by healthcare providers and pro-immigrant organisations, which grounded their claims - different in rationales but converging in goals - on the same conceptualisation of EU citizens with precarious residency status as 'illegal EU migrants'.

Therefore, while the federal government relied on welfare policies to create precarious EU migrants, healthcare providers, pro-immigrant organisations and the Constitutional Court referred to their 'deportability' (De Genova 2002; Paoletti 2010) to grant them rights. It is by turning EU migrants with precarious residency status into deportable, 'illegal (EU) migrants' that they recognised them as rightful owners of social rights. Although they engaged in this process to counter-react to the 2012 restrictive federal measure, these actors contributed to and legitimated - unwittingly or not – the institutionalisation of this status 'from below', grounding their arguments on different logics but converging representations of the 'illegality' of these EU citizens.

Hence, it is not only 'the State' and its immigration policies that produce migrant illegality, as the literature often contends (Ataç and Rosenberg 2019). Rather, as this study suggests, other institutional and civil society actors, including courts, street-level bureaucracies, welfare providers and pro-immigrant organisations, may become agents in the everyday production of illegality.

Nevertheless, any act that constructs individuals' legal identities has social and political implications (Coutin 1983). And while it is true that EU migrants with precarious residency status have been granted access to AMU again through this process, this does not imply that they have been recognised as legitimate members of the polity. Rather, their entitlement to AMU came at the cost of loosing recognition as citizens: these actors did not sustained EU migrants with precarious status as 'political claimants of rights' (van Baar 2017), but rather as 'deportable' non-citizens.

If 'non-deportability' is the essential component of citizenship (Kochenov and Pirker 2013, 388), this process challenged the very nature of EU citizenship. As an interviewee noted, 'There are many EU citizens that call us, shocked, after being told that they are only entitled to AMU because they are illegal here. They say "How is it possible? I'm French", or "I'm Italian".' (interview, PIO-B). EU citizens, who believed to have incomparable rights within the Union when compared to non-EU citizens, found themselves among the undeserving welfare beneficiaries par excellence, i.e. 'illegal migrants' (Kootstra 2016).

Conclusions

In the last decade, MSs have increasingly relied on welfare policies to control – and limit – 'unwanted (unproductive) EU migration' in a Union without physical borders. In spite of declared restrictive policy aims, however, they often continue providing welfare and healthcare services for EU migrants with precarious residency status.

By engaging in the discussion on policy inconsistency between restrictive policy aims and inclusive formal measures in Belgium, this article analysed the claims and logics for action of multiple institutional and civil society actors involved in the field, contending that it is in their ideal and actual struggle that policy inconsistency originated.

While analysing these actors' positions, the paper also traced the process through which EU migrants with precarious residency status have been entitled to additional social rights than the ones required by EU law, that is, by acknowledging their 'deportability'. Although healthcare providers and pro-immigrant organisations engaged in this process to counter-react to the 2012 restrictive measure, they ultimately became agents in production of (EU) migrant illegality, contributing 'from below' to its institutionalisation.

Dealing with policy inconsistency and (EU) 'migrant illegality', this contribution ultimately sought to problematise juridical conceptions of EU citizenship and its associated rights. De Genova (2002, 439) claimed that 'there is nothing matter-of-fact about the "illegality" of undocumented migrants.' Reversing his statement, this paper contends that there is nothing matter-of-fact about the 'legality' and social rights of EU citizens. In doing so, it calls for a critical analysis of the – potentially unexpected - processes by which the law and the welfare state interplay to produce citizenship status and 'illegality' in the Union.

Endnotes

1. The right of everyone to social security (Article 9), to an adequate standard of living (Article 10), and to enjoy the highest attainable standard of physical and mental health (Article 12).
2. Part I, on the right of everyone to enjoy the highest possible standard of health (Point 11), the right of everyone without adequate resources to social and medical assistance (Point 13), and on the right of everyone to benefit from social welfare services (Point 14).

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