

No Equity in Sight?

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Hurdles for Undocumented Migrants in Accessing COVID-19 Vaccines in the EU and the way forward

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While equitable access to COVID-19 vaccines has been above all discussed with regard to the global distribution of vaccines, it may also become relevant on a regional and national level. Especially marginalized parts of the population struggle to receive COVID-19 vaccination in practice: Even if vaccines are readily available, and the individuals concerned are *prima facie* legally entitled and willing to get vaccinated, practical and/or administrative barriers remain that keep certain groups from receiving the vaccine. In the European Union (EU) this is especially relevant for stateless or third country nationals without valid residency permit (hereinafter: undocumented migrants) whose residence or even existence is unknown to immigration authorities. This includes especially those who are experiencing homelessness.

This blog post focuses on equitable access of undocumented migrants to vaccination within the EU by highlighting relevant EU legislation and current state practice, including practical and administrative barriers, and by discussing arising human rights implications. The authors argue that an emphasis should be laid on providing effective access to all people willing to get vaccinated and that doing otherwise, i.e. restraining access through administrative hurdles, may violate human rights while also having additional negative effects on the remaining population.

Health Care of Undocumented Migrants: A Blind spot of EU Migration Law

EU regulation on health care is only rudimentary. Article 35 sentence 1 of the Charter of Fundamental Rights of the European Union (CFR) establishes everyone's right to health care access but confines it to 'the conditions established by national laws and practices'. It is thus primarily left to the Member States to enact and implement provisions on the access to health care for marginalized groups.

As an exception, Article 19 (1) Directive 2013/33/EU (commonly known as the Reception Conditions Directive) and Article 14 (1) lit. b Directive 2008/115/EC (the Return Directive) require States to ensure '[...] emergency [health] care and essential treatment of illnesses [...]'. Since the Reception Conditions Directive is only applicable to applicants for international protection, i.e. people who apply for international protection and have not yet received a final decision on their application (see Article 2 lit. b Directive 2013/33/EU), undocumented migrants are by definition excluded from this access right.

Health care access in the Return Directive is, however, limited in time as Article 14 (1) Directive 2008/115/EC only safeguards irreducible health care ‘during the period for voluntary departure granted [...] and during periods for which removal has been postponed [...]’. Both of these criteria require prior registration by immigration authorities. Hence, undocumented migrants as defined above are equally disqualified from the Return Directive’s protection. Accordingly, undocumented migrants’ health care and especially their right to a COVID-19 vaccine is generally not regulated by EU law.[1]

Administrative and Practical Barriers to Access the COVID-19 Vaccine

Despite the lack of EU legislation, national provisions in the specific case of COVID-19 vaccinations are generally inclusive at first sight: The vaccine is free of charge in all EU Member States[2] and none of the 25 countries of the European Economic Area examined by the International Organization for Migration explicitly excludes migrants in irregular situations from their vaccination plans.[3] Nevertheless, they do not have access to vaccines in practice in at least eight of the examined countries.

Two main administrative barriers have been stressed in this context in addition to language barriers and a lack of adequate information.

First, the requirement of specific documents, such as valid identity documents, registration in the public health insurance system or the proof of a habitual address, has been highlighted.[4] The requirement of registration in the public health system may exclude persons without residence permit, who are not usually registered in the system[5] and persons experiencing homelessness (especially rough sleepers) who face the same obstacle. Furthermore, persons experiencing homelessness are additionally excluded if they cannot pay the contributions to the health system or simply cannot be contacted[6].

A second barrier is the persistent obligation of health care providers to report undocumented migrants to immigration authorities. The legal obligation to exchange data between social service providers and immigration law enforcement is generally known to be a deterrent of persons in irregular situations from seeking health care services.[7] The mere fact that this obligation exists on paper is already sufficient to discourage many individuals from making a vaccination appointment, even if the reporting does not take place in practice e.g. due to current administrative practices.[8]

But even if no such legal obligation exists, data exchange may still take place. This is why human rights advocates and legal scholars have long argued in favour of so-called ‘firewalls’ which secure that ‘no information gathered by those responsible for protecting and realizing basic human rights can be used for immigration enforcement purposes’.[9] The lack of such firewalls has been criticized for years with regard to access to basic health care,[10] but now also has a severe impact on the accessibility and distribution of COVID-19 vaccines, effectively excluding a part of the community from vaccination in countries such as Germany and Poland.[11]

At the same time, undocumented migrants as well as people experiencing homelessness may be especially vulnerable to the pandemic. According to Médecins du Monde, undocumented migrants often already have a worse state of health than persons with similar demographic characteristics[12] and additionally are often disproportionately exposed to the virus due to difficult living conditions.[13] Similarly, persons experiencing homelessness have a heightened risk of severe consequences of infections and face difficulties in accessing health care systems in general.[14]

Undocumented migrants therefore have been explicitly included in the call for a tailored approach by the Council of Europe Committee on Bioethics[15] and countries such as Austria, Croatia, Cyprus and Germany have included them as a priority group in their national vaccination strategies.[16] This prioritization does not become effective, however, if administrative barriers, such as the legal obligation to report persons to immigration authorities are not temporarily suspended or repealed altogether at the same time.

Fundamental Rights Implications of Lacking Effective Access to Vaccines in Europe

Both administrative practices may ultimately be contrary to obligations under regional human rights law. Several regional human rights instruments become relevant with regard to equitable access to COVID-19 vaccines.

Most clearly, Article 3 of the Council of Europe Convention on Human Rights and Biomedicine ('Oviedo Convention') sets forth that States 'take appropriate measures with a view to providing, within their jurisdiction, equitable access to health care of appropriate quality'. The convention's monitoring committee has, with regard to the COVID-19 pandemic, stressed that Article 3 'involves ensuring that everyone, without discrimination, is offered a fair opportunity to receive a safe and effective vaccine'.[17] It follows, according to the committee, that

'Persons without residence or with insecure legal status (e.g. undocumented migrants, asylum seekers, and homeless persons) should not be hindered in their ability to access vaccination. To that end, proactive steps should be taken to remove administrative and other barriers. The provision of vaccines to persons without residence or with insecure legal status should be clearly detached from immigration control [...].'[18]

These are very clear guidelines establishing that administrative barriers should be limited to its minimum and firewalls established. To date 29 States have ratified the convention, which remains the only international treaty on the protection of human rights in the biomedical field. But ten EU Member States (including Germany) have not. Similar obligations may, however, be derived from the European Convention on Human Rights (ECHR).

Under Article 2 ECHR (the right to life) and Article 8 ECHR (the right to respect for private and family life), States have a general obligation 'to take adequate measures to protect individuals from the spread of COVID-19 and from being avoidably infected and suffering its consequences'.[19] The relevant rights shall be secured, according to Article 14

‘without discrimination on any ground such as, *inter alia*, national or social origin, property or other status’. Additionally, Article 1 of Protocol No. 12 ECHR prohibits discrimination more generally in ‘the enjoyment of any right set forth by law’, including national law.[20] Persons, who are generally entitled under national law to COVID-19 vaccines, must therefore also be able to effectively enjoy this right without discrimination. According to the Court’s jurisprudence, the requirement of permanent residence, nationality as well as immigration status are aspects of personal status to which the prohibition of discrimination applies.[21] A difference in treatment based on such a ground must be founded on ‘objective and reasonable justification’, i.e. pursue a legitimate aim and ‘reasonable relationship of proportionality between the means employed and the aim sought to be realised’.[22]

First, documentary requirements, such as a habitual residence have been implemented *inter alia* to avoid vaccination tourism. It is already questionable whether this is necessary, as vaccines are no longer scarce within the EU. There are, furthermore, other means available, such as outreach vaccination deployed with mobile health units, which are unlikely to attract vaccination tourists and which can be deployed in addition to permanent focal points, as has been done in several cities.[23] A general requirement of proving a permanent address is therefore unlikely to be strictly necessary in order to realise the pursued aim.

Second, legal obligations to transmit data to immigration authorities seek to enforce national immigration laws. It is, however, not clear whether such laws are suitable to achieve the objective in the first place, as persons avoid relevant locations as a consequence, unless seeking emergency care (where no reporting may take place).[24] Thereby the risk of apprehension can be minimized. It has also been argued that its effectivity is not supported by statistics.[25]

Moreover, the duty of health care professionals to report persons in irregular situations is likely to be disproportional: Not only does restricted access to COVID-19 vaccines affect individuals’ rights but it furthermore affects public health in general by favouring the further spread of the virus. Immigration enforcement furthermore still remains possible at other locations, with less negative effects on both individual and public health.[26]

Implementing such firewalls is finally also consistent with the clear guidelines issued by the Council of Europe, which call on Member States to include all migrants in COVID-19 vaccination programmes ‘regardless of their nationality and migration status’ and declares that ‘vaccination registration should not be used to collect information about an individual’s migration status and shared with immigration enforcement authorities’.[27] This shadows the previously issued Policy Recommendation by the Commission against Racism and Intolerance,[28] and on a European Union level the guidelines issued by the Fundamental Rights Agency[29]. On a global level, the Special Rapporteur on the Human Rights of Migrants[30] and the High Commissioner for Human Rights have long called for the establishment of firewalls.[31]

Similar obligations may be derived from international treaties such as, for instance, the International Covenant on Economic, Social and Cultural Rights (ICESCR). Article 12 obliges States Parties to recognize ‘the right of everyone to the enjoyment of the highest attainable standard of physical and mental health’. It is generally agreed upon that the implementation of this right must take into account the limited available resources of States.[32] The Covenant’s monitoring body has, however, made clear that States are under the obligation to ensure, at the very least, minimum essential levels of the right,[33] which includes the provision of essential drugs to everyone without discrimination in law and in fact, within the jurisdiction of the State.[34] In this sense everyone, including undocumented migrants, must be guaranteed non-discriminatory access to essential drugs. However, as of now COVID-19 vaccines do not meet the standards of such an ‘essential’ drug. Essential drugs are defined by the WHO Action Programme on Essential Drugs, which is updated every two years. For the meeting of the 23rd WHO Expert Committee on the Selection and Use of Essential Medicines in 2021, no application for the inclusion of the COVID-19 vaccine has been filed.[35] Nevertheless, its inclusion is already being discussed by scholarship.[36] And in light of recent developments, such as the full approval of the first COVID-19 vaccine in the US, it could be argued that COVID-19 vaccines might be declared as essential drugs in the immediate future.[37] Hope remains that this step is taken in 2023. Until then, the obligation to take ‘measures to prevent, treat and control epidemic and endemic diseases’ and ‘to provide immunization against the major infectious diseases occurring in the community’ in a non-discriminatory manner apply to all State Parties, which are not of immediate effect but still of comparable priority.[38]

Finally, the Committee has explicitly recommended that State Parties to the covenant establish firewalls.[39]

Unlike the ICESCR and the ECHR, the right to social and medical assistance enshrined in the revised European Social Charter (Article 13 (1) ESC) includes foreigners only in so far as they are nationals of other State Parties lawfully present within their territory.[40] This excludes migrants in irregular situation from the immediate scope of the Charter. But the European Committee of Social Rights has held that

‘legislation or practice which denies entitlement to medical assistance to foreign nationals, within the territory of a State Party, even if they are there illegally, is contrary to the Charter.’[41]

According to the Committee’s decision, the deprivation of *all* entitlement to medical assistance thus violates the right to social and medical assistance enshrined in Article 13 (1) of the Charter. Accordingly, while not giving right to full medical assistance, Article 13 (1) enshrines the right for undocumented migrants of a minimum of medical assistance. The Committee has, however, also pointed out that State Parties may extend the scope of the charter by extending national legislation to include non-nationals.[42] As Tekin Akillioglu has argued in his dissenting opinion to the above-mentioned decision: ‘Once the scope has been extended, it naturally follows that legislation and the relevant practice must not allow discrimination’.[43] In that sense, one could argue that if national

vaccination strategies include undocumented migrants, it follows that the same persons cannot be *de facto* excluded by discriminatory practices, prohibited by the Social Charter, which hinder effective access to their right.

Conclusion

Even if not being explicitly excluded from national vaccination strategies, undocumented migrants still face important administrative and practical barriers in accessing COVID-19 vaccines. We argue that legal obligations to transmit data from health care personnel to immigration authorities represent the most significant barrier. Therefore, the pandemic presents an opportunity to review the concept of firewalls in national immigration laws and adjust the law beyond the current health crisis. One may ask, if not now, when?

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[1] With the exceptions of registered third country nationals under Art. 14 (1) Directive 2008/115/EC as well as seldom cases of third-country nationals who are victims of trafficking in human beings or who have been the subject of an action to facilitate illegal immigration and cooperate with the competent authorities according to Article 7 (1) and 9 (1 and 2) Directive 2004/81/EC.

[2] EU Agency for Fundamental Rights, Coronavirus Pandemic in the EU – Fundamental Rights Implications: Vaccine Rollout and Equality of Access in the EU, Bulletin No. 7, May 2021, p. 30, accessible here: <<https://fra.europa.eu/en/publication/2021/covid19-rights-impact-june-1>> (last accessed 27 August 2021).

[3] IOM Country Office Review, Migrant Inclusion in COVID-19 Vaccination Campaigns, Updated 17 May 2021.

[4] *Ibid*; See e.g. in Malta ‘Maltese citizens and all residents of Malta with a valid residency card are eligible for the vaccine’, Government of Malta, ‘Vaccines’, last updated 03 August 2021, accessible here: <<https://deputyprimeminister.gov.mt/en/health-promotion/covid-19/Pages/vaccines.aspx>> (last accessed 27 August 2021).

[5] EU Agency for Fundamental Rights, Coronavirus Pandemic in the EU – Fundamental Rights Implications: Vaccine Rollout and Equality of Access in the EU (Fn 2), p. 21.

[6] Johanna Offe’s statement of 30 June 2021, accessible here: <<http://www.youtube.com/watch?v=QkXhiY17JL8>> (last accessed 27 August 2021).

[7] EU Agency for Fundamental Rights, Fundamental Rights of Migrants in an Irregular Situation in the European Union, Comparative Report, 2011, pp 79 and 82, accessible here: <<https://fra.europa.eu/en/node/3395>> (last accessed 27 August 2021).

[8] In Germany, an administrative decree on the Residence Act issued by the Ministry of Interior on 26 October 2009 clarifies that health care personnel is bound by professional secrecy and therefore exempt from the duty to report as established in the German Residence

Act, Section 87. Section 87 of the Residence Act is viewed by several authors as unconstitutional, see for an overview Wissenschaftlicher Dienst des Deutschen Bundestag, *Menschen ohne Papiere: Ihr Recht auf Gesundheit und ihr Zugang zu medizinischer Versorgung*, 2011.

[9] J. Carens, 'The Right of Irregular Migrants', 22 *Ethics & International Affairs* (2008), 163-186, 167.

[10] See e.g. François Crépeau, Bethany Hastie, 'The Case for "Firewall" Protections for Irregular Migrants', *European Journal of Migration and Law* (2015), 157-183. See also for a current campaign in Germany: <<https://gleichbehandeln.de/>> (last accessed 27 August 2021).

[11] See Belkis Wille's statement of 30 June 2021, accessible here: <<http://www.youtube.com/watch?v=QkXhiY17JL8>> (last accessed 27 August 2021).

[12] Médecins du Monde, European Observatory on Access to Healthcare (2009) *Access to healthcare for undocumented migrants in 11 European countries*, Paris, Médecins du Monde, pp. 10-12.

[13] EU Agency for Fundamental Rights, Coronavirus Pandemic in the EU – Fundamental Rights Implications: Focus on Social Rights, Bulletin Nr. 6, 2020, p. 31, accessible here: <https://fra.europa.eu/sites/default/files/fra_uploads/fra-2020-coronavirus-pandemic-eu-bulletin-november_en.pdf> (last accessed 27 August 2021).

[14] FEANTSA, Vaccine Strategy: Recommendations for the Protection & Prioritisation of People Experiencing Homelessness, 4 February 2021, accessible here: <https://www.feantsa.org/public/user/Resources/Position_papers/Vaccine_Statement_Feb_21.pdf> (last accessed 27 August 2021).

[15] Council of Europe, Committee on Bioethics (DH-BIO), COVID-19 and Vaccines: Ensuring Equitable Access to Vaccination During the Current and Future Pandemics, 22 January 2021, para. 13, accessible here: <<https://rm.coe.int/dh-bio-statement-vaccines-e/1680a12785>> (last accessed 27 August 2021).

[16] EU Agency for Fundamental Rights, Coronavirus Pandemic in the EU – Fundamental Rights Implications: Vaccine Rollout and Equality of Access in the EU (Fn 2), p. 21.

[17] Council of Europe, Committee on Bioethics (DH-BIO) (Fn 15), para. 3.

[18] *Idem*, para. 13.

[19] Biljana Braithwaite et al., Covid-19 and the Impact on Human Rights, An Overview of Relevant Jurisprudence of the European Court of Human Rights, AIRE Centre, 2020, p. 19.

[20] The term discrimination is interpreted in the same manner as for Article 14 ECHR, see ECtHR, *Pilav v. Bosnia and Herzegovina*, Application 41939/07, 9 June 2016, para. 40.

[21] See generally ECtHR, Guide on Article 14 of the European Convention on Human Rights and on Article 1 of Protocol No. 12 to the Convention, updated on 31 December 2020, accessible here:

www.echr.coe.int/Documents/Guide_Art_14_Art_1_Protocol_12_ENG.pdf (last accessed 27 August 2021).

[22] *Ibid.*

[23] *E.g.* in Frankfurt, Frankfurter Rundschau, 'Corona in Frankfurt: Impfstart für Wohnungslose und Geflüchtete', 15 April 2021, accessible here:

www.fr.de/frankfurt/frankfurt-corona-impfstoff-impfung-impfstart-gefluechtete-wohnungslose-90459875.html (last accessed 27 August 2021).

[24] EU Agency for Fundamental Rights, Fundamental Rights of Migrants in an Irregular Situation in the European Union (Fn 7) p. 79.

[25] PICUM Submission to the UN Committee on The Protection of the Right of All Migrant Workers and Members of their Families, 22 April 2013, p. 8, accessible here: www2.ohchr.org/english/bodies/cmw/docs/DGD/2013/DGDMigrationData_PICUM_2013.pdf (last accessed 27 August 2021).

[26] Other considerations may additionally be advanced, such as the right to professional secrecy and privacy rights of the patients.

[27] Council of Europe, Joint Guidance Note on Equitable Access to COVID-19 Vaccines for All Migrants', 8 March 2021, accessible here: <https://ec.europa.eu/migrant-integration/librarydoc/joint-guidance-note-on-equitable-access-to-covid-19-vaccines-for-all-migrants> (last accessed 27 August 2021).

[28] European Commission against Racism and Intolerance (ECRI) (2016) 'General Policy Recommendation No. 16 on Safeguarding Irregularly Present Migrants from Discrimination'. Available at: www.refworld.org/docid/581318d64.html (last accessed 27 August 2021).

[29] European Union Agency for Fundamental Rights, Apprehension of migrants in an irregular situation – fundamental rights considerations, 2013, Principle Nr. 2 and 3, accessible here: https://fra.europa.eu/sites/default/files/fra-2013-apprehension-migrants-irregular-situation_en.pdf (last accessed 27 August 2021).

[30] United Nations General Assembly (2017) 'Report of the Special Rapporteur on the Human Rights of Migrants (A/72/173)', para. 67, accessible here: <<https://reliefweb.int/report/world/human-rights-migrants-report-special-rapporteur-human-rights-migrants-a72173-enar>> (last accessed 27 August 2021).

[31] UN Office of the High Commissioner for Human Rights (OHCHR), *The Economic, Social and Cultural Rights of Migrants in an Irregular Situation*, October 2014, HR/PUB/14/1, available at: <<https://www.refworld.org/docid/54479e174.html>> (last accessed 27 August 2021).

[32] UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12 of the Covenant)*, 11 August 2000, E/C.12/2000/4, para. 9 available at: <<https://www.refworld.org/docid/4538838d0.html>> (last accessed 4 September 2021). See also Article 2 para. 1 of the Covenant.

[33] *Idem*, para. 43.

[34] *Idem*, paras 12 b) and 43 d).

[35] World Health Organization (WHO), *23rd Expert Committee on Selection and Use of Essential Medicines*, 2021, available at: <<https://www.who.int/groups/expert-committee-on-selection-and-use-of-essential-medicines/23rd-expert-committee>> (last accessed 05 September 2021).

[36] See e.g. Maxwell J. Smith et al., Should COVID-19 Vaccines Authorized for Emergency Use Be Considered "Essential" Medicines?, *Health and Human Rights Journal*, June 2021, accessible here: <<https://www.hhrjournal.org/2021/06/should-covid-19-vaccines-authorized-for-emergency-use-be-considered-essential-medicines/>> (last accessed 4 September 2021).

[37] US Food and Drug Administration, 'FDA Approves First COVID-19 Vaccine', 23 August 2021, accessible here: <<https://www.fda.gov/news-events/press-announcements/fda-approves-first-covid-19-vaccine>> (last accessed 5 September 2021).

[38] UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12 of the Covenant)*, 11 August 2000, E/C.12/2000/4, para. 44 b) and c).

[39] UN Committee on Economic, Social and Cultural Rights, Concluding observations on the sixth periodic report of Germany, E/C.12/DEU/CO/6, 27 November 2018, paras 26-27.

[40] See Appendix to the Charter.

[41] European Committee of Social Rights, International Federation of Human Rights Leagues (FIDH) v. France, Complaint No. 14/2003, Decision on the Merits, 8 September 2004, Para. 32.

[42] European Committee of Social Rights, Introduction to Conclusions XVII-1, 2004.

[43] European Committee of Social Rights, International Federation of Human Rights Leagues (FIDH) v. France, Complaint No. 14/2003, Decision on the Merits, 8 September 2004, Dissenting Opinion of Tekin Akillioglu.