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The Blue Card Directive:

Probing the Limits of EU Immigration Policy

Whereas much progress has been made at the EU level in the field of illegal immigration, legal immigration has traditionally been one of the least developed areas of EU migration policy and a highly sensitive policy issue. While the need to establish a harmonised framework at the European level was reasserted at several occasions by Member States, national governments fundamentally opposed attempts of the European Commission¹ to move towards extended community responsibility (or 'communitarisation'). Within legal immigration, labour immigration was a highly contentious issue, arousing constant competence debate. On the one hand, Member States wished to retain full control over who entered their labour market because of concerns related to welfare provisions, social integration and national security. On the other, the European Commission pushed for deeper European integration in this area. Against this backdrop, the Commission managed, nonetheless, to slowly get its foot in the door of legal immigration by revising its initial ambitions, moving from a horizontal to a sectoral approach.

This paper examines the decision-making process, which ultimately led to the adoption of the Council Directive on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment, the so-called 'Blue Card Directive'². It does so by focusing on the preferences of various actors (both governmental and non-governmental), as well as on whether and how they were able to influence the forging of this first legislative act adopted in the field of legal immigration at the level of the European Union. By disentangling the political dynamics visible in various venues, this study seeks to highlight the balance of forces and turning points which ultimately shaped the final political compromise. It is argued that the role of interest groups, and especially European business organisations, is an important explanatory factor of the shaping of highly skilled immigration policy. Underestimated in much of the literature on migration issues (cf. Menz 2009:4), trade unions and business associations are nonetheless immediately affected by a European immigration policy. As such, they seek to shape the position of national delegations operating in Brussels, as well as the approach and rhetoric adopted by EU institutional actors.

¹ In the present paper, 'European Commission' and 'Commission' are used interchangeably.

² This denomination makes reference to the US 'Green Card'.

This paper is structured in two main sections. Section I reviews the historical background which ultimately led to the inclusion of highly skilled immigration policy on the European political agenda. It highlights, among other things, the nexus between the narrative shift on EU immigration policy and ideas promoted by the business community. Section II explores the shaping of the political compromise (or, at times, the lack of it), focusing on the role of EU institutions, member states, business and labour organisations in the making of the Blue Card Directive.

1. The Emergence of an EU Immigration Policy Targeted at the Highly Skilled

The story of the rise of highly immigration policy on the EU agenda is characterised by the preeminence of Member States over EU institutions, at a time when the persistence of the unanimity rule applicable to legal immigration in the Council enabled national governmental actors to keep a firm grip on the decision-making process. However, the European Union had ambitions in this field, and pushed – especially the Commission - for the harmonisation of national policies and the establishment of a common policy regarding the admission of labour migrants. These attempts stirred, at first, fierce opposition from the part of national actors, who had no intention of relinquishing sovereignty or even reduce discrepancies between their admission systems. Against this backdrop and in order to avoid paralysis, the adoption of a new strategy by the Commission - based on ‘partitioning’ (Roos 2013)³ – enabled to keep the interest in an EU labour immigration policy alive and to find agreement. It is argued that the position of Member states and the new narrative adopted by the Commission were, to some degree, impregnated by ideas and concerns expressed by non-governmental actors.

1.1. The Challenges of Developing a Comprehensive Immigration Policy

EU legislation was initially rather vague as far as labour migration was concerned. Although the Treaty of Amsterdam established Community competence in immigration matters⁴, it lacked a clear political agenda in this area. The 1999 Tampere Summit - the first ever European Council dedicated to Justice and Home Affairs - placed the development of an area of freedom, security and justice at the forefront of the European political agenda. At this

³ ‘Policies that were initially intended to cover a range of migratory categories are split up during the policy process into individual pieces of partially binding legislation that only cover narrowly defined migratory categories’ (Roos 2013:162).

⁴ Article 63(3) of the EC Treaty provides that the Council is to adopt ‘measures on immigration policy within the following areas: (a) conditions of entry and residence, and standards on procedures for the issue by Member States of long-term visas and residence permits’ [...].

occasion, Heads of State and government acknowledged the need for the European Union to adopt a comprehensive migration policy (and avoid giving pre-eminence to restrictive controls). Participants further expressed 'the need for approximation of national legislations on the conditions for admission and residence of third country nationals, based on a shared assessment of the economic and demographic developments within the Union, as well as the situation in the countries of origin. It requests to this end rapid decisions by the Council, on the basis of proposals by the Commission' (Art. 20).⁵ To this end, the Council set a pluri-annual programme built on measures prescribed by the 1998 Vienna Action Plan, the Treaty of Amsterdam, and the Tampere Conclusions, extending over the period 1999-2004 (known as the 'Tampere Programme'). The European Commission was invited to prepare a scoreboard to review progress regularly, and a mid-term review was scheduled for December 2001.⁶ By defining the political framework in which Heads of State and government wished to build a common immigration policy, Tampere provided the European Union with new impetus to initiate discussion on JHA-related issues. Yet, although these political declarations legitimised subsequent efforts of the Commission to promote the harmonisation of admissions policies, gaps would remain between political declarations and effective action. The Presidency Conclusions themselves reflected a certain uneasiness with the domain of migration. In fact, despite the laudable intentions to consider the area in its entirety, the Conclusions reflected the highly delicate nature of the field.⁷ In this vein, the objectives stated in the 'Tampere Programme' lacked indications on how to concretely achieve the stated intentions.

Making use of the apparent window of opportunity opened by the Tampere Programme, the Commission presented a proposal for a Directive on 'the conditions of entry and residence of third-country nationals for the purpose of paid employment and self-employed economic activities' in July 2001⁸ and submitted it to the Council on 5 September. The text suggested the adoption of a single legal procedure to regulate both residence and work conditions of all economic third-country migrants without distinction. The 'Community preference principle', referring to the attribution of a post to a third-country national only in cases where no EU citizens or legal residents could be found, was to be respected. As explained by Georg Menz, the Commission hoped 'that this superimposed EU pathway might in the long term supersede or at least streamline national procedures' (Menz 2011: 453).

⁵ Presidency Conclusions 1999.

⁶ Presidency Conclusions 2001.

⁷ See Presidency Conclusions 1999:4, Section IV.

⁸ COM(2001) 386 final

In this endeavour (as in the case of most legislative proposals issued by the Commission concerning legal immigration) a delicate balance had to be found between the willingness of the European institution to open up new channels for labour migration, and the necessity to avoid the stirring of opposition from the part of Member States opposed to relinquishing sovereignty in this highly sensitive domain (Monar 2002: 125). In this vein, the proposal left substantial discretion to Member States. To give a few examples, they could limit economic migration by using national ceilings or quotas (Obj. 5 & 8, p.4); Member States were also granted the possibility to put in place 'green-card programmes' in order to recruit needed specialists in specific sectors (Art. 6(3), p.12)). The European Parliament, the Economic and Social Committee and the Committee of the Regions supported this initiative, but the proposal stirred strong resistance from the part of Member States, which opposed increased EU competence in the field of immigration policy. Discussion in the Council of Ministers was limited to a first reading of the text and came to an end in June 2002.

As was the case in most labour immigration-related EU initiatives (e.g. 2001 Proposal, Blue Card), the strongest opponents were Austria and Germany. Their position resulted partly from concerns expressed by their respective employer associations - the Austrian Wirtschaftskammer and the Bundesvereinigung der Deutschen Arbeitgeberverbände (BDA) – which were concerned about losing their political influence in case labour migration issues were transferred to the EU. Also, the Austrian and German governments questioned the ability of the Commission to take part in labour migration issues. In their view, Article 63(3)(a) of the Treaty of Amsterdam on 'conditions of entry and residence' did not encompass this field. This critical stance highlighted the willingness of these countries to keep their sovereignty over third country nationals' access to their domestic market by limiting EU competence as much as possible. In the German case, particular concerns had to do with possible effects of the EU on the national highly skilled immigration policy under elaboration, a project heavily supported by the BDA (Menz 2011: 458). Moreover, Employers' associations at the EU level - gathered in the Union of Industrial and Employers' Confederations of Europe, UNICE (became 'BusinessEurope' in January 2007) – also opposed the adoption of a one-size fits all framework, advocating instead the importance for Member States to be able to develop their own policies in line with their specific domestic realities (UNICE 2001, p.3). Facing political blockage, the European Commission decided to withdraw the text in 2006⁹ and put a halt to its horizontal approach to labour immigration covering all third-country nationals indistinctively.

⁹ See OJ 2006/C 64/03

1.2. The Revision of the EU Approach vis-à-vis Legal Immigration

Drawing lessons from the failure of the 2001 proposal negotiations, the European Commission adopted a more prudent stance in the following years. Its initial move consisted in modifying the narrative on labour immigration in order to make it more acceptable to governmental actors and employer organisations. This shift is visible in the Communication on immigration, integration and employment.¹⁰ In comparison to the 2001 draft proposal, which presented the EU labour policy as beneficial for European businesses and third-country workers, the 2003 Communication presented economic immigration as an important aspect of the success of the Lisbon strategy. Consequently, some of the resistance towards EU involvement in labour immigration areas toned down (Menz 2011). In order to keep interest in labour migration policy afloat, the subject was strategically put back on the EU political agenda in 2005 with a Green Paper on an EU approach to managing economic migration.¹¹ In the meantime, both the July 2003 Thessaloniki European Council and the June 2004 Brussels European Council had pointed to the need to develop a common immigration policy at the European level. The Commission, thus, believed time was ripe to revisit the subject.

By adopting a 'bottom-up' (rather than a 'top-down' perspective) (see Bertozzi 2007: 8), Commissioner for Justice, Freedom and Security Franco Frattini wished to launch a vast external consultation on the future of a common legal immigration policy prior to submitting a new directive proposal. The idea was to involve interested stakeholders at an early phase of policy-making in order to avoid subsequent opposition as much as possible. To this end, consultations were carried out with EU institutions, Member States and non-Member States, business organisations, trade unions, think-tanks, academia, non-governmental organisations, national parliaments and political parties, as well as regional and local authorities. International organisations were also invited to express their views on the subject.¹² Also, the hosting of these discussions enabled the Commission to give more legitimacy to its involvement (Luedtke 2011:17) and to send a signal to Member States that action was needed in this field (Roos 2013: 71). The objective of the Commission – via the Green Paper - was to convince Member States of the added value of having a European approach, which would address their domestic economic concerns. As was the case in the 2003 Commission Communication, the institution wished to justify its controversial involvement in legal immigration issues on the ground that a common immigration policy was needed to combat demographic decline and ageing, as well as to enable competitiveness

¹⁰ COM (2003) 336 final

¹¹ COM(2004) 811 final

¹² http://ec.europa.eu/dgs/home-affairs/what-is-new/public-consultation/2005/consulting_0016_en.htm

and the fulfilment of the Lisbon strategy. Further, the European institution wished to ease tensions and show its constructive attitude, underlining the fact that it had taken concerns of Member States expressed during the 2001 discussions into consideration (such as the right to determine the number of migrants admitted to enter their domestic labour market). It also insisted on the importance of moving gradually from national to EU rules, while reassuring Member States of their preserved latitude to put in place specific national measures.¹³ The Green Paper suggested three possibilities for progress. The first option was the adoption of a 'horizontal approach', identical to the one presented initially, including conditions of entry and residence for all third-country nationals. The second alternative was to partition the common framework into a series of sectoral legislative proposals covering, for example, skilled migrants, seasonal workers, or intra-corporate transferees. This second choice would put aside the overall common framework preferred by the Commission, but would have the advantage of facilitating the adoption of common rules.¹⁴ Third, a 'common fast-track procedure' in cases of specific labour and skills shortages was put on the discussion table. A public hearing closing the official consultation process was organised by the Commission (i.e. Directorate-General Justice, Freedom and Security) on 14 June 2005.¹⁵

The analysis of the approximately 130 written contributions sent to the European Commission in 2005 showed a high interest in the issue and general support for a common economic immigration policy, albeit with important discrepancies in the methods to be adopted. Overall, participants were divided into two groups. On one side stood the promoters of a comprehensive, horizontal perspective, along the lines of the 2001 Directive proposal. They included NGOs (e.g. Amnesty International, Caritas Europe, Red Cross) and Trade Unions (e.g. European Trade Union Confederation, ETUC), as well as the European Parliament¹⁶. These organisations shared the view that third-country immigrants seeking to enter the EU for economic purposes should be given equal conditions. They feared that a special scheme granted to the highly skilled would create first and second class immigrants. ETUC, in particular, expressed its disappointment 'about the overall emphasis in the Green Paper on the economic aspects and utilitarian arguments'.¹⁷ The other group, comprised of Member States and employer associations, remained doubtful regarding the establishment of a common labour immigration scheme. Both emphasised the need to 'fully respect the principle of subsidiarity' and preserve national leeway in this area (Council 2005: 15-16; UNICE 2005). Three aspects were repeatedly mentioned in their contributions, namely the

¹³ COM(2004) 811 final, p.5.

¹⁴ COM(2004) 811 final, p.5.

¹⁵ http://ec.europa.eu/dgs/home-affairs/what-is-new/public-consultation/2005/pdf/0015/programme_en.pdf

¹⁶ 'Believes that this legislation [a directive laying down minimum criteria for admitting third-country national into the Union for purposes of employment] should define an overall (rather than sectoral) regulatory framework of reference' (OJ C 272 E, parag. 26).

¹⁷ ETUC 2005, p.8.

need for the EU to equip itself with common rules towards specific categories of economic migrants (i.e. highly skilled and seasonal workers), the importance of putting in place a secure legal status for all immigrants working in the EU, and the necessity to move away from complex and bureaucratic administrative procedures. High-skilled third-country nationals, in particular, were seen as key for the European competitiveness and therefore had to be given priority over other categories of migrants.¹⁸ Hence, Member States, in line with business interests, showed clear preference for policies targeted at specific types of immigrants.

The idea of holding an external consultation round was to give everybody a voice, but all voices did not obviously bear the same weight. In a decision-making process handling legal immigration by unanimity in the Council (consultation of the European Parliament and non-involvement of the Court of Justice)¹⁹, it comes as no surprise that the Commission took special care to take concerns and preferences of Member States into consideration. As seen above, these positions coincided with the ones favoured by the business community and expressed via BusinessEurope. Hence, as underlined by Georg Menz (2009: 114), it may be no coincidence that the Commission adopted the exact direction advocated by UNICE, in its response to the Green Paper. In this document, the European employer federation advocated an 'horizontal framework covering all categories of economic migrants with more favourable provisions for trainees, intra-corporate transferees, contract service suppliers, business visitors, seasonal workers' (UNICE 2005: 2). By adopting such outlook, the EU institution moved away from its original grand plan, seeking to secure progress, no matter how meager it was. It ultimately received the green light from Member States (i.e. the veto players in the policy-making process) to work on new legislative proposals in the sensitive area of legal economic immigration.

1.3. The Adoption of a Sectoral Approach

With the end of the Tampere Programme in sight, came time for the EU to assess results in justice and home affairs and prepare future orientations. The Commission took this opportunity to issue a communication to the Council and the European Parliament, drawing up a broadly positive record of past achievements while underlining persisting difficulties: '[...] it is clear that the successes that have been achieved are considerable. However, the original ambition was limited by institutional constraints, and sometimes also by a lack of

¹⁸ See for example the German Federal government's response to the Green paper (http://web.archive.org/web/20061123125537/http://www.ec.europa.eu/justice_home/news/consulting_public/economic_migration/contributions/contribution_germany_en.pdf), or the Response to the Green Paper of the European Services Forum (ESF).

¹⁹ See Art. 67 of the Amsterdam Treaty.

sufficient political consensus'.²⁰ The document also included detailed proposals for a follow-up programme, which ultimately became the basis of the so-called 'Hague Programme' covering the period 2005-2009. This new multi-annual plan adopted by the European Council on 4-5 November 2004 was very much focused on completing unfinished tasks from the previous period, namely the development of an area of freedom, security and justice.²¹ The Hague Programme acknowledged the importance of legal migration, but the objectives in this domain were substantially vague, as if to avoid any potential controversial issues: 'Legal migration will play an important role in enhancing the knowledge-based economy in Europe, in advancing economic development, and thus contributing to the implementation of the Lisbon strategy'.²² More importantly, the narrative of the Programme was in line with the Commission's strategy, adopted following the failed 2001 attempt, to connect its labour migration objectives with the Lisbon agenda. Thus, although the European Council, once again, recalled that the determination of the number of labour immigrants remained under the strict control of Member States, its interest in an EU labour migration policy persisted. Thus, the European Council invited the Commission to prepare a Policy Plan on Legal Migration 'including admission procedures capable of responding promptly to fluctuating demands for migrant labour in the labour market' before the end of 2005.²³

This Policy Plan on Legal Migration, prepared on the basis of the contributions gathered during the Green Paper consultation process, marked a turning point of the EU political vision in the field of labour immigration.²⁴ More precisely, the document illustrated a change of paradigm, from a horizontal approach regulating entry and residence conditions of economic migrants (suggested in the 2001 legislative proposal) to a fragmented approach of immigration policy focusing on a few selected categories of labour immigrants.²⁵ This new viewpoint reflected a utilitarian, selective and economically-oriented approach to labour immigration policy (Carrera 2007: 2): the very same scheme ETUC and NGOs had criticised during the Green Paper consultation in 2005 (see above). The newly adopted approach also enabled a clear distribution of responsibility between the EU and national political spheres (Van Riemsdijk 2012: 352), as well as the consideration of heterogeneous domestic realities. In light of these developments, it seems relevant to posit that EU-level labour actors and NGOs were rather unsuccessful in influencing the policy-making process. By virtue of their mandate – to be protective of employment – they tend to be more inclined to oppose the mechanism of selection altogether (Interview, Business community, 15 July 2014): a position

²⁰ COM(2004) 401 final, p.5.

²¹ See Council Document 16054/04

²² Council Document 16054/04, p.10.

²³ Council Document 16054/04, p.10

²⁴ COM(2005) 669 final

²⁵ See COM(2005) 669, p.5

which may, at times complicate communication with more right-wing oriented policymakers keen to liberalise the EU labour market. The Policy Plan itself included an indicative roadmap of legislative proposals that the Commission intended to put forward in the remaining period of the Hague Programme (i.e. from 2006 to 2009). In this document, the Commission recommended the adoption of a general framework directive ‘to guarantee a common framework of rights to all third-country nationals in legal employment already admitted in a Member State, but not yet entitled to the long-term residence status’. It further suggested the adoption of four complementary directives covering highly qualified workers (other than researchers), seasonal workers, intra-corporate transferees and remunerated trainees. Against this backdrop, the December 2006 European Council acknowledged ‘the importance of migration issued for the EU’ (point 21) and agreed on a series of steps to be taken during the year 2007, including measures regarding legal immigration. The European Council expressed its desire to ‘develop [...] well-managed migration policies, fully respecting national competences, to assist Member States to meet existing and future labour needs’, adding that ‘the forthcoming Commission proposals within the framework of the Policy Plan on Legal Migration of December 2005 should be rapidly examined’ (point 24 (d), p.11).²⁶ As one can observe, the proposals did not touch upon national admissions policies (a prerogative fiercely defended by Member States and business interests). However, by changing its strategy, the Commission did manage, although modestly, ‘to get its foot in the door’ (Boswell and Geddes 2011: 96).

2. The Policy-Making Process of the Blue Card Directive

This section aims to highlight key dynamics, which shaped the making of the Blue Card Directive. In doing so, it focuses on governmental and non-governmental actors who played an active role in the elaboration, the negotiation (or stagnation) of the text. The legal base (i.e. unanimity voting procedure in the Council) had a deep impact on both the interactions of the different players and the content of legislation.²⁷ Under such circumstances, the balance of power between the Commission and Member States was clearly in favour of the latter. The European Union therefore appears, in this area, as an intergovernmental discussion forum where attempts to move towards increased communitarisation are very likely to be opposed by at least one Member State unwilling to see the EU gain any competence in the

²⁶ Brussels European Council 2006.

²⁷ The legal base of the Blue Card was Article 63(3)(a) and (4) of the EC Treaty. The latter provided for the adoption of co-decision (and thus the use of qualified majority voting) for areas covered by Title IV on ‘visas, asylum, immigration and other policies related to free movement of persons’ after a five-year period upon the unanimous vote of the Council. However, this provision did not apply to legal immigration. Consequently, highly skilled immigration policy remained under the unanimity rule until the entry into force of the Treaty of Lisbon, in December 2009.

field. As is shown below, the positions of both sides of the equation were, to a certain extent, impregnated by concerns of business actors operating collectively within their respective EU-level representative organisation.

2.1. The Framing of the Blue Card Proposal by the Commission

To understand the construction of a policy problem, one should keep in mind that the rhetoric utilised results from conscious choices preferred over others in view of achieving particular political objectives. As seen above, the idea of delegating sovereignty in labour migration control met with profound antipathy from the part of Member States, which had no intention of relinquishing power in such a high-sensitive area. The failed 2001 directive proposal incited the Commission to modify its presentation of the problem in order to legitimate the need for European-level activism. It did so by presenting EU-level immigration issues as an important factor of competitiveness, essential for the success of the Lisbon strategy. The Commission proposal on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment issued in 2007 took over part of this narrative, although the text was very much impregnated by notions of 'Community preference' and volume of admission. In other words, although the Commission advocated a migration policy oriented towards enhanced competitiveness and better efficiency in a competitive globalised economy, it simultaneously held back from going too far on the path of harmonisation and free movement of labour. In general terms, the European Commission suggested the creation of a common fast-track procedure characterised by a needs-based approach, which, however, would not create a right of admission. The Commission suggested establishing 'a level playing field at EU level to facilitate and harmonise the admission of [highly skilled workers] and by promoting their efficient allocation and re-allocation on the EU labour market'.²⁸ As such, two key aspects were tackled: the introduction of a special scheme for the entry and residence of non-EU high-skilled nationals applying to reside in the EU for a period exceeding three months, and conditions under which Blue Card holders legally residing in a Member State may reside with their family members in other Member States.²⁹

Just as the Commission was careful not to go too far in promoting the free movement of labour in a period of high unemployment in Europe, the business community refrained from promoting global labour migration publicly. As noted by a business representative, individual companies shied away from being too visible, which is often the case when it comes to

²⁸ Proposal for a Council Directive, COM(2007) 637 final, p.2.

²⁹ See articles 63(3)(a) and 63(4) of the Treaty of Amsterdam.

political positioning. However, improving the ability of the European Union to attract highly skilled personnel from third-countries was easier to argue politically, and for policymakers less risky to embark on (Interview, Business community, 15 July 2014). Taking a closer look at the Commission proposal, the adoption of an 'EU Blue Card' for third-country highly skilled personnel was justified, referring to narratives widely shared within the European business community. The Explanatory Memorandum of the document mentions, for instance, the allegedly necessity to combat skill shortages in view of improving the competitiveness of the European (COM(2007) 637 final, p.2): an idea repeatedly expressed by UNICE in its various position papers on EU labour immigration policy (see, for ex., UNICE 2001, 2005, 2006; BusinessEurope 2008) and which made its way to policy makers via national employer associations and EU-level think tanks (Interview, Business community, 15 July 2014). In the eyes of the Commission, which had adopted this narrative, the need to place this issue high on the political agenda was all the more important, given the poor performance of the EU as regards a fierce global competition for highly qualified professionals: whereas 87% of migrants coming to the EU from Maghreb countries were unskilled to medium-skilled immigrants, 54% of the highly qualified population from this same region were residing in North America (i.e. USA and Canada). Evidence from analysis also suggested that some Member States faced growing difficulty in finding needed skilled workers within their domestic labour market. According to the Commission, the reasons why the European Union encountered these difficulties in attracting talents were threefold. First, in comparison with the USA and Canada where admission procedures were similar over vast territories, highly qualified migrants coming to the EU had to deal with 27 heterogeneous admission systems. Second, migrants could not easily move from one country to another for work (until they acquired the long-term resident status). Lastly, lengthy and cumbersome procedures at times incited them to choose non-EU countries offering more advantageous conditions for entry and stay.³⁰ Moreover, Eurostat forecasts indicated a decrease of the total population of the EU by 2025, accompanied by a decline of the working-age population by 2011. Against this background, and as a result of constant expansion of employment in high-education sectors, a growing dependence of European economies on highly qualified labour was to be expected.³¹ Behind this rhetoric laid the idea that improving the ability of the EU to attract the best and brightest was a necessity in order to be successful in a globalized economy. BusinessEurope expressed very similar views in its Position Paper on the Commission's Proposal, arguing that '[the] ability [of European companies] to compete in the world economy depends to a large extent on their ability to attract the best and brightest' (BusinessEurope 2008: 2). As underlined by Georg Menz, other rhetorical links could have

³⁰ Proposal for a Council Directive, COM(2007) 637 final, p.3.

³¹ Proposal for a Council Directive, COM(2007) 637 final, p.3.

been drawn between immigration and competitiveness, such as requesting an increase of the labour population and wage limitations. However, such approach would have aroused concerns over wage dumping, therefore not being politically appealing (Menz 2011: 6). Furthermore, it is worth highlighting the preserved control of national governments over their domestic labour systems (see for example Art. 7 on the competence of Member States to determine the volumes of admission of highly skilled migrants) and the explicit reference made of the subsidiarity principle: two key demands of multinationals, as well as small and medium-sized European companies (as regards the subsidiarity principle, see for ex, UNICE 2006, BusinessEurope 2008, UEAPME 2008).

2.2. The Positions of Member States in the Council

Council negotiations on the Blue Card took place in a relatively short period of time. From January to December 2008, the different configurations of the Council met to discuss the text. By the end of the French Presidency in December 2008, a political compromise had been reached but political tensions remained. The new Member States, led by the Czech Republic which held presidency in the first half of 2009, felt that the adoption of a permit for highly skilled immigrants would penalise their citizens who did not, yet, enjoy freedom of movement (Interview, Czech Delegation, 24 January 2014). In this context, the formal adoption of the Directive by the Council was postponed, taking place in May 2009.

Main Lines of Division

Although the Commission had been careful to preserve national prerogatives, the proposal carried a high degree a symbolic weight, potentially initiating EU competence in the touchy area of labour migration (Boswell and Geddes 2011: 96). In such context, tensions were visible among Member States, which clustered around similar interests and conceptions of how to manage highly skilled immigration. Arguably, countries favourable to a European immigration policy for highly skilled personnel either did not have a specific national policy, or had a restrictive policy, towards this group of persons and/or were unsuccessful in attracting them (Cerna 2008: 18). One could add countries, which saw an opportunity to review their national policy or upload their national approach to the EU level. In fact, among the countries which backed the proposal, Italy, Spain and Sweden were not very successful at attracting highly skilled migrants. Difficulties related to immigration policy in Sweden led politicians to see the Blue Card as a potential way out (Engel 2008). Spanish Secretary of State for

Migration, Maria Consuelo Rumi Ibanez explained: "We need to have integrated (EU) policies, not only in fighting illegal immigration but also [...] to channel in an orderly fashion immigrants who come to work on the EU territory". The French, dissatisfied with their national policy towards highly skilled migrants thus far put significant energy into preparing the 'European Pact on Immigration and Asylum'. In this optimistic mood, French ambassador to the EU, Pierre Sellal, praised the Blue Card as an important step forward in attracting highly skilled migrants into the Union (Work Permit 2007). On the other hand, countries with open and/or successful high-skilled immigration policies were less interested in the Blue Card and refused to give away sovereignty in these sensitive matters (Collett 2008: 3). One could also include national governments, which were developing their own national scheme vis-à-vis highly skilled third-country foreigners at the time of the Blue Card negotiations and refused any involvement of the EU. Within this group, three sub-categories may be distinguished: countries which decided to opt out of the EU Blue Card permit (i.e. UK, Denmark, and Ireland), fierce opponents to the Blue Card proposal who aimed to make the Blue Card as restrictive as possible (especially Austria and Germany), and countries which disputed the Blue Card on principle (several of the new Member States).³²

Within the first sub-group, the United Kingdom saw very little benefits in the Commission's initiative since it already had a successful highly skilled policy towards third-country nationals and had implemented a points system in 2008 (Collett 2008: 3). Denmark, already having a system to attract highly skilled workers in place, experienced a similar situation. Consequently, the UK and Denmark opted out of the European scheme (together with Ireland).³³ The second sub-group encompassed the strongest opponents to the EU's desire to gain competence in labour migration issues, namely Austria and Germany. As during Council negotiations on the 2001 Directive proposal on the conditions of entry and residence of third-country nationals for the purpose of paid employment and self-employed economic activities, both delegations were instructed by their national governments to reject all provisions which could impact their domestic policies. A member of the General Secretariat of the Council confirmed that 'Austria and Germany had a systemic problem as far as legal migration was concerned. The fact that the legal basis of the proposed Directive touched upon access to their labour market was a fundamental issue, which they could not accept. They adopted the same stance on other texts, such as the Single Permit proposal' (Interview, General Secretariat of the Council, 24 March 2014). This fear of losing sovereignty and see the EU impacting national policies was widely echoed in the media. The Austrian Interior Minister, Gunter Platter, expressed a concern widely shared within this group, namely that

³² See Council Outcome of Proceedings, 5255/08, p.2.

³³ See Council Outcome of Proceedings, 9666/08, p.2, footnote 1.

each EU Member State was solely responsible to determine the number of migrant workers admitted to enter its territory, and that preference should be given to workers coming from other EU countries rather than third-country nationals. The Austrian government condemned the proposal as a 'centralisation too far' (BBC 2007). It is interesting to note that at the time of Council negotiations, Austria was in the process of drafting its own national immigration system. The 'Red-White-Red Card' (introduced in 2011) is a point-based residency and employment permit, which is directed, among other categories, to highly skilled third-country nationals. In Germany, resistance was particularly vehement, since many political actors, as well as major business associations (i.e. BDA and BDI) remained sceptical of the relevance of an EU-level solution to the problem of skill shortages (see UNICE 2005, footnote 1). German politicians were concerned about high levels of unemployment rates and believed that labour shortages of highly skilled talents could be solved at the domestic level (Collett 2008: 3). The German Economy Minister, Michael Glos, said that 'Germany could not take in large numbers of foreign workers just because it need[ed] them at one particular moment' (Spiegel 2007a). Labour Minister, Franz Müntefering, also expressed deep resistance as regards a European scheme in the field of labour immigration. In his view, such an important issue could not be discussed by Labour ministers and the Commissioner for Justice, Freedom and Security only; instead, Labour ministers from all the Member States had to be given the opportunity to express their view on the subject (Spiegel 2007b). On the contrary, business leaders shared the view that highly skilled immigration was needed in Germany, and that the dearth of IT specialists and engineers could impact the German economy negatively in the short term (Spiegel 2007a). For these countries, competition between Member States and their own success in attracting talents appeared more important than progress towards the establishment of a pan-European scheme. The third sub-group within the wider contestation front, led by the Czech Republic, gathered Member States which had joined the EU in 2004. Subject to transitional clauses which limited the free movement of their people, these countries insisted on the need to lift all remaining free movement restrictions of citizens of new Member States before the adoption of the Blue Card Directive.³⁴ The Czech minister, Ivan Langer, (supported by the Slovak minister Robert Kalinak) said to the press: 'Our citizens cannot be in a worse situation than non-EU states (Goldirova 2008).

³⁴ See Council Outcome of Proceedings, 5255/08, p.2.

Position of Member States and Non-Governmental Actors on Controversial Issues

Debates in the Council were particularly lively and concerned three key points: the definition of the terms ‘highly qualified employment’ and ‘higher professional qualifications’, complementarity between Community and national provisions, and admission criteria (i.e. the minimum salary threshold).³⁵ As underlined by Christof Roos, these discussions among member state delegations reflected, to a large extent, issues brought up previously by EU employers and labour unions (Roos 2013:169). Whereas questions of definitions did not seem to stand at the forefront of non-governmental actors’ concerns, both the preservation of Member States’ leeway in organising their domestic labour market and the possible use of a salary threshold to manage the admission of highly skilled third-country workers caused major concerns.

Regarding the issue of complementarity between EU-level and national immigration systems, DG Justice, Freedom and Security promoted the idea of moving away from the status quo, characterised by 27 highly diverse national schemes, by setting up binding minimum standards across the EU. Although Member States would retain their ability to manage their labour market needs and amend their legal framework, the immigration of highly skilled workers would be managed by the Blue Card system exclusively.³⁶ Among non-governmental actors, vocal opponents included business representatives. BusinessEurope, for instance, advocated the imperative for Member States to be able to retain their national schemes in parallel to the Blue Card permit (BusinessEurope 2008: 3). As a general remark, it is worth noting that business stakeholders tend to expect greater influence at the national than at the EU level. For this reason, they wish to ensure that more competence for the EU does not endanger their domestic channels of influence (Interview; Business community, 15 July 2014). The competence of the Commission therefore had to be kept within acceptable boundaries. In the Council, some Member States were in a similar state of mind, showing clear reluctance to go down such audacious road and wishing to preserve discretion in the area of highly skilled immigration policy. At a time of unanimity rule in the Council, the balance of power was clearly in favour of national delegations. The Commission was further put at a disadvantage by the fact that its power of initiative was limited to the possibility to put a point of equilibrium on the Council negotiating table, which it had attempted to define beforehand via extensive consultations. The line of division was clearly visible, underscoring opposition between two long-standing conceptions of the European construction: the

³⁵ The Presidency points to contention surrounding these issues in a note to the Permanent Representatives Committee dated 8 September 2008 (12687/08).

³⁶ See Council Proposal, COM(2007) 637 final, p.7.

intergovernmental approach on one side and the communitarisation view, based on incremental harmonisation, on the other.

The principle of complementarity gained political importance and ultimately led to a negotiation deadlock (in April 2008). In light of the situation, the Slovenian Presidency transferred the issue to COREPER (Interview, General Secretariat of the Council, 24 March 2014). As a result of these tensions, a new clause (cf. article 3(4)) was added in the compromise suggestions prepared by the Slovenian Presidency, stating: 'Member states may issue residence permits other than an EU Blue Card for the purpose of employment on terms that are different than those laid down by this Directive. Such residence permits shall not confer the right of residence in the other Member States as provided for in this Directive'.³⁷ In their attempt to scale down the ambitions of the Proposal, Germany and Austria suggested to delete a passage which read: 'Such residence permits shall not confer the right of residence in the other Member States as provided for in this Directive'. However, the Presidency preferred to keep it, even if redundant.³⁸ As for the Commission, it opposed the introduction of this new paragraph on numerous occasions.³⁹ The European Commission voiced its concern and underscored the importance of maintaining a level of exclusivity of the Blue Card.⁴⁰ Ultimately, and despite repeated objection expressed by the Commission, the new paragraph was kept unchanged until the adoption of the final text in May 2009. A member of the French delegation summed up the situation in the following terms: 'The Commission was opposed to the idea but we twisted its arm and it was done' (Interview, French Delegation, 26 March 2014).

The most important source of dissent revolved around the criteria for admission to a Member State, and more specifically the Commission's suggestion to set up a national salary threshold.⁴¹ In its memorandum of the Proposal, the EU institution explained that although Member States would retain the latitude to set this threshold at a level in line with their national labour market and immigration policies, it appeared necessary to establish a relative minimum threshold for highly qualified third-country nationals across the European Union aimed to avoid low salary levels which would deter potential candidates from applying.⁴² This provision provoked numerous reactions and shed light on divisions both between employers and labour unions and national delegations in the Council. BusinessEurope openly rejected this idea, opposing the very idea of adopting a wage admission criterion at EU level. In the

³⁷ Council, 8875/08, p.5.

³⁸ Council, 11512/08, p. 7, footnote 13.

³⁹ See Council, 9666/08, p.7, footnote 14; Council, 11512/08, p. 7, footnote 12.

⁴⁰ Council, 11512/08, p.7, footnote 12.

⁴¹ See Art. 5(2) of the Directive Proposal.

⁴² COM(2007) 637 final, p.9.

eyes of the business federation, the proposal weakened the competence of social partners, individual employers and workers to set salary levels and violated the subsidiarity principle.⁴³ In a similar vein, the UEAPME heavily insisted on the necessity for any wage threshold to be defined by national social partners.⁴⁴ By contrast, the European Trade Union Confederation (ETUC) called for increased harmonisation among Member States in the field of immigration. Unlike its business counterparts, it viewed 'minimum working conditions and equal treatment in situations of cross border working [as] necessary to bring about a European internal labour market, and to prevent social dumping'.⁴⁵ In the Council, lines of division ran between three main groups: strong opponents to a European scheme, who wished to turn the Blue Card into a highly selective permit (e.g. Austria and Germany), countries foreseeing practical difficulties in the implementation phase (either because they did not have a 'national salary threshold', or because they would not be able to offer highly skilled third-country nationals the minimum salary required) (e.g. Hungary, Spain, Finland, Sweden) and those generally more favourable to establishing EU-level rules (e.g. Belgium, Luxembourg, France, the Netherlands). Although it is beyond the scope of this paper, which focuses on the EU-level policy-making exclusively, it is worth underlining that the position adopted by Member States was, in some cases, profoundly shaped by national employer associations and trade unions. Connections between governmental officials and interest groups therefore, at times, expanded beyond the sole dimension of the European Union (see Menz 2009).

To conclude, this paper sought to explore the internal dynamics of labour immigration policy at the EU level, considering key aspects of the process which led to the adoption of the Blue Card Directive. It did so by considering governmental stakeholders, as well as business and labour interests (which are often left aside in European studies on migration). Drawing on the work of Georg Menz, it is argued that the role played by these actors should be taken into consideration to partly explain what the Directive turned out to be. The aim was therefore to probe the limits of the EU Blue Card by considering the nexus between these two types of actors and the extent to which they were able to shape (or at least influence) the EU-level decision-making process as regards highly skilled immigration policy. Preliminary findings suggest that the European business circles managed to get some of their ideas through, whereas labour union actors faced more difficulties. In the case of the Blue Card Directive, which is often depicted as a 'watered-down directive'⁴⁶ and as a directive based on a 'lowest

⁴³ BusinessEurope 2008, p.3.

⁴⁴ UEAPME 2008, p.2.

⁴⁵ ETUC 2007, p.4.

⁴⁶ Kahanec and Zimmermann 2010, p.20; Van Riemsdijk 2012, p.353.

common denominator⁴⁷, one could presume that this resulted, in parts, from the influence of positions promoted by business interests. By, on one hand welcoming the Commission's initiative to improve the attractiveness of the EU for highly skilled workers, and on the other hand, advocating the maintenance of the full latitude of Member States over their national labour market, business interests participated in the somewhat limited scope of the policy (in comparison with the Commission's initial ideas). It may therefore be argued that harmonisation occurred at the extreme margins and that concerns over national sovereignty played a substantial role in the nature of the final political compromise. Despite its limits, the Blue Card Directive carried a high degree of symbolic weight, given the fact that it marked the (timid) entry of the EU into the well-guarded national prerogative of labour immigration policy. In any case, although it would certainly be misleading to establish a systematic influential dynamic between the European employer associations on one side, and EU institutions and national delegations on the other, as the origin of this influence has not been traced in this paper, it appears fruitful to examine cross-fertilisation processes occurring between the actual policy makers taking decisions, and the myriad of interest groups evolving in EU-level spheres and beyond.

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⁴⁷ Cerna 2010, p. 25.

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