

THE “BLUE CARD” DIRECTIVE & ITS IMPACT ON EU & HOME STATE SOCIETIES

Highly skilled immigrants are considered to be “sort after” individuals. They provide countries with skilled labour often, if they originate from developing or least developed countries, with significantly less wage demands than similarly skilled domestic workers. Furthermore they provide an attractive solution to skills’ shortages in the labour market of western States. Schemes to encourage this type of immigration have a long history, with the most well known example being the US Green Card for labour migrants. Member States of the European Union have also operated similar schemes but it is only recently that the EU itself has entered this field with the adoption of Directive 2009/50/EC¹, the “Blue Card” Directive. This paper will briefly examine the details of the Directive, its aims and objectives and its interaction with other EU policy areas. The possibility of achieving these aims and objectives will be examined and the prospects for the success of the initiative.

The Blue Card Directive was adopted on 25 May 2009, with a final Member State transposition date of 19 June 2011. The Directive itself, or at least the concept behind it, has a longer back story. In 1997 the Commission put forward a proposal² for a Council Act to adopt a Convention for the first admission and residence of third country nationals (henceforth TCNs) to the Member States under the intergovernmental provisions of the Third Pillar of the TEU, Justice and Home Affairs (JHA). With the transfer of much of the JHA provisions into the EC Treaty, the supranational First Pillar, at the Treaty of Amsterdam in 1997, the Commission tried again with another proposal in 2001³, this time for a Directive. Unfortunately the scope of this proposal covered all TCNs seeking labour and the difficult question as to who had competence to determine first entry to the territory of a Member State

¹ Council Directive 2009/50/EC on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment, OJ 2009 L155/17

² Commission proposal for a Council Act establishing the Convention on rules for the admission of third-country nationals to the Member States, COM(1997) 387 final

³ Commission proposal for a Council Directive on the conditions of entry and residence of third-country nationals for the purpose of paid employment and self-employed economic activities, COM(2001) 386 final

went to the heart of the issue of national sovereignty. As such the proposal failed to garner enough support in the Council and was withdrawn in 2006. The Commission rethought its policy, adopted two Directives on the adoption of TCNs for the purposes of study⁴ and scientific research⁵ and issued a Communication in 2005 outlining a Policy Plan for Legal Migration⁶. This Policy Plan split the field covered by the 2001 proposal into sections in an attempt to adopt the legislation required for each section in an incremental manner. The five resulting categories⁷ included that of highly qualified migrant workers and the Commission duly issued a proposal⁸ for a Directive in this area that culminated in the Blue Card Directive.

Details of the Blue Card Directive

Article 1 sets out the purpose of the Directive, being to provide the conditions of entry and residence of highly qualified TCNs and their families for longer than three months into a Member State's territory and subsequent Member States, and Article 2 provides definitions of terms in the Directive. The key provisions for a TCN to obtain a Blue Card are contained in Articles 3 and 5. The scope outlined in Article 3(1) is straightforward until the derogations in paragraph 2. There are ten exempted classes of individuals, some of which are reasonable, expected and covered by other EU legislation (TCNs migrating to the EU to study⁹, conduct scientific research¹⁰, as family members of Union citizens who have exercised their free movement rights¹¹, posted workers¹² and long-term resident TCNs¹³) whilst others raise concern. These

⁴ Council Directive 2004/114/EC on the conditions of admission of third-country nationals for the purposes of studies, pupil exchange, unremunerated training or voluntary service, OJ 2004 L375/12

⁵ Council Directive 2005/71/EC on a specific procedure for admitting third-country nationals for the purposes of scientific research, OJ 2005 L289/15

⁶ Commission Communication on a Policy Plan on Legal Migration, COM(2005) 669 final

⁷ Ibid. at 6

⁸ Commission proposal on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment, COM(2007) 637 final

⁹ Op. Cit. n.4

¹⁰ Op. Cit. n.5

¹¹ European Parliament and Council Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, OJ 2004 L158/77 (corrected OJ 2004 L229/35)

¹² European Parliament and Council Directive 1996/71/EC concerning the posting of workers in the framework of the provision of services, OJ 1997 L18/1

include beneficiaries of international¹⁴ or temporary protection and seasonal workers. It is possible that these individuals could be highly qualified and fulfil the criteria for a Blue Card but the rights associated with having a Blue Card are denied them merely because of their status. The term 'seasonal workers' is not defined in Article 2 and therefore the rights associated with the acquisition of a Blue Card can be circumvented by classifying an individual as a 'seasonal worker'. The third exemption of concern is for TCNs whose expulsion has been suspended because of fact or law. The term 'suspended' would appear to indicate the expulsion to be temporary but again the Directive does not provide a definition. Both the terms 'seasonal worker' and 'suspended' may well require interpretation by the ECJ.

Article 5 lays out the criteria for admission, with paragraph 1 specifying the necessary documentary evidence. Paragraph 3 outlines a wage threshold for TCNs where the migrant's gross annual salary must be at least 1.5 times the average gross annual salary as determined and published by that Member State. This salary threshold can be reduced through the derogation in paragraph 5 to 1.2 for employment in professions in particular need of TCN workers and which belong to the major groups 1 and 2 of the International Standard Classification of Occupation (ISCO-88), those groups consisting of legislators, senior officials and managers, and professionals. This final wording of the salary threshold was half that suggested in the original proposal. Furthermore, the derogation in proposed Article 6 for graduate TCNs less than 30 years of age was completely removed. It should be noted that the Member States retain the right under Article 6 to control the volume of admission of highly qualified TCNs entering its territory

Chapter III, Articles 7 to 11, concern the procedural elements of issuing the Blue Card, grounds for refusal, withdrawal or non-renewal and procedural safeguards.

¹³ Council Directive 2003/109/EC concerning the status of third-country nationals who are long-term residents, OJ 2004 L16/44

¹⁴ Council Directive 2004/83/EC on minimum standards for the qualification and status of third-country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted, OJ 2004 L304/12

The rights that come with the Blue Card are contained in Chapter IV. Access to the labour market is contained in Article 12 with a restrictive approach for the first two years of legal employment that requires the conditions of Article 5 to be met and changes in employment only allowed with the prior authorisation in writing of the competent authorities of the host Member State. After two years the Member State has the discretion to grant equal treatment with nationals for access to highly qualified employment but if it does not the TCN concerned must communicate changes that affect the conditions of Article 5 to the host Member State's competent authorities, in accordance with domestic procedures. A public service restriction on access to the labour market can be retained by the Member States, as can restrictions reserving employment to nationals, Union citizens or EEA citizens in accordance with national or Community law. Loss of employment cannot automatically lead to withdrawal of the Blue Card, unless unemployment lasts for longer than three months, or if it occurs more than once during the period of validity of the Blue Card (Article 13). Article 14 provides a right of equal treatment for Blue Card holders with nationals of the host Member State in regards to: working conditions; trade union rights; education and vocational training; recognition of qualifications; social security; State pension; access to public goods and services; and, free movement within the host Member State's territory. Member States can limit this right to equal treatment when it comes to study and maintenance grants and access to further and higher education may be subject to specific prerequisites as specified by domestic law. The Family Reunification Directive¹⁵ provides the appropriate rights for families of Blue Card holders, according to Article 15, with a number of minor amendments and the Long Term Residence Directive is also to apply, but again with derogations set out in Article 16. Importantly the five year continuous residence requirement in the host Member State in Article 4(1) of the LTR TCN Directive is reduced to two years, with five years of continuous legal residence in the territory of the EU as a Blue Card holder.

A limited right to move between Member States is provided for in Chapter V, although the limited nature of this right must be noted, such that there is no right to

¹⁵ Council Directive 2003/86/EC on the right to family reunification, OJ 2003 L251/12

free movement. After 18 months of legal employment in the first Member State, the Blue Card holder and his family may move to another Member State to take up further highly qualified employment. A full application must be made again to the second Member State's authorities who determine whether to approve the application or not. Such an application can be made within a month of moving to the second Member State, that can refuse to allow the applicant to work until a decision has been taken, or from the first Member State. If the application is refused, and this can be on the basis of the volumes of admission in accordance with Article 6, the first Member State must immediately readmit the Blue Card holder and family members without formalities.

Aims and Objectives of the Blue Card Directive

The aims and objectives of the Directive are set out in the Recitals, but are expanded in the Explanatory Memorandum of the Commission's proposal¹⁶ and an Impact Assessment¹⁷ issued by the Commission at the same time as the proposal. The Impact Assessment located the problem¹⁸ that needed to be addressed in the demographic trend across the EU such that by 2050 the working age population would shrink by 48 million and the dependency ratio (OAPs to workers of working age) would double to 51%. Thus when setting this problem in the context of the requirements of the Lisbon Strategy¹⁹ and the Hague Programme²⁰, the employment of highly qualified TCNs within the EU became an attractive option. As such the Impact Assessment identified²¹ that legally resident TCN highly skilled workers (henceforth HSWs) within the EU had much higher rates of unemployment than EU national HSWs and so the first measure ought to be to utilise this unused

¹⁶ Op. Cit. n.3 at 2

¹⁷ Commission Staff Working Document (impact assessment) accompanying Commission proposal for a Council Directive on the conditions of entry and residence of third-country nationals for the purpose of paid employment and self-employed economic activities, SEC(2007) 1403

¹⁸ Ibid. at 8

¹⁹ Council of the European Union, Presidency Conclusions of the Lisbon European Council of 22-23 March 2000 – see Recitals 3 and 6

²⁰ Council of the European Union, The Hague Programme: Strengthening Freedom, Security and Justice in the European Union, OJ 2005 C53/1 – see Recital 4

²¹ Op. Cit. n.17 at 12

employment potential²². However, this would be unlikely to cure the principle problem of the demographic trend especially when coupled with the difficulties of geographic mobility to adjust labour demand and supply at relatively short notice, an adjustment better suited to immigrant labour to satisfy²³. When comparing the attractiveness for TCN HSWs of the EU to other developed countries the Impact Assessment, with respect to the average rate of employment, stated “the EU (with a value of 1.72%) definitely lags behind the performance of all the other main immigration countries, such as Australia (9.9%), Canada (7.3%), USA (3.2%) and Switzerland (5.3%)”²⁴. Finally the legislative framework recognised by the Impact Assessment was fragmented with all Member States having some special schemes for TCN HSWs with enhanced rights but only 10²⁵ going further than scientists, artists, intra-corporate transferees, researchers and university professors²⁶. Of these 10 Member States all had different definitions, entry and residence conditions, although all schemes were demand driven.

The Impact Assessment therefore identified²⁷ 2 global objectives: to improve the EU’s ability to attract and retain TCN HSWs; and, to effectively and swiftly respond to labour demands for highly qualified labour and offset skill shortages, by encouraging TCN HSW immigration and circulation within the EU. These general objectives were complimented by specific aims: to develop a coherent approach and common immigration policy on TCN HSWs; to increase the numbers of TCN HSWs immigrating to the EU on a needs-based approach; to simplify and harmonise admission procedures for TCN HSWs; to promote TCN HSWs’ social and economic integration; and, to foster intra-EU mobility, remove unnecessary barriers and allow a more efficient allocation of TCN HSWs through the EU.

Interaction with other EU Policy Areas

²² See S Peers, ‘EC Immigration and Asylum Law Attracting and Deterring Labour Migration: The Blue Card and Employer Sanctions Directives’ (2009) 11 EJML 387 at 404

²³ Op. Cit. n.17 at 12

²⁴ Ibid. at 14

²⁵ Austria, Belgium, Denmark, France, Germany, Greece, Ireland, the Netherlands, Portugal and the UK. The Czech Republic set up a pilot project on the admission of TCN HSWs in 2003

²⁶ Op. Cit. n.17 at 16

²⁷ Ibid. at 21

At the same time that the approach behind the Blue Card Directive was being formulated and the objectives being set an alternative consideration was being explored, first generally, and rather tentatively, by the Council in its document Global Approach to Migration²⁸, and then by the Commission over the concept of Circular Migration²⁹. In the Communication, the Commission sets out a proposed balancing exercise to fulfil the labour needs of Member States against the effects of “brain drain” in developing countries³⁰ with the Blue Card Directive placed at the heart of Circular Migration³¹. This new concept of Circular Migration was to be augmented by Mobility Partnerships, Return Agreements and dialogue with third countries.

Critique

To evaluate the Blue Card Directive the five specific objectives in the Impact Assessment will be considered, before considering the two general objectives and the alternative policy of avoidance of brain drain.

1. Specific Objectives

a. A coherent approach and common immigration policy on TCN HSWs

By producing a harmonising Directive, even though only minimum harmonisation, there is a minimum standard that Member States must adhere to once the Directive has been transposed into domestic law. Unfortunately that standard is a minimum with considerable amount of discretion left to the Member States over entry and residence requirements, numbers of TCN HSWs admitted and the rights attached to a Blue Card. Thus although there may be a common minimal approach that approach can remain fragmented inviting competition between Member States for

²⁸ Council of the European Union, Global Approach to Migration, Council Document 15744/05

²⁹ Commission Communication on circular migration and mobility partnerships between the European Union and third countries, COM(2007) 248 final

³⁰ Ibid. at 2

³¹ Ibid. at 10

these highly regarded immigrants. Furthermore through their Schengen opt-out, the UK and Ireland are not included in the scope of the Directive.

b. More TCN HSWs immigrating to the EU on a needs-based approach

This will be difficult to assess without fresh statistical data. However, the deep global recession from 2008 that has badly affected the EU is likely to depress demand for TCN HSWs. It is suggested that this is likely to have a detrimental effect, not just on TCN HSWs but also on the attainment of the Lisbon Strategy. As these immigrants have skills that can drive the knowledge-based economy then it is essential in these difficult economic times to draw them into working in the EU particularly when the EU is competing in a global market place.

c. Simplify and harmonise admission procedures for TCN HSWs

Admission procedures are harmonised by the Blue Card Directive and as such, across the EU, these procedures can be found to be simplified. However, the Member States retain the right to control the volume of admission of TCN HSWs.

d. Promote TCN HSWs' social and economic integration

Again the Blue Card Directive, through the rights granted in Chapter IV, has not only promoted TCN HSWs' social and economic integration but has also provided the means by which that can take place. Furthermore the requirement of the minimum salary threshold in Article 5(3) suggests that TCNs should be able to integrate with their host society, and indeed as this is a minimum threshold it is open to Member States to set a higher amount.

e. Increase intra-EU mobility

This last objective essentially deals with geographical mobility of TCN HSWs, the landscape which the Directive creates is difficult to be positive about. Blue Card holders are free to move within the Schengen area for up to three months³². However, the Directive makes clear that geographical mobility, although a primary mechanism for improving labour market efficiency, preventing skills shortages and offsetting regional imbalances, would be limited for the first two years of legal

³² Recital 14

employment in the host Member State due to the principle of Community preference and possible abuses of the system³³. As such geographical mobility of a Blue Card holder during the first period of legal stay should be controlled and demand-driven³⁴. The result is that only after 18 months of such legal employment can a TCN HSW, and his family, move to another Member State to take up further highly qualified employment (Article 18). Furthermore the second Member State has to assess another application for Blue Card holder status that it can reject on the basis of Article 6 volumes of admission reasons. This is adequate to deal with long term labour market inefficiencies and regional imbalances but it is in times of short term difficulties where there needs to be flexibility and swift responses. In many high-technology and innovative industries the mobility of personnel is essential to exploit and develop novel discoveries. At times of economic downturn mobility of labour is essential to ensure the maximisation of labour efficiency. The Blue Card Directive stifles such opportunities and as a consequence makes the EU less attractive to TCN HSWs. It could be argued that the derogations from the LTR TCN Directive in Article 16 make the acquisition of LTR TCN status more accessible, thereby increasing the opportunities for geographical mobility. However, the rights of equal treatment in Article 11 of the LTR TCN Directive are very similar to those under the Blue Card Directive and significant discretion³⁵ is given to Member States over the movement rights of LTR TCNs.

2. General Objectives

So the two general objectives must now be considered and indeed it can be said that the jury is out on both counts. It is difficult to see that the Blue Card regime introduced, with so much discretion left to the Member States, is likely to encourage immigration of TCN HSWs and their retention is difficult to gauge. Without a possibility of acquiring permanent residence and the status of EU citizen, the residence status of a Blue Card holder is likely to depend on the fluctuations in the labour market and the economy. Such flexibility may be the desired result for Member States but the uncertainty created is possibly going to have a negative

³³ Recital 15

³⁴ Recital 20

³⁵ See in particular Article 14(3) & (4) Op. Cit. n.13

impact on the retention of these sort after individuals. As for effective and swift responses to labour demands for highly qualified labour and offset skill shortages, by encouraging TCN HSW immigration and circulation within the EU, the immigration into the EU of TCN HSWs will depend on the first objective. However, geographical mobility within the EU is unlikely to be effective or swift considering the limitations imposed by the Blue Card Directive.

3. Brain Drain

The Impact Assessment makes clear that the majority of TCN HSWs already legally resident in the EU in 2005 come from States where there are dangers of brain drain³⁶. Thus as Peers³⁷ suggests these figures suggest that concerns of a brain drain exacerbated by the Blue Card scheme could be *prima facie* valid. Recital 22 encourages Member States, when implementing the Directive, not to pursue active recruitment in developing countries in sectors suffering from a lack of personnel. The development of ethical recruitment policies and principles in key sectors is suggested. However, as Peers notes³⁸, encouragement in the Recitals of the Directive is not the same as an obligation to pursue ethical recruitment policies, which the Impact Assessment³⁹ had suggested was a possibility. The Impact Assessment⁴⁰ does make the suggestion though that as so many TCN HSWs have already decided to move away from the home country to pursue employment in developed countries such as the USA and Canada, inducing them to come to the EU would not increase the total number migrating, and thus increase brain drain, but merely change the destination of migration. Peers⁴¹ points out that this is a disingenuous argument and one similar to that traditionally employed by defenders of tobacco advertising.

³⁶ Op. Cit. n.17 at 11 – 45.59% from “Other Africa” (excluding Northern Africa), 25.89% from South America, 15.59% from Southern and South Eastern Asia and 8.54% from Central America and the Caribbean

³⁷ Op. Cit. n.22 at 403

³⁸ Ibid. at 407

³⁹ Op. Cit. n.17 at 65

⁴⁰ Ibid. at 36

⁴¹ Op. Cit. n.22 at 406

4. Final difficulties

The final problems with the Blue Card scheme are alluded to by Guild⁴² when she considers the international obligations that already bind Member States. These obligations are contained in two conventions: the International Labour Organisation Convention 97 of 1949⁴³; and, the Council of Europe's Convention on the Legal Status of Migrant Workers 1977⁴⁴. Article 13(1) provides a grace period for unemployment of 3 months whilst the European Convention sets a minimum period of 5 months. Article 6(1)(b) of the ILO97, and Article 18 of the European Convention (although not so precisely), require equal treatment as own nationals for social security that includes sickness cover. This would appear to contradict one of the Blue Card Directive's criteria for admission, namely the requirement of sickness insurance. The Directive also requires sickness insurance to cover family members, a requirement not included in Article 12 of the European Convention. Finally Article 8(2) of the European Convention ensures that a worker cannot be bound to one employer within a territory, or to that territory, for more than a year. This again appears to contradict the Blue Card Directive's requirements, particularly the necessary authorisation by the domestic competent authority for any change in employment for the first two years of residence (Article 12(2)) and the ability to move to another Member State to work only after 18 months (Article 18(1)).

The result of these contradictions means that the Member State concerned must ensure that the higher standards specified by international legal commitments are satisfied thereby nullifying those elements of the Blue Card Directive.

Conclusion

⁴² E Guild, 'EU Policy on Labour Migration: A First look at the Commission's Blue Card Initiative' CEPS Policy Brief 145/2007 accessed on 10 December 2008 at http://www.libertysecurity.org/IMG/pdf_blueCard.pdf

⁴³ Ratified by Belgium (1953), Cyprus (1960), France (1954), Germany (1959), Italy (1952), the Netherlands (1952), Portugal (1978), Spain (1967), UK (1951)

⁴⁴ Signed by Belgium (1978), Germany (1977), Greece (1977) and Luxembourg (1977). Signed, ratified and entered into force in France (1983), Italy (1995), the Netherlands (1983), Portugal (1983), Spain (1983) and Sweden (1983)

Is the Blue Card Directive likely to achieve its objectives? It's too early to tell as of yet. However, there are concerns. First the harmonisation is minimum and so Member States can set higher standards. This means that the elimination of competition between Member States to attract TCN HSWs could well be accentuated rather than relieved. Second harmonisation is not achieved with the UK and Ireland opting out. Third there appears to be a cavalier attitude towards other policy areas, in particularly the elements supporting the idea of Circular Migration and the Brain Drain from developing and least developed countries. Fourth international commitments for Member States already set higher standards than those outlined in the Blue Card Directive. Fifth the inclusion of beneficiaries for international protection in the classes of exempted individuals is troublesome. This is because it appears to contradict with the identification by the Impact Assessment of legally resident TCNs as the first class of people who could help to solve the problem with the demographic trend. It also appears to contradict the findings of the Impact Assessment that those who have already proven their mobility by immigrating are those most likely to solve the problem of geographical mobility. The failure to utilise the skills of these individuals, some of whom can be very highly qualified, is a major concern that could have been, at least partially, resolved by including them in the scope of the Directive.

The result is likely to be disappointing and this area may well need revisiting in the short rather than the long term if the objectives set out in the Impact Assessment are to be achieved. It must also be mentioned that the interlocking of the Blue Card with Circular Migration could see the return of a failed system of labour migration, that of the 1950s guest worker. The hand of national sovereignty weighs heavy on the Blue Card and until this is lifted it is suggested it will continue to be a disappointment.