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The Blue Card Directive: Central Themes, Problem Issues, and Implementation in Selected Member States

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2 The EU Blue Card Directive: A Low Level of Trust in EU Labour Migration Regulation

Tesseltje de Lange

2.1 Introduction

According to the European Commission legal instruments such as the Blue Card Directive have ‘a central role to play in ensuring the EU’s long-term competitiveness and ultimately the future of its social model’.¹ In its 2020 strategy document, the European Commission writes that the EU needs migrant labour ‘given both the seriousness of the skills mismatch in European labour markets as well as irreversible demographic developments’.² The EC notes the positive effects of previous migration into the EU: ‘The contribution of immigrants to the EU economies has been substantial. In the period 2000-2005, third country immigrants to the EU accounted for more than a quarter of the overall rise in employment and for 21% of the average GDP growth in the EU-15. This growing migrant labour share consisted of both highly qualified jobs in the expanding sectors of the economy but also of many jobs requiring a mix of lower skills. Therefore, effectively managing migration and promoting the effective participation and inclusion in employment and in our societies of the important numbers of immigrants already living legally in the EU are key to achieving the employment objectives set in the Europe 2020 Strategy.’³ Apart from admitting new labour migrants into the EU, more lenient rules for mobility of the Third-Country Nationals (TCNs) already employed in the EU is central to this strategy. Symmetry between the free movement of workers within the EU and the admission and integration of TCNs was already at a core objective of the 1999 Tampere Program. I will argue that the Blue Card Directive 2009/52/EC as it stands, will not be of much help in achieving the EU’s ambitions because the Directive proves that there is a very low level of trust between Member States. As such, it is one out of many examples where the ambitions of the European Commission are frustrated by the Member States. Nevertheless, on a positive note, the Blue Card Directive does give one example of trust amongst the EU Member States where there is the need for mutual recognition of the admission decision of a Blue Card Holder (BCH).⁴ Indeed, the recognition of residency rights as a BCH granted in a first Member State when counting the relevant years for obtaining the status of long term resident under Di-

1 3rd Annual Report on Immigration and Asylum (2011) and Commission Staff working document of 30 May 2012 SWD (2012) 139. Also: The Global Approach to Migration and Mobility of 18 November 2011 COM (2011) 743.

2 Reference is made to Eurostat, *Statistics in Focus*, 72/2008 ‘Ageing characterizes the demographic perspectives of the European societies’.

3 3rd Annual Report on Immigration and Asylum (2011), COM (2012) 250 final.

4 H. Battjes, E. Brouwer, P. de Morree & J. Ouwerkerk, *The Principle of Mutual Trust in European Asylum, Migration and Criminal Law. Reconciling Trust and Fundamental Rights*, Meijers Committee, Utrecht: Forum 2011.

rective 2003/109. This is one of the legal instruments in the EU Blue Card Directive that will be analyzed here. But the other instruments that will be discussed, those regarding first admission and the conditions for mobility between the first and second Member State, show little or no sign of mutual trust or mutual recognition of legal decisions made elsewhere in the EU. Apart from the fact that these instruments have little to do with mutual trust between Member States, they also show little proof of trust in EU businesses selecting the brains the EU labour market needs. Before the three specific instruments in the Blue Card Directive are discussed, I will elaborate on the levels of trust the European Commission strives for and present a more successful labour migration governance model in use for quite some time already: the Scientist Directive 2005/71.

2.2 The Concept of 'Trust' in EU Labour Migration Governance

I recognize three dimensions of trust relevant to the issue at hand. The first dimension regards the mutual trust between the Member States when recognizing each other's decisions on granting BCHs entry onto the EU labour market. The second dimension is concerned with the level of mutual trust between the EU Member States and the countries of origin while the third dimension considers the amount of trust legal instruments require the Member States to place in businesses for selecting the wanted migrant workers.

2.2.1 Mutual Trust between Member States

The general principle of mutual recognition in EU law is relevant in many fields of law, for instance when it concerns the mutual recognition of judicial decisions and more specifically in migration law when recognizing a Schengen visa granted or the qualification as a refugee by another Member State. The recognition of the other Member State's legal decision is in the end based on trust: trusting the other to have taken a right decision. This is the dimension of trust that the Blue Card Directive is lacking when it comes to EU mobility during the first five years of residence of the BCH, but it is present to some extent once the migrant wants to apply for a status as long term resident; these issues will be discussed in the third section of this chapter.

2.2.2 Mutual Trust between the EU and Countries of Origin

The second dimension of trust present in the European Commissions' communications is part of the relationship between the EU, EU Member States and third countries, the so called 'sending' states or countries of origin of migrants. In the EU's Global Approach to Mobility and Migration attention is paid to geographical priorities and the reality of migration from certain countries. The European Commission stresses the need for building on relationships of mutual trust with the sending countries: "The first priority should be the EU neighbourhood, notably the Southern Mediterranean (Morocco, Algeria, Tunisia, Libya and Egypt) and the Eastern Partnership (Ukraine, Belarus, Moldova, Georgia, Armenia and Azerbaijan) where the migration and mobility dimensions are closely interwoven with the broader political, economic, social and security cooperation, with dialogues taking place both in the regional context and at bilateral level. The aim should be to systematically move towards strong, close partnerships that build on *mutual trust* and shared interests, paving

the way for further regional integration.⁵ This second dimension of trust isn't explicitly present in the Blue Card Directive. Some authors have argued that the Directive is oblivious to the interests of the EU's development agenda and the sending countries' interests.⁶ By mentioning of ethical recruitment in preamble (22) and article 3(3) of the Directive in the light of the development of brain drain into brain gain for the countries of origins can possibly be labeled as an example of this dimension of mutual trust, albeit only presenting one side of the coin of mutual trust and more than weak in terms of legal enforceability. Research on the impact of the Blue Card policy on economic growth in African sending countries qualifies the Directive as bleak rather than blue; not a promising qualification for the development of mutual trust between the EU and sending states.⁷

2.2.3 Mutual trust between the Member State and Private Actors

The third and final dimension of trust that I distinguish is the trust the EU Member State places in future employers of migrant workers. Elsewhere I've labeled this dimension of trust as the level of privatization of the selection of migrant workers, or permissive state action.⁸ To a limited extent such trust was present in the proposal for a Directive on the conditions of entry and residence of TCNs for the purpose of paid employment and self-employed economic activities, presented by the EC on 11 July 2001.⁹ The proposal for this general Directive on labour migration was withdrawn in early 2006 after the Member States could not reach an agreement on it.¹⁰ However, with the proposed Directive the EC had the intent to introduce an instrument that can be seen to express a high level of trust in employers. The proposed article 6 (5) of this general Directive on labour migration allowed for Member States to adopt national provisions according to which the fulfilment of the economic needs test would be deemed to be fulfilled for a specific TCN, if a defined amount of money has been paid by the future employer of that person to the competent authorities.¹¹ The money received from the employer must be spent for measures promoting the integration of TCN or for vocational training purposes. The reasoning

5 COM (2011) 743 final (The Global Approach to Migration and Mobility).

6 Martin Asensio, C. 'Die "Blue Card"-Richtlinie – eine Massnahme der politischen Inkohärenz der EU im Interesse der Erreichung ihrer Ziele im Rahmen der EU-Entwicklungspolitik', *ZAR* 2010, 175; Gümüs, Y.K. 'EU Blue Card Scheme: The Right Step in the Right Direction?', *EJML* 2010, p. 435-453.

7 Kancs, D. & Ciaian, P., 'The Impact of the EU Bleu Card Policy on economic growth in the African sending countries', *South African Journal of Economics* 2010 (3), p. 225-247.

8 Elsewhere I've labelled the latter level of trust as the level of privatization of the selection of migrant workers, or permissive state action. There I've used the terminology permissive state action in contrast with coercive state action, the latter being used to privatize the control over illegal migration, 'The privatization of control over labour migration in the Netherlands: in whose interest?', *European Journal of Migration and Law* 2011-2, p. 185-200.

9 Com (2001) 386. In general this proposal is briefly discussed in C. Barnard, 'The substantive Law of the EU. The Four Freedoms', Oxford University Press 2010, p. 543-544. Also: E. Guild & H. Staples 2003, p. 221 ff.; T. de Lange, *Staat, markt en migrant. De regulering van arbeidsmigratie naar Nederland 1945-2007*, Den Haag: BJU 2007, p. 253-257.

10 OJ C-64, 2006, p. 8.

11 The provision laid down in article 6 par. 5 is discussed in Com (2001) 386, p. 12.

behind this alternative for the economic needs test is the idea that the willingness of an employer to pay an extra premium for recruiting a TCN can be taken as implicit proof that there is a shortage at the EU labour market. The level of the contribution would need to be established at national level and could be expressed as a fixed amount of money or a flexible amount of money (multiple of monthly/annual income of the recruited person or other factor). According to the proposal, the main argument in favour of adopting this option of an 'employers contribution' is the idea of 'competing for successful models', which implies having different regimes applied and tested by Member States under the regime of the Directive and having the outcome and the experiences of Member States discussed and evaluated within the open coordination mechanism on migration policy. If such an instrument had been introduced, it would mean the authorities would have to trust the judgment of the employer on who is needed on the European labour market. Although for instance the Netherlands has successfully implemented such a system for the admission of highly skilled labour migrants, the EU Member States weren't ready for it.¹²

At the time, the Member States did however reach agreement on one specific labour migration Directive, the one on the migration into the EU of TCN scientific researchers (Directive 2005/71/EC).¹³ In this Directive, the academic institutions hosting researchers from abroad have been given a central role in the admission procedure and by doing so, the migration model incorporated in this Directive can be labelled as a model of trust between the state and private actors. Directive 2005/71 requires research institutions to be approved as host institutions prior to filing an application for the migration of a TCN (article 5). Once approved by the Member State the research institutions' applications may be dealt with in accelerated entry procedures (article 15) and no economic needs test is applied; the fact that the research institution wants to host the TCN proves he or she is needed in the EU. In return, the research institution has some 'control' obligations: within two months of the date of expiry of the hosting agreement, the institution must inform the relevant government agency that the work has been carried out. If the institution fails to comply with this requirement, the approval as research institution can be withdrawn, resulting in the research institution being excluded from the accelerated procedures. The Member States are to entrust the research institutions with migration control tasks in return for more efficient admission procedures. The practical implementation of this system in the Netherlands shows how this system has created a working relationship between research institutions like my own (University of Amsterdam) and the authorities that's largely based on mutual trust.¹⁴ The EC's recent evaluation of this Directive shows about 7.000 permits have been granted under this Directive up to 2010 and although there have been refusals as well, the application of the Direc-

12 This is the so called 'Kennismigrantenregeling', which Marcel Reurs elaborates on in his contribution to this volume.

13 Council Directive 2005/71/EC of 12 October 2005 on a specific procedure for admitting TCN for the purposes of scientific research, OJEU L 289/15.

14 T. de Lange, 'De Wetenschappersrichtlijn 2005/71/EG: een succesvol model voor arbeidsmigratiemanagement?', *Journal Nederlands Vreemdelingenrecht* 2012(1), p. 17-30.

tive has not lead to any legal proceedings.¹⁵ This may be the result of the trust-relationship built between research institutions and authorities: as in business relationships the level of trust and interdependence calls for negotiating differences instead of taking them to court. This system of prior recognition of the employer has not been included in the Blue Card directive.

2.3 The Blue Card Directive's Regulatory Instruments and Trust¹⁶

Three regulatory instruments of the Blue Card Directive have been selected to measure the level of trust, or lack thereof, between the Member States and the employers and between the Member States themselves. As mentioned in the previous section, the Directive mentions the development interests of the countries of origin. But all regulatory instruments that relate to the relationship with the countries of origin may or may not be implemented by the individual Member State, and this dimension of possible trust will not be part of my analysis here. As the level of trust in the employer is expressed in the decision on first admission, this will be discussed first.

2.3.1 First Admission and the Position of the Employer

Unlike the Scientist Directive, the employer doesn't need to be accepted as a hosting institution prior to the application. Actually, the Directive implements a rather traditional demand-driven system. The TCN who applies for an EU Blue Card under the terms of this Directive shall present a valid work contract or, as provided for in national law, a binding job offer for highly qualified employment, for at least one year in the Member State concerned (article 5(a)). As described by Fridriksdóttir in this volume, central to the labour contract or job offer is the salary level. If the set level is not met, the application can't be granted. Put bluntly, one can argue that the idea of 'putting money where the employers mouth is', an instrument introduced in the failed 2001 proposal is also part of the Blue Card Directive: if an employer is willing to pay this amount of money for a migrant worker, Member States can trust the worker is needed. However, the Member States may still apply a labour market test: they may verify whether the concerned vacancy can be filled by national or Community workforce or by TCN lawfully residence in the Member States (article 8(2)). If Member States indeed implement this labour market test it shows little trust in the employer's judgment of what highly paid migrant workers are indeed needed on the EU labour market.

Also, the judgment of what relevant skill levels are isn't totally entrusted to the employer. For unregulated professions, the migrant worker must present the documents attesting the relevant higher professional qualifications in the occupation or sector specified in the work contract or in the binding job offer as provided for in national law. Here the wording of the Directive is important: the qualifications must

15 Report from the Commission to the Council and the EP on the application of Directive 2005/71/EC on a specific procedure for admitting TCN for the purposes of scientific research, COM(2011) 901 of 20 December 2011.

16 I refer to the contribution of Bjarney Friðriksdóttir in this volume for information on the background of the Directive and negotiations.

be relevant. According to article 1 (g) 'higher professional qualifications' means qualifications attested by evidence of higher education qualifications or, by way of derogation, when provided for by national law, attested by at least five years of professional experience of a level comparable to higher education qualifications and which is relevant in the profession or sector specified in the work contract or binding job offer. Member States may, but don't have to, allow the employer to pick someone with five years of 'relevant' job experience but without 'higher education qualifications'. However, if Member States don't implement this derogation and stick to only allowing migrant workers with attested higher education qualifications it's again a sign of a low level of trust in the employers' judgment of who is a needed migrant worker.¹⁷

2.3.2 Second Member State Admission

For quite some time now, businesses in the EU have been lobbying for intra-EU mobility for TCN. Although the Blue Card originally promised to fulfil this long hoped for cut in red tape, it didn't come through. Admission into the second Member State is not necessarily less complicated and burdensome on the businesses HR-administration, than the admission into a first Member State. Article 18 sets out the conditions for admission into the second Member State. In order to be mobile within the EU, the BCH needs to be immobile for quite a while. Of course one can move whenever one wants, but the benefits of the Directive are only available after the TCN has had eighteen months of legal residence in the first Member State as a BCH (article 18, par. 1). After these 18 months he can move to another Member state and must apply for the BCH-status no later than one month after entering the territory of the second Member State (article 18, par. 2). The application should prove the fulfilment of the conditions set out in article 5 for the second Member State. This means that we'll see cases where a year and a half ago a first Member State confirmed that all conditions set out in article 5 were met, nevertheless the second Member State will repeat the whole procedure again. In addition, the second Member State may refuse the BCH if the optional national quota has been used up: there is no such thing as preferential treatment for the BCH (article 18, par. 7). While awaiting a decision on an application in a second Member State, the TCN may not be allowed to work in this second Member State; this does not seem like a realistic option for the highly skilled and highly paid workers we are talking about. Therefore the application may also be presented to the competent authorities of the second Member State while the BCH is still residing in the territory of the first Member State (article 18, par. 3). With the 90 day period to decide an application and, prior to the application being lodged and the necessity of getting a national attestation of one's qualifications, the procedure to move from a first to a second Member State may actually take some three or four months. The repetition of the procedure in the second Member State shows little trust between Member States; a conclusion confirmed by the German negotiator

during our conference in Nijmegen in 2011.¹⁸ The lack of trust between Member States is further illustrated by the fear of Member States as second Member States of responsibility for the return of the TCN to the country of origin if admission is not granted by the second Member State. It has thus been organized, somewhat along the lines of the responsibilities for dealing with the applications of asylum seekers in the Dublin Regulation, which the first Member State shall immediately readmit, without formalities, the BCH and his family members (par. 4). The TCN and/or his employer may be held responsible for the costs related to the return and readmission of the BCH and his family members, including costs incurred by public funds, where applicable (par. 6) This shall also apply if the Blue Card issued by the first Member State has expired or has been withdrawn during the examination of the application. Article 13 shall apply after readmission, which means that the BCH has legal residence for three months in order to find a new, blue card compatible, job. In addition, if the Blue Card issued by the first Member State expires during the procedure, Member States may issue, if required by national law, national temporary residence permits, or equivalent authorizations, allowing the applicant to continue to stay legally on its territory until a decision on the application has been taken by the competent authorities. After a first move, the TCN may move to the other Member States, again under the same conditions (article 18, par. 8).

Analyzing this mobility clause, there is obviously little trust between the Member States when it comes to the other states' capacities in seeking out the desirable highly skilled migrants: all Member States may impose their own criteria for admission, including quota, different salary levels and labour market tests. As long as this fragmentation of the EU labour market is a fact, I doubt the EU will be able to compete with traditional immigration recipient countries like Australia, the US and Canada. Caviedes shows that indeed the European labour markets are fragmented not only by country specifics, but also depending on the specific sector.¹⁹ But in some sectors the national differences are less obvious, calling for more common sectoral policies. Apart from the Seasonal Workers Directive that at the time of writing is still under negotiation, one could imagine lobbies developing on other sectoral levels, such as healthcare, transportation or heavy industries.²⁰

As in the Blue Card Directive, the Scientific Researchers Directive has a clause for EU mobility of the TCN researcher (article 13), but it stretches further on the recognition of a decision on admission by a first Member State. If the researcher stays in another Member State for a period of up to three months, the research may be carried out on the basis of the hosting agreement concluded in the first Member State, provided that he has sufficient resources in the other Member State and is not considered as a threat to public policy, public security or public health in the second

¹⁷ Attesting the documents can be time consuming and for the Netherlands this may be one of the reasons why the Blue Card isn't met with much enthusiasm. This was the outcome of a small-scale student research on the reason why employers do or don't like the Blue Card Directive in the Netherlands, C. Vermeer, *Het toelatingsbeleid van de kennismigrant in Nederland*, University of Amsterdam Master Thesis, July 2012.

¹⁸ Gisbert Brinkmann, the German representative during the negotiations on the Directive, confirmed during the seminar on the Blue Card Directive that the Member States don't trust each other at all.

¹⁹ Alexander A. Caviedes, *Prying Open Fortress Europe: The Turn to Sectoral Labor Migration*, Palgrave 2010.

²⁰ Proposal for a directive on the conditions of entry and residence of TCN for the purposes of seasonal employment of 13 July 2010, COM(2010) 379 final, 2010/0210 (COD).

Member State (article 13(2)). This mobility for a maximum of three months requires trust between the first and second Member States as the latter must recognize the first Member State's admission of the TCN researcher. It is telling, however, that the second Member State may conduct a national public order check of the TCN and doesn't have to trust the first Member State on that issue. If the researcher stays in another Member State for more than three months, Member States may require a new hosting agreement to carry out the research in that Member State. In all events, the conditions for first admission as set out in the Directives articles 6 and 7 need to be met in relation to the Member State concerned (article 13(3)), meaning the recognition of the admission decision of the TCN researcher by the first Member State does not reach beyond the period of three months. If visa or a residence permit are required in the second Member State for exercising mobility, such a visa or permit shall be granted in a timely manner within a period that does not hamper the pursuit of the research, whilst leaving the competent authorities sufficient time to process the applications (article 17(4)) and Member States shall not require the researcher to leave their territory in order to submit applications for the visas or residence permits (article 17(5)).

A Directive on Intra-company Transfer is still under negotiation.²¹ It will most likely also include intra-EU mobility options. Once definite, further comparison might lead to interesting insights as to whether mutual trust between the EU Member States on admission decisions of highly skilled TCN is growing or diminishing. The presence of a multinational corporation responsible for the migrant may allow for more trust between Member States as there is a clear third party that can be held liable if the migrant somehow doesn't stick to the rules.²²

2.3.3 Long Term Residence

After three years as a BCH it is advisable that the TCN remains immobile again as he will only be eligible for the status as an EU Long Term Resident (LTR) in a Member State where he has resided for at least two years prior to the application for that status (article 17 BCD). Preamble no. 20 of the Blue Card Directive says geographically mobile highly qualified third-country workers who have not yet acquired the LTR status should not be penalized for their mobility. Geographical and circular migration should actually be encouraged. It's a noble aim, but the derogations from Directive 2003/109/EC hardly encourage geographical mobility within the EU. The conditions that need to be met are: (a) five years of legal and continuous residence within the territory of the Community as BCH; and (b) legal and continuous residence for two years immediately prior to the submission of the relevant application as an BCH within the territory of the Member State where the application for the long-term residence permit is lodged. These derogations from the Long Term Residence Directive can be seen as a sign of mutual trust between Member States, as they

require the recognition of the admission into another Member State under the Blue Card Directive.

Maybe a more significant derogation from the LTR goes to show the trust the EU and its Member States place in the migrant workers, a dimension not mentioned in at the set out of this contribution. The Blue Card Directive and the derogation from the LTR are intended to stimulate the migrant worker to return home and possibly contribute to the home economy. Longer periods of absence during the first five years and as holder of the LTR-status are permitted without the migrant losing his status as BCH or 'LTR-status formerly BCH'. Periods of absence shorter than 12 consecutive months that do not exceed in total 18 months within the five years of legal and continuous residence (article 16 (3)) do not jeopardize the qualification of continuous residence. Once in the possession of the LTR-status periods of absence of 24 consecutive months don't jeopardize the residency status in the EU of the former BCH and his or her family (article 16 (4)). Member states may restrict these absences to stays in the country of origin for economic activities or voluntary service (article 16 (5)). Clearly, the EU trusts the migrant workers to play their part in the so called 'diaspora engagement' in developing countries of origin but wants to keep them as it's trusted them to invigorate the EU economy.

2.4 Concluding Remarks

No later than 19 June 2014 the European Commission shall report to the European Parliament and the Council on the application of this Blue Card Directive in the Member States, and shall propose any amendments that are necessary.²³ Unless Member States choose to trust each other by waving the labour market tests on second admissions and trust the employers to pick workers with good resumes and not necessarily official qualifications, it is my presumption that there will be little to report. In short, the Directive does not bring a high level of harmonization and hardly facilitates intra-European mobility of highly skilled TCN. Let's just say it's a start. In the near future the Blue Card Directive isn't likely to bring innovation to the EU labour market or the EU economy. Most of the trust is placed in the TCN migrant worker. But will the best and brightest TCN migrant workers feel inclined to solve the EU's labour market problems? As trust can be seen as the fuel of an economy and with an economy so seriously in crisis, one would hope for more mutual trust between the Member States than the Blue Card Directive proves there to be.

21 Proposal for a Directive of the European Parliament and of the Council on conditions of entry and residence of TCN in the framework of an intra-corporate transfer, COM (2010)378.

22 T. de Lange & S. van Walsum, 'Institutionalizing temporary labour migration in Europe: creating an 'in between' migration status', in: *Liberating Temporariness*, edited volume McGill-Queens Press (forthcoming).

23 Article 21 Directive 2009/50/EC.