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The European Commission and the Blue Card Directive: Supranational policy entrepreneurship in troubled waters

Sidonie Paris, *University of Luxembourg*

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Abstract

Labour immigration has traditionally been a highly contentious issue and therefore, one of the least developed areas of EU migration policy. This article explores the entrepreneurship of the European Commission over a ten-year period, which ultimately led to the adoption of the so-called 'Blue Card Directive' on the conditions of entry and residence of third-country nationals for economic reasons (2009/50/EC). It does so by utilising John W. Kingdon's three stream conceptual framework, which was initially developed within the context of US politics (2014, originally published in 1984). Despite firm resistance from the part of certain member states and the unanimity voting rule regarding legal migration matters under the Amsterdam Treaty, this article demonstrates how the Commission managed to somehow navigate troubled waters. Drawing on primary European institution sources, academic works, as well as interviews with EU officials and think tank representatives, it is argued that the Commission was a key entrepreneur in the case of the Blue Card Directive, capable of genuine adaptation and tenacity. By depicting the European Commission as a supranational policy entrepreneur, which managed to anchor the subject of highly skilled immigration in the EU political agenda, the present contribution departs from works stressing the weakness of the European Commission vis-à-vis member states.

Keywords

European Commission; Highly-Skilled Immigration Policy; Blue Card Directive; Policy Entrepreneur

INTRODUCTION

Legal migration made its way onto the political agenda of the European Union (EU) in the post-cold war period, at a time when the fall of the Berlin Wall and the war in the Balkan region led to a substantial increase of illegal immigration into Western Europe. The completion of the internal market was the cornerstone on which the Commission's activities in the field of justice and home affairs was originally built. In the years 2000, the EU experienced significant challenges, having to deal with societal problems such as the ageing of its population, labour shortages, the weakening of its welfare systems. In this context, emphasis was put on the need for Europe to improve its competitiveness in a globalized economy and, as ambitioned by the 2000 Lisbon Strategy, to make the EU the most competitive and dynamic knowledge-based economy in the world.¹

The European Commission played a key part in these different phases, not only making use of its right of initiative, but acting as a true 'policy entrepreneur'. The Commission was, indeed, the driving force, constantly pushing for increased harmonization in the area of justice and home affairs, and especially legal migration, in spite of reluctance from the part of member states and unanimity voting in the Council of Ministers. Learning from its past failure and despite the presence of multiple hurdles, the Commission managed to set foot in the door of legal immigration by revising its initial ambitions. It did so by focusing on the immigration of highly qualified third-country nationals in the first place, before considering other categories such as seasonal workers and intra-corporate transferees. Hence, the so-called 'Blue Card Directive' on the conditions of entry and residence of third-country nationals for economic purposes (Council Directive 2009/50/EC), was the first EU legislation adopted on migration

issues, in May 2009, and as such, marked the entry of the EU into the highly sensitive policy area of legal migration.

Generally speaking, political science research is a latecomer regarding high-skilled migration policy field (Cerna 2009: 145). This may partly explain why the Blue Card Directive has received relatively modest scholarly attention, in contrast to the extensive media coverage at the time of discussions on the Commission proposal. Most contributions on the Blue Card policy process emphasise the difficulties faced by the European Commission and the power of nation states in the admission of non-EU highly skilled workers (e.g. Van Riemsdijk 2012; Cerna 2010). Moreover, much attention is given to the policy outcome, the final text being described as a directive based on a 'lowest common denominator' (Cerna 2010: 25), not to mention the weak attractiveness of the Blue Card (Eisele 2013). Without denying the fact that the adopted directive was significantly less ambitious than the initial proposal of the Commission, this article examines the policy journey rather than the policy result. It provides empirical evidence of the Commission's entrepreneurship: a vital motor, it is argued, in the absence of which, the very presence of legal immigration on the EU agenda would have rapidly disappeared. Although legal immigration has traditionally been one of the least developed areas of EU migration policy, the Blue Card policy process was characterised by a high activity level of the Commission.

This analysis draws on the concept of 'policy entrepreneur', developed by John W. Kingdon (2014, originally published in 1984) and applies this notion to the EU supranational governance system. Hence, policy entrepreneurs are defined as '[...] advocates who are willing to invest their resources – time, energy, reputation, money – to promote a position in return for anticipated future gain in the form of material, purposive, or solidary benefits' (Kingdon 2014: 179). It is worth noting that such understanding implies a will to act from the part of an actor and presupposes that entrepreneurship is contingent and not automatic. When applied to the European Commission, it means that the institution deliberately chooses to make use of a policy process. As regards the making of the Blue Card Directive, I argue that notwithstanding the position of power held by member states, the Commission managed to push in favour of European integration on legal immigration, especially in the initial phases of the decision-making process (i.e. agenda-setting and identification of alternatives). For this reason, decision-making by national representatives in the Council of ministers and the subsequent implementation of the Blue Card Directive in the different member states are not included.

This study is grounded in the analysis of official documents from European institutions, secondary sources (both academic and from the media), and semi-structured interviews conducted in Brussels in 2014 and 2016. Interviewees were selected on their substantial expertise on the subject and on their past involvement in the Blue Card Directive decision-making process. As such, these interviews provided valuable detailed hands-on and contextual information from the very Commission officials in charge of steering the Blue Card Directive policy-making process. Exchanges with think tank representatives helped paint a clearer picture of the geopolitical and economic backdrop of the time. The article proceeds as follows. First, it presents the concept of 'supranational policy entrepreneurship' used in this analysis. Second, it examines the initial legal and policy developments of the EU in the field of legal immigration. Third, it studies the conditions under which the Commission's paradigm shift took place and how it came about. Finally, it analyses the patterns of interaction of the European Commission with member states, individually and within the Council of Ministers.

THE NOTION OF 'SUPRANATIONAL POLICY ENTREPRENEURSHIP'

Discussion on the role played by supranational actors in EU integration is by no means a novelty. Already in the 1960s, the neofunctionalist school of thought - initiated by Ernst Haas (1958) and later developed by Leon Lindberg (1963) – depicts supranational institutions as key elements in EU policy-making. By contrast, intergovernmentalist scholars relegate EU institutions to a secondary role, emphasising instead the power of states (Hoffman 1966; Moravcsik 1998). By contrast, supranationalists highlight the ability of European institutions to promote increased exchanges and communication among national governments. In particular, the European Commission is often depicted in this literature as an accomplished supranational policy entrepreneur, committed to instilling new ideas into policy-making and skilful at gaining support. Along this line of reasoning, Alec Stone Sweet and Wayne Sandholtz provide a theory of European integration. Drawing from neofunctionalism, they argue that European integration is a dynamic and gradual process, by which the EU expands its competencies, thus replacing the nation state (Sweet and Sandholtz 1997: 299).

The notion of 'policy entrepreneurs' was initially developed by John W. Kingdon (2014) in his research on US federal public policy development. Kingdon identifies three largely separate streams that run simultaneously through the federal government (Kingdon 2014: 87). First, members of government get acquainted with various problems (i.e. problem recognition). Second, policy specialists generate proposals (i.e. formation and refining of policy proposals). In the third stream, people engage in politics (events in this stream take place independently of the two other streams). At critical times - when a problem is recognised in the problem stream, solutions are at hand in the policy stream, and politics allows for change - the streams may converge (Kingdon 2014: 88). This coupling is more likely to occur when a 'policy window' opens.² In such cases, policy entrepreneurs must act swiftly, as the 'policy window' only opens for a short time. If they do not manage to make use of a window, they must wait until the next opportunity comes along. The qualities of a successful entrepreneur are threefold: first, (s)he must have 'some claim to a hearing'. This implies that the person has either expertise, is able to speak for others, or holds an authoritative decision-making position. Second, entrepreneurship requires having political connections or to be acknowledged for one's negotiation capability. The third characteristic of a successful policy entrepreneur is persistence, or 'sheer tenacity' (Kingdon 2014: 181).

Initially used to study agenda setting and the formation of alternatives from which political decisions are made in US politics, this framework is applied to the European Union in the present contribution (see also Piquet in this special issue). Yet, Kingdon's notion of 'policy entrepreneur' is somewhat modified in order to address the particular features of the European Commission in the case under study here. More concretely, our understanding of an 'entrepreneur' is less passive and more persistent than the one adopted by Kingdon in his research on the US political system. According to the American author, entrepreneurs respond to opportunity created by the federal government. In case this opportunity does not arise (or no window opens), their focus is said to shift to a different topic. In other words, it is the administration that provides actors with the opportunity to promote their views and it is foreseen that entrepreneurs will not engage time and energy on an issue for which limited gains is expected (Kingdon 2014: 167). The European Commission does not exactly match this view. For one thing, its mere activity in the field of legal immigration has been questioned by certain member states. As such, and in order to progress, the Commission quickly realised that it had to create favourable conditions for a window to effectively open. Furthermore, despite difficulties along the policy-making process and ongoing antipathy from countries that had no intention of relinquishing power in this area, the supranational

institution did not leave the boat. It wanted to progress at all costs and was aware that this required constant entrepreneurship.

The usage of Kingdon's three streams in the academic literature is by no means a novelty. Christian Kaunert, for instance, also utilises Kingdon's model in his study on the decisive role of the Commission in the making of the Common European Asylum System (Kaunert 2009) or in the construction of the EU's area of freedom, security justice (Kaunert 2010) in the past. Making use of a constructivist prism, Kaunert adds a normative dimension to the framework. As such, the 'norm stream' rests on the idea that member states preferences change as a result of European-level social interactions (Kaunert 2009: 156). Not denying the value of Kaunert's constructivist insights, this article however remains within the initial three-stream structure suggested by Kingdon. The reason for leaving aside Kaunert's 'supranational policy entrepreneurship' model has to do with the fact that data collected does not give strength to the significance of the normative process in the case under analysis. By contrast, evidence indicates that the ability of the European Commission to frame its Blue Card Directive proposal as part of the Lisbon Strategy (in view of making it more palatable to member states) did not fundamentally alter member states positions. In such circumstances, it may be argued that the Commission was not able to effectively alter the mind-set of member states vis-à-vis European activism in the field of highly skilled immigration and more generally, legal immigration policy. Against this backdrop, the definition of supranational institutional entrepreneurship embraced in this contribution directs attention to the organisation, the management and the risks taken by the European Commission in pushing for European integration in the area of legal immigration (see Roos and Howarth 2017: 6).

THE INITIAL SETTING OF THE EU LEGAL IMMIGRATION AGENDA

In order to understand the nature of the Commission entrepreneurship regarding the Blue Card Directive, it is necessary to recall the key milestones of agenda setting. Being a highly sensitive issue for member states, progress towards an integrated EU policy was both slow and incomplete. As we shall see, activities of the Commission in the field of migration may be traced back to the mid-1990s, with the push of a small yet ambitious 'Task Force' responsible for justice and home affairs. The entrepreneurship further developed in the years following the adoption and entry into force of the Amsterdam Treaty, despite what could be seen as a limited 'policy window' in both time and scope. Hence, the absence of a clear legal framework in the area of legal immigration, together with the questioning of the Commission's involvement in such sensitive sovereignty-related matters from the part of domestic governments requested permanent efforts from the part of the Commission to keep the topic on the agenda of the EU. This section highlights the first legal developments in the field of legal immigration, before examining the different policy streams at the time of the 'Task Force' and ultimately examining the somewhat shattered ambitions of the Commission in the early years 2000.

The evolution of the legal framework: the absence of a clear basis

The initial developments of EU legislation in the field of legal migration emerged, to some degree, from geopolitical events. The fall of the Berlin Wall together with civil war in ex-Yugoslavia in the 1990s, led to a massive rise of illegal immigration into Western European countries (Interview, European Policy Centre, 4 June 2014; see also De Bruycker 2002: 159). In this context, heads of state and government acknowledged that making Europe 'an ever closer Union' and developing the Schengen common travel area further, required a common immigration approach and a suitable legal basis for dealing with entry

and residence third-country nationals (Interview, European Commission, 3 May 2016). Moreover, one may also posit that changes in national ‘political streams’ played a role in this change of mood towards immigration with the coming into office of social democrats in a majority of EU states, who are usually relatively open on this question. In addition to political aspects, the relative good health of the European economy of the EU may give additional hint as to why heads of state and government wished to move beyond the pillar-structure of the Maastricht Treaty.

The Treaty of Maastricht may be seen as the first step, although modest, towards EU involvement in the area of legal immigration. The Treaty, signed in February 1992, formally established EU competence in the field of Justice and Home Affairs (JHA). However, in the absence of a clear political project, the vague designation of ‘immigration policy and policy regarding nationals of third countries’ (Maastricht Treaty, title VI, article K.1, paragraph 3) as ‘matters of common interest’ did not give the European Commission a wide range of latitude, to say the least. In fact, the vast majority of JHA issues were included in a ‘third pillar’³, structured along the intergovernmental approach. Heads of state and government did include a *passerelle* clause, which provided for the transfer from the third to the first pillar (Article K.9 TEU) - which followed the Community method-, but unanimity was the rule in the Council of Ministers. As such, this framework ‘guaranteed a safe distance from the European institutions and the community procedures’ (Papagianni 2006: 18).

Against this backdrop, national governmental representatives assumed a prominent position vis-à-vis EU institutions, and particularly the Commission, insofar as they retained their ability to control discussion in the area of migration. In the years following the entry into force of the Maastricht Treaty in 1993, member states remained opposed to sharing competency over immigration issues with the European Union, although it hampered the establishment of free movement as provided for by the treaty (as recalled by the ‘Task Force’ on justice and home affairs on numerous occasions throughout the 1990s). In this context, the Commission could not do much, as it had to share its right of initiative with member states and was only ‘fully associated with the work’ (article K.4, paragraph 2).

Competence in the area of migration was effectively granted to the European Commission by the Amsterdam Treaty (Interview, European Commission, 3 May 2016), at least to a certain degree (Article 63(3)(a) of the Treaty of Amsterdam on ‘conditions of entry and residence’). As such, the Treaty modified the cooperation in Justice and Home Affairs by committing the EU to constructing an area of freedom, security and justice (AFSJ) based on the free movement of persons within a five-year timeframe following the entry into force of the Treaty (see Title IV, article 61(a) TEU). Hence, the AFSJ became a formal objective of the European Union. Yet, despite these important developments, the EU still lacked a clear political agenda in this area and the communitarisation of immigration policy remained partial.⁴ The Amsterdam Treaty provided for the adoption of co-decision (and thus, the use of qualified majority voting) for areas covered by Title IV after this five-year period, upon the unanimous vote of the Council. However, this provision did not apply to legal immigration, which subsequently remained under the unanimity rule in the Council of Ministers (until the entry into force of the Lisbon Treaty in 2009 and the adoption of the ordinary legislative procedure) (see Article 67(4) TEC). Against this backdrop, the rise of Commission activity in legal migration matters was neither smooth nor easy.

The early days of the Commission’s entrepreneurship: the ‘Task Force’ on justice and home affairs

The roots of the Commission’s entrepreneurship in justice and home affairs may be traced back to the 1990s. At the time, the environment seemed particularly conducive to the opening of ‘windows of opportunity’. For one thing, one may argue that the ‘political stream’ was most promising, regarding

two particular aspects: events occurring within the Commission itself and the mood (or climate) of member states.⁵ As far as the first point is concerned, and in resonance with Kingdon's remarks on the agenda change caused by key personnel (see Kingdon 2014: 153), the qualities of officials at strategic posts proved crucial in initiating later developments. In 1995, the European Commission set up a 'Task Force' on justice and home affairs, placed under the authority of the Secretariat General. As underlined by Richard Lewis and David Spence, this practice is not without significance, given that the Secretariat General is 'the nerve centre of the Commission and the funnel through which proposals pass (Lewis and Spence 2010: 106). Comprising initially approximately 20 persons, this group in charge of immigration and asylum matters (as well as police and judicial cooperation), was headed by Adrien Fortescue. As reported by a former member of the 'Task Force',

These times were extremely interesting because we had an all-encompassing vision on things and we enjoyed considerable freedom. This was rather untechnocratic. We had the support of Adrien Fortescue, and were therefore in the position to make real political proposals. Mr. Fortescue understood the importance for the Commission to be active in the field of justice and home affairs prior to the adoption of the Amsterdam Treaty (Interview, former member of the Task Force, 16 June 2016).

Additionally, the 'Task Force' reported to the Swedish Commissioner responsible for justice and home affairs, Anita Gradin. First person to hold this position, Ms. Gradin held the view that Europe had to move forward on migration and asylum. Together with the head of the 'Task Force', she believed that innovative perspectives had to be put on the negotiating table in view of the forthcoming EU Treaty (Interview, former member of the Task Force, 16 June 2016). As regards the second aspect of the 'political stream', the attitude of European capitals vis-à-vis the Commission's activities in the area of justice and home affairs was relatively positive at the time. Members of the 'Task Force' were usually welcomed with open arms, as they brought with them alternatives to problems encountered by domestic authorities. In this context, Commission officials sensed that timing was optimal to suggest ambitious orientations. In fact, the 1995 Convention included proposals on legal migration, family reunification, as well as daring position regarding the right to vote for non-EU nationals.

This being said, the 'Task Force' had limited resources, therefore relying extensively on the assistance of other services internally in order to carry out its work. Support from key Commission officials – as important as it was – was not sufficient. As such, the 'Task Force' could not do without the deployment of active strategies aimed at creating opportunities for action. As explained by John W. Kingdon, a window usually opens 'in response to developments in the problems and political streams, not in the policy stream (Kingdon 2014: 173-174). Drawing further on Kingdon's model, the 'Task Force' sought to couple the 'policy' and 'problem' stream in view of opening a so-called 'problem window' (see Kingdon 2014: 174). Said differently, evidence shows that the 'Task Force' presented its work in the field of justice and home affairs as a means of solving a pressing problem, namely the completion of the internal market (see, for example, COM(95) 346 final). One of the prominent targets was DG XV, in charge of 'Internal Market and Financial Services', insofar as it dealt with subjects – such as the free movement of EU citizens or social security systems – which could be easily extended to third-country nationals. A former member of the 'Task Force' recalls:

As we had limited means to carry out our work, our idea was to build on existing community competence in order to try and expand the rights enjoyed by EU citizens to third-country nationals residing in the EU. Our reasoning rested on the idea that inhibiting the free movement of workers distorted the logic of the internal market, based on free competition. Once a third-

country national had entered EU territory and was in possession of a legal residence permit, there was no reason not to grant him/her the same rights as a citizen of the Union (Interview, former member of the Task Force, 16 June 2016).

As such, the 'Task Force' played an active role in creating alliances internally, linking its own agenda to problems of interest to colleagues working on the internal market. It is worth noting that this picture moves away from a somewhat passive understanding of policy specialists found in Kingdon's model. According to the author, '[...] proposals are constantly in the policy stream, but then suddenly they become elevated on the governmental agenda because they can be seen as solutions to a pressing problem or because politicians find their sponsorship expedient' (Kingdon 2014: 172). Here, instead, the opening of a policy window results from constant efforts from the part of the 'Task Force' to enable justice and home affairs' integration to take place.

The Tampere European Council and the 2001 Commission proposal: a diffraction pattern?

Characterised by the predominance of institutional elements over political aspects, the Amsterdam Treaty remained vague as regards the competencies of the European Union – and therefore of the European Commission – in the area of immigration. Its entry into force on 1 May 1999 demanded to define the objectives of the EU in this field. It may be argued that the transformation of the 'Task force' on justice and home affairs into an actual Directorate-general Justice, Freedom and Security at the time was a step towards more visibility. Nonetheless, internal organisational changes could not replace the need for strong political engagement and clear objectives from the part of heads of state and government in order to avoid paralysis and to foster the effective implementation of the JHA provisions, as well as the build-up of the AFSJ⁶ (see Tampere European Council, Presidency Conclusions 1999).

Five months after the entry into force of the Amsterdam Treaty, the Tampere European Council on JHA, held on 15-16 October 1999, establishing the first pluri-annual programme extending over the period 1999-2004 (known as the 'Tampere Programme'). At this occasion, heads of state and government acknowledged the need to develop a common migration policy in order to ensure freedom of movement to both EU citizens and third-country nationals legally residing in the EU. In view of developing an 'area of freedom, security and justice', the Council decided to put in place a work programme, which focused on four priorities, among which was the development of a common EU asylum and migration policy.⁷ In this field, consensus was found on the necessity to adopt a more comprehensive strategy not giving pre-eminence to restrictive controls, but addressing the phenomenon in all its dimensions and including common standards and minimum rights for both immigrants entering the EU, and for third-country nationals residing legally on the territory of a Member State (see Presidency Conclusions 1999: 4, section III). In order to keep track of progress, the European Commission was invited to prepare a scoreboard (see COM(2000) 167 final/2).

By defining the political framework in which heads of state and government wished to build a common immigration policy, Tampere provided the European Commission with new impetus to initiate discussion on JHA-related issues. The Tampere may be seen an important 'policy window' for the Commission, at least politically speaking. Laudable intentions were, indeed, countered by a certain uneasiness with the domain of migration visible in Presidency Conclusions (Presidency Conclusions 1999, section IV). However, the Commission felt that time was ripe and seized the opportunity for a policy push. Making use of the 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 2001 and submitted it to the Council in

September. At the time, the Commission entrepreneurship in this field led to tensions within the institution itself. Migration policy was a minor topic in the Commission in the early years 2000 and the small team from DG Justice, Freedom and Security was seen as ‘Martians’ by their colleagues from other services. In a similar way as the ‘Task Force’ enjoyed full support from key Commission officials, the persons working on migration issues in DG JLS benefitted from the extensive assistance from the Commissioner for Justice and Internal Affairs since September 1999, António Vitorino. The latter was determined to progress on this dossier (Interview, European Commission, 21 April 2016) and as such, took the part of an active policy entrepreneur (see Piquet in this special issue). His approach, which would impregnate the work of the European Commission for years to come in the migration field, was that an imperfect legal text was better than no text at all. Consequently, negotiations had to continue, regardless of difficulties or attempts by member states to dilute initiatives of the Commission.

The Commission – and particularly the team under the leadership of Commissioner António Vitorino - wished to show that it could provide an added value, therefore opting for an ambitious legislative proposal (Interview, European Commission, 3 May 2016). The 2001 directive proposal 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). Hence, the Commission hoped for a ‘spillover’ effect (Haas 1958), whereby the opening up of a window (i.e. an opportunity for action) increases the chance for another window to appear on a similar topic (see Kingdon 2014: 190). Nonetheless the ‘policy window’ closed shortly following the submission of the Directive proposal. Looking back, one could even wonder whether any ‘window’ opened at all. Regardless of the bumpy road ahead, the Commission chose to push its way through on the basis of rational argumentation, largely ignoring member states’ political concerns. In the view of the supranational institution, national heterogeneous labour markets disadvantaged the EU economy and were not in line with the free movement of persons and capital (see Luedtke 2011: 16). No matter how relevant this argument was in light of treaty provisions, such cost-benefit argumentation did not stand in face of political concerns regarding immigration in domestic settings. A plausible explanation for this has to do with the fact that in most EU member states, immigration falls within the remit of the ministers of the interior, who mainly view immigration under the prism of border control, fight against illegal migration, and internal security. As one can see, such a vision departs drastically from the European ambition to create an internal market in which all factors of production, including workers, would travel freely.

Following several years of blockage in the Council of Ministers, the Commission ultimately withdrew its proposal in 2006. Although this event put a halt to the horizontal approach to labour immigration of the Commission covering all third-country nationals indistinctively, it did not put an end to Commission entrepreneurship in the area of legal migration. Rather, the supranational institution showed signs of ‘sheer tenacity’, probably the most important quality of a successful entrepreneurs, according to Kingdon (2014: 181), as well as its ability to adapt. From then onwards, the Commission was careful not to repeat its past mistake, adopting a more prudent stance and switching to a slower pace. In order to make progress – no matter how limited it may be – the prime task was to maintain the subject of legal migration on the agenda of the European Union. Since legal immigration had not progressed from a ‘governmental agenda’ to ‘decision agenda’ status, there was a serious risk for member states to turn their attention to other topics (Kingdon 2014: 178). For this reason, the European Commission invested much resources into creating alternatives to enable new opportunities to emerge.

THE PARADIGM SHIFT OF THE EUROPEAN COMMISSION

Drawing lessons from the failure of the 2001 proposal negotiations, the European Commission showed what may be the key quality of an entrepreneur: persistency (Kingdon 2014: 181). Not losing sight of its legal immigration undertaking, the institution modified its narrative. Unlike what takes place in Kingdon's model, where entrepreneurs passively await problems to emerge from the government to which they can attach their solutions (Kingdon 2014: 172), the Commission took part in both problem identification and in the development of solutions in seeking to open a new 'policy window'. If states had done so themselves, following Kingdon's model, they would have either fully acknowledged the issue at stake and would have turned to the 'policy stream' (i.e. to the Commission) in search of a solution. Or, they would have activated the 'political stream' and adopted solution from the 'policy stream' in order, for example, to make use of the topic for re-election purposes. These two scenarios were highly improbable, for at least two reasons. First, there was no real demand from the part of member states for an EU-wide immigration policy (Interview, European Commission, 3 May 2016). Second, immigration is well-known for being a politically sensitive topic in domestic political debates, which rarely meets the test of political acceptability.

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 on immigration, integration and employment (COM (2003) 336 final) presented economic immigration as an important aspect of the success of the Lisbon strategy. This change of perspective also resulted from the need to adapt to the stiffening of attitudes on migration following the November 2001 terrorist attacks in New York, and the subsequent attacks in Madrid (March 2004) and London (July 2005) (Interview, European Policy Centre, 4 June 2014). National moods towards migration were leaning towards more control and security-related approaches, therefore affecting balance of forces in both domestic and EU politics (cf. Kingdon's 'political stream'). This section examines the new mode of entrepreneurship put in place by the Commission following the 2001 failure.

The Green Paper on an EU approach to managing economic migration and External consultation

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 (COM (2004) 811 final). 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. The persistent efforts deployed by the European Commission in the area of legal migration may be, to some extent, explained by the personal motivation of the successor of António Vitorino as Commissioner for Justice, Freedom and Security, Franco Frattini. With regard to the Blue Card Directive policy-making process, the latter 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 stage 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-EU 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. 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). Unlike what the Commission had

done regarding the 2001 Directive proposal, the institution was unwilling to bring forward new solutions prior to organising an extensive external consultation. This time, alternatives were to be discussed beforehand; only in a second stage would some of them be injected into the policy streams and coupled to problems encountered by member states.

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 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 EU members expressed during the 2001 discussions into consideration (such as the right to determine the number of migrants admitted to enter their domestic labour market). In addition, it 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. 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.

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), it comes as no surprise that the Commission took special care to take concerns and preferences of national governmental actors into consideration. These positions coincided with the ones favoured by the business community and expressed via BusinessEurope. Hence, as underlined by Georg Menz, it may be no coincidence that the Commission adopted the exact direction advocated by UNICE, in its response to the Green Paper (Menz 2009: 114). 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 meagre it was.

The Hague Programme

The presence of legal migration on the EU agenda was not to be taken for granted. Every opportunity to communicate on the topic was to be seized in order to ensure that legal migration stayed on the European agenda (Interview, European Commission, 21 April 2016). 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. Consequently, a ‘policy window’ opened quite predictably. The Commission took this opportunity to issue a communication to the Council and the European Parliament. This initiative was all the more pressing, as legal migration was on the brink of disappearing from the EU agenda (Interview, European Commission, 21 April 2016). Drawing up a broadly positive record of past achievements, the Commission underlined 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 sufficient political consensus’ (COM(2004) 401 final: 5). The document also included detailed proposals for a follow-up programme, which ultimately became the basis of the so-called ‘The Hague Programme’ covering the period 2005-2009. This new multi-annual plan - approved by the European Council on 4-5 November 2004 (Council Document 16054/04) – was

very much focused on completing unfinished tasks from the previous period, namely the development of an area of freedom, security and justice.

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' (Council Document 16054/04: 10.). Via the use of 'constructive ambiguity', legal migration remained on the EU agenda. What is more, the Commission obtained some gains, as the narrative of the Programme was in line with its strategy to connect labour migration objectives of the EU with the Lisbon agenda. The November 2004 European Council, once again, recalled that the determination of the number of labour immigrants remained under the strict control of member states. Heads of state and government 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.

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 (COM(2005) 669 final). 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 (COM(2005) 669 final: 5). The Commission was well aware that an alternative was fundamental in order to avoid a fading away of the topic of legal immigration from the EU agenda altogether. Making reference to Kingdon's terminology, the Commission sought to open a new 'policy window' by coupling the Blue Card scheme (i.e. 'policy stream') to skill shortages (i.e. 'problem stream'). 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. Concretely speaking, the Policy Plan marked the beginning of the Commission's work on the preparation of the Blue Card directive proposal (Interview, Commission official, 3 May 2016).

This new approach served as a device for the European Commission to legitimate the need for Europe-level involvement in the field of legal migration. This new approach served this purpose. Presented as an important factor of competitiveness, essential for the success of the Lisbon Strategy, it reflected a utilitarian, selective and economically-driven approach to labour immigration policy (Carrera 2007: 2). To avoid another failure in the field of legal migration, the Unit in charge of the dossier initiated a dialogue with member states at a very early stage of the decision-making process. To quote a Commission official:

The work we carried out [in the Unit] did not just consist of coming forwards with an ivory tower, a well-done technical proposal prepared [...] in isolation, irrespective of the political framework conditions. We also had to take into account critical member states, especially Germany (Interview, European Commission, 3 May 2016).

Apart from avoiding political blockage, this liberal approach of highly skilled immigration had another advantage in the eyes of the Commission: it was relatively easy to implement and to monitor. This explains why the definition of the Commission regarding a 'highly qualified' rested on a salary threshold and the allocation of a work-contract, rather than on qualifications and employment needs.

INTERACTION PATTERNS OF THE EUROPEAN COMMISSION WITH MEMBER STATES

This section seeks to highlight the relationship between the European Commission and member states throughout the making of the Blue Card Directive. In so doing, it focuses on the phases of the process at which point the Commission interacted with national governments, both before and during Council negotiations. The legal base (i.e. unanimity voting procedure in the Council) deeply impacted the balance of power between the two protagonists, member states having the final say. Against this backdrop, the balance of power was clearly in favour of national delegations. In this context, the European Commission was the driver of the Blue Card Directive. With the failure of the 2001 directive proposal still in everybody's mind, it wanted, more generally, to make progress in the legal migration area at all costs (Interview, European Commission, 3 May 2016). At the political level, Commissioner Franco Frattini was extremely active in promoting an EU approach to labour migration in the media, at times drawing a parallel with the American Green Card (e.g. Spiegel Online 2007). Aware of the sensitivity of national governments, he presented the EU 'Blue Card' as an opportunity for Europe, claiming that 'We have to look at immigration not as a threat but – when well-managed, and that is our new task – as an enrichment and as an inescapable phenomenon of today's world' (Bounds 2007). Political entrepreneurship was also visible on the part of Commission President José Manuel Barroso, who exposed the importance of legal migration in increasing economic growth of Europe and reaching the Lisbon objectives in a series of keynote speeches (e.g. Barroso 2007). Drawing on Kingdon's terminology, Mr. Frattini and Mr. Barroso tried to couple the 'policy stream' to the 'problem stream' by presenting the European Blue Card as a solution (among others) to improve the competitiveness of the European Union.

At the technical level, the Directorate-General in charge of the Blue Card file wished to justify its involvement in legal immigration issues. In this vein, DG JLS, in cooperation with DG Employment, had developed a discourse centred on the need to combat demographic decline and ageing, as well as to enable competitiveness and the fulfilment of the Lisbon strategy. However, the Commission faced fierce opposition from some member states in its endeavour to progress on the Blue Card dossier. 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). One should underscore that member states were not all fiercely opposed to the Commission directive proposal on how to manage highly skilled immigration.⁸ However, since legal migration fell under the unanimity rule in the Council, the pace of progress in this area was dictated by the most reluctant member states, which excluded any EU involvement as regards access to their labour market. The two most vocal states in this sense were Germany and Austria, which could not, however, for reasons of external visibility, prevent the adoption of the Directive. Referring to Kingdon's terminology, they could not stop the Blue Card from being put on the 'decision agenda', understood as '[...] a smaller set of items [compared to the 'governmental agenda'] that is being decided upon [...]' (Kingdon 2014: 166). However, being on the 'decision agenda' is no guaranty of the actual enactment and does not say anything about the content of the final legislation (Kingdon 2014: 166). In fact, Germany and Austria invested much effort into making the Blue Card into a highly restrictive permit (Interview, European Commission, 3 May 2016).

Against this backdrop, the Commission felt that it had to act at the political level and anticipate negative reactions as much as possible. As the draft proposal was almost finalised and about to be submitted to the College of Commissioners for formal approval and transmission to the institutions, Commissioner Franco Frattini gave the German Chancellery and the German Ministry of the Interior the possibility to have a final look at the proposal. This was a double-edged strategy. Whereas the Commission did manage to avoid complete political blockage by carefully preserving German prerogatives, the drafting suggestions of Berlin substantially watered down the Commission proposal. Most importantly, the idea of establishing a single regime replacing all existing national systems was heavily criticised by the Germans, the Blue Card therefore becoming an additional layer on top of national migration regimes targeted at highly-skilled migrants (Interview, European Commission, 3 May 2016).

Debates in the Council were particularly lively. As is common practice, members of the Unit in charge of the dossier in the European Commission were invited to present the Directive proposal at the level of the Working Party, and participated in several additional encounters with national experts on the subject. One could observe an opposition between the two long-standing conceptions of the European construction – the intergovernmental approach, incarnated by the member states, and the communitarisation view, based on incremental harmonisation, stirred by the European Commission. Issues such as the complementarity between Community and national provisions were considered problematic. The initial idea of DG Justice, Liberty and Security was to set up a European Blue Card system for the immigration of highly skilled workers, which would have replaced highly diverse national schemes. Although member states would retain their ability to manage their labour market needs and amend their legal framework, the immigration of highly skilled third-country nationals would be managed by this EU-wide system exclusively. The Commission opposed the distortion of its idea until it had no other option but to back down. As explained by a Commission stakeholder, it was a ‘battle’ between the two institutions (Interview, European Commission, 3 May 2016): a battle the Commission was willing to fight through in spite of very limited foreseen success.

CONCLUSION

The entrepreneurship of the European Commission has taken various forms throughout the years in the field of justice and home affairs. Prior to the entry into force of the Amsterdam Treaty, the ‘Task Force’ on justice and home affairs had limited resources, but did manage to gain support internally by anchoring its work on problems linked to the completion of the internal market. In the following years, the fully-fledged Directorate-general Justice, Liberty and Security, in charge of migration, went through ups and downs in its endeavour to progress on the bumpy road of European integration in this area. Drawing on John W. Kingdon’s model, the aim of this study was to highlight the persistent ‘policy entrepreneur’ nature of the European Commission over a 15-year time period or so, which ultimately led to the adoption of the Blue Card Directive in 2009. In so doing, this article’s primary concern was the process itself, and not so much the end result.

We have seen that the 1990s have been particularly favourable to the expansion of European integration in the field of justice and home affairs. The ‘political stream’ – particularly the domestic climate and the positive mind set of key personnel internally – formed a firm base on which the ‘Task force’ could lean in its endeavour to open a ‘policy window’. One may argue that internally, at least, this small group managed to couple their preferences to pressing problems faced by their colleagues from other services. This materialised via a support network comprising the Director-general of DG XV, the Secretary-General of the Commission, and the Commissioner in charge of justice and home affairs. The

entry into force of the Amsterdam Treaty opened a new chapter for the newly created Directorate-general, headed by a dynamic Commissioner, who wished to progress at all costs. However, the hope to open a new 'window' with the Tampere Summit rapidly came to a halt with the failure of the 2001 directive proposal. Our findings indicate that at this stage of the process, the Commission showed its capacity to adapt to new circumstances by modifying its proposals, in line with concerns of member states. At this point, achieving change demanded a paradigm shift, from an all-encompassing approach on legal migration to a categorised perspective on the topic. The maintenance of legal immigration on the EU agenda was the ultimate goal.

Stepping back, the adoption of the 'Blue Card' Directive may be seen as resulting from the successful continual push of the Commission in the highly sensitive field of legal immigration. Much has been written on the outcome, described as a 'watered-down directive' (Kahanec and Zimmermann 2010: 20; Van Riemsdijk 2012: 353) or as a directive based on a 'lowest common denominator' (Cerna 2010: 25). By adopting a long-term perspective of the different phases which led to the adoption of the Blue Card Directive, this article seeks to provide a basis for further discussions on the policy-making process. The time seems particularly appropriate for such an exercise. The Juncker Commission has launched a review of the 2009 EU Blue Card Directive 'as a first step towards a new European policy on legal migration' (Inception Impact Assessment 2015) and a new proposal for a Directive on the conditions of entry and residence of third-country nationals for the purpose of highly skilled employment has been sent to the European Parliament and to the Council in June this year (COM(2016) 378 final).

CORRESPONDENCE ADDRESS

Sidonie Paris, Université du Luxembourg, 11 Porte de Sciences, L-4366 Esch-sur-Alzette, Luxembourg [sidonie.paris@uni.lu; sidonieparis@gmail.com]

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ENDNOTES

¹ Lisbon European Council Conclusions of 23/24.3.2000.

² 'The policy window is an opportunity for advocates of proposals to push their pet solutions, or to push attention to their special problems' (Kingdon 2014: 165).

³ Except for certain aspects of visa policy, which were put in the first pillar (Article 100C TEC).

⁴ The term 'partial communitarisation' is mainly used in the literature in order to stress the fact that only a part of the former third pillar issues are transferred to the first pillar' (Papagianni 2006: 26).

⁵ According to Kingdon's model, the 'political stream' comprises three aspects: the national mood, organised political forces, and events taking place within 'government' (Kingdon 2014: 145-164).

⁶ This concern was later illustrated by the introduction of a 'scoreboard' by the Commission in March 2000 (at the request of the Tampere European Council) to ensure constant progress on the creation of the AFSJ (COM(2000)167).

⁷ The other three areas – judicial cooperation, the fight against crime and stronger external action – are not developed here as they fall outside the scope of this paper, focused on immigration.

⁸ France put significant energy into preparing the 'European Pact on Immigration and Asylum' during their Presidency in 2008. Beyond this political exercise, it wanted to retain full control over who entered its national territory (Interview European Commission, 3 May 2016). Spain, and Sweden saw in the Blue Card Directive an opportunity to review their relatively unsuccessful national policy. The 'pragmatists' – Belgium, Luxembourg, the Netherlands – were more favourable to establishing EU-level rules.

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