IMMIGRATION POLICY-MAKING IN THE EUROPEAN UNION:A CASE STUDY ON THE ADOPTION OF DIRECTIVE 2003/109/EC AND ITS IMPLEMENTATION BY GERMANY AND THE NETHERLANDS

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Abstract:

This article analyzes the ascent of immigrant-related policies in the European Union by identifying the most important actors influencing this process through an examination of key developments such as the Tampere European Council and the Amsterdam Treaty which paved the way for the adoption of Directive 2003/109/EC on the status and rights of third-country nationals. In doing so, the key question to be discovered is the role of the EU with regards to immigrant integration by investigating a key European-level instrument as the case study, namely the adoption of Directive 2003/109/EC which is the most recent and relevant legislation establishing the status of third-country nationals in Europe. By examining whether the adoption of this Directive has led to any progress in terms of the rights of third-country nationals in Germany and the Netherlands, I try to assess whether the adoption of the Directive may be explained with the supranationalist view that the Commission has a strong supranational role as a political entrepreneur that promotes common norms and values, or it is a reflection of the prevalence of liberal intergovernmentalism and the rationalist motivations of the Member States to promote their interests when reaching a final compromise. The conclusions show that Member States choose to cooperate in these areas mainly because of their socio-economic concerns such as restricting the increasing numbers of asylum, low-skilled immigration, the goal of global competitiveness and attracting qualified labor force. The preservation of these interests and the

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subordination of immigrant rights to national concerns reveal that Member States negotiate European policies by almost exclusively focusing on the distribution of gains unlike suggested by the supranational perspective which argues that negotiations are concerned with achieving an efficient policy outcome.

Keywords: *Immigration, Immigrant Integration, Third-Country National, Supranationalism, Liberal intergovernmentalism.*

Özet:

Bu çalışma, üçüncü ülke yurttaşlarının yasal statü ve haklarıyla ilgili düzenlemeleri kapsayan Direktif 2003/109/AT'nin kabul edilmesine zemin hazırlayan Tampere Avrupa Konseyi, Maastricht ve Amsterdam Antlaşmaları gibi gelişmeleri inceleyerek, Avrupa Birliği'nde göçmenlerle ilgili politikaların oluşum sürecini etkileyen en önemli aktörleri belirlemeyi amaçlamaktadır. Bu bağlamda, üçüncü ülke yurttaşlarının statü ve haklarını belirlemede en yeni politika sayılabilecek Direktif 2003/109/AT'nin kabul edilme süreci incelenecek ve Avrupa Birliği'nin göçmenleri entegre etme politikaları oluşturmadaki rolü anlaşılmaya çalışılacaktır. Bu Direktif'in Almanya ve Hollanda'da yaşayan göçmenlerin statü ve haklarında bir gelişmeye yol açıp açmadığı incelenerek, Direktif'in müzakere ve kabul edilme sürecinin Avrupa Komisyonu'nu ortak norm ve değerleri yükselten siyasi bir girişimci olarak gören ulusüstü bakış açısı ile mi yoksa üye devletlerin rasyonel çıkarlarını ön planda tutan liberal hükümetlerarası teori ile mi açıklanabileceği değerlendirilecektir. Çalışmanın sonuçları, üye devletlerin bu alanlarda işbirliği yapmalarında, Avrupa Birliği göç ve iltica politikasının yalnızca bir parçasını oluşturan entegrasyon politikaları geliştirme amacının değil, sayıları hızla artmakta olan mülteci ve göçmenler, küresel ekonomik rekabet ve yetenekli iş gücüne olan ihtiyaç gibi sosyo-ekonomik nedenlerin etkili olduğunu göstermektedir. Bu çıkarların korunması ve ulusal çıkarların göçmen haklarının üzerinde tutulması, üye devletlerin Avrupa politikalarını müzakere ederken ulusüstü teorinin savunduğu gibi etkili bir sonuca ulaşma amacı güttüklerinin aksine, müzakerelerin esas olarak ulusal kazançların dağılımı ile ilgili olduğunun altını çizmekte ve göçmen politikalarının yapımında hükümetlerarası teorinin geçerlililiğini işaret etmektedir.

Anahtar Kelimeler: *Göç, Göçmenlerin Entegrasyonu, Üçüncü Ülke Yurttaşları, Ulusüstü Teori, Liberal Hükümetlerarası Teori.*

1. Introduction

Immigration has become a crucial facet across the enlarged European Union (EU), as ageing and declining population together with the problem of unemployment strengthen the prospect and necessity of increasing immigration into Europe. Today, EU Member States are confronted with the challenges of immigration related to the political, legal, socio-economic and cultural integration of immigrants within their territories. These challenges have been emphasized in many European-level initiatives such as the 1999 Tampere European Council, where EU-level policymaking targeting third-country nationals (TCNs) has become a joint policy objective, often tied to the functioning of the single market, for the completion of which certain TCN rights equal to those of EU nationals are argued to be a logical and necessary consequence of the "fourth freedom" (Uçarer, 2010).

As currently constituted, the EU institutions possess very limited competence for issues impacting upon immigrant integration (Geddes, 2000: 643). Although with the Amsterdam Treaty, some immigration issues were moved to the first pillar allowing the European Commission to enjoy the right to prepare proposals while decisions are to be made through qualified majority voting (QMV), matters directly relating to the status and rights of TCNs remained strictly under the third pillar. This study probes the ascent of TCN policies at the EU-level by identifying the most important actors influencing this process through an examination of key developments such as the Amsterdam Treaty which paved the way for the adoption of Directive 2003/109/EC. In doing so, the key question to be discovered is the role of the EU with regards to immigrant integration by investigating the adoption of Directive 2003/109/EC which is the most recent and relevant legislation establishing the status of TCNs. Ultimately, I expect to reach a conclusion about the interplay and tension between national and EU levels with regards to the issue of immigrant integration and see whether it is the Member States who influence European policies or it is the EU affecting them and contributing to the convergence of integration policies in the

Member States.[1] In so doing, I also try to comprehend to what extent the policies of the EU are merely "rhetoric", and if this is not the case, where exactly the EU has an impact, and where not, or not enough.

2. Theory and Method

Observers and scholars of European integration often have contrasting and conflicting views on why states choose to coordinate certain policies by surrendering their national prerogatives to EU decision-making bodies. Although the intergovernmentalist vs. supranationalist debate with regards to many European policy areas including immigration policy-making has been widely studied (Kurt, 2006), the same debate on the issue of immigrant integration is yet very limited. By analyzing the two theories, in this article I seek to reintegrate the historical study of immigrants in the EU with theoretical inquiry into what factors prompted EU Member States to cooperate in the field of immigrant integration.

The term "intergovernmentalism" was first coined by Stanley Hoffmann (1966), suggesting that Member States perform as the primary actors in controlling the level of European integration. Several intergovernmentalist approaches have been put forward in the literature following the arguments by Hoffman (George and Bache, 2006; Moravcsik, 1999; Nugent, 2006). Emerged as a reaction toward intergovernmentalism, liberal intergovernmentalism was put forward by Andrew Moravcsik in 1990s. Moravcsik (1999) writes that the term "intergovernmental" within the institutional framework of the EU draws on general theories of bargaining and negotiation. In his theory, Moravcsik makes use of three major explanations. First, he emphasizes the significance of national preferences and argues that they are by and large formed by a series of rational economic interests which lead to a policy demand (24). Second, Moravcsik argues that interstate bargaining forms the policy supply and states that EU-level bargaining and negotiations reflect the relative power of the Member States, which in turn leads to various distributive outcomes. According to Moravcsik, states develop strategies and bargain with one another to

[1] It is because of this concern that Germany and the Netherlands, where there are high numbers of legally resident TCNs, are taken as the illustrative case studies which reveal the eagerness of Member States to ask for more discretion when EU level policies are being made.

achieve compromises that realize those national preferences more efficiently than in the case of unilateral action (20). Third, Moravcsik states three reasons for the transfer of sovereignty to supranational institutions by the Member States – commitment to European federalism, economizing on the analysis of information by centralizing technocratic institutions and the wish of national governments to control one another and increase joint gains (Moravcsik, 1999: 3-9). Thus, liberal intergovernmentalism underlines state preferences with an emphasis on rational cost and benefit calculations which by and large determine the conditions of interstate bargaining in the EU. As cost and benefit calculations are important, unanimity is the rule for decision-making as it allows Member States to preserve the power to veto any decision that runs contrary to national interests (51).

Vink (2001) argues that the domestic interests of Member States in European cooperation vary greatly. National governments (especially from frontrunner countries such as Austria, Germany, Sweden and the Netherlands) find themselves in tricky situations especially with regards to sensitive issues such as immigration and asylum. To overcome this dilemma, implementing restrictive policies by "locking in" European cooperation may be the only solution for these frontrunner countries. Once "locked in" European cooperation, harmonization of standards to the lowest common denominator allows Member States to maximize the benefits of interstate bargaining while lowering the costs of joint policies which could lead to significant changes in national law (Moravcsik, 1993).

Nugent (2006: 558) writes that supranationalism involves states working with one another in a manner that does not allow them to retain complete control over developments. That is, states may be obliged to do things against their preferences and their will because they do not have the power to stop decisions. Thus, supranationalism involves some loss of national sovereignty since national governments may place their interests below those of supranational actors and thus the power of decision-making is not centralized in the governmental procedures of the Member States. Pollack (1997: 121) argues that the decisive importance of supranational officials in European integration is and remains "the most common and far-reaching claim" found in the literature on the EC. From Jean Monnet in 1950s to Jacques Delors in 1980s, supranational officials have continuously looked for advancing proposals, achieving compromises and mobilizing domestic interest groups. With its direct and privileged access to the European

Parliament, press and other means of the media, the Commission breaks down the monopoly of technical, legal and political information held previously by national governments (Moravcsik, 1999: 57).

In line with the supranationalist approach, the entrepreneurship provided by supranational institutions decisively changes the outcomes of interstate bargaining (13). Challenging this view, liberal intergovernmentalism argues that European integration can be best explained as a series of rational choices made by national leaders who act as their own political entrepreneurs (18). The intergovernmental bargaining theory argues that national positions are stable as supranational officials have no advantage and only national governments and societal groups may act as effective policy entrepreneurs (56). Hence, in intergovernmental theory, negotiations almost exclusively focus on the distribution of gains unlike suggested by the supranational perspective which argues that negotiations are concerned with achieving an efficient policy outcome. Supranationalist views of bargaining suggest that pareto-efficient outcomes need supranational intervention, specifically if "package deals" or innovative proposals are involved (55).

As I argue that the comparison of these two theories provides an important framework for assessing the controversial progress of European integration on immigrant integration, the supranationalist versus intergovernmentalist debate is placed at the center of this article. In this respect, two hypotheses related to the analytical approaches on negotiation outcomes are to be examined. The first hypothesis suggests that the Commission is not very influential and Member States determine the extent and content of cooperation leading to the adoption of Directive 2003/109/EC. Policies have tended toward the lowest common denominator (Moravcsik, 1999) as Vink (2001) suggests in his analysis of cooperation in the field of asylum cooperation. The second hypothesis, on the other hand, suggests that the supranational Commission is influential as a political entrepreneur and EU level decision-making in immigrant matters is incipient supranationalism limiting national choices (Sassen, 1999). In accordance with this perspective, Member States prioritize the successful integration of immigrants above national interests. The lack of any progress in the status and rights of TCNs following the adoption of the Directive in Germany and the Netherlands will be indicative of a liberal governmental approach to European integration while any concrete progress (in the status

and rights of TCNs) will add value to the supranational theory anticipating European negotiations to be conducted with the aim of reaching an efficient outcome.

For the purpose of this process-tracing, primary sources adopted by the EU institutions, namely the Commission, Council of Ministers, the European Parliament, the European Court of Justice and the European Council, together with official documents, speeches and press declarations by the national governments and politicians of the Member States in question will be used as the yardsticks. Secondary sources related to immigrant integration will also be made use of. Furthermore, empirical projects which contribute to a more recent classification of countries' integration policies, namely the European Civic Citizenship and Inclusion Index and Migrant Integration Policy Index[2] (MIPEX) will also be referred to in order to better observe the changes in the analyzed countries' integration policies.

3. The Nexus of European Cooperation, National Governments and Interstate Negotiations

In the mid-1980s, as a result of an increased awareness of economic competition and Europe's perceived inability to "keep up internationally," along with additional factors, the revitalization of the Community began with a renewed commitment by government leaders to underpin the single market (Larsen, 2004: 10). Although economic concerns were salient within Member States' labor market policies and the free movement of TCNs is a necessary element of the realization of the single market, in the Single

[2] MIPEX measures the integration policies of 25 Member States and three non-EU countries (Canada, Norway, Switzerland) in six policy areas; labor market access, family reunion, long-term residence, political participation, access to nationality and anti-discrimination. The policies of the Member States are compared to a common normative framework, which is composed of European standards of best practices derived from EU Directives, from Council of Europe Conventions or EU Presidency Conclusions. The policy indicators measure Member States' current integration policies against these highest standards (Niessen *et. al*., 2007: 19). Thus, MIPEX will be a helpful tool to have an idea related to Member States' integration policies.

European Act (SEA), this right was not extended to TCNs[3]. Hence, even in matters directly related to economic integration of which the free movement rights of TCNs is a part, Member States have reserved sovereign prerogatives. Within such a context, why did they decide in Tampere to equalize the rights of TCNs with those of EU nationals although a rights-based approach has often been an underestimated?

Interweaved economies of the EU brings about the necessity to deal with labor market issues at the European level. Related to the labor market issue is the situation of illegal immigrants, who can be "regularized" in one Member State and try to take advantage of the socio-economic conditions in another (Parkes, 2008). Such challenges make it necessary for the EU countries to deal with immigration and asylum as a common policy objective, as the majority of them have been experiencing the similar interrelated problems of illegal and low-skilled immigration, rising numbers of asylum applications as well as the challenge of global economic competition in which Europe has lagged behind. The fair treatment of TCNs is indissolubly part of the immigration and asylum debate. During the Tampere Summit, the German government, together with British and French governments, declared their commitment to equalizing the rights of TCNs with Member State nationals, but with a statement that nationality of an EU Member State would be the only route to access EU rights.[4] As

[3] Within the EU context, the definition of TCN is "any person who is not a national of an EU Member State who is granted legal residence in the territory of a Member State" (Snel *et. al*., 2003). Although it is hard to accurately state the number of TCNs residing in the EU, based on the reports of a wide range of organizations, it could be said that out of the EU total population, TCNs account for almost 5%, which refers to 14 million. It shall be noted that throughout the study, the terms "immigrant" and "third-country national" may be used interchangeably. This implies that the term "immigrant" will refer to non-naturalized immigrants from outside the EU, excluding EU nationals with immigrant background.

[4] It should be noted that the events of 9/11 had an impact on such an approach since Member States were in a dilemma between a rights-based approach and a restrictive approach as a response in fighting terrorism. Thus it is not a surprise that an official from the Permanent Representation of Germany to the EU stated that the Commission proposal for Directive 2003/109/EC is related to the very fundamental question of whether the legal status of Member State citizens may include non-EU citizens (cited in Larsen, 2004: 21).

Member States are concerned with increasing numbers of asylum seekers and immigrants through family reunification, these concerns have led Member State to further European cooperation in these areas, as Vink (2001) also suggests.

Thus, EU policies have by and large addressed Member State concerns in many interrelated areas such as asylum, family reunification and the need for highly qualified labor force, and the very issue of TCN rights has been subordinated to the growing need for "keeping up internationally" and reducing the number low-skilled immigrants. Specifically, rational economic concerns are also extremely visible within the domestic contexts of the Member States. When Schily announced that "Germany is an immigration country" the necessity for directing Germany's immigration policy toward economic interests in the face of the global competition for high-skilled immigrants was also stated (Migration News, September 2001). After it was officially recognized that Germany is an immigration country and that it needs immigrant workers to fill labor shortages, the issue of immigrant integration was moved to national policy discussions. Together with concerns related to the labor market, the issue of asylum as elaborated above has also served as a reason why Germany has performed as a fervent actor with regards to the creation of EU-level policies in the areas of immigration and asylum (Vink, 2001: 5). Illustrative in this respect is the 1993 asylum debate which showed that Germany tried to use European level decision-making to slip national policy constraints in order to reduce the number of asylum seekers entering national territory.

Thus for Germany the EU is likely to serve as an actor providing legal and symbolic resources as the country has looked for concepts to inform its immigrant integration policies (Geddes, 2003). However, European cooperation is resisted when national sovereignty is challenged, *e.g.* with regards to the grant of direct EU rights to TCNs. This contradicts with an ideological commitment to European integration that has constituted one of the pillars of German policy, meaning that preferences towards European integration is dominated with the belief that the EU is perceived as a venue that can help states in solving important practical policy issues within the Member States (98). When we look at the Netherlands, similar motives can be observed. Similar to Germany, concerns for high-skilled labor force and the need to manage global competition are important reasons why multicultural policies are giving way to a focus shift toward the immigrant's

"self-sufficiency" and "autonomy", endowing the notion of "integration" with a heavy dose of economic instrumentalism (Joppke, 2007: 16).

I have tried to show that socio-economic concerns, namely, filtering new immigration through asylum and family reunification, illegal immigration and the need for qualified labor force as a result of the aging and declining population act as the primary motives of Member States in agreeing upon European cooperation in the field of immigrant integration. As Larsen (2004: 31) puts it, the EU legislation is a tool to further Member States' socio-economic interests and in the case of Directive 2003/109/EC they have used the EU to secure and legitimize their own concerns with regards to immigrant integration, the growing need for high-skilled TCNs and the right of states to limit entry into the domestic economy. With an attempt to alleviate these concerns, Member States chose to cooperate at the EU level but they simultaneously prevented the supranational Commission to have a say in who enters in national territory and what rights are to be granted to them. Now, I will try to demonstrate that the negotiation process of the Directive and subsequent amendments to the Commission's proposal also support a liberal intergovernmental approach.

The Commission proposal for Directive 2003/109/EC has a broad scope including all TCNs residing legally in a Member State, irrespective of the ground on which they were originally admitted (European Commission, 2001). Article 3 of the Directive indicates that all TCNs legally residing in the territory of the EU Member States are granted the long-term resident status provided that they fulfill the necessary conditions, the most important of which is to have lived in EU territory for at least five years. When compared to the original Commission proposal, the adopted Directive includes an additional distinctive clause that directly influences the implementation of it by the Member States. While the Commission only mentions the necessity of complying with integration measures rather than integration conditions, a subjective clause requiring TCNs "to comply with integration conditions in accordance with national law" (Council of Ministers, 2003a: 4) was inserted into the Directive as a result of strong claims made by the governments of Germany and the Netherlands in the Council. During the negotiations, through a note to the Strategic Committee on Immigration, Frontiers, and Asylum in the Council, the Austrian, Dutch and German delegations stated that,

> According to the German, Dutch and Austrian delegations, full participation of third country nationals can be encouraged by the implementation of integration policies. The primary aim of integration is the promotion of the self-sufficiency of so-called 'newcomers' and one of the main parts of integration policy is an integration programme. The aim of this suggestion is to include these programmes in the Council Directive for these programmes, especially as they are linked to the granting of the resident status. Integration programmes are meant to give an impetus to the independent functioning of newcomers (Council of Ministers, 2002: 1).

The note also includes the statement that the introduction of this integration criterion is essential for Austria, Germany, and the Netherlands given these countries' already existing or intended arrangements on integration programs for newcomers, provided that they are not able to communicate in the language of the country of residence (2). The Council thus agreed on amending Articles 5 and 15 of the Directive regarding the conditions for acquiring long-term resident status and conditions for residence in a second Member State. With regards to Article 5, the clause "integration conditions" provides Member States with the discretion of introducing various integration prerequisites in accordance with their national legislation, and since the clause does not explicitly define the scope of these integration conditions, Member States retain the possibility to determine the content of these conditions in accordance with national law. A similar situation can also be observed in Article 7, where the wording "appropriate accommodation" (Council of Ministers, 2003a: 5) is used to define one of the conditions for the long-term resident status. As the term "appropriate accommodation" is not clearly defined, this clause implies that it is the relevant Member State which is the ultimate authority to decide whether a TCN has "appropriate accommodation" to be granted the long-term resident status.

Besides the five-year rule, the original Commission proposal solely entails "stable and adequate resources and sickness insurance covering all risks" as the necessary conditions for long-term residence. Moreover, the Commission defines "stable and regular resources" with strict objective criteria and states that the minimum resources required may not be higher than the minimum income guaranteed by the State (European Commission, 2001: 15). Nevertheless, unlike proposed by the Commission, the Directive

clearly states that "Member States shall evaluate these resources by reference to their nature and regularity and may take into account the level of minimum wages and pensions prior to the application for long-term resident status" (Council of Ministers, 2003a: 4). Thus, during the Council negotiations, Article 5 and its wording was formulated in a way that gives Member States greater leeway in assessing the applicant's "stable and regular resources".

By virtue of Article 11 of the Directive, in accordance with Tampere principles, long-term resident TCNs shall enjoy equal treatment with Member State nationals within a wide variety of areas as elaborated by the Commission. Although Article 11 in principle enshrines the rights to be enjoyed by TCNs in an equal manner with Member State nationals, it is of paramount importance to indicate that these rights are subject to various limitations inserted into the Directive during the deliberations in the Council. Illustrative in this respect is the German attempt. During the negotiations, Germany fervently supported the restriction of the scope of Article 11 with an attempt to extend the margin of maneuver for the Member States. Indeed, it has to be noted that at an early stage of the negotiations, the German government *explicitly* stated its will to depart from the idea of equality of treatment (Halleskov, 2005: 190, emphasis added) although the country has fervently supported supranational immigration and asylum policies.

Access to employment of TCNs is one of these sensitive areas that Article 11 mentions. While the Commission's original proposal for Directive 2003/109/EC entails that TCNs with long-term status should have access to the labor market on an equal basis with Member State nationals (European Commission, 2001: 18), additional limitations related to TCNs' access to the labor market were inserted into the Directive during the negotiations. The foremost limitation in this respect is enshrined in Article 11(3)(a), which includes an optional derogation clause stating that Member States may restrict TCNs' right to access to the labor market "in cases where, in accordance with existing national or Community legislation, these activities are reserved to nationals, EU or European Economic Area (EEA) citizens" (Council of Ministers, 2003a: 6). During the first and second reading of the Directive, it was the German government that suggested the insertion of this clause (Council of Ministers, 2003b).

Now, I will look at the "territorial limitation" and "education" clauses which are also listed in Article 11. The territorial limitation clause allows Member States to limit equality of treatment "to cases where the registered or usual place of residence of the long-term resident lies within the territory of the Member State concerned" (Council of Ministers, 2003a: 16).[5] This provision brings about a limitation to TCNs' right of free movement, which can be denied by a second Member State in a situation where a TCN concerned has only stayed there for a short period of time.[6] With regards to the education clause in Article 11(1)(b) and (c), it is possible to observe similar limitations. The Commission's original proposal grants TCNs the absolute right to education and vocational training on an equal basis with Member State nationals; however, similar to the aforementioned provisions, the provision on education was also adopted with important limitations departing from the Commission's goal of equal treatment. Although the final Directive indicates that TCNs shall have access to education on an equal basis with Member State citizens, the right to education is subject to the territorial limitation clause.

It has to be stated that during the final deliberations in the Council, the German government persistently insisted on adopting stricter measures in the area of education (Council of Ministers, 2003b). The German government successfully lobbied for the insertion of "specific educational prerequisites" clause in Article 11(3)(b) which renders Member States with the ability to demand numerous additional national requirements. Although in principle Article 11(1)(b) lays out TCNs' right of access to education as an area of equality of treatment as stipulated by the Commission proposal, the vague clause of "specific educational prerequisites" provides a

[5] According to Halleskov (2005: 193), the insertion of this clause by a proposal from the Greek Presidency may be viewed as a complementary attempt to the bargaining power of restrictive Member States, such as Austria, Germany and the Netherlands.

[6] Although Article 14(2) states that "a long-term resident may reside in a second Member State on the following grounds: exercise of an economic activity in an employed or self-employed capacity, pursuit of studies or vocational training, and for other purposes" (Council of Ministers, 2003a: 7), this right is constrained by various limitations. Article 14(3) clearly states that with regards to the economic activities of TCNs, Member States may consider their labor market conditions and apply national procedures for the exercise of such activities thereafter.

possibility for extensive derogation by the Member States. A parallel situation exists with regards to TCNs' right to achieve study grants on equal terms with Member State nationals. Article 11 defines this right by using the phrase "in accordance with national law", although the Commission's proposal simply assigns this right to TCNs on equal terms with Member State citizens.[7]

Table 1. Differences between the Commission's Proposal and the Adopted Council Directive

Amended/Inserted Articles	**Commission Proposal**	**Adopted Directive in the Council**
Article 3(2) Chapter I: General Provisions	Broad scope including all TCNs residing legally in a Member State, irrespective of the ground on which they were originally admitted	Precludes students, people benefiting from subsidiary or temporary protection, refugees, people who reside on temporary grounds and diplomats
Article 5(1) Chapter II: Long-term Resident Status in a Member State	"Stable and adequate resources and sickness insurance" is included as a condition for long-term resident status but is defined with strict criteria	Change in wording providing Member States with greater leeway in evaluating these resources by reference to their nature and regularity
Article 5(2) Chapter II: Long-term Resident Status in a Member State	Complying with integration measures	Complying with integration conditions in accordance with national law

[7] It has to be mentioned that the term "in accordance with national law" may not necessarily imply a possibility for derogation but may simply be a means of stating that TCNs shall have access to education on an equal footing with Member State nationals (Halleskov, 2005: 196). However, given the dominant discretion-based approach within the Council where the majority of the Member States are willing to derogate from the Directive's provisions as the abovementioned explanations have tried to demonstrate, it is more likely that the Member States deliberately agreed on the wording of Article 11(1)(b).

Article 6(1) Chapter II: Long-term Resident Status in a Member State	"Public policy or public security" limitations are subject to certain criteria similar to some of those in Directive 64/221/EEC of February 1964	No limitation to Member States' right to reject a long-term residence application on "grounds of public policy or public security"
Article 7(1) Chapter II: Long-term Resident Status in a Member State	Does not mention "appropriate accommodation" as a condition for long-term resident status	The clause "appropriate accommodation" as a condition for long-term resident status is inserted
Article 11(1) Chapter II: Long-term Resident Status in a Member State	Absolute right to education and vocational training on an equal basis with Member State nationals	The clause "specific educational prerequisites in accordance with national law" is inserted
Article 11(2) Chapter II: Long-term Resident Status in a Member State	Participation of TCNs in the labor market on an equal basis with Member State citizens	This right may be restricted "in cases where, in accordance with existing or Community law, these acticities are not reserved to nationals, EU or EEA citizens"
Article 11(3) Chapter II: Long-term Resident Status in a Member State	Proposal inspired by existing Community law on free movement for the citizens of the Union	Equality of treatment may be limited "to cases where the registered or usual place of residence of the long-term resident, or that of family members for whom he/she claims benefits, lies within the territory of the Member State concerned"

Article 11(4) Chapter II: Long-term Resident Status in a Member State	Does not mention any limitation to the equality of treatment in social assistance and social protection	Restrictions on equal treatment in respect of social assistance and social protection
Article 14(3) Chapter III: Residence in the Other Member States	Does not mention any limitation to the equality of treatment in employment the exception being jobs entailing involvement in the exercise of public authority	Member States may consider their labor market conditions and apply national procedures for the exercise of economic activities
Article 15(3) Chapter III: Residence in the Other Member States	Does not mention specific integration measures to be implemented by the Member States	Member States may require integration measures in accordance with national law (*i.e.* attending language courses)

I tried to show that the Commission's initial legislative proposal for Directive 2003/109/EC was by and large watered down by the Council, including the provisions on free movement on which the Commission had based its proposal. Following the Directive's adoption, Groenendijk (2006: 407) writes that Directive 2003/109/EC have had the more perverse effect on Germany and the Netherlands of scaling down (making access more difficult) rather than increasing the level of protection by facilitating access to long-term resident status. Then why did the two Member States agree upon the adoption of the Directive although there is not a concrete positive step in progressing the status and rights of TCNs?

Although the Directive envisaged harsher conditions vis-à-vis the existing arrangements in some Member States (such as Belgium and France where one could obtain long-term resident status after three years while the Directive stipulates five), it was more generous than the laws in Member States that provided weaker rights for TCNs (such as Austria, Denmark and Germany). For the Council did not include a stand-still clause which would have prevented the Member States from "harmonizing downwards", *i.e.* reducing higher national standards to conform to the standards of the

Directive (Halleskov, 2005: 188), countries such as Belgium, France and the Netherlands could use EU legislation to gain the freedom to crack down on immigrant rights (Luedtke, 2009). The Netherlands, together with France and Belgium, relatively supported the Commission's proposal, primarily because the proposed Directive already included less generous measures than the national laws of these countries (European Council, 2002). This suggests that the Netherlands, as the small but pro-active country supporting European cooperation (Directive 2003/109/EC), could indeed lay the ground for domestic change toward worsening the conditions for TCNs through the Directive.

There are also cases when EU policies transcend the standards within the domestic contexts of the Member States. In Germany, the rights for TCNs were far less generous than the Directive. It is for this reason that the country fervently argued against the Directive as its adoption would lead to an increase in the rights for TCNs. Illustrative in this respect is the residence requirement; Germany had to reduce the residence requirement for long-term residence from eight to five years when the Directive was adopted. Germany thus tried to amend the proposal in order to insert clauses to make the Directive compatible with their existing national legislation and to minimize the need for future changes or create room for announced or intended changes in their national law (Hailbronner, 2000; Groenendijk, 2006).

In 1998, the Dutch government introduced rules on language courses in their laws on the integration of TCNs; however, at that time the country did not intend to use language tests as a tool in regulating the admission and status of immigrants in the Netherlands (Groenendijk, 2006). It was in 2002 when the idea of using integration tests for the regulating the status of TCNs received support in the Dutch Parliament (398). The reason why I mention this policy change is to show that during the negotiations of the Directive, the Dutch government had the intention to introduce into its national law rules on language and integration tests. This by and large explains the successful attempt of the Dutch government (together with Austrian and German delegations) in inserting into the Directive a subjective clause requiring TCNs "to comply with integration conditions in accordance with national law" (Council of Ministers, 2003a: 4) with an intention to lay the ground for domestic policy change. In 2004, the Dutch government officially announced the introduction of language and integration tests as a

new requirement for long-term residence status, and this was justified with reference to Directive 2003/109/EC (Groenendijk, 2006: 404). On the other hand, the same attempt by the German government can be explained by the situation that Germany already had a language requirement for long-term residence permit and for this reason the German delegation supported the insertion of this clause to make the Directive compatible with existing legislation.

In Germany, the debate on the Immigration Act (*Zuwanderungsgesetz*) especially during 2002-2004 influenced the both the negotiations and content of the Directive. The German government tried to create room for announced or intended changes in its laws (403) as with the Residence Act of 2004, the language requirement for permanent residence was made stricter by the German government. In addition to the requirement of sufficient knowledge of German language, the German government introduced basic knowledge of the legal and social system and the German way of life as a new condition for permanent residence permit (399). These national developments show that Germany and the Netherlands had already existing or intended arrangements with regards to their goal of restricting new immigration especially through family reunification.

Having shown that the oppositional attitude of the Member States and their will to amend the Commission's proposal derived primarily from the attempt to make the Directive compatible with their existing and/or intended national regulations so that the transposition of the Directive would only lead to slight changes within the domestic context, I now will try to explain the theoretical implications of this situation. Both in the light of the negotiation process of the Directive and as documented in the historical description of how the EU has been granted the competence of making legislation in the areas of immigration and immigrant integration, it appears that Member States are reluctant to weaken their sovereignty over TCNs living in their national territory. Hence, it can be said that harmonizing Member States' integration practices with European legislation in the form of hard law through Directives or Regulations is difficult as these directives only set the minimum standards that Member States have to comply with, as the case of Directive 2003/109/EC has shown. As a result, as the European Parliament (2005: 161) states, Member States transpose Directives freely, "*à la carte*" and the Commission provides an insufficient mechanism of

monitoring while the ECJ is not empowered to impose sanctions in cases where legislative acts include vague and flexible wording, which is deliberately arranged by Member States with relatively more bargaining power (such as Germany) with an attempt to circumvent harmonization.[8]

In the first Part, I emphasized that any concrete progress or the lack of any improvement in the status and rights of TCNs in Germany and the Netherlands will shed light on why Member States choose to cooperate in the area of immigrant integration and adopt Directive 2003/109/EC. Then, let me now try to explain the theoretical implications of the finding that the adopted Directive has not produced an amelioration of the status and rights of TCNs in Germany and the Netherlands. Calling for intensive cooperation in this area, the Commission has been empowered to propose legislation in the area of immigration and asylum with the Amsterdam Treaty as Member States have opted for developing strategies to achieve compromises that realize those national preferences more efficiently than in the case of unilateral action (Moravcsik, 1999). Furthermore, Member States have tried to control one another and increase joint gains (3) with regards to the very important issue of providing immigrants with EU rights including the right of free movement from one Member State to another. It may appear that the Amsterdam Treaty strengthened the supranational character of the EU in favor of supranational institutions such as the Commission and the ECJ. However, despite the Commission's increasing role, a supranational decision-making process is difficult to function, as the Commission shares the rights of proposal with the Member States meaning that immigrant-related matters are not in the exclusive competence of the Commission although it acts as the initiator of the policy-making process. The role of the ECJ is also limited with regards to the preservation of law, order and internal security (Kurt, 2006: 79). Furthermore, it is up to the Council to unanimously change this procedure in favor of supranational institutions. In the light of these findings, the limitations to judicial review and

[8] The possibility to circumvent harmonization primarily stems from optional derogation clauses, which provide the opportunity to derogate from specific articles of the Directive if a Member State wishes to do so. Hence, the fate of the Directive by and large depends on how each Member State chooses to interpret these derogation clauses, the most important of which are related to the right to employment, education and social benefits.

parliamentary scrutiny of Council decisions, it is reasonable to argue that matters related to TCNs are likely to be dominated by intergovernmental processes excluding any harmonization the absence of which seriously undermines a supranational policy-making process.

Thus, responses to the formation of immigration and immigrant integration *acquis* remain "national". Furthermore, provided by the discretion of the Directive, Member States may adopt more restrictive or additional integration policies which constrain the rights of TCNs within EU territory. With regards to the case of Directive 2003/109/EC, Germany and the Netherlands have pursued restrictive policies not that much different from those that they would have pursued in the absence of European cooperation; however, they could get away with it more easily by rationally benefiting from the EU as a playing field (Vink, 2001: 23). By agreeing upon making the debate a "European" matter, Member States seem to undermine their decision-making capacities but they were in fact reserving certain prerogatives which were zealously defended in the negotiations of Directive 2003/109/EC.

Thus, European cooperation appears as a "need" rather than an ideological commitment to supranational institutions and their liberal axis toward granting more rights to TCNs. Once Member States agree upon European cooperation, they engage in a battle to continue this cooperation based on lowest common denominator standards (Moravcsik, 1999). Within such a context, European integration does not necessarily lead to an abrogation of national sovereignty or a loss of authority by the Member States. Instead, expanding competences of the EU have allowed Member States to transnationally define the issue of TCNs not as a human rights concern but as a matter of securing socio-economic interests, and the EU only remains as a frame for policy-making in immigration and asylum *acquis*. Hence, unlike suggested by a supranational bargaining theory underlining the role of the Commission in disseminating knowledge and the generation of potential solutions to common problems (Pollack, 1997), the adopted Directive reflects the primary interests of national governments whose bargaining power in negotiations tend to constrain the emergence of an efficient outcome.

In this sense, I agree with Moravcsik that the integration process did not supersede or circumvent the political will of national leaders; it *reflected*

their will (Moravcsik, 1999, emphasis added). Hence, as Moravcsik (18) argues, European integration can be best explained as a series of rational choices made by national leaders who share common demographic and socio-economic problems. The negotiation process of the Directive is by and large dominated by the preferences of national governments with relatively more bargaining power such as Germany and the Netherlands, whose restrictive attempts toward the grant of direct rights to TCNs constrained the emergence of "package deals" that lead to cross-issue linkages. Furthermore, Member States agree upon progressing European cooperation in order to become "less-regulated EU Member States" (Moravcsik, 1999). In the case of Directive 2003/109/EC, the German government has continually rejected the possibility of reaching a compromise through concessions and has put forward significant revisions of the Commission proposal together with the Dutch government instead. Skeptical countries led by Germany opted for a vague legal language so that the Directive would render them with more discretion that would hardly be restricted by the ECJ. Thus, Member States are not faced with hard legal obligations, preventing the ECJ to take legal action in case of non-compliance. In the case of Directive 2003/109/EC, the adopted legislative text mainly reflected the interests of Germany, but did not damage the interests of other Member States since they were willing to follow Germany's position so that national discretion on the legal status and rights of TCNs was maintained using the EU policy-making process (Joppke, 2007). Through the German government's relative power in interstate bargaining, the Directive appears as a German victory and a step back for the supporters of supranational decision-making with regards to immigration and immigrant integration (Luedtke, 2009). Thus, it may be argued that unlike Sassen (1999) suggests, immigrant matters is not incipient supranationalism limiting national choices, as the successful integration of immigrants is placed below national interests preserved in European negotiations.[9] Thus, the Directive was only a "baseline"

[9] This is not to completely overthrow the role of supranational actors such as the Commission and the ECJ. However, what I argue in line with Moravcsik's argument is that although many proposals by supranational officials have been accepted or adopted, supranational actors are not the essential actors in these processes (1999: 53). In the history of the legal status and rights of TCNs living in the EU, the Commission's role is especially salient given its persistent attempts

harmonization, which was criticized by many NGOs on the grounds that it allowed for a "lowest common denominator" policy that would empower Member States to lower the rights of TCNs (Luedtke, 2009).

4. Conclusions

Within a context of increasing interdependence and as the proportion of TCNs in the population of Member States increases, EU states would benefit from coordinating their policies vis-à-vis the immigrants within their borders. A number of commitments have been made at the EU level especially since the Tampere European Council; however, the desired level of convergence among Member States policies has not been achieved yet. This article has found out three main conclusions. The first conclusion states that the Maastricht Treaty, the Amsterdam Treaty and the Tampere Council clearly show Member States' growing need for common immigration and asylum policies as the majority of them have faced the problems of restricting the increasing numbers of asylum, low-skilled immigration, the goal of global competitiveness and attracting qualified labor force. It is because of these concerns that Member States find themselves discussing matters like immigration although this area was not originally the part of the EU's mandate, as Larsen (2004) also states. The growing need for controlling unwanted immigration has led to the expansion of the use of external measures the most important which is cooperation at the EU forum (Geddes, 2003: 112). Hence, notwithstanding the Commission's attempts, it has been Member States' socio-economic concerns deciding on the extent

even when these attempts are not easily approved by the Council. As mentioned before, supranational officials have a key role in initiating negotiations by advancing proposals that direct the attention of national governments to common problems (Moravcsik, 1999). Calling the attention of national governments to the problem of immigrant integration, it was the Commission that initiated negotiations on this debate through a proposal on Directive 2003/109/EC. Nevertheless, the supranational initiative supported by the Commission was adopted with significant amendments leading to a substantial gap between the intentions of the Commission and Member State preferences circumventing any supranational decision that would bind national governments. Even though the proposal comes from the supranational Commission, state preferences dominating the bargaining process function in such a way that leaves no room for any supranational decision harmonizing Member State policies.

and content of immigration policy-making especially since the Tampere Council.

Member State concerns for socio-economic interests bring us to the second conclusion of this article. Although the Commission has succeeded in its agenda-setting task by initiating the proposal for Directive 2003/109/EC, it has been the Member State governments determining the terms and content of the Directive in line with their national concerns dominating the negotiation process. Although the Commission and various Brussels-based NGOs have been active in keeping the matter on the political agenda of the EU (Groenendijk 2006), the final outcome left these actors discontent due to the several rounds of changes resulting in a restrictive legislative instrument. The final Directive is primarily based on the already existing national immigration rules of the Member States (Halleskov, 2005). Hence, matters related to the legal status and rights of TCNs continue to be dealt with at the national level, leaving EU institutions with serious limitations for supranational decision-making.

Third, this article exhibits no concrete improvement in the status and rights of TCNs after the adoption of the Directive by Germany and the Netherlands. The lack of any progress after the adoption of the Directive shows that the negotiators of the Directive opted for finding *ad hoc* compromises rather than devising a general principle as envisaged by the Commission, and Member States could reserve their competence to make several exceptions to equality of treatment in many areas. Based on these conclusions, I argue in favor of a theoretical explanation based on the liberal intergovernmental theory. The lack of any improvement in the status and rights of TCNs in Germany and the Netherlands shows that although we witness Member States' converging commitments with regards to preventing unwanted immigration and asylum, countries have become more European in controlling immigration but have reserved their sovereign prerogatives with regards to TCN rights promoted by the supranational Commission. State preferences thus remain primary as national governments retain their power and sovereignty through the Council which significantly interferes with Commission initiatives in a way that the adopted Act hardly resembles the original Commission proposal. Negotiations almost exclusively focus on the distribution of gains unlike suggested by the supranational perspective which argues that negotiations are concerned with achieving an efficient policy outcome. By agreeing upon

surrendering some level of sovereign prerogatives in the area of immigration especially since the Maastricht Treaty establishing JHA cooperation, Member States have used the EU policy-making space to expand the competences of the EU primarily with the aims of filtering new immigration in the face of the global competition for high-skilled immigrants but used those competences to place the status and rights of TCNs below the rights of national interests as so defined by national authorities (Larsen, 2004: 31). "Escaping to Europe" to find common solutions to common problems (Guiraudon, 1998), Member States primarily perceive the EU forum as a tool for assisting Member States in solving practical policy issues relevant to their domestic contexts.

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