One Market, 25 States, 20 Million Outsiders?: European Union Immigration Policy

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1. Introduction

European integration (the transfer of policymaking authority from national governments to Brussels) presents a dilemma for national immigration authorities. The walls and borders that divided East and West have slowly crumbled and the lines between insiders and outsiders are increasingly blurred. The EU has expanded from 15 member countries to 25, which will eventually allow almost 500 million citizens to move freely across borders. With little or no coordination on security and immigration issues, Europe will experience an unprecedented challenge. Can nation-states construct free trade zones – allowing free movement of persons, services and goods – without common immigration policies? Or is a common immigration policy the inevitable product of the functioning of regional economic cooperation, despite the national pressure to maintain domestic control over this sensitive issue?

Looking at the history of European integration, one sees that in other policy areas (such as gender equality or environmental protection), member state governments did not originally anticipate the degree to which the EU's central institutions (the European Commission, Court of Justice, and Parliament) would eventually gain policymaking authority as the EU evolved (Stone Sweet and Sandholtz 1998, Stone Sweet, Fligstein and Sandholtz 2001, Stone Sweet 2000, Stone Sweet and Caporaso 1998, Cichowski 1998). Thus, when the real possibily of EU-level *immigration* policy "harmonization" arose in the run-up to the 1992 Maastricht Treaty, the member states tread very carefully. The EU's involvement with immigration in the Maastricht Treaty was kept to a minimum, weak, "intergovernmental" bargain, whereby any one member state could veto any proposed EU immigration policy, and such policies (if passed) would only be non-binding targets, as opposed to "hard", judicially enforceable laws. This development makes sense, of course, given immigration's high degree of political salience, and given the

worries of national governments that electorates would punish them for relinquishing control over entry into national territory (a central facet of the Westphalian state).

And yet events in the last decade have proven surprising. Despite open member state worries over the possibility of the EU taking control over immigration policy, and despite conscious national attempts to head off EU control through institutional innovations and blockages, the draft European constitution makes immigration an area of full EU control.[1] In the meantime, the EU has also passed binding immigration laws in a variety of areas, which now commit national governments to implementing EU immigration policy. What factors caused this dramatic result, and what does this mean for the future rights and freedoms of the EU's immigrants?

Section Two of this paper will detail the evolution of the EU's immigration regime, from Maastricht's modest beginnings, to the ambitious European constitution. Since "immigration policy" is a very broad topic, covering diverse areas such as labor migration, family reunification, political asylum, social integration, and the fight against illegal immigration, the third and fourth sections will focus on one key policy area: the rights and freedoms of Europe's nearly 20 million "third-country nationals" (TCNs), who are *legally resident* in an EU member state, but do not hold citizenship in any member state. Despite calls by the European Commission, the Parliament, and several of the member states, TCNs do not possess the same rights as EU citizens to move freely and take up employment in any member state. Therefore these immigrants, though legally resident in the EU, cannot participate in the common market. The third and fourth sections will detail the political struggle over whether or not to give free movement rights to TCNs, looking at the key roles played by the European Court of Justice

[1] Though with one significant exception – Germany succeeded in inserting a clause into the draft constitution stating that member states shall retain responsibility for setting levels (numbers) of immigrants who can enter their country.

(analyzed in Section Three) and the European Commission (analyzed in Section Four) in the face of strong opposition by powerful member states. This political struggle will be analyzed in the context of the debate between supranationalism and intergovernmentalism (Stone Sweet and Sandholtz 1998, Moravcsik 1998), and will be analyzed on the basis of secondary sources, and interviews I conducted with political actors in Brussels during 2003 and 2004. The fifth section concludes the chapter, analyzing the extent of TCN free movement rights as they currently stand, as well as their prospects of future expansion, in the broader perspective of the increasing degree of EU control over immigration policy in the 21st Century.

2. The Evolution of a European Union Immigration Regime

Europe's national governments are under constant political pressure on the issue of immigration. One the one side, business groups call for more immigration, and human rights groups call for a higher level of immigrant rights and freedoms. On the other side, however, electorates punish political parties deemed "soft" on immigration, and many voters turn towards radical Right parties, who openly advocate strong anti-immigration stances. In some countries, of course, radical Right parties have even won governing power, while in other countries, radical Right parties simply push mainstream parties into taking more restrictive stances on immigration (Schain, Zolberg and Hossay 2002, Givens 2002, Sniderman et al. 2000).

In such a highly-charged political situation, where national governments are often accused of "losing control" over immigration, one might not expect to see national governments willingly giving up what control they *do* have to the European Union. This is especially so given that the European Commission (the EU's quasi-executive branch) and Parliament have openly expressed pro-immigrant opinions, and have called for a more pro-active and egalitarian

immigration policy, which respects human rights and serves the needs of business (European Commission 2000, European Parliament 2001). And yet this section will detail how the logic of European integration seemingly pushes towards EU control over immigration. Member states have apparently found it impossible to have a free-travel zone (with a common external border), without also agreeing on a common policy of who to let in to this zone, and what rights and freedoms they should enjoy once they are in. This is how immigration differs from other high-salience policy areas, such as defense policy and foreign policy. Immigration policy has a clear link with the common market and the free-travel zone. To put it bluntly, Italy's frontiers are now Sweden's frontiers.

Of course, in the run-up to the 1992 Maastricht Treaty, Europe did not yet have a free-travel zone, and the single market existed mainly on paper. Yet even at this early stage, member states had already seen limited advantages to coordinating and cooperating on immigration policy, though keeping the final say for each national government, of course. As early as 1976, a resolution by the EU's Council of Ministers (the legislative body representing national governments) encouraged member states to develop common immigration policies, in consultation with the Commission (Papademetriou 1996). Economic malaise and anti-immigrant politics throughout the 1970s seemed to prevent any further movement towards a common policy, but in the mid-1980s, as both economic growth and European integration gathered speed, the Commission put forth a set of "Guidelines for a Community Policy on Migration" (European Commission 1985). These guidelines not only emphasized the importance of free movement for EU citizens (which was by now a right well-established in EU law, though little-used by EU workers), but also called for "equality of treatment in living and working conditions for all migrants, whatever their origins" (cited in Papademetriou 1996, 20). In other words, the

Commission called for TCNs to be given free movement rights, commensurate with EU citizens. In the same year (1985), the Commission also released a Decision that required member states to provide advance notice of any measures they intended to take towards TCNs in the areas of entry, residence and employment. However, even this small, non-binding step was unwelcome as far as some member states were concerned, and these member states took their objections to the European Court of Justice (ECJ), arguing that the Commission had over-stepped its authority by seeking to play a role in immigration policy. The ECJ reached a compromise decision, voiding parts of the Decision, but letting the remainder stand (Papademetriou 1996). This political struggle over immigration policymaking authority foreshadowed the much larger struggles that were to come a decade later.

In 1986, the beginnings of the single market became reality, with the Single European Act's declaration of the "four freedoms": freedom of movement for goods, services, capital, and (most importantly), *persons*. Predictably, the Commission interpreted the category of "persons" expansively, arguing that it should cover legally-resident TCNs. Member states, on the other hand, argued that it should cover EU citizens only. Worried about the Commission's expansive position, member states adopted a declaration affirming their right to control immigration policy (Papademetriou 1996).

The following years saw member states coooperating only minimally on immigration, using intergovernmental fora that were entirely outside of the EU's institutional structure, and did not bind national governments to any "hard" commitments. But the early 1990s brought new opportunity for EU control, during the intergovernmental conference leading up to the Maastricht Treaty. Given that free movement for EU citizens would soon become a reality, the Commission, European Parliament, and some member states argued that the existing structure of

immigration cooperation was both inefficient (a multitude of overlapping bodies producing no binding commitments) and undemocratic (meeting behind closed doors, with no parliamentary and judicial oversight). These same actors called for immigration to be brought under EU jurisdiction, to make it more open, democratic and effective (Hix 1995).

Heeding member state reluctance, however, the Luxembourg Presidency of the EU in 1991 proposed an institutional structure that would keep foreign/defense policy and immigration as separate "pillars" of the Community, outside of the control of the Commission, Parliament and Court of Justice. This draft was met with resistance by several of the more pro-EU member states, one of which, the Netherlands, submitted an alternate draft Treaty that brought immigration policy under EU control. But this draft was defeated by the more skeptical member states, including the UK, Ireland, Denmark, Greece and France. The resulting Maastricht Treaty thus prevented immigration policy from becoming "supranationalized" in four respects: 1) it allowed member states the right of initiative to propose new EU-level measures (in "normal" EU decision-making, it is only the Commission who can propose new measures); 2) it allowed the Parliament only the right to be "consulted" over decisions, but gave it no veto or amendment power; 3) it prevented the ECJ from having legal jurisdiction over immigration; and 4) it allowed any member state to veto a proposed measure. Thus, the Maastricht Treaty was a victory for intergovernmentalism, in that it did little to change the already-existing structures for immigration cooperation (Papademetriou 1996).

Five years later, however, the debate was re-opened. In the run-up to the 1997 Amsterdam Treaty, three key developments pushed immigration cooperation back onto the agenda. First, the Amsterdam Treaty incorporated the Schengen agreement (on free travel) into the EU's institutional structure. Thus, external borders would become common borders,

obviously lending new salience to immigration cooperation. Second, the modest cooperation already achieved on immigration (e.g. agreements over common standards on political asylum, to prevent "asylum-shopping" among member states), was seen by national governments as a success, in that it allowed them to crack down on immigration at the EU level, where they were relatively free of pressure by pro-immigrant NGOs and courts (Guiraudon 2000, Lahav and Guiraudon 2000, Givens and Luedtke 2004). Increasing problems with illegal immigration and political asylum throughout the 1990s gave these issues even more pressing salience. And finally, most participants agreed that the "Third Pillar" structure was relatively inefficient, given the plethora of intergovernmental groups that lacked the power to forge binding commitments (Geddes 2000).

These factors pushed all but the most reluctant member states (the UK, Ireland and Denmark) to re-think their opposition to EU control. Thus, the Amsterdam Treaty achieved a partial supranationalization of immigration policy authority. It was agreed that after five years, the Commission would gain the sole right of initiative, the Parliament would gain the power of "co-decision", the unanimity requirement (national veto) in the Council would disappear, and decisions would thus be taken by a majority vote (though this arrangement would have to be implemented by a *unanimous* vote after the five-year transition period!). It was also agreed to give the European Court of Justice jurisdiction over immigration, though with a special exception, in that only *high courts* could refer cases to the ECJ (this is detailed in Section Three). Since the three most skeptical member states (UK, Denmark, Ireland) were not participants in the Schengen agreement, they were allowed to "opt-out" of this new decision-making structure, thus allowing them to drop their objections to supranationalization (Geddes 2000).

As the five-year transition period neared its close, it was overshadowed by the Convention on the Future of Europe, and the resulting draft Constitution. Secure in the knowledge that EU control had allowed them to be "tough" on immigration over the past five years, by passing highly restrictive measures (most notably the various steps to reduce the number of asylum-seekers, which even the UK had opted in to!), member states appeared swept up in the supranationalist momentum of the Constitution, and agreed to further expand EU control. Not only would the Commission get the sole right of initiative, the Parliament get co-decision, and the member states lose the national veto (as agreed at Amsterdam, after five years), but the ECJ was also given full jurisdiction over immigration (in that *any* national court could request an ECJ ruling). The only full (opting-in) participant to express strong skepticism was Germany, who succeeded in inserting a compromise clause into the Constitution stating that member states shall retain the ultimate control over determining the quantitative *levels* of immigration in their countries.

It is by no means clear that the draft Constitution will pass, however, and in the meantime, the five-year transition period has ended. Accordingly, member state governments agreed in late 2004 on a blueprint for EU immigration policy, the Hague Programme, which will lay the groundwork until the Constitution's passage (and will continue to guide policymaking in the event of the Constitution's failure). And during interviews with political actors in Brussels, I learned that the Hague Programme is seen by many as a setback for supranationalism, in that it prevents the ECJ from having full jurisdiction over immigration (again, only national high courts can refer cases), and, more importantly, it moves all areas of immigration policymaking to co-decision and majority voting, except for one key area: *legal* migration. In other words, other areas of immigration policy (most notably illegal immigration and political asylum) will become

"normal" EU policy areas, with full EU control, but control over legal migration will retain aspects of intergovernmentalism (unanimity voting in the Council, and no co-decision power for the European Parliament).

Thus, EU immigration policy faces two possible futures. If the draft Constitution passes, then full EU control will become a reality (though with the caveat that member states can set numerical levels of immigrants). But if the Hague Programme continues to be the guiding structure, then national governments will have retained control over the most sensitive area of immigration: legal migration. Illegal immigration and political asylum, while sensitive in their own right, raise less controversy when delegated to Brussels, because they are seen in terms of restriction and control; i.e., how can the EU help reduce the numbers? Legal migration is more sensitive for national governments because these are decisions over who to *let in*. Member state governments have few problems with using the EU as a way to coordinate exclusion; coordinating *inclusion* is a different matter altogether.

What does the evolution of EU control over immigration policy mean for the rights and freedoms of Europe's almost 20 million third-country nationals? Will TCNs gain the right to participate in the EU's single market, by moving freely across borders to take up employment? The next two sections analyze the political struggle over TCN free movement rights, beginning with the role of the European Court of Justice, and moving to the Commission in Section Four. Both sections will be analyzed in the context of the debate between supranationalism and intergovernmentalism. For supranationalists, the EU tends to gain increasing power despite the intentions of member states (Stone Sweet and Sandholtz 1998), while for intergovernmentalists, member states always retain the final say (Moravscik 1998). Given that the European Commission, Parliament and Court of Justice have advocated the expansion of immigrant rights

and freedoms, while national governments have preferred a restrictive line, the debate between supranationalism and intergovernmentalism is of direct importance to the future of Europe's TCNs.

3. Third-Country Nationals and the European Court of Justice

Until recently, developments in EU immigration policy seem to have provided strong verification for intergovernmentalism, especially because the member states consciously excluded the ECJ (normally the vanguard of supranationalism) from jurisdiction over a key policy area. This is the issue of legally-resident TCNs, who are workers that do not possess free movement rights in the EU, due to not having citizenship in their member state of residence. Many analysts were skeptical about TCNs ever gaining free movement rights, despite the fact that the European Parliament, Commission, and some of the more federally-minded member states consistently called for the granting of these rights throughout the 1990s (Papademetriou 1996). This is because the Parliament and the Commission both lacked the political clout to get such rights past the Council, who still voted by the unanimity rule where immigration is concerned. Thus, it seemed that the ECJ was the only institution that could grant TCN rights, due to the special political status of European law on free movement of workers, and of a legacy of successful rights claims within this law. However, the institutional changes after Amsterdam (detailed above) gave the Commission more clout in the area of immigration, resulting in the passage of a directive in 2004 that gives TCNs some limited form of free-movement rights. This seemed to make the Court's role less crucial, and to enhance the Commission's ability to expand immigrant rights, though the ECJ may still play a vital role in interpreting the new rules.

Looking at TCN cases that have already come before the Court, as well as the views of other analysts regarding the likely role that the Court will play on immigration, I will now answer the question of whether there is anything "special" about immigration as a policy area that prevents the ECJ from gaining as much jurisdiction over it as it has over other policy areas. After covering the ECJ's role, Section Four will analyze the European Commission's power and the new "Long Term Residents Directive", a piece of binding EU law passed in 2004, to determine its effect on TCN free movement rights. These two sections will attempt to answer the question of whether TCN rights have been expanded (or the institutional groundwork laid for future expansion), against the express wishes of some of the member states. Since the institutional arrangements for making immigration policy in Brussels are currently unclear, given the confusion surrounding the European Constitution, I will close by pointing to some initial signs that show promise for increased future oversight by the Court of Justice and the Commission.

Undeniably, the ECJ has gained some jurisdiction over the rights of TCN immigrants, through its power to legislate on free movement of workers. Free movement policy (for EU nationals) is by now strongly "supranationalized," with EU jurisdiction. This is a fait accompli. However, all EU immigration policy vis-à-vis legal immigrants, which does not deal with the movement of EU nationals (those who are citizens of member states), is still decided upon in a quasi-intergovernmental fashion, meaning that the EU's central organizations (the EP, Commission and ECJ) have little "competence" over this area. However, in the words of Geddes (2000), "this does not mean that the two [free movement and immigration] are disconnected and can be analyzed separately" (32). They are inextricably linked in the political realm, because, paradoxically, "freer movement for EU citizens has brought with it tighter controls on movement

by non-EU citizens [TCNs]" (32). At the same time, "free movement for people has . . . created legal and political sources of power and authority [like the ECJ] that have implications for TCNs" (43). In other words, by giving the Court the power to regulate free movement, the member states unintentionally granted the Court a limited say over immigration policy as a whole, since immigration is inseperable from free movement in some limited ways, which will be detailed below. If we can find evidence of the Court making use of this role, to eventually grant TCNs free movement rights against the wishes of national politicians, then we can say that "spillover" (a key causal mechanism of supranationalization, whereby the EU expands its power into new areas) has occurred.

Initially, the Court had no role to play, as free movement was advanced under the framework of the 1985 Schengen Agreement, an intergovernmental bargain by 6 member states, outside of the EU's institutional framework, to drop all internal border controls. Squabbling over standards held up implementation, however, and in 1987 the EU "caught up" to Schengen through the Single European Act, which formally proposed the "four freedoms" of movement. In 1992 the Single European Act's ambitious goals came to concrete fruition in the Maastricht Treaty, with its "Third Pillar", as detailed above. Again, the Third Pillar was seen as widening the EU's "democratic deficit" by handing more power to member state executives (ministries that deal with immigration), who were to have no judicial oversight. In Article K2 of Maastricht, a symbolic nod was made to compliance with the European Convention on Human Rights and the Geneva Convention, but this would prove "difficult to enforce because the provision was not justiciable by the ECJ" (Geddes 2000, 96). This is an obvious point for intergovernmentalism. Geddes argues that the Third Pillar "indicated superficial regard for the symbolic importance of these international obligations, but scant regard for ensuring effective compliance" (96).

What was the Court's role in all of this? The Court in fact played the very role that its member state principals would have wanted, striking down the Commission's only two regulations on immigration, both of which dealt with harmonized visa policy (Geddes, 100). Thus, at this point things looked quite bad for the supranationalist outlook, as EU institutions were locked out of the process and the Court made sure to reinforce this state of affairs.

The Amsterdam Treaty changed things only marginally vis-à-vis ECJ jurisdiction, with its compromise decision whereby the ECJ was only given jurisdiction when national courts of "final instance" requested rulings, an apparently rare prospect according to one legal analyst (Guild 1998). And again, the 2004 Hague Programme retained this restriction. What does this mean for eventual ECJ jurisdiction over TCN matters? In other policy areas, the ECJ's growing jurisdiction has depended on using the law itself as a shield and a mask, relying on the isolation of the legal realm's "technical discourse" to overcome member state reluctance, which in turn depends upon the the consistency and coherency of legal reasoning and the EU's evolving case law (Mattli and Slaughter 1998). The mechanism of "direct effect," which allows any national court to request an ECJ ruling, is the key component in this process (Weiler 1994). Aware of this requirement, the member states (consistent with intergovernmentalism) appeased Britain and Denmark by denying full direct effect on TCN matters. "Therefore coherence will be much slower dependent first on the adoption of measures which will regulate TCNs . . . and it will take much longer for interpretive questions to reach the Luxembourg Court" (Guild 1998, 619). That is, if spillover is to happen, it may be a longer, more drawn-out process than with other areas of European law.

Further, Amsterdam explicitly denied the ECJ jurisdiction in all areas of border controls (including TCN entry) that "relate to the maintenance of law and order and the safeguarding of

internal security" (Monar 1998, 141), which may well be interpreted to cover all areas of immigration policy in the current political climate. This might seem like an additional victory for intergovernmentalism, but the ECJ actually has the power, under Amsterdam, to determine for itself the criteria for "law and order" and "internal security," meaning that the Court will likely not rule itself out of the picture. This, of course, seems more consistent with supranationalism.

The legal coherence and consistency problem, however, remains a daunting challenge for the supranationalist outlook. Again, EU free movement law (for EU citizens only) is both coherent and consistent, with full EU supremacy. "Coherence," in this case, means no national discretion over legal matters, since national discretion is an inherent obstacle to integration. Thus, in line with supranationalist expectations, and against the political wishes of member states, the Court expanded the legal coherence and consistency of free movement law, setting a seemingly irreversible process into motion. EU nationals now have free movement rights that are judicially enforceable at the supranational level. Rights enforcement is a key mechanism for legal spillover, since it constitutes "implicit delegations of enormous discretionary authority to constitutional judges" (Stone Sweet 2000, 96). But what about TCNs? Under the Amsterdam Treaty, TCNs now have the coherent, consistent right to short-term travel across the EU's internal borders without frontier checks. However, there is a clear lack of rights, protections and freedoms in three other areas of TCN travel, which are still subject to full member state discretion (with no "floor" of standards/procedures that could pave the way for rights-claiming). These are: visa-free travel, standards for the issuing of visas, and external border checks. In these three areas, member states are free from the ECJ's watchful eyes, and can apply the utmost national discretion in their policies. TCNs who feel that they are unjustly required to have visas,

are unjustly denied visas, or are abused at the EU's external borders have no formal recourse to the ECJ (Guild, 617).

Intergovernmentalists would take heart at this state of affairs, since it maximizes the ability of national politicians to capitalize on the public's fears over immigration as a national security threat. But how did the supranational institutions attempt to counter this marginalization? The European Parliament, keen to extend ECJ jurisdiction (as well as its own competence) challenged national discretion over visa policy in the Court of Justice itself, and lost (Parliament v Council [1997] cited in Guild, 617). This seemingly confirms the hypothesis of Garrett, Kelemen and Schulz (1998), who argue that the Court is reluctant to overstep its delineated role on issues where it feels it could lose political legitimacy in the eyes of its member state creators. Thus, TCNs remain only the "objects" of EU policy and law, and cannot be "actors" in their own legal right since they have no right of direct effect (bringing ECJ-justiciable claims to national courts). Under intergovernmentalism, there is no legal framework, which in turn means no legal coherence or consistency, which in turn means that law cannot function as mask or shield to everyday politics. Indeed, there is not even a clear, stated, guiding goal for TCN policy in the Treaty (unlike with free movement), so the Court has no guiding principles to invoke in future rulings. In the absence of guiding principles and legal coherence, there would seem to be scant possibility for spillover. Intergovernmentalism, again, seems to be confirmed by the member states retaining discretion in order to minimize domestic political costs.

However, it was mentioned earlier that there are some openings, or "political opportunity spaces," that might allow for spillover by letting the ECJ rule on TCNs, against member state wishes, through the mechanism of free movement law. The first example of these openings regards TCN family members of EU nationals who exercise their freedom of movement in

another member state. According to the ECJ, TCN family members of EU citizens are entitled to the same residence, work and welfare rights as member state nationals. However, this right, for the ECJ, is not directly held by the foreign family member as a "human" right, but is instead derived from the rights of EU-national economic migrants, meaning that the ECJ has intentionally limited the legal standing of TCNs to economic matters (Guiraudon 1998). This, again, might confirm Garrett et al's self-limiting hypothesis, despite the fact that it is a small opening for TCN spillover. Another possible expansion of immigrant rights, however, comes with the issue of same-sex spouses. Several officials whom I interviewed mentioned that free movement rights could also be extended to TCN same-sex partners of EU citizens, against the wishes of many member states, if the ECJ interprets "spouse" to include same-sex partners. While covering only a small number of immigrants, this is an example of how supranational control can move policy away from national preferences. One British official admitted to me that ECJ competence over immigration and asylum is a "big worry" for the UK, because of the tendency of the judiciary to exert its political independence.

Another opening, however, has provided additional hope for TCN legal spillover. The TCN rights in this case are also derived from economics, but are potentially farther-reaching than that applying to family members. This opening concerns the status of TCN workers who are employed by EU firms performing services in another member state. In the Rush Portugesa [1990] decision, the ECJ found that if some of the company employees are TCNs, "member states cannot refuse them entry to protect their own labor market on the grounds that immigration from non-EU states is a matter of national sovereignty" (Guiraudon 1998). In other words, the "four freedoms" (labor, capital, goods, services) appear to trump national discretion over immigration policy, meaning that TCNs gain rights if they are included in the protective cradle

of EU economics (being employed by EU firms). Again, however, TCNs have no direct rights under Rush Portugesa, but instead have indirect rights that stem from discrimination against their employers, not against them. Being that this decision came against member state wishes, however, it seems a small step towards legal spillover where TCNs are concerned (Guiraudon 1998).

The third opening that should be mentioned is perhaps the farthest-reaching one in terms of the potential for ECJ "activism" to bring TCNs into the EU fold. This concerns the legal status of "Association Agreements" between the EU and third countries, which provided a quasi-legal framework for supranational immigration policy. "These Agreements have direct effect and have established rights of free movement and the transferability of social entitlements for some TCNs," applying to large numbers of Turkish and North African migrant workers (Geddes 2000, 149). Guiraudon (1998) argues that ECJ "activism" allowed for some legal spillover in this area, against member state wishes, since "member states clearly intended association law to be incomplete in the sense that no individual rights could be inferred" (Hailbronner and Katsantonis 1992; 57). The ECJ was therefore activist, contrary to intense political pressure from the member states (and thus contrary to Garrett et al's self-limiting hypothesis), because it ruled that "nationals of associated contracting states had directly enforceable rights that . . . had to be upheld by national courts" (Guiraudon, 660). In the 1987 Demirel case, the ECJ granted itself jurisdiction over the entry and residence of Association workers. In the 1990 Sevince case, the ECJ went even further by arguing that a "right of residence" could be inferred from Association Agreements, since the already-established rights of employment would be "useless" without rights of residence (Guiraudon, 660). And in the 1991 Kziber case, the Court went

further still, by vindicating a Moroccan living in Belgium's application for unemployment benefits, effectively bringing TCNs into the cradle of "social Europe".

These rulings seem to be a victory for supranationalism, because the Court decided to ignore the difference between EU nationals and TCNs; "judges applied the principles of Community law rather than the limited framework of Association law . . . the Court ignored principles such as reciprocity: there are no unemployment benefits in Morocco" (Guiraudon, 660). These rulings made the member states "furious," according to Guiraudon, and even pro-EU observers found the ECJ's legal reasoning here to be "dubious" (660). Was there a loss of legitimacy for the Court, and did this cause the Court to retreat, as Garrett's hypothesis might suggest? The "judicial capital . . . which is involved each time that a court breaks with the past and makes a new development" (Weiler 1993) may indeed have eventually seemed "prohibitive" for the Court. In a 1995 case, the ECJ retreated from its earlier activism and ruled against the plaintiff, a Turk, whose incapacity to work led to his residence permit not being renewed (Guiraudon, 660). And since then, the member states have been careful to exclude the right of free movement from new Association Agreements with Eastern European countries, perhaps rendering the Court's early activism a moot point.

However, Geddes (2000) has pointed to the existence of a significant political opportunity space here, emphasizing the fact that NGOs have "argued that if these rights are extended to some TCNs because of relevant Association Agreements, then it is unsustainable for other legally resident TCNs to be excluded" (149). Indeed, the fairness of this arrangement might be called into question by political actors, and this "leads to a free movement dynamic with potential spillover effects" (149). It seems that the Court, while dormant for the moment, has preserved itself a future space whereby it could extend Association-derived rights to all

TCNs by virtue of the principles of legal coherence and consistency, not to mention normative fairness. Whether or not it acts in this area will be a good future test of the intergovernmentalism/supranationalism debate.

An additional political opening should be mentioned here, and this is the Treaty provision prohibiting discrimination on a wide variety of grounds, including race (but, notably, not nationality). Guild (1998) argues that this anti-discrimination principle (as a guiding norm) "is capable of providing a further justification . . . for assimilation of the position of legally resident third country nationals to the position of their member state national colleagues" (619). What would be the legal logic? The Court may in the future rule that treatment of TCNs "may need to be equivalent to that of member state nationals if it is to avoid the risk of being challenged as . . . discriminatory on the basis of race" (Guild, 619). This would admittedly involve a rather large leap in legal reasoning by the Court, but the fact that it holds competence over the anti-discrimination provision means that it might in the future take the activist path, member state objections or not. This is especially true considering that *all* national courts and tribunals can refer questions of non-discrimination to the ECJ (unlike other areas of TCN law, in which only courts of final instance can take this step), since the Court has full jurisdiction over this area.

4. The Commission and the Long-Term Residents Directive

As stated above, throughout the past decade the European Commission consistently advocated for TCNs to have free movement rights. But given the intense political salience of the issue, several member states were reluctant to take this step. And because of the institutional mechanisms of the Third Pillar (unanimity voting in the Council) it seemed unlikely that the objections of these member states could be overcome, in potentially drafting a new directive to

let TCNs participate in the single market. Thus, all pro-immigrant eyes turned to the ECJ as a potential force for change. While this potential has not yet been realized, new hope for immigrants and their advocates came from the direction of the Commission in 2003, in the form of the so-called "Long Term Residents Directive" (LTRD). This section will analyze the political evolution of the LTRD, with a view to analyzing whether it is an example of successful harmonization, and it whether it is (currently or potentially) expansive towards immigrant rights, in a way that diverges from national preferences.

As stated before, the Commission has been a consistent defender of TCN rights. And at the Tampere Council in 1999, the Commission pushed the member states into declaring their agreement with the principle of equality between (legally-resident) TCNs and EU citizens. This is an example of supranational leadership, in which the Commission used its role as agenda-setter to reach agreement on broad (but not yet binding) policy goals (Ucarer 2001, Hooghe 2002, Pollack 1999). The Tampere conclusions read:

> "The European Union must ensure fair treatment of third country nationals who reside legally . . . A more vigorous integration policy should aim at granting them rights and obligations comparable to those of EU citizens. The legal status of third country nationals should be approximated to that of Member States' nationals. A person, who has resided legally in a Member State . . . should be granted in that Member State a set of uniform rights which are as near as possible to those enjoyed by EU citizens" (European Council 1999).

Taking these conclusions as its mandate, the Commission then proposed an ambitious directive in 2001 that would not only harmonize the status and rights of LTR TCNs across the EU, but would also grant these recognized LTRs roughly the same free movement rights as EU citizens. Under the guidelines of the proposed directive, TCNs would be able to freely move from their member state of residence to a second member state, as long as they were taking up work, study or vocational training (or if they had adequate financial resources to support

themselves). Further, they would not lose their status as a "worker" (and thus not be deportable), even if they had an illness, accident, took up vocational training, or lost their job. In the latter case, they would even have a guarantee of unemployment benefits. On the restrictive side, however, the proposed directive did mandate that TCNs would have to apply for a residence permit in the second member state within three months of moving there, and could be required to present proof of employment or resources, and could also be expelled for reasons of "public health", "public policy", or "domestic security". However, if the second member state expelled the TCN, (s)he would have the right to return to the first member state of legal residence.

Predictably, this proposal was attacked from two sides. Some member states felt that it was too generous and expansive, while some pro-immigrant groups felt that it was too restrictive towards TCN rights, and did not go far enough to equalize their status with EU citizens. This political conflict provides a good test of supranationalism, because the Commission expressed a commitment to defending the principle of TCN equality, against the wishes (preferences) of some of the more powerful member states. Thus, I will now evaluate the two-year political battle that raged in the Council over the Long-Term Residents Directive, to determine if the outcome deviated (or may deviate in the future) from national preferences in any meaningful way. How much did the final Directive, adopted January 2004, diverge from the Commission's proposal (in terms of restricting TCN rights), and do TCNs now have the right of free movement, against member state wishes?

Pro-immigrant groups had already attacked the proposed 2001 LTRD for being too restrictive towards TCNs. The well known UK-based group Statewatch fretted that the proposed LTRD did not explicitly refer to a right to take up economic or non-economic activities under the same conditions as EU nationals. Instead, it created a separate regime with less-clear legal

protections. Statewatch argued for making explicit reference to legislation on free movement rights of EU citizens: "at present, while such a right could possibly be inferred from the proposed Directive, it could also be argued that it is not included in the absence of express wording. The best way forward would be to incorporate references to legislation on the free movement rights of EC nationals in place of a separate regime for long-term residents" (Statewatch 2003). The UK-based Immigration Law Practitioners' Association raised similar objections, in that they recognized the right to *reside* in a second Member State, but found the lack of any express reference to the right to undertake economic or non-economic activities in another Member State (ILPA 2003). The ILPA also raised potential legal problems with problemmatic language in the Directive (which could lead to inadequate legal bases for TCN rights) in several other areas: unemployment benefits in the second Member State, vocational training, identity documents, proof of resources, family reunification, conditions for expulsion, judicial remedies, a 3-month deadline for the state to process applications, a provision that application fees be no higher than those for nationals to get identity cards, and a provision that TCNs cannot work while waiting for their permit in the second Member State, which is not in line with the rules for EU citizens. On all of these issues, the ILPA felt that TCN free movement rights either lacked an adequate legal basis (key for future ECJ rulings that might take rights in a more expansive direction), or else did not do enough up front to equalize TCN free movement rights with those enjoyed by EU nationals.

Though the Commission was certainly sympathetic to these positions, it clearly felt that its hands were tied to some degree, and that its proposed directive was an acceptable "first draft" to begin the (likely) difficult negotiations with the more recalcitrant member states in the Council. Any further expansion of TCN rights might alienate the member states to an

insurmountably large degree. Thus, work began in the Council to turn the Commission's proposal into a real directive that would begin to harmonize TCN status and rights across the EU.

It is important to note that the UK, Denmark and Ireland (normally the most Euro-skeptic member states on issues of immigration) played virtually no role in the negotiations over the LTRD, since these states were opting out of the EU's immigration policy. Thus, other member states did not have the "usual suspects" to hide behind on this issue (which had worked quite well under unanimity voting, for obvious reasons – member states could preserve their Euro-federalist reputations while letting the UK take the heat for blocking harmonization), and had to make their objections clear. And indeed, a new curmudgeon stepped up to take the UK's role, in the form of Germany. Over the two years that the Directive was negotiated, Germany consistently played the spoiler, preferring to restrict the free movement rights of TCNs. This provides an excellent test of supranationalism, then, because intergovernmentalists would predict that Germany would get its way, and that any successful harmonization would reflect German preferences. Supranationalists, on the other hand, would predict that Germany would (or will) eventually lose control over the policy.

Germany took a very strong line on the issue of TCN free movement. One German official with whom I spoke even denied that the Tampere Conclusions imply equal treatment between TCNs and EU nationals. Referring to the use of the word "approximate", he (and the German delegations to the Council) argued that the Tampere Conclusions do not imply that TCNs should have full free movement rights. Thus, instead of the draft directive proposed by the Commission, Germany preferred to let member states give preference to their own nationals in the labor market – a clear violation of the principle of free movement of labor. Germany was not alone in this position, however, and was joined by a cabal of like-minded member states. In

a Council working party meeting of December 2002, the Greek, Italian and Austrian delegations blatantly opposed the equal treatment of TCNs as regards free movement rights (European Council 2002). At the same meeting, the German delegation joined these three countries in advocating that the Directive text be changed so that member states gained the right to give preference to their own nationals for jobs. France, Finland and Sweden opposed this suggestion, and advocated full equal treatment for TCNs.

As the draft directive was edited and made its way through the Council's four legislative bodies dealing with immigration (the Working Party on Migration and Expulsion, SCIFA, COREPER and the JHA Council), two camps coalesced around the issue of free movement rights. The German camp, which also included Austria, Luxembourg, Greece, Italy, Spain, and Portugal, resisted granting TCNs full free movement rights. I do not have the space here to fully analyze the reasons behind these national preferences (see Givens and Luedtke 2004 for an attempt to explain national preferences), but in the German case it was clear that domestic politics was the obvious catalyst. Germany had previously been quite Euro-federalist and cooperative on immigration issues (Hix and Niessen 1996), but (in addition to losing the UK as a "shield") was now recalcitrant because of political pressure on the Social Democratic/Green government, coming mainly from the Lander (since the Bundesrat was controlled by the Christian Democrats). One German official admitted to me that Edmund Stoiber, the Chancellor of Bavaria and possible future leader of the CDU/CSU, who is quite restrictive on immigration (and even wants competence to revert fully back to the member states!), had been making a political issue of immigration. Since the Lander are responsible for paying social benefits and aid, there was a prominent worry that legal migration by TCNs might lead to an increase in social aid, e.g. a TCN moving to Germany from another EU country and becoming jobless after

two years. Since German social protection is more generous that other member states, the Lander worried that TCNs would engage in "benefit shopping", and flock to Germany under the new rules. Since Stoiber and others had succeeded in politicizing this worry, the German Council delegations felt that they must protect the principle of favored treatment for nationals vis-à-vis TCNs. We can probably assume that similar dynamics were happening in Austria, Luxembourg, Greece, Italy, Spain, and Portugal, though Germany's objections were the most prominent and important in terms of the success or failure of the Directive.

The pro-TCN camp in the Council included the Netherlands, France, Belgium, Finland and Sweden. These Member States, as well as the Commission, wrangled with Germany and the others regarding equal treatment for TCNs. A Commission official told me that the Commission got some leverage by reminding Member States of their grand promises (in the Tampere Conclusions), when it came time to draft legislation, thus confirming supranationalist arguments about Commission leadership and agenda-setting. However, the resulting Directive, finally adopted in January of 2004, must be seen as a German victory and a setback for pro-TCN advocates. The same Commission official admitted to me that the resulting LTRD does not live up to the Tampere Conclusions in many areas. In fact, the final Directive is so restrictive towards TCN rights, that a British official told me that the UK is now seriously considering opting in! Though there were some victories for the pro-TCN camp in non-free movement areas, such as the duration of residence needed before gaining LTR status (Italy wanted it to be six years, but the Commission and the more expansive-minded member states succeeded in keeping it to five years), on the whole the free movement section of the Directive does not offer much positive evidence for supranationalism (in that protectionist national preferences were safeguarded).

Not only did Germany succeed in getting the national labor market preference inserted, member states also gained the important rights to set numerical quotas on TCNs, and to require that TCNs comply with certain "integration" measures, including taking language classes. Importantly for assessing immigration policy harmonization's impact on European integration in general, these and other departures from the principle of equal treatment for TCNs were allowed through multiple uses of the word "may" (instead of "shall") in the language of the directive, so that member states are not faced with hard legal obligations. Recall that a key part of the supranationalist argument is the coherence of the law, so that the ECJ can later use legal language to raise the standard of rights protection. With this past history in mind, member states obviously here wished to free themselves from further legal action by the ECJ, by agreeing to a Directive that contained very weak legal language.

Thus, the intergovernmentalist perspective still appears to be the correct one in assessing currently developments regarding TCN free movement rights. However, there are some signs of future hope for supranationalism. One Council legal specialist I spoke with admitted that the Court may not be "impressed" with the text of the Directive, and particularly the removal of the word "right" (of residence) from the final draft. He wondered if the ECJ could in the future possibly infer a right, using one or more of the legal bases mentioned above. This same official told me that in view of the very minimal and restrictive harmonization contained in the LTRD, he sees this directive as an intermediate stage, and thinks that there will be a new one within 10 years. Clearly, the ECJ, Commission, and the European Parliament still have some room for maneuver in bringing TCNs into the free movement fold, against (some) national preferences. This is especially so if the European constitution passes, given that it gives the ECJ full

jurisdiction over immigration, gives the Parliament co-decision rights over all aspects of immigration, and mandates majority voting in the Council, as opposed to unanimity.

5. Conclusion

Why and how have EU organizations attempted to wrest institutional control away from member states and move common policies in a more expansive direction vis-à-vis immigrant rights? National governments initially agreed to harmonize immigration policies in order to regain control over immigration flows and maximize electoral capital (Guiraudon 2000, Joppke 1999, Lahav and Guiraudon 2000, Givens and Luedtke 2004). Thus, the delegation of sovereignty was a calculated move to enhance policy effectiveness, in building a "Fortress Europe" to more effectively exclude migrants. But in recent years, this control may now be slipping out of the grasp of member states, and this has had (and will likely have in the future) positive effects in terms of the level of rights protection and freedoms for immigrants.

This policy area provides a strong test of supranationalism's power, because it appears to be a "least likely case" for three reasons: 1) political salience is quite high; 2) the transnational "exchangers" (namely immigrants and their employers and supporters) are politically weak and face enormous populist counter pressure; and 3) states are openly worried about the dangers of supranationalization in the field of immigration, given their past experiences with the EU, and have taken active steps to avoid supranationalization. Though the initial signs are not entirely promising, if supranational governance is consolidated even in this controversial, core area of sovereignty, then Europe will have made a radical break with traditional notions of statehood and territorial control.

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