A ‘Guildian’ Analysis of The Equivocal Trusted Sponsorship under EU Labour Migration Law

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This contribution applies a ‘Guildian’ analysis of the institution of the trusted sponsor in the European Union and its Member States. A Guildian analysis is to place the migrants’ perspective central.1 Elspeth Guild studied power relations between states, third parties and migrants with an eye for the ‘professional futures of the individuals involved’.2 The Guildian analysis considers the extent to which the individual labour migrant ‘alone can regulate his or her life in accordance with clear rules with a degree of security as to the consequences of any particular choice or action’.3 This analysis is applied to the instrument of trusted sponsorship, or recognized employer, which is incorporated in two Directives and one proposed Directive on highly skilled migration of third-country nationals coming into the EU. These Directives are on the entry of Students, Researchers and some others,4 the Intra-Corporate Transfers Directive5 and the proposed recast of the Blue Card Directive.6 I will give some insights into the drafting history with respect to the concept of the trusted sponsor in each Directive, the requirements for trusted sponsors, the costs and benefits that come with being a trusted sponsor and, most relevant to the Guildian analysis, the consequences of a failing trusted sponsor for the migrant.

Other perspectives on labour migration are those of the host state, which has to secure its labour market from imbalances resulting from unwanted migration and might need to cure labour market shortages. The interest of an individual European Union Member State does not necessarily coincide with the European Unions’ point of view, for one because labour markets are not equally needing of migrant workers throughout

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1 E. Guild, European Community Law from A Migrant’s Perspective, PhD Radboud University Nijmegen, Nijmegen: GNI 2000.
3 Guild 2000, p. 314.
4 Directive on the conditions of entry and residence of third-country nationals for the purposes of research, studies, training, voluntary service, pupil exchange schemes or educational projects and au pairing, 2016/801/EU of 11 May 2016
the Union. Obviously, there is a business perspective to have readily available the workers needed to deliver. Both Member States and businesses may be competing for the same international talent, or Member States compete over businesses whereby easy access to labour migrants is a ‘country branding’ tool. Another perspective is that of the country of origin, which may benefit from labour migration through remittances or so called brain circulation. This is not some futuristic artificial intelligence concept where brains are linked into a circuit, but, in the words of Vertovec, an alternative discourse to the much feared brain drain; brain circulation describes labour migration ‘within transnational networks of skilled workers… throughout an international arena (such as Indian IT workers who work, at one time or another, in Singapore, Australia and the USA, as well as in India)... The idea is to accept the fact that skilled persons may want to migrate for career development, while seeking to encourage the skilled migrant’s return, mobilization or association with home country development.’ The circular perspective does aim to limit the migrants’ freedom to decide on saying yes or no.

The study by Noronha, D’Cruz and Ul Lateef Banday shows how Indian IT workers embed in the Netherlands (of whom many live in Amstelveen, also called ‘Mumbai on the Amstel’) are internationally wanted highly skilled labour migrants. However, they can see their freedom of choice and action restricted through migration law or their employers’ instrumental use of it. Noronha et al. describe how, for instance, employers make their Indian staff return to India before they have a full five years of employment, to avoid access to permanent residence and independency from their employer in their professional aspirations. The question addressed in this chapter is to what extent the instrument of the trusted sponsor or recognised employer allows the individual labour migrant to regulate his or her own life? I will argue that the instrument of trusted sponsorship is an equivocal instrument of facilitating and controlling large scale skilled labour migration. It is an enabler of labour migration. But also, and for this I will mainly use the Netherlands as an example, the instrument can seriously limit the migrants’ room for individual choices and actions.

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Three EU Directives and the Trusted Sponsor

Students, Researchers and Some Other Directives

Directive 2016/801/EU of 11 May 2016 sets conditions of entry and residence of third-country nationals (meaning non-EU nationals) for the purposes of research, studies, training, voluntary service, pupil exchange schemes or educational projects and au pairing (SRD). I focus on students and researchers. Member States may approve hosting organisations for all of these categories, but for au pair bureaus. The original Commission proposal provided the option to approve a hosting organisation only for researchers. The extension of the concept of approved sponsor beyond the researchers was the result of the political negotiations. Setting up such a procedure for others than researchers followed, amongst others, from Amendment 57 of the European Parliament concerning fast-track procedures. As a possible alternative to state approval of the sponsor up front, an amendment suggested host entities to be registered in an accreditation system, in order to facilitate future application procedures. Indeed, obligatory (private) accreditation is, in other domains of administrative law, a common tool to select ‘good’ government partners and the recognised sponsor shows some similarities to an accreditation systems.

Member States are given the discretion to provide for an approval procedure in accordance with procedures set out in the national law or administrative practice. EU law does not set any conditions or limitations as to the characteristics of the sponsor. Applications for approval shall be made in accordance with those procedures and be based on their statutory tasks or corporate purposes as appropriate and on evidence that they conduct research. The reference to national law or administrative practice leaves the Member States a wide margin of discretion in the design of an approval procedure, if designed at all. The Directive does however require Member States to grant an organisation an approval for a minimum period of five years. Only in exceptional cases, may it be for a shorter period. Although the Directive does not articulate grounds for approval it does give facultative and non-limited grounds for refusal to renew or for withdrawal of the approval where, in the case of for instance research organisations. Member States may require migrants, their family members, or host entities to pay fees for the handling of notifications and applications. The level of such fees shall not be disproportionate or excessive.

13 Article 15. Au pairs are not to be made subject to trusted sponsors because they are prone to abuse (preamble 23). Apparently, the Commission takes the view that highly skilled migrants are abuse resistant. As the work of Noronha et al. (2018) shows, this does not always hold true.
15 Brussels, 5 April 2016, COM(2016) 184 final, 2013/0081(COD), Communication from the Commission to the European Parliament pursuant to Article 294(6) of the TFEU. Political agreement was reached between co-legislators at the trialogue meeting of 17 November 2015, and was endorsed by COREPER on 25 November 2015, and by the LIBE Committee on 30 November 2015.
17 Amendment 86 by MEP Hélène Flautre (Greens) suggesting an alternative Article 15 par. 1 a.
18 Article 15 SRD.
19 Article 9 SRD.
20 Article 36 and Preamble 4 SRD.
The benefits of the approval are in the fast track application procedure, which is still long: 60 days instead of the standard 90 days. If applying to stay with an approved institution, the applicant shall be exempted from presenting to the Member States’ authorities one or more of the documents or evidence of their address in the Member States, their health insurance, payment of handling fees, proof of having sufficient resources to cover subsistence costs without having recourse to the social assistance system, as well as return travel costs. The assessment of these requirements is left to the host institution. The host will need to check for the availability of sufficient resources based on an individual examination of the case and shall take into account resources that derive, inter alia, from a grant, a scholarship or a fellowship or a valid work contract or a binding job offer. The approved research institution, in part, takes on the role of migration authority.

The approved status can be withdrawn, for instance, when the organisation no longer conducts research, when it has not covered the costs of return of a migrant or when it failed to inform the authorities on time of the finalization of the research (and hence provide a reason for withdrawal of the residence permit of the migrant researcher). Where an application for renewal has been refused or where the approval has been withdrawn, the organisation concerned may be banned from reapplying for approval for a period of up to five years from the date of publication of the decision on non-renewal or withdrawal. Sanctions against host entities who have not fulfilled their obligations under the Directive shall be effective, proportionate and dissuasive. Member States have again been granted a rather wide margin of discretion to determine in their national law the sanctions and consequences of the withdrawal of the approval or the refusal to renew the approval for the existing hosting agreements, as well as the consequences for the researchers concerned. From a migrant rights perspective this is a missed opportunity for the EU to set minimum standards on the protection of researchers, students and other wanted highly skilled migrants against their dependence on ‘failing’ institutions. Possibly article 33 (on proportionate sanctions) can be read as to be precluding sanctions that disproportionally hurt the migrant, but other than that, the Directive is silent on the migrants’ legal position vis-à-vis the Member State in case the host fails to comply. The obligation to publish a list of approved institutions is relevant here as well: according to Dutch case law the migrant can check the list regularly to see if his or her institution is still compliant and his or her residence permit is not at risk. I doubt migrants check such lists on a regular basis. Its availability provides false security for the migrant.

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21 Article 34 SRD.
22 Article 35 SRD.
23 Article 9 par. 3 SRD.
24 Article 33 SRD.
Intra-Corporate Transferees Directive

The ICTD applies to third-country nationals admitted in the framework of an intra-corporate transfer as managers, specialists or trainees. This Directive sets the standards for their temporary labour migration of a maximum of three years, or one year for trainees. Its most important asset is that it provides for some intra-EU Mobility.  

Member States may also set up a simplified procedure for multinationals which have been recognised for that purpose, again in accordance with their national legislation or administrative practice. The recognition must be regularly assessed, an instruction missing in the SRD. Member States may require the payment of fees for handling of all applicants in accordance with the Directive, which fees shall not be disproportionate or excessive.  

Once recognised, the multinational is facilitated with simplified procedures relating to the issuing of intra-corporate transferee permits, permits for long-term mobility, permits granted to family members of an intra-corporate transferee, and visas. Simplification shall include at least the applicant’s exemption from presenting some of the evidence and a fast-track admission procedure allowing intra-corporate transferee permits and permits for long-term mobility to be issued within less than 90 days. Without success EP suggested that fast track meant that a decision should be taken within 45 days, but that suggestion was dropped during the negotiations. The recognition also imposes certain obligations on the multinationals, again obligations not imposed on the hosts of researchers or students: they shall notify to the relevant authority any modification affecting the conditions for recognition within 30 days. Obviously, this requires a proper administration of project and human resources management. Apart from the fees and administrative obligations, the recognized sponsor is at risk of administrative sanctions. Member States must provide for appropriate sanctions, including revocation of recognition, in the event of failure to notify the relevant authority. In the event the multinational would lose the status of a recognised sponsor, the transferred TCN migrant worker is not protected however and is likely to lose his or her residence permit. Likely, but not definitely. Any decision to withdraw or to refuse to renew an intra-corporate transferee residence permit shall take account of the specific circumstances of the case and respect the principle of proportionality. Because the ICTD requires the multinational to declare it will take care of the return of the transferee, no right to a search period for another job in the country where one is stationed is provided for.  

A Guildian analysis of this Directive would, in general, leave us with a sour taste because it does not present the migrant as an actor. The ICTD only allows for temporary migration of otherwise wanted highly skilled people and only as an ‘asset’ of the

27 Article 11 ICTD.
28 Article 16 ICTD.
30 Article 11(8) ICTD.
31 Article 8 ICTD.
32 Article 5(1) under c) sub iv ICTD.
multinational corporation, moved (and returned) across the globe, at the multinationals will. Albeit probably paid well (although, given the hours they might be asked to work, maybe not even so). Originally, the Directive prescribed that the Member States check on the financial health of the multinational, in order to secure continued payment of the transferees.33 But all prescriptions regarding the recognition, which might be considerate of migrant rights, were deleted along the way. What remains creates an equivocal migration management tool, with fast tracks however in which the migrant is not ‘alone’ to regulate his or her life. Security of residence following any particular choice or action by the migrant under the Directive is low, this is for the multinational to decide on. In the Dutch case, the migration authorities prefer for these migrants to stay on. If the migrant and a recognised employer so desire, they can switch into a national highly skilled migrant status.

Proposed Recast Blue Card Directive

Finally, let me address the Blue Card Directive (BCD). The BCD sets standards for the admission of highly qualified and well earning third-country nationals. Its recast was submitted on 7 June 2016 and, nearly three years on, is still under negotiation.34 The foreseen obligation to redesign national schemes for highly skilled into a blue card scheme, appears to be a deal breaker.35 The proposed recast has a wider scope than the original BCD. While the ‘current’ Blue Card builds on the traditional demand-driven labour migration model, the recast allows for more hybrid labour migration schemes: it introduces a job search period, which is a typical supply-driven model. It is also expected to introduce a new the concept of a recognised employer to provide for fast track procedures. According to the proposal, the recognition procedure is to be regulated at national level. Again, such procedure must be transparent and not entail disproportionate or excessive administrative burden and costs for employers. The benefit is a fast tracked procedure (30 days maximum) and it has less evidence requirements.36

Sanctions against its abuse are required and where the employer has been sanctioned for the employment of illegally staying TCN pursuant to Directive 2009/52/EC (on employer sanctions), this may be a reason to be excluded from recognition as a trusted sponsor. Interestingly, if the status is refused or withdrawn this does not mean the Blue Card residence permit may be refused or is no longer valid, it only means that the application or renewal of that EU Blue Card will be done through the more traditional, more time consuming, procedures. It would make the procedure more of an administrative burden for the employer but would not jeopardize the migrants’ opportunity to enter and remain with this employer as a highly qualified migrant worker.

From a migrants’ perspective, the BCD recast would be an important improvement compared to the current Dutch highly skilled migration scheme, which today

36 Article 12 BCD-recast proposal.
offers no serious alternative in case the recognised employer falls short. In the Dutch case, a withdrawal of the recognition of the employer means illegality for all the highly skilled TCN employed by that sponsor, unless the migrants find a new recognised employer, within three months. In practice we have seen cases where it took more than three months for the TCNs to find out their employer was no longer recognised, although, like with the research institutions, a list of recognised sponsors is made public. This happened in cases of mergers, take overs and the alike, where the employees were transferred to another legal entity within a group, but the employer had forgotten to obtain recognised sponsorship status for the new entity. Hence, the TCNs had no time to find another employer.37 Once a residence permit was obtained again, they had a ‘gap’, meaning they did not have continuous legal residence and thus the counting of years before eligibility for permanent residence started from scratch and they were, again for five years, tied to an employer with trusted sponsor status. So much for their future professional freedom. This is obviously equivocal treatment of the otherwise so sought after highly skilled labour migrants. In Sweden the law was changed to avoid revoking the residence permit of the wanted labour migrants due to their employers lack of compliance.38 From a migrants’ perspective, the proposed BCD recast offers more protection, the recognition covers fast tracking procedures and less control but doesn’t tie the worker to the employer as the Dutch trusted sponsorship does. Also, the mobility right incorporated in the BCD, which allows BC holders to move to another Member State without losing entitlements to long term residence, provides room for taking control over ones migratory and professional ambitions. Although, according to Noronha, Indian IT workers are not prone to collectivisation,39 their collective call for an agreement on the recast BCD (or strike if it remains disagreed upon?) would possibly make for a powerful action of migrant workers in the EU.

Some Final Thoughts

To conclude, let me start by pointing out that few EU Member States have actually implemented a procedure for the recognition of employers and fast tracking procedures for their wanted migrant workers. Spain, Slovakia, Italy and the Netherlands have it. France has been said to contemplate its use.40 The recently proposed German labour migration law offers expedited procedures based on an agreement between the employer and the German immigration authorities.41 This been said, I come to four final thoughts using the ‘Guildian’ analysis of the design of the recognised employer, or trusted sponsor, and whether the individual labour migrant ‘alone can regulate his or her life in accordance with clear rules with a degree of security as to the consequences

39 Noronha et al. 2018.
41 Proposal Fachkräfteeinwanderungsgesetzes 13 March 2019, par. 81a (p.35).
of any particular choice or action’. Firstly, any demand-driven labour migration scheme with work permits could be said to allow for an employer to have power over the migrant worker, hence, little is decided on ‘alone’ when work permit requirements or the like apply. All schemes discussed are mainly demand driven. Secondly, the recognised sponsorship under the ICT and the SRD and practice in the Netherlands, increase the migrants dependency on the host. The BCD, as it now stands as well as the proposed recast, offers more room to manoeuvre individually. It is, thus, a pity that it isn’t agreed upon yet. Thirdly, one must consider that highly skilled and well paid migrant workers are commonly perceived as not so vulnerable, able to hire a lawyer to advise them and able to check a website listing recognised employers. But having them rely on their employer for all information on, and application for, their migration status implies a high risk of abuse. And such abuse occurs. Future sponsorship systems should hence require, in some more detail, Member States to take responsibility for the wanted highly skilled migrants. Fourthly, and somewhat to the contrary of the previous conclusion, the trusted sponsorship, as an equivocal instrument of migration control, is a very important tool in stepping up labour migration into the European Union, not just in fast tracking procedures, but in allowing larger numbers of labour migrants to arrive without too much political upheaval. Both final points go to the heart of the Member States’ obligation to provide worker protection, an obligation that cannot be neutralised by the States’ privatisation of labour immigration control. The trusted sponsorship schemes should not exacerbate the migrants’ dependence on the employer. They should provide just fast track procedures, not instead of but as a free to choose alternative to otherwise also well-functioning, but lengthier, regular procedures. There should be nothing equivocal about that. As such, the procedure should provide the migrant an interesting opportunity for a true Guildian ‘professional future’ in which the migrant ‘alone can regulate his or her life in accordance with clear rules, with a degree of security as to the consequences of any particular choice or action’.