



WHY COME HERE IF I CAN GO THERE? ASSESSING THE 'ATTRACTIVENESS' OF THE EU'S BLUE CARD DIRECTIVE FOR 'HIGHLY QUALIFIED' IMMIGRANTS

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NEUJOBS WORKING PAPER No. D18.2

SEPTEMBER 2013

Abstract

This paper analyses the attractiveness of the EU's Blue Card Directive – the flagship of the EU's labour immigration policy – for so-called 'highly qualified' immigrant workers from outside the EU. For this purpose, the paper deconstructs the understanding of 'attractiveness' in the Blue Card Directive as shaped by the various EU decision-making actors during the legislative process. It is argued that the Blue Card Directive sets forth minimum standards providing for a common floor – not a common ceiling: the Directive did not, as originally envisaged by the European Commission, create one European highly skilled admission scheme. This raises questions regarding its concrete use. A critical focus is placed on the personal scope of the Blue Card Directive and the level of rights offered, and a first comparative perspective on the implementation of the Directive in five member states is provided.



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1. Introduction

In the last decade the EU and its member states have made major efforts to introduce a novel European scheme for labour immigration. In the 2009 Stockholm Programme, the EU Heads of State and Government recognised that labour immigration can contribute to economic vitality and called for the creation of flexible admission systems that are responsive to the priorities and volumes (number of people admitted) set by each member state. Under the Europe 2020 Strategy, the EU's ten-year growth strategy, the European Commission stressed the promotion of a forward-looking and comprehensive labour migration policy that responds in a flexible way to the needs of member states' labour markets with a view to raising employment levels.² This corresponds with the 2000 Lisbon Strategy that aimed for the EU to become the most competitive and dynamic knowledge-based economy in the world.³ In a speech on 9 May 2013, the European Commissioner for home affairs, Cecilia Malmström, emphasised that Europe needed skilled people in order to grow.⁴ While acknowledging the tough economic times, the Commissioner highlighted the serious labour market shortages on the one hand and the untapped pool of skills and talents of migrants on the other.⁵

Stimulating the immigration of highly qualified workers from third countries to the EU member states forms a cornerstone of the envisaged EU labour immigration policy.⁶ To this end, the EU legislator adopted in 2009 the so-called EU 'Blue Card Directive',

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² European Commission Communication, COM(2010) 2020, 3.3.2010, p. 18.

³ Lisbon European Council Conclusions of 23/24.3.2000.

⁴ Speech delivered by C. Malmström at the State of the Union Conference on 9 May 2013, "Europe should give migrants the opportunities they deserve", SPEECH/13/399.

⁵ Ibid.

⁶ "EU labour immigration policy" as understood in the EU treaties as conditions of entry and residence for third-country nationals (see Article 79 TFEU).

which aims to introduce strong incentives for non-EU workers to enter the EU for the purpose of highly qualified employment.⁷ In the explanatory memorandum to the Blue Card Directive, the Commission indicated three elements as to why

the EU as a whole [...] seems not to be considered attractive by highly qualified professionals in a context of very high international competition [...]. The attractiveness of the EU compared to such countries [USA and Canada] suffers from the fact that at present highly qualified migrants must face 27 [now 28] different admission systems (1), do not have the possibility of easily moving from one country to another for work (2), and in several cases lengthy and cumbersome procedures (3) make them opt for non-EU countries granting more favourable conditions for entry and stay.⁸

The Commission hints here at the question of the 'effectiveness' of the Blue Card Directive. Put differently – in positive terms – the Commission made clear that the EU's main attractiveness compared to its competitors is the possibility now of accessing 28 labour markets, and thus to grow professionally while responding to EU companies' concrete needs.⁹ For this to become a reality, "EU action establishing a common system for admitting such workers is indispensable." Common action would ensure that "these workers:

- are admitted under common rules;
- enjoy the same level of rights throughout the EU;
- will have the possibility of moving from one member state to another so as to adapt and respond promptly to fluctuating demands for highly qualified migrant labour;
- are fully integrated into the EU."¹⁰

This paper seeks to assess and deconstruct the understanding of 'attractiveness' of the EU Blue Card Directive as framed by the different EU decision-makers throughout the legislative process and by the member states during the implementation phase.

The paper argues that:

- The 'attractiveness' of the Blue Card Directive was from the very beginning subject to the interests of the different institutional actors involved – this approach has arguably ignored the interests of businesses and the individual immigrants who still may have to face a slow and weighty bureaucracy (despite the objective of creating fast-track and flexible procedures with the Directive¹¹).

⁷ Council Directive 2009/50/EC of 25 May 2009 on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment.

⁸ European Commission, Explanatory Memorandum to the Proposal for a Council Directive on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment, COM(2007) 637, 23.10.2007, p. 3; the Commission described the "status quo" in the following way: "Member States' immigration policies widely differ on admission of highly qualified workers. Such workers are increasingly needed to fill existing and arising gaps on the labour market, but the EU substantially fails in attracting them." (p. 5).

⁹Ibid., p. 7.

¹⁰ Ibid.

¹¹ Ibid., p. 2.

- The Blue Card Directive does not meet the Commission's original aim to do away with 28 different national systems for highly qualified migrant workers, and can therefore merely be regarded as an upgraded national residence and work permit.
- The flexibility as to what 'highly qualified employment' means has to a certain extent been compromised in the final text of the Blue Card Directive. This goes hand in hand with the insertion of the many 'may-clauses' that provide the member states with wide discretion and, as a consequence, reduce the 'attractiveness' as initially framed by the Commission.
- The 'attractiveness' of the Blue Card Directive was affected by the dynamics evidenced in the decision-making process: the Directive was adopted in a period of transition, namely seven months prior to the entry into force of the Treaty of Lisbon. The new Treaty framework would entail major implications for the decision-making procedure under Title V TFEU expanding the ordinary legislative procedure to most fields of justice and home affairs, including to the field of legal immigration.¹²

To address the issues raised, the paper is structured in the following way: in a first step, the background, the rationale and the procedure that determined the adoption of the Blue Card Directive are explained (section 2). In a next step, the paper analyses the Council negotiations of the latter Directive with a view to investigate, first, who qualifies as a 'highly qualified' third-country worker under the Blue Card Directive, and second, the level of rights offered to Blue Card holders, which is key for their inclusion in the host member state (section 3).

The question of who is considered to be 'highly qualified' by the Blue Card Directive is central (section 3.1). It has been pointed out that the definition of 'highly-skilled immigrant' in national settings is unclear and at times not purely contingent on the educational and professional qualifications of the worker, but on other criteria such as the expected salary level.¹³ In the latter case, this would imply that the notion of 'highly skilled' is strongly linked to the profit that the immigrant worker would generate in the state of destination.¹⁴ The analysis aims to illustrate that we experience a similar scenario under the EU Blue Card scheme. It is explored what exactly the Blue Card Directive offers to such 'highly qualified' immigrants (in terms of the level of rights and benefits) with a view to facilitating their inclusion (section 3.2). Such rights and benefits deal with, for example, the ease to access the labour market in a given member state, the possibility to bring one's family along or to move within the EU for employment purposes.

¹² In 2004, on the basis of a Council Decision, the Community method was extended to all fields of migration under former Title IV EC Treaty except for the field of legal migration – see Council Decision of 22 December 2004 providing for certain areas covered by Title IV of Part Three of the Treaty establishing the European Community to be governed by the procedure laid down in Article 251 of that Treaty (2004/927/EC).

¹³ S. Carrera (2007), "Building a Common Policy on Labour Immigration: Towards a Comprehensive and Global Approach in the EU", CEPS Working Document No. 256, Centre for European Policy Studies, Brussels, p. 2.

¹⁴ Ibid.

Treating certain third-country workers more favourably than others raises questions of non-discrimination: the fact that a sectoral approach in labour migration (“geared towards highly-skilled migrants”) would result in discrimination was already pointed out by the European Economic and Social Committee (EESC) in 2005.¹⁵ The EU’s sectoral approach in labour migration has contributed to creating a highly fragmented legal framework for third-country nationals. Alongside issues of non-discrimination, this fragmented legal framework raises serious concerns relating to coherence, transparency and legal certainty (see section 4).

The paper moreover gives an insight into how the Blue Card Directive has been implemented to date in a selection of the member states, including Germany, France, Spain, Hungary and Sweden. This comparison provides a clearer picture of how the Blue Card has been framed in the distinct national systems (section 5). The paper ends with some key findings and policy suggestions (section 6).

The paper was drafted within the framework of the NEUJOBS research project, which aims to analyse future possible developments of the European labour market(s) under the main assumption that European societies face four main transitions that will have a major impact on employment.¹⁶ The attractiveness of the Blue Card Directive, the flagship of the EU’s labour immigration policy, is important to investigate in particular in the light of the objective to increase international migration to the EU to mitigate shortages in European labour markets: most notably, migrants are the key actors in the societal transition and they play a fundamental role in the skills transition, in which education and skills matter, more than ever, for employment and wages.

2. Adopting the EU Blue Card Directive: Background, rationale and procedure

On the basis of the competences under Title V TFEU on the area of freedom, security and justice, the EU has adopted a number of legislative instruments in the area of labour immigration since 1999. The 2001 Commission proposal stipulating the conditions of entry and residence of third-country nationals for employment purposes did not find the necessary support by the member states in the Council. This rejection was due to different reasons, such as the sensitivity surrounding the policy field of labour migration, the lack of consensus concerning a combined residence and work permit, as well as a highly bureaucratic framework suggested by the proposal, which

¹⁵ Opinion of the European Economic and Social Committee on the Green Paper on an EU approach to managing economic migration, CESE 694/2005 - SOC/199 (COM(2004) 811 final), Rapporteur: Mr. Pariza Castaños (Spain), 9 June 2005; see also S. Carrera and M. Formisano (2005), “An EU Approach to Labour Migration – What is the Added Value and the Way Ahead?”, CEPS Working Document No. 232, Centre for European Policy Studies, Brussels, p. 11.

¹⁶ The NEUJOBS project is financed by the European Commission under the 7th Framework Programme; the four main transitions that will have a major impact on employment are socio-ecological and societal transitions, a skills transition and a transition concerning new territorial dynamics (see website of the NEUJOBS project at www.neujobs.eu. Work Package 18 deals with “Labour Immigration Policy and Socio-Economic Integration of Immigrants in Europe”).

did not mesh with the member states' national systems.¹⁷ Therefore, from 2005 onwards, a sectoral approach was pursued covering specific categories of third-country nationals. One of these categories related to highly-skilled immigration.¹⁸ In other words, the adoption of the Blue Card Directive must be seen as one of the measures of the sectoral approach in the area of EU legal economic migration that was pursued as a compromise solution after it became clear that a horizontal approach covering all third-country nationals was not backed by the member states.

When explaining that the proposed Blue Card Directive complied with the subsidiarity principle, the Commission also specified the underlying rationale of the Directive:

If Member States act alone, they may not be able to face international competition for highly qualified third-country workers. There will be a series of different entry and residence conditions for these workers, each national system being closed and in competition with the others. This could lead to distortions in immigrants' choices, and more importantly would over-complicate the re-allocation of the necessary labour force as needs change on labour markets, with the possibility of losing a highly qualified workforce already present in the EU.¹⁹

It took the member states 19 months, and hence four different Presidencies, to come to an agreement on the final text of the Blue Card Directive in the Council. This time frame is rather short as compared to the lengthy negotiations on other migration law directives. The Blue Card Directive, which sets out the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment for longer than three months, was adopted by unanimity in the Council; the European Parliament was only consulted.²⁰ The Directive does not apply to Denmark, or to the UK or Ireland.²¹

The negotiations that have resulted in the Blue Card Directive started in January 2008. The documents that detail the negotiations include the Commission proposal of 23 October 2007,²² the outcome of proceedings summarised by the Council Working Party on Migration and Expulsion as well as by the JHA Counsellors, and official

¹⁷ S. Carrera and M. Formisano (2005), "An EU Approach to Labour Migration – What is the Added Value and the Way Ahead?", CEPS Working Document No. 232, Centre for European Policy Studies, Brussels, pp. 2-3.

¹⁸ European Commission, Proposal for a Council Directive on the conditions of entry and residence of third-country-nationals for the purpose of paid employment and self-employed activities, COM(2001) 386, 11.7.2001; European Commission Communication, Policy Plan on Legal Migration, COM(2005) 669, 21.12.2005.

¹⁹ European Commission, Proposal for a Council Directive on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment, COM(2007) 637, 23.10.2007, p. 7.

²⁰ European Parliament legislative resolution of 20 November 2008 on the proposal for a Council Directive on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment.

²¹ See Recitals 28 and 29 of Council Directive 2009/50/EC.

²² European Commission, Proposal for a Council Directive on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment, COM(2007) 637, 23.10.2007.

correspondence between the General Secretariat, Coreper II, the Presidency, the Strategic Committee on Immigration, Frontiers and Asylum (SCIFA), and the aforementioned Working Party. The Blue Card Directive was adopted on 25 May 2009.

3. The Council Negotiations on the EU Blue Card Directive: Shaping ‘attractiveness’

This section illustrates how the ‘attractiveness’ of the Blue Card Directive as first conceptualised in the Commission proposal by DG HOME was reshaped during the law-making process under the Slovenian, French and Czech Presidencies. While the Commission aimed to promote the Europeanisation of migration policies under the sectoral approach, the member states were, by contrast, eager to stick to their national schemes for highly qualified immigrants.

The Council negotiations on the key provisions contained in the Blue Card Directive dealing with the questions of ‘who’ the Directive targets (scope of application) and ‘what’ the Directive offers to Blue Card holders (level of rights that Blue Card holders enjoy) are analysed. The French Presidency pointed out that the most contentious issues during the Council negotiations on the Blue Card Directive in 2008 concerned the definitions, the admission criteria (in particular the salary requirement) and the complementarity between EU and national provisions.²³

3.1 The Definition of ‘Highly Qualified’: A Blue Card Directive for whom?

Article 3 of the Blue Card Directive determines that the measure applies to third-country nationals who apply to be admitted to the territory of a member state *for the purpose of highly qualified employment* under the terms of this Directive. The Council’s records concerning the definitions of “highly qualified employment” and “higher professional qualifications” and “higher education qualifications”, which are key in determining to whom the Blue Card Directive applies, are explored below.

The discussions also related to the question as to which categories of third-country nationals should be excluded from the scope of the Directive, such as those who are covered by other EU directives.²⁴ Importantly, a clause was inserted into Article 3 allowing the member states to issue (national) residence permits other than an EU Blue Card for any purpose of employment, which was supported by Germany and opposed by the European Commission.²⁵ This latter addition provides the member states with the option to maintain or introduce national admission schemes for highly-qualified employment.²⁶

²³ See Council of the European Union, Note – Presidency, 15 September 2008, document number: 13029/08, p. 1.

²⁴ See Article 3(2) of Council Directive 2009/50/EC.

²⁵ Council of the European Union, Outcome of Proceedings – Working Party on Migration and Expulsion, 19 June 2008, document number: 9666/08, p. 7, footnote 14.

²⁶ Article 3(4) of Council Directive 2009/50/EC.

3.1.1 'Highly-Qualified Employment'

The definition of 'highly-qualified employment' was extensively negotiated: what exactly should this expression mean for the purpose of the Directive? The Commission proposed the definition of employment established by the Court of Justice in the free movement law of EU citizens ("the exercise of genuine and effective work under the direction of someone else for which a person is paid"²⁷) *adding the requirement of higher education qualifications or at least three years of equivalent professional experience.*²⁸ The Commission explained that this definition was based on two elements: first, the requirement of being employed (excluding self-employed activities); second, the necessary 'higher professional qualifications' requirements, which should be replaceable by a minimum of three years professional experience in the profession, instead of the higher education qualifications.²⁹ In addition, the Commission underlined that the definition should be considered in the context of employment, insofar as it aims at defining the job and not the third-country nationals concerned.³⁰

The member states had concerns about different aspects of the proposed wording. Hungary, for example, expressed doubts about the fact that the professional experience could be considered equivalent to higher educational qualifications. Likewise, Estonia and Latvia suggested that the focus of this definition should be on education, and Greece proposed deleting the addition *or at least three years of equivalent professional experience* altogether. Italy, Portugal and Slovakia expressed reservations about the number of years (*at least three years*) of equivalent professional experience required. Germany, Latvia and Austria indicated the risk of abuse in the assessment of the equivalent professional experience – Germany asked to insert *for which either higher education qualifications or both equivalent qualifications at and least three years of professional experience is required*, thereby narrowing down the option to substitute professional experience. Sweden suggested deleting the word *equivalent* and introducing two different profiles of highly skilled workers, the first relating to the third-country nationals who possess higher educational qualifications, and the second concerning those who have acquired the required professional experience.³¹

The final version of the Blue Card Directive defines 'highly-qualified employment' as *the employment of a person who:*

- in the member state concerned, is protected as an employee under national employment law and/or in accordance with national practice, irrespective of the legal relationship, for the purpose of exercising genuine and effective work for, or under the direction of, someone else,

²⁷ Case 66/85 *Lawrie Blum* [1986] ECR 2121 and Case C-456/02 *Trojani* [2002] ECR I-7573.

²⁸ European Commission, Proposal for a Council Directive on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment, COM(2007) 637, 23.10.2007, p. 19.

²⁹ European Commission, Explanatory Memorandum to Proposal for a Council Directive on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment, COM(2007) 637, 23.10.2007, p. 9.

³⁰ Council of the European Union, Outcome of Proceedings – Working Party on Migration and Expulsion, 18 January 2008, document number: 5255/08, p. 4, footnote 4.

³¹ *Ibid.*, p. 4, footnote 6.

- is paid, and,
- has the required adequate and specific competence, as proven by higher professional qualifications.³²

At the request of Sweden, the first subparagraph was amended inserting the requirement that a person falling under 'highly qualified employment' must be protected as an employee under national employment law.³³ The wording of the third subparagraph was defined more precisely by the addition *adequate and specific technical competence*, as Portugal had suggested.³⁴ The specifications of *relevant* or *equivalent* to qualify 'professional qualifications' were dropped (see, however, definition of 'higher professional qualifications' below); instead, the term was renamed '*higher professional qualifications*'.

3.1.2 'Higher Professional Qualifications'

In the proposal of the Commission, 'higher professional qualifications' was defined as "qualifications attested by evidence of higher education qualifications or of at least three years of equivalent professional experience."

A considerable number of member states entered scrutiny reservations with regard to the required period of professional experience, but it was Poland that first requested a five years-period.³⁵ The Netherlands and Sweden did not support the increase in the number of years of professional experience from three to five years.³⁶ The Working Party on Migration and Expulsion did not support the idea of an aptitude test aimed at assessing the professional experience of the person concerned.³⁷ The Commission pointed out that the professional experience should be assessed by the member states, taking into account the standards and requirements set by the employer for the relevant job.³⁸

Austria initially asked that both – higher education qualifications and professional experience – should be required, whereas Germany, reiterating the risk of abuse, proposed to delete the requirement of professional experience.³⁹ This suggestion by the German delegation was supported by other delegations which considered that the

³² Article 2(b) of Council Directive 2009/50/EC.

³³ Council of the European Union, Outcome of Proceedings – Working Party on Migration and Expulsion, 19 June 2008, document number: 9666/08, p. 3, footnote 4.

³⁴ Council of the European Union, Outcome of Proceedings – Working Party on Migration and Expulsion, 8 May 2008, document number: 8249/08, p. 3, footnote 7.

³⁵ Council of the European Union, Outcome of Proceedings – Working Party on Migration and Expulsion, 18 January 2008, document number: 5255/08, p. 6, footnote 11.

³⁶ Council of the European Union, Outcome of Proceedings – Working Party on Migration and Expulsion, 19 June 2008, document number: 9666/08, p. 4, footnote 6.

³⁷ Ibid.

³⁸ Council of the European Union, Outcome of Proceedings – Working Party on Migration and Expulsion, 18 January 2008, document number: 5255/08, p. 6, footnote 11.

³⁹ Council of the European Union, Outcome of Proceedings – Working Party on Migration and Expulsion, 8 May 2008, document number: 8249/08, p. 5, footnotes 12-13; Council of the European Union, Outcome of Proceedings – Working Party on Migration and Expulsion, 19 June 2008, document number: 9666/08, p. 4, footnote 6.

emphasis should be on educational qualifications.⁴⁰ The Presidency, held by Slovenia at the time, as well as Malta, drew attention to the fact that in some sectors which may be relevant for the purposes of this proposal, the persons concerned do not possess higher education qualifications.⁴¹ Recalling the special needs, especially in the field of the information technology, the Commission highlighted the importance of maintaining, even if only as a subsidiary possibility, the criterion of the professional experience. The Presidency, held by France in the second half of 2008, also felt that it would be important not to exclude such a possibility, in order to make the proposal more attractive for highly qualified third-country nationals.⁴²

The final text upon which the Council agreed leaves the member states more leeway in that higher educational qualifications can – if provided for by national law – be substituted by five years of relevant professional experience of a level comparable to higher educational qualifications and which is relevant in the profession or sector specified in the work contract or binding job offer.⁴³ When compared to the original proposed definition, the adopted provision renders the Blue Card more exclusive, and thus more difficult to obtain.

3.1.3 ‘Higher Education Qualifications’

Article 2(h) of the Blue Card Directive defines ‘higher education qualification’ as

any diploma, certificate or other evidence of formal qualifications issued by a competent authority attesting the successful completion of a post-secondary higher education programme, namely a set of courses provided by an educational establishment recognised as a higher education institution by the State in which it is situated. For the purposes of this Directive, a higher education qualification shall be taken into account, on condition that the studies needed to acquire it lasted at least three years.

This definition was subject to some minor amendments in the Council, but the requirement of a minimum of three years’ study was maintained.⁴⁴ The Commission made clear that the expression *recognised as a higher education institution by the State in which it is situated* aimed at covering all the post-secondary education, in accordance with the Bologna classification.⁴⁵ Along this line, the definition was adjusted. Next, the terms ‘any degree, diploma or other certificate’ used in the proposal were changed into ‘any diploma, certificate or other evidence of formal qualifications’ for clarification purposes. The suggestion by Malta to include a reference to the European

⁴⁰ Council of the European Union, Outcome of Proceedings – Working Party on Migration and Expulsion, 19 June 2008, document number: 9666/08, p. 4, footnote 6.

⁴¹ Ibid.

⁴² Council of the European Union, Outcome of Proceedings – Working Party on Migration and Expulsion, 24 July 2008, document number: 11512/08, p. 4, footnote 3.

⁴³ See also Council of the European Union, Note from the Presidency to SCIFA, 7 July 2008, document number: 11365/08, p. 2; Article 2(g) of Council Directive 2009/50/EC.

⁴⁴ See Council of the European Union, Note from the Presidency to SCIFA, 7 July 2008, document number: 11365/08, p. 2.

⁴⁵ Council of the European Union, Outcome of Proceedings – Working Party on Migration and Expulsion, 18 January 2008, document number: 5255/08, p. 6, footnote 10.

Qualifications Framework or the ISCED (International Standard Classification for Education) was not integrated.⁴⁶

3.1.4 Admission Requirements

Article 5 of the Blue Card Directive sets out the criteria for admission. Notably, there was much debate about the salary threshold that would be required for obtaining the Blue Card in Article 5(3). The Commission proposal reads in Article 5(2):

[...] the gross monthly salary specified in the work contract or binding job offer must not be inferior to a national salary threshold defined and published for the purpose by the Member States which shall be at least three times the minimum gross monthly wage as set by national law.” The second paragraph of Article 5(2) continued: “Member States where minimum wages are not defined shall set the national salary threshold to be at least three times the minimum income under which citizens of the Member State concerned are entitled to social assistance in that Member State, or to be in line with applicable collective agreements or practices in the relevant occupation branches.

Numerous member states put forward objections and suggestions for amendments regarding this provision.⁴⁷ Hungary proposed that the member states should be able to determine the minimum gross monthly salary threshold themselves, which would provide the member states with more discretion.⁴⁸ Austria asked for an additional reference to integration conditions, which would make it more difficult to obtain a Blue Card.⁴⁹

The Commission underlined the need for a salary-based approach: a relative salary threshold was considered to be the minimum criterion necessary for admission by the vast majority of member states and the member states remained free to set the national threshold at a higher level (but not at a lower one).⁵⁰ Germany suggested a monthly salary of at least twice the average gross monthly salary of the member state concerned; this suggestion was supported by Austria, which proposed, however, a coefficient of 1.35 of the average gross monthly salary.⁵¹ The reference to the average gross monthly wage was adopted (instead of referring to a minimum wage) in the final text. It was agreed to set the coefficient in the middle at least 1.5 times the average gross monthly wage, pointing out that “an indicator of this type has the advantage of reflecting real pay levels in a given member state and of being available for all member states. It remains consistent with the objective of targeting highly qualified

⁴⁶ Council of the European Union, Outcome of Proceedings – Working Party on Migration and Expulsion, 8 May 2008, document number: 8249/08, p. 5, footnote 11.

⁴⁷ Council of the European Union, Outcome of Proceedings – Working Party on Migration and Expulsion, 28 February 2008, document number: 6051/08, p. 7, footnote 10.

⁴⁸ Council of the European Union, Outcome of Proceedings – Working Party on Migration and Expulsion, 8 May 2008, document number: 8249/08, p. 13, footnote 31.

⁴⁹ Ibid., p. 14, footnote 32; see, however, Article 15(3) of the adopted Blue Card Directive.

⁵⁰ Ibid., p. 13, footnote 31.

⁵¹ Council of the European Union, Outcome of Proceedings – Working Party on Migration and Expulsion, 19 June 2008, document number: 9666/08, p. 10, footnote 24 .

employment, since the level is, by definition, above the average, and is set sufficiently above that average.”⁵² Some delegations considered the multiplier of 1.5 as too low or too high respectively.⁵³ Article 5(5) of the Directive provides, however, the derogation for employment in professions, which are in particular need of third-country workers, to require at least 1.2 times the average gross annual salary. Generally speaking, the wage is thus another decisive factor as to whether a third-country worker may obtain an EU Blue Card and is considered to be ‘highly skilled’.

Most of the other admission criteria in Article 5(1) points (a) to (f) of the adopted Blue Card Directive have been amended during the Council negotiations. The notion of a “binding job offer” in Article 5(1) points (a), (b) and (c) was specified by the amendment “as provided for by national law” because Poland and Greece emphasised that this notion was not acknowledged in their legal systems.⁵⁴ This amendment provides for more leeway for the member states.

Article 5(1) point (b) was slightly changed in that proof must be attested to by a document for fulfilment of the conditions set out under national law for the exercise by Union citizens of the regulated profession specified in the work contract or binding job offer. Austria’s request to add at the end of point (b) the words “including the higher professional qualifications” was not considered.⁵⁵ This additional requirement would have rendered admission for applicants even stricter.

Article 5(1) point (c) on unregulated professions raised some concern among a number of the member states. The Netherlands, supported by Sweden, considered the criterion of salary as sufficient and pointed out that it was unclear as to who would assess the qualifications. In addition, the two member states took the view that the authorities should not take the role of the employer. Poland felt that “a system providing for a double check of the qualifications could have the consequence of making the admission of the person concerned more complicated”.⁵⁶ Similarly, Cyprus, Estonia, Greece and Romania entered reservations on this provision, questioning which bodies would assess the equivalence [of professional qualifications] and on the basis of which criteria.⁵⁷ France came up with two possibilities: either envisaging a regular updating of the two criteria (*higher qualifications* and *equivalent professional experience*) or providing for a system which would combine them.⁵⁸ At a later stage of the

⁵² Council of the European Union, Note from the Presidency to SCIFA, 7 July 2008, document number: 11365/08, p. 4.

⁵³ Ibid.

⁵⁴ Council of the European Union, Outcome of Proceedings – Working Party on Migration and Expulsion, 28 February 2008, document number: 6051/08, p. 4, footnote 4.

⁵⁵ Council of the European Union, Outcome of Proceedings – Working Party on Migration and Expulsion, 8 May 2008, document number: 8249/08, p. 10, footnote 24.

⁵⁶ Council of the European Union, Outcome of Proceedings – Working Party on Migration and Expulsion, 28 February 2008, document number: 6051/08, p. 5, footnote 5.

⁵⁷ Ibid.; Council of the European Union, Outcome of Proceedings – Working Party on Migration and Expulsion, 18 January 2008, document number: 5255/08, p. 4, footnote 6.

⁵⁸ Council of the European Union, Outcome of Proceedings – Working Party on Migration and Expulsion, 28 February 2008, document number: 6051/08, p. 5, footnote 5.

negotiations Ireland and the Netherlands even suggested to delete this provision.⁵⁹ Except for the proposal of France, the considerations all go into one direction: they aim at not making admission too restrictive for the applicants in cases where professions are unregulated, taking thus a favourable stance for applicants. In the end, however, the final provision was only amended by the addition: “binding job offer as provided for by national law”.

Article 5(1) point (d) was adjusted on the initiative of Belgium, Greece and Hungary, which stated that an application could also be submitted if the applicant resided outside the member state where he/she should be admitted to work – this could be addressed with a reference to visas. Therefore, an ‘applicant-friendly’ solution was inserted referring to a visa *or even the application for a visa, if required*.⁶⁰ Next, the scope of evidence of a valid residence permit was extended in the final version of the Directive by including the addition: “or of a national long-term visa, if appropriate”.

Article 5(1) point (e) has the objective to avoid possible double insurance. The provision was eventually worded somewhat more favourably than initially suggested by the Commission at the request by the Netherlands, requiring “[...] evidence of having or, if provided for by national law, having applied for sickness insurance [...]”.⁶¹ Admittedly, this leaves some room for manoeuvre in cases where the member states’ laws foresee this exception. Germany’s demand to also require “appropriate means of subsistence” was not incorporated. The reference to the sickness insurance cover of the family members of a Blue Card holder was deleted in this provision; such family members are still required to have sickness insurance, as set out by the Family Reunification Directive.⁶²

Only Article 5(1) point (f) was not changed, despite suggestions made by the Netherlands and supported by Germany to add “as defined by national law”. The Commission rejected this suggestion pointing to the fact that the same clause was used in the Directives on students and researchers.⁶³ The member states would have obtained discretion to determine the terms “public policy, public security and public health” in this context themselves, had this suggested amendment been accepted.

Article 5(2) of the Blue Card Directive allows member states to require the applicant to provide his address in the territory of the member state concerned. This addition was a compromise suggested by the Commission in response to the request of Slovakia, supported by Hungary and Austria, to include the requirement of providing evidence of appropriate accommodation (as in the case of the sponsor under Article 7(a) of the Directive on the right to family reunification). The Commission took the view that it

⁵⁹ Council of the European Union, Outcome of Proceedings – Working Party on Migration and Expulsion, 8 May 2008, document number: 8249/08, p. 11, footnote 25; Council of the European Union, Outcome of Proceedings – Working Party on Migration and Expulsion, 19 June 2008, document number: 9666/08, p. 9, footnote 20 .

⁶⁰ Council of the European Union, Outcome of Proceedings – Working Party on Migration and Expulsion, 28 February 2008, document number: 6051/08, p. 5, footnote 7.

⁶¹ Council of the European Union, Outcome of Proceedings – Working Party on Migration and Expulsion, 28 February 2008, document number: 6051/08, p. 6, footnote 8.

⁶² Ibid.

⁶³ Ibid., p. 6, footnote 9.

would not be justified to introduce this new requirement, as the situation is quite different (the sponsor already lives in the territory of the member state concerned, while under this proposal the applicant will, in most cases, not be resident there yet).⁶⁴

3.2 The Level of Rights offered to Blue Card Holders

The first contribution of Work Package 18 of the NEUJOBS project focused on the trends and gaps in the academic literature on EU labour migration. In examining the literature on highly skilled immigration, M. De Somer observes that “the rights/benefits that are most often singled out by studies concern the right to family reunification (and rights granted to family members upon arrival), followed by employment and social security rights, and finally the possibility to acquire permanent residence”.⁶⁵ She queried why many academic studies of such rights mirror a logic of international competition “in reviewing the relative attraction-value that can be accorded to each of these rights”. As a consequence, “rather than critically assessing the merit of granting such rights *“an sich” [in itself]*, too often the review focuses on how the availability of any of these rights can positively influence the decisions of highly skilled persons to emigrate to the state at hand”.⁶⁶

Importantly, the level of rights offered to immigrants is central for their inclusion and integration into the host member state because this level determines the degree to which they can take part in the labour market and society. The focus here, however, is on the Blue Card Directive exclusively.

It has been pointed out that the isolated debates on highly skilled immigrant workers are problematic in that this isolation, first, obscures the framing of policy dilemmas through official narratives (such as the alleged need to participate in “the global race for talent”) and, second, prevents the development of a progressive accumulation of knowledge and stocktaking of the status of migrants’ rights in policy agendas and law-making with regard to EU labour migration legislation as a whole.⁶⁷ In this context, the present research responds to the call for further research on the manner in which EU policies have constructed and justified the more generous framework for highly qualified immigrants, and separated this framework from the policies in place for lower-skilled migrants.⁶⁸

This section provides an analysis on the Council negotiations of the level of rights that the Blue Card holders have been granted. The emphasis is on Article 12 on labour market access, Article 14 on equal treatment, Article 15 on family members, Article 16 on long-term resident status and Article 18 on intra-EU mobility.

⁶⁴ See Council of the European Union, Outcome of Proceedings – Working Party on Migration and Expulsion, 28 February 2008, document number: 6051/08, p. 4, footnote 3.

⁶⁵ M. De Somer (2012), “Trends and Gaps in the Academic Literature on EU Labour Migration Policies”, NEUJOBS Working Paper No. 5, December, p. 6.

⁶⁶ Ibid., p. 7.

⁶⁷ Ibid., pp. 17-18.

⁶⁸ Ibid., p. 18.

3.2.1 *The Rules on Labour Market Access and Changes in Employer*

Article 12 of the Blue Card Directive deals with labour market access. This article has likewise been subject to lengthy negotiations in the Council working groups, but the provision was in the end not changed in a substantial way. The Commission emphasised that Article 12 of the Blue Card Directive aimed at setting out an *attractive scheme for highly skilled workers*. The Commission clarified that the objective of this provision is to allow either a change of functions or a change of enterprise, but in the framework of the same kind of job. The Commission pointed out that paragraph 2 of the provision set out two requirements for the person concerned: he/she must continue to exercise a highly qualified employment and he/she must notify any relevant changes to the competent authorities of the member states.⁶⁹

While Spain asked for more flexibility by suggesting a one-year deadline in paragraphs 1 and 2, Malta on the contrary proposed a three-year time period for both provisions.⁷⁰ Italy took the view that not allowing the person concerned to change the job for a period of two years would infringe the principle of free choice of employment.⁷¹ As regards modifications of the terms of the work contract that affect the conditions for admission or changes in the work relationship, the Netherlands, supported by France, felt that it should not be necessary to require a prior authorisation, as long as the person concerned continued to fulfil the conditions set out by the proposal. Likewise, Finland felt that the system for changing the job should be made more flexible.⁷²

The Netherlands and Austria insisted on the possibility for member states to be able to verify that the person concerned continued to fulfil the salary criterion also beyond the first two years.⁷³ At the request of Germany, supported by Austria, the word “residence” was replaced with “employment” both in paragraphs 1 and 2, thus narrowing the rule on access to the labour market.⁷⁴

3.2.2 *Equality of Treatment with the Member States’ Nationals*

Article 14 of the Blue Card Directive specifies the equal treatment that Blue Card holders enjoy with nationals of the member state issuing the Blue Card. When comparing the originally proposed provision with the adopted article in the Blue Card Directive, it is striking that the equal treatment for Blue Card holders was restricted. Most visibly, the provisions providing for equal treatment as regards tax benefits and

⁶⁹ Council of the European Union, Outcome of Proceedings – Working Party on Migration and Expulsion, 8 April 2008, document number: 7642/08, p. 3, footnote 5.

⁷⁰ Council of the European Union, Outcome of Proceedings – Working Party on Migration and Expulsion, 8 May 2008, document number: 8249/08, p. 23, footnote 69.

⁷¹ Council of the European Union, Outcome of Proceedings – Working Party on Migration and Expulsion, 24 July 2008, document number: 11512/08, p. 16, footnote 37.

⁷² Council of the European Union, Outcome of Proceedings – Working Party on Migration and Expulsion, 8 May 2008, document number: 8249/08, p. 23, footnote 69.

⁷³ Council of the European Union, Outcome of Proceedings – Working Party on Migration and Expulsion, 24 July 2008, document number: 11512/08, p. 17, footnote 38.

⁷⁴ Council of the European Union, Outcome of Proceedings – Working Party on Migration and Expulsion, 8 April 2008, document number: 7642/08, p. 3, footnote 6.

social assistance have been dropped at the initiative of Germany, the Czech Republic and Hungary.⁷⁵

According to Spain, Article 14(b) of the Blue Card Directive on the freedom of association should contain a right to strike; this position was opposed by Austria.⁷⁶ Article 14(c) of the Blue Card Directive on education and vocational training was controversially discussed: several delegations pointed out that the notion of *study grants* was not clear. Germany suggested restricting the rights under point (c), as member states should be allowed to limit access to education, vocational training and study grants in accordance with national law.⁷⁷ Paragraph 2 of Article 14 allows for further restrictions, and it was even tightened in the course of the negotiations: Germany proposed to also restrict access to education and vocational training. While this suggestion was not taken over, the proposals for a more restrictive approach of Austria (that access to university may be subject to specific prerequisites according to national law) and Sweden (the member state concerned may restrict equal treatment to cases where the registered or usual place of business of the Blue Card holder, or that of family members for whom benefits are claimed, lies within its territory) were integrated in the Blue Card Directive.⁷⁸

Furthermore, Article 14(e) on social security of the Blue Card Directive was fiercely disputed. The Czech Republic demanded the deletion of the latter provision insofar as it interfered with the principle of subsidiarity, while Germany and Finland suggested listing all the benefits to which the Blue Card holders may be eligible rather than making reference to Regulation 1408/71. There was also disagreement about Article 14(f) on pensions of the Blue Card Directive. Again, the Czech Republic, this time with the support of Hungary and Austria, expressed its wish to delete this provision. However, the suggestion by Spain, along with Finland and Sweden, was eventually implemented, which asked for the consideration of income-based acquired pensions.⁷⁹ In relation to Article 14(e) on access to and supply of goods and services of the Blue Card Directive, it is interesting to point out that Germany, Finland and Austria were

⁷⁵ Council of the European Union, Outcome of Proceedings – Working Party on Migration and Expulsion, 8 May 2008, document number: 8249/08, p. 30, footnote 95; Council of the European Union, Outcome of Proceedings – Working Party on Migration and Expulsion, 19 June 2008, document number: 9666/08, p. 22, footnote 71.

⁷⁶ Council of the European Union, Outcome of Proceedings – Working Party on Migration and Expulsion, 8 May 2008, document number: 8249/08, p. 27, footnote 91; Council of the European Union, Outcome of Proceedings – Working Party on Migration and Expulsion, 19 June 2008, document number: 9666/08, p. 21, footnote 66.

⁷⁷ Council of the European Union, Outcome of Proceedings – Working Party on Migration and Expulsion, 8 May 2008, document number: 8249/08, p. 28, footnote 92; Council of the European Union, Outcome of Proceedings – Working Party on Migration and Expulsion, 19 June 2008, document number: 9666/08, p. 22, footnote 71.

⁷⁸ Council of the European Union, Outcome of Proceedings – Working Party on Migration and Expulsion, 19 June 2008, document number: 9666/08, p. 23, footnote 73.

⁷⁹ Council of the European Union, Outcome of Proceedings – Working Party on Migration and Expulsion, 8 May 2008, document number: 8249/08, p. 30, footnote 96.

keen to limit the assistance to be provided by employment offices to information and counselling services.⁸⁰

3.2.3 Favourable Family Reunification Rights

Article 15 on family members of the Blue Card Directive sets out the rules for family reunification. The provision stipulates derogations as regards the application of Council Directive 2003/86/EC on the right to family reunification that are more favourable for Blue Card holders and their family members.⁸¹ This means that:

- *Family reunification will not be made dependent* on the requirement of the EU Blue Card holder having reasonable prospects of obtaining the right of permanent residence and having a minimum period of residence.
- *Integration conditions and measures* referred to in Council Directive 2003/86/EC may only be applied *after the persons concerned have been granted family reunification*.
- Residence permits for family members of EU Blue Card holders shall be granted, where the conditions for family reunification are fulfilled, at the latest *within six months* from the date on which the application was lodged.
- The duration of validity of the residence permits of family members shall be the same as that of the residence permits issued to the EU Blue Card holder insofar as the period of validity of their travel documents allows it.
- Member states will not apply any time limit in respect of access to the labour market for family members of EU Blue Card holders.
- *For the purposes of calculating the five years of residence* required for the acquisition of an autonomous residence permit, *residence in different member states may be cumulated*.
- If member states have recourse to the option provided for in the previous paragraph, the provisions set out in Article 16 of the Blue Card Directive on long-term resident status in respect of accumulation of periods of residence in different member states by the EU Blue Card holder shall apply *mutatis mutandis*.⁸²

Article 15 was only slightly amended in the course of the Council negotiations, although some member states expressed reservations. Doubts related inter alia to the deadline of six months for issuance of residence permits for family members: Germany, supported by Sweden, preferred not to set any deadline at all and to simply state that the residence permits of the family members should be issued as soon as possible.⁸³ In reply to the remarks from the delegations, the Commission noted that the choice of setting a short deadline from the lodging of the application to the residence

⁸⁰ Ibid., p. 30, footnote 98.

⁸¹ Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification.

⁸² See Articles 15(2), (3), (4), (5), (6), (7), (8) of Council Directive 2009/50/EC of 25 May 2009 on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment.

⁸³ Council of the European Union, Outcome of Proceedings – Working Party on Migration and Expulsion, 8 May 2008, document number: 8249/08, p. 32, footnote 103.

permit being issued for family members is a political one, based on the intention to attract highly skilled third-country nationals.⁸⁴

When compared to the legal regime under Council Directive 2003/86/EC, the Blue Card Directive provides for a more advantageous set of rights for family reunification. Importantly, the Directive guarantees the family members of Blue Card holders access to the labour market without any time limit as requested by the Netherlands and supported by the Commission, which underlined that full labour market access from the first day of the stay, would render the provision certainly more attractive.⁸⁵

However, the '*may-clauses*' of this provision challenge the objective of granting Blue Card holders the *same level of rights throughout the EU* as envisaged by the proposal of the Commission: this holds true for the optional clause on integration measures (which became *integration conditions and measures* in the adopted text) as well as the optional clause on the accumulation of residence periods in different member states. As regards this last aspect, the Commission recalled that the purpose of this optional provision is not to penalise family members of EU Blue Card holders who exercise mobility in respect of the time needed to obtain an autonomous residence permit (and not the long-term resident permit, for which no facilitation is foreseen).⁸⁶

3.2.4 Advantageous Rules for Long-Term Resident Status

Article 16 of the Blue Card Directive determines a derogatory regime for EU Blue Card holders under Council Directive 2003/109/EC on long-term resident status.⁸⁷ Considering the reservations and comments the member states had concerning this provision, it is quite surprising that the text as proposed by the Commission has only been subject to amendments related to the periods to obtain and keep the long-term resident status as a Blue Card holder.

Several delegations emphasised that the implementation of this provision, which introduced a series of derogations to Council Directive 2003/109/EC, could give rise to quite a complex system, difficult to be managed by the national administrations, in particular with respect to the issue of absences. The Czech Republic felt that introducing such exceptions did not contribute to the clarity and simplicity of the system in general and took the view that once they fulfil the conditions of Directive 2003/109/EC, Blue Card holders should enjoy the same treatment as long-term residents, also with respect to absences. The Czech Republic suggested either entirely deleting the provision, as Austria, or maintaining the first two paragraphs only. According to Hungary, rather than targeting Blue Card holders who have acquired long-term resident status, the provisions of paragraphs 3 and 4 should apply to all long-term residents, having regard to the objective of fostering circular migration and also on the basis of the principle of non-discrimination.⁸⁸

⁸⁴ Ibid.

⁸⁵ Ibid., p. 33, footnote 105.

⁸⁶ Ibid., p. 33, footnote 106.

⁸⁷ Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents.

⁸⁸ Council of the European Union, Outcome of Proceedings – Working Party on Migration and Expulsion, 8 May 2008, document number: 8249/08, p. 34, footnote 107.

As suggested by the Commission, a Blue Card holder who made use of the intra EU-mobility right under the Directive (as developed below) is allowed to accumulate periods of residence in different member states in order to fulfil the requirement concerning the duration of residence, if he/she:

- has legally and continuously resided for *five years* in the EU as an EU Blue Card holder and
- had *legal and continuous residence for two years* immediately prior to the submission of the relevant application as an EU Blue Card holder within the territory of the member state where the application for the long-term resident's residence permit was lodged.⁸⁹

The suggestion of the German delegation to require six instead of five years of legal residence, and to increase the two-year to a three-year period, was not followed.⁹⁰ Article 16(3) of the Blue Card Directive sets out that, for the purpose of calculating the period of legal and continuous residence in the EU (by way of derogation Article 4(3) of Directive 2003/109/EC), periods of absence from the territory of the EU shall not interrupt the five-year period if they are shorter than 12 consecutive months and do not exceed in total 18 months (not 16 months, as proposed by the Commission) within these five years; this paragraph shall apply also in cases where the EU Blue Card holder has not made use of the possibility to move to another member state under the Directive. Again, Germany opposed these derogations.⁹¹

Once long-term resident status has been obtained by the EU Blue Card holder, the person concerned enjoys the extended authorised period of absence from the territory of the EU of 24 consecutive months.⁹² Spain and Belgium asked for the deletion of this paragraph. The Commission noted that Article 9(2) of the Long-Term Residents' Directive is an optional provision, while this paragraph was a compulsory one and for this reason it preferred maintaining it.⁹³

Article 16(5) of the Blue Card Directive states that the derogations to Directive 2003/109/EC set out in paragraphs 3 and 4 of this provision *may be restricted* (as opposed to *shall* as envisaged in the Commission proposal) to cases where the third-country national concerned can present evidence that he has been absent from the territory of the EU to exercise an economic activity in an employed or self-employed capacity, or to perform a voluntary service, or to study in his own country of origin.

⁸⁹ Article 16(2) of Council Directive 2009/50/EC.

⁹⁰ Council of the European Union, Outcome of Proceedings – Working Party on Migration and Expulsion, 8 May 2008, document number: 8249/08, p. 33, footnote 108; Council of the European Union, Outcome of Proceedings – Working Party on Migration and Expulsion, 1 August 2008, document number: 12320/08, p. 20, footnote 44.

⁹¹ Council of the European Union, Outcome of Proceedings – Working Party on Migration and Expulsion, 8 May 2008, document number: 8249/08, p. 35, footnote 110.

⁹² Article 16(4) of Council Directive 2009/50/EC.

⁹³ Council of the European Union, Outcome of Proceedings – Working Party on Migration and Expulsion, 8 May 2008, document number: 8249/08, p. 35, footnote 111.

3.2.5 Promoting Intra-EU Mobility

Article 18 of the Blue Card Directive addresses the conditions for residence of Blue Card holders in other member states. The Commission proposal explained that this provision

aims to encourage the geographic mobility of highly qualified workers. Derogations to Directive 2003/109/EC thus aim at not penalising mobile workers, by allowing them to cumulate periods of residence in two (or at the maximum three) member states in order to fulfil the main condition for obtaining the long-term resident status. The derogations on the periods of absence from the EU should be subject to strict conditions in order to sustain the circular migration policy and to limit possible brain drain effects.⁹⁴

Belgium and Hungary questioned the added value of this provision.⁹⁵ A number of member states communicated their discontent concerning the time period of two years of legal residence after which the Blue Card holder would be entitled to move to a second member state. Sweden and Spain proposed to replace the two-year period with one year.⁹⁶ Equally, the Netherlands did not support the requirement of a period of two years and pointed out that the objective of this provision was to promote internal mobility.⁹⁷ Finally, the member states agreed on an 18-month period.

The Netherlands requested to insert, at the end of paragraph 2, that *the applicant is not allowed to work during the application procedure*.⁹⁸ This limiting addition was incorporated in a more attenuated form providing member states with the option to prohibit the applicant from working until a positive decision was declared on the application.

The particular importance of this provision is reflected in the preamble to the adopted Blue Card Directive:

the occupational and geographical mobility of third-country highly qualified workers should be recognised as a primary mechanism for improving labour market efficiency, preventing skill shortages and offsetting regional imbalances.⁹⁹

⁹⁴ European Commission, Explanatory Memorandum to the Proposal for a Council Directive on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment, COM(2007) 637, 23.10.2007, p. 11.

⁹⁵ Council of the European Union, Outcome of Proceedings – Working Party on Migration and Expulsion, 19 June 2008, document number: 9666/08, p. 27, footnote 81.

⁹⁶ Council of the European Union, Outcome of Proceedings – Working Party on Migration and Expulsion, 8 May 2008, document number: 8249/08, p. 38, footnote 119; Council of the European Union, Outcome of Proceedings – Working Party on Migration and Expulsion, 19 June 2008, document number: 9666/08, p. 27, footnote 83.

⁹⁷ Council of the European Union, Outcome of Proceedings – Working Party on Migration and Expulsion, 8 May 2008, document number: 8249/08, p. 38, footnote 119.

⁹⁸ *Ibid.*, p. 39, footnote 127.

⁹⁹ Recital 15 of the Council Directive 2009/50/EC.

4. The Council Negotiations Reviewed: The Implications of Reshaping ‘Attractiveness’

The above analysis of the Council records concerning the scope of application of the Blue Card Directive and the level of rights for Blue Card holders reveals a number of key issues that had a direct impact on the shaping of ‘attractiveness’ of the Blue Card Directive.

4.1 Tug-of-War in Law-Making: Jeopardising Coherence

The genesis of the Blue Card Directive represents a paramount example of the continuous power struggle between the EU institutions. The Commission used the latter Directive as a justification for ‘more Europe’ in the field of legal migration, which is an area of mixed competence after it became clear that a horizontal approach was blocked by the member states. With its proposal, the Commission aimed at a high level of harmonisation envisaging using the EU competence to the fullest extent. The member states, in turn, had a keen interest in maintaining sovereignty concerning the admission schemes for highly skilled migrants. It turned out to be impossible to push through the Blue Card Directive without preserving the member states’ respective national systems for highly qualified third-country immigrants. Seeing that the measure was subject to unanimity voting in the Council, the latter institution and each of the member states held a strong position. The role of the European Parliament was very much limited in that it merely issued a non-binding opinion. Arguably, however, this opinion was taken into consideration to a certain extent which can *inter alia* be attributed to the pre-Lisbon context of the proposal. A migrant-centred approach is not apparent in the Blue Card Directive: it seems as if the interests of individuals have been sacrificed to allow the interests of the institutional actors to prevail.

Coherence has considerably been jeopardised on various levels. First, the sectoral approach in EU labour migration policy led to a highly dispersed and non-transparent legal framework going against the principle of legal certainty. Second, the insertion of Article 3(4) into the Blue Card Directive has endangered the coherence of the Blue Card scheme itself, seeing that this provision permits the member states to issue national residence permits next to the Blue Card for any purpose of employment, including for highly-qualified employment. This option calls into question the Commission’s objective to overcome “different entry and residence conditions for these workers, each national system being closed and in competition with the others” assuming the Blue Card Directive would create a common level playing field by introducing *one European highly skilled admission scheme*.¹⁰⁰ In this context, it must be pointed out that Article 6 of the Directive in fact already closes each national system in that it allows member states to stipulate quotas for third-country nationals entering their respective territory for the purposes of highly qualified employment.¹⁰¹ The EU Blue Card can thus be regarded as an upgraded national residence and work permit.

¹⁰⁰ European Commission, Proposal for a Council Directive on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment, COM(2007) 637, 23.10.2007, p. 7.

¹⁰¹ Compare Article 79(5) TFEU; it appears as if quite some Member States have made use of this option to introduce quotas on the basis of Article 6 of Council Directive 2009/50/EC.

Moreover, the Council records reveal to what extent the Commission's understanding of 'attractiveness' of the Blue Card Directive has been reshaped by the member states. One of the most contentious issues related to the scope of application of the Blue Card Directive. From the start, some member states in Central and Eastern Europe queried why the focus was put on highly skilled workers from third countries, leaving potential within the EU unused. This position is understandable as it relates to the fundamental issue whether third-country nationals can (even temporarily) be treated more favourably than certain EU citizens by virtue of transitional arrangements that restrict the latter's free movement rights.

It has been pointed out that the suggested wording by the Commission of "highly qualified employment", which is at the heart of the Blue Card Directive determining who is eligible for the Blue Card, provided for valuable flexibility to meet business needs.¹⁰² This flexibility has to a certain extent been compromised as the adopted text allows for the substitution of higher education qualifications, if provided for by national law, by five years of specified, relevant professional experience. Some member states emphasised the alleged risk of abuse in the assessment of the equivalent professional experience, while others underscored that in some sectors that may be relevant for the purposes of this proposal, the persons concerned do not possess higher-education qualifications.

The Blue Card applicant must further comply with the salary requirement, which was subject to much discussion. In its opinion on the Blue Card Directive, the European Economic and Social Committee (EESC) took a clear position, stating that salary is not an appropriate criterion for consideration as a highly qualified worker.¹⁰³ Rather, the EESC specified, the "concept of 'highly qualified' should be linked to higher education certificates and qualifications or equivalent vocational skills rather than the salary that the worker is to receive". The EESC warned that "making salary one of the requirements for access to the EU Blue Card will make it hard to achieve a common policy in the EU" and that "the major differences in national minimum wage levels that currently exist between the member states hinder harmonisation". By contrast, the European Parliament implicitly accepted salary as a criterion for highly qualified employment by suggesting a national level of at least 1.7 times the gross average wage in the member state concerned.¹⁰⁴ In the end, the threshold was set at least 1.5 times the average gross monthly wage. The compromise was based on the argument that this definition reflected the real pay levels in the member states and could be used in all member states. The salary level is hence also a determining factor as to whether a third-country worker may be considered as 'highly qualified' for the purpose of the

¹⁰² E. Guild (2007), "EU Policy on Labour Migration: A First Look at the Commission's Blue Card Initiative", CEPS Policy Brief No. 145, Centre for European Policy Studies, Brussels, pp. 3-4.

¹⁰³ Opinion of the European Economic and Social Committee on the proposal for a Council Directive on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment, SOC/300 - COM(2007) 637 final – 2007/0228 (CNS), Rapporteur: Mr. Pariza Castaños (Spain), 9 July 2008.

¹⁰⁴ European Parliament legislative resolution of 20 November 2008 on the proposal for a Council directive on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment; see amendment 29.

Blue Card Directive. Taking into account, however, that the average gross monthly wage differs in the member states (ranging from €61,640 in Sweden to €13,372 in Hungary, see section 5), the Directive does not give a conclusive answer as to who those ‘highly qualified’ immigrants are – it may differ from member state to member state. This differentiation in terms of salary requirement is actually reflected in the member states’ pre-existing national systems for ‘highly qualified’ immigrants.¹⁰⁵ The warning that the predominance of national trends in EU labour migration policy undermines coherency was already given in 2007.¹⁰⁶ In addition, the way of calculating the average wage may vary across the member states, thereby making a direct comparison difficult.

The discussions on the scope of application and the salary requirement are illustrative for the negotiations of other provisions: the Commission repeatedly stressed the factor of ‘attractiveness’ to underline and justify its position; however, in many instances it proved difficult to convince the member states, which held a strong position to amend the various provisions of the Blue Card Directive. These amendments compromised the ‘attractiveness’ as initially framed by the Commission. The frequent use of ‘may-clauses’ provided the member states with wide discretion and rendered the implementation of Blue Card Directive less coherent throughout the national legal systems. The same challenge poses the often-inserted addition “as provided for by national law” that allows the member states to condition rules and rights in line with their own systems.

4.2 Privileging as a Form of Discrimination

The EU Blue Card, once acquired, provides for an upgraded permit in comparison to what other EU Directives offer in the field of legal migration; the basis for this differentiation is based on the sectoral approach pursued in EU policy on labour migration. The EU Blue Card Directive sets forth special, privileged rules in relation to labour market access, equality of treatment with member states’ nationals, family reunification as well as more favourable rights concerning long-term resident status. Concerning this latter aspect, importantly, the EU Blue Card holder may be absent from the territory of the EU for a period of up to 24 consecutive months.

A derogatory rule for young professionals who are less likely to have enough professional experience to claim high salaries (former Article 6 of the Commission proposal) was deleted. Some member states opined that the provision conflicted with the principle of non-discrimination.¹⁰⁷ The most surprising outcome relates to Article 18 of the Blue Card Directive on intra-EU mobility, which was considered to be one of the key elements for making the Blue Card Directive ‘attractive’. The envisaged time period of two years of legal residence after which the Blue Card holder would be entitled to move to a second member state was reduced to an 18-month period. This adjustment constitutes a real advantage as it allows for faster reactions to labour

¹⁰⁵ S. Carrera (2007), “Building a Common Policy on Labour Immigration: Towards a Comprehensive and Global Approach in the EU”, CEPS Working Document No. 256, Centre for European Policy Studies, Brussels, pp. 13-14.

¹⁰⁶ Ibid., p. 12.

¹⁰⁷ Council of the European Union, Outcome of Proceedings – Working Party on Migration and Expulsion, 19 June 2008, document number: 9666/08, p. 11, footnote 27.

market developments in the member states. However, the Blue Card holder and/or his employer must present, along with the application for the Blue Card in the second member state, all the documents proving the fulfilment of the admission conditions of Article 5 for the second member state.

In more general terms, the 'attractiveness' conceptualised in the Blue Card Directive translates into an enhanced set of rights for those workers who qualify as 'highly qualified' immigrants for the purpose of the Directive. This raises questions as regards the general principle of non-discrimination: S. Carrera criticised this approach as utilitarian, selective and profit-oriented, in that the economic interests of the state dictate "special employment schemes with a facilitated administrative system for entry and residence only for the kind of labour force categorised as 'highly skilled', 'profitable' or 'talented'."¹⁰⁸ E. Guild considered the categorisation of migrants based on their perceived value to the EU labour markets as a "market approach to human beings": third-country nationals who are highly qualified workers are given better rights than workers who are lower skilled.¹⁰⁹ It has been stated that "the paradoxical outcome of these mechanisms is that the economically stronger are privileged, while the economically weaker enjoy fewer rights".¹¹⁰ This is the system underlying the sectoral approach; the negotiations on the directives on intra-corporate transferees and seasonal workers are ongoing.¹¹¹

The final version of the Blue Card Directive is a compromise that raises serious doubts as to the added value of the measure. It is true that the Blue Card Directive establishes, for the first time, a system that allows for intra-EU mobility to respond rather promptly to fluctuating demands for highly qualified migrant labour. Yet, whether this possibility of intra-EU mobility is actually perceived as 'attractive' by the migrants targeted – and used – remains to be seen. In any event, taking into consideration the option for member states to apply national highly skilled systems in parallel and the wide discretion that many provisions of the Blue Card Directive leave to the member states challenge the initial idea of creating "common rules for admission" for highly skilled migrants who should enjoy "the same level of rights throughout the EU" as envisaged by the Commission.¹¹² We have now in place a multi-layer, complex system,

¹⁰⁸ S. Carrera (2007), "Building a Common Policy on Labour Immigration: Towards a Comprehensive and Global Approach in the EU", CEPS Working Document No. 256, Centre for European Policy Studies, Brussels, p. 2.

¹⁰⁹ E. Guild (2011), "Equivocal Claims? Ambivalent Controls? Labour Migration Regimes in the European Union", in E. Guild and S. Mantu (eds), *Constructing and Imagining Labour Migration – Perspectives of Control from Five Continents*, Farnham, Surrey: Ashgate Publishing, pp. 216-218.

¹¹⁰ M. De Somer (2012), "Trends and Gaps in the Academic Literature on EU Labour Migration Policies", NEUJOBS Working Paper No. 5, December, pp. 3-4.

¹¹¹ European Commission, proposal for a directive of the European Parliament and of the Council on the conditions of entry and residence of third-country nationals for the purposes of seasonal employment, COM(2010) 379, 13.7.2010; European Commission, proposal for a directive of the European Parliament and of the Council on conditions of entry and residence of third-country nationals in the framework of an intra-corporate transfer, COM(2010) 378, 13.7.2010.

¹¹² European Commission, Explanatory Memorandum to the Proposal for a Council Directive on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment, COM(2007) 637, 23.10.2007, p. 7.

as the Blue Card Directive exists alongside the (possibly up to 28) national systems for highly qualified employment.

5. The Implementation of the Blue Card Directive – A First Perspective on Five Member States

It is crucial to explore how the Blue Card Directive has been implemented into national law four years after its adoption considering the wide scope of discretion that the member states enjoy in view of the transposition. This section provides a first perspective on the implementation in Germany, France, Spain, Hungary and Sweden.¹¹³ The information provided below was obtained on the basis of interviews with policy-makers as well as relevant literature; the Commission evaluation on the application of the Blue Card Directive in the member states is ongoing at this point in time.

5.1 Germany

In Germany the Blue Card Directive was transposed into national law with an implementing law of 1 June 2012, which entered into force on 1 August 2012.¹¹⁴ This implementing law contains six articles that provide for amendments of the Residence Act, the Nationality Act, the social security code, as well as a number of other acts. A foreign national qualifies for the EU Blue Card without a review of the German Federal Employment Agency provided that the conclusion of a work contract is in sight that allows him/her to earn a minimum annual salary of €46,400 (2012: €44,800), and provided that he/she is in possession of a national university diploma, or a foreign one that is comparable to a national university diploma.¹¹⁵ Changes in employer are subject to prior authorisation in the first two years of legal employment.¹¹⁶

For employment in professions, which are in particular in need of third-country workers, the annual salary threshold has been set at €36,200 (2012: €34,944).¹¹⁷ In such

¹¹³ For analyses on the implementation of the Blue Card Directive in the Netherlands and Bulgaria, see Strik, T. and C. Grütters (eds) (2013), *The Blue Card Directive: Central Themes, Problem Issues, and Implementation in Selected Member States*, Oisterwijk: Wolf Legal Publishers.

¹¹⁴ Gesetz zur Umsetzung der Hochqualifizierten-Richtlinie der Europäischen Union of 1 June 2012 (BGBl. I Nr. 24, S. 1224).

¹¹⁵ See Articles 19a and 18(5) Aufenthaltsgesetz (German Residence Act); see article “Neues Gesetz zur Arbeitsmigration” [New law on employment migration] on the website of the Federal Government of Germany of 25 July 2012 (www.bundesregierung.de/Content/DE/Artikel/IB/Artikel/Arbeitsmarkt/Anerkennung_Abschluesse/2012-07-25-blaue-Karte.html?nn=391850) as well as article “Bundesinnenminister Friedrich zieht nach sechs Monaten Blaue Karte eine positive Bilanz” [Interior Minister Friedrich draws a positive conclusion on the Blue Card after six months] on the website of the Federal Ministry of the Interior of 18 February 2013 (www.bmi.bund.de/SharedDocs/Pressemitteilungen/DE/2013/02/blaue_karte.html).

¹¹⁶ Article 19a(4) Aufenthaltsgesetz (German Residence Act).

¹¹⁷ Article “Neues Gesetz zur Arbeitsmigration” on the website of the Federal Government of Germany of 25 July 2012 (www.bundesregierung.de/Content/DE/Artikel/IB/Artikel/Arbeitsmarkt/Anerkennung_Abschluesse/2012-07-25-blaue-Karte.html?nn=391850) as well as article “Bundesinnenminister

cases an examination by the Employment Agency is necessary to verify whether the respective working conditions and the salary correspond to the usual working conditions. Holders of a (fixed-term) EU Blue Card may in principle obtain a settlement permit after 33 months of legal employment.¹¹⁸ He/she can qualify for such a settlement permit already after 21 months of legal employment in case the Blue card holder has German language skills of a B1-level.¹¹⁹ In addition, a new visa was introduced for foreign professionals holding a university degree (either a German degree, or a recognised one, or a foreign one that is comparable to a German degree) to look for employment for up to six months in Germany provided they dispose of sufficient funds to sustain themselves.¹²⁰

There have also been amendments that facilitate access by foreign students enrolled at German universities to the labour market and improve their employment opportunities during their studies: foreign nationals who graduated from a German university and who earn less than the salary threshold necessary to obtain the Blue Card receive a residence permit for an employment that corresponds to their qualification in accordance with Article 18 of the German Residence Act. The salary must be sufficient to assure an independent livelihood; a review of the working conditions by the Federal Employment Agency has been dropped.¹²¹ Graduates are eligible for a residence permit for up to 18 months to search for suitable employment, and they may work during this time period without restrictions.¹²² Moreover, students may now work up to 120 days not requiring prior permission.¹²³ Likewise, foreign nationals who have a residence permit in line with Articles 16(5) or 17(1) of the German Residence Act for the purpose of completing vocational training can rely on improved rules allowing for access to the German labour market.¹²⁴

The implementation of the Blue Card Directive into German law was received with approval and criticism by a committee of experts. The points that were criticised related in particular to the minimum salary threshold (because of the perceived risk of wage dumping), a bureaucratic and non-transparent German aliens law, the fixed-term

Friedrich zieht nach sechs Monaten Blaue Karte eine positive Bilanz" on the website of the Federal Ministry of the Interior of 18 February 2013 (www.bmi.bund.de/SharedDocs/Pressemitteilungen/DE/2013/02/blau_karte.html).

¹¹⁸ Article 19a(6) Aufenthaltsgesetz (German Residence Act).

¹¹⁹ Ibid.

¹²⁰ Article 18c Aufenthaltsgesetz (German Residence Act).

¹²¹ Article "Neues Gesetz zur Arbeitsmigration" on the website of the Federal Government of Germany of 25 July 2012 (www.bundesregierung.de/Content/DE/Artikel/IB/Artikel/Arbeitsmarkt/Anerkennung_Abschluesse/2012-07-25-blaue-Karte.html?nn=391850); see also Article 3b Beschäftigungsverordnung (German Employment Act).

¹²² Article 16(4) Aufenthaltsgesetz (German Residence Act).

¹²³ Article 16(3) Aufenthaltsgesetz (German Residence Act).

¹²⁴ See Articles 16(5b) and 17(3) Aufenthaltsgesetz (German Residence Act), as well as Article 27(3) Beschäftigungsverordnung (German Employment Act); information obtained from the German Ministry of the Interior.

right of residence, and the lack of a welcoming culture in Germany.¹²⁵ The German Minister of the Interior stressed that the Blue Card has been a success since its introduction: in mid-February 2013, he stated that over 4,100 Blue Cards had been issued to highly qualified workers addressing the shortage of skilled labour in Germany.¹²⁶

5.2 France

The Blue Card Directive was transposed into the French legal system by virtue of the Law on Immigration, Integration and Nationality of 16 June 2011, as well as a decree of 6 September 2011.¹²⁷ In addition to excluding EEA and Swiss nationals, the Blue Card in France also excludes Algerian nationals from its scope of application on the basis of an agreement between France and Algeria of 27 December 1968.

To obtain the Blue Card in France, the third-country migrant must have:

- a higher education qualification of at least three years issued by a university recognised in the state in which the institution is situated, or have five years of work experience of a comparable level;
- a work contract for the duration of minimum a year approved by the “Service de Main d’Œuvre Etrangère”; and
- a monthly salary that equals 1.5 times the average salary of reference, which is stipulated annually by the Minister in charge of immigration by decree; the salary threshold amounted to €52,725 gross per annum on 30 November 2011.¹²⁸

The required monthly salary in France for the Blue Card happened to equal approximately three times the minimum salary (*SMIC = salaire minimum interprofessionnel de croissance*) – the definition initially proposed by the Commission. The French authorities did not make use of the derogation to require at least 1.2 times the average gross annual salary for certain, particularly wanted professions as the salary threshold was too high for intermediate categories, such as health personnel with the exception of doctors. Instead, France has bilaterally decided on favourable recruitment rules with certain countries, such as with Tunisia and Senegal.¹²⁹

¹²⁵ G. Brinkmann (forthcoming 2013), Umsetzung der Hochqualifiziertenrichtlinie in Deutschland, in: *Festschrift für Prof. Hailbronner*.

¹²⁶ See article “Bundesinnenminister Friedrich zieht nach sechs Monaten Blaue Karte eine positive Bilanz” on the website of the Federal Ministry of the Interior of 18 February 2013 (www.bmi.bund.de/SharedDocs/Pressemitteilungen/DE/2013/02/blau_karte.html).

¹²⁷ LOI n° 2011-672 du 16 juin 2011 relative à l'immigration, à l'intégration et à la nationalité (JORF n°0139 du 17 juin 2011 page 10290 texte n° 1); Décret n° 2011-1049 du 6 septembre 2011 pris pour l'application de la loi n° 2011-672 du 16 juin 2011 relative à l'immigration, l'intégration et la nationalité et relatif aux titres de séjour (JORF n°0207 du 7 septembre 2011 page 15036 texte n° 9).

¹²⁸ See Article 17 LOI n° 2011-672 du 16 juin 2011; see also website of the French agency in charge of immigration and integration on the Blue Card in France (www.immigration-professionnelle.gouv.fr/acteurs-%C3%A9conomiques/fiche/carte-bleue-europ%C3%A9enne).

¹²⁹ Information obtained from the French Ministry of the Interior.

The impact of the Blue Card in France has been limited to date, which has been attributed to the crisis that has hit the French economy hard. However, the Blue Card has been assessed as having a strong symbolic character. The policy discourse focusing on the need to attract talents created a consensus among politicians and civil society on the subject matter. A bill that aims to attract young foreign professionals below the age of 30 is envisaged to be tabled in 2013 (the corresponding provision in the Blue Card Directive was deleted due to a lack of support from the other member states).¹³⁰

5.3 Spain

The 2009 reform of the Organic Law of Aliens (OLA) in Spain aimed at integrating certain EU immigration directives into Spanish law, including the Blue Card and Researchers' Directives.¹³¹ Prior to this reform, no specific approach towards highly skilled workers existed under the Spanish Immigration Act.¹³²

In 2011, with a view to boosting the economy, a Royal Decree was adopted that provides for a flexible mechanism to specifically attract more skilled workers.¹³³ This Royal Decree on the Organic Law of Aliens (REOLA) introduced the provision on 'highly-qualified workers' under Article 38 ter of OLA implementing the Blue Card Directive. The new admission procedures stipulated in Articles 85 to 96 REOLA follow closely the system of the Directive.¹³⁴ Article 88.5 REOLA establishes the procedural rule for fast-track admission, stipulating a maximum of 45 days to resolve proceedings. Doubts have been raised in relation to the right of equal treatment as set out in Article 12 of the Blue Card Directive, pointing out that this rule does not appear in the implementing law.¹³⁵

¹³⁰ Ibid.

¹³¹ Organic Law of Aliens [*Ley Orgánica de extranjería*] 4/2000 of 11 January 2000 on the rights and liberties of foreigners in Spain and their social integration, modified by Law 2/2009 of 11 December 2009.

¹³² The previous scheme towards highly qualified immigrant workers was labelled as "non-specific" and "exceptional", see Iglesias Sánchez, S. (2013), "The Transposition of the Blue Card Directive in Spain", in T. Strik and C. Grütters (eds), *The Blue Card Directive: Central Themes, Problem Issues, and Implementation in Selected Member States*, Oisterwijk: Wolf Legal Publishers, pp. 68-69.

¹³³ M. Fernández and C. Gortázar (2012), Spanish National Report for the project "Integration of High Skilled Third Country Nationals in Europe: A New Proposal for Circular Talent Management", IEM – COMILLAS PONTIFICAL UNIVERSITY, p. 19 (<https://sites.google.com/site/integrationqualification>); Royal Decree on the Organic Law of Aliens [*Real Decreto de la Ley Orgánica de extranjería*] 557/2011, of 20 April 2011, which approves the rules of the Organic Law 4/2000, on the rights and liberties of foreigners in Spain and their social integration, after its reform of Organic Law 2/2009, BOE number 103 of 30 April 2011.

¹³⁴ S. Iglesias Sánchez (2013), "The Transposition of the Blue Card Directive in Spain", in T. Strik and C. Grütters (eds), *The Blue Card Directive: Central Themes, Problem Issues, and Implementation in Selected Member States*, Oisterwijk: Wolf Legal Publishers, p. 72.

¹³⁵ M. Fernández and C. Gortázar (2012), Spanish National Report for the project "Integration of High Skilled Third Country Nationals in Europe: A New Proposal for Circular Talent Management", IEM – COMILLAS PONTIFICAL UNIVERSITY, pp. 20-21.

It has been emphasised that the definition of a highly qualified worker under Article 85 REOLA departs from the definition in the Directive: a highly qualified worker under this provision is a foreigner authorised to exercise an activity for which higher education qualifications are required; exceptionally, five years of professional experience can be considered (which is, however, not further explained in REOLA).¹³⁶ Contrary to the formulation in the Blue Card Directive, the definition of “higher education qualifications” is more restrictive: Article 85 REOLA refers to qualifications derived from higher studies of at least three years and that “provide a level of qualification necessary in order to exercise a profession which requires a higher level of capability or in order to be accepted on a programme of advanced research”. S. Iglesias Sánchez pointed out that this differentiation can only be understood by considering Recital 9 of the Directive, which refers to ISCED level 5a (higher education studies of at least three years) and 6 (advanced research qualifications, e.g. Master, PhD) and criticised the associated legal uncertainty it triggers.¹³⁷

A Blue Card applicant who wishes to enter Spain must produce evidence of an annual salary of at least €34,185 (1.5 times the average salary of reference: 22,790 in 2010).¹³⁸ In addition, a Blue Card applicant in Spain must:

- not be in an irregular situation;
- not have a criminal record for the last five years for crimes regulated Spanish legal order,
- not have been listed as non-admissible in databases such as the Schengen Information System and
- have paid the administrative fee.¹³⁹

REOLA also introduced rules that facilitate the intra-EU mobility of workers as provided for under Title V of the Blue Card Directive; all EU Blue Card workers admitted as such in another EU member state will have the right to move to Spain for that activity with authorisation to reside and work without a visa.¹⁴⁰

The Blue Directive was implemented in Spain in a time period of economic recession and high unemployment, which is reflected in the national legislation: the attraction of

¹³⁶ S. Iglesias Sánchez (2013), “The Transposition of the Blue Card Directive in Spain”, in T. Strik and C. Grütters (eds), *The Blue Card Directive: Central Themes, Problem Issues, and Implementation in Selected Member States*, Oisterwijk: Wolf Legal Publishers, p. 73.

¹³⁷ *Ibid.*, p. 74.

¹³⁸ See Press Release “Wage Structure Survey 2010” of the Instituto Nacional de Estadística of 24 October 2012 (updated 3 December 2012) (www.ine.es/jaxi/menu.do?L=1&type=pcaxis&path=%2Ft22%2Fp133&file=inebase).

¹³⁹ S. Iglesias Sánchez (2013), “The Transposition of the Blue Card Directive in Spain”, in T. Strik and C. Grütters (eds), *The Blue Card Directive: Central Themes, Problem Issues, and Implementation in Selected Member States*, Oisterwijk: Wolf Legal Publishers, p. 74.

¹⁴⁰ M. Fernández and C. Gortázar (2012), Spanish National Report for the project “Integration of High Skilled Third Country Nationals in Europe: A New Proposal for Circular Talent Management”, IEM – COMILLAS PONTIFICAL UNIVERSITY, p. 20.

highly qualified workers was not a priority on the political agenda. The transposition into Spanish legislation is restrictive in some specific aspects.¹⁴¹

5.4 Hungary

The Blue Card Directive was implemented into Hungarian law in June 2011.¹⁴² In 2012, however, it was noted that the executive rules delegated to the government and responsible minister had not been issued.¹⁴³ In general, research indicates that the impact of the transposition of labour immigration law in Hungary remains limited because of the restrictiveness of the public sector for non-nationals, the insecurity of residence of third-country nationals and the inadequacy of the integration measures.¹⁴⁴

The legal status of qualified workers in Hungary is determined by inter alia the following rules: the government may regulate the annual quota of employed third-country nationals including the Blue Card holders. Moreover, the applicant for the Blue Card must provide a written commitment of employment issued by the potential employer that establishes the authorisation. "This commitment shall contain the name of position, the length of employment, the minimum monthly salary of the worker and the required qualification. These conditions must not be changed because the labour contract becomes void if its substance is different from the written commitment. The executive rules will define how to account for the size of salary (over the lawful minimum)."¹⁴⁵ In Hungary a Blue Card applicant must dispose of a salary of at least 1.5 times the average gross annual salary, which amounted to 4,014,000 Hungarian Forint [about €13,372] in 2012.¹⁴⁶

5.5 Sweden

Sweden transposed the Blue Card Directive in 2013 after the Swedish government had received a letter of formal notice and a letter of reasoned opinion from the Commission. On 13 June 2013, the Swedish parliament adopted the respective government bill, which was published on 2 July 2013.¹⁴⁷ The legislation implementing the Blue Card Directive entered into force on 1 August 2013. The Blue Card Directive

¹⁴¹ S. Iglesias Sánchez (2013), "The Transposition of the Blue Card Directive in Spain", in T. Strik and C. Grütters (eds), *The Blue Card Directive: Central Themes, Problem Issues, and Implementation in Selected Member States*, Oisterwijk: Wolf Legal Publishers, pp. 78-79.

¹⁴² 2011 Act CV that entered into force on 26 June 2011.

¹⁴³ J. Tóth (2012), "Hungary", in D. Vanheule (ed.), *International Encyclopedia of Laws: Migration Law*, Alphen aan den Rijn: Kluwer Law International, p. 83 and p. 292.

¹⁴⁴ *Ibid.*, p. 132.

¹⁴⁵ *Ibid.*

¹⁴⁶ Data published by the Hungarian Central Statistical Office, see website: <http://www.ksh.hu/?lang=en>; for 2012 data, see <http://www.ksh.hu/docs/hun/xftp/gyor/let/let21212.pdf>; for data from January to June 2013, see <http://www.ksh.hu/docs/hun/xftp/gyor/let/let21306.pdf>.

¹⁴⁷ Government Bill (prop. 2012/13:148 Genomförande av blåkortsdirektivet).

mainly entails amendments in the Swedish Aliens Act¹⁴⁸ and in the Swedish Aliens Ordinance.¹⁴⁹

The Blue Card scheme in Sweden exists alongside the national labour immigration scheme; a national permit under the observance of the Swedish national collective agreements can be obtained for the validity of three months, whereas the Blue Card requires a work contract of one year.¹⁵⁰

To obtain the Blue Card in Sweden, the third-country migrant must inter alia have:

- adequate and specific competence for the highly qualified employment in form of higher education qualifications (at least three years post-secondary higher education) or five years of professional experience relevant in the profession or sector specified in the employer's job offer;
- a salary of at least 1.5 times the average gross annual salary in Sweden, irrespective of the type of highly qualified employment, amounting to 536,400 Swedish kronor [about €61,640]; the average salary of reference is 357,600 Swedish kronor [about €41,093] in 2012. The bill proposes that the Swedish Migration Board together with the Swedish National Mediation Office (the government body responsible for public statistics on wages and salaries) determines the salary threshold.¹⁵¹

Sweden has chosen not to make use of the option to introduce a lower salary threshold for certain particularly desirable professions as provided for in Article 5(5) of the Blue Card Directive.

6. Key Findings and Policy Suggestions

The EU Blue Card Directive is the first European scheme introduced with the objective to attract highly qualified workers from outside the EU. The Blue Card Directive constitutes one key element for building an EU labour migration policy that aims to be demand-driven, forward-looking and in accordance with the Europe 2020 Strategy. Yet, the governments of Ireland, the UK and Denmark did not wish to participate in the Blue Card Directive. Since an agreement on a horizontal framework that would cover all third-country workers could not be reached, a sectoral approach was pursued from 2005 onwards. This paper explored how the understanding of 'attractiveness' of the EU Blue Card Directive has been shaped by the different EU decision-makers throughout the legislative process and implemented by the member states in the national legal systems. The analysis in this paper leads to the following key findings:

First, it has been shown how the interests of the different institutional actors involved in the EU decision-making process and the associated inter-institutional struggles have considerably compromised the 'attractiveness' of the Blue Card Directive, and thus attainment of its objectives. The detailed analysis of the Council negotiations has demonstrated the dynamics in the decision-making process for various key provisions

¹⁴⁸ Aliens Act (SFS 2005:716).

¹⁴⁹ Aliens Ordinance (SFS 2006:97).

¹⁵⁰ Information obtained from the Swedish Ministry of Justice.

¹⁵¹ See also website of the Swedish Migration Board on the EU Blue Card (www.migrationsverket.se/info/7557_en.html).

of the Blue Card Directive. Arguably, this process has resulted in an approach that has ignored the interests of businesses and the individual immigrants who still may have to face a slow and weighty bureaucracy. Indeed, there is no record that the opinions of other EU institutions, including the EESC and the European Parliament, have been taken into account by the Working Party on Migration and Expulsion during the Council negotiations.¹⁵² This is particularly alarming in view of the compatibility of the Directive with international and regional conventions (see below); the Treaty of Lisbon has brought a change in this respect by having extended the use of the ordinary legislative procedure providing the European Parliament with a stronger position.¹⁵³ There seems to have been a misconception by national governments of who is wanted on the member states' labour markets seeing that only a specific group of people is targeted as evident from the definition of a 'highly qualified' worker in the Blue Card Directive: not only higher education qualifications or professional experience are decisive but also a bulk of admission criteria, including a salary requirement that varies from member state to member state.¹⁵⁴ It is unfortunate that the member states seemed incapable of moving beyond a restrictive, exclusionary approach when formulating the Blue Card Directive even though 'highly skilled' immigrants were supposedly a privileged target group. Rather than welcoming the latter immigrants, the member states' positions appeared to be wary and distrustful.

Second, the Blue Card Directive sets forth minimum standards providing for a common floor, not a common ceiling. The Commission's vision of putting in place one common European admission system for highly qualified third-country workers with the Blue Card Directive was blocked in the Council. The Blue Card Directive has arguably not created common rules and the same level of rights for the migrants targeted: there are many possibilities for member states to introduce derogations. This is, in turn, reflected in the implementation of the Blue Card Directive into the national legal systems. The overview of the transposed Blue Card Directive in selected member states illustrates the divergence of the national rule, thereby making it difficult to identify the common denominator that the Blue Card Directive aimed to establish. The fact that member states could keep their national schemes for highly qualified immigrants is not conducive to – not to say undermine – a genuine European scheme and raises the question of the added value of the Blue Card Directive. While, in comparison, the Family Reunification and the Long-Term Residents' Directives have substantially improved the legal situation of third-country nationals in the EU, it is hard to pinpoint a similar, concrete added value with regard to the Blue Card Directive. The use of the latter Directive remains optional and co-exists with the national schemes in place, including the member states' bilateral conventions with selected third countries; put differently, the Directive does not remedy the potential

¹⁵² Fridriksdóttir, B. (2013), "Negotiations on the Blue Card Directive in the Working Party on Migration and Expulsion", in T. Strik and C. Grütters (eds), *The Blue Card Directive: Central Themes, Problem Issues, and Implementation in Selected Member States*, Oisterwijk: Wolf Legal Publishers, pp. 5-15.

¹⁵³ Ibid., pp. 14-15.

¹⁵⁴ For a contrasting, detailed analysis on the concept of "low-skillness", which is blurred and fuzzy on the EU and Member States' levels as well, see L. Kureková, C., Haita and M. Beblavy (2013), *Being and Becoming Low-Skilled: A Comprehensive Approach to Studying Low-Skillness*, NEUJOBS Working Paper No. 4.3.1, February 2013.

existing competition among such schemes but contributes to creating a complex multi-layered system. Moreover, the duration of the Blue Card issued by the member states may vary significantly, from three months to four years. The Blue Card can thus be regarded as an upgraded national residence and work permit that has effectively increased the variable geometry of highly skilled labour schemes in the EU.

Third, the element of intra-EU mobility was considered as vital from the very beginning for the Blue Card Directive. Instead of two years of legal residence, the member states agreed on an 18-month period after which the Blue Card holder would be entitled to move to a second member state. This facilitated option to move within the EU was a rather unexpected, positive outcome of the Council negotiations. But whether this possibility in fact makes more highly skilled migrant workers opt for the EU as a destination is not clear. In other words, “in order to be mobile within the EU, the Blue Card holder needs to be immobile for quite a while.”¹⁵⁵ The fact that the admission conditions have to be complied with for the second member state as well, which in addition can apply national quota, is unfortunate: intra-EU mobility can easily be hampered.¹⁵⁶ The Commission underscored that one of the EU’s most attractive features compared to its competitors is the possibility of accessing 27 [now 28] labour markets. Indeed, the EU is not perceived as one European labour market today. However, the vision of such a European labour market could be realised in the future – and for this, the promotion of intra-EU mobility plays a fundamental role.

Arguably, these first three findings demonstrate that the three elements that the Commission initially identified as weak points that detract from the EU’s attractiveness compared to other countries (namely 28 different admission systems; the impossibility of moving easily from one country to another for work; and lengthy and cumbersome procedures) are only to a very limited extent remedied by the Blue Card Directive.¹⁵⁷

Fourth, the fact that highly qualified immigrants as defined under the Blue Card Directive enjoy a greater set of rights than other third-country workers raises questions about discrimination. How is this preferential treatment on the basis of higher education qualifications, professional experience and salary level compatible with the general principle of non-discrimination? The cause for differentiation lies in the sectoral approach that the EU pursued after it became clear that no compromise could be found for a horizontal approach in EU labour migration that is applicable to all third-country nationals. An EU immigration code could provide a framework to improve and consolidate EU migration law into one document, and tackle the currently very fragmented framework for EU migration law and policy.

Fifth, the equal treatment for Blue Card holders is granted to nationals of the member state issuing the Blue Card in a number of specific areas. Provisions stipulating

¹⁵⁵ T. De Lange (2013), “The EU Blue Card Directive: A Low Level of Trust in EU Labour Migration Regulation”, in T. Strik and C. Grütters (eds), *The Blue Card Directive: Central Themes, Problem Issues, and Implementation in Selected Member States*, Oisterwijk: Wolf Legal Publishers, pp. 17-25 and p. 22.

¹⁵⁶ Ibid.

¹⁵⁷ See European Commission, Explanatory Memorandum to the Proposal for a Council Directive on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment, COM(2007) 637, 23.10.2007, p. 3.

equality of treatment with regard to tax benefits and social assistance were dropped following an initiative from Germany, the Czech Republic and Hungary.

The evaluation of the implementation of the Blue Card Directive into member states' legal systems is ongoing; the Commission report on the application of the Directive is scheduled for June 2014. The first experiences with the EU Blue Card in the member states differ: while the Blue Card was praised as a "success story" with about 8000 Blue Cards issued since August 2012 (by June 2013) in Germany, and is most likely to become the main permit for highly qualified immigrants, the impact of Blue Card has been much lower in other member states. For instance, in France, where only 50 Blue Cards have been issued in 2012, the adoption of the Directive was assessed as a "political act" sought to improve the image of a "welcoming Europe."¹⁵⁸ In a few years time it will be easier to assess how the legal transposition into member states' systems operates in practice. On the assumption that the Blue Card scheme is maintained, its objective should be highlighted again: the creation of a flexible admission scheme that allows companies and businesses to recruit workers according to their concrete needs. Such a flexible admission scheme may, however, not come at the expense of the rights of the individual – in other words, a highly skilled labour system cannot place economic considerations above the interests and rights of migrants.¹⁵⁹ A Blue Card Directive that factors in business needs and is formulated in conformity with a rights-based approach considering the interests of those individuals to whom the measure applies, would enhance the 'attractiveness' of the Blue Card Directive.¹⁶⁰

This would include enhancing the level of rights for Blue Card Holders in relation to labour market access, equality of treatment, family reunification rights and long-term resident status. In this context, E. Guild pointed out that the Commission proposal was not in line with international standards such as the International Labour Organisation (ILO) Convention No. 97 as well as the Council of Europe Convention on the Legal Status of Migrant Workers.¹⁶¹ This still holds true for the adopted Blue Card Directive. Specifically, the author highlighted that the ILO Convention and the Council of Europe Convention require equal treatment with own nationals in relation to accommodation and social security;¹⁶² that the Council of Europe Convention prohibits binding the

¹⁵⁸ Information obtained by means of interviews held with officials of the German and French Ministries of the Interior.

¹⁵⁹ S. Carrera and M. Formisano (2005), "An EU Approach to Labour Migration – What is the Added Value and the Way Ahead?", CEPS Working Document No. 232, Centre for European Policy Studies, Brussels, p. 14.

¹⁶⁰ On the challenges for a global rights-based EU approach to migration, see S. Carrera, A. Faure Atger, E. Guild and D. Kostakopoulou (2011), "Labour Immigration Policy in the EU: A Renewed Agenda for Europe 2020", CEPS Working Paper No. 240, Centre for European Policy Studies, Brussels, pp. 3-6.

¹⁶¹ E. Guild (2011), "EU Policy on Labour Migration: A First Look at the Commission's Blue Card Initiative", CEPS Policy Brief No. 145, Centre for European Policy Studies, Brussels, pp. 5-6; ILO Convention No. 97 concerning Migration for Employment of 1 July 1949; European Convention on the Legal Status of Migrant Workers CETS No.: 093 of 24 November 1977.

¹⁶² Article 6 of ILO Convention No. 97 and Articles 13 and 18 of the European Convention on the Legal Status of Migrant Workers.

worker to the same employer or the same locality for a period longer than one year¹⁶³ and that Article 12 of the latter Convention does not require sickness insurance for family reunion.¹⁶⁴

Another weakness – thus providing room for improvement – relates to the fact that the Directive does not deal with the EU-wide, rather than national recognition of qualifications: there is no system in place that provides for the evaluation and recognition of qualifications obtained from higher education institutions situated in third countries.¹⁶⁵ Article 14(1)(d) of the Blue Card Directive stipulates equal treatment of Blue-Card holders in comparison to nationals of the member state issuing the Blue Card, as regards: recognition of qualifications *in accordance with the relevant national procedures*.

In March 2013, the Commission put forward a proposal for a Recast Directive on students and researchers, which combines the current two Directives.¹⁶⁶ If the Commission considered a recast of the EU Blue Card Directive in the future, it would be important to mitigate the multiple inconsistencies that the Directive currently displays, while not lowering the existing standards. The Commission could consider introducing guidelines as to how the salary level could be harmonised. Moreover, an EU-wide scheme for highly qualified personnel replacing the member states' national schemes should be taken into consideration. The EU Blue Card Directive is one piece of the puzzle, which should, once put together, constitute an EU labour migration policy that simply serves the purpose for which it was created: attracting third-country nationals with their skills and knowledge to the EU who enrich societies and states alike.

¹⁶³ Article 8 of the European Convention on the Legal Status of Migrant Workers.

¹⁶⁴ E. Guild (2011), "EU Policy on Labour Migration: A First Look at the Commission's Blue Card Initiative", CEPS Policy Brief No. 145, Centre for European Policy Studies, Brussels, pp. 5-6.

¹⁶⁵ Y.K. Gümüs (2012), "EU Blue Card Scheme: The Right Step into the Right Direction?", *European Journal of Migration and Law*, 12: 435, p. 446.

¹⁶⁶ European Commission, Proposal for a Directive of the European Parliament and of the Council on the conditions of entry and residence of third-country-nationals for the purposes of research, studies, pupil exchange, remunerated and unremunerated training, voluntary service and au pairing, COM(2013) 151, 25.3.2013.

ANNEX: Matrix on the Blue Card Directive

	Commission Proposal of 23 October 2007	Positions of the Specified Member States	Adopted Version of the Blue Card Directive of 25 May 2009
Article 2: Definitions	<p>For the purposes of this Directive: [...]</p> <p>(b) "highly qualified employment" means the exercise of genuine and effective work under the direction of someone else for which a person is paid and for which higher education qualifications or at least three years of equivalent professional experience is required;</p>	<p><u>Council of the EU, Outcome of Proceedings – Working Party on Migration and Expulsion, 18 January 2008, document number: 5255/08:</u></p> <p>- [...] the Cion underlined that point (b) has to be seen under the context of employment, insofar as it aims at defining the job and not the third-country nationals concerned [...]</p> <p>- A large number of delegations entered scrutiny reservations on this provision, in particular on the criterion of at least three years of equivalent professional experience. DE, LV and AT drew attention to the risk of abuse in the assessment of the equivalent professional experience.[...] DE suggested the following draft: "highly qualified employment" means the exercise of genuine and effective work under the direction of someone else for which a person is paid and for which either higher education qualifications or both equivalent qualifications and least three years of professional experience is required. [...]SE suggested deleting the word equivalent and introducing two different profiles of highly skilled workers, the first relating to the third-country national who possess higher education qualifications, and the second concerning those who have acquired the required professional experience. [...]</p> <p><u>Council of the EU, Outcome of Proceedings – Working Party on Migration and Expulsion, 19 June 2008, document number: 9666/08:</u></p> <p>- SE suggested the following wording for point b): "highly qualified employment" means the employment of any person who, in the member state concerned, is protected as an employee under national employment law and/or in accordance with the national practice, for which either higher education qualifications or qualified professional experience is required.</p>	<p>For the purposes of this Directive: [...]</p> <p>(b) 'highly qualified employment' means the employment of a person who:</p> <ul style="list-style-type: none"> — in the member state concerned, is protected as an employee under national employment law and/or in accordance with national practice, irrespective of the legal relationship, for the purpose of exercising genuine and effective work for, or under the direction of, someone else, — is paid, and, —has the required adequate and specific competence, as proven by higher professional qualifications;



		<p><u>Council of the EU, Outcome of Proceedings – Working Party on Migration and Expulsion, 8 May 2008, document number: 8249/08:</u></p> <p>- PT suggested amending the wording of this provision as follows: "highly qualified employment" means the exercise of genuine and effective work under the direction of someone else for which a person is paid and for adequate and specific technical competence, resulting from higher education qualifications or at least five years of relevant professional experience is required.</p>	
	<p>(g) "higher education qualification" stands for any degree, diploma or other certificate issued by a competent authority attesting the successful completion of a higher education programme, namely a set of courses provided by an educational establishment recognised as a higher education institution by the State in which it is situated. These qualifications are taken into account, for the purposes of this directive, on condition that the studies needed to acquire them lasted at least three years;</p>	<p><u>Council of the EU, Outcome of Proceedings – Working Party on Migration and Expulsion, 18 January 2008, document number: 5255/08:</u></p> <p>- CZ, EE, EL, ES, FR, HU, IT, MT, LT, LV, NL and AT entered scrutiny reservations on point (h), linked in particular with the concerns expressed in relation with point (b) with regard to the period of professional experience. According to PL, the duration of the period of professional experience should be of at least five years.</p> <p><u>Council of the EU, Outcome of Proceedings – Working Party on Migration and Expulsion, 19 June 2008, document number: 9666/08:</u></p> <p>- In the framework of the examination of this provision, the idea of an aptitude test aimed at assessing the professional experience of the person concerned was also considered, which was not, however supported by the Working Party. [...] NL and SE did not support the increase in the number of years of professional experience from three - as envisaged in the original Cion proposal - to five years.</p> <p>- According to BE, DE, EE, LI, LV and AT, this definition should focus on the educational qualifications and not on the professional experience</p> <p><u>Council of the EU, Outcome of Proceedings – Working Party on Migration and Expulsion, 8 May 2008, document number: 8249/08:</u></p>	<p>(h) 'higher education qualification' means any diploma, certificate or other evidence of formal qualifications issued by a competent authority attesting the successful completion of a post-secondary higher education programme, namely a set of courses provided by an educational establishment recognised as a higher education institution by the State in which it is situated. For the purposes of this Directive, a higher education qualification shall be taken into account, on condition that the studies needed to acquire it lasted at least three years;</p>

		<p>- AT suggested replacing or with and - [...] DE suggested deleting the words or of at least three years of equivalent professional experience.</p> <p><u>Council of the EU, Outcome of Proceedings – Working Party on Migration and Expulsion, 24 July 2008, document number: 11512/08:</u></p> <p>- Recalling the special needs, particularly of the area of the information technology, the Cion stressed the importance of maintaining, even if only as a subsidiary possibility, the criterion of the professional experience. The Pres. also felt that it would be important not to exclude such a possibility, in order to make the proposal more attractive for highly qualified third-country nationals</p>	
	<p>(h) "higher professional qualifications" means qualifications attested by evidence of higher education qualifications or of at least three years of equivalent professional experience; [...]</p>	<p><u>Council of the EU, Outcome of Proceedings – Working Party on Migration and Expulsion, 18 January 2008, document number: 5255/08:</u></p> <p>- [...] concerning the expression recognised as a higher education institution by the State in which it is situated, the Cion pointed out that this definition aims at covering all the post-secondary education, in accordance with the Bologna classification.</p>	<p>(g) 'higher professional qualifications' means qualifications attested by evidence of higher education qualifications or, by way of derogation, when provided for by national law, attested by at least five years of professional experience of a level comparable to higher education qualifications and which is relevant in the profession or sector specified in the work contract or binding job offer;</p>
<p>Article 12: Labour market access</p>	<p>(Article 13 in the Commission proposal) 1. For the first two years of legal residence in the member state concerned as holder of an EU Blue Card, access to the labour market for the person concerned shall be restricted to the exercise of paid employment activities which meet the conditions for admission set out in Articles 5 and 6. Modifications of the terms of the work contract that affect the conditions for admission or changes in the work relationship shall be subject to the prior authorisation in writing of the competent authorities of the member state of residence,</p>	<p><u>Council of the EU, Outcome of Proceedings – Working Party on Migration and Expulsion, 8 May 2008, document number: 8249/08:</u></p> <p>- ES suggested providing for a deadline of one year, rather than two years, in paragraphs 1 and 2...</p> <p>- NL, supported by FR, felt that it should not be necessary to require a prior authorisation, as long as the person concerned continues to fulfil the conditions set by the proposal. For this reason it suggested the following wording: either subject to a prior authorisation or to a notification in writing to the competent authorities of the member state of residence</p> <p><u>Council of the EU, Outcome of Proceedings – Working Party on Migration and Expulsion, 8 April 2008, document number: 7642/08:</u></p>	<p>1. For the first two years of legal employment in the member state concerned as an EU Blue Card holder, access to the labour market for the person concerned shall be restricted to the exercise of paid employment activities which meet the conditions for admission set out in Article 5. After these first two years, member states may grant the persons concerned equal treatment with nationals as regards access to highly qualified employment.</p> <p>2. For the first two years of legal employment in the member state concerned as an EU Blue Card holder, changes in employer shall be subject to the prior authorisation in writing of the competent authorities of the member state of residence, in accordance with national procedures and within the time limits set out</p>

	<p>according to national procedures and within the time limits set out in Article 12(1).</p> <p>2. After the first two years of legal residence in the member state concerned as holder of an EU Blue Card, the person concerned shall enjoy equal treatment with nationals as regards access to highly qualified employment. The holder of the EU Blue Card shall notify changes in his/her work relationship to the competent authorities of the member state of residence, according to national procedures. [...]</p>	<p>- Pointing out that, under Article 14, the persons concerned are allowed to legally reside in the territory of a member state in a situation of temporary unemployment for a period not exceeding three months, DE, supported by AT, suggested replacing the word residence with employment both in paragraph 2 and in the first sentence of paragraph 1</p>	<p>in Article 11(1). Modifications that affect the conditions for admission shall be subject to prior communication or, if provided for by national law, prior authorisation. After these first two years, where the member state concerned does not make use of the possibility provided for in paragraph 1 regarding equal treatment, the person concerned shall, in accordance with national procedures, communicate changes that affect the conditions of Article 5 to the competent authorities of the member state of residence. [...]</p>
<p>Article 14: Equal Treatment</p>	<p>(Article 15 in the Commission proposal)</p> <p>1. Holders of an EU Blue Card shall enjoy equal treatment with nationals at least as regards: [...]</p> <p>(b) freedom of association and affiliation and membership of an organisation representing workers or employers or of any organisation whose members are engaged in a specific occupation, including the benefits conferred by such organisations, without prejudice to the national provisions on public policy and public security;</p> <p>(c) education and vocational training, including study grants in accordance with national law; [...]</p> <p>(f) social assistance as defined by national law;</p> <p>(g) payment of acquired pensions when moving to a third country;</p> <p>(h) tax benefits;</p> <p>(i) access to goods and services and the</p>	<p><u><i>Council of the EU, Outcome of Proceedings – Working Party on Migration and Expulsion, 8 May 2008, document number: 8249/08:</i></u></p> <p>- DE entered a scrutiny reservation on this provision [referring to paragraph 1 point c of the proposal]. Several delegations felt that the notion of study grants to which this provision refers should be clarified...</p> <p>- CZ suggested deleting this provision [referring to paragraph 1 point f of the proposal], for reasons of subsidiarity. HU suggested deleting point (f)</p> <p>- [With regard to paragraph 1 point g of the proposal] SE suggested the following addition: payment of income-based acquired pensions when moving to a third country. CZ, which evoked the principle of subsidiarity, as well as HU and AT, suggested deleting point (g).</p> <p>- [referring to paragraph 1 point (i) of the proposal] DE and FI, supported by AT, suggested limiting the assistance to be provided by employment offices to information and counselling services.</p> <p><u><i>Council of the EU, Outcome of Proceedings – Working Party on Migration and Expulsion, 19 June 2008, document number: 9666/08:</i></u></p>	<p>1. EU Blue Card holders shall enjoy equal treatment with nationals of the member state issuing the Blue Card, as regards: [...]</p> <p>(b) freedom of association and affiliation and membership of an organisation representing workers or employers or of any organisation whose members are engaged in a specific occupation, including the benefits conferred by such organisations, without prejudice to the national provisions on public policy and public security;</p> <p>(c) education and vocational training; [...]</p> <p>(f) without prejudice to existing bilateral agreements, payment of income-related acquired statutory pensions in respect of old age, at the rate applied by virtue of the law of the debtor member state(s) when moving to a third country;</p> <p>(g) access to goods and services and the supply of goods and services made available to the public, including procedures for obtaining housing, as well as information and counselling services afforded by employment offices;</p>

	<p>supply of goods and services made available to the public, including procedures for obtaining housing and the assistance afforded by employment offices; [...]</p> <p>2. member states may restrict the rights conferred under paragraphs 1(c) and (i) in respect to study grants and procedures for obtaining public housing to cases where the holder of the EU Blue Card has been staying or has the right to stay in its territory for at least three years.</p> <p>3. member states may restrict equal treatment as regards social assistance to cases where the holder of the EU Blue Card has been granted EC long-term resident status in accordance with Article 17.</p>	<p>- ES suggested introducing in point (b) a reference to the right to strike. AT opposed the ES suggestion</p> <p>- CZ and DE maintained reservations and NL maintained a scrutiny reservation on point (g) [(h) of the proposal]. DE, supported by CZ, suggested deleting this provision</p> <p>- DE suggested revising the text of paragraph 2 as follows: In relation to Article 1 (c), member states may restrict access to education and vocational training, including study grants in accordance with national law...SE suggested introducing the following new sub-paragraph in paragraph 2: With respect to the provisions in paragraph 1, point (c) the member state concerned may restrict equal treatment to cases where the registered or usual place of business of the EU Blue Card holder, or that of family members for whom he/she claims benefits, lies within the territory of the Member state concerned.</p>	<p>[...]</p> <p>2. With respect to paragraph 1(c) and (g) the member state concerned may restrict equal treatment as regards study and maintenance grants and loans or other grants and loans regarding secondary and higher education and vocational training, and procedures for obtaining housing. With respect to paragraph 1(c): (a) access to university and post-secondary education may be subject to specific prerequisites in accordance with national law; (b) the member state concerned may restrict equal treatment to cases where the registered or usual place of residence of the EU Blue Card holder, or that of the family member for whom benefits are claimed, lies within its territory. [...]</p> <p>4. When the EU Blue Card holder moves to a second member state in accordance with Article 18 and a positive decision on the issuing of an EU Blue Card has not yet been taken, member states may limit equal treatment in the areas listed in paragraph 1, with the exception of 1(b) and (d). If, during this period, member states allow the applicant to work, equal treatment with nationals of the second member state in all areas of paragraph 1 shall be granted.</p>
<p>Article 15: Family Members</p>	<p>(Article 16 in the Commission proposal)</p> <p>1. Council Directive 2003/86/EC shall apply with the derogations laid down in this Article.</p> <p>2. By way of derogation from Articles 3(1) and 8 of Directive 2003/86/EC, family reunification shall not be made dependent on the requirement of the holder of the EU Blue Card having reasonable prospects of obtaining the right of permanent residence</p>	<p><u>Council of the EU, Outcome of Proceedings – Working Party on Migration and Expulsion, 8 May 2008, document number: 8249/08:</u></p> <p>- BE, DE, EE, EL, FI, AT and SE expressed concerns on the deadline provided for in this provision [paragraph 3 of the proposal]. DE, supported by SE, preferred not to set any deadline at all and to simply state that the residence permits of the family members should be issued as soon as possible. According to FI, the residence permits for Blue Card holders and their family members should be issued in the same</p>	<p>1. Directive 2003/86/EC shall apply with the derogations laid down in this Article.</p> <p>2. By way of derogation from Articles 3(1) and 8 of Directive 2003/86/EC, family reunification shall not be made dependent on the requirement of the EU Blue Card holder having reasonable prospects of obtaining the right of permanent residence and having a minimum period of residence.</p> <p>3. By way of derogation from the last subparagraph of Article 4(1) and Article 7(2) of Directive</p>



	<p>and of he/she having a minimum period of residence.</p> <p>3. By way of derogation from Article 5(4), first subparagraph, of Directive 2003/86/EC, residence permits for family members shall be granted at the latest within six months from the date on which the application was lodged.</p> <p>4. By way of derogation from Articles 4(1), last subparagraph, and 7(2) of Directive 2003/86/EC, the integration measures referred to therein may only be applied after the persons concerned have been granted family reunification.</p> <p>5. By way of derogation from Article 14(2) of Directive 2003/86/EC and in respect of access to the labour market, member states shall not apply the time limit of 12 months.</p> <p>6. By way of derogation to Article 15(1) of Directive 2003/86/EC, for the purposes of calculation of the five years of residence required for the acquisition of an autonomous residence permit, residence in different member states may be cumulated.</p> <p>7. If member states have recourse to the option provided for in paragraph 6, the provisions set out in Article 17 in respect of accumulation of periods of residence in different member states by the holder of an EU Blue Card shall apply <i>mutatis mutandis</i>.</p>	<p>timeframe</p> <p>- HU suggested amending the text of paragraph 3 as follows: By way of derogation from Article 5(4), first subparagraph, of Directive 2003/86/EC, the competent authorities of the member states shall give written notification of the decision as soon as possible and in any event no later than residence permits for family members shall be granted at the latest within six months from the date on which the application was lodged</p> <p>- In reply to the remarks from the delegations, the Commission noted that the choice of setting a short deadline from the lodging of the application to the residence permit being issued for family members is a political one, based on the intention to attract highly skilled third-country nationals.</p> <p><u><i>Council of the EU, Outcome of Proceedings – Working Party on Migration and Expulsion, 19 June 2008, document number: 9666/08:</i></u></p> <p>- BE suggested deleting this provision</p> <p>- [Concerning paragraph 3 of the proposal] DE and FI suggested replacing the words at the latest within six months with as soon as possible.</p> <p>- AT, which entered a reservation on paragraph 4 [of the proposal], suggested deleting this provision.</p> <p><u><i>Council of the EU, Outcome of Proceedings – Working Party on Migration and Expulsion, 24 July 2008, document number: 11512/08:</i></u></p> <p>- BE, DE, AT and SE maintained reservations on Article 16. FI pointed out that the Blue Card holder and his/her family members should be admitted at the same time. BE queried the added value of this provision.</p>	<p>2003/86/EC, the integration conditions and measures referred to therein may only be applied after the persons concerned have been granted family reunification.</p> <p>4. By way of derogation from the first subparagraph of Article 5(4) of Directive 2003/86/EC, residence permits for family members shall be granted, where the conditions for family reunification are fulfilled, at the latest within six months from the date on which the application was lodged.</p> <p>4. By way of derogation from the first subparagraph of Article 5(4) of Directive 2003/86/EC, residence permits for family members shall be granted, where the conditions for family reunification are fulfilled, at the latest within six months from the date on which the application was lodged.</p> <p>5. By way of derogation from Article 13(2) and (3) of Directive 2003/86/EC, the duration of validity of the residence permits of family members shall be the same as that of the residence permits issued to the EU Blue Card holder insofar as the period of validity of their travel documents allows it.</p> <p>6. By way of derogation from the second sentence of Article 14(2) of Directive 2003/86/EC, member states shall not apply any time limit in respect of access to the labour market. This paragraph is applicable from 19 December 2011.</p> <p>7. By way of derogation to Article 15(1) of Directive 2003/86/EC, for the purposes of calculation of the five years of residence required for the acquisition of an autonomous residence permit, residence in different member states may be cumulated.</p> <p>8. If member states have recourse to the option provided for in paragraph 7, the provisions set out in Article 16 of this Directive in respect of accumulation of periods of residence in different member states by the EU Blue Card holder shall apply <i>mutatis mutandis</i>.</p>
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<p>Article 16: EC long-term resident status for EU Blue Card holders</p>	<p>(Article 17 in the Commission proposal)</p> <p>1. Directive 2003/109/EC shall apply with the derogations laid down in this Article.</p> <p>2. By way of derogation from Article 4(1) of Directive 2003/109/EC, the holder of an EU Blue Card having made use of the possibility provided for in Article 19 is allowed to cumulate periods of residence in different member states in order to fulfil the requirement concerning the duration of residence, if the following conditions are met:</p> <p>(a) five years of legal and continuous residence within the territory of the Community as holder of an EU Blue Card;</p> <p>(b) legal and continuous residence as holder of an EU Blue Card within the territory of the member state where the application for the long-term resident's EC residence permit is lodged for two years immediately prior to the submission of the relevant application.</p> <p>3. For the purpose of calculating the period of legal and continuous residence in the Community and by way of derogation from Article 4(3), first subparagraph, of Directive 2003/109/EC, periods of absence from the territory of the Community shall not interrupt the period referred to in paragraph 2(a) and shall be taken into account for its calculation if they are shorter than 12 consecutive months and do not exceed in total 16 months within the period referred to in paragraph 2(a). This paragraph shall apply also in cases where the holder of an EU Blue Card has not made use of the possibility provided for in Article 19.</p> <p>4. By way of derogation from Article 9(1)(c)</p>	<p><i>Council of the EU, Outcome of Proceedings – Working Party on Migration and Expulsion, 8 May 2008, document number: 8249/08:</i></p> <p>- Several delegations underlined that the implementation of this provision, which introduces a series of derogations to Directive 2003/109/EC, could give rise to quite a complex system, difficult to be managed by the national administrations, in particular with respect to the issue of absences (paragraph 3). CZ, which felt that introducing these kinds of exceptions does not contribute to the clarity and simplicity of the system in general, considers that once they fulfil the conditions of Directive 2003/109/EC, Blue Card holders should enjoy the same treatment of long-term residents, with respect also to absences. CZ suggested either entirely deleting Article 17 or maintaining paragraphs 1 and 2, while deleting the rest of the provision (and in particular paragraph 5). AT also suggested deleting the entire provision. According to HU, rather than targeting Blue Card holders who have acquired long-term resident status, the provisions of paragraphs 3 and 4 should apply all long-term residents, having regard to the objective of fostering circular migration and also on the basis of the principle of non-discrimination</p> <p>- DE suggested a deadline of six years instead of five years [concerning paragraph 2(a)]</p> <p>- While supporting the objective of fostering circular migration, DE preferred not to derogate to the provisions of Article 4(3) of the long-term residents Directive [...]</p> <p>- Making reference to Article 9(2) of the long-term residents Directive - according to which member states may provide that absences exceeding 12 consecutive months or for specific or exceptional reasons shall not entail withdrawal or loss of status – ES, supported by BE, suggested deleting paragraph 4. The Cion noted that Article 9(2) of the long-term residents Directive is an optional provision, while paragraph 4 is a compulsory one and for this reason it preferred maintaining it.</p> <p><i>Council of the European Union, Outcome of Proceedings – Working Party on Migration and Expulsion, 1 August 2008,</i></p>	<p>1. Directive 2003/109/EC shall apply with the derogations laid down in this Article.</p> <p>2. By way of derogation from Article 4(1) of Directive 2003/109/EC, the EU Blue Card holder having made use of the possibility provided for in Article 18 of this Directive is allowed to cumulate periods of residence in different member states in order to fulfil the requirement concerning the duration of residence, if the following conditions are met:</p> <p>(a) five years of legal and continuous residence within the territory of the Community as an EU Blue Card holder; and</p> <p>(b) legal and continuous residence for two years immediately prior to the submission of the relevant application as an EU Blue Card holder within the territory of the member state where the application for the long-term resident's EC residence permit is lodged.</p> <p>3. For the purpose of calculating the period of legal and continuous residence in the Community and by way of derogation from the first subparagraph of Article 4(3) of Directive 2003/109/EC, periods of absence from the territory of the Community shall not interrupt the period referred to in paragraph 2(a) of this Article if they are shorter than 12 consecutive months and do not exceed in total 18 months within the period referred to in paragraph 2(a) of this Article. This paragraph shall apply also in cases where the EU Blue Card holder has not made use of the possibility provided for in Article 18.</p> <p>4. By way of derogation from Article 9(1)(c) of Directive 2003/109/EC, member states shall extend to 24 consecutive months the period of absence from the territory of the Community which is allowed to an EC long-term resident holder of a long-term residence permit with the remark referred to in Article 17(2) of this Directive and of his family</p>
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	<p>of Directive 2003/109/EC, member states shall extend the period of absence allowed to an EU Blue Card holder and of his/her family members having been granted the EC long-term residence status from the territory of the Community to 24 consecutive months.</p> <p>5. The derogations to Directive 2003/109/EC set out in paragraphs 3 and 4 shall apply only in cases where the third-country national concerned can present evidence that he/she has been absent from the territory of the Community to exercise an economic activity in an employed or self-employed capacity, or to perform a voluntary service, or to study in his/her own country of origin.</p> <p>6. Articles 13, 15 and 16 shall continue to apply, where applicable, after the holder of the EU Blue Card has been issued a residence permit pursuant to Article 18.</p>	<p><u>document number: 12320/08:</u></p> <p>- According to DE the deadline for acquiring long-term resident status should be increased from two to three years [paragraph 2(b)].</p>	<p>members having been granted the EC long-term resident status.</p> <p>5. The derogations to Directive 2003/109/EC set out in paragraphs 3 and 4 of this Article may be restricted to cases where the third-country national concerned can present evidence that he has been absent from the territory of the Community to exercise an economic activity in an employed or self-employed capacity, or to perform a voluntary service, or to study in his own country of origin. 6. Article 14(1)(f) and 15 shall continue to apply for holders of a long-term residence permit with the remark referred to in Article 17(2), where applicable, after the EU Blue Card holder has become an EC long-term resident.</p>
<p>Article 18: Conditions for residence in other Member States</p>	<p>(Article 19 in the Commission proposal)</p> <p>1. After two years of legal residence in the first member state as holder of an EU Blue Card, the person concerned and his/her family members shall be allowed to move to a member state other than the first member state for the purpose of highly qualified employment under the conditions set out in this Article.</p> <p>2. No later than one month after entering the territory of the second member state, the holder of the EU Blue Card shall notify his/her presence to the competent authorities of that member state and present all the documents proving that he/she fulfils the conditions set out in Articles 5 and 6 for the</p>	<p><u>Council of the EU, Outcome of Proceedings – Working Party on Migration and Expulsion, 8 May 2008, document number: 8249/08:</u></p> <p>- SE suggested reducing the deadline to one year...</p> <p><u>Council of the EU, Outcome of Proceedings – Working Party on Migration and Expulsion, 19 June 2008, document number: 9666/08:</u></p> <p>- BE maintained a reservation on this provision. Pointing out that, in its view, the only added value of Article 19 is the possibility for the person concerned to submit an application when he/she is residing in the first member state, BE suggested replacing this provision with a clause along these lines. HU supported the BE position. DE and AT felt that the person concerned should notify his/her intention to move to another member state when he/she is still in the first member</p>	<p>1. After eighteen months of legal residence in the first member state as an EU Blue Card holder, the person concerned and his family members may move to a member state other than the first member state for the purpose of highly qualified employment under the conditions set out in this Article.</p> <p>2. As soon as possible and no later than one month after entering the territory of the second member state, the EU Blue Card holder and/or his employer shall present an application for an EU Blue Card to the competent authority of that member state and present all the documents proving the fulfilment of the conditions set out in Article 5 for the second member state. The second member state may decide, in accordance with national law, not to allow the applicant to work until the positive decision on the</p>

	<p>second member state. [...] 5. In application of this Article, member states may continue to apply volumes of admission as specified in Article 7.</p>	<p>state. - NL did not support the two year deadline. ES suggested replacing the two year deadline with a time-period of one year.</p>	<p>application has been taken by its competent authority. 3. The application may also be presented to the competent authorities of the second member state while the EU Blue Card holder is still residing in the territory of the first member state. [...] 7. In application of this Article, member states may continue to apply volumes of admission as referred to in Article 6.</p>
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