

# Cooperation and competition in highly skilled migration policy in the European Union

Citation for published version (APA):

Bury, P. (2018). *Cooperation and competition in highly skilled migration policy in the European Union: analysing the policy cycle of the Blue Card directive*. [Doctoral Thesis, Maastricht University]. Maastricht University. <https://doi.org/10.26481/dis.20181206pb>

## Document status and date:

Published: 01/01/2018

## DOI:

[10.26481/dis.20181206pb](https://doi.org/10.26481/dis.20181206pb)

## Document Version:

Publisher's PDF, also known as Version of record

## Please check the document version of this publication:

- A submitted manuscript is the version of the article upon submission and before peer-review. There can be important differences between the submitted version and the official published version of record. People interested in the research are advised to contact the author for the final version of the publication, or visit the DOI to the publisher's website.
- The final author version and the galley proof are versions of the publication after peer review.
- The final published version features the final layout of the paper including the volume, issue and page numbers.

[Link to publication](#)

## General rights

Copyright and moral rights for the publications made accessible in the public portal are retained by the authors and/or other copyright owners and it is a condition of accessing publications that users recognise and abide by the legal requirements associated with these rights.

- Users may download and print one copy of any publication from the public portal for the purpose of private study or research.
- You may not further distribute the material or use it for any profit-making activity or commercial gain
- You may freely distribute the URL identifying the publication in the public portal.

If the publication is distributed under the terms of Article 25fa of the Dutch Copyright Act, indicated by the "Taverne" license above, please follow below link for the End User Agreement:

[www.umlib.nl/taverne-license](http://www.umlib.nl/taverne-license)

## Take down policy

If you believe that this document breaches copyright please contact us at:

[repository@maastrichtuniversity.nl](mailto:repository@maastrichtuniversity.nl)

providing details and we will investigate your claim.

# Cooperation and competition in highly skilled migration policy in the European Union

## Analysing the policy cycle of the Blue Card directive

Dissertation

to obtain the degree of Doctor at Maastricht University

by

Paulina Bury née Kość

14 June 2018



**Supervisors:**

**Prof dr Tannelie Blom**

**Prof dr Maarten Vink**

**Assessment committee:**

**Prof dr Esther Versluis (chair)**

**Prof dr Thomas Christiansen**

**Dr Paul Minderhoud, Radboud University**

**Prof dr Christine Neuhold**

**Prof dr Florian Trauner, Vrije Universiteit Brussel**



## Table of Contents

List of Figures.....	9
List of Tables.....	10
List of Boxes.....	10
List of Abbreviations.....	11
1. Chapter I: Introduction.....	13
1.1. The ambitions of the EU in the field of migration policy .....	13
1.2. Research question and scope of the dissertation .....	19
1.3. Scope and definitions .....	20
1.4. State of the art .....	21
1.5. Academic relevance.....	24
1.6. Political and societal relevance .....	26
1.7. Outline of the dissertation .....	27
2. Chapter II: Theory.....	29
2.1. Introduction.....	29
2.2. Theorising EU migration policy.....	29
2.3. Regulatory competition and cooperation .....	33
2.3.1. Regulatory competition.....	33
2.3.2. Regulatory cooperation.....	35
2.4. Coopetition in business and political science.....	35
2.4.1. Coopetition.....	36
2.4.2. Coopetition in business: how does it work?.....	38
2.5. Problems with applying coopetition to international relations .....	41
2.6. Regulatory coopetition applied to the case of immigration policies .....	42
2.7. Coopetition dynamics in EU migration policies.....	43
2.7.1. Assumptions .....	43
2.7.2. The company (becoming an EU member state).....	44
2.7.3. Competitors (becoming other member states and third countries).....	45
2.7.4. Complementors (becoming other member states).....	46
2.7.5. Clients (becoming migrants).....	46
2.7.6. Suppliers (becoming stakeholders) .....	47
2.8. Conclusion .....	48

3.	Chapter III: Methodology .....	51
3.1.	Introduction.....	51
3.2.	Case selection.....	51
3.2.1.	Blue Card as a case .....	51
3.2.2.	Member states selection.....	52
3.3.	Operationalising the analytical framework.....	53
3.3.1.	First step: analysis of the EU Blue Card negotiations.....	54
3.3.2.	Second step: analysis of the transposition of the Blue Card into national law.....	54
3.3.3.	Third step: analysis of the implementation of the Blue Card .....	57
3.4.	Data collection.....	58
3.4.1.	Official Council documents.....	58
3.4.2.	Official Commission documents.....	59
3.4.3.	Official European Parliament documents .....	59
3.4.4.	National legislation and evidence of public debate .....	60
3.4.5.	Statistical data .....	61
3.4.6.	Interviews .....	61
3.5.	A mixed methods analysis.....	62
3.6.	Conclusion .....	62
4.	Chapter IV: The history of EU labour migration policy.....	65
4.1.	Introduction.....	65
4.2.	From cooperation to harmonisation .....	67
4.3.	The first proposal for a directive on labour migration .....	70
4.4.	The Hague Programme.....	72
4.5.	Agenda-setting for the Blue Card Directive Proposal of 2006 .....	73
4.6.	Towards the Treaty of Lisbon .....	74
4.7.	Conclusion .....	75
5.	Chapter V: Proposal and negotiations.....	77
5.1.	Introduction.....	77
5.2.	The proposal of the Commission.....	78
5.3.	Initial reactions.....	80
5.4.	The negotiations in the Council.....	82
5.4.1.	The first steps from the end of 2007.....	83
5.4.2.	The first draft compromise in May 2008 under the Slovenian Presidency and the call for intensification of work.....	95

5.4.3.	The start of the French Presidency.....	103
5.4.4.	Final stages of discussion in the Council .....	117
5.5.	The final outcome of the negotiations: the main differences between the EC input and the output .....	119
5.6.	Conclusion .....	123
6.	Chapter VI: Transposition of the Blue Card directive.....	127
6.1.	Introduction.....	127
6.2.	Transposition and compliance .....	130
6.2.1.	Salary thresholds .....	136
6.2.2.	Minimal length of validity.....	137
6.2.3.	Labour market testing .....	137
6.2.4.	Time of processing.....	138
6.2.5.	Admission quotas .....	138
6.2.6.	Fees.....	139
6.3.	Transposition of the EU Blue Card directive – empirical findings .....	139
6.3.1.	Construction of the openness of transposition index.....	141
6.3.2.	Understanding categorisation of countries.....	146
6.3.3.	Transposition of the Blue Card directive in the Netherlands .....	149
6.3.4.	Transposition of the Blue Card directive in Germany .....	150
6.3.5.	Transposition of the Blue Card directive in Austria.....	152
6.4.	Conclusion .....	153
7.	Chapter VII: Implementation of the EU Blue Card directive .....	155
7.1.	Introduction.....	155
7.2.	Numbers of Blue Cards issued.....	156
7.3.	The Blue Card directive as a pretext for policy change .....	160
7.3.1.	Definitions of highly skilled workers .....	160
7.3.2.	Germany: Replacing the national policy with the Blue Card.....	164
7.3.3.	Austria: Complementing the Blue Card with a national system .....	169
7.3.4.	The Netherlands: Avoiding the Blue Card with preference for the national scheme .	172
7.4.	Conclusion .....	178
8.	Chapter VIII: Conclusions.....	183
8.1.	Research question .....	183
8.2.	Empirical findings in light of the cooptation theory.....	186
8.3.	Innovation and broader academic implications.....	189

8.4.	Limitations and future research possibilities .....	191
9.	Chapter IX: Epilogue: Towards the revision of the Blue Card directive .....	193
9.1.	The new, revised proposal of the Commission .....	194
9.2.	The resistance of national parliaments .....	196
9.3.	The European Parliament's new legislative role .....	198
9.4.	The discussions in the Council.....	199
9.5.	The potential scenarios and implications for the coopetition model .....	200
10.	References.....	203
10.1.	List of interviews.....	203
10.2.	Official and Legal Documents.....	203
10.2.1.	Data sources for the transposition.....	209
10.3.	Scholarly references .....	211

**List of Figures**

Figure 2.1: The coepetition microcosm (“value net”) ..... 36

Figure 2.2: Possible roles taken by organisations ..... 37

Figure 4.1: Timeline of selected events in the history of EU labour migration..... 67

Figure 5.1: The timeline of negotiations ..... 83

Figure 6.1: The Blue Card Index (BCI) constructed by Cerna ..... 131

Figure 6.2: Delay in transposition of the Blue Card directive vs. the values of the Blue Card  
transposition index..... 148

Figure 7.1: Blue Cards as first permits issued and replacing the previously obtained permits between  
2012 and 2015 ..... 157

Figure 7.2: The openness of transposition vs. Blue Cards issued..... 160

## List of Tables

Table 5.1: The most important differences between the proposed and adopted text of the Blue Card directive.....	121
Table 6.1: Conditions of acquisition of the Blue Card directive in 24 EU member states .....	140
Table 6.2: Blue Card Openness of Transposition Index.....	145
Table 7.1: First permits issued for remunerated activities by reason, length of validity and citizenship (EU Blue Cards) [migr_resocc] and EU Blue Cards by type of decision, occupation and citizenship [migr_resbc1] .....	158
Table 7.2: Blue Cards issued as first permits and national permits for highly skilled workers. ....	163
Table 7.3: Immigration to Germany of highly-qualified workers from third countries between 2009 and 2015 (entering in the respective year) .....	165
Table 7.4: Salary levels as required by the BC directive and German law .....	167
Table 7.5: The comparison of required salaries for highly skilled workers in the Netherlands in 2017 .....	174

## List of Boxes

Box 4.1: Article K.1. of the Maastricht Treaty (author's underline) .....	68
Box 4.2: Article 63 of the Amsterdam Treaty .....	69

## List of Abbreviations

<b>AGRI</b>	Agriculture and Fisheries Council
<b>ALDE</b>	Alliance of Liberals and Democrats for Europe
<b>BC</b>	Blue Card
<b>BCI</b>	Blue Card Index
<b>CEDEFOP</b>	European Centre for the Development of Vocational Training
<b>COREPER</b>	Committee of Permanent Representatives
<b>DEVE</b>	Committee on Development
<b>EC</b>	European Communities
<b>EMPL</b>	Committee on Employment and Social Affairs
<b>EPSCO</b>	Employment, Social Policy, Health and Consumer Affairs Council
<b>EP</b>	European Parliament
<b>ETUC</b>	European Trade Union Confederation
<b>EU</b>	European Union
<b>HSI</b>	Highly Skilled Index
<b>HSM</b>	Highly Skilled Migration
<b>HSW</b>	Highly Skilled Workers
<b>ICT</b>	Intra-Corporate Transferees
<b>JHA</b>	Justice and Home Affairs Council
<b>LIBE</b>	Committee on Civil Liberties, Justice and Home Affairs
<b>MEP</b>	Member of the European Parliament
<b>MS</b>	Member State
<b>OECD</b>	Organisation for Economic Cooperation and Development
<b>OMC</b>	Open Method of Coordination
<b>QMV</b>	Qualified Majority Voting
<b>SCIFA</b>	Strategic Committee on Immigration, Frontiers and Asylum
<b>TCN</b>	Third-Country National
<b>TEC</b>	Treaty Establishing the European Community
<b>TEU</b>	Treaty on the European Union
<b>TFEU</b>	Treaty on the Functioning of the European Union
<b>UK</b>	United Kingdom
<b>USA</b>	United States of America
<b>WPME</b>	Working Party Migration and Expulsion



# 1. Chapter I: Introduction

## 1.1. The ambitions of the EU in the field of migration policy

In 2000 the European Union (EU) set itself the objective of becoming “the most competitive and dynamic knowledge-based economy in the world, capable of sustainable economic growth with more and better jobs and greater social cohesion”. The so-called Lisbon strategy, adopted in the Council conclusions (Council of the European Union, 2000), included actions aiming to improve education quality, increase educational attainment and attract highly skilled professionals from outside the EU. Back then, the level of cross-border labour mobility in the EU was as low as 0.29% (OECD, 2012, p. 64). In such conditions, the flows of workers do not adjust according to the forces of supply and demand, and as a result, in some states highly skilled workers have to be sourced from third countries.

In 2012, despite the economic crisis, 36% of EU businesses experienced difficulties in filling high-skilled jobs, while 10% of them had trouble finding unskilled or low-skilled workers (CEDEFOP, 2012, p. 22). According to the European Centre for the Development of Vocational Training (CEDEFOP), in total the EU will need about 80 million highly skilled workers who will have to be distributed across 28 member states by 2020. It is also predicted that demand for highly skilled workers in the EU will grow by 16 million between 2010 and 2020 (CEDEFOP, 2010, p. 63). CEDEFOP also stated that “[e]mployment of those highly qualified across Europe in all occupations in the next 10 years will increase from 32% to 38%” (CEDEFOP, 2016, p. 18) and high-level qualifications are to increase by over 15 million by 2025 (*ibid*, 20). In 2012, as few as 1.6 million third-country nationals (TCNs) working in the EU were in high-skilled occupations (EMN, 2013, 11). Another trend singled out by CEDEFOP is that high-level skills will be required even in the sectors that could have done without them in the past.

In this context, a two-pronged action is required. In order to keep the economy functioning, the EU needs a supply of workers. And in order to be competitive and innovative, it needs to attract highly skilled and extremely well qualified workers. The idea of a common immigration policy was first floated

about 30 years ago as a direct consequence of the Schengen agreement and the subsequent creation of common external borders. At the time, the Commission underlined the need for a common migration policy as was “important to ensure that the migration policies of Member States in relation to non-member countries take into account both common policies and the actions taken at Community level, particularly within the framework of Community labour market policy, in order not to jeopardize the results” (Commission of the European Communities, 1988). Currently, the EU, which is a service- and know-how-based economy faced with a growing demographic deficit and growing international competition, needs a skilled workforce more than ever.

The EU’s first attempt to regulate legal migration came in 2001 in the form of the so-called “horizontal labour migration directive”<sup>1</sup>. It aimed to establish the rules of residence and employment for all kinds of foreign workers. This project, however, was met with member states’ resistance and failed. Subsequently, 24 out of 27 EU member states (Croatia joined the EU after the policy plan for legal migration had been adopted) agreed to participate in a common migration policy that currently is being shaped in the area of highly skilled migration (opt-outs of the UK, Ireland, and Denmark). With very divergent social policies, labour market dynamics and labour laws, the member states established a very ambitious target of speaking with one voice and acting as one to attract highly skilled workers. Amid several policy tools designed to manage legal migration, the most relevant to highly skilled workers (HSW) are the so called Blue Card, the Researchers and the ICT directives. The Blue Card directive<sup>2</sup> was first tabled by the Commission in late 2007 and adopted two years later, after long discussions within and between the EU institutions. The transposition deadline was set for 19 June 2011.

---

<sup>1</sup> 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 economic activities COM/2001/0386 final

<sup>2</sup> 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, Official Journal of the European Union, 18.6.2009.

Yet, even before becoming fully operational, the directive's limited scope received severe criticism and ultimately became only a minor entry channel for HSW to the EU. The criticism came from think-tanks, employer organisations, trade unions and academia alike. Sorroza Blanco, Ette, Gonzalez Enriquez and Parkes explain that "the Blue Card was adopted in relative isolation from other migration measures due to the way that the Commission reacted to the veto of its more comprehensive 2001 proposal. As a result, the EU has ignored the fluid distinctions between categories of migrants, and overestimated the utility of the Blue Card mechanisms – as opposed to, say, education or research policy – in attracting foreign workers" (Sorroza Blanco et al., 2013, p. 5). ETUC, concerned with the preferential treatment of highly skilled migrants and potential discrimination of others, came out in favour of the horizontal approach (including all types of migrant workers, irrespective of their skill levels) as had been proposed by the Commission in 2001 (ETUC, 2007).

The Blue Card directive's limited scope is best illustrated by numbers. In 2012, the first year for which statistics are available, only 3,538 Blue Cards were issued. In 2016 20,947 of them were issued. (Eurostat, 26.04.2018). Set against the around 2 million non-EU citizens who migrated to the EU in 2016 (Eurostat 2018), only 1% of all non-EU migrants arriving in 2016 did so with a Blue Card. These numbers can lead to the conclusion that the Blue Card directive is of negligible importance and, hence, a failed policy instrument. Yet, such a pessimistic conclusion would disregard a new competitive dynamic that the Blue Card directive helped to trigger in the form of parallel national schemes of admission of highly skilled workers, which were put in place in several EU countries. In addition, the directive led to an increased awareness on the part of EU countries on the issue of highly skilled migration. Therefore, it can be stated that the EU-inspired cooperation in the field had actually led to more competition between EU countries.

It is this PhD dissertation's claim that complete harmonisation is by no means the only method of European integration and that cooperation and competition can occur simultaneously and at various levels of interactions between member states.

As Martenczuk stated, “[o]verall, it is clear that neither in Amsterdam nor Lisbon, member states had the will to accept that the conferral of competences to the EU in the field of migration policy would automatically deprive them of all external competences in the area” (Martenczuk, 2014, p. 82). Nevertheless, at the same time the work to unify the policies on the EU level continues. Hence, what is puzzling is that the European Union’s (cooperative) policies coexist with (competitive) policies on the national level. This is currently particularly visible in the case of EU policies for highly qualified migrants. In practice, this means that EU member states still pursue the policy objectives and implement actions which are best for them and not necessarily optimal on the EU level. This is a collective action problem which is made visible by the fact that despite functional pressures to cooperate, there is still a significant degree of competition and no shortage of free-riding between member states. The trend could also be extrapolated to those labour migration policy areas where member states have to compete for scarce resources. Currently, it is highly qualified workers, but, as mentioned at the beginning of this chapter, in the foreseeable future less-skilled migrants will be in ever higher demand. As Parsons, Rojon, Samanani, and Wettach argue, “[h]ost Governments increasingly express a preference for (top-earning) high-skilled immigrants, since they are widely perceived as net contributors to host societies, which in turn makes it easier for politicians to pacify anti-immigrant sentiment among voters. This emphasis masks the fact that both the absolute level and absolute growth in employment in the more affluent countries of the globe will likely occur in low skilled occupations” (Parsons et al., 2014).

Article 67 of the Treaty on Functioning of the European Union (previously: article 61 of the Treaty establishing the European Community) proclaims the establishment of “*an area of freedom, security and justice*”. It is, however, underlined that this should be done with respect for “*different legal systems and traditions of the Member States*”. EU laws aiming to attract high-skilled migrants are shaped by member states that have different preferences and targets depending on their migration histories, economies, etc., and are therefore likely to agree on a lowest common denominator. One could even say that there is a discrepancy in the behaviour of member state governments. On the one

hand they declare their willingness to boost Europe's competitiveness by means of attracting highly skilled workers, and yet they deliberately develop common policies that seem to be unable to yield substantial results.

Due to its importance for national economies, as well as a limited supply of resources, high-skilled migration policy is a subcategory of the legal migration policy area that has the potential for triggering competition between member states for such migrants. Currently, the power in the field is shared between the EU and its member states that are the only ones able to decide on the volumes of migration (as in article 79(5) TFEU, but also before the Treaty of Lisbon entered into force, explicitly mentioned in the Blue Directive). The case for transferring the decision-making power to the Union level in the sensitive field of migration can be called into question. In theory, there are several reasons why EU member states should cooperate. First, the existence of positive cross-border externalities created by the migrants, similar to those observed in the field of research and development, with migrants seen as "circulation of knowledge spillover agents fostering innovation and growth in Europe" (Reiner, 2010, p. 459) and as transmitters of new ideas, techniques, and know-how. Second, the immediate access to all EU labour markets could act as an incentive for high-skilled workers to come to work in Europe. Finally, a common EU entry and residence system could "provide much greater visibility, predictability, and transparency" (von Weizsäcker, 2006, pp. 27-28). These aspects are vital for potential migrants who consider coming to Europe. If they could rely on a uniform system rather than a fragmented patchwork of laws and requirements, their decisions could be more informed and, what is even more important, they could consider working in countries they would have never thought of going to. Such outcomes could only be achieved if member states decided to cooperate and abandon national policies. This, however, is not the case, mostly due to domestic political constraints. Additionally, Meyers (2002, p. 15) indicates that the existence of multilateral cooperation in the area of free labour migration is dependent on the volume of migration – the lower the numbers, the easier it is to cooperate because the potential burden of migrants on the destination countries during crises is smaller. As things stand, member states maintain a strong preference for retaining autonomy in their

labour migration policies and insist on controlling the volumes of immigration, also regarding third-country nationals already present in the EU. According to von Weizsäcker, creation of a common migration policy is politically difficult for a number of reasons, which include: differences in “tradition, outlook and migration experience”, the fact that immigration is a “politically divisive subject within most member states,” and the fact that “there is a natural reluctance to delegate decisions about who is allowed to enter a country and who is not to the European level since such decisions are often seen as one of the defining elements of national sovereignty” (von Weizsäcker, 2008, p. 4).

This PhD dissertation explores the cooperative and competitive dynamics of EU highly skilled migration policy by looking specifically at the Blue Card directive. While the existing literature on EU policies for highly skilled migrants is to a large extent descriptive, this dissertation aims to make a theoretical contribution to the previously developed approaches to the subject through conceptualisation of the dual – cooperative and competitive – character of relations between EU member states. Additionally, the extensive analysis of the policy lifecycle of the Blue Card directive constitutes an empirical contribution to the existing literature.

Cooperation is visible at the stage of negotiations, transposition, and implementation of directives (and regulations), yet its drivers vary from stage to stage. For this reason, it is crucial to analyse all three stages of the policy cycle. Czaika and de Haas make a distinction between four levels of conceptualisation of migration policies: public policy discourses, actual migration policies on paper, policy implementation and policy outcomes (Czaika and de Haas, 2013, p. 494). In this dissertation, three stages of the EU Blue Card lifecycle are analysed to discover the evolution of the positions of EU member states. In that sense, the thesis takes up the three levels as described by Czaika and de Haas, and categorises them as negotiations and their outcome (policy discourse vs actual migration policy on paper, so the text of the directive), transposition of the directive (implementation into the national law), and implementation (policy outcomes, so the numbers of immigrants and the results of the application of the transposed directive). In the negotiation phase, the policy discourse was largely

framed and shaped by the Commission: the EU needs more skilled migrants. However, already at this early stage some member states voiced their concerns and indicated other policy priorities. In the transposition phase, those voices have concretised themselves into divergent national laws. This often results in what Czaika and de Haas identify as a discursive gap between the public discourses and the policies brought to life. In the present research, this kind of “hypocrisy” (where the policy output is different than what was declared before it was reached) is observed as the difference between the positions in the supranational negotiations (in the Council of the EU) and the transposition and implementation phases.

## 1.2. Research question and scope of the dissertation

The puzzle of this dissertation is why EU member states engage in cooperation if they are primarily driven by (competitive) national interests? Or, to put it differently, why did the creation of a common policy for highly skilled migrants lead to the establishment of targeted national policies? This phenomenon has already been spotted by other researchers. ? This phenomenon where the Blue Card has had the unanticipated effect of stimulating individual domestic efforts to attract highly skilled immigrants was already spotted by other researchers (e.g. Sorroza Blanco et al., 2013, p. 6). Yet the political drivers of this paradoxical outcome have remained largely unexplored; or, at least, there is no consensus in the literature on what explains this outcome.

In light of the above, the central question of this research project is, **what are the determinants and the implications of the degree in which EU member states cooperate in creating a common migration policy for highly skilled workers from third countries?** In other words, this thesis looks into the limits and degrees of cooperation taking into account competitive behaviours between member states in the field of EU highly skilled migration policy.

The research question will be dealt with in two steps: the theoretical framework is developed in Chapter 2 and an empirical study follows in Chapters 5 to 7 discussing the decision-making,

transposition, and implementation of the Blue Card directive. This three-stage empirical analysis allows for a comprehensive analysis of the lifecycle of the directive and the changing attitudes of the member states towards it.

### **1.3. Scope and definitions**

The purpose of this section is to establish the understanding of terms used in this dissertation, as well as the extent to which they are going to be researched. In this section three sets of terms are clarified: cooperation and competition, migrants and migration, and highly-skilled or qualified workers.

First of all, it is necessary to define cooperation and competition in the framework of the policy for attracting highly skilled migrants. The basic assumption is that cooperation on the EU level is not a relation of “member states vs. the EU”, but rather “member state vs. member state”, as member states themselves are the EU law-makers struggling with a collective action problem throughout the policy cycle. Further deliberations would answer the question of what form competition can take: for instance, competition can be understood both as lack of cooperation or as an active pursuit of competitive policies. In this regard, opt-outs could be considered an expression of competitive behaviour; however, as proven by Adler-Nissen (2009), in some cases opt-outs do not necessarily imply lack of influence on the EU policy direction. For example, her research proved that Denmark, while presiding over the Council in 2003, had a significant influence on the justice and home affairs agenda leading other member states to agree on Danish proposals (formally non-binding for Denmark).

Second, as regards the use of the words “migrant” and “migration”, these refer to third-country nationals. EU citizens establishing themselves in EU member states other than their own are not considered migrants, but rather EU citizens exercising their right to mobility. As such they fall outside the scope of this thesis. The historical background for this differentiation is described in subchapter 4.2.

Third, a last vital issue to clarify is the use of terminology referring to the ‘skills’ of the workers. In this research, the terms “highly-skilled” and “qualified” are used interchangeably.<sup>3</sup> Generally speaking, these terms refer to persons who possess higher education education of at least 3 years of study, or relevant high level experience. In addition, member states have very diverse definitions of skilled, qualified, and highly qualified migrants, a phenomenon which is further discussed in subchapter 7.3.1.

#### 1.4. State of the art

For a long time, national migration policies across Europe aimed to restrict the flows of people or were related to guest workers schemes. Research on highly skilled migration policy is a relatively new field, even if the particular characteristics of highly-skilled migrants have been observed for many years. Salt, among the first scholars working in this field, as early as 1988 pointed out that “[h]ighly-skilled personnel in one country can become more easily informed about improved conditions elsewhere, and they can take advantage of their marketable skills.” (1988, p. 387) In fact, highly skilled migrants are less reliant on networks already established in countries. At that time, however, highly skilled migrants were mostly considered to be expatriates, who were typically moved within transnational corporations. Initially, after the opening of Eastern Europe for foreign trade and migration, researchers concentrated on the brain drain problem (Salt, 1992, p. 486). With time, more attention was paid to the methods designed to attract skilled workers. Cerna and Czaika (2016, p. 23) identify a number of strands in the highly skilled migration literature. Namely, literature referring to highly skilled migration policies *per se*, to the highly skilled migration policy effectiveness, to the links between highly skilled migration and gender and, finally, to the impact of the economic crisis on highly skilled migration. This PhD dissertation is mainly concerned with the first strand of research named by Cerna and Czaika, and

---

<sup>3</sup> In fact, even EU legislators have not been consistent. The Blue Card directive of 2009/50/EC refers to highly qualified workers, while the new proposal of a revised Blue Card (COM(2016) 378 final) is aimed at highly skilled workers.

it aims to fill the gaps in the literature relating to the EU Blue Card directive and the national policies targeting highly skilled migrants.

In parallel, another relevant strand of research focused on the evolution of EU policy making and the growing EU powers in the field of justice and home affairs. In this aspect, this research project will be supported by the classical EU integration literature and its grand theories, as well as the literature on preference building and interstate bargaining (cf. Moravcsik (1993), Beach (2005), and Pollack (1996, 2001)). In 2009, Menz wrote that bottom-up Europeanisation in the field of asylum and migration is particularly difficult, since the governments “(...) need to be successfully persuaded, given the *de jure* unanimity requirement for decision-making in the Council until 2004 and arguably *de facto* since” (Menz, 2009, p. 7). Some scholars doubt whether EU member states can manage to develop common policies in this domain at all. For instance, Gümüs underlines that “if countries in fact have diverging labour market needs, then it seems that one high skilled immigration programme will be unable to cater effectively for the whole of the common market” (Gümüs, 2010, p. 449; see also Freeman, 1995, p. 881). Others claim that member states have “genuinely wished to cooperate in immigration measures but still showed great reluctance to give up national sovereignty in favour of Community competence. This reluctance was the main cause of the phenomenon of ‘intergovernmental cooperation’, i.e. cooperation between EC Member States outside the scope of the European Community” (Boeles, et al. 2009, p. 41). Betts and Cerna (2011, p. 61) underline that highly skilled migration policy is predominantly a unilateral exercise since these policies can be counted as private goods, unlike refugee protection which has the characteristic of a global public good, or other types of migration which the authors consider to be a club good.

The main gap in migration policy literature until now is that the policies designed to attract migrants are presented in an exclusive way. This means that there is always an assumption that a supranational policy should prevail over the national one, keeping in mind the primacy of EU law. The current research, which recognises that there are cooperative efforts in a mostly competitive environment,

makes use of what business literature (Brandenburger and Nalebuff, 1996) calls ‘coopetition’. The political economy model of coopetition draws on client politics as developed by Freeman (1995), Putnam’s two-level games (1988), and Europeanisation literature. While assuming that EU member states are unitary actors (but see Putnam, 1988, p. 432), the thesis takes into consideration the influence and the national-position shaping role of domestic interest groups, such as employers, trade unions, non-governmental organisations and the electorate. This is done through the distinction between the central actor – in this case, a particular EU member state – and four groups of other actors: customers, suppliers, competitors, and complementors.

From the perspective of this dissertation, the most important works stem from the research carried out by Lucie Cerna (2016, 2018), Christof Roos (2013), Katharina Eisele (2010), Georg Menz (2015), Micheline van Riemsdijk (2011) and Sidonie Paris (2017). Cerna has been researching highly skilled immigration since 2004 (2016, p. vii) and developed the crucial Highly Skilled Immigration (HSI) index, measuring the openness of policies towards highly skilled migrants across the OECD countries. Similarly to the approach adopted here, Cerna produced an index which she enhanced by five detailed case studies. Further to her HSI index, which has become a reference point for other research, in 2018 she developed the Blue Card Index (BCI) covering the 25 EU member states bound by the directive (Cerna, 2018, pp. 96-97). Consequently, she compares the two indices to see what is more restrictive: the Blue Card transposed into national law or national schemes. More information about her indices is contained in subchapter 3.3.2. Cerna points out that more open policies do not necessarily lead to increased numbers of migrants (*ibid*, p. 101). The public policies are, according to her, largely shaped by the employers and the unions. The former tends to push for more open highly skilled migration policies and the latter’s position varies depending on the sector (*ibid*, p. 100).

Interestingly, Paris assumed that “decision-making by national representatives in the Council of ministers and the subsequent implementation of the Blue Card Directive in the different member states” (*ibid*, p. 1027) should not be included in her analysis since they are irrelevant to the problem

she researched, namely the actual role of the Commission in the drafting of the Directive. This logic is not in line with current research, which assumes that it is the member states that have a decisive role in shaping the final version of the Blue Card directive. A similar argument is made in the newer work of Menz, who underlines the entrepreneurial role of the European Commission suggesting that intergovernmentalism is an outdated approach. The OECD has published a number of studies, including “Recruiting Immigrant Workers: Europe 2016”, which, despite being largely descriptive, are very informative and shed light on all EU member states with special regard to the OECD countries. As of now, two authors have published very exhaustive legal books on the Blue Card directive: Herzog-Schmidt on its transposition into the German law (2014) and Posse-Ousmane on the Blue Card directive in relation to other migration directives such as the Single Permit directive and the Long-term Residency directive (2017). Last, but not least, one of the most relevant contributions to the subject of the Blue Card directive is an edited volume by Grütters and Strik (2013). As in the current research, the authors in this volume focus on different stages of the Blue Card directive lifecycle, including the negotiations and transposition in four member states: Bulgaria, Spain, the Netherlands and Germany. They also included some theoretical considerations as well as a more international perspective. Finally, in his contribution, Ryan presents the case of a member state that decided to go alone, namely the United Kingdom. Important research was done by Wind and Adamo (2015) who compared the Blue Card system with the national scheme of attracting qualified migrants as introduced by Denmark. “At first sight one might expect this to put Denmark in fierce competition with its European counterparts. It has however never before been thoroughly investigated how Denmark has managed its own Green Card scheme and whether Denmark from an overall perspective can be said to have been better or worse off outside the EU’s Blue Card.” (Wind and Adamo, 2015, p. 331).

### **1.5. Academic relevance**

Having in mind the research gaps identified in the previous section, this dissertation makes an original contribution to the field of EU migration policy studies in two ways. First of all, the use of the

coopetition theory that derives from business strategy literature is the theoretical novelty of this research project. Secondly, the detailed analysis of the three stages of the lifecycle of the Blue Card directive constitutes the empirical novelty.

The existing theories of international cooperation and competition are much too often presented as contradictory and mutually exclusive. The theoretical framework of this research project builds on the game theory model of coopetition, which is based on the idea that cooperation (as in devising a common policy to attract highly skilled workers) and competition (competing to become more attractive than the counterparts) are not necessarily mutually exclusive. By applying coopetition theory to international relations, this dissertation aims to prove that both can coexist, overlap and concur to reach policy objectives. Coopetition is created thanks to “competitive pressure and collaborative desires” (Luo, 2007, p. 131) and is an effect of growing interdependence between organisations. The adopted theory assumes that the players will engage in different types of relations depending on the conditions they find themselves in. This framework of analysis focusing on cooperation and competition is relevant in the case of highly skilled migration policy, where member states seem caught between the functional need to have a common external migration policy and the domestic constraints of diverging labour market dynamics and sceptical electorates. The EU member states, connected economically and politically, pool their resources together by creating a policy that should incentivise highly skilled workers to move to Europe, but at the same time, they further use the created market opportunities for their own profit.

In terms of empirical innovation, this dissertation aims to fill a gap in the existing literature that has not yet confronted the entire lifecycle of said directive, nor has it undertaken a highly detailed analysis of the negotiation process. The novelty of this research is best seen in its two dimensions: temporal and comparative. The former will help to understand the evolution of member states’ positions throughout the entire lifecycle of the directive. The latter will provide comparative analysis of member states’ behaviour at crucial stages in the law-making process. This type of empirical research is a

natural consequence of the adopted theoretical framework. Coopetition is a game that can bring either win-win results or zero-sum results depending on the current rules of the game, set by the players. Luo explains that “coopetition is (...) bolstered by the need for strategic flexibility” (Luo, 2007, p. 131). In the case of migration policy, strategic flexibility could be understood as the freedom of choosing and promoting one policy over another, depending on the current needs. As the labour market conditions change with time, some countries will prefer to ensure enough leeway to be able to easily switch from the EU to the national policy and vice versa, making the relations between the EU member states very dynamic.

### **1.6. Political and societal relevance**

At a time of growing global competition for scarce, increasingly mobile resources and a demographic challenge facing the EU, an in-depth analysis of factors that contribute to the shaping of the migration policy is more important than ever. The conclusions of this research will help to understand the policy formation process in the field of highly-skilled migration at national and EU levels. As such, this may help to understand and predict the influence of the interstate negotiations on global migrant destinations and the labour markets. This could have practical implications for the functioning of multinational companies and organisations that have a vested interest in professionals’ mobility.

While this thesis deals primarily with the Blue Card directive adopted in 2009, currently, in 2018, negotiations on its new version are ongoing. The new proposal was introduced in 2016, a mere five years after the deadline for transposition of the Blue Card 2009/50/EC. The idea of its reform was introduced in the pitch for the position of the president of the European Parliament of Jean-Claude Juncker: “We will have to look at this again with a fresh pair of eyes to identify ways and means of substantially broadening this initiative.” (Juncker, 2014) And although Juncker did not become the President of the EP, he remained true to his ideas when he became the President of the European Commission. The revision of the Blue Card is one of the priorities of his term as President and the fact

that it was realised so quickly is telling of the hopes regarding the new decision-making process. The findings of this research can be used to assess the extent to which the revised directive will be able to fulfil its objectives.

### **1.7. Outline of the dissertation**

The remainder of this dissertation is composed of three main parts. The first consists of the chapters devoted to the theoretical framework (Chapter 2), methodology (Chapter 3), and a chapter resuming the history of labour migration policies in the European Union (Chapter 4). Most importantly, this part of the PhD thesis introduces and conceptualises the theory of cooptation, which is the basis for further deliberations.

The second, empirical part of the dissertation is contained in three subsequent chapters. In Chapter 5 the proposal and negotiations of the Blue Card directive are analysed, while Chapter 6 examines its transposition, and Chapter 7 considers the implementation of the directive into the national laws. As previously stated, it is important to analyse the three stages in the directive's lifecycle are important to be analysed separately as the behaviour of decision-makers in the member states tends to vary depending on the stage.

The third part includes the last two chapters and references. Chapter 8 is a summary and conclusions drawn from the findings of the PhD project. Finally, Chapter 9 consists of an epilogue with considerations regarding the revision of the Blue Card directive currently being discussed (in 2018), which is the Commission's attempt to make the scheme more attractive and efficient.



## 2. Chapter II: Theory

### 2.1. Introduction

In the following sections, a theoretical framework of cooptation is developed, in order to frame the phenomena that were described in the Introduction. The first two sections discuss regulatory competition and regulatory cooperation, which later are merged into the cooptation theory as used in business literature. The transposition of the cooptation theory into political science is explained after the potential pitfalls of such a move have been discussed. The chapter concludes with a brief summary of the findings regarding the way in which cooptation theory is applied to the case of EU highly skilled migration policy.

### 2.2. Theorising EU migration policy

This dissertation aims to discover the mechanisms behind the behaviour of central actors in EU migration policy formation, which range from cooperative to competitive with the two not being mutually exclusive. As such, the objective of migration policies is to regulate migratory flows, or, as Cerna and Czaika state, to “influence the size and attributes of the migrant workforce relative to the national labour demand” (2016, p. 38). This means that the policy makers might strive to attract migrants or, on the contrary, discourage them from coming. The first case is the instance where highly skilled workers or other types of workers to meet shortage demands are invited to come and work in a given country. The second occurs when “unwanted”<sup>4</sup> migrants intend to enter a country. “Unwanted” is a wide and vague term, due to the fact that, for different countries, cultures, and cases, it can include different groups of people. One of the groups that are often regarded as burdensome are asylum seekers. Countries bound by the Geneva Convention are obliged to process their

---

<sup>4</sup> Menz uses the terms “useful” and “burdensome” migrants (2009, p. vii).

applications and comply with a wide set of rules. Instruments such as the Geneva Convention or the Dublin Regulations were conceived as cooperation tools setting minimal standards for admission of refugees, in order to ensure that they are treated fairly and humanely. This is because, if left to decide, countries would (with some exceptions) probably close their borders and apply very restrictive admission policies to people who are at risk and are fleeing conflict. Such policy competition would entail a race to the bottom; hence the need for cooperation and burden-sharing.

In the case of “wanted” migrants, the benefits of migration are in principle experienced by all actors engaged in the process: the migrants themselves (because they maximise their welfare), their countries of origin (because they export the surplus of unnecessary workers) and the countries of destination (as they can boost their production due to the filling of the labour shortages). Meyers (2002, p. 6) argues however that international migration is asymmetrical because it mainly involves movement from poorer to richer countries, which could lead to brain drain and brain waste. In terms of theory, the regulatory competition model implies that states have to regulate so as to create better environments for citizens and businesses. In reality however, global competition for labour forces is unbalanced – it is not shaped according to the laws of supply and demand but is distorted by such inherent competitive factors as national languages, climate, location, and, finally, regulatory barriers set for potential migrants (cf. Meyers, 2002, p. 15). Additionally, migratory decisions are disproportionate due to inadequate information as different countries provide differing levels of information to prospective immigrants, outlining the conditions of admission, residence and work. More generally, at a global level it is impossible to let the market forces work. Hostilities (such as wars, political and ethnic conflicts or historical rivalries) still divide many countries. This does not allow for any cooperation, let alone relinquishing national policies for the benefits of the invisible hand of the market. “In the case of the international politics of migration, the absence of a coherent and comprehensive multilateral governance framework means that states can competitively act in their own self-interest. Rather than being constrained by any clear institutional framework, powerful states are able to define their migration policies in accordance with their interests. They can admit migrants

they regard as 'good migrants' and reject the migrants they regard as 'bad migrants'. They will determine their migration policies on the basis of reconciling their economic and security interests." (Betts, 2011, pp. 21-22). Hollifield wrote in 1992 that "[l]iberal states have had few incentives to cooperate in controlling migration, because states and employers were able to obtain foreign labor without international cooperation" (Hollifield, 1992, p. 569). In 2011 he stated, however, that "(...) states have little choice but to cooperate in migration governance, even though a truly multilateral migration regime has proven elusive" (2011, p. 5). Meyers (2002, pp. 9 and 17-18) underlines that international cooperation is more likely in the case of skilled migration. In the last decade, while unemployment rates have been increasing, more and more shortages of professionals with very specific skills have started to appear. To keep pace with their competitors, companies have to source such skilled workers from foreign markets. This implies competition, but since many companies operate on wider than national scales, it can also result in cooperation between countries. Highly skilled migrants create value to states through the investment of their skills and experience in industry and research. However, their value is diminished by the fact that despite their qualifications they can be perceived by native citizens as a potential burden.

In the case of migration policy for the highly qualified, under the supposition that workers would follow job offers and move around Europe, the EU could optimise the use of available labour force through the redistribution of workers according to market needs. The absence of physical borders between the Union members also underlines the common interest in efficient entry management of all persons, whether they are workers or not. In turn, full regulatory competition in the cases where full mobility of workers were to be assured (paradoxically, this could only be done through regulatory cooperation) would allow member states to compete for workers within the entire EU, no matter where they originated from. As a logical consequence of what is indicated above, in order for regulatory competition to have the possibility to occur, a certain level of cooperation between member states is necessary. EU member states currently compete for highly qualified migrants, but for benefits of regulatory competition to accrue, migrants would have to be able to freely move between member

states. Moreover, regulatory competition can occur only insofar as markets and information systems are integrated. Hence, a large degree of cooperation between member states is required. Mobility of EU citizens is already possible. Yet, there is no mobility for third-country nationals without long-term resident status within the EU, which precludes pure regulatory competition in their case. This means that negative externalities (Geradin and McCahery, 2004, p. 92) are created because there is no mutual recognition of admission decisions, including decisions regarding the recognition of qualifications. In turn, for a qualified migrant, the decision to move from one EU member state to another is almost as burdensome as coming from outside the EU. This may result in 'lock-ins' of foreign workers who, instead of following the labour market needs, tend to stay in the countries with lower barriers of entry, or at least perceived as being lower.

As member states might not share the same incentives to attract migrants (even those who are highly skilled), it is unreasonable for them to transfer the entire competence to the EU level. This is why the common policy at its current state is weak and member states reserve the rights to have their individual policies. "(...) This reluctance was the main cause of the phenomenon of 'intergovernmental cooperation', i.e. cooperation between EC Member States outside the scope of the European Community" (Boeles et al., 2009, p. 41). Barbou des Places and Oger (2005, pp. 356-357) suggest that member states are not genuinely interested in having a harmonised migration policy. Instead, they would rather take advantage of the opportunity to play the game on two levels of governance and instrumentalise the EU level by introducing their national priorities to EU policies while justifying some changes in the national laws by ascribing them to EU influence.

The EU is the world's biggest, albeit imperfect, single market. It is only logical that it would present itself globally as a coherent and unified labour market in order to attract more highly skilled workers and businesses. The current concentration and consolidation of markets and capital requires that countries be more responsive to the needs of multinational corporations. However, whereas it is in the interest of some states to gather as many high-skilled workers as possible, others might be

reluctant to grant them access to the national labour market. The premise of the EU-wide policy aim, as the European Commission sees it, is to attract as many highly skilled migrants from third-countries as possible. In principle, once a member state adopts a policy for admission of such individuals, it should also be assumed that the aim is to increase their share in the national labour market.

The element of competition in cooperation can lead to the phenomenon of free-riding. In the case of policies for high-skilled migrants, this could be done through non-participation in the common scheme for attracting third-country workers, yet still reaping the benefits of the policy. For instance, a member state that does not attract high-skilled workers from third countries could import them from another member state, once they have proven to be substantially qualified and integrated. It could take advantage of the proximity of newly acquired migrants, but admit them according to their own rules. Otherwise, free-riding could be also conceptualised as adopting a common policy at a certain common denominator level and then not complying with what was agreed upon (e.g. being excessively restrictive with admissions or, on the contrary, overly open).

## **2.3. Regulatory competition and cooperation**

### **2.3.1. Regulatory competition**

The starting point for these theoretical considerations is the regulatory competition theory. It was first introduced by Charles M. Tiebout in his paper 'A Pure Theory of Local Expenditures' (1965). In the context of the federal system of the United States of America, Tiebout developed a model that equates laws with commodities and proposes that consumer-voters move to the region where the combination of public revenue and expenditure would best suit their preferences. The wider the choice of regions (communities), the more fine-tuned the realisation of preferences would be (Tiebout, 1965, p. 418). For Levi-Faur and Jordana, the "departure point of this theory is that governments compete for factors of production – and also to attract habitants – when they regulate" (2004, p. 18).

According to this theory, regulatory competition leads to several policy benefits. First, consumer-voters are given a choice of regulation available in different jurisdictions, which means that they may choose their place of residence on the basis of the most suitable legal framework. Second, due to the fact that the adjustment of legislation is performed on the basis of local conditions, laws are also simplified and controlled locally which, in turn, helps to circumvent regulatory failure. This would happen if the laws agreed upon were not complied with. Moreover, fewer harmful compromise solutions are involved since there is little need to accommodate sometimes contradictory requests of stakeholders on various administrative levels (Baldwin and Cave, 1999, pp. 182-183). As stated by Tiebout, there are a number of conditions necessary for regulatory competition to occur. First, freedom of movement is necessary in order to let the consumer-voters choose the regional system which presents the highest utility for them. Second, perfect information is needed to ensure the transparency and rationality of choice. Third, what is essential is the enforcement of regulations, which means that decisions of consumer-voters are based on a reasonable expectation of the rule of law.

In the case of regulatory competition, it is tempting to assume that the regulators will strive to achieve the best result just for themselves, not taking into consideration public goods and depleting natural resources. However, despite the fact that competition among states is natural, regulatory competition does not have to involve a race to the bottom. For instance, in the case of environmental policy, researchers identified what they called the California effect. This effect can be seen when one regulator pushes for the highest standards, setting models for others to follow. This phenomenon was first observed after the state of California introduced its Clean Air Act in 1970. This caused the “(...) ratcheting upwards of regulatory standards in competing political jurisdictions (...)” (Vogel, 1995, p. 259).

There is, however, a crucial difference that has to be borne in mind. The regulatory competition theory was coined through observation of the states of the United States of America, which form a federal state, thus exposing them to a certain degree of pre-established cooperation. The EU is a specific case

of a group of states that have only (relatively) recently decided to become integrated, so the areas of cooperation are gradually increasing and, now include, for instance, free movement of people and external border controls.

### 2.3.2. Regulatory cooperation

There are various policy areas in which cooperation is necessary for the well-being of citizens and the collective interests of states. In integrated systems such as the EU, policies can be driven both by cooperation and competition, and, as will be demonstrated at a later stage, those do not have to be of an exclusive nature. Many times, states have to cooperate in order to set common standards that stop the race to the bottom and avoid sub-optimal outcomes, such as depletion of resources (public goods). Therefore, despite competition at a certain level, one can observe cooperation. Alexander Betts wrote that the reason for creating multilateral institutions, such as the EU for example, is to “overcome so-called collective action problems” (Betts, 2011, p. 6), which he defines as a disjunction “between a course of action that would be collectively rational” (*idem*) and the separate interests of the states. Betts also underlines that the national interests “define the prospects for mutually beneficial international cooperation” (Betts, 2011, p. 20). In that vein, according to this author, refugee protection can be taken for a public good, for in this case “the benefits of governance are non-excludable and non-rival between states” (Betts and Cerna, 2011, p. 61). Clear rules, established internationally in this regard, make the asylum-seeking process more orderly and fair.

## 2.4. Competition in business and political science

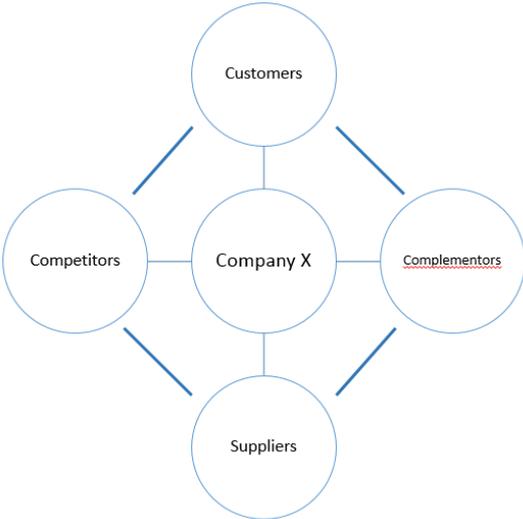
The puzzle underlying this PhD thesis is that neither regulatory competition theory, nor the regulatory cooperation theories can fully explain the patterns of behaviours of EU member states and the fact that the outcome of their interactions will always be a mix of cooperation and competition. Since Castles argues that “narrow and monodisciplinary explanations of migration” (2004, p. 872) should be

replaced by mid-range theories that describe specific problems, the following sections introduce regulatory cooptation as an alternative explanatory tool for highly skilled migration policies in the EU. The main expectation from the cooptation model being applied to highly skilled migration policy is that it will merge the existing theories (notably client politics and two-level games) and serve as an explanatory apparatus for behaviours of EU member states when they create policies to attract such migrants. The stages discussed are the negotiations of the directive and, subsequently, the transposition and the implementation of policies after they have been agreed upon. It can be seen that there is a great deal of cooperation and competition at all of those stages.

### 2.4.1. Cooptation

As mentioned before, the theoretical foundation of this research project, which aims to describe and define the relations between EU member states in the area of highly skilled migration, lies in business literature. It stems from the model of cooptation (a neologism coined from the words cooperation and competition) which entails a dynamic situation whereby the central actor – a company – interacts with its direct environment. This environment comprises other companies, competitors, suppliers, complementors, and customers. This microcosm is presented in Figure 2.1.

Figure 2.1: The cooptation microcosm (“value net”)



Source: Brandenburger and Nalebuff, 1992

This model of cooptation was developed by two American business scholars, Adam M. Brandenburger and Barry J. Nalebuff.<sup>5</sup> It serves to explain how companies react to pressures from external actors and how they adjust their cooperative and competitive strategies to the existing conditions. The cooptation model outlines the conditions for cooperation in competitive settings by adopting the assumption that actors' behaviours are driven by their bargaining power. Bargaining power is a key term in this model and signifies the ability to negotiate more thanks to the (feasibly) created added value. The more value one can create for others, the more bargaining power one has. The potential for competition and cooperation depends therefore on the negotiating position one can assume. Organisations striving for profit maximisation weigh the costs and benefits of sharing information and resources with their competitors and adjust their cooperative and competitive strategies. To present the possible roles taken by organisations, one can use the table designed by Stein (2010, p. 260) on the basis of the typology developed by Luo (2004, p. 205):

Figure 2.2: Possible roles taken by organisations

		cooperation	
		low	high
competition	high	<b>Contender:</b> bargain, challenge, appeasement	<b>Co-opetitor:</b> compromise, influence
	low	<b>Alienator:</b> compliance, circumvention	<b>Partner:</b> Accommodation, co-optation, adaptation

Source: Stein (2010, p. 260)

<sup>5</sup> While there are other models, the decision was made to use the most basic and classical model developed. Other definitions of cooptation include those of: Hamel, Doz and Prahalad who defined it as cooperative relationships among firms that have converging strategic goals, while having diverging competitive goals (Hamel, Doz and Prahalad 1989, p. 135); Lado, Boyd and Hanlon, who base their definition on the concept of "syncretic rent-seeking behaviour" that describes how firms achieve a dynamic balance between competitive and cooperative strategies (Lado, Boyd and Hanlon 1997, p. 111); Dagnino and Padula who stress the interactions between companies that are based on a "partially convergent interest structure" (Padula and Dagnino 2007, p. 37); Luo, in the context of global competition, views cooptation as "the interdependence containing cooperation and competition as two separate yet interrelated continua (...) in the course of winning global reach, expansion and profit" (Luo, 2004, p. 12).

It can be seen that when competition and cooperation are equally high, the players become coopetitors, engaged in compromise and having an influence on their associations. The levels of cooperation and competition depend on the positions assumed by the players.

As stated by Okura (2007, p. 56), the individual actions of actors directly affect the payoffs of others. Alliances may increase one's welfare, but only as long as one remains alert to situations where other players become stronger. In the following section the roles of different actors of the coopetition model will be explained and the possible configurations illustrated by examples.

#### 2.4.2. Coopetition in business: how does it work?

A company, let us call it "Company X", purchases its final product components from another company, say "Company Y", being its supplier. It should be noted in this place that Company Y represents one of many possible suppliers. Company Y can have a decisive influence on the existence and appearance of Company X's products. Firstly, it will have an effect on the availability of product X. Secondly, on its quality and price. One could easily imagine a situation in which a large number of suppliers engage in a battle to win a contract with Company X, or the opposite, where the suppliers are so scarce that Company Y has the upper hand in negotiations with Company X. The first situation could be illustrated by a case where Company X, this time being a publishing house, needs to choose from the offerings of paper producers. Its decision will be probably based on the quality and price, and there will be no shortage of rivals. Most probably the order would also be of large volume, so suppliers might willingly adjust their offer. This often happens with commodities. The opposite scenario would occur where Company X would be an airplane manufacturer looking for a supplier of specialised engine parts. It would probably mean that the producer of those parts could set any price and date of delivery, and Company X would have to agree. This could also work to the advantage of Company X. To use a real-life example, Robert Taylor was a businessman who wanted to market liquid soap in bottles with a pump in the 1980s. The problem was that he could not patent his product and did not want to have any competition before he got a significant share of the market and a became recognised brand.

Therefore, he bought all of the available pump supplies in the US and sold liquid soap worth 25 million dollars. His first mover's advantage was obtained thanks to the limited number of available suppliers. This illustrates how important the changing dynamics of relations between Company X and Company Y are, and the ways they interact between each other.

The power of customers is also pivotal and their relationship with Company X is similar to the relationship between Company X and its suppliers. Depending on the situation on the market, customers can be price takers or givers. In the conditions of supply shortage, they are more reliant on a company and will pay more for a desired good. This happens not only in the case of rare goods (such as unique pieces of art), but for also instance with Apple products which are marketed at premium prices, but as products with distinct features. Otherwise, customers might find themselves in the position of power, dictating to the companies what and at what prices they should offer. As one can see, this can also vitally influence the relations of Company X with its suppliers.

Complementors are those companies that make the product of Company X more valuable to the customers. In other words, their products are indispensable for the success of the product of Company X. This could be for instance the case of the producers of contact lenses who would not exist without the liquid solution suppliers and vice versa. It is important for Company X to support the functioning and development of complementors as its products would lose the market share if they had no compatible components available. For example, once fax machines became extinct, producers of fax paper suffered the same fate. In such cases Company X should look for cooperation opportunities to branch out in the business.

In addition, there are also special ties linking Company X with its competitors depending on the competition on the market. This relationship is fairly straight forward. The more competitors offering a similar product, the less of a premium Company X can ask customers to pay for it. Alternatively, Company X will have to try to differentiate its product from the one of its competitors and make it more attractive to potential buyers. Another possibility is that Company X will start cooperating with

its competitors in order to develop a product for which they can all acquire higher premiums. This is the phenomenon by which companies cooperate in order to make the “cake” bigger and only then divide it into pieces. Being natural competitors, companies often have to cooperate in order to win a bigger market, or finance research and innovation – “[l]ook for complementary opportunities as well as competitive threats” (Brandenburger and Nalebuff, 1996, p. 32). Such circumstances can also provoke free riding. That is, using the fact that other players cooperate (and through this cooperation create a public good available to anyone) in order to gain personal advantage (using the public good created). Free riding in society could be depicted with the example of the majority of a vaccinating themselves, making the environment safe, and the fraction that does not vaccinate. The unvaccinated fraction exploits the safety of the entire population without making the concessions to create this safety. A business example of the same course of action would be a process whereby several cooperating companies create a novel technology, while another one copies it when it is already certain that it will be successful.

In the cooperation model parties are competitive, but when they do consider cooperation a more beneficial (also less costly) option, they reconsider their strategy. This leads to a series of repeated games, in which relations and distribution of power may change each time, because they are subject to new conditions. Due to the number of participants in the policy creation game, it should be considered a network game, and not a simple dyadic relationship. This entails the mode of interactions: in networks cooperation is rarely symmetrical. Some players prefer to be competitive, others cooperative. Moreover, as previously stated, the cooperation setting is a dynamic one, where attitudes can change depending on the environment, leading to different optimal social equilibria. Cooperation is of a continuous character, in that it is the variety of behaviour possibilities in the scope of a negotiated policy.

## 2.5. Problems with applying coopetition to international relations

The coopetition model in business literature had been already criticised for not being “scientific” enough – not having a robust theoretical foundation and structure (Stein, 2010, p. 257). The founding piece by Nalebuff and Brandenburger was indeed written for practitioners and not academics. However, notwithstanding these shortcomings, it is possible to adapt the coopetition model into a mid-range theory of international relations.

As argued previously, regulatory competition theory cannot entirely explain the phenomenon of the highly skilled migration policy formation. On the one hand, it is impossible to remain solely competitive in a situation where an increasing number of policy areas are linked. On the other hand, the cooperation approach (functional spill-overs) does not fully acknowledge the rationale of state sovereignty and the role of national stakeholders in the policy making. Therefore, the coopetition model can serve as a good addition, or even alternative to the existing theories. It engages economic and game theories in political science. Nevertheless, as early as 1995, Moe criticised applying economic theories to politics. He underlined that the distinctive features of politics, that is public authority, political firms, political uncertainty, and political compromise, make it impossible to copy economic explanations (Moe, 1995, p. 147). Indeed, an obvious caveat of the coopetition model is that states, unlike companies, do not produce immediately quantifiable outputs that would help to assess the efficiency of their strategies. They also do not work in isolation, but are dependent on many external rules and regulations or political obligations and budgetary restrictions. Additionally, the assessment of the policies can sometimes only be done a few years later when different persons are in charge and different priorities are set. Moreover, countries are not unitary actors and their decision-making is much more complex than that of even the biggest corporations including not only a wide variety of powerful stakeholders, but also uncertain property rights and the necessity to protect future positions. Moe stressed forcefully that in case of politics, there is “uncertainty about the very basis of all transactions” (Moe, 1995, p. 124) and “ownership is separated from managerial control” (*ibid*).

According to him, “(...) the right to exercise public authority can be thought of as a property right of sorts. These rights are used formally by politicians and informally by the interest groups that influence them to make choices about policy and the structure about government” (*ibid*). However, in liberal democracies, there is no set of individuals that could permanently secure these rights – politicians can easily be “dispossessed” in the next elections. Soroos underlines that states are “complex networks of actors, which commonly have different objectives and may even work at cross purposes (1990, p. 316)”. Furthermore, Moe indicated that the research interests of economists and political scientists are divergent. In his view, the latter are concerned with “hierarchy, control, authority, coordination, cooperation, and efficiency” (Moe, 1995, p. 118). However they could bring in a “new approach, anchored in rational choice and empowered by the rigor and analytical tools of microeconomics” (*ibid*). Having those limitations in mind, it is possible to converge the two viewpoints and apply regulatory cooperation to political science.

## **2.6. Regulatory cooperation applied to the case of immigration policies**

In this dissertation, the EU is considered from the cooperation perspective as it is an interdependent international system with far-reaching policy coordination in many domains. From the worldwide point of view, its specificity stems from the fact that globally there is no arbitration (cf. Soroos, 1990, p. 313), so there is not so much cooperation, which always entails some political costs. The EU is a special situation where the rights of cooperating member states are judicially guaranteed by the Court of Justice of the EU, which reduces the risks borne by the member states. The establishment and then the reinforcement of the European Single Market, followed by the harmonisation of laws that facilitate the movement and retention of workers’ rights, inevitably led to pressures to undertake common action in relation to external actors. Despite the fact that the 28 EU member states are very divergent (linguistically, culturally, politically, by size of their labour markets, territories and economies), there exists their common interest versus those of the rest of the world. In the EU, regulatory cooperation can be understood as decisions to centralise policies at Union level based on the assumption that

centralisation “permits the Community to internalize significant spill-over by redistributing risk across regions” (Geradin and McCahery, 2004, p. 91).

## **2.7. Coopetition dynamics in EU migration policies**

### **2.7.1. Assumptions**

EU member states, as constituent units of the European Union, have a double role of policy-makers and policy-implementors. At present, the European Commission has the power of legislative initiative and the European Parliament acts as the co-legislator in most of the EU legislation. However, the previous institutional set up made the Council the most important institution, where member states were negotiating and agreeing on directives and regulations, often with complete disregard for the other institutions’ advice. This is in line with the liberal intergovernmentalist views of Andrew Moravcsik (1993). In addition, it is also true that the European Commission and the European Parliament have their own agendas, which do not necessarily mirror the priorities of EU member states. However, it is assumed that it is the member states that have the most significant influence on the final shape of directives (especially in the case of the Blue Card directive which was adopted through the consultation procedure) and on the allocation of power in the Union.

The coopetition model explains why and to what degree EU member states cooperate to create a common migration policy for high-skilled workers, acting to ultimately achieve nationally defined policy objectives. It implies balancing cooperation with competition, depending on the distribution of bargaining power. The bargaining power mainly depends on the value that an actor puts into the ‘game’, but also on the individual preferences of the actors. The outcome reflects the balance achieved on the EU level in the light of domestic power struggles and economic contingencies. Coopetition is a nuanced model that depends not only on inter-state bargaining, but takes into account also the domestic bargaining. The main weak point of this approach is that while being very comprehensive, it can be of relatively low parsimony.

Coopetition does not occur only during the formation of preferences and negotiations within the Council. As it will be argued, there is an element of ambivalent cooperation at every stage of EU decision-making. Most significantly, during the negotiations at the intergovernmental level (in the Council), when different national views collide and are balanced between more cooperation and more competition, but also later, during the directive's transposition and implementation phase. Depending on how much leeway is given to member states after the negotiations phase, the transposition may vary from very restrictive to very lenient. The conditions of transposition can show more or less cooperation and competition, based on the degree of unionisation and involvement in the common policy. The transposition, however, is not everything. A coherent implementation in the spirit of the directive will result in an emanation of cooperation.

#### 2.7.2. The company (becoming an EU member state)

The central actor, which in the business coopetition model was a company, in the coopetition model applied to the EU will be a member state. As stated by Borjas (1989, p. 461), "competing host countries make 'migration offers' from which individuals compare and choose". Each country will aim to capture the most attractive migrants; therefore, the competition element will be inherent in this relationship rendering it impossible for EU member states to be solely cooperative in this case. However, when it comes to cooperation, in politics, like in business, what counts is the "first mover's advantage". Menz claims that this might "motivate governmental actors to take adequate steps to ensure that their own propositions provide the basis for future EU regulation" (2009, p. 84). It seems that, according to the coopetition model, also in the case of highly skilled migration, the most likely to be aligned with the EU-level policy are those member states whose added value is the lowest. Added value is a concept used in financial analysis to describe the difference between the cost of sales and the cost of production. In the case of migrants, it can be understood as the difference between the social and political costs that a country has to bear, and the contribution of the migrant to the national economy. When regarded from an inter-state perspective, similarly, added value is the difference between the costs of membership (which can be understood in terms of money transfers to poorer member states

or political problems that are elevated to the EU level) and the benefits (for instance a big market for EU goods and services) that a member state brings in. However, it should be borne in mind that the added value concept is considered in relation to all actors involved in the game. Hence, seemingly economically comparable countries might assume divergent positions in the EU negotiations and in creating national policies. Meyers (2002, p. 52) claims that “bargaining positions and results are not determined by relative military or economic power, but by whether the participants are countries of origin or those of destination”. Despite the fact that EU member states increasingly change into countries of destination, as indicated by Freeman (1995, p. 893), their migration histories are divergent.

### 2.7.3. Competitors (becoming other member states and third countries)

Member states become more connected while various policy areas progressively overlap. In these circumstances, game theory can offer useful insight into relations between member states, because it “is particularly effective when there are many interdependent factors and no decision can be made in isolation from a host of other decisions” (Brandenburger and Nalebuff, 1996, p. 7). Each member state aims to capture the most attractive migrants, therefore the inherent competition element renders it impossible for EU member states to be purely cooperative. All EU member states additionally compete with other countries trying to attract high-skilled migrants, such as USA, Canada or Australia. Member states should be concerned about the policies of their counterparts since “an inflow of labour in one country affects the labour market equilibrium not only in the receiving country but also in other EU countries” (Reiner, 2010, p. 454). As member states might not have the same needs to attract migrants (even the highly skilled), it is unreasonable for them to transfer all their competencies to the EU. As a result, the common policy is weak and member states reserve the right to pursue their own policies.

Some scholars doubt whether EU member states will ever manage to develop common policies in the migration policy domain. For instance, Gümüs (2010, p. 881; see also Freeman, 1995) states that “if countries in fact have diverging labour market needs, then it seems that one high skilled immigration

programme will be unable to cater effectively for the whole of the common market". This significant diversity is seen by Reiner as a strategic weakness in competition with the US. He also notes that "European economies have a more compressed and egalitarian wage structure with smaller wage premiums for the highly skilled" and that "European firms are less technology-intensive and becoming an innovative entrepreneur in Europe remains cumbersome" (Reiner, 2010, p. 451).

#### 2.7.4. Complementors (becoming other member states)

Member states are complementors since they create more value in connection: for certain migrants it is much more attractive to go to Poland when they know that they can exercise freedom of movement within the EU like EU citizens or even later move to Germany or Spain. It can be assumed that some countries would be attractive to migrants on their own, while others benefit from cooperation. Similarly, the complementarity of member states is not linked exclusively to the increased attractiveness of member states as a group. For many reasons, such as the need to satisfy the anti-immigration electorates, changing future demographic predictions or even administrative capacity restrictions, member states cannot absorb all migrants that their economies might need in a given moment. In a way, the cooperation element could equip them with the opportunity for a natural redistribution of workers, depending on the market forces. The issue, therefore, is what kind of concessions should the latter make to convince the former to take part in the common policy and why would they be ready to pay a price for it. It has to be, however, borne in mind that as policies are not created in a vacuum, concessions can also be made in areas that are outside the scope of the present research.

#### 2.7.5. Clients (becoming migrants)

The working assumption of this research project is that highly skilled workers can be conceptualised as clients in the co-competition model (or as consumer-voters in the regulatory competition approach). High-skilled migrants create value for member states by bringing skills to the EU economy. They are,

therefore, desired. However, their value is diminished by the fact that despite their qualifications they can be perceived by EU citizens as a potential burden for the society (in economic or cultural terms) and some governments may be responsive to the sentiments expressed by the *demos*. Interestingly, Favell and Hansen claim that the liberalisation of EU migration policy has not been endorsed by public opinion, which seems “increasingly hostile to ... market-led demands” (Favell, 2002, pp. 593-594). In the cooptation model it is assumed that migrants (here called clients) are types of *homo oeconomicus* which make informed and educated decisions. The economic theory of migration is “based on the behavioural assumption that individuals migrate because it is in their benefit (either in terms of psychic satisfaction or income) to do so” (Borjas, 1989, p. 457).

#### 2.7.6. Suppliers (becoming stakeholders)

The last group of actors in the cooptation model for highly skilled migration – companies, employers, labour unions, and electorates – constitutes the category of suppliers. They feed divergent preferences on the shape of policy into the system and, depending on their position in the country’s economy and politics, and can have more or less bargaining power. In other words, in the cooptation model, the policies are an output to be compared with the product of the producer. Suppliers supply legitimacy and ideas for those policies, which is proven by political support. Therefore, what is ultimately being supplied is political support. For instance, in the countries where trade unions are strong, there might be more reluctance to open labour markets for non-EU workers. Where markets are more liberal, decision making might be more influenced by business representatives pushing for more availability of skilled (or unskilled) workers. This part of the cooptation model relates to the client politics approach, characterised by concentrated benefits and diffused costs, developed by Freeman (2006, p. 229). It pushes policy makers to refine “regulatory requirements and approaches” and adopt “more efficient laws and enhances social welfare” (Geradin and McCahery, 2004, p. 95). Favell and Hansen conclude that immigration to the EU has been generally determined by market concerns and the needs of industry, not really by state control (Favell, 2002, p. 592). As a result, the EU common immigration

policy is dictated by the needs of economic integration and necessitates that states have to give up their discretion in the field (*ibid*, 585, cf. Menz, 2009, p. v). Adopting a more detailed point of view, according to Cerna, variations in high-skilled migration policies can be explained by the coalitions of actors with different preferences mediated by labour market organization and the electoral system' (Cerna, 2009, p. 145). This is further confirmed by Meyers (2002, p. 34) who does, however, mention that the inclusion of the domestic actors in the model only marginally improves the prediction of multilateral cooperation, but decreases its parsimony. Menz (2009), on the other hand, suggests that policy design will depend on the variety of capitalism and the access of non-state actors to governments. He also maintains that "(...) employers will not simply lobby for 'more liberal' policy, but rather the production system in which they are embedded conditions the quality and quantity of labor migration advocated" (*ibid*, p. 8). What is more, he argues that domestic interest groups try to influence governments to set immigration policies on the national level, so that they can be more flexible and more resistant to top-down Europeanization in the future (*ibid*, pp. 15 and 82).

## **2.8. Conclusion**

This chapter has developed an analytical framework based on the overview of the theoretical considerations that are at the crossroads between political science and business literature. As Betts wrote, the formulation of migration policies depends on the maximisation of the economic and security interest that can be best met either by cooperation or competition (Betts, 2011, p. 20). Yet, he also calls for examining the intra-state politics and the interest groups formation.

The coopetition model implies balancing cooperation with competition, depending on the distribution of bargaining power. The bargaining power mainly depends on the value that an actor puts into the 'game', but also on the individual preferences of the actors. The fact of entering the game is also crucial – an issue can be important or not for an actor, which would give them a negotiation advantage in case they decided to take part in the negotiations. The outcome reflects the balance achieved on the EU level in the light of domestic power struggle and economic contingencies. Coopetition is a nuanced

model that depends not only on inter-state bargaining, but takes into account also domestic bargaining. In this research project, it is argued that EU member states present different levels of commitment to the creation of a common migration for highly skilled workers. This commitment is conceptualised as the degree to which member states cooperate.

In the following chapters, these theoretical considerations will be taken into account while analysing the negotiations, transposition and implementation of the EU Blue Card directive 2009/50/EC in the member states bound by it in 2009, with a special view on three case studies: the Netherlands, Germany, and Austria.



## 3. Chapter III: Methodology

### 3.1. Introduction

The cooperative behaviours of member states, who are the main actors in the EU policy formation, as presented in Chapter 2, can be observed at various stages of policy-making. In this dissertation, the specific case of the EU Blue Card directive has been selected as not only is it an innovative tool (on the EU level at least) for attracting migrants, but also because its adoption was preceded by failed attempts to legislate in the field of labour migration. The power struggles that were apparent even before the Blue Card proposal was put forward, continued not only during the negotiations on the directive, but also after the adoption of the directive. The analysis of the different stages requires the use of diverse methods, which include the analysis of the available documents, interviews, and detailed legal analyses of national legislation.

In the next sections, the case selection of the Blue Card directive will be explained in detail and the methods of analysis will be presented and described. Subsequently, the data sources and the method of analysis will be discussed.

### 3.2. Case selection

#### 3.2.1. Blue Card as a case

The origins of this PhD project stem from the comparative political economy approach to migration policy. Using the theoretical framework of cooperation, it aims to analyse the single case of the Blue Card (2009/50/EC) directive in a multi-dimensional way. The selected case is the first successful attempt of the EU to legislate in the area of legal migration after the remarkable failure of the horizontal labour migration directive proposal of 2001 (further discussed in Section 4.2.1). Despite the fact that the legislative conditions have changed since the adoption of the directive, the case is still very interesting as it can serve as a starting point in explaining the variance in policy output in the area

of legal migration. In order to demonstrate how political actors use institutional resources to achieve their political aims, the following path has been taken in this dissertation: first, the positions of the member states during the negotiations are being analysed; next, the timeliness and correctness of the transposition are assessed, and finally, the implementation and its effectiveness are presented. The main foundation for this method is the conviction that EU member states can show different degrees of cooperation and competition at different stages of EU policy making. The behaviours of the principal actors (i.e. member states) are determined not only by the internal and external conditions, but also by the influence of the other players in the game. As the situation is dynamic, there is no assumption that the positions of individual actors have to be constant, nor that they will be equally strong during the examined time-period.

The Blue Card directive aims to attract highly skilled migrants and the analysis focuses on the elements of the national immigration policies targeting highly skilled migrants. Particular attention has to be paid to the fact that the directive was adopted under pre-Lisbon conditions, meaning that unanimity between member states was required, while the role of the European Parliament was minimal. In the current process of revision of the Blue Card (see sections 9.1 to 9.5), the legal framework is the ordinary legislative procedure (hence qualified majority voting in the Council and co-decisive role of the EP). The trilogues, enshrined in this procedure, dilute the preferences of individual member states, so a similar analysis for the ongoing negotiations would certainly bring different outcomes.

### 3.2.2. Member states selection

This study attempts a bird's-eye view on the use of the Blue Card directive in the member states that adopted it (with the exception of the three opt-out member states and Croatia, which joined the EU after the decision-making process was finished). Special attention is paid to the positions of Germany, Austria and the Netherlands, which are the three countries where the use of the Blue Card directive is the most varied, under similar socio-economic conditions. In addition, as Menz mentions, “[t]he directive also temporarily coincides with the genesis of national labour migration initiatives in the

three countries that had previously been most adamantly opposed to Commission activity in this field, namely Austria, Germany and the Netherlands” (2015, pp. 564-565), which makes those countries even more interesting to look at.

These EU member states were chosen as they have broadly similar internal characteristics such as employment rates (in all three between 74.8% and 78.7%<sup>6</sup>), unemployment rates (between 4.1% and 6.2% in 2016, according to Eurostat), social policies, industry needs (much higher than EU-average R and D expenses in all three countries), demographic conditions (GDP per capita of about 124 in PPS in all three) and undeniable presence of far-right parties on the political scene. Notwithstanding all these similarities, they represent different strategies towards the Blue Card directive. Austria complemented the Blue Card with its own national system (the Red-White-Red Card), introduced at the same time. The Netherlands transposed the Blue Card directive alongside with the existing national system (the *Kennismigrantenregeling*) but makes little use of the Blue Card. Germany completely changed its approach to legal migration, becoming much more open than ever before. Crucially, it offers EU Blue Cards instead of national permits, which were issued to migrants present in the country previously.

### 3.3. Operationalising the analytical framework

The stepping stone for this analysis is the operationalisation of cooperative and competitive behaviours during the Blue Card directive negotiations, transposition and implementation. Cooperation is herewith understood as behaviours leading to “more EU”, so more aligned and coherent policies. A cooperative behaviour would be a timely transposition, but also actual implementation. In contrast, competition would appear where member states showed more consideration of their own interests rather than those of the EU as a whole. Obviously, regardless of what happens, the member states have preference for the wellbeing of their own citizens; however, this can be done with or without harm for the common good. In the following sub-sections, it will be

---

<sup>6</sup> Source: Eurostat (online data code: lfsi\_emp\_a), 2016

explained how cooperative and competitive behaviours, such as putting preference on national entry schemes or negotiating on a strict agenda, are represented at different stages of the directive's lifecycle.

### 3.3.1. First step: analysis of the EU Blue Card negotiations

First, the cooperative and competitive behaviours can be observed during the negotiations, when representatives of the governments of the EU member states present their national positions to agree on the final shape of a directive. It is herewith assumed that cooperative behaviours lead to a more unionised directive, which means more centralised coordination. On the contrary, competitive behaviours mean that more power should be retained on the national level, which could lead to a more fragmented EU, legally speaking. In most cases, the result would be mixed, that is with some elements of cooperation and some of competition – that is – cooptation. This phenomenon is described in Chapter 5.

### 3.3.2. Second step: analysis of the transposition of the Blue Card into national law

The next stage where one can observe the abovementioned dichotomy is the stage of directive transposition. Depending on the leeway prescribed in the directive, member states can adapt the directive to their needs, making the transposition more or less restrictive. The timeliness of the transposition is also of essence. This occurrence is presented in Chapter 6.

#### 3.3.2.1. *Openness of Transposition Index*

In order to get an overview of the Blue Card transposition measures it was decided to create an openness of transposition index. The leeway given to the member states as regards the Blue Card directive's transposition is considerable – to the point that this legal instrument cannot be perceived by an unbiased observer as a uniform EU scheme. Therefore, it was decided that in order to assess the real outcome of the directive negotiations, the elements of the directive would have to be quantified

and presented in a way that would allow for systematic comparison. As such, the openness of transposition index was constructed.

It is an index of openness rather than restrictiveness, since the aim of the Blue Card directive is to attract highly skilled migrants. It was therefore decided that in such a perspective considering national policies as restrictive would be inappropriate (although in some cases it is a fact). The index was constructed according to the guidelines of Bjerre et al. (2015) on how to construct indices measuring immigration policies. In line with their argument, the author “will refer to legal regulations as policy outputs while implementation will be regarded as a separate aspect of policy” (2015, p. 560). As this research refers to an EU directive, it was necessary to take into account the fact that in EU legislation there are two policy outputs to be considered, namely the text of the negotiated directive and the national transposition of it. Therefore, the policy outputs were split into two parts and will be considered separately. The index is created for transposition since this is the stage where most of the variance occurs and on which the national implementation depends to a large extent. It has to be borne in mind that this kind of index is highly specific to the policy field to which it applies, namely highly skilled migration in EU countries, or even just the Blue Card directive. However, it can be helpful when analysing the changes in national laws (or the transposition of the revised directive in the future) so that one can see the evolution of attitudes of the national legislators.

With regard to high-skilled migration indexing, the main existing work is by Cerna (2008). Cerna’s two versions of the High-Skilled Index (HSI) (from 2008 and 2012) are limited to the science and technology sectors of high-skilled migration and draw on six variables divided into two groups: admission mechanisms (numerical caps, labour market test, employer portability) and work rights (labour protection, permanency rights, spouse’s work rights) (Cerna, 2008, p. 13). In 2018, Cerna also devised the Blue Card Index (BCI), which is composed of the same variables as the HSI yet enhanced by two: initial permit duration and processing times (2018, p. 100). Having constructed two indices, she compared the results of the two in order to assess whether national policies are more restrictive than

the Blue Card directive as transposed in the analysed member states (*ibid*, p. 99). Cerna assigns each of the categories 0 to 3 points, from the most open to the most restrictive, applying the equal weighting principle. The most restrictive country receives 100 points. The data presented by Cerna were also gathered in 2014 (in November).

The index in this dissertation is composed of six factors. These are: the required salary level in relation to the national gross average, the existence of labour market tests, the maximum length of permit (i.e. before possible renewal), the time of processing of the Blue Card application, the legal possibility of setting entry quotas and the fees charged for the Blue Cards in relation to the salaries a migrant is obliged to attain. There is a range of other characteristics of the Blue Card directive's modes of transposition that could have been taken into account; however, either they relate to administrative details or the variation observed in them is not sufficient to constitute a case for national particularities. The rights of migrants and their family members were also excluded from the analysis. Moreover, additional provisions that make the schemes more or less attractive to the potential migrants were also excluded. This last category includes, for instance, the administrative requirements, as well as additional incentives for migrants who, for example, speak the national language. Since there is no framework which would limit such additional provisions, the variance observed here is very wide and a comparative aggregated analysis would be a futile exercise. As can be seen, the overlap between current openness of transposition index and Cerna's BCI relates to four categories: numerical quota, labour market testing, length of validity of the permit, and processing times. As a result of the different variables choice, both indices lead to different findings.

The chapter is based on the data collected from official documents of member states, their relevant ministry websites, Eurostat, the EU immigration portal, EMN reports and other sources, such as national statistics, where necessary. The data refer to 2014, with footnotes on the changes that appeared in the later years. Since the analysis was based primarily on basic legislation and not

executive acts, it was not in all cases possible to determine whether a member state decided to introduce explicit provisions on some issues.

Where no mention of labour market testing was found, it is assumed that such provisions do not exist. Similarly, where there is no mention of the time required for application processing, it is anticipated that the member state concerned implies the maximum processing time as set by the directive (90 days). Moreover, for the sake of comparability, where the values of this category are presented in the national acts in units different than days, it is assumed that a week equals 7 days and a month 30 days. Nevertheless, the missing data were cross-validated with data collected by other researchers and institutions, such as the studies of the OECD, EMN.

The methodology of coding the data included in the index is presented in detail in Chapter 6.

### 3.3.3. Third step: analysis of the implementation of the Blue Card

It is important to examine the implementation after the negotiations and transposition of the directive since member states can show their commitment to a common policy by making a compliant implementation. At this stage, what counts is the effective use of the directive, as well as possible overlap with national legislation. Indeed, the mere analysis of the transposition of the Blue Card directive would not give the full picture of the openness of the policies adopted in particular member states. Therefore, it is also necessary to analyse the implementation. The transposition measures can give an impression of being relatively open, but the lack of implementation can lead to more restrictiveness than in a member state with a much harsher transposition. In the typology developed by Bjerre et al., the implementation of immigration legislation, is considered to be an outcome of the policy. The authors invoke the work of Jeannette Money who, in 1999, identified that one of the problems that occur when determining the reasons for policy is “the difference between the issuance of regulations (and ultimately legislation) and their implementation” (Money, 1999, p. 105) and indicated that the numbers of incoming migrants could be telling of the restrictiveness of immigration policy. As recommended by this researcher, the numbers of incoming migrants are herewith

considered in the chapter devoted to implementation. In subchapter 7.4 they are also juxtaposed against the openness of transposition index, which allows the readers to observe the relation between the output of the legislation (national measures transposing the directive) and its outcome. Furthermore, Bjerre et al. give two reasons for studying not only the legislation, but also its implementation. According to them, the study of implementation “is crucial to be able to isolate the effects of outputs on outcomes” (2wsfz2015, p. 561). Indeed, in this dissertation it is of utmost importance to track the entire life-cycle of the Blue Card directive in order to answer the research question: what drives cooperation and competition between EU member states in the field of highly skilled migration policy?

The study of the implementation was done by assessing the numbers of permits issued and the relation of the Blue Card directive and the national schemes that can be present in member states. The latter was conducted by both comparing the numbers of permits issued in different categories and the content of the provisions aimed at attracting a highly qualified workforce from third countries. The developments in this field are described in Chapter 7.

### **3.4. Data collection**

#### **3.4.1. Official Council documents**

The analysis was based on the Council documents that were made publicly available at the time of the study. Since all documents were systematically released to the public five years after the adoption of the Directive, there was no need to apply for these documents individually. The process of revision of the Blue Card was ongoing during the drafting of this thesis, so the most interesting documents were still restricted. Therefore, according to the exception stated in article 4(3) of Regulation 1049/2001, the documents unavailable to the public and relating to the ongoing decision-making process (in particular being part of the deliberations) would not be disclosed. This is also the reason why at the current moment (first semester of 2018), the documents relating to the current negotiations could not be analysed and presented herewith.

The Council documents include the outcomes of proceedings of the Working Party Migration and Expulsion, the agendas of COREPER (Part 2) and Councils, as well as the press releases relating to them. The documents were identified using the Council document database by means of the interinstitutional file number 2007/0228 (CNS), which should be attributed to all documents relating to the procedure. Since this is not always the case, additional search terms were used such as "Blue Card" and "highly qualified". The referencing to the Council documents is done by their standard numbers throughout the dissertation in order to ensure clarity of sources. The standard number is given in the Council to all documents that relate to a dossier. They bear a type of document code "ST", which is usually dropped when they are being cited (this is the practice within the Council). Therefore, a standard number would usually take the shape of four to six digits, followed by a slash and the last two last digits of the document's year, e.g. 14576/08. All official documents used in the dissertation are listed in section 10.2.

#### 3.4.2. Official Commission documents

The Commission's official documents included in the analysis are the proposals for directives (the proposal of 2007 and the new revised proposal 2016), the accompanying Commission staff working documents (including impact assessments), reports on implementation of EU law and other similar documents. Additionally, for the last chapter of this thesis, the documents stemming from the Expert Group on Economic Migration meetings, as well as the European Commission Strategic Plan for 2016-2020 were taken into account. Other useful sources of information were the European Migration Network Ad-Hoc Queries and Reports.

#### 3.4.3. Official European Parliament documents

The European Parliament did not have a major role in the decision-making during the Blue Card negotiations of 2006-08. However, there are roll-call votes from the plenary voting (the evidence of who voted and how, even if in the end the adopted report had little impact on the final shape of the

directive) and the report prepared by the rapporteur Ewa Klamt. The plenary discussion of the report was also examined.

As far as the European Parliament is concerned, additionally, the author of this thesis assisted at several EP events that took place in 2017 and where members of the European Parliament could voice their opinions. These included a panel discussion “Migration Talks #3: The Global Race for Talents” organised by Uphold Europe and Brando Benifei, MEP, that took place on 10 May 2017 and another panel discussion entitled “Migration of skilled workers: the revision of the EU Blue Card Directive” organised by the European Movement on 7 March 2017. Although these events were not directly linked to policy making, they made it possible to become familiar with the positions of various MEPs (including the rapporteurs and shadow rapporteurs like Jean Lambert and Brando Benifei) on the revised Blue Card and the challenges of migration into the EU in general.

#### 3.4.4. National legislation and evidence of public debate

National transposition measures of the 24 researched member states were traced through the Eur-Lex database. This database is fed by the member states themselves; therefore, its reliability can be uncertain, when it comes to communicating all transposition measures and their updates, and not just their selection for instance. Most of the national legislation is drafted in the original languages, therefore where necessary, a Google translation was done, using translations between Germanic languages (e.g. Swedish to English), Romance languages (e.g. Romanian to French) and Slavic languages (e.g. Bulgarian to Polish), in order to ensure the highest quality of the automated translation. As regards cross-validation, the results were later compared with the summarised information available on the official government websites and forms (such as Blue Card applications) in English, as well as in other academic sources that already dealt with the challenges of the Blue Card transposition. Finally, where in doubt, the researcher consulted native speakers to shed light on the particularly unclear pieces of text in order to complete the missing data. In particular, the Lithuanian Ministry of Interior was consulted on 29 May 2013 in order to obtain more information on the Lithuanian transposition

measures. Where it was possible, acts derived from basic legislation were also taken into account. In the most interesting cases, national debate in the parliaments or the news was followed. This was, in particular, the case of debates conducted in Polish, English, French, Spanish, and German.

Thanks to the use of the IPEX database, linked to the European Parliament's legislative observatory, the positions of the national parliaments relating to the revised proposal of the Blue Card (reasoned opinions on subsidiarity) could be established (if they had an opinion). These were also followed up with analysis of the available evidence from the national debate.

#### 3.4.5. Statistical data

The statistical data were accessed predominantly from the Eurostat database and the national statistical databases where necessary. The Eurostat databases that were mainly used were "EU Blue cards" (migr\_resbcard) and "EU Blue Cards by type of decision, occupation and citizenship" (migr\_resbc1). There is a discrepancy in the data provided by Eurostat in two databases: migr\_resbc1 and migr\_resocc. Eurostat explained in an email exchange (on file with the author) that data on EU Blue Cards were collected first in the migr\_resocc table for statistics in 2011. Only afterwards (in 2012), a separate data collection on EU Blue Cards was implemented: migr\_resbc1, migr\_resbc2, and migr\_resbc3. Migr\_resocc only covers first permits issued to newcomers, while migr\_resbc1, migr\_resbc2 and migr\_resbc3 include all Blue Cards. The problems appearing from the incoherent data collection are further explained in section 7.2 in the chapter on the Blue Card implementation. The data on family members was not taken into consideration. OECD data were also considered, but only for the sake of comparison when necessary.

#### 3.4.6. Interviews

The five interviews cited in the thesis were held between 2012 and 2017 with representatives of member states (the Netherlands and Austria), as well as the interest groups from those countries (employers' organisations, trade unions, visa brokers). In the case of Germany, the response rate was very low – with responses either non-existent or negative. Another set of interviews and informal

conversations were completed with officials of EU institutions, namely the Council and the Commission. Additional evidence was collected at events held in the European Parliament where the MEPs in charge of the revision of the EU Blue Card were speaking publicly.

### **3.5. A mixed methods analysis**

As was presented in Chapter 2, it is not only important to observe how EU member states negotiate, but also what the consequences of their negotiations are, i.e. the transposition and implementation. Therefore, the empirical study included in this dissertation is based on causal process-observations – of the context, processes and mechanisms, which involved process tracing within the case study of the Blue Card (Bennett and Checkel, 2014, p. 8). In this process tracing exercise, an in-depth study using official documents of the European Commission, European Parliament, and the Council of the EU was undertaken. Bennett and Checkel instruct that process tracing can be done through a combination of induction and deduction depending on the possessed knowledge and extant theories (Bennett and Checkel, 2014, pp. 17-18). In this case, the cooperation theory serves as a heuristic device to conduct theoretically informed empirical research. The document analysis was enhanced by interviews that were conducted when necessary and possible in order to obtain more information. Subsequently, on the basis of the outcomes of the comprehensive comparative analysis of 24 EU member states involved in the Blue Card negotiations, three case studies were selected: Austria, the Netherlands, and Germany. The empirical analysis serves to illustrate under which conditions EU member states cooperate and compete in the field of highly skilled migration policy.

### **3.6. Conclusion**

A holistic analysis of an EU directive requires looking into its negotiations, transposition and implementation in order to be able to draw conclusions on the role of this piece of legislation. As each of those stages in the directive's lifecycle are different, they also require an adapted methodology that will address their specificity. The study of negotiations primarily involves an analysis of the documents produced by EU institutions (the Commission, Parliament, and the Council; also to a lesser extent the

two advisory Committees). The study of the transposition, in turn, entails a study of national legislation, which can take different forms in all member states bound by the directive, not to mention several languages. Finally, the study of the implementation needs another set of tools, such as statistical databases. This chapter presented the methodology proposed in order to fully assess the state of play in the Blue Card directive. With three stages in the directive's lifecycle, the attitudes of the member states can change in time, making it possible to have drastically different outcomes in different moments of policy creation and execution.

The next chapter gives an overview of the history of the common EU policy for labour migration and is followed by the chapters presenting the aforementioned three stages of the directive's lifecycle.



## 4. Chapter IV: The history of EU labour migration policy

### 4.1. Introduction

In 2006, the then MEP Ewa Klamt, penned the following in the introduction to a book by Ioannis M. Varvitsiotis (another MEP) entitled “Politique d’immigration en Europe”:

*« Petit à petit, les mesures prises dans différents domaines vont engendrer ce que, même dans leurs rêves les plus hardis, les pères fondateurs de l’Union européenne n’auraient jamais eu l’audace d’imaginer : une politique commune en matière d’immigration »<sup>7</sup> (Varvitsiotis, 2006, p. 9)*

Indeed, a decade later the EU is closer to a complete EU migration policy than ever. However, the road to a common policy remains long and winding. The beginnings of the EU migration policy date back, in fact, to the establishment of the principle of free movement of workers within the European Economic Community. This kind of liberty was unprecedented on a continent that barely a decade before had been torn apart by wars. In 1957, the Treaty of Rome envisaged that workers (economic stakeholders) would be able to freely move within the common market created by six member states. It was a part of the larger concept of free circulation of people, services and capital that would be possible after the establishment of the European Economic Community. The Treaty of Rome put the emphasis on non-discrimination of workers from other member states (article 48(2)), their right of residence on the territory where they were employed (article 48(3)), and the transferability of social rights (article 51). At the time, there was no mention that any particular rights should be given to citizens of other European countries, let alone people from other continents (Boeles et al., 2014, p. 155).

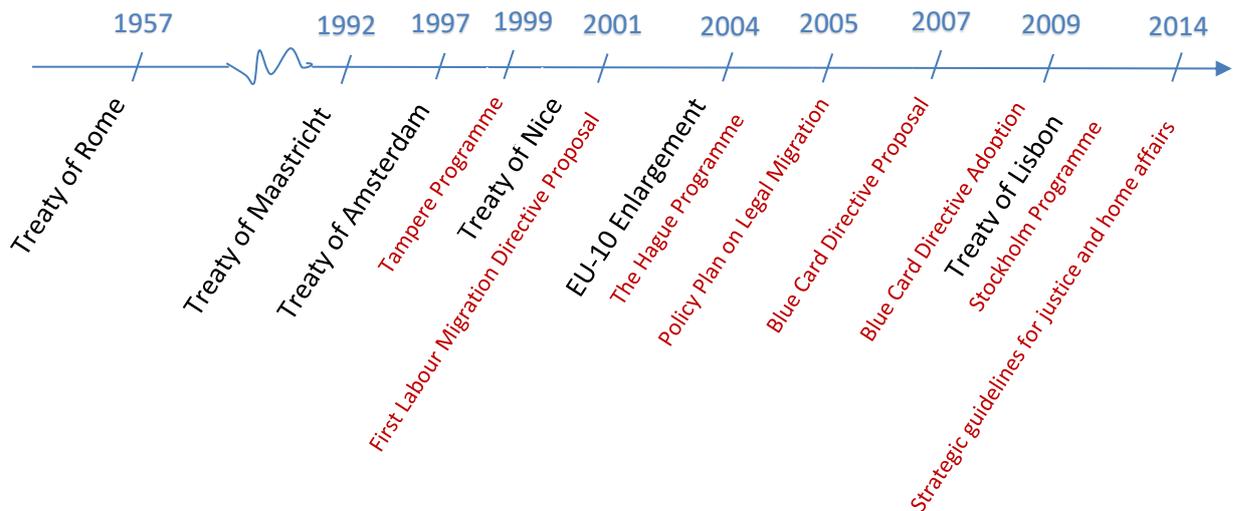
---

<sup>7</sup> “Little by little, the measures taken in various areas will generate what, even in their boldest dreams, the founding fathers of the European Union would have never dared to imagine: a common immigration policy” (author’s translation)

In 1992, the European Union was created through the Treaty of Maastricht and that event also marked the birth of European citizenship. The freedom to move between the EU member states also became a right for those who were not economically active outside their home country. As was confirmed many times by the Court of Justice of the EU, including cases such as *Grzelczyk* (paragraph 31), *Baumbast and R* (paragraph 82), *Garcia Avello* (paragraph 22), *Zhu and Chen* (paragraph 25) and *Rottmann* (paragraph 43), “the status of citizen of the Union is destined to be the fundamental status of nationals of the Member States” (paragraph 58 of the judgment *Dano* C-333/13, cf. Boeles et al., 2014, p. 31). From the entering into force of the Maastricht Treaty, EU citizens obtained a separate set of rights (and obligations) independent from their economic activity. This is also when the member states started to think more concretely about the rights attributed to workers coming from third countries. It was important in particular in view of the fall of communism in Central and Eastern Europe, which caused a revolution in relationships between the West and the East.

Until the 2000s, most changes in the EU’s labour migration policies were done through negotiating new treaties (see Figure 4.1). However, as of 1999, this method was replaced by (intergovernmentally) establishing five-year plans with guidelines for justice and home affairs of the EU member states. This political decision gave an impetus for a new dynamic in the policy formation and more flexibility than the treaties. In the remainder of this chapter, the marked events in the history of EU labour migration will be discussed in detail, in order to frame the Blue Card directive negotiations and adoption in a wider context.

Figure 4.1: Timeline of selected events in the history of EU labour migration



Source: Author's compilation

## 4.2. From cooperation to harmonisation

Until the Treaty of Amsterdam, which was signed in 1997, the member states of the European Communities (and later of the European Union) undertook all efforts in the areas of immigration and external border control in the framework of intergovernmental control. The first sign of such cooperation was the signature of the Schengen agreements in 1985 and 1990, which helped to gradually abolish internal borders and made the free movement of workers more tangible than before. Boeles et al. (2014, p. 32) underline that under the conditions where the European Community was facing ever more migratory pressures from third countries, “[a]wareness rose that cooperation and coordination might be necessary for a more effective policy of immigration control” (*op. cit.*). The establishment of the European Union by the Treaty of Maastricht in 1992 formalised the cooperation in the areas of immigration and asylum although only as being part of the third pillar under Title VI: “Cooperation in the fields of justice and home affairs”. This meant that although the cooperation in those fields had been formally introduced, the EU had no power to create supranational legislation that would prevail over the national ones. This cooperation, meant to be mutual information and

consultation within the Council in order to coordinate actions (as per article K.3.) in the regulation of access to the labour market, had been declared in article K.1. of the Maastricht Treaty:

**Box 4.1: Article K.1. of the Maastricht Treaty (author's underline)**

*For the purposes of achieving the objectives of the Union, in particular the free movement of persons, and without prejudice to the powers of the European Community, Member States shall regard the following areas as matters of common interest: (...) (3) immigration policy and policy regarding nationals of third countries: (a) conditions of entry and movement by nationals of third countries on the territory of Member States; (b) conditions of residence by nationals of third countries on the territory of Member States, including family reunion and access to employment.*

Interestingly, as one can gather from the abovementioned article, EU member states were interested in regulating not only the conditions of entry and residence of third-country nationals, but also their access to employment. Toner underlines that in the Treaty of Maastricht, “alongside the cooperation taking place *outside* the framework of EC law, the pillar structure of the EU was being constructed. Again, in the second and third pillar, this focused on *intergovernmental* rather than supranational cooperation. (...) [U]nanimity was the rule and directly effective ‘hard law’ was not the order of the day” (Toner, 2014, p. 35).

The Treaty of Amsterdam introduced Article 63, on which, until the entry into force of the Treaty of Lisbon, all further legislation was based. According to Thym, it was “a more robust Treaty foundation” (Thym, 2016, p. 272). The Treaty of Amsterdam was therefore the first step from pure intergovernmentalism to more Community competence in the area of migration; however, according to Toner, “it cannot be said that this was full communitarization” (Toner, 2014, p. 35), especially considering the maintained pillar structure of the Treaty. The contents of the ground-breaking Treaty article were the following:

Box 4.2: Article 63 of the Amsterdam Treaty

Article 63

*The Council, acting in accordance with the procedure referred to in Article 67, shall, within a period of five years after the entry into force of the Treaty of Amsterdam, adopt:*

*(1) measures on asylum, in accordance with the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees and other relevant treaties, within the following areas:*

*(a) criteria and mechanisms for determining which Member State is responsible for considering an application for asylum submitted by a national of a third country in one of the Member States,*

*(b) minimum standards on the reception of asylum seekers in Member States,*

*(c) minimum standards with respect to the qualification of nationals of third countries as refugees,*

*(d) minimum standards on procedures in Member States for granting or withdrawing refugee status;*

*(2) measures on refugees and displaced persons within the following areas:*

*(a) minimum standards for giving temporary protection to displaced persons from third countries who cannot return to their country of origin and for persons who otherwise need international protection,*

*(b) promoting a balance of effort between Member States in receiving and bearing the consequences of receiving refugees and displaced persons;*

*(3) measures on immigration policy within the following areas:*

*(a) conditions of entry and residence, and standards on procedures for the issue by Member States of long term visas and residence permits, including those for the purpose of family reunion,*

*(b) illegal immigration and illegal residence, including repatriation of illegal residents;*

*(4) measures defining the rights and conditions under which nationals of third countries who are legally resident in a Member State may reside in other Member States.*

*Measures adopted by the Council pursuant to points 3 and 4 shall not prevent any Member State from maintaining or introducing in the areas concerned national provisions which are compatible with this Treaty and with international agreements.*

Yves Pascouau stated that the initial idea was to include access to employment in the scope of article 63(3)(a); however, due to the resistance of the German delegation, it was abandoned effectively limiting the powers of the EU in the field of migration (Pascouau, 2010, p. 109). The Treaty of Amsterdam also introduced the possibility of opt-outs for the UK, Ireland and Denmark (Toner, 2014, pp. 35-36).

Following the adoption of the Treaty of Amsterdam, the European Council in Tampere in 1999 marked the initiation of a discussion on a common policy on legal migration. It set political guidelines and concrete objectives in the area of immigration policy, including equal treatment of third-country nationals in the EU and efficient management of migration flows. However, the goals it set were soon deemed too ambitious (International Organization for Migration and European Parliament, 2009, p. 20). Instead of following a plan to gradually harmonise the policies, member states agreed to use the open method of coordination (OMC) in the area of migration (Shaw, 2011, p. 71). The OMC's logic of peer pressure seemed for some time to be the most appropriate and served as a 'competitiveness-fostering exercise' (Shaw, 2011, p. 60). As von Weizsäcker identifies, harmonisation is a "good solution when national preferences are well aligned, while coordination is often more appropriate when spillovers are major but national preferences are diverse" (von Weizsäcker, 2008, p. 4). In the case of migration policy, the interests of the member states have historically varied.

### **4.3. The first proposal for a directive on labour migration**

As a result of the member states' reluctance to shift more competence to the EU, the Commission had to withdraw its 2001 proposal of a *Directive on the conditions of admission and stay of third-country workers*<sup>8</sup>. Proposed to 15 EU member states – hence, not raising the contentious issue of free movement of workers from the so called *New Member States* – in the times of economic bloom and low unemployment, the Commission's initiative aimed to standardise management of labour migration.

---

<sup>8</sup> COM(2001) 386, withdrawn in June 2006.

At the time, the EU was seemingly changing its image from the 'Fortress Europe' to a place more open to legal migration (Zaiceva and Zimmermann, 2008, p. 2). However, the proposal was presented in July, two months before the 9/11 attacks in the US, which led to anti-immigrant sentiments and securitisation in the Western world. Among the reasons for member states' opposition to the proposal, Mayer (2017, p. 259) names the merger of the residence and work permit into one, little flexibility in bureaucratic processes, and conditions of granting the permits. Menz suggests that the main resistance to the proposal came from Austria, Germany, and the Netherlands (Menz, 2015, p. 561). At this time, the latter two especially, had guarded their sovereignty very carefully, and did not accept any intrusion by the European Commission.

This proposal left no space for the member states to attract third-country nationals through different migration schemes. In 2003, Germany criticised the proposal on account of not addressing the demographic shortages, but rather allowing the 'entry and residence in the European Union, with a view to exercising an economic activity, (...) only (...) when there are gaps to be filled and under the conditions that it establishes' (13954/03, p. 2). In other words, the directive was not driven by a forward-looking vision and did not address the future needs for specific skills and other challenges of international industrial competition. Germany also raised reservations to the article dealing with more favourable provisions created or maintained in the absence of Community law, and insisted on including highly qualified workers in the list of exceptional cases (13954/03, p. 8). To this end, Austria wanted to make the list open ended, to be able to adjust its policies according to its specific market needs. As can be seen, on the one hand, there was the growing ascertainment that the labour migration issue cannot be left to the EU; and on the other hand, some states wanted to pursue a more liberal approach to migrant workers, especially those with appropriate qualifications. Moreover, it was pointed out that EU-wide labour market tests were at that time insufficiently effective, since the EURES network responsible for matching EU labour markets' demand and supply only covered 15% of European vacancies (13954/03, p. 17).

In 2002, the Council Legal Service assessed that the 2001 proposal as presented by the Commission would have to be split into two separate acts in order to accommodate the possible opt-outs of Denmark, Ireland and the UK (14150/02, p.5).

#### **4.4. The Hague Programme**

In 2001, the Nice Treaty was adopted. It did not have an influence on the shape of EU migration policies and is remembered as a hasty negotiation in view of the 'big' EU enlargement. The years between 2004 and 2009 were filled with ideas and hopes for a common policy for migration. The number of EU member states increased by ten in May 2004, which brought about not only internal, but also external challenges. These included a large increase of population as well as an extension of the external borders, which could potentially lead to uncontrollable flows of people within the Union. The issues of migration and free movement of EU citizens became ever more pressing. In the years following the enlargement, efforts were made to create a new Treaty that would reform the setting so as to accommodate the augmented number of member states. The most promising point on the agenda was the introduction of qualified majority voting in many policy areas including migration. In November 2004, the European Council adopted the Hague Programme which set out ten priorities for the EU in the following five years. Its aim was to strengthen the area of freedom, security and justice. Among those priorities, there was an aim to define a balanced approach to migration, both legal and illegal. As far as the latter is concerned, the Hague Programme called for the adoption of a communication and a plan for legal immigration. The Policy Plan on Legal Migration, presented by the Commission in December 2005, identified four kinds of workers for whom individual directives were designed in order to cover their entry and residence conditions: highly skilled workers, seasonal workers, intra-corporate transferees (ICTs), and remunerated trainees. As can be seen, alongside the previous suggestions of the Legal Service of the Council, the Commission decided to split its initial proposal of 2001 that was supposed to regulate the entry of all kinds of TCN workers and self-employed workers and chose a sectoral approach instead. The European Council believed that once the Lisbon

Treaty was in effect, the decision-making process would be sped up. The Treaty of Lisbon was signed in 2007 and was supposed to be ratified in 2008. However, the referendum in Ireland which initially rejected the ratification, delayed the treaty adoption by one year. Von Weizsäcker deemed that the progress of the Hague Programme was “uneven and controversial” (2008, p. 3); however, it did lead to progress in EU migration policy. Until the entry into force of the Lisbon Treaty, which would entail qualified majority voting, the norm would be “protracted decision-making and incremental progress towards a common migration policy” (von Weizsäcker, 2008, p. 4).

#### **4.5. Agenda-setting for the Blue Card Directive Proposal of 2006**

As observed by Menz, “[p]ublic policy in particular (...) does not simply emerge out of thin air at the EU level, but is generally the mutated offspring of national initiatives, heritage, patterns of regulation and governments.” (Menz, 2009, p. 83) He further remarks that “[t]here is no automatism in the increase in EU competence; the European arena relies on the interaction of actors who possess a strong interest in molding policymaking according to their preferences” (*idem*). In this context, Paris argues that “notwithstanding the position of power held by member states, the Commission managed to push in favour of European integration on legal immigration, especially in the initial phases of the decision-making process (i.e. agenda-setting and identification of alternatives)” (Paris, 2017, p. 1027). In fact, although member states had agreed to discuss the Blue Card directive, they were not entirely convinced by the project. They did not really have a great deal of choice, either. In 2007, the ETUC pointed out to the policy makers that “(...) national policies (...) with regard to the entrance of certain groups of migrant workers (such as high skilled workers) are already having an impact on the labour markets of other Member States, because of regulations with regard to mobility of long term third country nationals, the right to deliver services in other MS’s, and the general impact of admission of TCN’s on the European labour market.” (European Trade Union Confederation, 2007). Indeed, as envisaged by the French presidency of 2008, “[d]eveloping a comprehensive European migration policy, complementing Member States’ policies, remains a fundamental priority.” (10684/08, p. 66)

#### 4.6. Towards the Treaty of Lisbon

The Treaty of Lisbon, which marked the suppression of the pillar structure and the incorporation of migration policies into the *acquis communautaire*, was foreseen to come into force by the end of 2008. In the same year, under the French Presidency in the Council, the European Pact on Immigration and Asylum was agreed upon. It was a prelude to the Stockholm Programme, adopted by member states in June of the following year. As Toner put it, the European Pact on Immigration and Asylum was of an inherently intergovernmental nature and demonstrated a surprising “persistence of nationalism and intergovernmentalism” in the times of advanced EU integration (Toner, 2014, p. 28). Due to the Irish referendum of June 2008, the Treaty of Lisbon only came into force in December 2009 after a few minor adaptations to please the opposing Irish society. In the area of migration, the Treaty “has not yet signalled a retreat from the complex interplay between the forces of national interest and a more cooperative supranational Europeanized approach to these matters, and indeed the complexities of understanding the interplay between national or European-level approaches, and more liberal/restrictive immigration policies.” (Toner, 2014, p. 29). Toner also underlines that such tensions played out “between national-level authorities pressing for or wanting to maintain greater restrictions in the face of European-level norms seeking to impose more liberal policies that would challenge these restrictions” (*idem*). The role of the European Parliament was strengthened, while the member states in the Council had to get used to qualified majority voting rather than taking the decisions unanimously. The institutional arrangements for the next directives foreseen by the Policy Plan on Legal Migration have changed in comparison to those that were in place during the adoption of the Blue Card. Until 2016 the Council and the Parliament have jointly adopted the seasonal workers directive (2014/36/EU); intra-corporate transferees (ICTs) directive (2014/66/EU); and the research, studies, pupil exchange, remunerated and unremunerated training, voluntary service and au pairing directive (2016/801/EU). In their adoption processes, the Council and the Parliament were gradually growing into their new role, and their positions started to change accordingly.

#### 4.7. Conclusion

The adoption of the Blue Card directive, despite being the last migration directive adopted under the “old” institutional framework, constituted a breakthrough in the history of EU migration policy. It also marked, ever more starkly, that the interests of the EU member states diverge considerably. As a result, even under the setting of the Lisbon Treaty, the discussions on migration issues remained difficult and controversial. Thym suggests that the previous success of the common entry and border control measures, as well as asylum systems, were due to the fact that they were pre-established by the Schengen Agreements on the Geneva Convention (Thym, 2016, p. 272). As she put it, “[i]n contrast to the predominantly restrictive national practices in the field of economic migration at the time [late 1990s and early 2000s], the Commission boldly proposed [in document COM(2000)757] a 'proactive immigration policy' based on the assumption that 'the existing "zero" immigration policies which have dominated thinking over the past 30 years are no longer appropriate'" (Thym, 2016, p. 272). At the time, however, the Commission was much more optimistic when it came to the EU cooperation than it would be in the coming years. The economic crisis of 2009 that accompanied the ratification of the Treaty of Lisbon created more tensions and problems for EU integration than could have been envisaged.

The next three chapters analyse in detail how these tensions played out in, respectively, the negotiations, transposition, and implementation of the Blue Card directive.



## 5. Chapter V: Proposal and negotiations

### 5.1. Introduction

The aim of this chapter is to describe and analyse the process of negotiations on the proposal for the Blue Card directive 2009/50/EC. In the first section, the proposal of the Commission is presented, together with the reasoning behind it. The second part of the chapter follows with a meticulous analysis of the negotiations in the Council and in the European Parliament. The negotiation process is analysed chronologically so as to give an accurate account of the dynamics of the discussions in different instances of the Council. Evidence is also presented of some member states' positions that were adopted in view of the Council negotiations. In this chapter, the behaviours of the EU member states are observed in the process of preference formation and negotiations at the supranational level. The chapter is concluded by a brief summary of the differences between the proposed directive and its final outcome.

The idea of the Blue Card directive 2009/50/EC came in the aftermath of the failure of the proposal for a general labour migration scheme of 2001 (discussed in 4.3). The EU labour migration directive of 2001 was blocked by the German and Austrian governments, which were under the influence of local employers (Menz, 2011, p. 439). Other sources show that the reasons for German resistance were twofold: "the German government at that time did not appear to be willing to agree on such a far-reaching opening of the country to labour migrants (...) [and] the proposal would have clashed with the idea of establishing a point system" (Kolb, 2017, p. 12). As a result, the proposal for a directive aiming to attract highly qualified migrants had two purposes: to establish common criteria for a special procedure of entry for third-country nationals that apply to reside in the EU for the purpose of highly qualified employment, and to create a specific residency period that would not only allow them to work, but would also create a range of rights for the workers and their families. As was stated in the European Social and Economic Committee's opinion, it was hoped "(...) that the EU will have adequate,

sufficiently harmonised legislation so that immigration can be channelled through legal, flexible, transparent procedures, in which third-country nationals are fairly treated, with comparable rights and obligations to EU citizens.” (European Economic and Social Committee, 2008, p. 7).

## **5.2. The proposal of the Commission**

The proposal of the European Commission was preceded by a customary impact assessment (SEC(2007) 1403) issued in October 2007. The most important findings of this document were that “all Member States have in fact special schemes in place that cover specific categories of third-country nationals admitted to exercise an economic activity for which high qualifications are currently required, but only ten go further than scientists, artists, intra-corporate transferees, researchers, university professors, etc.” (Commission of the European Communities, 2007, p. 16). Crucially, it was observed that “the identification of who should be considered a [highly skilled worker] is not unanimous and/or difficult to define: the minimum salary level is the main criteria (with big differences), used by six out of ten Member States, even though usually associated with other criteria such as professional qualifications. Four Member States do not define the category at all ([Austria, Belgium, the Netherlands and Portugal]), while two ([Denmark and Ireland]) restrict it to specific sectors/occupations for which there are recognised gaps in the labour market. Finally, four Member States ([Germany, France, Greece and Ireland]) have more than one category of HSW, for which different entry (and/or residence) conditions exist.” (*idem*). Moreover, during the consultations conducted in the framework of the proposal preparation, it turned out that eight member states were preparing their own schemes for highly qualified workers’ admission.

Apart from the demographic considerations, the main problem identified by the Commission was that the EU was not attractive to highly qualified workforce, which constituted only 1.72% of its immigration intake, as compared to Australia (9.9%), Canada (7.3%), the US (3.2%), and Switzerland (5.3%) (Commission of the European Communities, 2007, p. 14). The temporariness of the national schemes

was also underlined as a competitive disadvantage against countries where immigrants can settle down.

It was also determined in the impact assessment that there is indeed an appropriate legal base in the area of migration, namely the article 63 (3)(a) and (4) of the Treaty establishing the European Community (TEC). The reason given was that “[i]f Member States act alone, they may not be able to face international competition for highly skilled third-country workers.” (Commission of the European Communities, 2007, p. 20). This could be even more important for small member states, as mentioned by Chaloff: “[s]maller countries which are completely unknown by talent abroad, for example, benefit from the appeal of a larger labour market and from the EU’s ability to identify and even train qualified workers in third countries to meet skills shortages in Europe.” (Chaloff, 2016b)

The initial proposal of the European Commission (COM(2007) 637) from the outset excluded independent workers, researchers, family members of EU citizens exercising free movement, refugees, and people under international protection (or applicants for these statuses). It required a binding job offer of at least one year, relevant higher professional qualifications, a valid travel document (even covering the length of the work contract), and sickness insurance. It set the salary threshold at 3 times the minimal national salary or, where the minimal salaries were not defined by law, at least three times the minimum income under which citizens of the member state concerned are entitled to social assistance. The Commission also introduced a derogation from the salary threshold for young professionals (below 30 years of age) who studied in the EU (two thirds of the general threshold applied). Numerical quotas were allowed at entry to the EU, recognising the national competence in this field. The proposed length of validity of the Blue Card was of 2 years, with 3 months grace period in case of unemployment. Access to the labour market was to be restricted for the first 2 years. The rights attributed to the workers and their families included: entering, re-entering and staying in the member state issuing the Blue Card, as well as travelling through other member states. The

applications were to be assessed within 30 days (with a possible 60-day prolongation for complicated cases). The decisions regarding the issuance of Blue Cards were contestable in national jurisdictions.

Moreover, Blue Card holders were to enjoy equal treatment as regards EU nationals in terms of working conditions (salary, dismissal, health and safety at work), freedom of association and affiliation, education and vocational training, recognition of qualifications etc. However, the rights to social housing and social assistance could be restricted by member states. So as to not penalise mobile workers who would like to become EU (back then – EC) permanent residents, it was proposed to allow them to build up periods of residency in maximum three member states. Moving to another member state would be possible after two years of residency in the first country issuing the Blue Card.

### **5.3. Initial reactions**

As can be seen, the Blue Card proposal was not very generous, especially in view of the trade unions, but opened pathways to intra-EU mobility of third country nationals and ensured a quick and fair admission process. The European Economic and Social Committee feared that such an institutional setting would result in a very restrictive directive, since as it said, “(...) this proposal for a directive is being debated in the Council under the unproductive principle of unanimity.” (European Economic and Social Committee, 2008, p. 2) Indeed, Bonjour et al. observe that “[t]he influential metaphor of ‘Fortress Europe’ reflects this intergovernmentalist view of European cooperation as a means for restriction-minded member states to close down their external borders.” (Bonjour, Servent, and Thielemann, 2018, p. 411). Another piece of criticism comes from Sorroza Blanco, Ette, Gonzalez Enriquez and Parkes:

*“Still, the Directive is generally considered to have fallen short of its central goal. It does not give immigrants access to the whole European labour market, but only that of the first country they go to, allowing subsequent movement to a second state under strict conditions only. This only highlights the disparity between the EU and its main competitor, the US. For one thing, labour markets are bigger in the US and the migrant who begins working in Illinois can then move freely to California or Oregon, while in the EU he or she must usually begin another application process to migrate to other Member State.*

*Secondly, even if they could move freely across Member States, the divisions in the 'common' European labour market would hinder their mobility, as it does that of EU citizens. Income disparities between EU states are the main reason for the refusal of some richer countries, like Germany, to accept the free movement of HSM, as many could qualify for a permit in a poorer Member State – the national average salary is the main reference – and then move to a richer one.” (Sorroza Blanco et al., 2013, p. 5)*

The ETUC was concerned that the directive would lower the standards for workers already resident in the EU and stall investments in the local workforce, such as training, working conditions, research and innovation. In particular, the ETUC had “doubts about splitting off ‘those we want’ and ‘those we do not want’, which can in practice be difficult to define.” (European Trade Union Confederation, 2007, p. 18 of the Annex). It also did not appreciate the weak provisions for preventing unethical and aggressive recruitment. Besides, the lack of a unified method of recognition of qualifications in the EU member states was pointed out from the position of the ETUC, with a suggestion that equivalent professional experience should also be taken into account. Understandably, the trade unions did not like the idea of a salary threshold dependent on the minimal wage, which can vary enormously within the EU, and advocated for salary thresholds to be discussed with the local unions on the basis of particular highly skilled jobs to be filled. They were equally opposed to the positive discrimination of young workers with regards to the salary thresholds and to favouring highly qualified migrants with regards to family reunification. From a more practical perspective, the ETUC put in doubt the feasibility of the fast-track, transparent admission procedure as envisaged by the European Commission. Finally, the trade unions welcomed the idea of equality of rights for TCN workers, including in particular their right to mobility within the EU after 2 years of employment and the right to circular migration. (European Trade Union Confederation, 2007, pp. 18-20 of the Annex). The Trade Union representative also pointed out the global implications of the proposed instrument. “The global social responsibility for preventing brain drain is an area where a coordinated EU policy on high skilled migration would be very welcome, to prevent MS’s competing with each other for skilled workers at the expense of countries of origin, and to promote ethical recruitment practices of high skilled workers from

developing countries.” (*idem*) The competition among member states was visible back in 2007, but it was still believed that it could have been replaced by cooperation through a common European scheme. The most interesting argument from the point of view of this dissertation is that the trade unions were not in favour of abandoning national schemes for highly skilled workers’ admission: “[T]he Directive prohibits MS’s to apply more favourable rules in order to prevent competition between MS’s. It is very questionable if this can be maintained. Will MS’s really be willing to abandon their power to ease labour migration requirements for favoured business?” (European Trade Union Confederation, 2007, p. 19). In fact, the final outcome of the negotiations proved the ETUC right. In the light of the competition theory, abandoning the national schemes would mean cooperation without space for direct competition. The difference between migration policies and trade policy (which is an exclusive EU competence) is that migrants, unlike goods, have free will and cannot be simply transferred from one place to another if such a need occurs. EU countries are aware of the fact that they are diverse and attractive to migrants to different degrees. Therefore, competition between them is inherent to EU integration. Trade unions, additionally, view the labour market from the perspective of social rights, which are not harmonised within the Union. Until the latter are centrally controlled within the EU, the competition for migrants between the member states will remain significant.

#### **5.4. The negotiations in the Council**

The negotiations in the Council were done in the framework of the Working Party Migration and Expulsion (WPME), the Strategic Committee on Immigration, Frontiers and Asylum (SCIFA), the Committee of Permanent Representatives (COREPER) and at the ministerial level. The proposal was discussed at seven meetings of the Council in two configurations: JHA (4 times) and EPSCO (3 times) between 8 November 2007 and 2 October 2008. Finally, the directive was signed at the meeting of the AGRI Council on 25 May 2009 (see Figure 5.1).

Figure 5.1: The timeline of negotiations

Council	<ul style="list-style-type: none"> <li>• 8-9 November 2007 JHA Council</li> <li>• 5-6 December 2007 EPSCO and JHA Council (jointly)</li> </ul>
WPME	<ul style="list-style-type: none"> <li>• 11 January 2008</li> <li>• 28 January 2008</li> </ul>
COREPER	<ul style="list-style-type: none"> <li>• 6 February 2008</li> </ul>
WPME	<ul style="list-style-type: none"> <li>• 7 March 2008</li> <li>• 4 April 2008</li> <li>• 13-14 May 2008</li> </ul>
Council	<ul style="list-style-type: none"> <li>• 9 June EPSCO Council (AoB information from the Presidency)</li> </ul>
European Council	<ul style="list-style-type: none"> <li>• 19-20 June 2008 European Council which called for intensifications in work on the Blue Card directive (9857/08)</li> </ul>
WPME	<ul style="list-style-type: none"> <li>• 3-4 July</li> </ul>
SCIFA	<ul style="list-style-type: none"> <li>• 10 July 2008</li> </ul>
COREPER	<ul style="list-style-type: none"> <li>• 16 July 2008 (Preparation of the Council)</li> </ul>
Council	<ul style="list-style-type: none"> <li>• 24-25 July 2008 JHA Council</li> </ul>
WPME	<ul style="list-style-type: none"> <li>• 28-29 July 2008</li> </ul>
JHA Counsellors	<ul style="list-style-type: none"> <li>• 12 September 2008</li> </ul>
COREPER	<ul style="list-style-type: none"> <li>• 24 September 2008 (point II marked as LA = legislative activity)</li> </ul>
Council	<ul style="list-style-type: none"> <li>• 25 September 2008 JHA Council</li> </ul>
COREPER	<ul style="list-style-type: none"> <li>• 1 October 2008 (point II marked as LA = legislative activity)</li> </ul>
Council	<ul style="list-style-type: none"> <li>• 2 October 2008 EPSCO Council</li> </ul>
COREPER	<ul style="list-style-type: none"> <li>• 9 October 2008 (point II)</li> <li>• 17 October 2008 (point II)</li> <li>• 22 October 2008 (point II)</li> </ul>
JHA Counsellors	<ul style="list-style-type: none"> <li>• 5 December 2008 JHA Counsellors</li> </ul>
Council	<ul style="list-style-type: none"> <li>• 25 May 2009 AGRI</li> </ul>

#### 5.4.1. The first steps from the end of 2007

The negotiations for the Blue Card directive started in the Justice and Home Affairs Council that took place in Brussels on 8-9 November 2007, still under Portuguese Presidency. The Council had a first exchange of views on the directive and “(...) agreed to return to these proposals [Blue Card and Single Permit] in the context of a joint meeting with EU Employment Ministers in December 2007. It also instructed its preparatory bodies to further examine these texts with a view to reaching an early agreement.” (14617/07, p. 12). A month later, on 6 December 2007, employment ministers met JHA ministers in the margins of the EPSCO Council “for a policy debate on migration, employment and the

Lisbon Strategy” (16139/07, p. 18). The fruit of this debate was the conclusion that the Council should move forward with working on the Blue Card directive (among others).

On the technical level, the negotiations started with the meeting of the Working Party on Migration and Expulsion (WPME) on 11 January 2008, under the Slovene Presidency. At this meeting, the Commission presented its proposal, which was broadly supported by member states, especially in regards to favouring the mobility of highly qualified workers in the EU. However, such issues as definitions, criteria, requirements and procedures, were signalled to be rising problems. The member states also underlined the links between the Blue Card proposal and the long-term resident and the single permit directives (5255/08, p. 1).

By this first WPME meeting 17 delegations had entered scrutiny reservations and 4 others parliamentary reservations. Scrutiny reservations are raised if an issue needs to be scrutinised back in the member state because the national position is not yet (fully) established. Parliamentary reservations, on the other hand, appear where the delegation is bound to obtain its parliament’s approval. As was clarified by the member of the Council’s Legal Service, “[w]ith regards to the other [than linguistic] reservations, they remain reservations until the moment where the member state has to decide, has to vote, has to express a position. So then, of course, the Presidency cannot go before COREPER or the Council with 15 MS having reservations, but if there are less, what we are used to say to those member states is, basically: ‘you have a reservation, but you have to decide on whether you will expressly vote against, abstain, or do not consider it as really binding and vote in favour.’” (Interview V, 23.06.2017). The definitions in Article 2 turned out to be the most contentious. **Germany, Austria** and Latvia suggested the possible abuse of the criterion of “at least three years of equivalent professional experience” (5255/08, p. 4), while a large number of delegations entered scrutiny reservations. The Hungarian delegation doubted whether professional experience could be even considered equivalent to higher education qualifications. Estonia and Latvia supported this argument by saying that the definition should be focused on education. At the same time, Sweden proposed that

two different profiles of highly skilled workers be introduced “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.” (5255/08, p. 6). Regarding the scope, some delegations, including Sweden, wondered why the beneficiaries of international protection were excluded from the opportunity to apply for the Blue Card, but the response of the Commission was that this was a political-level type of a discussion.

During the second round of discussions of WPME on 28 January 2008, in the context of Article 4 on more favourable provisions, **Germany** and **the Netherlands**, supported by Finland, raised for the first time the issue that “member states should be allowed to maintain national schemes, resulting in the issue of a national residence permit/card for highly skilled third-country nationals” (6051/08, p. 3). The Commission explained that the *national schemes* for people not falling within the scope of the proposed directive could continue obtaining national permits, but the applicants for an EU Blue Card who met all the relevant requirements “could only be admitted on the basis of the proposal, not under national schemes” (*idem*). As for more favourable provisions, the proposed Article 4(2) was as follows: “This Directive shall not affect the right of member states to adopt or retain more favourable provisions concerning conditions of entry and residence for persons to whom it applies, except for entry into the first member state” (*idem*). Portugal pointed out that with such wording, it could be possible to grant free movement to another member state earlier than after the proposed first 2 years. The Commission ascertained that this was not the aim of this provision and promised to reformulate it. It also said that “[i]n its view the first entry, as well as the issuing of the Blue Card, should take place on the basis of rules as uniform as possible. More favourable provisions could then be granted for residence conditions and intra-EU mobility” (*idem*). This would therefore enable cooperation on entry and competition on distribution of skilled workers among the EU member states.

The *conditions of admission* were listed in Article 5 of the proposal in an exhaustive list. Slovakia, supported by Hungary and **Austria**, proposed including the requirement of providing evidence of

appropriate accommodation, like in the directive on family reunification. The Commission, however, was opposed to the idea, because the applicants would not have family members already resident in the EU. As for a binding job offer of at least one year, **Austria** was puzzled about this condition as the validity of the Blue Card was to be for two years. Poland questioned what would happen if a job contract were shorter, and, to this query, the Commission explained that for shorter contracts or trial periods, the workers would still have to apply for national permits (6051/08, p. 4).

The proposed Article 5(1)(c) stipulated that “for unregulated professions, [an applicant for a Blue Card shall] present the documents attesting the relevant higher professional qualifications in the occupation or sector specified in the work contract or in the binding offer of work”. **The Netherlands** entered a reservation on this point, stating that the salary criterion should be a sufficient condition and questioning who would assess the qualifications. “It took the view, supported by Sweden, that the authorities should not take the role of the employer” (6051/08, p. 5). Also, Poland felt that this kind of double-verification would be too much of an administrative burden.

Regarding the *salary thresholds* from Article 5(2), **Austria** entered scrutiny reservations. **Germany** (supported by Greece) suggested that the salary threshold should be defined using a job-based criterion, like “salary earned for the specific category of job concerned” (6051/08, p. 7). Similarly, Lithuania supported by Portugal, suggested that it should be “referring to the average wage in the sector where the person concerned will be employed” (*idem*). Spain proposed to delete the salary threshold provision altogether, but this was opposed by Belgium and **the Netherlands**, who supported the original formulation. **The Netherlands** was of the opinion that “it would be difficult to define a specific or an average wage for a certain category of job” (*idem*). Ireland was of the view that the envisaged salary threshold was too small. France underlined that the entry conditions should be selective and practicable. The Commission reminded the member states that the salary criterion and its limits had already been discussed with the member states in the preparatory stage of the proposal. At that point, most of the member states had accepted the relative salary threshold as the minimum

criterion necessary for admission. In the view of the Commission, the wording “at least three times the minimum” was flexible enough, because it let the member states set a higher threshold (6051/08, p. 7). It turned out, however, that the discussions at the preparatory stage were not satisfactory and this topic remained one of the most important issues until the end of the negotiations process.

At this point, it is important to mention the reasoning behind the opt-outs of Ireland and the UK, both of which had the possibility of opting-in to the scheme within three months from the proposal (in this case, the deadline would fall on 23 January 2008). However, the potential cost of losing the opportunity to access the pool of highly qualified workers was recognised, and it was recommended that “(...) Ireland continues to actively participate in the negotiations on the proposals in order to secure the best possible result for Ireland and to keep the possibility of opting into them under active consideration.” (Joint Committee on European Scrutiny, 2008). Ireland was concerned that the established salary threshold could constitute a breach of subsidiarity since wage-setting is an exclusive national competence. Moreover, in their view, the principle of equal treatment could also be breached. Interestingly, the Irish Joint Committee on EU scrutiny (composed of deputies and senators) considered the three-month grace period to be unrealistically short and, therefore, inefficient as a measure. It also assessed that “(...) the derogation under the proposal concerning young professionals less than 30 years of age, and who are not likely to have enough professional experience to claim high salaries, [is] completely arbitrary and unacceptable. Justified age discrimination should not have a place in work place.” (*idem*). As can be seen, the considerations of Ireland were mirrored in the discussions of the member states that did not have the luxury of opting-out.

Article 6 of the proposal introduced a *derogation for workers of less than 30 years of age*, who should obtain the Blue Card if their proposed salary amounts to two thirds of the proposed general threshold. In point (b) of that article, a possible waiver of the salary requirement was proposed as long as the applicant completed his or her Bachelor’s/Master’s studies on the territory of the European Community. **Austria** entered a reservation to this provision. Finland, France and Sweden were

concerned with regard to the principle of non-discrimination. However, the Commission underlined that since that was positive discrimination, it was not a breach of the *acquis communautaire*. Malta deemed that the derogation should not be obligatory. The Commission explained to Bulgaria that the decision to set the limit at 30 years old was a political one and there was no particular reasoning behind it.

Article 8(2) provided for the *initial validity* of the Blue Card for two years, which could be renewed for another two years. In case of a work contract shorter than two years, the Blue Card would be issued for the length of the contract plus three months. **The Netherlands** claimed that the length of validity should not be fixed, but rather linked to the length of the contract. Greece supported the proposed two years, while Spain suggested one year, renewable until the applicant obtained the status of a long-term resident. Poland recommended changing the wording of the proposal to “at least two years”, renewable only if the work contract has a duration longer than the period of validity. Similarly, the Czech Republic wanted to link the renewal to the duration of the work contract. The Commission explained that its intention was to “allow possibilities of control and to ensure a gradual access of the person concerned to the labour market” (6051/08, p. 10).

The possibility of *labour market testing* was proposed in Article 9(2) (article entitled “Grounds for refusal”). The Commission explained that the rejection of an application could also be done on the grounds that the quota for certain jobs had already been filled. Belgium (supported by Greece) was concerned about the jurisdiction of the European Court of Justice where the applicants could potentially challenge the rejections and the assessment of the labour market situation done by the member states (which would be an exclusive national competence) (6051/08, p. 12). Article 9(2) also underlined the “Community preference” (meaning that employers were obliged to choose workers from the EU instead of third country nationals, especially important in conditions of restricted freedom of movement for workers from New Member States) which, as initially proposed, “may be” given to Union citizens and residents. Eight member states, of which seven were known at the time as “new

member states” proposed making it obligatory by replacing “may” with “shall”. Sweden preferred retaining “may”. The Commission replied that this provision represented a political commitment and that “the proposal does not intend to define how the Community preference should be implemented in practice” (6051/08, p. 12). The issue of Community preference remained, until the end of the negotiations, a crucial one.

Article 12 entitled “Procedural safeguards” raised reservations from **the Netherlands, Austria, Portugal, Sweden and Slovakia**. Portugal also “considered that it is difficult to grant procedural guarantees to a person who is not yet on its territory” (6051/08, p. 16). The article foresaw that the applications for EU Blue Cards should be processed within 30 days from the filing of the application. There were, however, concerns regarding visa granting and Blue Card issuance since the two procedures were not specifically separated. The Commission stated that the visa granting fell outside of the scope of this provision. As for the 30-day deadline, Estonia, Finland, Hungary, Lithuania, Latvia, **the Netherlands**, Poland, Sweden and Slovakia considered it too short. Sweden, supported by **the Netherlands**, pointed out that in the researchers’ directive there was no specific deadline, simply the statement “as soon as possible”. The Commission responded to that argument with the point that this time it wanted to be more ambitious. Interestingly, **Germany** was speculating as to whether national authorities should be obliged to give reasons for rejecting applications (6051/08, p. 17).

At the meeting on 7 March 2008, the discussions concentrated on articles 13 and 14 of the proposed directive. The former tackled the problem of labour market access, while the latter dealt with temporary unemployment. The Commission initially proposed that Blue Card holders should only have restricted access to labour market for the first 2 years of legal residence. Spain advocated for a shorter period of just one year. Before this deadline, any modifications in terms of the work contract would have to be authorised by the national authorities. However, some member states voiced their disagreement with this concept. **The Netherlands**, supported by Estonia and France, suggested that mere notification of the authorities (as long as the migrant fulfils the requirement of the directive)

should be sufficient. The Commission explained that this was a method to avoid abuse. The second paragraph of article 13(1) stipulated that after two years of legal residence, the Blue Card holder should receive equal treatment with nationals regarding access to highly qualified employment. Several member states (Cyprus, Estonia, Hungary, Latvia and Sweden) entered scrutiny reservations on this provision. In particular, Hungary underlined that this was a national exclusive competence. **The Netherlands** was of the opinion that, regardless, the salary threshold should continue to be monitored, but the Commission responded that it wanted to minimise the requirements put on the employees. It also underlined that if the new job of the migrant was not in highly qualified employment, the member state had the right to withdraw the Blue Card under article 10(1)(c). Point 5 of article 13 mentioned the Community preference once again, which raised questions from the delegates of the Czech Republic, Bulgaria and Romania – countries whose nationals did not have full labour market mobility in the EU at that point. The Commission recalled that “under this proposal and the long-term residents Directive, the mobility of third-country nationals from one Member State to another is not a right, but a possibility” (7642/08, p. 5). Article 14 on temporary unemployment raised a reservation from France. Spain wanted to increase the member state flexibility in accepting temporary unemployment by replacing “shall” (not constitute a reason for revoking an EU Blue Card) with “may”. Estonia was against any periods of unemployment, while the Czech Republic advocated for just two months. Italy suggested six months, similar to the national allowance there.

The meeting of the WPME of 4 April 2008 was devoted to articles 15 to 26 and concluded the first reading of the proposal. Document 8249/08 consolidated the outcomes of previous proceedings with member states being given another opportunity to clarify their remarks. Article 15 on equal treatment raised quite a number of reservations (the Czech Republic, Spain, Hungary, Italy generally on the article, Finland on point 1(a)) and scrutiny reservations (Belgium, Cyprus, Greece, **Austria** and Slovakia, Finland and Lithuania on paragraph 1, Spain on point 1(b)). **The Netherlands**, supported by **Germany**, Lithuania and **Austria**, proposed introducing a paragraph that would stipulate that equal treatment would not lead to an extension of the right of residence. Spain wanted to include the right to strike.

What turned out to be a very contentious point was the right to equal treatment in education and vocational training. **Germany** entered a scrutiny reservation and Sweden a reservation, while Ireland suggested that such a right should only be given to long-term residents. The notion of study grants mentioned in the article needed to be clarified according to several delegations.

Article 16 on family reunification for Blue Card holders raised many reservations, especially from **Germany**, which, supported by Sweden, was against setting any deadline for issuance of permits for family members. In their view, a waiting period of six months was too long and member states should facilitate family reunification as soon as possible. Hungary suggested: as soon as possible, but no later than six months. Finland held that Blue Card holders and their family members should be issued permits at the same time and Belgium found it unreasoned to set specific deadlines for family members, since the directive was supposed to bring about simplicity and coherence. In addition, the Czech Republic did not see a reason for making the procedures quicker for Blue Card holders' families than for the high-skilled workers themselves. The response of the Commission to those complaints was that indeed a short deadline for family members was politically motivated and "based on the intention to attract highly skilled third-country nationals" (8249/08, p. 32). The proposed article 16(5) also caused heated discussions as it provided for a derogation to the family reunification directive, giving access to labour market to the family members of the migrant only after 12 months of residency. The interpretation of this paragraph was unclear for some delegations which underlined (especially the Czech Republic and **Germany**) that it could lead to more favourable access to labour market access for family members vis-à-vis the Blue Card holders. **The Netherlands** explained that, as it understood the situation, the idea was to grant family members immediate labour market access, so this should be clearly stated in this article. The Commission defended the provision by stating that member states were allowed to set labour market testing for family members and that if member states wanted, they could require the family members to comply with the same conditions as the sponsor, as per the directive 2003/86/EC. Otherwise, full labour market access from day one was also possible.

Four member states (Belgium, Greece, **Germany**, and Estonia) issued reservations on article 17 on becoming a long-term resident, and Hungary and **Austria** had scrutiny reservations. This article provided several derogations to the long-term residence directive 2003/109/EC, which were deemed too complex and administratively burdensome by several delegations. Greece and the Czech Republic were in particular worried about the overall clarity of the system to the extent that the Czech Republic and **Austria** advocated for deleting article 17 in its entirety, or at least paragraphs 3-5. The latter idea was supported by Belgium, which did not see an added value for Blue Card holders vis-à-vis the long-term residence status. It also called for deadlines that would be coherent with article 16. With regard to the period of legal and continuous residence that would give access to long-term residence, **Germany** wanted to prolong the time from five to six years. The proposal stated that applicants for long-term residency should reside in the country of application for at least 2 years prior to the application. Latvia, supported by Belgium, suggested that this was too short and it should be three years. The directive, as a derogation from the long-term residence directive 2003/109/EC proposed an extended period of absence allowed to Blue Card holders – 24 instead of just 12 consecutive months. Spain, supported by Belgium, suggested the deletion of this provision. Paragraph 5 of article 17 provided a list of reasons for absence from the territory of the EU, which in principle, were supposed to foster circular migration to the countries of origin. This raised questions from several delegations. Greece wondered whether such reasons as military service or pregnancy could not also be taken into account, while Poland questioned what to do in case educational activities (such as an MBA) took place in another third-country. The Commission clarified that there were optional provisions made available by the directive 2003/109/EC itself.

Article 18 introduced a new notion of “Long-term resident – EC/EU Blue Card holder” for those who fulfil the conditions enumerated in article 17. Belgium, Estonia, Greece, France and Latvia did not see the point in introducing yet another residence permit, while **Germany** entered a reservation and underlined that for reasons of technical practicalities, the name of this permit was too long. The Commission responded that this issue could be resolved at the Visa Working Party.

Chapter V, which covered articles 19 to 21, was about residence in other member states. Belgium and Poland rightly pointed out that to enter a second member state, a Blue Card holder has to fulfil all the entry conditions anew, there is no added value in the provision. However, the Commission responded that there is room for flexibility that could be accommodated by the member states in the future so that they “would be allowed to grant more favourable treatment in terms of admission to a second Member State” (8249/08, p. 38). Sweden suggested reducing the waiting period for changing the member state of residence from two years to just one. **The Netherlands** went even further noting that the objective of increased intra-EU mobility could not be met if there were such deadlines imposed. The Commission replied that the deadline was foreseen to reduce abuse. De Lange points out in her analysis that “[t]he repetition of the procedure in the second Member State shows little trust between Member States; a conclusion confirmed by the German negotiator [Gisbert Brinkmann, the German representative during the negotiations on the Directive]” (de Lange, 2013, pp. 22-23). Bulgaria feared that, due to the way it was constructed, the article would not guarantee Community preference for citizens of the new member states. However, the Commission did not confirm that: the Accession Treaties would still prevail over secondary legislation. The mobility of Blue Card holders would be notified to the local competent authorities, according to article 19(2), within one month of arrival of the highly-qualified employee and his or her family. **Austria** suggested changing the term “notification” to “application” (Portugal made a similar suggestion), while **Germany** and Estonia took the view that the application should be done before transferring to another member state. In that case, **the Netherlands** suggested adding the sentence “During the application procedure the applicant is not allowed to work” (8249/08, p. 39). Nevertheless, Estonia, Italy, and **Austria** entered reservations on this provision and **Germany** raised the point that the second member state should also be given the opportunity to set its own recognition of qualifications process. When it comes to the removal of an unentitled resident former Blue Card holder, **the Netherlands** and **Austria** put forward a claim that it should not only be the applicant, but also his or her employer, that could be held financially responsible for the costs of the removal.

Article 20 on access to the labour market of the second member state raised a German reservation, as well as scrutiny reservations on the part of Belgium, Latvia, and **the Netherlands**. Bulgaria was once more concerned about the prevalence of the Accession Treaties over the discussed directive and the guarantees for new member states that their citizens would always have preference over third-country nationals. **The Netherlands** suggested deleting the provision giving long-term residents – EC/EU Blue Card holders preference over other applicants from third countries. The Czech Republic suggested deleting the entire article altogether.

As for the rights of the family members in the second member state, Greece suggested the provision of article 21(3)(b), which stipulated that they have to supply proof of having resided with the Blue Card holder in the first member state. **Austria** wanted to add additional requirements “in order to ensure consistency with [a]rticle 15 of the Directive on the right to family reunification” (8249/08, p. 42). These requirements would include proper accommodation and sufficient resources to sustain the welfare of the whole family. **Germany** was also of the opinion that member states should be able to require that the persons concerned have appropriate means of subsistence.

In chapter VI – final provisions – the Commission proposed that member states communicate their legislative and regulatory measures through the network established by Decision 2006/688/EC (on mutual information mechanisms concerning member states’ measures in the areas of asylum and immigration). This project raised opposition from several delegations – **Germany** entered a reservation, and Greece and Portugal were of the opinion that this decision was not meant to serve the proposed purpose. Point 3 of article 22 dealt with statistics that were supposed to be delivered by member states by 1 April of each year, starting in the year following the transposition of the directive. These concerned the volumes of third-country nationals who have been granted renewed Blue Cards or have withdrawn a Blue Card, nationality, and occupation. The same would apply to family members. **Germany, Latvia, the Netherlands, Austria, and Poland** expressed their concerns as “requesting these statistics to be elaborated and transmitted to the Member States will represent an excessive

bureaucratic burden for their administrations.” (8249/08, p. 44). **The Netherlands** suggested limiting the scope of information transmitted by adding the sentence “with the exception of information about the profession” in reference to family members. Latvia questioned why would the information on the previous country of residence would be so important, to which the Commission responded that it intended to monitor the trends in intra-EU mobility and the needs of national labour markets.

Article 25 foresaw the transposition deadline of two years, to which Sweden entered a reservation and expressed its concerns. The final two articles – 26 and 27 – raised no comments nor reservations.

At the same time as the Council was deliberating on the shape of the directive (5-6 May 2008), it was being discussed in the European Parliament’s LIBE committee, in the form of Ewa Klamt’s report. The rapporteur herself declared that she would finish her report under the French Presidency. The most important element of the discussed directive was, according to her, the salary thresholds and criteria for migration. At this meeting, the Slovenian Presidency of the Council said that the directive could be adopted before the end of 2008 (9259/08, p. 4).

#### 5.4.2. The first draft compromise in May 2008 under the Slovenian Presidency and the call for intensification of work

The Presidency drafted a compromise proposal that was discussed on 13 and 14 May 2008 during the meeting of the Working Party on Migration and Expulsion. The compromise was presented in Council document 8875/08 and the results of the group discussion in document 9666/08. This Presidency compromise did not bring any substantial changes to the text of the proposal. The main differences were seen in article 2(g/h) – the definition of higher professional qualifications was made stricter by requiring 5 years of relevant professional experience rather than just three. Nevertheless, some delegations (notably **Germany**, Estonia, and Greece) advocated the deletion of the phrase referring to years of professional experience as, according to them, this could lead to abuse. The Slovenian Presidency and Malta pointed out that in some sectors persons who are needed may not possess higher education qualifications. **Austria** proposed maintaining the deadline of three years, and so did

**the Netherlands** and Sweden. In the point defining higher education qualifications, Spain suggested replacing the requirement of three years of studies with four years.

Article 3 (scope) was reformulated so that refugees could apply for Blue Cards. This change was endorsed by Hungary, Latvia and Sweden. However, Cyprus, Greece, and **Austria** advocated for maintaining the limited scope. Evidently, the main point of contention was the mobility of EU Blue Card holders-ex-refugees. Latvia and **the Netherlands** wanted to include in the scope third-country nationals who were already long-term residents and were either employed or self-employed. Finland and Sweden were questioning why seasonal workers should be excluded from the scope of the directive.

One of the most important changes to the original proposal was the introduction of article 3(4): “Member States may issue residence permits other than an EU Blue Card for the purpose of employment on terms that are different than those laid down by this Directive. Such residence permits shall not confer the right of residence in other Member States as provided for in this Directive.” (8875/08, p. 5). In short, as early as the fifth meeting of the Working Party Migration and Expulsion, member states entered a game-changing provision on parallel national schemes. The introduction of this point was supported by the Czech Republic, **Germany**, Greece, Finland, **the Netherlands**, **Austria**, and Poland. In addition to that, **Germany** suggested deleting the recital that the Presidency wanted to include in the preamble to the directive: “A third-country national that fulfils the conditions for entry and residence set out in this Directive, should only be issued an EU Blue Card” (9666/08, p. 7). The Commission fiercely opposed those ideas.

In the framework of article 5 (criteria for admission), **Austria** wanted to insert the possibility of requiring third-country nationals to comply with integration conditions as set in the national law. It also wanted, together with Hungary, to require highly skilled immigrants to prove that they have appropriate accommodation assured. Moreover, **Austria** wanted to make sure that the binding job offer that was presented by the migrant in fact required highly qualified employment. In that case,

additional documentation might have been required. **The Netherlands** was in favour of deleting the provision (article 5(1)(c)) whereby for unregulated professions the Blue Card applicant would have to present documents attesting relevant higher professional qualifications in the occupation/sector specified in the work contract. Point 2 of article 5, one of the most contentious ones – on the salary threshold required – was just slightly reformulated in the Presidency compromise. As a result, the Czech Republic, Cyprus, **Germany**, Spain, Finland, Hungary, Italy, Latvia and **Austria** maintained their reservations on this provision. While Hungary and the Czech Republic wanted to delete the words “at least three times the minimum gross monthly wage” (9666/08, p. 10), Finland, Italy, and Sweden wanted to make reference to collective agreements, so that the salaries of immigrants would be comparable to the collective agreements or practices in different occupational branches. This was later supported by **the Netherlands**. **Germany** suggested changing the threshold to twice the average gross monthly salary, an idea which was supported by **Austria**, which also proposed to apply a coefficient of 1.35 instead of 2. Hungary suggested stating that the salary threshold be defined by each member state individually.

In article 6 (derogation for persons younger than 30 years of age), a provision which stipulated that member states should not require professional experience in addition to higher education qualifications, was deleted. Another point was added in this article however: “This article shall be without prejudice to applicable collective agreements or practices in the relevant occupation branches” (9666/08, p. 11). Generally, reservations were maintained on this provision, with **Austria** insisting on deleting the whole article and Malta, supported by Finland, suggesting that it be made optional rather than obligatory. This suggestion was also welcomed by Estonia.

In article 8 (EU Blue Card), **Germany** wanted to underline the state’s discretion insofar that the issuance of the Blue Card to an eligible candidate would not be automatic. The Commission was against this idea. The length of validity of the permit remained contentious, with Spain once again insisting it

should be of only one year, while Hungary wanted to cover the whole period of the work contract plus three months.

In article 9, the most important suggestion was that of Lithuania which wanted to impose obligatory labour market testing on the member states. Greece and **the Netherlands** were against this idea.

A new point (4)(b) was also added to article 10 to underline that as long as the holder of the EU Blue Card and his/her family do not have to make recourse to national social assistance, the presumable insufficient resources to maintain the highly-skilled migrants should be evaluated by member states. This point raised reservations from Estonia and Hungary.

In turn, paragraph 3 of article 11 (applications for admission), which required member states to grant the Blue Card applicants whose applications were accepted every facility to obtain the necessary visas, was deleted (this provision was however added to article 8(1)). Another point was added to this article, to exclude from the scope of the directive posted workers in the meaning of the directive 96/71/EC. Hungary suggested deleting paragraph 1 of article 11, or using the option “and/or” in relation to who should make the EU Blue Card application – the migrant him-/herself or the employer. Greece and France opposed the derogation in paragraph 3 (ex para 4) of article 11, whereby member states could accept applications from persons legally present (and not resident) in the member state concerned.

Article 12 on procedural safeguards was enriched by a line on the consequences of a lack of a decision. The new line was as follows: “Any consequence of no decision being taken by the end of the period provided for in this provision shall be determined by national legislation of the relevant Member State” (9666/08, p. 16). Interestingly, the wording of the first paragraph of that article was “The competent authorities (...) shall adopt a decision on the complete application for an EU Blue Card and notify the applicant (...) as soon as possible after the date on which the application was lodged” (9666/08, p. 16). The expression “as soon as possible”, which was inserted at the request of **Germany** and Sweden, and supported by **the Netherlands**, replaced the deadline of 30 days. Those two sentences read together therefore made little sense. Additionally, Hungary suggested that in paragraph 3 of article 12, the legal

challenges against the negative decisions concerning Blue Card applications should be possible; however, not in cases where the application was rejected on the basis of articles 5(2) (adequate salary threshold) and 7 (volumes of admission). In the same paragraph, **Germany** suggested deleting the words “reasons for the decision” from the content of the notification of application rejection.

Article 13 on labour market access remained difficult and contentious. While Cyprus claimed that the two-year period after which a Blue Card holder could obtain unrestricted access to highly qualified employment in a member state was too short, Spain wanted to reduce it to one year and Malta wanted to prolong it to three years.

As regards temporary unemployment (article 14), four member states (Cyprus, the Czech Republic, Estonia and Latvia) maintained their reservations on the entire article. The question that was discussed in the Working Party was whether multiple periods of unemployment should be allowed. **The Netherlands** and Slovenia were against such a possibility, while Belgium was of the opinion that unemployment should be allowed for 3 months within two years. Romania suggested looking into the reasons for unemployment, while Spain wanted to make the provisions of paragraph 1 optional. **The Netherlands**, supported by Poland, wanted to include an additional clause restricting the acceptability of unemployment. Namely, it would be allowed only in case the Blue Card holder does not make recourse to the member states’ social assistance.

In article 15(2) the conditions of gaining equal treatment as regards study grants and housing were made more stringent, limiting the scope of this provision to long-term residents instead of Blue Card holders residing in the member state for at least three years. This change followed the suggestions of the Maltese delegation; however, reservations and comments had been already raised by Sweden, Slovenia, **Austria** and Greece. In paragraph 1 of article 15, **Germany**, **the Netherlands** and Poland suggested adding a clause (otherwise proposed to be included in the preamble) of the following wording: “The exercise of the right of equal treatment should not lead to a right to an extension of the right of residence of holders of an EU Blue Card” (9666/08, p. 21). Spain suggested adding the right to

strike in point (b) of paragraph one, **Austria** was against this idea. Many member states had a problem with the provision granting equal access to pensions – Finland and Sweden wanted to underline that these should be income related, while Greece, supported by Belgium, pointed out that the provision had to be consistent with bilateral agreements that member states might have with third countries. On equal access to tax benefits, **Germany** and the Czech Republic wanted to delete this provision, while Romania wanted to clarify it.

While maintaining its reservations, Belgium suggested deleting article 16 on family members. Reservations on that article were also maintained by **Germany**. The proposed directive foresaw that as a way of derogation from Directive 2003/86/EC on family reunification, members of the families of the Blue Card holders could join them after just six months. Hungary and Sweden maintained reservations on this provision, while **Germany** and Finland suggested replacing “six months” with “as soon as possible”. **Austria**, having entered a reservation on paragraph 4, suggested deleting the passage altogether. The paragraph contained reference to integration measures for family members, which, according to the spirit of the proposal, could only be applied for once the family was in the member state concerned.

The granting of long-term resident status to Blue Card holders raised many reservations linked to the issue of the calculation of periods of absence. Therefore, Belgium, the Czech Republic, Hungary and **Austria** suggested to delete article 17. Alternatively, the Czech Republic proposed the deletion of paragraphs 3-6 of this article. France, **the Netherlands**, Portugal, and Sweden opposed the ideas of deletion since the calculation of cumulative periods of residence was the basis for fostering circular migration. Nevertheless, several delegations expressed doubts as to the practicalities of administrative processing of applications with various periods of stay in different member states. Latvia additionally suggested changing the proposed 2-year period of continuous residence in the member state where the Blue Card holder applies for long-term resident status to three years. Spain suggested deleting

paragraph four, which constituted a derogation to the long-term residence directive insofar as it extended the allowed period of absence from the EU to 24 consecutive months.

Rather logically, referring to article 18, which described the long-term residence permit for Blue Card holders, Hungary suggested that if no particular rights are given to the holders of that status, the article should be deleted.

At the request of **Austria**, in particular, chapter V on residence in other member states was also made more restrictive, requiring Blue Card holders willing to relocate not only to notify the new member state of their arrival, but to present an application instead. Additionally, the applicants would not be allowed to work before receiving a positive decision from the second member state (as **the Netherlands** had requested at the previous meeting of the working party). Article 19 was also enriched by point 3(bis), which allowed member states to issue national temporary residence permits in case the Blue Card from the first member state was due to expire in the meantime. This was done after a remark made by the Greek delegation that expressed concerns about a possible residence permit vacuum. At the request of **the Netherlands** and **Austria**, the employers (and not only the migrants themselves) were added as responsible for the costs related to the return and readmission if necessary in article 19(4).

Belgium, after maintaining its reservation (as **Germany** did too), suggested deleting article 20, which was on the access to the labour market of the second member state for holders of the long-term resident status. In the following article (21) on the residence of the families in the second member state, in order to ensure coherence with the other provisions, the wording “notify” was replaced with “submit an application”. It was also clarified that the person responsible for lodging the application was the sponsor. **Germany**, supported by Estonia, suggested that, as in article 19, the application for residence permit should be filed before the migrant’s family arrives in the second member state. In the third paragraph of article 21, **Austria** again suggested introducing a requirement of proper accommodation and resources in order to be able to profit from family reunification. A similar (but not

identical) provision was proposed by Poland in the framework of article 21(3)(c), whereby members of the family would have to have not only sickness insurance covering all risks in the second member state, but also stable and regular resources that would allow the migrant family not to make recourse to social assistance.

Finally, in the Presidency compromise proposal, paragraph 2 of the proposed article 22 (information to be included in the communication of transposition measures) was deleted, after suggestion from Italy.

The last issues that raised opposition at the meeting of 13-14 May 2008 were the transposition measures to be communicated together with a correlation table between the national provisions and the text of the directive. Spain, Latvia and Malta were against the idea of submitting the correlation table (Malta suggested a less obliging wording for this provision), while Sweden once again pleaded to extend the transposition deadline to three years.

A few weeks later, on 9 June 2008, the ministers of employment met in the Council. The item on the Blue Card directive was registered in the section "any other business" of the agenda (10087/08, p. 5) and contained information from the Presidency regarding "the comments made by the Czech Republic, Hungary and Belgium on the item" (10414/08, p. 28).

The Slovenian Presidency was concluded by the European Council. The leaders met on 19 and 20 June 2008 in Brussels and, among other statements, called for intensifications of work on the Blue Card directive (11018/08, p. 3). This European Council took place a week after the failed Irish referendum regarding the adoption of the Treaty of Lisbon. As in the first semester of 2008 member states could still believe that the Blue Card directive could be adopted under the new rules of co-decision, in mid-June it became clear that for some time the institutional conditions would not change. The draft versions of the conclusions, prepared in May, included a call for adoption of the Blue Card directive "by the end of the year" (9857/08, p. 2), but this element was later deleted from the final document 11018/08.

### 5.4.3. The start of the French Presidency

As previously stated, the Slovenian Presidency was concluded by a meeting of the heads of states and governments who wanted to see more progress in the negotiations. Mayer recalls that they “started rather sluggishly and only picked up drastically under the French Presidency, which made the adoption of the directive a priority.” (Mayer, 2017, p. 263). The French Presidency opened the new Trio (French, Czech, and Swedish Presidencies), which presented its 18-month work programme in mid-June 2008, in which it underlined its commitment to work on the Policy Plan for Legal Migration, including a rapid adoption of the Blue Card directive.

With these priorities on the agenda, the first meeting of the Working Party on Migration and Expulsion under the new French Presidency was foreseen for 3-4 July 2008. In view of this meeting, the incoming Presidency sent a note with suggestions for compromise to all delegations (10398/08). The innovations introduced by the new compromise included a definition of regulated profession in Article 2(j) (reference made to Directive 2005/36/EC) and a new category of persons excluded from the scope of the directive (applicants for protection in accordance with national legislation, article 3(c) – following a suggestion by **the Netherlands** and **Germany**). The discussions on the definition of higher professional qualifications did not cease, with delegations making ever bolder suggestions. Latvia once again repeated that priority should be given to higher education qualifications (and not professional experience), while Slovakia wanted to make it obligatory to have a higher education diploma and three years of experience. Belgium was of the opinion that the equivalent professional experience should be taken into account from a period of ten years. The Commission felt that, especially in the information technology sector, equivalent experience would be of utmost importance. The Presidency shared this view. It was also agreed that in the preamble to the directive, a reference would be made to the ISCED 1997 levels 5a and 6 in order to further define higher education qualifications.

The inclusion of refugees in the scope of the directive remained problematic. **The Netherlands** welcomed this change in the proposal, while Greece, supported by Cyprus and **Austria**, was reluctant

to accept it. The **German** delegation diplomatically stated that “the question of double status needs to be further considered” (11512/08, p. 5). Indeed, the Commission also stated that the issue of mobility of refugees to the other member states was especially contentious, and the Presidency suggested considering the introduction of a chapter on the rights of refugees. **The Netherlands** also suggested including in the scope of the directive family members of Union citizens exercising their right to free movement and long-term residents who reside in another member state. The Presidency and Latvia were in favour of deleting the latter provision (article 3(2)(f)). As regards parallel schemes, **the Netherlands**, supported by Bulgaria, “felt that the current draft of this provision does not ensure enough discretion to the member states” (11512/08, p. 7). The possibility of having parallel national schemes was further supported by Bulgaria, the Czech Republic, **Germany**, Greece, Finland, **the Netherlands**, **Austria**, Portugal and Sweden. Regarding this issue, the Commission answered that the Blue Card should have “a level of exclusivity” (*idem*), while the Presidency “underlined the need to find the right balance in this area, in order not to jeopardise harmonisation” (*idem*).

As stated by the Dutch representative in Brussels (Interview I, 27.05.2014), the already existent Dutch policy regarding highly skilled migration (*Kennismigrantenregeling*<sup>9</sup>) was not in line with the more restrictive approach that prevailed during the negotiations of the Blue Card at the Council. This is why the Dutch government pleaded to allow for parallel national schemes. The discussions in the upper chamber of the Dutch Parliament (2008) that took place on 17 January 2008, revealed that the Dutch government in principle welcomed an EU policy in the field of labour migration; however it claimed that it should provide sufficient space for national policy, make the procedures as simple as possible, and respect the developments in the national economy and its labour market. The Parliament urged the government to lead the negotiations in the Council in such a way so as to make it possible for **the Netherlands** to retain a demand-driven admission of skilled migrants from outside the EU and so that

---

<sup>9</sup> The current scheme is governed by the law that entered into force on 1 June 2013 (the so called MoMi: Modern Migration Policy Act), but the *Kennismigrantenregeling* has been in force since 1 October 2004.

the structure of social security rights of skilled migrants in other EU countries would not create additional entitlement to social security in **the Netherlands**. In the view of the government, the Blue Card proposal could help alleviate illegal immigration and employment. Moreover, the directive negotiations were influenced by the strong representation of Dutch private companies, in whose interest it is to have a competitive scheme with easy procedures to attract skilled labour force. In the view of the Dutch government, a common fast-track and simple procedure for highly skilled migrants would increase transparency in the EU and lead to more uniform procedures. However, such procedure should be complementary to the national policies and not replace them. This was also the opinion of the interviewed representative of the Dutch Industry (Interview IV, 25.04.2017). Since there were more member states that had their doubts about the effectiveness of a common labour migration policy, as a final result, one of the most striking features of the Blue Card directive is the breadth of discretion that is given to member states not only as to the modes of transposition of its provisions, but also to the introduction of or the keeping of parallel national schemes. As mentioned by Putnam, “[a]t the national level, domestic groups pursue their interests by pressuring the government to adopt favourable policies (...). At the international level, national governments seek to maximise their own ability to satisfy domestic pressures, while minimizing the adverse consequences of foreign developments.” (1988, p. 434) The case of the Blue Card shows how the EU member states put in practice the wish to “have their cake and eat it too”.

Furthermore, in article 5(1)(d) (criteria for admission), a national long-term visa (if required) was added to the conditions of admission, following a suggestion by Greece and supported by **Germany** and the (Slovene) Presidency. Most importantly, the salary threshold established in article 5(2) was set at at least 1.5 times the average gross monthly wage. The reference to the average gross monthly wage was suggested by **Austria** and **Germany**, however with different coefficients proposed. The Czech Republic and Estonia suggested reducing the coefficient to 1.24, while **the Netherlands** and Slovenia felt that it was just too high. **Germany** preferred to increase it to two (as it had proposed previously). Poland and Slovakia preferred the reference to the minimum wage and Sweden wanted to take into account other

factors than just salary. Hungary wanted to make the salary threshold dependent exclusively on the will of the member states and for Latvia it was sufficient to make sure that the salary received by the highly qualified third-country national was higher than the average salary in the country. Italy insisted on making reference to collective agreements. Greece and **Austria** pointed out that the source of the data concerning the gross monthly salaries in different member states should be made clear.

At this stage, it is important to remark that the salary threshold is the most important element of the Blue Card directive and, at the same time, it remained the most contentious issue until the end of negotiations. One of the fears was that the spill over effect would obligate member states to set legal minimal salaries (at some level) and a number of member states does not use this concept. The amount of money to be paid to migrants was also widely discussed. Among the most restrictive was **Germany, which** pleaded a salary level of twice the average. The final amount agreed by the EU member states was 1.5 of the average gross annual national salary, but it was not indicated, how this should be calculated nor what the source of data should be – as was argued at a meeting at the beginning of July 2008. The German Bundesrat estimated that the legal instruments used in **Germany** that regulate the access of third-country nationals to the labour market were well-balanced and very flexible and only required minor adjustments (Deutsches Bundesrat, 2007, p. 4). As a result, in its recommendations, it rejected a reorganisation imposed by the European law. In particular, the Bundesrat feared that the definitions of highly qualified workers as proposed by the Commission were unclear and bore probability of abuse. Moreover, the salary threshold as proposed by the Commission was “way too low”, as well because linking the salary threshold of highly qualified workers to minimum wages would send the wrong signal that those occupations are underestimated. At the same time, the Bundesrat invited the German government to lower the salary thresholds required by the German national scheme (Deutsches Bundesrat, 2007, pp. 4-6). It also rejected the idea of free labour market access in a second member state and proposed a point-based system of admission of migrant workers that would better comply with the diversity of European labour markets. Finally, it underlined that the immigration of third-country workers cannot be used as a method to face the demographic challenges

of **Germany** (although it would uncontestedly be good for its economy) (Deutsches Bundesrat, 2007, p. 11). As cited by Barbara Laubenthal, the **German** minister for Interior stated that the German Länder authorities “(...) [did not] see any need for EU regulation at all. This question should remain a national competence. There will be no directive on labour migration, since the Bundesrat will not approve (Innenminister der Länder gegen Blue Card, 2007).” (Laubenthal, 2014, p. 469). The **Austrian** Ministry of Interior also underlined that the question of who and in what numbers enters a member state should remain a national competence (Bundesministerium für Inneres, 2008).

Article 6 (derogation for professionals younger than 30 years of age) was deleted and instead a new paragraph was added to article 5. The new paragraph 3 of article 5 foresaw a derogation for third-country nationals who obtained their higher education qualifications within five years preceding their application. As it was previously, the salary requirement in that case would amount to two-thirds of the general salary threshold. This provision was made obligatory, but it was suggested by Estonia and Malta that it be converted into an option. The Czech Republic, Estonia, Spain, Finland, Malta, **the Netherlands**, Sweden, and Slovakia maintained reservations on this paragraph. Additionally, Finland, **Austria** and Sweden preferred to delete it, as for them it was discriminatory.

After the concerns of France, a small correction was made in article 8(2) establishing the length of the Blue Card validity at two years extendable by the same duration (previously at least the same duration). Poland was against this change, and so was Finland. Hungary wanted to make the initial period of length two years and three months, while Spain still insisted on limiting it to just one year. **The Netherlands**, supported by Greece, Poland and Sweden, sought to change the provision so that the initial length of validity would be of the length of the contract plus three months, with the possibility of setting the maximum validity of the first permit at two years and the general limit of validity of the Blue Card at five years. While Belgium, Estonia, and Slovakia were in favour of linking the length of validity of the Blue Card to the length of the contract (but expressed concerns about the additional three months), the Commission found it difficult to accept.

Following the reservations of **Germany**, supported by Estonia, Greece, Hungary, and Latvia, a sentence was added to article 9(2) enlisting article 7 as a possible legal basis for refusal of granting an EU Blue Card. To Belgium, article 7 was not a reason for refusal, but rather a reason for treating the application as inadmissible, which would limit the possibilities of legal challenge. Estonia suggested inserting a phrase by means of which employers who were condemned for providing illegal employment or having tax arrears would see their applications rejected (or the applications of their potential employees).

In article 11 on applications for admission, paragraph 3 was deleted (derogation for persons already legally present (but not resident) in the territory of the member state). Sweden, Belgium, Hungary and Portugal deplored this deletion. Instead, in paragraph 2 a phrase was added that applications can be accepted from holders of valid residence permits or national long-stay visas. This was opposed by Greece and Italy.

The previously mentioned problem of deadlines for application processing of article 12 was now corrected (against the will of **Germany** and Sweden) to include the phrase “as soon as possible and at the latest within sixty days” (10398/08, p. 11). Cyprus was still convinced that this was too short, while Latvia and Lithuania wanted to extend it to ninety days. A footnote was added that there was a suggestion to insert in the preamble a phrase underlining that those deadlines did not include the time necessary for the recognition of qualifications or processing of visas.

Regarding article 13 on labour market access, Italy pointed out that not allowing a person to change their job for two years constituted an infringement of the principle of free choice of a job. **Austria** and **the Netherlands** wanted to maintain the possibility of checking salary conditions beyond the period of two years. Estonia suggested introducing a provision whereby the changes in the working conditions would have to be authorised until which point the worker concerned is granted long-term resident status.

In article 14 on temporary unemployment, member states (especially **the Netherlands** and Slovenia) forced the insertion of a clause that the three-months unemployment period would be only allowed

once during the period of validity of the Blue Card. Sweden was not on board with this change and postulated going back to the original provision. Spain wanted to make article 14(1) optional (“may” instead of “shall”).

Important changes were made in the list of rights granted in terms of equal treatment with member states’ nationals. Against the will of Greece and **Germany**, reference to study grants was deleted from article 15(1)(c). Italy and Sweden supported the new phrasing. As Finland, supported by Sweden, had requested, it was made clear that the payment of pensions should be of those which are income related (article 15(1)(f)). Sweden wanted to further clarify that the provision was referring to public or state pensions, while Belgium considered reciprocity and Latvia the existence of bilateral agreements with third-countries (a problem raised by Greece at the previous meeting). **Germany**, supported by Estonia and Slovakia, wanted to delete the provision on equality as regards tax benefits (article 15(2)(g)). Another modification was made at the suggestion of **Austria**, which wanted to insert a sentence in paragraph 2 that “[a]ccess to university may be subject to specific prerequisites according to national law” (9666/08, p. 23 and 10398/08, p. 15). Additionally, **Germany** and Poland wanted to change the wording of this paragraph, in order to further restrict equality in access to financing education and training from public resources. Notwithstanding the result of the discussions at the previous meeting of WPME, **Germany** insisted on shortening the proposed period after which Blue Card holders would have unrestricted access to housing and study grants to 4 years, and not after the person had obtained a long-term resident status. A final paragraph was added to this article, which underlined that equal treatment did not prevent member states from withdrawing the Blue Cards in accordance with article 10.

Following its remarks at the previous working party, Finland suggested a crucial addition to article 16 on family members, namely that the Blue Card holder and his or her family members should be admitted at the same time (and not within six months at latest). **Austria** once again suggested deleting

paragraph 4 of article 16 (integration measures to be applied only once the family is in the member state, and not before).

Regarding article 17, granting long-term resident status to EU Blue Card holders remained problematic. Belgium and Hungary were against the creation of a separate status, while Latvia was of the opinion that all of the proposed derogations should be applicable to all third-country nationals acquiring the long-term resident status. To this suggestion, **Germany** replied that it was willing to grant longer periods of absence for Blue Card holders, but not to extend it to other third-country nationals. At the same time, **Germany** and Latvia claimed that the deadline for acquiring long-term resident status should be of three years spent in the last member state, and not just two. Spain wanted to delete paragraph four (derogation on the absence allowed for long-term residents), while Poland pointed out that it would be technically challenging to implement paragraph 5 since it was difficult to provide evidence for the reason for absence from a member state. Also, Belgium and Estonia felt that paragraph 6 should be deleted (applicability of articles 15(f) and 16 after issuance of a long-term resident permit) since it did not bring any added value.

Belgium, **the Netherlands** and Poland maintained their reservations on article 19 (conditions of residence in other member states) with Poland stating that the provisions included were unattractive, Belgium discussing its added value. Additionally, Belgium and **the Netherlands** did not want to impose a two-year deadline for movement to other member states, since according to them, it was hampering the intra-EU mobility. Spain also thought that two years was too long, and preferred to set a one-year deadline.

In article 21, a number of changes were made. First of all, at the request of Greece, a phrase was added “as well as visa, if required”, in accordance with the new wording of article 5(1)(d). A new paragraph on sufficient resources was also added, at the suggestion of Poland, which constituted a copy of article 10(3)(b). As regards the implementing measures (article 22), the compromise proposal took into account the protests of many delegations, which did not want to use the network established by

Decision 2006/688/EC for the purpose of the Blue Card directive. All references to this network were deleted. Portugal, supported by the Czech Republic and Greece, suggested using Eurostat instead. Additionally, the requirement of communicating the occupations of Blue Card holders was softened by the use of the expression “as far as possible” (10398/08, p. 23). Finally, the idea of presenting the transposition measures using a correlation was abandoned (article 25). However, it was agreed to include a recital in the preamble which would encourage member states to draw such tables.

In July, the dossier on the state of negotiations on the Blue Card directive 2009/50/EC was transmitted to the Strategic Committee on Immigration, Frontiers and Asylum (SCIFA). This was done in the framework of the preparation to the orientation debate at the Justice Home Affairs Council. The most important features of the proposal and its compromise version that were presented to SCIFA were the definitions used (higher education qualification and higher professional qualifications), the scope (whether or not to include the beneficiaries of international protection and the relation with national provisions, i.e. national parallel systems), the salary criterion (salary levels and derogations to them), and the status of the long-term residents. Document 11365/08 which was sent to the members of SCIFA, contained a summary of the discussions and the status quo in the WPME. The higher education qualification was to be attested by a certificate of completion of studies of at least three years of length, higher professional qualifications were to be linked to the higher education qualification or, as a derogation, to five years’ relevant professional experience. While the former provision was supported by a “large majority of delegations” (11365/08, p. 2), the latter raised reservations as to the equivalence of professional experience. However, “(...) delegations were in favour of maintaining this criterion, if need be by specifying or modifying the terms of implementation or by making it optional” (11365/08, p. 3). The text of the compromise submitted to SCIFA also included beneficiaries of international protection in its scope, so that unjustified difference in treatment would be avoided. Nevertheless, some delegations expressed doubts, taking into consideration the possible complexities resulting from the “combination of the beneficiary of international protection status with one of EU Blue Card holder” (11365/08, p. 3). As for the salary criterion, SCIFA was informed that “most

delegations were in favour of a reference to the [1.5 of the] average gross monthly wage, but others preferred another approach or a reference to national legislation” (11365/08, p. 4). The conclusion in note 11356/08 was that “[d]epending on the exchanges of views in the SCIFA and then in COREPER, questions relating to a limited number of these points may be referred to the Council meeting (...)” (11365/08, p. 5). On the basis of the exchange in the SCIFA, the Presidency decided to refer a number of questions (including the admission criteria, salary levels, and national schemes) to the higher instances, so as to have a political debate at ministerial level (12200/08, p. 2). The next step of the negotiations was therefore a note from the Presidency to COREPER and the Council 11734/08. This note revealed that reaching an agreement on this proposal was an aim of the French Presidency. The two questions that were referred to COREPER and the Council were the one on the admission criteria (especially the salary criterion and the derogations to it) and on the existence of the parallel national schemes.

As per document 12050/08, following the meeting of SCIFA on 10 July 2008 and their comments on the addition of the beneficiaries of international protection to the scope of the directive, the Presidency had to draw a new compromise proposal, which was examined by the WPME on 28 and 29 July 2008. Already at that time, it was made clear that the results of the Justice Home Affairs Council meeting on 24 and 25 July 2008 would necessitate a new compromise proposal that would be discussed in September 2008 (12050/08, p. 2). The Council was “largely in favour of complementary application of the European Blue Card scheme and national arrangements” (11653/08, p. 11, cf. 12714/08, p. 3); however on the issue of admission criteria and salary thresholds, “delegations expressed different points of view” (*idem*). According to the information contained in document 12050/08, it was decided that the granting of Blue Cards to those who applied for protection according to national legislation would be optional and dependant on the decision of the member state. New provisions were added to article 10 on grounds for withdrawal or non-renewal of the Blue Card. It was made possible to do so in case the Blue Card holder did not communicate his/her address within a reasonable period of time and when he or she applied for social assistance. Important changes were

made in chapter IV referring to rights. Equality in access to labour market (qualified employment after two years) was made optional. This involved a number of changes in article 13. It was also proposed that the deadline for residence in other member states be changed to 18 months in order to “make mobility possible in practice once this period has come to an end” (12050/08, p. 20). In the same article (19) how the provisions should be understood in case of future mobility between member states was also clarified. In article 21, a point was added (at the insistence of **Austria**) that the Blue Card holder moving with his/her family to another member state has to have accommodation that would be “normal for a comparable family in the same region” (12050/08, p. 23). At the meeting of 28 and 29 July 2008 the Working Party on Migration and Expulsion discussed the compromise proposed in document 12050/08. Delegations mainly insisted on the changes they had suggested during previous meetings; however, there were also some new points taken on board. In particular, it was agreed that several passages to be added to the preamble of the directive, in order to underline the importance of some of the provisions. **The Netherlands** suggested introducing (in a new, separate article) the category of EU Blue Card Commuter, which would allow Blue Card holders to reside in one member state and be employed in a highly skilled occupation in a neighbouring member state. In the new compromise, there also appeared a suggestion to reinforce the provisions limiting brain-drain, namely introducing a paragraph, which later became article 8(4). It was added that “with respect to Article 9(2.b) [finally: 8(4)], which results from a new compromise suggestion, the Presidency envisages to further develop recital 20” (12320/08, p. 11). There are no traces in the documents of where this suggestion came from.

After the summer break of 2008, the file on the Blue Card directive was forwarded to COREPER, which also concluded the meetings of the Working Party Migration and Expulsion (WPME) on that topic. The following discussions were had in the framework of meetings of the JHA Counsellors, COREPER or the Council. In document 12687/08, the Presidency presented the main points of contention that emerged up until September. It also summarised the policy debate in the Council (24 and 25 July 2008), where the definitions and complementarity of the Blue Card and parallel national schemes were agreed upon,

while the minimum salary threshold remained problematic. The new lines of compromise were presented at the meeting of SCIFA in the beginning of September 2008.

By this time, it was clear that the most problematic issue encountered during the preparation by the working parties was the salary threshold (12687/08, paragraph 6). As mentioned in paragraph 5(c), “[t]he idea is to retain the criterion, which is essential for the defining of the Directive’s scope, in line with its subject matter of highly qualified employment, while taking a factual and statistical approach as a basis” (12687/08, p. 2). To this end, a footnote in document 12687/08, relating to article 5, was added, which promised an additional clause in article 22 (Implementing measures) that “[f]or the purpose of the implementation of Article 5(2) and, where appropriate, 5(4), reference will be made to the Eurostat data.” (12687/08, p. 4). Additionally, in comparison to document 12320/08, the paragraphs included in article 5 have changed. Notably, the previous paragraph 3 was replaced and the special derogation for recent graduates disappeared. Examination of footnote 17 on page 8 of document 12320/08 reveals that paragraphs 2,3 and 4 of article 5 were discussed at the SCIFA meeting of 10 July 2008 or the JHA Council of 24 July, but “the issue will be further considered at the level of JHA Counsellors and Permanent Representatives Committee” (12320/08, p. 8).

At the meeting of the JHA Counsellors of 12 September 2008, the Presidency finally told **the Netherlands** that its insistence on introducing the category of cross-border workers was pointless as it went “beyond the scope of this proposal” (13009/08, p. 3) not only in the view of the Presidency, but also in that of other delegations. Such discussions could be continued in the framework of the Single Permit directive. Interestingly enough, article 3 as per document 13009/08 reintroduced beneficiaries of international protection to the list of persons excluded from the scope of the proposed Blue Card directive. Apparently “(...) it was agreed to include a statement from the Council inviting the Commission to consider, this issue in the framework of the establishment of a common asylum system” (13009/08, p. 5). Also, provision (2)(f), which excludes long-term residents from the scope of the directive, was reinserted. A new paragraph (2a) was added underlining that the directive does not

apply to posted workers in the meaning of directive 96/71/EC. In turn, the possibility of derogating from article 3(1)(c) was deleted, so the possibility of inclusion of persons under protection as per national legislation was excluded. Finally, article 3(4) was reformulated to state clearly that member states remain free to issue national permits for any purpose of employment, including highly qualified employment. As far as other changes are concerned, most importantly, **the Netherlands, Austria** and Slovakia maintained their reservations on article 5(2) and the salary threshold, which in their view (1.5 of the gross average annual, now changed from monthly, salary) was too high. The Czech Republic, Hungary, and Sweden also had reservations on that paragraph and it was therefore agreed to include another recital in the preamble, which would underline that the salary threshold “does not interfere in any way in terms of determination of wages” (13009/08, p. 8). Additionally, a new derogation was introduced by means of paragraph 4 with a salary threshold of 1.2 of the gross average annual wage for employment in professions in particular shortage. This provision replaced the derogation foreseen for young graduates. As far as rights are concerned, the Czech Republic was of the opinion that the job changes that should require an authorisation should only be those of the employer, and that the possibility of changes should be limited to the job for which the person was admitted. The Czech Republic also wanted to exclude persons who committed serious infringements on their work contracts from the opportunity for the grace period in case of temporary unemployment. In terms of equal treatment (article 15), the changes that were introduced included the deletion of equal treatment as to tax benefits, a new passage underlining the importance of freedom of individuals to choose their contractual partners, and a new paragraph 4 whereby it is possible to limit equal treatment in case an applicant moving from one member state to another is awaiting the decision of issuance of the Blue Card in the second member state. Cyprus wanted to make the provisions of article 16(5) optional, limiting the access of the family members to the labour market. **Germany** was again insistent that the waiting period before application for long-term residency should be increased from two to three years, for the sake of integration. In article 18, after the discussions from previous meetings, it was agreed not to create a special category of long-term residents, but just to mention in

the “remarks” section on the permit that it is being issued to a former EU Blue Card holder. Article 19 again raised some doubts: **Austria** and Slovakia were concerned about the 18-month deadline to be applied before mobility, while Belgium and **the Netherlands** found it of little value. Some major changes were made to article 22, the member states having agreed that statistics on the Blue Cards should be transmitted to the Commission two years after the transposition (and not one year as proposed previously) and not by April, but by July. At the previous request of **Germany**, the expression “as far as possible” was added in article 22(2) to limit the obligation to report the numbers of renewed and withdrawn Blue Cards. Another paragraph was added to make reference to Eurostat data upon implementation of article 5(2) and 5(4) on the salary thresholds.

After the COREPER meeting of 11 September (13029/08 and 12687/08), a very limited number of reservations were maintained in reference to the definitions (higher professional and education qualifications). The definition of scope that allowed member states to maintain their parallel national systems was unanimously accepted, and, as regards the minimum salary threshold, there were still a few reservations, but “it transpired that the balance thus struck probably corresponded to the best possible compromise in view of the different positions” (13029/08, p. 2). The outstanding issues that were to be discussed by COREPER were to agree on the rewording of article 5 and the newly inserted recital in the preamble and to ensure that there were no other substantial difficulties.

At meetings of COREPER on 17 September and the JHA Counsellors on 19 September, no major changes were done to the previous Presidency compromise, apart from reformulations in article 15 (equal treatment). In particular, equal treatment as regards study and maintenance grants and loans, as well as procedures for obtaining housing was further limited, not excluding long-term residents anymore (13163/08). In declarations to be inserted in the Council minutes, the Council underlined the Community preference in the view of the recent admission of EU-12 and Austria, referring to article 15(1)(f), emphasised the importance of the transferability of international social security pensions by way of exception to its reciprocity clause (13748/08).

The Justice and Home Affairs Council met on 25 September and, as was mentioned in the press release issued on that occasion, “[t]he Council asked [COREPER] to finalise the text of this Directive on two specific points.” (12923/08, p. 8). According to Mayer, this was the moment when the Council took the political decision to adopt the directive (Mayer, 2017, p. 263).

As previously stated, in the European Parliament, which only had a consultative role, three committees were engaged: Civil Liberties, Justice and Home Affairs (LIBE), and, as associated committees: Development (DEVE) and Employment and Social Affairs (EMPL). The report was prepared by German MEP Ewa Klamt (PPE-DE) and opinions were given by Danut Budreikait (ALDE) and Jan Tadeusz Masiel (UEN). 388 MEPs were in favour of the amendments of the proposal as drawn by Ewa Klamt, with 56 votes against and 124 abstentions. The EP’s amendments mainly referred to the salary threshold (1.7 of the gross national average, but not less than for national workers in similar positions), a clause on the avoidance of brain-drain, the deletion of the derogation for persons of below 30 years of age, a provision allowing migrants to cross-border commute after 36 months of the issuance of the Blue Card, extension of the proposed validity of the BC (3+2 years instead of 2), and a prolonged grace-period for unemployment (up to 6 months).

#### 5.4.4. Final stages of discussion in the Council

On 2 October 2008 the employment ministers met for the last time, but during this Council they were merely informed about the state of negotiations, without engaging in further discussions. On 5 December 2008 the JHA Counsellors examined the recitals of the preamble and also studied the opinion of the European Parliament given on that proposal (16952/08). However, no references were made to the Parliament’s opinion, nor were the Parliament’s suggestions taken on board on that occasion. Fridriksdottir claims that “[t]here are no records of the submission of the Parliament or the EESC being discussed in the WPME or by other parties to the negotiations” (Fridriksdottir, 2016, p. 117). Nevertheless, the delegations had the opportunity to read the summary of the meeting of the Parliament’s LIBE Committee (9259/08). The main points of contention, according to the summary,

were in line with those raised in the Council preparatory bodies (definitions, salary thresholds, added value of the proposal, situation of the new member states). The agreement on the final text (included in document 16952/08) was reached by COREPER on 22 October 2008. It was stated in the minutes that “[l]e Comité a parvenu à dégager un accord sur le texte”<sup>10</sup> (9057/09, p. 2).

The proposal was one of the four official priorities of the French Presidency (next to climate change, European defence and agricultural policy) that took place in the second semester of 2008. The following Czech Presidency was turbulent, with a sudden change of government in April 2009. Additionally, as outlined by Král, “[a]t a certain point, the talks [among the Presidency Trio – France, the Czech Republic and Sweden] were so closely to collapse that the programme [of the 18-month trio] had to be drafted by the General Secretariat of the Council which came up with a compromise wording” (Král, 2008, p. 37). The plan of the Czech Presidency was to concentrate on the three ‘E’s’: Economy, Energy and Europe in the world. The Blue Card was not really a top issue (Brunsden, 2008), especially because the so called “New Member States” (those who acceded to the EU in 2004 and 2007) still saw the rights of their citizens as unequal to those of the “Old Member States” as regards labour market access, and because the transition period negotiated in the accession treaties could be prolonged by two additional years by some countries, including Austria and Germany. Therefore, the period between the end of negotiations and the adoption of the directive was extended to almost half a year, until May 2009, when the restrictions on labour market access of the citizens of the 8 new member states were finally lifted.

As stated by Král, “[r]ecently the Czech Republic has enacted a very liberal legislation at national level, giving access to third country nationals for both skilled and non-qualified workers to the Czech labour market (known as the Czech ‘Green Card’). This would make the Czech Republic an obvious promoter of such progressive measures at EU level that are currently debated, such as the EU Blue Card. (...) But the Czech Republic actually behaves quite destructively in this respect.” (Král, 2008, p. 43). This author

---

<sup>10</sup> “The Committee has managed to reach an agreement on the text” (author’s translation)

also underlined that, at the time, the Czech Republic was on bad terms with the European Commission, which ultimately decided to have the follow up of the “Hague Programme” concluded by the Swedish Presidency (later known as the “Stockholm Programme”) rather than going forward with the “Prague Programme”. Another reason for disaccord with the EU in general was “(...) a lot of suspicion towards transferring more competences to the EU probably motivated by institutional ego of law-enforcement ministries who are afraid of losing power to Brussels and also by a bad state of some parts of law enforcement, particularly intelligence services but also the judiciary. If some kind of differentiated integration should arise, the Czech Republic will most probably not be willing to participate” (Král, 2008, p. 43). As this illustrates, the positions of the subsequent presidencies were sharply different and the Czech Presidency was particularly reluctant to the idea of a common immigration policy. This could be seen not only in the wake of 2009, but also during the whole of 2008, when the Czech Republic was very harsh on the issues linked to equal treatment and labour market access.

The last Council document that was issued in relation to the interinstitutional file 2007/0228 (CNS) was associated with the adoption of the proposal and was an I/A item note addressed to COREPER and the Council (9057/09). The text to be adopted was contained in document 17426/08, issued on 18 March 2009 and finalised by the Legal Linguistic experts, and in this form was transmitted to be published in the Official Journal.

### **5.5. The final outcome of the negotiations: the main differences between the EC input and the output**

In the preamble of the directive the Council sets out the scope of its aims: in paragraph 3 it underlines the necessity of creating “measures to attract and retain highly-qualified third-country workers” (not concentrating the activities of the EU on circular migration solely), in paragraph 7 it expresses the desire to “facilitate the admission of highly qualified workers and their families by establishing a fast-track admission procedure”, while at the same time it allows the member states “to maintain or to introduce new national residence permits for any purpose of employment”, whereas “the third-

country nationals concerned should have the possibility to apply for an EU Blue Card or for a national residence permit". In the same paragraph, it also permits granting "additional rights and benefits which may be provided by national law, and which are compatible with this Directive." In paragraph 8 the Council states that member states should have the liberty to set quotas – be it set in global volumes or restricting access to "certain professions, economic sectors or regions"<sup>11</sup>. Martenczuk sees it as an anticipation of the entry into force of article 79 (5) TFEU and a "serious limitation of the level of harmonization, since in principle it seems to leave the possibility to member states even to set the level of admission to zero" (Martenczuk, 2014, p. 78). As far as unification of rules is concerned, in paragraph 9 it is stated that "the definition of a common minimum denominator for the salary threshold is necessary to ensure a minimum level of harmonisation in the admission conditions throughout the Community". The guidelines are also given that "Member States should fix their threshold in accordance with the situation and organisation of their respective labour markets and their general immigration policies". In the same paragraph, the possible derogations are given as for the salary threshold: "where (...) there is a particular lack of available workforce and where such professions are part of the major group 1 and 2 of the ISCO (International Standard Classification of Occupation) classification." (Council Directive 2009/50/EC).

The most important provisions that were included in the proposal and the final directive are presented in Table 5.1. It may appear that the differences are not that numerous; however, they do make a difference. First of all, the adopted definitions of highly qualified employment and higher professional qualifications are the provisions that were significantly changed during the negotiations and are the cornerstone of the directive. The introduction of various "may" clauses also changed the overall perception of the provisions.

---

<sup>11</sup> In line with currently in force Article 79(5) TFEU (the provision on determination of volumes of admission was not present in the pre-Lisbon Treaty).

Table 5.1: The most important differences between the proposed and adopted text of the Blue Card directive

Issue	Article of the final directive	Content of the proposal	Content of the final directive
Definitions	Article 2	"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 <b>higher education qualifications or at least three years of equivalent professional experience is required</b> ;	'highly qualified employment' means the employment of a person who: <ul style="list-style-type: none"> <li>— in the Member State concerned, is <b>protected as an employee</b> 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,</li> <li>— is paid, and,</li> <li>— <b>has the required adequate and specific competence, as proven by higher professional qualifications</b></li> </ul>
		"higher professional qualifications" means qualifications attested by <b>evidence of higher education qualifications or of at least three years of equivalent professional experience</b> ;	'higher professional qualifications' means qualifications attested by evidence of higher education qualifications or, <b>by way of derogation</b> , when provided for by national law, attested <b>by at least five years of professional experience</b> of a level comparable to higher education qualifications and which is <b>relevant</b> in the profession or sector specified in the work contract or binding job offer;
Personal scope	Article 3	HSW excluding: <ul style="list-style-type: none"> <li>– independent workers,</li> <li>– researchers,</li> <li>– family members of EU citizens exercising free movement,</li> <li>– refugees and people under international protection (or having applied for it)</li> <li>– persons whose expulsion has been suspended</li> </ul>	HSW excluding: <ul style="list-style-type: none"> <li>– independent workers,</li> <li>– researchers,</li> <li>– family members of EU citizens exercising free movement,</li> <li>– refugees and people under international protection (or having applied for it)</li> <li>– persons whose expulsion has been suspended</li> <li>– <b>people under temporary protection or having applied for it</b></li> <li>– <b>seasonal workers</b></li> <li>– <b>posted workers</b></li> </ul>
More favourable conditions	Article 4	Possible within existing international agreements	Possible within existing international agreements + <b>MS have the right to adopt or retain more favourable provisions for beneficiaries of the BC directive</b>
Requirements	Article 5	<ul style="list-style-type: none"> <li>– Binding job offer ≥1 year</li> <li>– relevant higher professional qualification</li> <li>– a valid travel document</li> <li>– sickness insurance</li> </ul>	<ul style="list-style-type: none"> <li>– Binding job offer ≥1 year</li> <li>– relevant higher professional qualification</li> <li>– a valid travel document</li> <li>– sickness insurance</li> </ul>
Salary level	Article 5	3 times the minimal national salary or 3 times the minimum income entitling to social assistance	<b>at least 1.5 times the average gross annual salary in the Member State concerned or 1.2 for shortage occupations</b>
Special provisions	(Article 6 of the proposal)	Derogation for young professionals (under 30 y.o.)	<b>Deleted</b>

Length of validity	Article 7(2)	2 years + 3 months grace period	Between 1 and 4 years
Application processing	Article 11	30 days (60 in difficult cases)	ASAP, but not more than 90 days
Access to labour market	Article 12	Restricted for the first 2 years	Restricted for the first 2 years, afterwards MS may grant equal treatment as regards access to HQ employment
Equal treatment	Article 14	As for: <ul style="list-style-type: none"> <li>– working conditions</li> <li>– freedom of association</li> <li>– education and vocational training</li> <li>– recognition of qualifications</li> </ul> Possibly restricted as for: <ul style="list-style-type: none"> <li>– social housing</li> <li>– social assistance</li> </ul>	As for: <ul style="list-style-type: none"> <li>– working conditions</li> <li>– freedom of association</li> <li>– education and vocational training</li> <li>– recognition of qualifications</li> </ul> Possibly restricted as for: <ul style="list-style-type: none"> <li>– social housing</li> <li>– study and maintenance grants and loans</li> </ul>
Family reunification	Article 15	After 6 months	At latest within 6 months of the application, but without a minimum period of residence of the main BC holder
Long-term residence	Article 16	After 5 years of residence in the EU, with at least 2 years prior to the application in the MS concerned, absences of up to 24 consecutive months are allowed if the TCN is 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	After 5 years of residence in the EU, with at least 2 years prior to the application in the MS concerned
Moving to another MS	Article 18	After 2 years, simple notification	After 18 months, but with a new application and subject to the conditions set by the second MS.

These passages from the preamble summarise the goals and the means of the Blue Card directive as adopted by 27 EU member states. The initial proposal, being already a less ambitious version of a previous proposal for a labour migration directive, was severely reduced to what Belmonte calls “a commonly used label” (2015). Menz describes it as “a package that bears the imprint of national preferences and hesitance.” (2015, p. 564). Azoulai and de Vries refer to the discretion of the member states provided for by the Blue Card directive as being “so extensive that it would seem difficult to qualify such admission [of TCNs] in terms of an individual ‘right’” (2014, p. 4). Kolb, in his account, admits that “[t]he large gap between the initial proposal and the version of the directive, as it was finally passed in May 2009, is also to a large extent the result of **Germany** ‘standing on the brakes’.” (Kolb, 2017, p. 13).

## 5.6. Conclusion

The negotiations of the Blue Card directive did not reveal any particularly strong and consistent coalitions between member states. However, **Germany**, **Austria**, and **the Netherlands** were very active, voicing their opinions strongly. In the case of **the Netherlands**, it could be seen that the overarching logic in their negotiating position was to follow the forces of the labour market. First of all, **the Netherlands** wanted to make the salary level the only criterion for admission, which would make it much less burdensome for the national administration and companies. Secondly, **the Netherlands** wanted to set the salary level depending on the collective agreements, specific to sectors. However, from the very beginning, the **Dutch** delegation (together with the **German** delegation) proposed to introduce articles on more favourable provisions granted by member states. Coincidentally, these countries had put in place their own systems for attracting high-skilled workers and are among the strongest EU economies. Moreover, at the Council’s second reading, when the proposal still assumed that highly qualified workers fulfilling all the criteria set by the directive could only enter the EU labour markets via this directive (and not any other national scheme), **Germany** wanted to set the salary threshold very high (twice the average national salary – at the same time,

**Austria** advocated for just 1.35 of the average), which would severely diminish the scale of potential migration. In fact, **Germany** intended to maintain the flexibility of its national system of admission, while averting the perceived dangers of a common immigration policy.

The initial proposal of the European Commission (COM (2007) 637) did not anticipate the existence of parallel national schemes. Yet, on the initiative of some member states, article 3(4) was introduced, which allows for issuance of residence permits for highly skilled workers other than the Blue Card. This introduction, opposed by the Commission, was supported by **Germany**, the Czech Republic, Greece, Finland, **the Netherlands**, **Austria** and Poland. It was also the idea of **Germany** to delete a recital that was suggested by the Presidency and that proscribed issuing other permits than the Blue Card.

The ultimate result of the negotiations is a “(...) EU Blue Card scheme [which] provides for the lowest common denominator.” (Eisele, 2010) De Lange argued that the Blue Card directive “(...) will not be of much help in achieving the EU’s ambitions because the Directive proves that there is a very low level of trust between Member States. As such, it is one out of many examples where the ambitions of the European Commission are frustrated by the Member States” (de Lange, 2013, p. 17) The low levels of trust were especially visible in the negotiations on the provisions that allowed for changing residence from one member state to another. Initially, they were supposed to simply notify the second member state that they moved to work and reside. On the motion of **Austria**, a highly qualified migrant had to apply for intra-EU mobility, even before moving to the second member state (on the initiative of **Germany**) and the migrant would not be allowed to work during the time of processing of the application (this was a provision entered on the request of **the Netherlands**). This kind of lack of trust can also be considered competition, because the member states did not intend to commit to a truly cooperative directive. What is especially striking is the imposition of double verification of qualifications and credentials – no mutual recognition in that area. This requirement makes the cooperation between member states in this area even weaker. In the same vein, Fridriksdottir concludes that “[d]uring the negotiations for the Directive, it became apparent that the Member

States, although perhaps agreeing with the objective of the Directive in theory, considered the conditions set forth in the proposal for the Directive first and foremost from the perspective of their own national interest and not that of the EU as a common labour market in need of highly qualified workers who could easily move between the Member States to ‘reallocate their skills’ where needed.” (Fridriksdottir, 2016, p. 133)

The representative of the Council’s Legal Service suggests that the positions of the member states during the negotiations strongly depended on the presence of far-right parties in the national politics (Interview V, 23.06.2017). Hix and Noury had argued similarly in 2007: “(...) the rise of anti-immigrant parties and movements in several countries, and the increase in violence targeted at ethnic minorities, suggests that political preferences rather than economic interests are the main determinants of the views of many European citizens on immigration and migration-related issues, such as the rights of ethnic minorities.” (Hix and Noury, 2007, p. 182). To a large extent, the negotiations of the Blue Card directive followed the patterns identified by Kahanec and Zimmermann who present migration policies targeting highly skilled workers in four clusters of countries: “(...) Scandinavian welfare states, the Western European core, newly emerged European cores, and the new member states.” (Kahanec and Zimmermann, 2011, p. 7). The northern member states (Sweden and Finland as Denmark was not taking part in the negotiations) were in general open to admitting migrants, however careful about granting them equal rights to social assistance which is generous in those countries. The Western European core, which could be represented by Germany, Austria, the Netherlands, Belgium, and France, did not have a unified front, however. The same is true for the newly emerged European cores (Spain, Portugal, Greece), but on the other hand, the new member states presented their interests in a rather coherent and united manner. This was, however, most probably linked to their characteristics as emigration countries (rather than immigration) and the aforementioned restrictions of access to the EU labour markets until 2009. The typology introduced by von Weizsäcker, whereby he categorises the 27 EU member states according to the juxtaposition of the net flows and stocks of migrants in 2005, also does not fit this picture. Von Weizsäcker grouped the countries in six clusters: dynamic

immigration countries, classic immigration countries, legacy immigration countries, emerging immigration countries, emigration countries and other countries (von Weizsäcker, 2008, p. 8). The first group included Spain, Ireland, Luxembourg and Cyprus. The second: Sweden, Germany, Austria, the Netherlands, Belgium and France. The third, Latvia and Estonia, while emigration countries comprised Poland, Bulgaria, Romania and Lithuania. Portugal, Malta, Italy, Denmark, Greece and the UK were treated as emerging immigration countries, while the others were Finland, Hungary, Slovakia, the Czech Republic and Slovenia. As can be perceived from the reports of the negotiations, the positions of the countries within the aforementioned groups are not entirely aligned. For instance, Sweden and Germany had different ideas about the methodology of setting the salary levels, and the group of countries which advocated for parallel national schemes was not coherent at all (Bulgaria, the Czech Republic, Germany, Greece, but also Finland, the Netherlands and Portugal). Moreover, according to van Riemsdijk, “[m]ember states backed the Blue Card proposal if they did not have a skilled migration policy or a restrictive policy and/or if they were little successful in attracting skilled workers” (van Riemsdijk, 2012, p. 353) (the initially discussed proposal was designed as the only entry channel; hence more restrictive national stances had to be defended against a more open EU policy).

The following chapters will analyse how the negotiated directive translated into the national laws of the 24<sup>12</sup> EU member states bound by it and how the member states’ positions have changed since the adoption of the directive in May 2009.

---

<sup>12</sup> Croatia being excluded from the analysis as not having taken part in the negotiations.

## 6. Chapter VI: Transposition of the Blue Card directive

### 6.1. Introduction

The transposition phase is a crucial point in the life of a directive, especially one that includes a leeway for the member states with regard to how to make the provisions part of national law. In this chapter, attention will be paid to the timeliness of the transposition of the Blue Card directive 2009/50/EC, as well as to some features of the directive and the way they were transposed into the national law. While it can be claimed that member states found it difficult to transpose the directive on time, one could also perceive this as a deliberate action aimed at weakening the common policy. The previous two chapters gave an overview of the initial labour migration policy ambitions in the EU and the outcomes of the negotiations of the Blue Card directive. While putting forward the proposal (COM/2007/637/Final), the European Commission maintained that the Blue Card directive is coherent with the principle of subsidiarity. Yet, many EU member states seemed to be more convinced by the effectiveness of action on the national level. Balch and Geddes (Balch and Geddes, 2012, p. 18) underline that the EU has no unambiguous competence in this field. Due to this ambiguity, during the directive negotiations the member states have not only secured a very wide leeway for transposition methods, but also ensured that national schemes for highly skilled migrants could still exist (Chaloff, 2016a, p. 45).

It can hardly be expected that in the context of wide disparities in the economies and labour markets, one common policy could attract highly qualified workers to all member states proportionately. For that reason, it could be anticipated that those member states that have been successful in attracting migrants and can promise a high income to the highly skilled will be less inclined to transpose the Blue Card directive because they can attract a high number of workers in any case. This chapter aims to identify the variation in the transposition of the Blue Card directive within the 24 member states that

were bound by it at the moment of its adoption (hence excluding Croatia, which only joined in 2013) and to explain the relative openness of the transposition. To better understand this variation and achieve comparable data, a Blue Card transposition index is introduced.

It is generally established in academic literature that two years do not constitute a major delay (Falkner, Hartlapp and Treib, 2007, p. 398), and according to research of Zhelyazkova, the connection between delay and commitment cannot be definitely established (Zhelyazkova, 2013, p. 704). Nevertheless, König and Mäder ascertain that “the more a member state disagrees with a directive, the more conformable transposition is delayed.” (König and Mäder, 2012, p. 49). While it has to be kept in mind that the transposition measures might not always mirror the member states’ positions during the directive negotiations, the delay incurred in the transposition will only be treated in this chapter as a secondary indicator of the commitment of member states to introducing a common migration policy for highly skilled workers (cf. Mendrinou, 1996). In this chapter, cooperation is considered only from the point of view of transposition measures, which means that neither the numbers of inflowing migrants nor the realities of street-level bureaucracy are taken into account. The actual numbers of persons who arrive in the European Union and reside on the basis of the Blue Card are studied in the following chapter on implementation. In the current chapter, when considering transposition measures, cooperation is embodied by coherence with the adopted directive – meant as the distance from the baseline established on the EU level, reinforced by the swiftness of implementation. To the contrary: where member states try to limit the effectiveness of the Blue Card directive (whose aim is to attract migrants) by establishing quotas or creating red tape, it is understood that they would create obstacles for a Union policy. Where the adopted measures are a lowest common denominator (introducing a restrictive interpretation of the directive) and, additionally, a national policy for attracting highly skilled migrants is designed, it is considered to be a competitive behaviour. While this is not a classical noncompliance case (all of the 24 states actually transposed the directive sooner or later), it is considered appropriate to regard the problem from the compliance literature perspective. The literature of the first wave of compliance research explained the variation

in transposition and implementation by the policy objectives and administrative capacity of the member state (Treib, 2008, p. 7). Moving forward, the second wave of compliance research and the misfit hypothesis developed by Héritier are more applicable to the current case, however, they cannot be fully employed in the case of the Blue Card directive because the latter allows for creation and maintenance of national entry systems. This in practice implies that the member states do not have to change their philosophies of admittance – if such already exist. Finally, the third wave of compliance research that uses the typology of four worlds of compliance, as developed by Falkner, Hartlapp and Treib. In the case of the Blue Card, member states' positions could be categorised as belonging to the world of law observance, to the world of transposition neglect, to the world of domestic politics or to the world of dead letters (Falkner, Hartlapp, and Treib, 2007; Falkner and Treib, 2008). The salience of the migration issue, as researched by Versluis and Spenzharova, can be expected to explain the possible correlation between the modes of transposition of the Blue Card directive and the migratory patterns present in member states.

Where a member state does manage to insert its policy priorities into the EU level, it can potentially be more drawn to full compliance – which does not mean an “open” transposition, but just adhering to the letter of law. In fact, the research of Zhelyazkova showed that “national legislators are less likely to comply with a provision if their representatives in the Council objected to its content” (Zhelyazkova, 2013, p. 717). At the same time, uploading of a minimalist scheme (modest in ambitions) might lead to a more intergovernmental solution and the creation of a parallel national system. A similar result might be an effect of compensating for difficult downloading of the agreed directive (Sanahuja, 2013, p. 38). Menz and Caviedes remark that “rather than seeing one single type of policy emerge as the outcome of this imputed competition between states, states still differ in terms of their calculations and evaluations of what they see as the greatest vulnerabilities of their own particular bundle of collective goods” (Menz and Caviedes, 2010, p. 13). While most of the preference-based policy shaping is done during the negotiation process, there is still some room for manoeuvre in the transposition and implementation phase – the approach of member states towards this legislative tool might have

changed in light of economic changes, inflow of migrants of other categories, changes in public opinion etc. It should be noted that the Blue Card directive gives considerable liberty to member states on how they should transpose it, which means that the conditions for obtaining the Blue Card could potentially vary depending on the time and place of submission of the application. This fact was also underlined by Chaloff, who pointed out that “the EU policy-making cycle is long: it can take up to ten years from the first discussion of a proposal to its final transposition. Since it takes years to pass a directive, the only way to make sure policy can react to changes in the situation is to give leeway to member states.” (Chaloff, 2016b).

In contrast to the following chapter, the aim of the present one is to compare legal transposition and not practical implementation. Indeed, despite the relatively early life phase of the directive, analysing implementation is not yet fully revealing, but in light of the revision of the directive, a necessary step to take. The transposition measures can be corrected over time and the implementation can further adjust the existing legal framework to the policy aims (not always following the letter of law).

## **6.2. Transposition and compliance**

The traditional approach to transposition of directives is based on the timeliness and correctness of the transposition. In the case of the Blue Card directive, the national legislators received a great deal of leeway, which makes the variation of the transposition more significant among member states, but also the flexibility bestowed results in fewer breaches of the directive. Therefore, in this chapter, the author will concentrate mainly on the variation in the transposition and the delay of transposition, rather than its correctness (which will be mentioned, but not analysed).

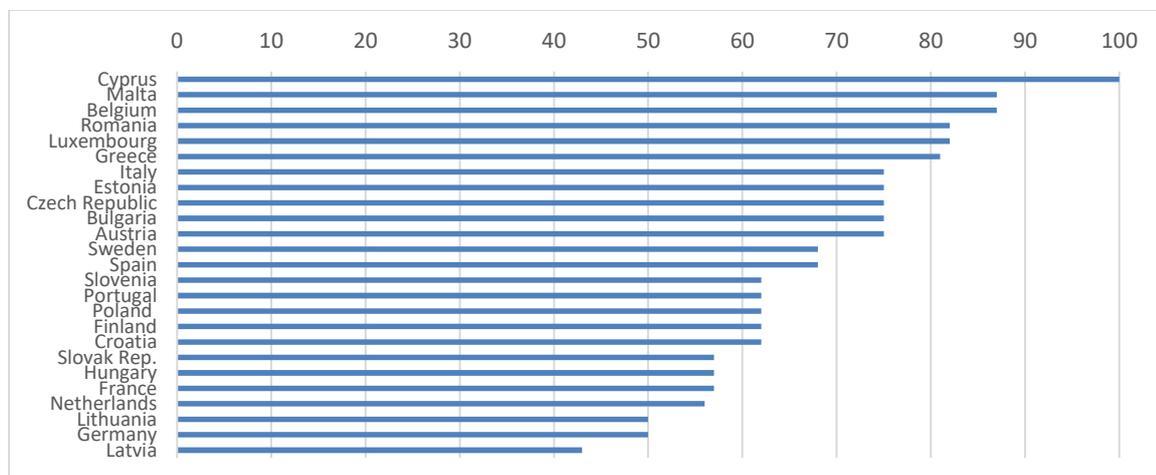
Mastenbroek lists three strands of transposition literature, based on their approach to explaining the variance in transposition (Mastenbroek, 2003, pp. 374-375). The first one groups research which seeks to explain the transposition gap through politico-administrative characteristics of member states (such as administrative capacity for transposition or the federal structure and veto points linked to it), the

second by other country-specific factors, and the third by the fit of the EU policies to the existing national policies.

The complexity of the varieties of modes of transposition of the Blue Card directive calls for the creation of an index that would help to order the examined member states. Such indices can prove to be very useful when making coherent analyses and grouping countries into categories. However, the methodology of creation of indices varies from one researcher to another. As a consequence, the results obtained differ between themselves. While this is not a negative point, it has to be remembered when comparing indices.

In the case of the Blue Card directive, Cerna coined a Blue Card Index (BCI) in 2018 (Cerna, 2018, pp. 96-99). Her analysis differs from the current one substantially, mostly because she chose eight factors instead of just six and only four of them overlap. These are numerical caps (or quota, as they are called herewith), labour market test, initial duration of the permit and processing times. Additionally, Cerna takes into account employer portability rights, spouses' work rights and permanent residency rights. In the construction of her index, she is slightly more nuanced, for instance through assessing the generosity of the numerical caps. As a result, Cerna's findings, although by and large coherent with the ones of this PhD dissertation, in some cases diverge importantly. The graphic illustration of Cerna's index is presented below:

**Figure 6.1: The Blue Card Index (BCI) constructed by Cerna**



Source: Cerna, 2018, p. 97

The previously stated levels of commitment can be treated as indicators in the model of regulatory cooperation: the simultaneous regulatory cooperation and competition, whereby EU member states undertake policies both on the EU and national levels. Such a strategy can allow them to maximise the flexibility of their migration systems. In this chapter, it is argued that a restrictive transposition of the Blue Card directive, coupled with a well-developed national admission system, are an emanation of competitive behaviours, while an open transposition of the directive as the sole entry channel of highly skilled workers implies a cooperative behaviour that leads to strengthening of the common EU migration policy.

Mastenbroek identifies that there is a problem in implementation of EU law and through her research assesses the timeliness of transposition and explains the delays. In particular, in 2003 she looked in to the transposition of EU directives in the Netherlands. She underlines that “late transposition endangers the uniform application of Community law and implies the continued existence of discriminatory practices” (Mastenbroek, 2003, p. 372). However, the mere fact that a law is transposed quickly, does not mean that it is done correctly and efficiently. In the current research, an additional element is taken into account, namely the relation between the timeliness of the transposition and its openness. Open and quick transposition would be an emanation of cooperative behaviours.

In parallel to the analysis of how member states transposed the directive in terms of legal language, the delay of the transposition is examined, according to the dates of adoption, publication, and entry into force, taking into account also the infringement procedures launched by the European Commission. Transposition delay is measured as the number of days that passed since the deadline for transposition of the directive (19 June 2011), based on the piece of the national legislation that tackles the Blue Card most comprehensively. In cases where it was not possible to determine the actual date of entry into force of the national legislation, the date of adoption or publication in the official journal were taken. Versluis and Spendzarova propose assessing the national execution measures on the basis of data provided by member states to the Eur-Lex database and to base the findings on the last

implementing measure (Spendzharova and Versluis, 2013, p. 1507). Mastebroek (2003, p. 375) assumes that the process of transposition is finished once the first measure is adopted. In this dissertation the focus is on the assessment of the essential elements of the directive, as transposed in to the national law. One challenge, however, is that the data provided by member states is often incomplete and/or misleading and needs further verification (cf. Thomson, 2010, p. 579, Mastebroek, 2003, pp. 373-374). For example, Austria has communicated 48 transposition measures, including the change of the Viennese Fiaker and Horse Car Carriage Act. The two other leaders of numerous transposition measures are Lithuania (66) and the Czech Republic (46). Such scattered transposition made it necessary to decide that the transposition was complete when the essential elements of the directive were included in the national law, so as to ensure that the national laws were operational.

On the other side of the spectrum, countries such as Greece have introduced transposition measures, but still lack implementation acts in order to allow third country nationals entry into the country. Yet, in the eyes of the Commission, Greece has already transposed the directive (closure of the infringement procedure on 27 September 2012), despite the fact that it does not comply with all provisions<sup>13</sup>. Mastebroek notes that the data collected by the Commission are unreliable because the latter only relies on notifications from member states and does not systematically conduct any further verification (Mastebroek, 2003, pp. 373-374). Similarly, there are a number of countries in which sectoral exceptions for salary threshold 1.2 are possible according to the base legislation but have to be published each year in executive acts. In those cases, however, it was assumed that exceptions are allowed.

The period of transposition foreseen in the adopted directive was 24 months – the member states were supposed to integrate it in their national legal systems by 19 June 2011. After this date, the European Commission has signalled 20 cases of non-transposition. The only spared member states (European Commission, 2014, p. 2) were the Netherlands, the Czech Republic, Spain and Estonia.

---

<sup>13</sup> This can be additionally illustrated by the number of Blue Card issued in this country, namely zero.

Sweden, the last country bound by the Blue Card directive, transposed it on 1 July 2013. This constituted a delay of slightly over two years, which did not lead to a Court case, but ended with an additional reasoned opinion requested by the European Commission<sup>14</sup>. While this means that all member states have transposed the directive, this chapter draws from the compliance literature to explain the variance of modes of transposition. It should be underlined that the mere fact that a member state has reported transposition measures to the Commission does not imply that it is complying with all the provisions (Thomson, 2010, p. 579).

During the transposition phase, one could observe the attitudes of member states to the Blue Card directive. Initially, six countries out of 24 (Sweden, Portugal, Poland, Malta, Italy and Germany) were prompted by a European Commission reasoned opinion on infringements (European Commission 2011). Six months later, three more followed: Austria, Cyprus, and Greece (European Commission 2012). By July 2013, all member states bound by the directive had implemented it, with Sweden being over two years behind the deadline (in fact, Sweden was the country that during the negotiations was repeatedly proposing to apply a deadline of three and not just two years). While the Commission did not decide to launch any cases against a member state that had transposed the Blue Card directive incorrectly, such an enforcement of law could be pivotal for the effectiveness of the EU scheme. The competition between the national and EU-wide schemes is a fact: even without enforcement of the directive, many member states still have a different channel of entry for highly skilled migrants, which might demobilise Suppliers in the cooptation theory from fighting for good implementation.

As described in the previous chapter, one of the most striking features of the Blue Card directive is the ample discretion that is given to member states not only as to the modes of transposition of its provisions, but also as to the introduction and retention of parallel national schemes. In this context, cooperation on the EU level is measured as the degree of openness of member states towards migrants

---

<sup>14</sup> The procedure was closed 17 October 2013.

entering via an EU channel (in that case – the Blue Card) that confirms the usefulness of it, making the EU-wide scheme a reality.

After careful examination of the Blue Card directive provisions, which were extensively analysed in the previous chapter, six factors have been selected to assess the variation in transposition, depending on their saliency during the decision-making phase. These are: the required salary level in relation to the national gross average, the existence of labour market tests, the maximum permit length (i.e. before renewal), the processing time of the Blue Card application, the legal possibility of setting entry quotas, and the fees charged for the Blue Cards in relation to the salaries a migrant is obliged to obtain. There is a range of other characteristics of the Blue Card directive's modes of transposition; however, they either relate to administrative details or the variation observed in them is not sufficient to constitute a case for national particularities. The rights of migrants and their family members were also excluded from the analysis. Additional provisions that make the scheme more or less attractive to potential migrants, such as administrative requirements or additional incentives for migrants who, for example, speak the national language, were also not taken into account.

The index is based on the data collected through the analysis of official documents of member states, their relevant ministry websites, the Eurostat data, the EU immigration portal, EMN reports and other internet sources where necessary<sup>15</sup>. In most cases, national legislation is only available in the country's native language, so automated and author translations were conducted where needed. Where possible, acts derived from the basic legislation were taken into account. The data relate to 2014, with footnotes on the changes that appeared in the future.

Since the analysis was based primarily on the basic legislation and not the executive acts, it was not possible in all cases to determine whether the member states had decided to introduce explicit provisions on some issues. Therefore, for practical reasons, it was assumed that where no mention of

---

<sup>15</sup> See full details of all sources in 10.2.

labour market testing was found, it does not exist. Similarly, where there is no mention of the application processing time, it is anticipated that the member state concerned implies the maximum processing time as set by the directive (90 days). Moreover, for the sake of comparability, where the values of this category are presented in the national acts in units different than days, it is assumed that a week equals 7 days and a month – 30 days. The data derived according to this logic is denoted in Table 6.1 in italics.

### 6.2.1. Salary thresholds

The first considered factor – the required salary level – as mentioned in the directive itself should be of at least 1.5 times the average national gross salary. The directive provides the possibility for exceptions in the case of shortage occupations and the threshold of 1.2. Since this chapter aims to assess the openness of the transposition of the directive, the current dataset includes the amounts required in national transposition measures as the proportion to the average gross national salary, and not the real amounts, which are sometimes mentioned in base legislation or executive acts. The reasons for discrepancies between the salary levels declared in the base legislation and explicitly demanded in executive acts have not been researched. It should be noted, however, that some research has already indicated such inconsistencies (cf. OECD, 2013, 107).

The mere fact that the salary thresholds are calculated on the basis of national gross averages, means that the difficulty in finding a job which is paid accordingly lies not only in the level of the national average salary, but primarily in salary distribution in a given member state. The OECD analysed the differences between the means and the national thresholds and found that in the case of Italy, only 11% of workers earn more than 1.5 times the national average, while in Portugal it is already 28%. At the same time, in countries where salaries are compressed (also due to collective agreements), like Sweden or Finland, only the top 10% of workers would be eligible for a Blue Card if they had to apply for it (Chaloff, 2016a, p. 45). This means that the restrictiveness of the transposition as regards the salary thresholds is not only affected by the government's decision (as in the case of Romania or

Lithuania which decided to apply thresholds of four times and twice the average), but by the forces of the labour market. Above the level of 1.5 it is fairly easy to adjust the Blue Card requirements to the realities of the national labour market, but it is legally impossible (as it would constitute a breach of the directive) to manipulate the thresholds below the level set by the directive. Therefore, even in member states that did decide to simply comply with the directive and not impose additional burdens (like Sweden), the actual level of difficulty in accessing the Blue Card may be higher than in those that set salary thresholds higher than the 1.5 set by the directive. This should be kept in mind not only with regards to the transposition process, but above all when analysing the effects of the directive's implementation (see Chapter 7).

### 6.2.2. Minimal length of validity

The second of the features of the Blue Card directive transposition is the minimum length of validity of the permit. The shorter the length of validity of the first Blue Card, the more precarious the situation of highly qualified migrants, so the less attractive the admission scheme. The idea of a common migration policy is not to create only short-term circular migrants (see paragraph 3 in the preamble to the directive), but to accumulate know-how in science and industry. The Blue Card directive instructs that the length of the work contract should be of the length of at least 1 year (Article 5(1)(a)). However, some countries do not require a minimal length and set the minimal validity of the Blue Card as the length of the contract plus three months, and the Blue Card should be issued for a period between one and four years (Article 7(2)).

### 6.2.3. Labour market testing

The third issue – the presence of labour market testing – is a protective measure towards member states for (EU) nationals. It is important to mention that according to research conducted in France in mid-1990 by Gross and Schmidt, “the market test remains insignificant even when controlling for the exemption of some high-skill intracompany transfers and researchers” (Gross and Schmitt, 2012, p. 12). Yet, the presence of such a practice can slow down the admission procedure or even discourage

potential migrants and employers, especially from small and medium enterprises. The way the labour market testing is done depends entirely on the decision of the member state and its administrative traditions. The directive does not set any requirements in that regard.

#### 6.2.4. Time of processing

Finally, the time of handling the application can be a serious hindrance for applicants. The Council in the preamble to the Blue Card directive calls for a “fast-track admission procedure” (para 7). However in paragraph 12, it is stated that “[t]he deadline for examining the application for an EU Blue Card should not include the time required for the recognition of professional qualifications or the time required for issuing a visa, if required” (to be added to the 90 days for Blue Card processing). Some member states (e.g. the Netherlands) do in fact add the time for visa requests and qualifications’ recognition, which can potentially even double the waiting time for the work/residence permit. For instance, in the Netherlands, diplomas from American universities, need to be confirmed by the university itself, which significantly prolongs the time of processing (Interview III, 15.03.2015). This is an especially important issue when there are other ways of entry available (national schemes that stay in competition with the Blue Card), which take less time: in particular, taking into account that the employers need workers to be available quickly.

#### 6.2.5. Admission quotas

Some member states made it possible in their national legislation to apply numerical limits to migrant admission. Setting numerical limits to migration can be discouraging and can hamper the natural flows of highly skilled professionals. In this chapter, what is taken into consideration most is the legal possibility of such a procedure rather than its practical use. However, in most cases where admission quotas were foreseen by the transposition measures, they were also used. Moreover, the numbers of persons allowed in a member state are not taken into consideration herewith.

#### 6.2.6.Fees

Similar to the other measures, the levels of fees charged by member states can wither be discouraging or not pose a problem. In this study, it was decided to use the data provided by the EU immigration portal which aggregates the fees and salary thresholds available for 2014. Since the fees do not always mirror the costs of living in a given member state, the method adopted was to present them in relation to the required salary threshold.

### **6.3. Transposition of the EU Blue Card directive – empirical findings**

This section presents how the directive was transposed according to the criteria listed in the previous section (6.2). The main element of this part of the dissertation is Table 6.1, which summarises the legislation of 24 member states. Notably, the last column of the table presents the relation of the application fee to the salary threshold as calculated in the EU immigration portal (as not all member states use the Euro currency as of yet). The fees requested by member states are not regulated by the directive, and it is very interesting to see the variation in this variable (the highest being in the Netherlands, 881 EUR, although in this case, the fees for the Blue Cards are uniform with the fees for national permits in the same category).

**Table 6.1: Conditions of acquisition of the Blue Card directive in 24 EU member states**

EU State	Required annual salary level (as expressed in the legislation)	Exceptions for shortage occupations	Initial maximal length of permit (in months)	Labour market test	Maximal time of processing (in days)	Numerical quota	Fee in EUR	Fee to salary threshold <sup>16</sup>
<b>Austria</b>	1.5	no	24	yes	56	no	120	0.21%
<b>Belgium</b>	1.5	no	13	no	90	no	215	0.42%
<b>Bulgaria</b>	1.5	no	12	yes	7	no	278	3.40%
<b>Cyprus</b>	1.5	yes	12	yes	90	yes	50	0.21%
<b>Czech Republic</b>	1.5	no	24	yes	90	no	92	0.81%
<b>Estonia</b>	1.5	yes <sup>17</sup>	27	yes	60	yes <sup>18</sup>	120	0.66%
<b>Finland</b>	1.5	no	24	no	90	no	500	0.92%
<b>France</b>	1.5	no	36	no	90	no	260	0.49%
<b>Germany</b>	1.14 <sup>19</sup>	yes	48	no	14	no	110	0.22%
<b>Greece</b>	1.5	yes	24	yes	90	yes <sup>20</sup>	300	0.98%
<b>Hungary</b>	1.5	yes	48	yes	30	yes <sup>21</sup>	60	0.44%

<sup>16</sup> According to the fee in EUR as stated on the EU immigration portal

<sup>17</sup> Threshold of 1.24.

<sup>18</sup> Estonia applies general quota to all immigration which is 0.1 per cent of the permanent population of Estonia annually. The permanent population includes the Estonians living in Estonia, TCNs with long-term residence permits, and EU citizens with their families. Curiously, among various groups exempted from the quota, there are Japanese and US citizens.

<sup>19</sup> According to the national legislation, the threshold should amount to “2/3 of the income threshold in the general pension” (author’s calculation, cf. OECD 2013)

<sup>20</sup> Blue Card yearly quota: 1000.

<sup>21</sup> The Ministry for National Economy sets out the total number of TCNs employed at the same time with work permits in a decree. The numbers of EU Blue Card holders cannot exceed a monthly average of free vacancies reported in the preceding year. In 2016, the maximum number of TCNs employed at the same time was 49,000, which highly exceeded the numbers of applications. (EMN 2016)

<b>Italy</b>	1.26 <sup>22</sup>	no	24	no	90	yes	274	1.11%
<b>Latvia</b>	1.5	no	60	no	90	no	100	0.73%
<b>Lithuania</b>	2 <sup>23</sup>	no	12	yes	60	no	116	0.50%
<b>Luxemburg</b>	1.5	yes	24 <sup>24</sup>	no	90	no	80	0.11%
<b>Malta</b>	1.5	yes	12 <sup>25</sup>	yes <sup>26</sup>	90	no	255	1.59%
<b>Netherlands</b>	1.5	no	48	no	90	no	881	1.37%
<b>Poland</b>	1.5	no	24	yes	90	no	111	0.72%
<b>Portugal</b>	1.5	yes	12	no	60	no	103	0.43%
<b>Romania</b>	4	no	24	no	15	yes <sup>27</sup>	179	0.69%
<b>Slovakia</b>	1.5	yes	36	yes	30	no	170	1.13%
<b>Slovenia</b>	1.5	no	24	yes	30	no	102	0.36%
<b>Spain</b>	1.5	yes	12	yes	90	no	418	1.23%
<b>Sweden</b>	1.5	no	24	no	90	no	218	0.35%

### 6.3.1. Construction of the openness of transposition index

In order to better understand the variation in the modes of transposition of the directive, on the basis of the data presented in the previous section, a Blue Card transposition index is created in this section of the paper. This index, designed as a measure used to assess the openness or restrictiveness of the transposition of the Blue Card, ranges from the values 0 to 100, where the value of 100 indicates the

<sup>22</sup> According to the national legislation, the threshold should amount to “three times the minimum level for exemption from participation in health spending” (author’s calculation).

<sup>23</sup> In a reform of 2017, a lower threshold (1.5) was applied for occupations in high demand which would also be excluded from labour market testing.

<sup>24</sup> In 2017, in order to make the scheme more attractive, the length of the permit was extended to 4 years.

<sup>25</sup> In Maltese legislation a worker has to get an “employment license”, which is valid for 12 months and the residence permit is linked to the length of the employment.

<sup>26</sup> There is a list of occupations exempted from labour market testing, updated annually.

<sup>27</sup> Blue Card yearly quota in 2013 was 1000, but it has since diminished amounting to 800 in 2016 and only 500 in 2017.

most open transposition of the directive and 0 the most restrictive. It is assumed that non-compliance (non-implementation) constitutes on its own a restrictive policy as it effectively blocks the entry of migrants via this admission channel – such a case is, however, not present in reality (the opt-out member states are excluded from the index). The openness index ultimately created is an aggregate of the values assigned according to the methodology presented below. To ensure proper comparability, the data collected was categorised into 5 categories in the range from 0 to 100: 0, 25, 50, 75, and 100.

As previously stated, based on the Blue Card directive provisions, six factors were chosen to assess the variation in transposition.

a) the required salary level in relation to the national gross average

The first considered factor – the required salary level – as mentioned in the directive itself should be of at least 1.5 times the average national gross salary. The directive provides a possibility for exceptions in the case of shortage occupations and the threshold of 1.2.

As regards salary levels, a value of 100 is assigned to those countries where the salary threshold is below 1.2 (there are two such countries that against the wording of the directive set lower levels directly in the base legislation: Italy (salary level of about 1.26) and Germany (approximately 1.14)). Where there are possible exceptions (salary level between 1.2 and 1.5), the value assigned is 75, and value of 50 is assigned to the level of 1.5. For salary thresholds of above 1.5, the value 0 on the extreme of the spectrum applies to the most restrictive empirical case (currently 4 times the average salary in Romania) and a value of 25 to the ones in between (Lithuania with a salary threshold double the average).

b) the existence of labour market tests,

The second issue – presence of labour market testing – is a protective measure towards member states for (EU) nationals. Here, only two values are possible: 100 and 0. Where

labour market testing exists, the value allocated is 0, where recruitment of highly skilled migrants is free from it, 100.

c) the maximum initial length of the permit

The third of the features of the Blue Card directive transposition is the minimum length of validity of the permit. The shorter is the length of validity of the first Blue Card, the more precarious the situation of highly qualified migrants, so the less attractive the admission scheme. The idea of a common migration policy is not to create only short-term circular migrants (see paragraph 3 in the preamble to the directive), but to accumulate know-how in science and industry.

The directive ascertains that the Blue Card permits should be valid for at least the length of the work contract (which should be signed for at least one year) increased by three-months. In practice, most of the member states apply the validity of 1, 2, 3 or 4 years. This leads to a natural division into the categories: 0 for no validity (non-compliance cases), 25 for those of 1 year, 50 for those of 2 years, 75 for those of 3 years and 100 for the longest possible, 4-year, period. The two countries in which the validity periods are different – Belgium and the Czech Republic – fall into the categories that are the closest to the values in those states.

d) the time of processing of the Blue Card application

Finally, the time of handling the application can be a serious hindrance for applicants. When it comes to the length of processing time for the Blue Card applications, periods equaling 90 days (the maximum time set in the directive) are graded as 25. Zero is reserved for cases (empirically not found) where the member states would go beyond the period of consideration allowed by the directive. As even in the most efficient administrations, a period for considering requests cannot possibly be equal to 0 days, the maximal number of points (100) is attributed to cases where this processing lasts less than 15 days. Similarly, 30 days means a rating of 75, and 60 days a rating of 50.

e) quotas

Several member states decided to apply numerical limits to immigration. In some cases, it is related to the entire immigrant population, in others – just to the Blue Card holders. It was decided to grant the score 0 to those countries where quotas were applied and 100 to those where quotas were not.

f) fees

It was decided to calculate the relationship between the application fees and the salary threshold required. As member states are free to set the extent of the fees they charge for applications for the Blue Card, the variance in this category is significant. However, since the fees are simply not comparable between different member states, due to differences in living standards, they are measured in relation to the required salary threshold. In this approach, countries where the fees accounted for more than 3% of the salary threshold, scored 0; when the ratio was equal to or above 1% (up to 3%), the member states were assigned the value of 25; those between 0.7% and 1% scored 50; those between 0.4% and 0.7% got 75, and those lower than 0.4% – 100.

Table 6.2: Blue Card Openness of Transposition Index

EU State	salary level	Initial maximal length of permit (in months)	Labour market test	Maximal time of processing	Numerical quota	Fees	Index
Germany	100	100	100	100	100	100	100
Luxemburg	75	50	100	25	100	100	75
Portugal	75	25	100	50	100	75	71
France	50	75	100	25	100	75	71
Sweden	50	50	100	25	100	100	71
Netherlands	50	100	100	25	100	25	67
Slovenia	50	50	100	75	0	100	63
Finland	50	50	100	25	100	50	63
Belgium	50	25	100	25	100	75	63
Slovakia	75	75	0	75	100	25	58
Latvia	50	25	100	25	100	50	58
Austria	50	50	0	50	100	100	58
Hungary	75	100	0	75	0	75	54
Romania	0	50	100	100	0	75	54
Malta	75	100	0	25	100	25	54
Italy	100	50	100	25	0	25	50
Czech Rep.	50	75	0	25	100	50	50
Bulgaria	50	25	0	100	100	0	46
Poland	50	50	0	25	100	50	46
Lithuania	25	25	0	50	100	75	46
Spain	75	25	0	25	100	25	42
Cyprus	75	25	0	25	0	100	38
Greece	75	50	0	25	0	50	33
Estonia	75	25	0	25	0	75	33

In the openness index developed above, twelve countries achieved results of over 55 (the threshold adopted in the analysis) and twelve of 55 or less. The choice of the value of 55 as the cut-off point is based on the fact that this is the median of the dataset. The index is, however, best read as a continuum since the differences between countries qualified as “open” and “restrictive” can be very small. Nevertheless, the range from 33 to 100 suggests that the attitudes towards the Blue Card directive are very varied.

Some member states did not believe in the success of the Blue Card directive in their country. For instance, during the works on the transposition of the directive, Polish Secretary of State, Piotr Stachańczyk, in response from a question from an MP said that the analyses of the Ministry of Interior predict that yearly there should be no more than a dozen permits issued, underlining that if they were to be counted by tens, the Ministry would be surprised (Sejm, 2012). In the following chapter, the implementation of the directive data will be presented to show the evolution in numbers of Blue Cards issued and whether the policy makers were right in their predictions.

Iglesias Sánchez points out that although the Spanish transposition of the Blue Card directive can be considered satisfactory and timely, it also “makes use of the margin of appreciation awarded by the [d]irective in a restrictive fashion (only a contract and not a binding job offer is contemplated; no free access to the labour market after two years; application of labour market tests, etc.)” (Sánchez Iglesias, 2013, p. 79). In the view of this researcher, which is also in line with the results obtained through the construction of the openness of transposition index, “the Spanish transposition does not always adopt the most restrictive options possible. For example, labour market tests are not applicable for renovating the authorization for highly qualified workers, and no admission volumes are applied.” (*idem*).

### 6.3.2. Understanding categorisation of countries

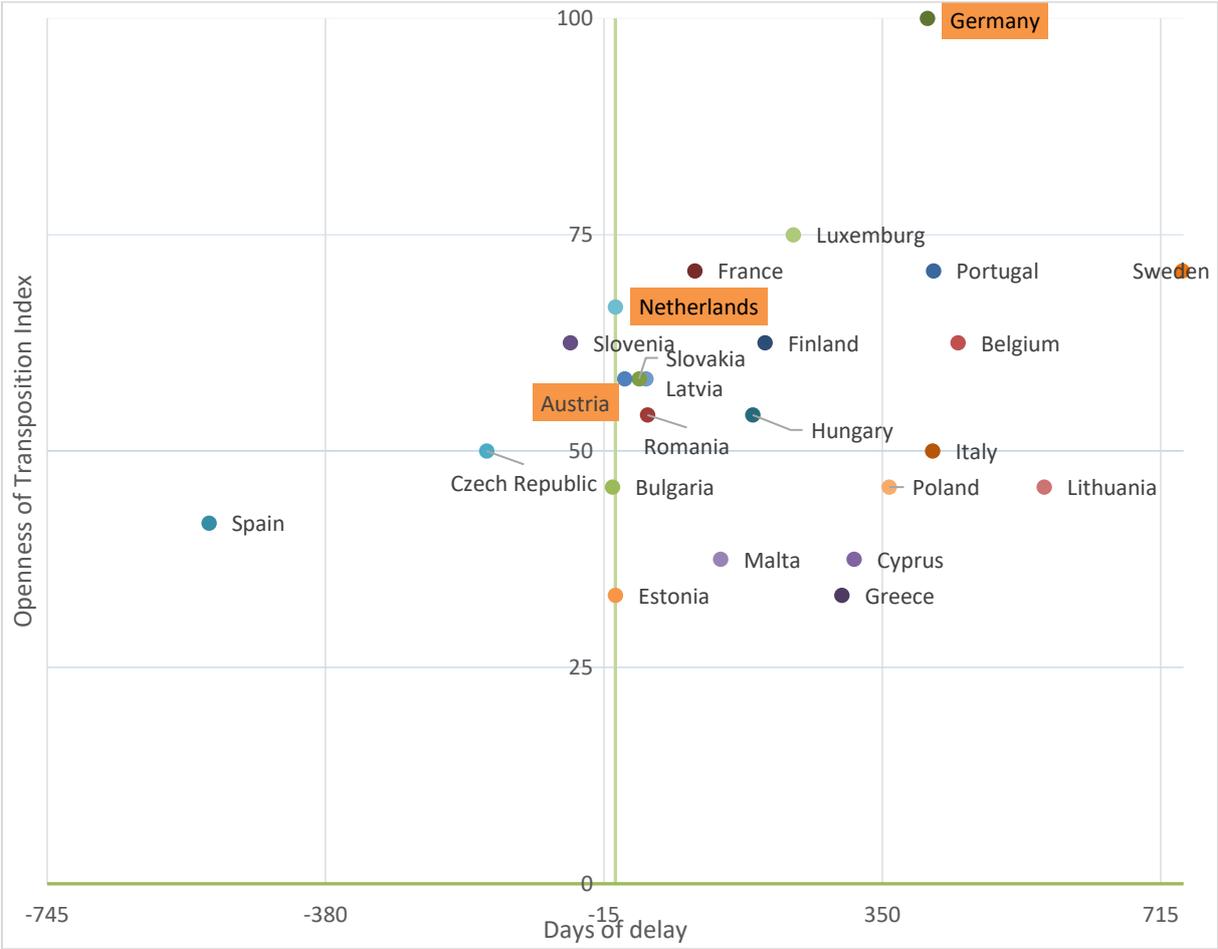
As seen in Table 6.2, the country that scored the highest in the Blue Card transposition index is Germany, which has maximum marks in every category. However, Germany was one of the

countries that insisted on having a lowest common denominator EU policy that would allow for the existence of parallel national admission systems. The change in the attitude of this member state, as well as the transposition incoherent with the wording of the directive, makes it a very interesting case to be studied in detail. Curiously enough, this breach of EU law had already been spotted in the Bundestag by the SPD MPs (Deutscher Bundestag, 2012, p. 9), so such a transposition could not be attributed to an error or miscalculation. Incidentally, Germany is the second EU country with the highest job vacancies rate, which could explain why it needs to draw as many highly skilled workers as possible. It seems, however, that the job vacancy rate alone cannot explain the openness of transposition. The country with the highest vacancy rate, Malta, not only scored a mere 38 on the openness index, but upon its entry to the EU in 2004, out of fear of massive immigration, it set barriers on entry for EU workers for 7 years. However, taking into account the size of its labour market, a 3% vacancy rate in Malta does not require substantial inflows of professionals.

Further analysis of the vacancy and unemployment rates does not confirm the hypothesis that countries with high vacancy rates will opt for an open transposition. This is especially visible in the case of Belgium, Cyprus, Austria, and Malta, which present opposite scenarios.

Figure 6.2 represents the relationship between the time taken by member states to transpose the directive and the openness of the transposition expressed by the Blue Card transposition index. According to the research of Zhelyazkova, issues that raised conflicts during the negotiations in the Council have a negative impact on the delays in the transposition (Zhelyazkova, 2013, p. 707). In the case of the Blue Card directive, the Council discussions took almost two years and were assessed by some scholars as “long and difficult” (Angenendt and Parkes, 2010). A different view is taken in this dissertation: the actual negotiations were in fact finalised by December 2008, and work in the working party had only started in January of the same year. However, one can see that indeed, on average, it took a long time to transpose the directive and the results are very divergent.

Figure 6.2: Delay in transposition of the Blue Card directive vs. the values of the Blue Card transposition index



Source: author’s data compilation

The presented graph consequently plots member states according to their approaches towards the transposition of the Blue Card directive. The upper-right and the lower-left quarters of the graph represent the mixed results. These are the countries that have either implemented the directive very late, but in a very open manner, or the contrary, countries which transposed the directive quickly and restrictively. With a very open transposition, Germany is clearly an outlier. This openness has not been hampered by the fact that the transposition was late. Most of the EU member states were less than one year late with the transposition and fell into the rather restrictive transposition patterns. The correlation between the index and the delay is positive and amounts to 0.27.

It was concluded that most of the EU member states had decided to transpose the Blue Card directive in a moderately restrictive manner. This fact signals the lack of commitment towards a common migration policy, which was already apparent in the first half of the 2000s and in the withdrawal of the first Commission proposal of the directive dealing with labour migration.

As there is no unambiguous answer on the openness of the Blue Card directive scheme in different member states when looking solely at the transposition measures, there is similarly no clear answer as to whether a member state has its national entry scheme for highly skilled workers or not. In fact, Germany still has its national scheme, although it has put all of its efforts into promoting the Blue Card. Sweden, on the contrary, has no national scheme aimed specifically at highly skilled migrants, but its national policy does not distinguish between skilled and unskilled migrants. Therefore, the EU policy is incoherent with the Swedish approach and skilled workers would prefer to enter on the national conditions. The Czech Republic is often praised for abandoning its Green Card scheme in favour of the use of the Blue Card.

### 6.3.3. Transposition of the Blue Card directive in the Netherlands

The Netherlands transposed the EU Blue Card directive by means of two royal decrees: one of 15 June 2011 (*Besluit van 15 juni 2011 tot vaststelling van het tijdstip van inwerkingtreding van onderdelen van het Besluit modern migratiebeleid en tot wijziging van het Vreemdelingenbesluit 2000 en het Besluit inburgering in verband met die inwerkingtreding*) and one of 24 July 2010: *Besluit van 24 juli 2010, houdende wijziging van het Vreemdelingenbesluit 2000 en enkele andere besluiten in verband met de versterking van de positie van de referent in het reguliere vreemdelingenrecht en versnelling van de vreemdelingenrechtelijke procedure, in verband met de implementatie van Richtlijn 2009/50/EG van de Raad van 25 mei 2009 betreffende de voorwaarden voor toegang en verblijf van onderdanen van derde landen met het oog op een hooggekwalificeerde baan (PbEU L 155), in verband met de openbare orde en enkele andere onderwerpen (Besluit modern migratiebeleid)*. It came into force on 19 June 2011. The Blue Card was introduced in parallel to the pre-existing national scheme (*Kennismigranten*

*regelung*) that had been in force since 1 October 2004 and was reformed on 1 June 2013 (with the creation of MoMi: Modern Migration Policy Act). For instance the Netherlands insisted on creating parallel national systems, yet it opposed the two-year ban for intra-EU movement (8249/08, 38) and claimed that the 1.5 salary threshold was too high. In its own national system for highly qualified workers, it uses only the salary criterion (and not the higher education requirements), and the permit is obtainable within as little as two weeks (maximum 90 days for the Blue Card). Further details on the competition between the Dutch national scheme and the Blue Card directive are given in the following chapter.

#### 6.3.4. Transposition of the Blue Card directive in Germany

The transposition of the Blue Card into German law was foreseen to be done on time. Initially, it was part of a wider package of reforms; however, at the request of the CDU / CSU and FDP, the elements of the transposition were removed from the legislation as voted in September 2010. (Brinkmann, 2013, p. 43 and Deutscher Gewerkschaftsbund Bundesvorstand, 2012, p. 2). The abridged law entered into force on 26 November 2011. On 7 December 2011, the Federal Cabinet adopted a draft law implementing the Highly Qualified Directive and submitted it to the Bundesrat for its evaluation. On 10 February of the following year, the Federal Council adopted recommendations. The political groups of the CDU / CSU and the FDP have introduced further amendments (Drs. 17/8682), taking into account the proposals of the Federal Council.

Finally, the Blue Card was transposed to German law on 1 June 2012 and entered into force on 1 August 2012, over 13 months after the transposition deadline. The transposition was done by incorporating the elements of the directive into the existing Residence Act (*Gesetz über den Aufenthalt, die Erwerbstätigkeit und die Integration von Ausländern im Bundesgebiet (Aufenthaltsgesetz - AufenthG)*). On this occasion, a number of amendments to the German labour migration policy were introduced. It was decided in order to attract students and graduates of German universities to work in Germany. For instance, graduates could then stay in Germany for 18 instead of just 12 months after graduation

with the purpose of job searching and those who want to follow necessary vocational training can stay in Germany without having to reach the Blue Card salary threshold and be exempted from labour market testing. Since 1. August 2012, such graduates are also allowed to be self-employed in the field strictly linked to their study programme, provided that they earn a minimum income. In consequence, some of the previously existing provisions on admission of skilled workers were omitted; for instance, special requirements for specialists and managers with special professional experience who now can only be issued Blue Cards (while the salary requirement is now lower than was before).

Most of the member states transposed the directive to the letter, basing the salary threshold on the data collected and published by their national statistical offices. Germany, in turn, based the threshold on the social security contribution. The required amount is “two thirds of the compulsory annual pension scheme contribution limit”<sup>28</sup>, which is adapted yearly through a regulation regulation (BMAS, 2015). In 2015 it was set to 72,600 EUR per year. In its position paper, the German Trade Union Confederation (Deutscher Gewerkschaftsbund Bundesvorstand) calls for a transposition more in line with the directive, in particular to adjusting the salary levels so that they correspond to the minimum threshold set by the directive (according to their calculation, 59,607 Euro per annum instead of the proposed 44,000) (Deutscher Gewerkschaftsbund Bundesvorstand, 2012, pp. 4-5). Herzog-Schmidt (2014, p. 130) explains that the difference stems from different modes of calculation of the average salary. She underlines that the directive does not specify whether the average salary should be calculated solely on the basis of full-time employees or not, or whether it should take into account self-employed or not. Further, she clarifies that the source of German calculation would be based on salaries of full-time employees employed in areas comparable to those of the Blue Card. However, in paragraph 10 of the preamble to the directive, it is stated that “[t]he definition of a common minimum denominator for the salary threshold is necessary to ensure a minimum level of harmonisation in the

---

<sup>28</sup> “two thirds of the annual contribution assessment ceiling for the statutory pension fund” as translated by the Bundesagentur für Arbeit. Interestingly, the amount required prior to the introduction of the Blue Card was equal to 100% of the annual contribution as named before.

admission conditions throughout the Community.” Furthermore, in paragraph 11 of the preamble, it is reiterated that the threshold should be set “taking into account a statistical observation published by the Commission (Eurostat) or by the Member States concerned.” It could therefore be argued that a coherent interpretation of an average salary was envisaged by the regulator. Moreover, Herzog-Schmidt does not propose the average salary sources that would justify the lower threshold. If indeed the calculation was to be done on the basis of occupations corresponding to the Blue Card, then according to common sense, the average salary in those areas should be higher than the general average in all areas.

In accordance with the directive, member states are obliged to process the Blue Card applications as soon as possible and at the latest within 90 days. The initial proposal suggested a period of 60 days; however, member states were reluctant to commit to such a short processing time. Germany wanted to keep an ambiguous “as soon as possible”. According to the European Commission (2014, p. 8), German law currently foresees 90 days for application handling, although the author has not found direct reference to this in the transposition documents (cf. Herzog-Schmidt 2014, 146). Brinkmann also underlines that “[i]n general, the German administration is not bound by time-limits for a decision, although according to the Code of Administrative Court Procedure (Verwaltungsgerichtsordnung) after three months a complaint about inaction (...) can be lodged (...).” (Brinkmann, 2013, p. 48)

#### 6.3.5. Transposition of the Blue Card directive in Austria

The Blue Card was transposed into Austrian law in July 2011, only slightly after the directive transposition deadline. At the same time the Red-White-Red Card was introduced as it was deemed that the Blue Card alone cannot satisfy the needs for qualified labour in Austria. The Red-White-Red Card was proposed in 2008, when the Blue Card negotiations were slowly coming to an end.

Currently in Austria, apart from the Blue Card, a skilled worker can obtain a Red-White-Red Card, a Red-White-Red Card Plus, or a Jobseeker visa. The predominantly advertised entry channel is the Red-White-Red Card, which applies to five groups of applicants: 1. Very highly qualified workers; 2. Skilled

workers in shortage occupations; 3. Other key workers; 4. Graduates of universities and universities of applied sciences in Austria; 5. Self-employed key workers. The Blue Card is the only permit which is not issued using the point based system. In all other similar categories one has to secure different numbers of points (out of 100), which give access to the Red-White-Red Card, albeit with different sets of rights.

Between Austria and the Netherlands, the most striking divergence in transposition of the Blue Card directive lies in the introduction of the labour market testing. In the view of the Netherlands, it is not necessary, because the salary requirements do regulate the market themselves. In Austria, there is a fear of abuse of the social security system and on this basis, the country applies labour market testing both to the Blue Card procedure and to the national scheme (with the notable exception of the extremely highly skilled tier). The main factor explaining the difference is the relative weight of the social partners, employers and trade unions, in shaping the government's position. It was revealed in an interview with the **Austrian** representative in Brussels (Interview I, 27.05.2014) that the main voice heard by the government was that of the trade unions, while the **Dutch** representative (Interview II, 28.05.2014) admitted that in the case of highly skilled migration the government was mostly approached by employers and big companies.

#### 6.4. Conclusion

The behaviours and attitudes of member states differ in the stages of negotiations and transposition of a directive. This is partly due to the fact that negotiators and 'transposers' are different persons. The negotiations are done by ministers responsible for a given subject and their employees, while the transposition is a task also for the national parliaments. Therefore, the latter can "fix" what was, according to them, not done properly in the negotiation phase. This phenomenon was described by Mastenbroek as the creation of 'Chinese walls': "In many departments preparation is carried out by policy officials and transposition by legal experts." (2003, p. 377). The political decision makers often do not foresee the legal issues that might appear during the transposition phase. Nevertheless, the political decisions apparent during the transposition phase, can prove the commitment to Union's

policy. Creation of parallel national schemes at the same time as transposing the Blue Card directive is a strong example of the competitive nature of those decisions. Under such conditions, administrative and bureaucratic hurdles, are just a minor factor influencing the success of the EU policy.

In the same vein, the correlation between timeliness and openness is weak. In line with previous compliance research (Versluis, 2007; Mastenbroek, 2003), the reasons for late transposition are not necessarily linked to any resistance to the legislation proposed. Often it is due to administrative capacity or the mode of transposition – incorporation into an old law (more complex) or creation of a new one (simpler). Indeed, in the case of the Blue Card directive, the late transposition by some member states, notably Germany, did not influence negatively their commitment to its functioning. In this country, the delay was caused primarily by the amount of necessary changes to the national immigration law. Similarly, quick transposition is often done in the “one-to-one” mode (like in Malta), but without any substantial effect on the flows of migrants or national policies. The argument that timely transposition is an emanation of cooperation, therefore, has to be dropped.

However, as mentioned by Versluis, “a directive can be perfectly transposed into national legislation, but this does not necessarily lead to practical implementation as well.” (Versluis, 2007, p. 51) For this reason, the following chapter contains an analysis of the practical implementation of the Blue Card directive by the EU member states that negotiated it.

## 7. Chapter VII: Implementation of the EU Blue Card directive

### 7.1. Introduction

The implementation of the Blue Card could not, until now, be comprehensively analysed, mainly due to the delayed transposition of the directive. The European Commission made an attempt to assess the implementation in May 2014, which was not even three years after the transposition deadline of 19 June 2011. The results of their study were not conclusive, but pointed out that the Blue Card directive has not been particularly successful until now. The main weakness listed by the Commission is that the directive “only set minimum standards and left much leeway to MS through many ‘may-clauses’ and references to national legislation” (European Commission, 2014, p. 10). Martín et al. suggest that “the way transposition into national legislation was conceived, [is] geared to restricting the number of beneficiaries rather than to facilitating the matching between EU labour demand and international skilled workers” (Martín, et al., 2015, pp. 69-70). With the relatively low numbers of Blue Cards issued, the conclusion of the OECD and the European Commission that “EU labour migration policy operates only insofar as it is implemented in national legislation” (OECD and EU, 2016, p. 61) is concurrent with the thesis of this dissertation in that the increased cooperation possibilities caused enhanced competition between member states. Most importantly, the Commission underlined that the variation in numbers of the Blue Cards issued by different member states could be due to the “policy choices by MS who apply and promote the Blue Card in considerably different ways” (European Commission, 2014, p. 10). The authors of a study commissioned by the European Parliament’s LIBE Committee indicate that the Blue Card system does not respond to the EU’s needs for highly skilled labour, and above all, it does not “ensure real added value in relation to highly-qualified national migration schemes” (Martín, et al., 2015, p. 69). Moreover, the OECD also supports this claim: “(...) as of 2012, national schemes were more effective than the Blue Card system in targeting high-skilled immigrants. (...) countries that were able to attract a large number of high-skilled immigrants appeared

to be reluctant in transposing the Blue Card system.” (Colussi, 2016, p. 16). With regard to the national schemes, Sorroza Blanco et al. suggest that “(...) any evaluation of the Blue Card’s implementation should (...) investigate existing dualist national admission systems spurred by the negotiation and the implementation of the Directive.” (Sorroza Blanco et al., 2013, p.6). In light of the above, when assessing the implementation of the Blue Card directive, it is vital to look into the matter of national admission systems either already in place or introduced after the directive was adopted. Therefore, this dissertation includes an analysis of the national admission schemes in selected member states, and this chapter, in particular, aims to shed light on this issue using the example of three countries: the Netherlands, Austria and Germany.

## **7.2. Numbers of Blue Cards issued**

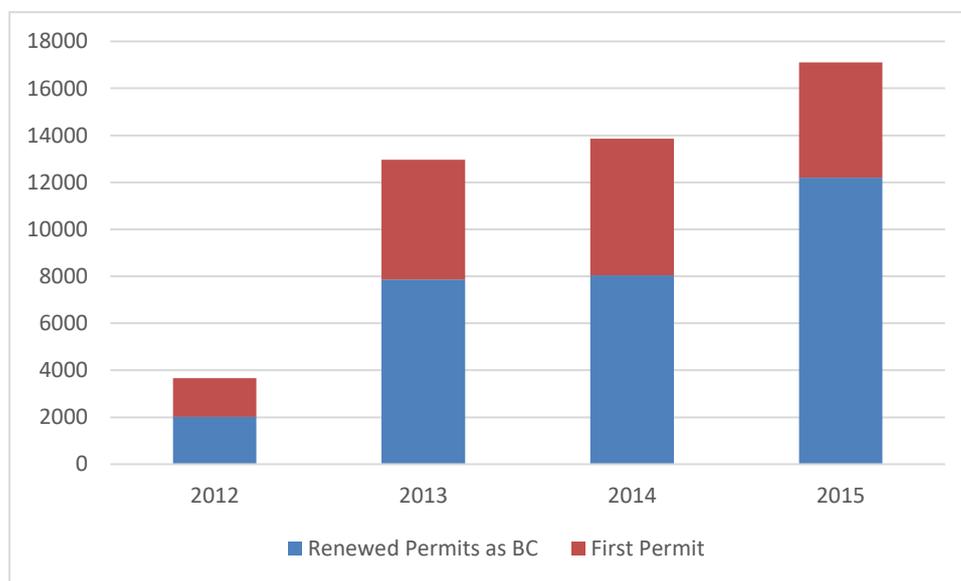
The beginning of the Blue Card was modest: the first 146 Blue Cards reported to Eurostat were issued in 2011. In the year following the transposition deadline (2012), another 3,664 Blue Cards were granted EU-wide, of which 71% were in Germany. The subsequent year brought a tremendous increase of 254%, after which the numbers kept growing: by 7% in 2014 and 23.4% in 2015 (Eurostat, as of 26.02.2017). While these numbers may suggest an increase in use of the Blue Card, it is important to assess these in the context of the potential use. According to the OECD, “[a]t least 10 000 newly arriving third-country nationals should be eligible annually for the EU Blue Card, yet less than half that amount was issued in 2014 as first permits (...)” (OECD and EU, 2016, p. 18).

Germany continues to be the champion in Blue Card granting. From 2013 to 2015 it issued between 85 and 89 per cent of all Blue Cards. According to the Federal Ministry for Migration and Refugees, in the first half of 2016, this trend continued with Germany having issued 85.5% of the Blue Cards issued in the EU. It is clearly visible that Germany dominates the landscape. Martín and Kalantaryan underline that the Blue Card “[a]s a labour migration instrument (...) seems to be limited in practice to one country, Germany (which had lacked a legal migration scheme for highly qualified third-country nationals and has a well-identified need for university graduate workers), and to multinational

companies with a European reach" (2015, p. 9). According to the OECD (2015, p. 206), at the end of December 2014 there were 21,000 Blue Card holders resident in Germany, out of which 10,000 were employed in shortage occupations.

However, as for the Eurostat data, only between 18 and 35 per cent of Blue Cards are issued as first permits in this country. Figure 7.1 represents the proportion of Blue Cards issued as first permits and those issued as subsequent permits on the aggregated EU level.

Figure 7.1: Blue Cards as first permits issued and replacing the previously obtained permits between 2012 and 2015



Source: Eurostat

Table 7.1 represents the total number of Blue Cards issued in the EU since 2011, as well as those that meet the condition of the "first permit"; so either a permit issued for the first time or a permit issued at least 6 months after the expiry of the old permit<sup>29</sup>. Upon examination of Table 7.1, one can discover that among 25 EU member states that can issue Blue Cards, only six (France, Portugal, Hungary, Finland, the Netherlands, and Luxembourg (after 2012)), have been consistently granting Blue Cards only to persons not possessing any other residence permit previously (so presumably, first-time

<sup>29</sup> The data provided in the two Eurostat datasets, migr\_resbc1 and migr\_resocc, is inconsistent. In principle, migr\_resbc1>migr\_resocc. Yet, there are a number of cases where it is on the contrary, e.g. France in 2014.

arrivals). On the other side of the spectrum, in two countries (Belgium and Malta) Blue Cards were offered solely to possessors of other residence permits. On the whole in the EU, Blue Cards as first permits were issued to between 45 (in 2012) and 29 (in 2015) per cent of all Blue Card holders. This means that the Blue Card in terms of attracting workers from outside the EU has not been particularly successful. An econometric study commissioned by the OECD showed that “the Blue Card’s implementation increased the arrivals of high-skilled immigrants by 1.1 percent in the years after the implementation of the Directive” (Colussi, 2016, p. 17). However, if one considers that the Blue Card was “designed to (1) facilitate the admission of [highly qualified workers] by harmonising entry and residence conditions throughout the EU; (2) simplify admission procedures; and (3) improve the legal status of those already in the EU” (EMN, 2013, p. 9), then in some member states part of these goals were achieved.

**Table 7.1: First permits issued for remunerated activities by reason, length of validity and citizenship (EU Blue Cards) [migr\_resocc] and EU Blue Cards by type of decision, occupation and citizenship [migr\_resbc1]**

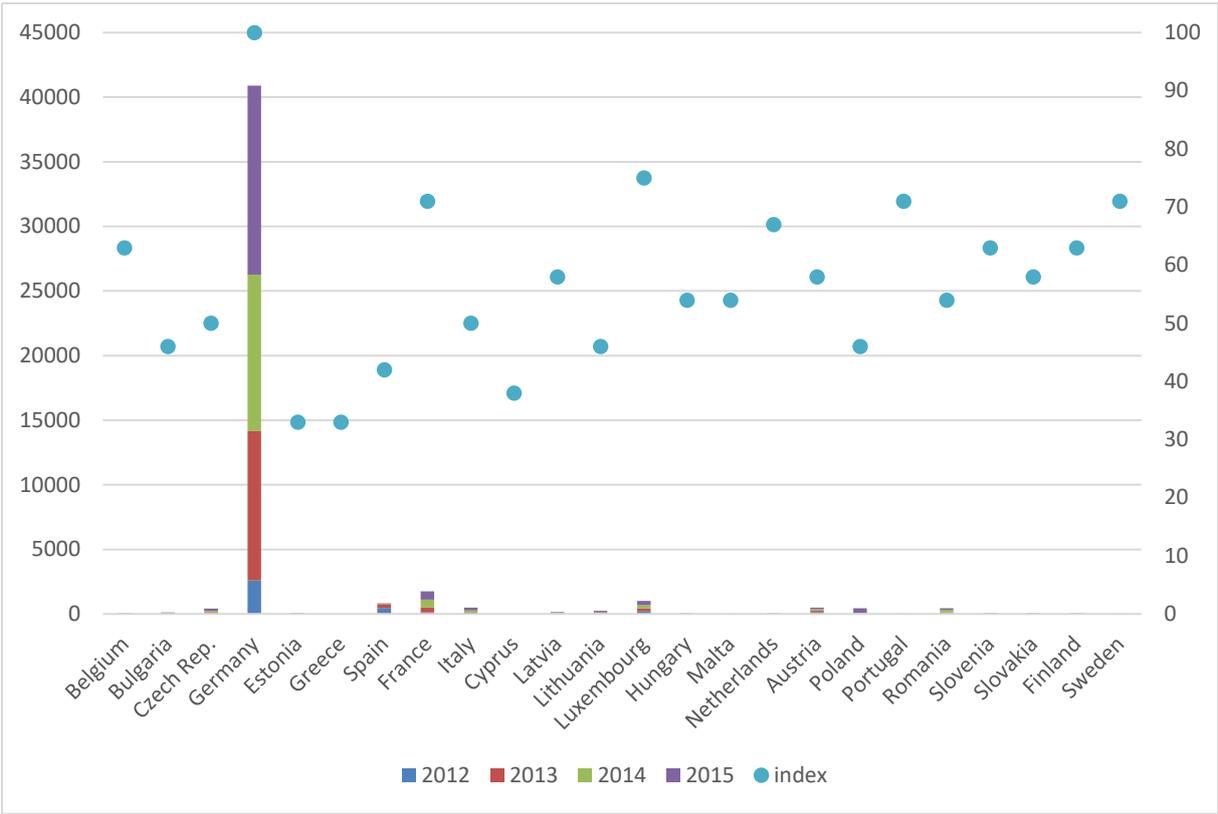
		2011	2012	2013	2014	2015
Belgium	First permits (BC)	0	0	0	0	0
	All Blue Cards	:	0	5	19	19
Bulgaria	First permits (BC)	2	7	2	10	52
	All Blue Cards	:	15	14	21	61
Czech Republic	First permits (BC)	0	68	67	101	160
	All Blue Cards	:	62	72	104	181
Germany	First permits (BC)	0	700	3,776	4,197	2,642
	All Blue Cards	:	2,584	11,580	12,108	14,620
Estonia	First permits (BC)	0	12	12	12	16
	All Blue Cards	:	16	12	15	19
Greece	First permits (BC)	0	0	0	0	0
	All Blue Cards	0	0	0	0	0
Spain	First permits (BC)	107	443	303	37	2
	All Blue Cards	:	461	313	39	4
France	First permits (BC)	0	126	371	604	659
	All Blue Cards	:	126	371	602	659
Croatia	First permits (BC)	:	:	4	8	27
	All Blue Cards	:	:	10	7	32
Italy	First permits (BC)	0	6	84	164	237
	All Blue Cards	:	6	87	165	237
Cyprus	First permits (BC)	0	0	0	0	0
	All Blue Cards	0	0	0	0	0

Latvia	First permits (BC)	3	5	11	32	71
	All Blue Cards	:	17	10	32	87
Lithuania	First permits (BC)	0	0	17	71	128
	All Blue Cards	:	:	26	92	128
Luxembourg	First permits (BC)	0	96	236	262	336
	All Blue Cards	:	183	236	262	336
Hungary	First permits (BC)	1	1	4	5	15
	All Blue Cards	:	1	4	5	15
Malta	First permits (BC)	0	0	0	0	0
	All Blue Cards	:	0	4	2	0
Netherlands	First permits (BC)	0	1	3	8	20
	All Blue Cards	:	1	3	8	20
Austria	First permits (BC)	42	120	102	121	132
	All Blue Cards	:	124	108	128	140
Poland	First permits (BC)	0	0	17	26	322
	All Blue Cards	:	2	16	46	369
Portugal	First permits (BC)	0	2	4	3	57
	All Blue Cards	:	2	4	3	:
Romania	First permits (BC)	0	46	71	148	0
	All Blue Cards	:	46	71	190	140
Slovenia	First permits (BC)	1	7	2	7	11
	All Blue Cards	:	9	3	8	15
Slovakia	First permits (BC)	0	4	5	3	4
	All Blue Cards	:	7	8	6	7
Finland	First permits (BC)	0	2	5	5	17
	All Blue Cards	:	2	5	3	15
Sweden	First permits (BC)	0	0	0	1	2
	All Blue Cards	:	0	2	0	2
Total EU-24	First permits (BC)	156	1,646	5,096	5,825	4,910
	All Blue Cards	0	3,664	12,964	13865	17,104

Source: Eurostat (as of 2 February 2017)

The data shown in the above table are plotted against the values of the transposition index in Figure 7.2. As can be seen, there is no correlation between the number of Blue Cards issued and the openness index. Germany is an outlier, with high numbers of permits issued and high score on the index as well. However, there are countries which scored almost as high on the openness, yet the numbers of Blue Cards given to migrants is negligible. This is notably the case of Portugal and Sweden.

Figure 7.2: The openness of transposition vs. Blue Cards issued



### 7.3. The Blue Card directive as a pretext for policy change

#### 7.3.1. Definitions of highly skilled workers

The adoption and later transposition of the EU Blue Card directive forced the EU member states to start thinking of their labour market needs in relation to workers from third countries. Several countries (Poland, Hungary, the Slovak Republic) did not have any particular measures designed to specifically tackle the issue of qualified employment of third-country nationals. Some had special programmes devoted to them (the Netherlands, Germany, the Czech Republic) and others, like Sweden, had a completely different vision of a migration policy. As a result, the introduction of the EU Blue Card brought about unanticipated consequences in the form of more national systems targeting highly skilled workers. From the point of view of the European Commission, this can be perceived as a failure of the common migration policy. However, from the perspective of the cooperation theory, this is a natural consequence of creating a cooperative environment.

As was proven by a European Migration Network (EMN) study, there were “different definitions and concepts, based on national labour market demands and other national criteria” (2013, p. 4). It turned out that, for many, the standard set by the EU Blue Card was not enough. The definition of a highly qualified (and, in fact, not necessarily highly skilled) worker established in the directive is very broad and does not, in fact, indicate any particular skills. It means “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,
  - is paid, and,
  - has the required adequate and specific competence, as proven by higher professional qualifications.”
- (as of article 2(b) of the directive).

Higher professional qualifications are to be attested by evidence of higher education qualifications or (as a derogation), attested by at least five years of professional experience of a level comparable to higher education qualifications relevant in the profession or sector of the job (article 2(g)). Higher education qualifications, in turn, mean “any diploma, certificate or other evidence of formal qualifications (...) attesting the successful completion of a post-secondary higher education programme (...) on the condition that the studies needed to acquire it lasted at least three years” (article 2(h)). Under such conditions, the range of workers who could enter the EU is very wide. However, the directive excludes self-employed, researchers, and refugees/people seeking international protection, so that it leaves out a high number of potentially highly skilled migrants that might or might not fall under different schemes (not necessarily equally generous). Meanwhile, the national definitions of highly skilled workers were based not only on formal qualifications and high salaries, but also on professional experience or belonging to a group of coveted professionals in shortage occupations.

From Haverland's (2000, p. 95) point of view, national schemes that co-exist with the Blue Card somehow "patch-up" the EU-wide permit and its shortcomings. Cerna and Czaika underline that "(...) the Blue Card is seen both as complement and as competition to the separate national policies" (2016, p. 31). From the perspective of the competition theory, the EU Blue Card is an opportunity to compete in the cooperative conditions. Overall, the evolution of European policies targeting highly skilled migrants can be therefore seen as a positive occurrence. Following that logic, the policies adopted by member states will differ from one country to another, reflecting the needs and attractiveness of the local labour markets.

As will be presented in the following sections, the three member states selected for the analysis, namely Germany, the Netherlands and Austria, have decided on three different approaches to address the shortcomings of the Blue Card. Germany replaced its national system with the Blue Card, but it bent the legislation so that the German transposition is not exactly compliant with the directive as regards the salary levels. The Netherlands, as mentioned in the previous chapter, transposed the directive to the letter, but as can be seen in Table 7.2, it does prefer the national system. The definition of highly skilled migrants in the Dutch national scheme is rather wide as it also encompasses such categories as guest lecturers, researchers, and medical trainee specialists. Finally, Austria added a national scheme (Red-White-Red) which introduces the notions of "skilled workers" and "very highly skilled workers" (among others), complementing the definition of the highly-qualified workers from the Blue Card directive. The definitions of these two are slightly different than the one of the highly-qualified workers targeted by the Blue Card directive – in the latter migrants are supposed to have much higher qualifications than requested by the Blue Card scheme, while in the former, they are supposed to be skilled in a wide sense of the term.

On the one hand, the existence of a national admission scheme can allow for direct competition between the national and EU-wide schemes. Even without enforcement of the directive, many member states still have another channel of entry for highly skilled migrants, which does little to push

stakeholders to fight for correct implementation. On the other hand, the EU policy could be used as a platform to introduce new policy directions without stirring difficult discussions on the national arena.

**Table 7.2: Blue Cards issued as first permits and national permits for highly skilled workers.**

		2008	2009	2010	2011	2012	2013	2014	2015
Germany	national scheme	96	119	122	177	210	11	13	11
	Blue Cards	0	0	0	0	700	3,776	4,197	2,642
Netherlands	national scheme	6,411	4,895	5,531	5,594	5,514	7,046	7,123	7,909
	Blue Cards	0	0	0	0	1	3	8	20
Austria	national scheme	827	575	668	868	1,158	1,228	1,083	1,173
	Blue Cards	0	0	0	42	120	102	121	132

Source: Eurostat

Table 7.2 shows how the introduction of the Blue Card impacted the inflows of highly skilled immigrants in three countries: Germany, the Netherlands and Austria. The red line indicates the year of the Blue Card transposition deadline (not kept by Germany, where the first Blue Cards were issued a year later). The data reveal three interesting tendencies. First, in all three member states the number of immigrants has been increasing since the implementation of the Blue Card. Second, only Germany has experienced a major increase in the number of Blue Cards issued while the number of national permits diminished. Third, the proportion of Blue Cards to the national scheme in Austria has been (approximately) constant since 2012. Clearly, the Blue Card was used by Germany to make the country more attractive to potential migrants and it did *de facto* replace the national scheme. In the Netherlands, the recruitment of third-country highly skilled migrants was on the rise, but not due to the Blue Card. In Austria, the Blue Card, although accounting for less than 10% of permits issued, could be seen as a catalyst as the intake of skilled immigrants in this country has been increasing. In the case of both Austria and the Netherlands, the reformed national schemes were decisive regarding the inflow of immigrants. Most (in the case of Austria) or virtually all (in the case of the Netherlands) highly skilled workers entered the country through the relevant national scheme. This kind of strategy allows them, whenever the external and internal conditions change, to turn back to the EU scheme or to remain concentrated on the national admission system.

### 7.3.2. Germany: Replacing the national policy with the Blue Card

The most striking case of a member state that replaced its national policy regarding highly skilled migrants with the Blue Card system is Germany. There are other examples, like the Czech Republic, but Germany is a particular case among other EU member states due to its large labour market with a rapidly ageing workforce, thus needing to attract foreign workers. In contrast to the United Kingdom, Germany did not become a major country of destination for migrants from EU member states joining in 2004 and 2007; in fact, net immigration decreased in those periods (Statistisches Bundesamt, 2018). In 2000, Germany introduced the Green Card scheme in order to attract specialists in the field of information technology. The admission was limited to 20,000 workers; however, despite the country's booming economy, it did not manage to attract even this number (Herzog-Schmidt, 2014, p. 43). One of the possible reasons is the language barrier as it is virtually impossible to obtain a job offer in Germany without knowing the language (OECD, 2013, p. 22; Mayer, 2013, p. 30). Back in 2011, Geis, Uebelmesser and Werding wrote that “[a]s to the legal framework for immigration, e.g., France and Germany have very restrictive immigration policies (...)” and “are considered to be the preferred destination of migrants with lower skills and weaker economic potential” (Geis et al., 2011, pp. 767-768). The same authors suggest that in France and Germany, as opposed to Anglo-Saxon countries, the welfare state is more generous, unemployment higher, and the salaries more compressed (*ibid*).

Although Eurostat statistics suggest otherwise, the Blue Card is currently not the only permit a qualified third-country national can obtain in Germany, and this is due to multiple definitions used. The Interior Ministry (*Bundesministerium des Innern*) also includes in its statistics qualified migrants (who only require a vocational training course of two years in Germany), self-employed, and researchers (Table 7.3). If one considers the permits issued to different categories of skilled workers in Germany, only two

out of six categories stem from the Blue Card directive. At the same time, most permits are being issued to qualified workers<sup>30</sup>.

In principle, Germany does not apply labour market testing to the Blue Card applicants who meet the salary criteria. However, the approval of the German Federal Employment Agency (*Bundesagentur für Arbeit*) is required when a person would like to be employed in a shortage occupation, but does not meet the salary criterion, and yet possesses a German university degree. Applicants working in regulated professions need to obtain a license (or evidence that it would be granted) before the Blue Card can be issued.

**Table 7.3: Immigration to Germany of highly-qualified workers from third countries between 2009 and 2015 (entering in the respective year)**

Migration for employment purposes in accordance with:	2009	2010	2011	2012	2013	2014	2015
Section 19 of the Residence Act (highly-qualified persons)	169	219	370	244	27	31	31
Section 19a of the Residence Act in conjunction with section 2 subs. 1 No. 2 letter a) of the Employment Ordinance (EU Blue Card, core occupations)	-	-	-	1,387	2,786	3,099	3,786
Section 19a of the Residence Act in conjunction with section 2 subs. 1 No. 2 letter b) of the Employment Ordinance (EU Blue Card, professions for which there is a particular need)	-	-	-	803	1,856	2,279	3,006
<b>Total highly-skilled workers</b>	<b>164</b>	<b>219</b>	<b>370</b>	<b>2,434</b>	<b>4,669</b>	<b>5,409</b>	<b>6,823</b>

Source: Author's calculation on the basis of Bundesministerium des Innern. Bundesamt für Migration und Flüchtlinge, 2015, p. 90

<sup>30</sup> Interestingly, the numbers presented in Table 7.3 do not correspond to those presented in Table 7.2 or Table 7.1. The requested answers of Eurostat and the German Ministry of Interior regarding that matter has not been received.

Table 7.4 depicts the discrepancy between the wording of the directive and the German transposition of it (§41a(1) of the German Residence Act) year by year in terms of salary requirements. The average gross monthly salary (in EUR) is taken as published by the German Statistics Office year by year since the transposition of the directive (01.06.2012). The directive requires the highly skilled migrant to obtain a binding job offer with a salary of at least 1.5 times the gross average salary (column B) in a given member state. According to this requirement, the amounts calculated are presented in column C. Column D presents the monthly contributions to the pension scheme in Western Germany and column E is the calculation of two-thirds of that amount, as indicated in §41a(1) of the German Residence Act. Accordingly, column F shows the proportion of the amount required in the German law and that required by the directive, which fluctuates around 75% each year. This discrepancy was also noted by Chaloff (OECD, 2013, pp. 106-107), Herzog-Schmidt (Herzog-Schmidt, 2014, p. 129), Kolb (2017, p. 18), and the European Commission itself (European Commission, 2014, pp. 6, 14). The latter very carefully posits that “in some MS the threshold may not correspond to the minimum 1,5 times the average gross salary” (*idem*, 6). Until this point, no infringement procedure has been launched against Germany by the European Commission because of the breach of EU law. The interviewee from the Council’s Legal Service, when asked about the reason of non-action of the Commission, said: “No, I don’t know. So they could. They would have the legal reason to do so. (...) [O]ne of the problems in the field of JHA is in general, and in the area of legal migration in particular, the lack of infringement procedures of the Commission.” (Interview V, 23.06.2017). He also added that “(...) it’s really a problem, (...). And then if you don’t do anything, what happens after a while is that a member state comes, pressures the Commission to make a recast in order to align the EU legislation with their national legislation. So I guess it’s not exactly the purpose of the Commission.” (*idem*).

Table 7.4: Salary levels as required by the BC directive and German law

A	B	C	D	E	F
Year	Average gross monthly salary <sup>31</sup>	The threshold set by the directive	Monthly Pension scheme contribution (West) <sup>32</sup>	Two thirds of the monthly pension scheme contribution <sup>33</sup>	Proportion <sup>34</sup>
2015	3,612	5,418	6,050	4,033	74.44%
2014	3,527	5,290.5	5,950	3,967	74.98%
2013	3,449	5,173.5	5,800	3,867	74.74%
2012	3,391	5,086.5	5,600	3,733	73.40%

Germany also decided to take advantage of the exceptions provided for by means of article 5(5). The derogation of salary requirement (1.2 of the gross annual average salary instead of 1.5) is applied to scientists, mathematicians, engineers, medical doctors and IT specialists. In 2017, those categories of workers have to earn 39,624 EUR gross per year (BAMF, 2017)<sup>35</sup>; which according to German law is 52% of the monthly pension scheme contribution.

According to article 4(2) of the Blue Card directive, member states are free to adopt or retain more favourable provisions for Blue Card applicants and holders. In Germany, Blue Card holders are granted privileged access to an unlimited settlement permit (*unbefristete Niederlassungserlaubnis*) after just

<sup>31</sup> Statistisches Bundesamt (2017)

<sup>32</sup> The herewith applied amount of the monthly pension contribution is based on the western part of the country. The amounts in the east are about 900 EUR lower each year, which constitutes an even starker breach of the directive.

<sup>33</sup> See also: Bundesministerium des Innern. Bundesamt für Migration und Flüchtlinge, 2015, pp. 30-31.

<sup>34</sup> This is the proportion between the salary level calculated in Germany and the salary threshold as required by the directive. To be in line with the directive, these numbers should be at least 100%.

<sup>35</sup> BAMF (2017)

33 months of continuous highly qualified employment and proven contributions to the social insurance and pension system during that time. Moreover, if a third-country national additionally possesses intermediate German language level (B1 on the Council of Europe scale) such a permit can be issued after 21 months.

The Blue Card directive as implemented in German legislation, constitutes a breakthrough in the policy of this country. Not only is it more generous than the previously existing national schemes, but also, in fact, more liberal than the directive itself. Kolb underlines that the Blue Card directive is a significant outlier among other migration directives, which until then were transposed “one-to-one” (2017, p. 14). Certainly, Germany shifted their position since the negotiations on the proposal of the European Commission. They moved from very restrictive to very lenient. This is an example of a changing attitude whereby a country opting for less cooperation in the EU (decreasing the possible impact of a common scheme for highly skilled migration) decided to make the most of it, advertising itself as a part of the EU rather than simply Germany. However, Kolb also points out that Germany excels in attracting workers from the EU and “[t]he high mobility of EU citizens to Germany must be understood as a kind of ‘natural barrier’ for labour migration from third countries since employers can be assumed to prefer EU citizens over third country nationals” (Kolb, 2017, p. 16).

In practice, depending on the region, the processing of the application can vary. For example, it could take 4 to 6 weeks (Baden-Württemberg<sup>36</sup>), about 5 weeks (Kassel<sup>37</sup>), 6 to 8 weeks (Berlin<sup>38</sup>), or 8 to 10 weeks (Wiesbaden<sup>39</sup>). Neither the 90 days period, nor any of the examples given above comprise the

---

<sup>36</sup> <http://service-bw.de/zfinder-bw-web/processes.do?vbid=2279976&vbmid=0&action=null> accessed on 6.10.2015

<sup>37</sup> <http://www.serviceportal-kassel.de/cms05/dienstleistungen/102556/index.html/#deadline> accessed on 6.10.2015

<sup>38</sup> <https://service.berlin.de/dienstleistung/324659/> accessed on 6.10.2015

<sup>39</sup> <https://www.wiesbaden.de/vv/produkte/33/141010100000153744.php> accessed on 6.10.2015

time required for the recognition of qualifications, which, if the dossier of the applicant is complete, could take up to two weeks in Germany.<sup>40</sup>

### 7.3.3. Austria: Complementing the Blue Card with a national system

Another remarkable case in the current analysis is Austria. Like Germany, during the directive negotiations, it took a rather restrictive position. Its transposition of the Blue Card directive was, however, much less lenient. Additionally, on the very same day that the Blue Card legislation entered into force in this country, the national scheme (“Red-White-Red Card”) was also introduced.

In the case of the Austrian Red-White-Red Card, the migrants targeted by the national scheme are categorised as: very highly qualified workers, skilled workers in shortage occupations, other key workers, graduates of Austrian universities and colleges of higher education, and self-employed key workers. The workers are selected using a point-based system through which they earn points for their qualifications (“skilled” in this case does not necessarily imply possessing higher education degrees), age (being below 30 years of age is particularly valued), work experience (they receive double the points for having already worked in Austria), and language skills (German and English). The government publishes a list of shortage occupations each year. The cost of application and issuance of both the Red-White-Red Card and the Blue Card in Austria amounts to 120 EUR.<sup>41</sup>

Apart from different requirements for different permits, procedures and family rights granted are identical. For both the Blue Card and the RWR Card the processing time is 8 weeks (56 days). However, due to the high numbers of current applications, especially in the region of Vienna, one can expect a major delay (up to 90 days). The application is filed by the worker or by the employer on behalf of the worker at the competent residence authority in Austria (local Provincial Governor’s Office,

---

<sup>40</sup> <http://www.kmk.org/zab/zeugnisbewertung-hochschulqualifikationen/bewertungszweck-blue-card.html>, accessed on 7.10.2015

<sup>41</sup> <http://www.migration.gv.at/en/types-of-immigration/permanent-immigration-red-white-red-card/skilled-workers-in-shortage-occupations.html>

*Landeshauptmann*, or the duly authorised district administration bodies (*Bezirkshauptmannschaft* or *Magistrat*)). The employer's application has to be filed alongside an employer's declaration (*Arbeitgebererklärung*). First-time applications done by the migrants themselves have to be submitted to the Austrian diplomatic representation abroad. Persons eligible for visa-free entry or who are already legally resident in Austria can submit the application in person to the immigration office in Austria during the validity period of their visa.

The Blue Card directive instructs that the length of the work contract should be of at least 1 year in length (Article 5(1a); however some countries do not require a minimal length and set the minimal validity of the Blue Card as the length of the contract plus three months). The Blue Card should be issued for a period of between one and four years (Article 7(2)) or the length of the contract plus three months, in case it covers a shorter period. Austria has decided to grant the first Blue Cards for a period of two years. The national Austrian permit is issued for one year (or 6 months for very highly skilled job seekers). In the framework of the competition model, it is considered that the shorter the length of validity of the first Blue Card, the more precarious the situation of highly qualified migrants, and, subsequently, the less attractive the admission scheme. The idea of a common migration policy is not to create only short-term circular migrants (see paragraph 3 in the preamble to the directive), but to accumulate know-how in science and industry. It has to be admitted though that in the framework of the Red-White-Red Card in Austria one can only receive a permit valid for one year.

The presence of labour market testing is a protective measure for member states' (EU) nationals. The use of such a procedure can slow down the admission procedure or even discourage potential migrants and employers, especially from small and medium enterprises. In the transposition to the Blue Card, Austria is one of the twelve countries<sup>42</sup> that apply the labour market test. This measure can be considered a preventive tool that inhibits migration even more than just the salary threshold and

---

<sup>42</sup> Austria, Belgium, Bulgaria, Cyprus, Spain, Hungary, Italy, Luxembourg, Malta, Poland, Slovakia and Slovenia (European Commission, 2014, p. 7)

requirements regarding diplomas. This is because labour market testing prolongs the processing of the application and introduces an element of uncertainty as a third-country national favoured by the employer could potentially not get the job if another resident were deemed equally or more appropriate. An interview conducted with a representative of Austria in Brussels (Interview I, 27.05.2014) revealed that Austria's position was that labour market testing is needed to avoid higher unemployment rates, which could be an effect of the inflow of EU citizens to Austria, as well as high rates of third-country nationals resident in the country. Austria is therefore using the labour market testing to be able to quickly react to labour market needs. While applying labour market testing in the Blue Card directive transposition, Austria also uses labour market tests (*Arbeitsmarktprüfung*) in the case of national policy for highly skilled migrants (the Red-White-Red Card). However, it applies a derogation to graduates of tertiary education in Austria, skilled workers in shortage occupations, and to very highly skilled migrants who can apply for a six-month job search visa. The latter category of migrants is targeted towards professionals with doctoral or post-doctoral qualifications, preferably in the domains of mathematics, informatics, natural sciences or technology. The eligibility for such permits is assessed through a points-based system. In addition to the typical criteria of labour market testing (no equally qualified worker registered as a jobseeker with the Public Employment Service (AMS) available for the job), the employers cannot hire immigrants in place of fired workers over the age of 50.

In Austria, after having been employed for at least for 21 out of the previous 24 months, the Blue Card holder can apply for the Red-White-Red Card plus, which entitles its holder to settlement and unrestricted employment. The spouse of the Blue Card holder receives the Red-White-Red Card plus by default from the beginning.

The strategy of Austria is to complement the Blue Card scheme with a tailor-made national scheme which has a name that makes reference to the colours of the national flag (as the Blue Card is supposed to mirror the blue background of the European Union flag). The restrictive position of this member

state during the negotiations of the directive has not changed in the transposition and implementation of this legal tool. However, Austria defined the weaknesses of the EU scheme and addressed them in the national scheme; therefore, competing for skilled workforce not only with third countries like the United States or Canada, but also with other member states.

The Austrian Ministry for Science, Research and Economy in its report of 2014, signalled that the RWR Card system was falling short of meeting its aims as in 2013 the expectations were to have 8,000 RWR Cards issued (Bundesministerium für Wissenschaft, Forschung und Wirtschaft, 2014, p. 65). In the same report, it advocated an extended scope of the RWR Card. The proposed measures were to include graduates of Bachelor studies and to lower salary thresholds for them in addition to extending the job-search period for graduates of Austrian universities from 6 to 12 months (*ibid*, 2014, p. 61).

#### 7.3.4. The Netherlands: Avoiding the Blue Card with preference for the national scheme

The most prominent cases of EU member states that could, but did not wish to use the Blue Card are the United Kingdom and Ireland. These cases were addressed in chapter five of this thesis as they opted out of the scheme at the negotiation level. Other member states (apart from Denmark) did not have such possibility. Therefore, they either were able to negotiate the directive according to their preferences, and/or transpose and implement it as they wished (within what is legally possible). As stated previously, the Netherlands were not satisfied with the negotiated directive as it was too restrictive and the admission criteria that were established were too complicated. Therefore, in order to attract the desired number of highly qualified immigrants, this country designed its own policy, alongside of implementing the Blue Card directive. An interviewee from the Permanent Representation of the Netherlands said that “we feel the need to attract highly skilled third-country nationals because we have shortages and apparently, the EU nationals don’t fill these shortages” (Interview I, 27.05.2014). In an official document of the Dutch government it is stated that the decision to keep the national scheme in parallel to the Blue Card directive was dictated by the need to overcome administrative burdens to citizens and businesses (Obradović, 2014, p. 28). An interview with an

immigration consultant revealed that companies consider parallel schemes to be more appropriate and responsive to changing labour market needs (Interview III, 15.03.2017). According to her, the processing of Blue Cards applications even for recognised sponsors was, until recently, much longer than the expected 2 weeks. This could change in the near future as the authorities are supposed to train more people to issue Blue Cards.

While to obtain the Blue Card one has to prove that s/he possesses a higher education degree that is recognised in the Netherlands, the national scheme only requires a salary of a set monthly level. In this regard, the main difference between the national scheme and the Blue Card is the income criterion. Not only does the national scheme apply a lower salary threshold, but it also introduces special provisions for employees who graduated in the Netherlands and those under the age of 30. This solution was removed from the initial Blue Card proposal under the pretext that it was a discriminatory measure (the deletion suggestion was made by Austria, but the discrimination issue was raised by Finland, France and Sweden (8249/08, p. 14)). The amounts required in both schemes are presented in Table 7.5.

These salary levels are indexed every year (published around 15 December to come into force on 1 January) with the percentage change of the index of the wages set by collective labour agreements for the month of October of the year before. That index is published by the Central Bureau for Statistics. The amounts are valid throughout the whole country and in all occupations and sectors. The salary threshold for migrants older than 30 in the Dutch national scheme was deemed too high by 36% of the respondent organisations (Obradović, 2014, p. 8), which can be illustrative also in the case of the Blue Card – the salary threshold being even higher in this case. As revealed in an interview with an immigration consultant from a company dealing with visa issuance for enterprises, “4,500 euros is already a very decent salary in the Netherlands, but this one [the Blue Card salary threshold] is more... if you’re really specialised or you’re a manager, then you’d earn it, but for a lot of jobs it’s just too high. (...) The Blue Card salary is not something that many people actually earn.” (Interview III, 15.03.2017).

Indeed, the OECD claims that “[i]n most EU Member States, the salary threshold is rather restrictive: in only seven do over 40% of all tertiary-educated full-time employed in skilled occupations meet the salary threshold. Most EU Blue Cards are issued in countries where the threshold is less restrictive proportionately to the salary distribution.” (OECD and EU, 2016, p. 21)

**Table 7.5: The comparison of required salaries for highly skilled workers in the Netherlands in 2017**

Standard amounts for residence as a highly skilled migrant <sup>43</sup>	Standard gross amount per month
Highly skilled migrant older than 30 years	€4,324
Highly skilled migrant younger than 30 years	€3,170
Highly skilled migrant after job-seeking year for graduates/highly educated persons	€2,272
European Blue Card holder	€5,066

Source : <https://ind.nl/en/Pages/income.aspx>

Interestingly, on the government website devoted to the EU Blue Card, one can read a short welcome message: *“You wish to work in the Netherlands as a holder of a European blue card from another Member State. You need a residence permit to live and work in the Netherlands. What are the conditions and how does the application procedure work?”*<sup>44</sup> The message conveyed is that the EU Blue Card is not to be treated as the main entry scheme for highly skilled workers to the Netherlands. The suggestion is that this is the right method for those who have already resided in another member state. The interviewee specialised in preparing work permit applications in the Netherlands (Interview III, 15.03.2017) confirmed this by saying that in her practice there have been few cases where people specifically wanted to get a Blue Card. If they insisted on obtaining it, rather than the national permit,

<sup>43</sup> These salary requirements do not apply to migrants performing scientific research or physicians in training to become specialists. They just have to meet the provisions listed in the Dutch Minimum Wage Act.

<sup>44</sup> <https://ind.nl/en/work/Pages/EU-blue-card-holder.aspx> [accessed on 15.03.2017]

they did it mostly for the reason of accumulating residency periods for EU long-term residency. In that case, their employers often agreed to choose that option.

The amendments introduced to the national scheme made the admission process easier and faster for highly skilled workers, but more cumbersome for their potential employers who have to undergo the recognition procedure (this may last between 4 weeks and 3 months) and in 2017 cost the employer 5,276 EUR. It is also the employers who have the obligation of keeping migrants' records and data for five years after the cessation of the contract. Upon expiration of the work permit, the migrant worker is obliged to leave the Netherlands. In case s/he fails to do so, the Dutch authorities will pay for his/her removal, but might reclaim these expenses from the sponsor. A company wishing to hire a foreigner on the basis of the Blue Card cannot have been subject to a fine for breaching article 2 of the Labour Act for Aliens (*Wav*), or for not deducting or insufficiently deducting wage taxes or premiums for employees or national insurance. Besides the two schemes for highly skilled workers coming from third countries, since 2007 there is a possibility for third country national alumni having obtained their bachelor's or master's degree at a Dutch university (research university or university of applied sciences) to receive a one-year residence permit under the 'Orientation Year for Graduates Seeking Employment' (*Zoekjaar afgestudeerde*) scheme. During this time, they are not subject to any income requirements and if after that year they apply for a national permit for highly skilled workers, they are only required to earn 2,201 EUR (in 2015) per month.

Finally, since 2009 (pilot project, extended in 2012 for another two years), there is the possibility of an orientation year for highly educated persons (valid for one year, not extendable). These migrants are supposed to have obtained a Masters degree or a PhD in the Netherlands or abroad at a university which is included in the top-200 of the most recent Times Higher Education World University Rankings, the most recent QS World University Rankings, or the most recent Academic Ranking of World Universities (also known as the Jiao Tong Shanghai ranking). The diploma has to be evaluated by Nuffic, as in the case of the Blue Card permits. Graduation from the university must have taken place not more

than 3 years prior. The applicants may not have ever held this residence permit to seek and perform work in employment or otherwise before. Moreover, one needs to obtain at least 35 out of 40 points that are scored for education (PhD counts for 30 points, Master's for 25), age (between 21 and 40 years old allows for 5 points), and indicators for success in the Netherlands (maximum 5 points that are granted for previous employment or studies in the Netherlands, decent command of Dutch or English, degrees obtained in countries that signed up to the Bologna declaration).

In general, the Dutch law regarding immigrants is very flexible and subject to adaptations once a specific need is identified. The *kennismigranten regeling* has been in force since 2004, but has been adjusted approximately once every two years. For instance, the Netherlands does not use labour market testing at all. An interview with a representative of the Dutch government in Brussels revealed that the government is not afraid of social dumping and that such phenomena are not observed. In the case of abnormalities appearing in this regard, the policies would be changed accordingly. The Netherlands often tests various possibilities of attracting skilled or highly educated workforce, by introducing different pilot projects, in force for two years or more. Later, it assesses the success of the pilot and decides whether to implement the tested rules permanently. In the example of highly skilled workers, the salary criterion is supposed to be enough to create barriers to unwanted immigration. Moreover, recognised sponsors have a legal duty to ensure a careful recruitment and selection.

The "recognised sponsor" system is the main characteristic of the Dutch scheme for highly skilled worker, differentiating it from the Blue Card. The system was established within the framework of the Modern Migration Policy (*MoMi*) that took effect on 1 January 2011. It means that a company has to undergo a screening procedure to be able to start hiring foreign workers. This allows the national administration to share the burden of administrative procedures with the employers (keeping the files, tracking the whereabouts of the migrant, expelling them from the country if necessary) while streamlining the recruitment and admission processes. There are currently over 5,500 recognised

sponsors in the Netherlands, which is almost double the number from 2014 (2,810).<sup>45</sup> Although costly, this system allows the employers to, once becoming enlisted as recognised sponsors, have permits issued within 2 weeks of the application. This is because there is an established trust relationship between the companies and the authorities, which can therefore be more flexible and responsive to business needs (Interview III, 15.03.2017). In 2017, the Ministry of Security and Justice, after having ascertained that the fees could be prohibitive for smaller businesses, introduced a differentiation of fees, depending on the size of the enterprise. While the regular fee is 5,276 EUR per employer, companies that hire less than 50 people or are start-ups can pay only 2,638 EUR.

As previously stated, the the application handling time can be a serious hindrance for applicants. The Council, in the preamble to the Blue Card directive, calls for a “fast-track admission procedure” (paragraph 7); however, in paragraph 12, it is stated that “[t]he deadline for examining the application for an EU Blue Card should not include the time required for the recognition of professional qualifications or the time required for issuing a visa, if required” (in addition to the Blue Card processing of 90 days). Some member states (e.g. the Netherlands) do in fact add the time for visa requests and qualifications recognition, which can potentially even double the waiting time for the work/residence permit. This is an especially important issue when there are other ways of entry available (national schemes that stay in competition with the Blue Card), which take less time. In particular, they take into account that the employers need workers to be available quickly. Additionally, as mentioned by the interviewee from the visa agency (Interview III, 15.03.2017), the directive does not oblige member states to have the diplomas accredited by national authorities, and the fact that the Netherlands introduced this requirement is another means to discourage employees and companies from using the Blue Card scheme. As she underlined, in some cases the accreditation

---

45

<https://ind.nl/en/Documents/Public%20Register%20Regular%20Labour%20and%20Highly%20Skilled%20Migrants.pdf> [accessed on 13 February 2017]

procedure cannot be as quick as two weeks (expedited procedure) because for instance American universities have to send the transcript of records of their alumni directly to the accreditation office (Nuffic). This takes a great deal of time (Interview III, 15.03.2017).

In the Dutch case, Blue Cards can be issued to workers whose employers are recognised (on a voluntary basis) or not. This means that the time of granting the permit can vary between 2 weeks and 90 days. The migrant has to be abroad at the time of the application. Most migrants have to additionally apply (via the employer) for the provisional residence permit (*MVV*) to enter the Netherlands, which takes up to three months (usually 10 business days), and have the documents legalised/apostilled by the appropriate Dutch embassy. The employers willing to hire a worker on the basis of the Blue Card directive cannot have been, within the period of 5 years prior to the application, fined for having violated Article 2 of the Labour Act for Aliens, or for the failure to pay (or the failure to pay sufficient) wage tax, employee insurance premiums, or national insurance contributions.

After having correctly and timely transposed the directive 2009/50/EC, the Netherlands makes little use of it. All available evidence shows that the flows of highly skilled migrants to this country have been significant in the past years, but not due to the Blue Card. The interviewee from the Permanent Representation of the Netherlands in Brussels disclosed that it is of “secondary importance” to the Dutch government, which scheme highly skilled migrants use in order to gain admittance to the Netherlands, as long as they continue coming (Interview II, 28.05.2014). The EU scheme was set aside after having lost the competition with the more attractive national scheme.

#### **7.4. Conclusion**

This analysis of the implementation of the Blue Card directive demonstrates that the same legal instrument can be used to serve different needs – or in fact, not to serve (in EU member states that make little use of it). Wiesbrock and Hercog claim that “the implementation of the EU Blue Card regime will only marginally affect the attractiveness of Germany and the Netherlands as countries of destination for highly skilled migrants from India” (Wiesbrock and Hercog, 2012, p. 16). While the Blue

Card was not conceived to attract immigrants from a specific location, this conclusion could be generalised to a wider scale. After 2012, one can see that indeed, the Netherlands makes little use of the Blue Card, but Germany, on the contrary, does. Therefore, the initial assessment of Wiesbrock and Hercog is contestable today. However, they also underline that “[t]he Directive is far from establishing the kind of legal certainty, clarity and predictability aimed at” (Wiesbrock and Hercog, 2012, p. 19). With the implementation that increased the range of modalities of transposition of the directive, this statement remains very true. In the view of Cerna and Czaika, the heterogeneity of national versions of the Blue Card directive, is mainly due to “national labour market situations with different degrees of shortages, priorities regarding the education systems, long-term development and protection of domestic workforce and openness for integrating foreign workers” (2016, p. 38). However, these authors also indicate the importance of the political level and the “result of negotiations between different stakeholders, especially employers, unions and the government” (*idem*).

Figure 7.2 depicts the number of Blue Cards issued in the EU member states (as previously presented in Table 7.1) against the openness of transposition index (as calculated in Table 6.2). As can be seen, only in a few cases (Germany, France, Luxembourg), is a high openness index associated with an elevated number of Blue Cards issued. Countries such as Portugal, Sweden, and the Netherlands, which score well in terms of openness of transposition, scarcely issued any Blue Cards. There is a weak correlation (0.62) between the numbers of permits that were issued and the modalities of transposition, at least between the years 2012 and 2015.

In terms of factors influencing policy, the main difference between the Netherlands and Austria turned out to be the ratio between third-country immigration and EU-mobility in comparison to the native population. While in real numbers the EU-mobility towards those countries is comparable, one has to take into account that Austria’s population is almost half the size of that of the Netherlands. According to the interviewed representatives of Austria and the Netherlands working in Brussels, there are qualitative differences between the EU nationals coming to Austria and those coming to the

Netherlands. It appears that in Austria they find highly qualified employment, while in the Netherlands they tend to fill vacancies for low-skilled jobs, such as truck drivers. Therefore, the Netherlands still needs to attract many workers from outside of the EU, while Austria's needs in this area are less important (Interviews I and II, 27 and 28.05.2014). Germany is a case which combines the issues present both in Austria and in the Netherlands, where many immigrants are present, but the strong and large economy has important needs for qualified personnel.

An interesting issue to monitor in the future is whether the leeway negotiated in the Blue Card directive will be upheld by the Court of Justice of the European Union (EUCJ) in any cases that might appear. Vink et al. observed such a phenomenon in case of the Family Reunification Directive, where "(...) Dutch politicians did not foresee that the jurisprudence of the Court would turn a text that appeared to leave member states a great deal of leeway, into a precise and constraining legal instrument" (2014, p. 204). The current status of the Blue Card directive makes it conceivable that the Court would try to limit the scope of interpretation of the directive and to force EU member states to implement the directive in a more uniform manner. However, until this point (March 2018), there have been five cases<sup>46</sup> at the EUCJ that are related to the Blue Card directive, but none of them directly refer to it. What is more, as underlined by the Dutch representative, in the framework of the post-Stockholm programme, one can observe the tendency to oppose the common schemes for labour migration. Boucher and Cerna claim that "(...) highly skilled immigration is here to stay both as a policy preference and as a source of global competition for the "best and the brightest" immigrants across selecting states" (Boucher and Cerna, 2014, p. 24). However, the future could follow the logic of the statement of the Dutch interviewee: "And ok, common European rules, common European playing field, but if this is not attracting more people, then maybe it's better to get back to the old situation, with 28 systems, but where at least people come." (Interview II, 28.05.2014). The European Commission openly admits that the Blue Card directive is an imperfect tool: "[it] only set minimum standards and

---

<sup>46</sup> C-443/14 *Alo*, C-153/14 *K and A*, C-579/13 *P and S*, C-491/13 *Ben Alaya* and C-571/10 *Kamberaj*

left much leeway to MS through many “may-clauses” and references to national legislation” (European Commission, 2014, p. 10).

Despite the scepticism about the likelihood of creating of a unified and efficient entry system, the Council is already working on a new version of the directive, which was announced by the Commission “[i]n order to address some of the implementation challenges (...) over the course of 2015, in the framework of the forthcoming European Agenda on Migration.” (European Commission, 2015).



## 8. Chapter VIII: Conclusions

### 8.1. Research question

The needs of member states of the European Union when it comes to the labour market in general, and to migration in particular, are very diverse. Yet, there is a trend that became apparent in the early 1990s to make those policies increasingly integrated within the European Union. The puzzle of this dissertation is why EU member states make cooperative efforts if they are driven by competitive national interests. In particular, in the case of labour migration policies, there are many policy elements that have to be taken into consideration when examining the motivations of different actors involved in policy-making. In this vein, Cerna and Czaika point out that the current heterogeneity of highly skilled migration policies in the EU “largely reflects differences in national labour market situations, with varying degrees of quantitative and qualitative shortages, priorities regarding the national educational system, the long-term development and projection of the domestic workforce, and also the openness for integrating foreign workers and visions about national identity, social inclusion and societal coherence” (2016, p. 24). In her most recent research, Cerna points out that “(...) while Europe needs highly skilled immigrants to fill labour shortages and respond to ageing populations, it continues to struggle to recruit these immigrants due to increasing political tensions over immigration (...). These tensions are visible in the varying national policies and Blue Card versions at the EU level.” (2018, p. 87). Once again, if this is the situation, then why do the EU member states continue their efforts to forge common migration policies despite all these tensions?

This dissertation addressed the research question of **the determinants and the implications of the degree to which EU member states cooperate in the context of the creation of a common migration policy for highly skilled workers from third countries**. It was established that the cooperative efforts do not exclude competition between the EU member states. And, conversely, that the competition between them also does not preclude cooperation. This is visible not only in the case of migration

policies, but also upon observation of other policies, such as the EU competition policy. In this case, the EU regulates the markets in order to ensure fair competition between the commercial operators present on them, which, once the member states establish a cooperative framework, can continue fierce competition involving the economic actors present on their markets.

It was established in this PhD thesis that the determinants of the use of the Blue Card directive and parallel national policies are country-specific. What was recognised is that the role of social partners, such as trade unions and industry, is crucial for the shaping of the migration policies. Especially in the case of the Netherlands it was shown that structured partnerships with such entities will have an impact on the success of policies. When the lobby of enterprises and the Dutch government could not have done anything more regarding the EU Blue Card during the negotiations, they decided to switch to the national system that would offer better adjustment to the needs of the industry present in the country. Regarding the negotiations within the Council, it was revealed that the positions adopted by member states largely depend on the tendency of the national political scene to represent extreme (or radically populist) parties.

As for the implications of the cooperation and competition between member states, it can be seen that while the European Commission comes up with policy proposals that are supposed to unify entry and residence in the EU for some groups of migrants, countries become more and more competitive in the fight for the best and the brightest. Nevertheless, the integration efforts of the Commission cannot be completely dismissed. As demonstrated in the previous chapters, the extent to which EU member states cooperate is limited. However, pure and exclusive cooperation is not the only way to work together. Obviously, the ambitions of the European Commission are not fulfilled, and this is why it continues to put forward new proposals. However, it is possible to view the developments in this policy area from a more positive angle. Coopetition theory offers a nuanced approach to European policy making. Mixed effects are only natural as far as the shape of the policies is concerned, and they can lead to positive outcomes regarding the policy outcomes. Therefore, the seemingly unsuccessful

bid of the European Commission for a common migration policy is actually pushing the EU member states to “make the cake bigger” (cooperation) and then slice it according to the strength of the competitors. Prior to the Blue Card, migrants may have been unaware that the EU member states have specific policies targeting highly skilled migrants (if, in fact, they did). Even if the application of the Blue Card directive is very heterogeneous in the countries bound by it, potential migrants, if attracted by the idea of an entry channel, may begin researching other avenues and eventually might choose a national scheme to gain entry to the EU. However, what counts is that the Blue Card’s existence motivated them to migrate to the EU. Whether through a different scheme or not, in the end, this is of secondary importance. After all, the ultimate goal of the European Union in this pursuit was to get more of the best and the brightest.

Jeanine Hennis-Plasschaert, MEP, who spoke in the European Parliament during a debate on the Blue Card directive, in 2008 ,underlined that it was not a tool of efficient cooperation:

*“We all know that the Council has been excellent in making ambitious statements, but we also know that, too often, effective decision making is constrained by the inability of the Member States to really work together in their mutual interest, and that effective decision making in this field is being undermined by a very emotional and muddled debate on legal migration, owing to a lack of focus.”* (European Parliament 2008)

One striking element of this quote is that this MEP firmly believes that working together is in the mutual interest of the member states, which is somewhat true. However, competition between them does not cease to exist. There are currently 28 EU member states and each of them has specific needs, which they address through national entry schemes. It is worth underlining that even if individual member states have not developed policies targeting specific migrant groups, their general admission policies may be more enticing than those designed by other countries. What is at stake are global workers who reside not only outside the European Union, but also within its member states. Therefore, despite seemingly aligned interests, member states remain in competition. The ETUC suggested in

2007 that “EU legislation on the admission of economic migrants should therefore be conceived as a ‘first step legislation’, laying down certain common definitions, criteria and procedures, while leaving to the Member States to respond to the specific needs of their labour markets and to determine the volumes of admission of persons.” (European Trade Union Confederation, 2007).

The main idea behind the cooperation theory as applied to the case of the European Union, is that member states cooperate in order to “make the cake bigger”, but then compete when it comes to dividing “the cake” between them. In such a way, they build up their value and recognition as a community but share the profits unequally. Coming back to migration, Martenczuk (who is rather tellingly a European Commission official, besides being an academic author) writes that “(...) the goal of EU migration policy must (...) be the full harmonization of all rules governing entry into the Union by TCNs. Time will tell whether there is sufficient political will to achieve such full harmonization, in particular in the area of economic migration” (Martenczuk, 2014, p. 105). In the light of cooperation theory, as developed in this dissertation, such political ambitions are not only overly optimistic, and also, unnecessary. If the desired policy outcome is to attract increased numbers of skilled immigrants, then constant stimulation between the national and EU levels is to be desired.

## **8.2. Empirical findings in light of the cooperation theory**

The empirical chapters described the competitive behaviours in the various stages of the lifecycle of the Blue Card directive: its negotiations, transposition and implementation. The positions of (some) member states were not consistent throughout the process as they were adopting different dynamics depending on the political conditions (as foreseen by the cooperation model). Therefore, the relationships between the different actors were changing constantly. The general assumption was that immigration of highly skilled workers from third countries is generally beneficial.

Cooperation theory assumes that cooperation in migration can facilitate competition in several ways. First of all, one can observe direct competition by means of a stand-alone national scheme as in the case of the EU member states which have an opt-out clause on justice and home affairs (the United

Kingdom and Ireland in particular). The second possibility is that member states maintain a national policy while implementing the Blue Card directive in a restrictive manner. Thirdly, what is also conceivable is that a member state competes through lenient transposition of the directive (as in the case of Germany). Finally, competition can be understood as non-cooperation; hence no efficient implementation of a commonly agreed directive (as in the case of Malta, which applies zero quotas, so does not promote the common scheme in any way).

The heuristic theory of co-competition allows us to see a mixture of behaviours – competitive and cooperative. This mixture is observable on all levels of policy-making, because of different domestic actors, domestic conditions, and the interaction between the countries in the system. In particular, this dissertation employs the co-competition theory in order to explore the dynamics of cooperation on the level of the European Union. Following from the evidence provided in the empirical chapters, countries such as the Netherlands became more competitive (having a national scheme) in the situation where the EU member states decided to create a cooperative framework. This is because they can advertise themselves as part of the EU, but not necessarily entice potential migrants to use the Blue Card as an entry mode. If a migrant searches for “EU Blue Card the Netherlands”, he or she will be directed to the website of the Immigration and Naturalisation Service of the Dutch Ministry of Justice and Security. However, the Blue Card is by no means promoted on this site. Rather, it is blended in with the more attractive and easier to obtain national *kennismigrantenregeling*. Therefore, the Netherlands uses the label of the Blue Card in order to stream the attention of potential migrants to other avenues of entry to this country.

Many researchers such as Cerna and Czaika (2016, p. 31) claim that “[t]he success of the Blue Card is also debatable.” However, Czaika and de Haas underline that “[t]he fact that migration is also influenced by other factors is not a reason to label the policy a failure, and perhaps we can say that a policy has only failed entirely if it has produced no effect at all or even an effect in the opposite direction” (Czaika and de Haas, 2013, p. 504). Indeed, the Blue Card directive could have been

considered a complete failure only if it had not delivered at all. However, skilled migrants continue to arrive to the EU, perhaps choosing the national schemes over the Blue Card, but member states can still use the Blue Card as bait or an incentive to attract highly skilled workers from third countries. Although hard to conceive, many non-Europeans (even those supposedly well-educated) are not aware of the existence of some of the smaller member states. Thanks to the common immigration scheme, they receive the knowledge of the composition of the EU and can make more informed choices. This logic is in line with the assumptions of the cooperation theory – making the cake bigger through cooperation to then compete over the division of slices. The main finding to be drawn from the analysis of the Blue Card directive through the lens of the cooperation theory is that, contrary to what previous research has indicated, the Blue Card is not a failure. It is only natural that after creating conditions for competition, member states will compete ever more fiercely. Therefore, the limited direct effect of the Blue Card directive (the low numbers of migrants using this scheme) should not lead to the dismissal of this instrument. The extent of the success of the Blue Card directive can be assessed by its ability to attract migrants to the European Union; however surprisingly, this is not done necessarily through this scheme. The mere fact that the EU Blue Card directive has increased highly skilled migrants' awareness of the existence of the EU as a labour market, is its greatest success. The avenues of entry to the member states are of secondary importance. This can help with the interpretation of the aforementioned case of the Netherlands, which to some extent uses the Blue Card as bait for migrants. Colussi points out that the inflow of highly skilled workers has increased in most of the EU member states since 2012. However, he claims that “[t]he number of Blue Cards issued in each signatory country is extremely low compared to the number of work-permits granted under existing national schemes. Moreover, the econometric analysis does not provide evidence of any impact of the implementation of the Directive on the inflow of third country skilled workers. The effect is statistically significant for some countries, but it is unlikely to be caused by the implementation of the Directive.” (Colussi, 2016, p. 36)

The general implications of the cooptation model allow for it to be applied more generally to other policy areas. Unlike that which Martenczuk claims (as was cited previously), the ultimate aim of the EU is not necessarily overall harmonisation. Perversely, cooperation can be used to intensify the competition of member states, rendering the whole continent more attractive in terms of know-how, human resources, innovation etc.

Haverland, in his analysis of the implementation of the Packaging and Packaging Waste directive, observes that this directive also had a difficult path to take. The levels of environmental protection in different member states at the time were very varied, and some of the requirements imposed on producers in particular countries were deemed to constitute barriers to the free movement of goods. However, instead of challenging some systems (notably the German one) before the European Court of Justice, the Commission decided to propose a directive that would harmonise those national regulations and that would ensure a high level of environmental protection. However, exactly as in the case of the Blue Card directive, the Packaging and Packaging Waste directive that was adopted did not serve its purpose and achieved “neither a harmonisation of national regulations nor high environmental standards” (Haverland, 2000, p. 90). Upon analysis of transposition measures, the Commission discovered that “the countries who have a fragmented institutional structure (strong bicameralism, federal division of competencies) have on average a worse implementation record than centralised states” (*ibid*, p. 100).

### **8.3. Innovation and broader academic implications**

This dissertation has offered innovations that are two-fold. On the one hand, the use of the cooptation theory is the theoretical contribution to the existing literature. On the other hand, the diligent analysis of all the stages of the Blue Card directive’s lifecycle is the empirical contribution to the literature on highly skilled migration in the EU.

In light of the findings of this dissertation, three main implications for research are to be considered. Firstly, this dissertation has aimed to enrich the existing literature on the subject of EU labour migration

policy theoretically and empirically. Theoretically, building on existing political economy literature that predominately approach competition between member states in the area of highly skilled migration policy as a zero-sum game (e.g. Cerna 2013, Paul 2012) this dissertation proposes a novel theoretical approach where there is some room between complete adherence to the European Commission's project and guarding national competence. In other words, neither full integration or full national competence are the only possible outcomes of cooperation and competition. Secondly, in the field of European studies, a new kind of mid-range theory is being introduced, going beyond supranationalism and intergovernmentalism. Third, until now, the literature on the EU Blue Card directive has not analysed in a systematic way the whole lifecycle of the Blue Card directive, taking into account not only the negotiations leading to the directive, but also its transposition and implementation. The most recent work of Cerna (2018) synthesises the transposition of the Blue Card directive into 25 national legal systems. However, there have not been any publications to day that combine an analysis of the three stages in the policy lifecycle. Apart from the gaps in the literature as regards the descriptive analyses of the Blue Card directive, as of yet there has not been a framework that enables to discuss the various positions of EU member states depending on each moment in the lifecycle of a directive.

While this dissertation was designed to specifically study the EU Blue Card directive, which is a case of EU cooperation in the field of highly skilled migration policies, it is possible to conceive that the competition model as developed herewith has been adopted, to first of all, other migration directives, but also to further policy fields. The most likely cases for taking up the competition model are the policy areas which have traditionally been national competences, but with the increasing pressures from the Commission and the changing global reality, have become increasingly communitarised. As in the case of migration policies, competition appears because there is no full harmonisation of the policies around it, such as social policies. An immediate example for competition is the common research policy, where member states always want to have the most advantages for themselves, while it is crucial that they cooperate.

#### 8.4. Limitations and future research possibilities

As far as future research in the area is concerned, the most immediate need and possibility is the study of the newly revised Blue Card directive as it is currently (early 2018) being negotiated. This exercise becomes particularly interesting as the institutional setting designed by the Treaty of Lisbon is more complex than the one in place in 2008 and 2009 when the Blue Card directive was first being discussed and adopted. The most important change regarding the adoption of new legislation in the area of migration is the fact that currently it has to be adopted by qualified majority in the Council and agreed with the European Parliament. This entails, on the one hand, less compromise needed within the Council and fewer possibilities for venue shopping. As Menz stated, “member states can no longer decisively set the agenda, easily lock in their own national policy as a blueprint for future European regulation, or venue shop.” (Menz, 2015, p. 555). On the other hand, the necessity of trilogues with the Parliament makes the negotiations even more complex. One has to consider that both institutions (i.e. the Council and the Parliament) are not homogenous and their chief negotiators receive restrictive mandates.

The limitations of the cooperation theory in light of the post-Lisbon architecture originate from the fact that the member states are not fully responsible for the deal that has been struck. The increased weight of the role of the European Parliament also means that it could align more with the positions of the member states, rather than staying in opposition to them. The Parliament, however, does have an interest in making the legislation happen, so this creates more possibilities for cooperation (cf. Trauner and Servent Ripoll, 2016, pp. 1419 and 1429). Moravcsik expresses scepticism about an ‘ever-closer union’, although, at the same time, indicates that this does not imply that the EU will become obsolete, but that states will continue to cooperate, ‘based on a pragmatic division between national policy and supranational policy’ (Moravcsik, 2012, p. 68).

The empirical design of this study was limited to a birds-eye view of the modalities of the Blue Card in 24 EU member states and a more detailed perspective on three of them. This kind of case selection

comes with the caveat of limited generalisability of the findings. However, the cases were selected on the basis of the variety of outcomes (different degrees of cooperation presented by the countries), while the countries themselves were rather similar in terms of socio-economic conditions. As a next stage of research, it would be beneficial to examine another set of cases, based on their similarities on outcome, but differences in input. As a first glance proposal, the dataset could include a very small member state (e.g. Cyprus or Malta) and a member state from Central-Eastern Europe (e.g. Latvia or Lithuania).

The cooptation theory applied in political science and specifically, in the area of regulatory politics, can serve as a tool for better understanding phenomena occurring in policy making. This applies in particular to the cases where many parties have to negotiate at international fora, as is the case of the European Union. As ideas on the future shape of European integration between the member states' governments are tending to diverge more and more, the elements of cooptation will have to find a new balance.

## 9. Chapter IX: Epilogue: Towards the revision of the Blue

### Card directive

The Blue Card, as previously established, has not been perceived as the most successful European instrument. Due to its weaknesses, it remains a secondary tool for admission of highly skilled immigrants to the EU. The European Commission, after having assessed<sup>47</sup> the implementation of directive 2009/50/EC in the Communication of 22 May 2014 (COM(2014) 287 final) and having done (in May 2015) a public consultation on labour migration and on the Blue Card Directive, decided to propose a new version of the directive that would bridge the gap between the expectations and the legal possibilities. Initially, this process of revision was intended to be a simple recast. A recast, contrary to a revision, “permits the adoption of a single legislative text which simultaneously makes the desired amendment, codifies that amendment with the unchanged provisions of the earlier act, and repeals that act” (point 5 of the preamble to the Interinstitutional Agreement of 28 November 2001 on a more structured use of the recasting technique for legal acts). The clear advantage of a recast as an instrument is that it allows for the fast adoption of the amended act as the structure of the act is kept and the elements to be changed are clearly indicated. However, if the need for ample changes are identified, the Commission can also propose a completely new, revised directive. This is what has happened during the drafting of the new Blue Card proposal. The changes were so considerable that the directive needed to be redrafted from scratch.

One of the possibilities for why the Commission decided to propose the initial version of the Blue Card directive and not to withdraw the proposal once it was stripped of its most substantial features was the fact that it wanted to gain more competence and enhance it in the future. The rapidly proposed

---

<sup>47</sup> The assessment of directive 2009/50/EC was also put in the roadmap REFIT - Legal Migration Fitness Check.

revision (after just 3 years of the last implementation measure), can serve as proof that it was indeed a way to get a foot in the door. The Commission had the right to think that under the institutional conditions of the Lisbon Treaty, the strategies of the key players as well as possible policy outcomes would be different than under the previous setting. The main differences between the previous and the current system are that since the Lisbon Treaty, the decisions taken in the field of migration and asylum are done under qualified majority in the Council and with equal participation of the European Parliament. One interlocutor from the Council Legal Service stated that “as from 2009 and the entry into force of the Lisbon Treaty, everything changed. Not immediately I would say. But definitely, QMV and codecision, has tremendously changed the institutional framework, and as well the content, probably, of the text. So I said not immediately, it’s a little bit like a dead star. They are still shining a little bit, so the former system shined two or three years still. But after that...” He recalled that during the negotiations of the Single Permit directive in 2010, the Belgian Presidency (which ran until the end of December 2010) and the subsequent Hungarian Presidency wanted to have everyone on board. But later, for the ICT and Seasonal Workers Directive, those directives were adopted with counter votes of some member states, with the ICT directive being just a few votes below a blocking minority. He then concluded that “that means that it’s good, because it means that finally the QMV was effectively used.” (Interview V, 23.06.2017). He further observed: “But I would say that when it comes to legal migration, I would say that, let’s see... For all the texts adopted... I would say two things. First, that it’s maybe still a consequence of the former system, the text reflected something like 70% of the position of the Council and in 30% of the Parliament. (...) If you look at the positions of the Council and the Parliament position, you see that, at the end, three quarters of the position of the Council were kept.” (*idem*).

### **9.1. The new, revised proposal of the Commission**

A new revised directive is one of the strategic goals of DG HOME for the years 2016-2020: “The next step should be an attractive EU-wide scheme for highly qualified third-country nationals. (...) The reform will envisage to make the Blue Card more flexible and attractive for highly skilled third country nationals, by facilitating intra-EU mobility through an EU-wide scheme. (...) A platform of dialogue, the

European Dialogue on Skills and Migration, has also been established to include input from business, the trade unions, and other social partners, to maximise the benefits of migration for the European economy and the migrants themselves.” (European Commission, 2016, p. 19) Therefore, the proposal includes such features as:

- a lower salary threshold (between 1 and 1.4 times the national gross average, with additional exceptions) (Article 5(2), (4) and (5));
- prohibition of national schemes for people falling in the scope of the directive (Article 3(4));
- regulated sponsorship to simplify issuance conditions and shorten the time of processing (Article 10(1));
- quicker access to permanent residency (3 years) (Article 17(2));
- expanded intra-EU mobility (not only for changing work and residency, but also for travelling) (Article 19);
- a widened scope of application to eligible persons under international protection (Article 3(2) and Article 8(4)).

The European Commission is conscious of the fact that for a directive to work, member states have to adopt a certain attitude: “[a]s regards legal migration, the willingness of main stakeholders (Member States and employers) to cooperate will be crucial. In addition, the outcome of labour migration policies such as the revision of the EU Blue Card (...) will also be influenced by other external factors such as: the general economic situation of the EU which will determine the overall labour market needs; the degree of competition with other similar mechanisms; and other factors which will influence the attractiveness of the EU for skilled workers such as the administrative formalities linked to migration towards the EU (issuing of residence and work permit, etc).” (European Commission, 2016, p. 22). As Maria Vincenza Desiderio wrote: “Will a qualified majority of Member States accept these new terms? Resistance is likely to come from several quarters, not least those governments whose national schemes have fared better than the existing Blue Card in attracting highly skilled

migrants. EU Member States recognize that they not only compete against other regions of the world, but against each other.” (Desiderio, 2016)

## **9.2. The resistance of national parliaments**

The Treaty change in 2009 brought about not only the strengthening of the role of the European Parliament and the dominance of qualified majority voting in the Council, but also empowered the national parliaments. Today, a procedure set out in Protocol No 2 to the Treaty on the Functioning of the European Union, read together with Article 5(3) and Article 12(b) TEU, allows them to monitor compliance with the principle of subsidiarity. Therefore, already at the stage of discussion of the Commission’s proposal it is possible to discover what the positions of the member states’ parliaments are (which are usually aligned with the positions of the national governments, expressed in working parties of the Council, which are not public).

With the work on the new Blue Card directive having started in the European Parliament, two national parliaments, Czech and Bulgarian, sent their reasoned opinions to contribute to the discussions. Five other member states (Austria, Italy, Poland, Portugal and Romania) engaged in a political dialogue with the European Commission on this issue. According to the British Minister for Immigration, half the EU Member States share concerns about the violation of the subsidiarity principle. The Chamber of Deputies of the Czech parliament is strongly opposed to the directive, which, in their view, constitutes a breach of the subsidiarity principle. Their opposition stems from the provisions on the prohibition of parallel national systems, the limitation of the possibility for carrying out labour market tests and imposing quotas, as well as the extension of the scope of the directive to beneficiaries of international protection, the mandatory recognition of professional experience and the reduction in the minimum remuneration rate (Chamber of Deputies of the Parliament of the Czech Republic, 2016). As can be seen, the contested elements are those that aim to make the transposable measures more uniform across Europe. The Bulgarian critique of the proposal is much softer, with the Bulgarian parliament generally supporting the initiative of the Commission. The issues raised by this parliament concern

“the mandatory nature of the provisions on the equivalence of educational qualifications and ‘higher professional skills’ (Article 2(g) and (i)), insofar as such a practice does not form part of Bulgarian national law and may result in significant changes in the country’s education system”. Also, the term used in Article 12 (‘recognised employers’) needs further clarification as “the conditions exist for this to be interpreted broadly and divergently, which may lead to an increase in red tape”. The reduced period of validity of the Blue Card and the equality of treatment mentioned in Article 15(1)(d) are also problematic. Finally, the lowering of the threshold for the gross annual salary (Article 5(2) and (4)) can constitute a problem due to “the lack of safeguards for the domestic labour market and for protecting third-country nationals, who may be forced to work for lower wages than workers from the EU, the EEA and Switzerland”. All in all, according to the Bulgarian parliamentary bodies, “the proposal did not comply with the principles of subsidiarity and proportionality”. Most importantly “the outright ban (in Article 3(4) of the proposal) on parallel national arrangements would limit both the scope for lawful migration by highly skilled third-country nationals and the Member States’ ability to pursue flexible labour migration policies of their own.” Once again, the Austrian parliament (as during the negotiations in 2007-2009) defended the existence of national schemes because they may be “better suited” to attain the desired effects. The same issue was raised by the lower chamber of the Polish parliament. Among those voices of criticism, the Italian and Portuguese parliaments only engaged in political dialogue with the Commission in order to welcome the initiative and confirm that indeed, without Union intervention, they would have difficulty attaining the desired objective of attracting highly qualified migrants. The Romanian parliament, in general favourable of the proposal, only demanded that the situation of EU-citizens would not deteriorate and that the preference in hiring them would be sustained.

Before having decided to opt-out of the new Blue Card, the UK parliament did not send a reasoned opinion on subsidiarity, but they did discuss the matter in chamber. “When the Committee first considered this proposal, it decided not to recommend a Reasoned Opinion, both because the United Kingdom was unlikely to participate in any revised Blue Card scheme, and because, once the United

Kingdom left the EU, UK citizens might benefit from the revised regime.” (UK House of Commons, 2017). However, the European Commission was criticised for not presenting enough data supporting the need for a more unified scheme. For instance, what was asked for was evidence that intra-EU mobility would be directed to areas with skill shortages rather than from countries where it was easier to obtain a Blue Card to those where it was more difficult. The same fears were expressed by the British Minister for Immigration, who not only pointed out that the proposal breaches the principle of subsidiarity, but also that it “might compound, rather than address, the problems claimed by the Commission for lower income Member States in competing for skilled third country workers” (*idem*). This is because, if poorer member states have to compensate the outflow of their native highly skilled workers with third-country nationals, under the condition that the latter are granted free movement rights, this compensation exercise would be futile. Additionally, the Commission was criticised for arbitrarily setting the salary threshold (again). Most importantly, the reduced possibility of setting quota on admission would constitute a breach of Article 79 (5) TFEU. However, Minister of State for Immigration Robert Goodwill admitted that “[i]t may, however, be arguable that since the admission criteria specified in the proposal includes a binding offer of employment, it is not incompatible with article 79(5), since the latter is concerned with volumes of admission only in as much as they are coming to seek work.” (*idem*).

### **9.3. The European Parliament’s new legislative role**

At the meeting “Migration of skilled workers: the revision of the EU Blue Card Directive” that took place on 7 March 2017 in the European Parliament, three Members of the European Parliament (MEPs) voiced their concerns and ideas about the future of the Blue Card. Rapporteur in the Committee on Civil Liberties, Justice and Home Affairs (LIBE) Jean Lambert (Greens/EFA) underlined how important it is to maximise the possibilities of legal entry to the EU and how not everybody fits into the categories of permits currently issued. She criticised the salary thresholds for being “a shorthand for the question ‘are you a desirable person based on your earning capacity?’” She advocated that migrants’ salaries should just be comparable to national workers’ salaries, guided by the principle “equal pay for equal

work". The example she gave were teachers who, however highly qualified, often earn less than even the national average. This is why the salary thresholds were removed from the proposal in her report. Brando Benifei (Socialists and Democrats), Shadow rapporteur in the EMPL Committee, proposed a different view, having in mind that wages are a national competence of member states. He suggested that thresholds should be maintained to ensure that there be no social dumping, which would help to maintain the support of the voters for that project. Shadow rapporteur in the LIBE Committee, Nathalie Griesbeck (ALDE) admitted that the revision of the Blue Card is a controversial file that goes against the current mood. In her view, the proposal of the European Commission lacks ambition. The scope of the directive should embrace all migrant workers and national schemes should be progressively abolished. She also expressed her pessimism regarding the negotiations in the Council, deploring the fact that ministers "say different things in Brussels and in the capitals", which increases national xenophobia and brings to force extreme right and left parties. While all MEPs present said how important it is to attract foreign workers to the EU and that all member states have it on the agenda, Jean Lambert suggested that national schemes, although they may seem more efficient than the Blue Card, will not ensure that the skilled workforce remains within the EU, so their existence can result in being counterproductive. During another panel debate that took place in Brussels on 10 May 2017, the Estonian MEP Yana Toom (ALDE), fiercely presented her opinion that the Blue Card system is mirroring the irregular migratory movements from the South, and that in the end, everyone wants to go to Germany.

#### **9.4. The discussions in the Council**

The currently ongoing discussions in the Council of Ministers are not publicly available, so the only evidence that can be gathered stems from the interviews and official COREPER and Working Parties' agendas. When asked about the support for the revised proposal of the Blue Card directive, the representative of the Council's Legal Service responded that: "I'm almost convinced... I don't know if the Commission has been pressured by the Parliament, certainly not by the Council, it's typically the initiative of the Commission. (...) I'm sure, I have not checked, but I'm sure that from 2009, or, let's say,

2011, until the proposal of the Commission for the recast, you will never find any Council conclusions on the need. Precisely this is why it was so freshly<sup>48</sup> received here in the Council, a lot of member state do not see the necessity of the recast of the Blue Card.” (Interview V, 23.06.2017). He also disclosed that the French delegation would like to extend the personal scope of the directive so as to include refugees. Apparently, the French arrived at this initiative alone, but were later supported by some other member states, including Sweden, Spain and Luxembourg. The German delegation did not have a strong position on this issue, however it did not oppose the idea. Additionally, it seems that “[t]he Czech, they are dead against.” (Interview V, 23.06.2017).

On 24 July 2017, the new Estonian Presidency obtained a negotiating mandate (Council of the European Union, Press release 498/17) to start talks with the European Parliament. In the press release, there is no mention of whether parallel national systems are to be maintained or not. On 12 September 2017, the first trilogue was launched and the results of the negotiations are to be seen in the near future.

### **9.5. The potential scenarios and implications for the co-competition model**

While the negotiations of the revised Blue Card directive are ongoing, it is unlikely that despite the resistance of member states, the proposal will follow the fate of the 2001 general labour migration proposal. What is crucial here is the entrepreneurial role of the Commission, as underlined by Menz (2015) and Paris (2017), and its ambitions to spread the EU competence ever wider. In the case of the Blue Card directive, its lifespan, between the adoption and proposed revision just five years, was very short. This shows the drive of the European Commission and its newly chosen President Jean-Claude Juncker to adopt the new version of the directive. While initially the corridor rumours had it that the proposal would be withdrawn if the member states did not abandon their idea to re-implement national schemes into the proposal, the current suspicions are that as the proposal is so important for

---

<sup>48</sup> The interlocutor meant that the reception of the revised proposal was rather cool.

Juncker that he would not dare take it off the table. Nevertheless, both scenarios remain possible. It is, however, difficult to conceive that in the present political atmosphere, the national schemes would be abandoned and the sole competence in the area of highly skilled migration permits would be given to the EU.

The cooperation model does not have any predictive use to it. Nevertheless, in light of main political dynamics discussed in this dissertation, it may be expected that member states will continue to compete within the cooperative framework set by the European Commission, despite the decision-making architecture that was designed by the Lisbon Treaty. In case the European Commission insists on its role as policy entrepreneur and as the ultimate venue for migration policy design, it is possible that some countries will decide to implement a comprehensive labour migration policy (as in Sweden), instead of following a sectoral model. This way they would be able to overtake the potential prohibition of national policies targeting highly skilled migrants. The insistence of the European Commission on creating an EU-only admission system could potentially lead to suboptimal outcomes, and not to sincere and full cooperation.



## 10. References

### 10.1. List of interviews

Interview I: Interview with a legal adviser of the Permanent Representation of Austria to the EU, Brussels, 27.05.2014

Interview II: Interview with a legal adviser of the Permanent Representation of the Kingdom of Netherlands to the EU, Brussels, 28.05.2014

Interview III: Interview with an immigration consultant from an immigration services provider enterprise, Brussels, 15.03.2017

Interview IV: Interview with a representative of the Dutch employers' organisation (VNO-NCW), the Hague, 25.04.2017

Interview V: Interview with a representative of the Legal Service of the Council of the EU, Brussels, 23.06.2017

Interview VI: Email exchange with a representative of the Dutch trade unions (FNV), 16.05.2017

### 10.2. Official and Legal Documents

Bundesamt für Migration und Flüchtlinge (BAMF) (2017) Blaue Karte EU. Retrieved 03.03.2017 from <http://www.bamf.de/DE/Migration/Arbeiten/BuergerDrittstaat/BlaueKarte/blau-karte-node.html>.

Bundesministerium für Arbeit und Soziales (BMAS) (2015) Verordnung über maßgebende Rechengrößen der Sozialversicherung. Retrieved 15 05 2016 from [http://www.bmas.de/SharedDocs/Downloads/DE/PDF-Pressemitteilungen/vo-sozialversicherungsrechengroessen-2015.pdf?\\_\\_blob=publicationFile](http://www.bmas.de/SharedDocs/Downloads/DE/PDF-Pressemitteilungen/vo-sozialversicherungsrechengroessen-2015.pdf?__blob=publicationFile)

Bundesministerium des Innern. Bundesamt für Migration und Flüchtlinge. (2015). *Migrationsbericht des Bundesamtes für Migration und Flüchtlinge im Auftrag der Bundesregierung. Migrationsbericht 2013.*

Bundesministerium für Wissenschaft, Forschung und Wirtschaft (BMWFV). (2014). *Leitbetriebe Standortstrategie.* Wien.

- Bundesministers für Inneres. (2008). *Bericht des Bundesministers für Inneres an das österreichische Parlament. Legislativ- und Arbeitsprogramm der Kommission für 2008 Achtzehnmonatsprogramm des deutschen, portugiesischen und des slowenischen Vorsitzes.* Vienna. Retrieved 4 May 2017, from [https://www.parlament.gv.at/PAKT/VHG/BR/III-BR/III-BR\\_00345/imfname\\_102894.pdf](https://www.parlament.gv.at/PAKT/VHG/BR/III-BR/III-BR_00345/imfname_102894.pdf)
- Bundesrat. (2007). *Empfehlungen der Ausschüsse zu Punkt ..... der 840. Sitzung des Bundesrates am 20. Dezember 2007. Vorschlag für eine Richtlinie des Rates über die Bedingungen für die Einreise und den Aufenthalt von Drittstaatsangehörigen zur Ausübung einer hochqualifizierten Beschäftigung KOM(2007) 637 endg.; Ratsdok. 14490/07 Drucksache 762/1/07*
- Deutscher Bundestag (2012). *Antrag der Abgeordneten (...) und der Fraktion SPD. Programm zur Unterstützung der Sicherung von Fachkräftebedarfs mit mitteln des Aufenthaltsrechts.* Drucksache 17/9029.
- Chamber of Deputies of the Parliament of the Czech Republic. (2016). *Reasoned opinion of the Chamber of Deputies of the Parliament of the Czech Republic on the 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 purpose of highly qualified employment.* 28 June 2016.
- Commission of the European Communities. (1988). *COMMISSION DECISION of 8 June 1988 setting up a prior communication and consultation procedure on migration policies in relation to non-member countries (88/384/EEC).*
- Commission of the European Communities. (2007). *IMPACT ASSESSMENT Accompanying document to the Proposal for a COUNCIL DIRECTIVE on the conditions of entry and residence of third country nationals for the purpose of highly qualified employment.* Brussels, 23.10.2007 .
- Council of the European Union. (2000) European Council - Presidency Conclusions (Lisbon, 23 and 24 March 2000). Strasbourg, Retrieved on 9 June 2018 from [http://www.europarl.europa.eu/summits/lis1\\_en.htm](http://www.europarl.europa.eu/summits/lis1_en.htm).
- Council of the European Union. (2002, November 12). Contribution of the Legal Service to the proceedings of the Working Party on Migration and Expulsion. (14150/02). Brussels.
- Council of the European Union. (2003, November 25). Outcome of proceedings of the Working Party on Migration and Expulsion (22 October 2003). 13954/03. Brussels.
- Council of the European Union. (2008, 18 January). Outcome of proceedings of the Working Party on Migration and Expulsion (11 January 2008). 5255/08. Brussels.
- Council of the European Union. (2008, 24 January). "I" Item Note. 5597/08 and 5597/1/REV1. Brussels.

- Council of the European Union. (2008, 28 February). Outcome of proceedings of the Working Party on Migration and Expulsion (28 January 2008). *6051/08*. Brussels.
- Council of the European Union. (2008, 3 April). Outcome of proceedings of the Working Party on Migration and Expulsion (7 March 2008). *7642/08*. Brussels.
- Council of the European Union. (2008, 8 May). Outcome of proceedings of the Working Party on Migration and Expulsion (4 April 2008). *8249/08*. Brussels.
- Council of the European Union. (2008, 29 April). Note from the Presidency to the Working Party on Migration and Expulsion (13 May 2008). *8875/08*. Brussels.
- Council of the European Union. (2008, 29 April). Note from the General Secretariat of the Council to the Delegations. Summary of the meeting of the Committee on Civil Liberties, Justice and Home Affairs (LIBE) of 5-6 May 2008. *9259/08*. Brussels.
- Council of the European Union. (2008, 19 June). Outcome of proceedings of the Working Party on Migration and Expulsion (13-14 May 2008). *9666/08*. Brussels.
- Council of the European Union. (2008, 18 June). Note from the incoming Presidency to the Working Party on Migration and Expulsion. *10398/08*. Brussels.
- Council of the European Union. (2008, 7 July). Note from the Presidency to the Strategic Committee in Immigration, Frontiers and Asylum (SCIFA). *11365/08*. Brussels.
- Council of the European Union. (2008, 19 June). Outcome of proceedings of the Strategic Committee in Immigration, Frontiers and Asylum (10 July 2008). *12200/08*. Brussels.
- Council of the European Union. (2008). Press Release from the 2887<sup>th</sup> Council meeting (Justice and Home Affairs) of 24 and 25 July 2008. *11653/08 (Presse 205)*. Brussels.
- Council of the European Union. (2008, 24 July). Outcome of proceedings of the Working Party on Migration and Expulsion (3-4 July 2008). *11512/08*. Brussels.
- Council of the European Union. (2008, 11 July). Note from the Presidency to the Permanent Representatives Committee/Council. *11734/08*. Brussels.
- Council of the European Union. (2008, 22 July). Note from the Presidency to the Working Party on Migration and Expulsion. *12050/08*. Brussels.
- Council of the European Union. (2008, 11 September). "I/A" Item Note. *12714/08*. Brussels.
- Council of the European Union. (2008, 1 August). Outcome of proceedings of the Working Party on Migration and Expulsion (28-29 July 2008). *12320/08*. Brussels.
- Council of the European Union. (2008, 8 September). Note from the Presidency to the Permanent Representatives Committee. *12687/08*. Brussels.
- Council of the European Union. (2008, 15 September). Outcome of proceedings of JHA Counsellors meeting of 12 September 2008. *13009/08 and 13009/08 COR1*. Brussels.

Council of the European Union. (2008, 15 September). Note from the Presidency to the Permanent Representatives Committee. *13029/08*. Brussels.

Council of the European Union. (2008, 7 October). Note from Presidency to the Permanent Representatives Committee. *13748/08*. Brussels.

Council of the European Union. (2008, 21 October). Note from Presidency to the Permanent Representatives Committee. *14470/08*. Brussels.

Council of the European Union. (2008, 10 December). Note from the Presidency. *16952/08 + COR1*. Brussels.

Council of the European Union (2009) 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, Official Journal of the European Union, 18.6.2009.

Deutscher Gewerkschaftsbund Bundesvorstand. (2012, April 16). *Stellungnahme zum Entwurf eines Gesetzes zur Umsetzung der Hochqualifizierten Richtlinie der EU, einschließlich der Änderungsvorschläge des Bundesrates und der Koalitions fraktionen (Drs. 17/8682)*. Retrieved 07 October 2015, from Deutscher Gewerkschaftsbund Bundesvorstand: [https://www.google.be/url?sa=t&andrc=j&andq=andesrc=s&andsource=web&andcd=5&andcad=rja&anduact=8&andved=0CD8QFjAEahUKEwi\\_gfKjn7DIAhVJQBQKHdQyDos&andurl=http%3A%2F%2Fwww.dgb.de%2Fthemen%2F%2B%2Bco%2B%2Bae7d5fba-8aee-11e1-69b9-00188b4dc422&andusg=AFQjCNF4hz7Rkc0k6K-hwPgM-Ui\\_GhAc\\_Q&andsig](https://www.google.be/url?sa=t&andrc=j&andq=andesrc=s&andsource=web&andcd=5&andcad=rja&anduact=8&andved=0CD8QFjAEahUKEwi_gfKjn7DIAhVJQBQKHdQyDos&andurl=http%3A%2F%2Fwww.dgb.de%2Fthemen%2F%2B%2Bco%2B%2Bae7d5fba-8aee-11e1-69b9-00188b4dc422&andusg=AFQjCNF4hz7Rkc0k6K-hwPgM-Ui_GhAc_Q&andsig)

Eerste Kamer der Staten General (2008) E090144 - Richtlijn betreffende de voorwaarden voor toegang en verblijf van onderdanen van derde landen met het oog op een hooggekwalificeerde baan (Europese blue card). Retrieved on 16 May 2018 from <http://www.eerstekamer.nl/9370000/1/j9vviasdcklggj/vhp9ii8hvjv0>

European Commission. (2001) *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 economic activities* (COM/2001/0386 final)

European Commission (2005a). *Green Paper on an EU approach to managing economic migration*. COM(2004) 0811, Brussels, 11. January 2005.

European Commission (2005b). *Communication from the Commission to the Council and the European Parliament, The Hague Programme: Ten priorities for the next five years, The partnership for European renewal in the field of Freedom, Security and Justice*. COM(2005)184 final, Brussels, 10. May 2005.

European Commission (2005c). *Communication from the Commission – Policy Plan on Legal Migration*. COM(2005) 0669, Brussels, 21. December 2005.

- European Commission (2007a). *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)0637 final - CNS 2007/0228. Brussels, 23. October 2007.
- European Commission (2007b). Commission Staff Working Document, Accompanying document to the Proposal for a Council Directive on the conditions for entry and residence of third-country nationals for the purposes of highly qualified employment, Impact assessment.
- European Commission (2007c). Commission Staff Working Document, Accompanying document to the Proposal for a Council Directive on the conditions for entry and residence of third-country nationals for the purposes of highly qualified employment, Summary of the impact assessment.
- European Commission (2010). Communication from the Commission, Europe 2020, A strategy for smart, sustainable and inclusive growth. Brussels, 03 March 2010.
- European Commission. (2014). *Communication from the Commission to the European Parliament and the Council on the implementation of Directive 2009/50/EC on the conditions of entry and residence of third-country nationals for the purpose of highly qualified employment ("EU Blue Card")*. Brussels. COM(2014) 287 final
- European Commission (2015). *Summary of replies to the public consultation on the EU Blue Card and the EU labour migration policies for highly skilled workers*. European Commission, DG HOME, Brussels. Retrieved 18 November 2017, from [https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-is-new/public-consultation/2015/docs/consultation\\_029/summary\\_of\\_replies\\_to\\_the\\_public\\_consultation\\_en.pdf](https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-is-new/public-consultation/2015/docs/consultation_029/summary_of_replies_to_the_public_consultation_en.pdf)
- European Commission. (2015). *Towards a Comprehensive European Migration Policy: 20 years of EU Action*. Retrieved 7 October 2015, from [http://europa.eu/rapid/press-release\\_MEMO-15-4544\\_en.htm](http://europa.eu/rapid/press-release_MEMO-15-4544_en.htm)
- European Commission. (2016). *Strategic Plan 2016-2020*. Brussels: DG MIGRATION AND HOME AFFAIRS. Retrieved 7 October 2015 from [https://ec.europa.eu/info/file/17257/download\\_en?token=VCglDECy](https://ec.europa.eu/info/file/17257/download_en?token=VCglDECy)
- European Economic and Social Committee. (2008). *Opinion of the European Economic and Social Committee of the 'Proposal for a Council Directive on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment*. Official Journal of the European Union, C 27, Volume 52, pp. 108-113. Brussels.
- European Migration Network (EMN). (2013). *Attracting highly qualified and qualified third-country nationals. European Migration Network Study*. European Migration Network (EMN).
- European Trade Union Confederation. (2007, 12 21). *ETUC position regarding European Commission's proposals on legal and 'illegal' migration*. Retrieved from European Trade Union Confederation: <https://www.etuc.org/documents/etuc-position-regarding-european->

[commission%E2%80%99s-proposals-legal-and-%E2%80%98illegal%E2%80%99-migration#.Wg81nLpFyDx](#)

Interinstitutional Agreement of 28 November 2001 on a more structured use of the recasting technique for legal acts, Official Journal C 077, 28/03/2002 P. 0001 - 0003

Joint Committee on European Scrutiny. (2008). *EU Scrutiny Report No. 12: COM (2007) 637 and COM (2007) 638 – Proposal for a Directive of the Council on the conditions of entry and residence of third country nationals for the purpose of highly qualified employment*. Houses of the Oireachtas, Dublin.

Juncker, J.-C. (2014). *Europe needs more solidarity to cope with the challenge of immigration*. Retrieved September 28, 2017, from <http://juncker.epp.eu/news/europe-needs-more-solidarity-cope-challenge-immigration>

National Assembly of the Republic of Bulgaria (2016). *Reasoned Opinion of the National Assembly of the Republic of Bulgaria on the 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 Highly Skilled Employment*. 19 September 2016, Bulgaria. <http://www.ipex.eu/IPEXL-WEB/dossier/files/download/082dbcc55ec06c17015ec33f677b0262.do>

Parliament of the Czech Republic (2016). Chamber of Deputies Committee for European Affairs Resolution No. 298 53rd session on 1st September 2016 to the 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 highly skilled employment /COM(2016) 378 final, Council reference 10012/16/ <http://www.ipex.eu/IPEXL-WEB/dossier/files/download/082dbcc55701bbad015704bcc20302a0.do>

Romanian Parliament Senate (2016). Opinion of the Senate regarding the the 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 Highly Skilled Employment. 21 September 2016, Bucharest, Romania <http://www.ipex.eu/IPEXL-WEB/dossier/files/download/082dbcc557fe134b01580100d20a0381.do>

Sejm (2012). Meeting of the Committee for Administration and Interior Affairs (Komisja Administracji i Spraw Wewnętrznych /nr11/). *Bulletin nr: 292/VII*. Poland: Sejm Rzeczypospolitej Polskiej. Retrieved from <http://orka.sejm.gov.pl/Zapisy7.nsf/wgskrn/ASW-11>

Senate of the Republic of Poland (2016). Opinion of the Foreign and European Union Affairs Committee of the Senate of the Republic of Poland on the 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 highly skilled employment COM(2016)378 adopted at the meeting on 20 September 2016

Senato della Repubblica (2016). Risoluzione Della 1ª Commissione Permanente (Affari costituzionali, affari della Presidenza del Consiglio e dell'Interno, ordinamento generale dello Stato e della Pubblica Amministrazione) (Relatore MAZZONI) approvata nella seduta del 3 agosto 2016 Sulla Proposta Di Direttiva Del Parlamento Europeo e del Consiglio sulle Condizioni di

Ingresso e Soggiorno dei Cittadini di Paesi Terzi che Intendano Svolgere Lavori Altamente Specializzati (COM(2016) 378 Definitivo) ai sensi dell'articolo 144, commi 1 e 6, del Regolamento <http://www.ipex.eu/IPEXL-WEB/dossier/files/download/082dbcc5573f87f6015742bc34ff03e4.do>

Statistisches Bundesamt (2017) Gross Monthly Earnings Statistics. Retrieved on 13 February 2017 from <https://www.destatis.de/EN/FactsFigures/NationalEconomyEnvironment/EarningsLabourCosts/EarningsEarningsDifferences/Tables/GrossMonthlyEarningsTables.html>

Statistisches Bundesamt (2018) Immigration Statistics. Retrieved on 15 May 2018 from <https://www.destatis.de/DE/ZahlenFakten/GesellschaftStaat/Bevoelkerung/Wanderungen/Tabellen/WanderungenAlle.html>

The six Member States: Belgium, Germany, France, Italy, Luxembourg, Netherlands . (25.03.1957, March 25). Treaty establishing the European Economic Community. Rome. Retrieved on 25.11.2017, from <http://eur-lex.europa.eu/legal-content/FR/TXT/PDF/?uri=CELEX:11957E/TXT andfrom=EN>

The Senate of the Parliament of the Czech Republic (2016). 517<sup>th</sup> Resolution of the Senate delivered on the 27th Session held on 24th August 2016 on the 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 highly skilled employment (Senate Print No. N 95/10) <http://www.ipex.eu/IPEXL-WEB/dossier/files/download/082dbcc556c3ef5b0156c64e011b016c.do>

UK House of Commons (2016). Protocol of the Parliamentary Scrutiny Considered by the European Scrutiny Committee on 20 July 2016 (Ninth Report) [https://publications.parliament.uk/pa/cm201617/cmselect/cmeuleg/71-vii/7112.htm#\\_idTextAnchor015](https://publications.parliament.uk/pa/cm201617/cmselect/cmeuleg/71-vii/7112.htm#_idTextAnchor015)

UK House of Commons (2017). Protocol of the Parliamentary Scrutiny Considered by the European Scrutiny Committee on 18 January 2017 (Twenty-Sixth Report) [https://publications.parliament.uk/pa/cm201617/cmselect/cmeuleg/71-xxiv/7117.htm#\\_idTextAnchor023](https://publications.parliament.uk/pa/cm201617/cmselect/cmeuleg/71-xxiv/7117.htm#_idTextAnchor023)

### 10.2.1. Data sources for the transposition

Austria: Fremdenrechtsänderungsgesetz 2011 – FrÄG 2011

Belgium: Loi du 15 mai 2012 modifiant la loi du 15 décembre 1980 sur l'accès au territoire, le séjour, l'établissement et l'éloignement des étrangers

Bulgaria: НАРЕДБА за условията и реда за издаване, отказ и отнемане на разрешения за работа на чужденци в Република България

Cyprus: Ο Περί Αλλοδαπών και Μεταναστεύσεως (Τροποποιητικός) Νόμος του 2012

Czech Republic: Zákon, kterým se mění zákon č. 326/1999 Sb., o pobytu cizinců na území České republiky a o změně některých zákonů, ve znění pozdějších předpisů z pozdějších změn

Estonia: Välismaalaste seaduse muutmise seadus

Finland: Laki ulkomaalaislain muuttamisesta HE 37/2011

France: La loi du 16 juin 2011 relative à l'immigration, à l'intégration et à la nationalité

Germany: Gesetz zur Umsetzung der Hochqualifizierten-Richtlinie der Europäischen Union (Gesetz über den Aufenthalt, die Erwerbstätigkeit und die Integration von Ausländern im Bundesgebiet 19a)

Greece: Law N° 4071/2012 transposing 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

Hungary: A nemzetgazdasági miniszter 44/2011. (XII. 16.) NGM rendelete az EU Kék kártyával foglalkoztatott harmadik országbeli állampolgár részére fizetendő kötelező legkisebb nka-bér megállapításáról, valamint egyes munkaügyi tárgyú miniszteri rendeletek módosításáról

Italy: DECRETO LEGISLATIVO 28 giugno 2012, n. 108 Attuazione della direttiva 2009/50/CE sulle condizioni di ingresso e soggiorno di cittadini di Paesi terzi che intendano svolgere lavori altamente qualificati.

Latvia: MK noteikumi Nr.582 "Grozījumi Ministru kabineta 2010.gada 21.jūnija noteikumos Nr.553 "Noteikumi par darba atļaujām ārzemniekiem"" ("LV", 117 (4515), 28.07.2011.) [stājas spēkā 29.07.2011.]

Lithuania: Law of the Republic of Lithuania on the Legal Status of Aliens

Luxemburg: Loi du 8 décembre 2011 modifiant la loi modifiée du 29 août 2008 sur la libre circulation des personnes et l'immigration.

Malta: L.N. 433 of 2011 IMMIGRATION ACT (CAP. 217) Conditions of Entry and Residence of Third-Country Nationals for the purpose of Highly Qualified Employment Regulations, 2011

- Netherlands: Besluit van 15 juni 2011 tot vaststelling van het tijdstip van inwerkingtreding van onderdelen van het Besluit modern migratiebeleid en tot wijziging van het Vreemdelingenbesluit 2000 en het Besluit inburgering in verband met die inwerkingtreding
- Poland: USTAWA z dnia 27 kwietnia 2012 r. o zmianie ustawy o cudzoziemcach oraz ustawy o promocji zatrudnienia i instytucjach rynku pracy
- Portugal: Lei n.º 29/2012 - Alteração ao regime jurídico de entrada, permanência, saída e afastamento de estrangeiros do território nacional
- Romania: LEGE nr. 157 din 11 iulie 2011 pentru modificarea si completarea unor acte normative privind regimul strainilor in Romania
- Slovakia: Act No. 223/2011 Coll, 404/2011 Law on Residence by Aliens
- Slovenia: UKAZ o razglasitvi Zakona o zaposlovanju in delu tujcev (ZZDT-1), UKAZ o razglasitvi Zakona o tujcih (ZTuj-2)
- Spain: Ley Orgánica 2/2009, de 11 de diciembre, de reforma de la Ley Orgánica 4/2000, de 11 de enero, sobre derechos y libertades de los extranjeros en España y su integración social. + Guía Laboral del Ministerio de Empleo y Seguridad Social - NIPO: 270-12-070-9
- Sweden: Regeringens proposition 2012/13:148 Genomförande av blåkortsdirektivet

### 10.3. Scholarly references

- Adler-Nissen, R. (2009). Behind the scenes of differentiated integration: circumventing national opt-outs in Justice and Home Affairs. *Journal of European Public Policy*, 16 (1), pp. 62-80.
- Angenendt, S., and Parkes, R. (2010). The Blue Card Impasse. Three options for EU Policy on Highly Qualified Migrants. *Stiftung Wissenschaft und Politik*.
- Azoulay, L., and de Vries, K. (2014). Introduction. In L. Azoulay, and K. de Vries (eds.), *EU Migration Law. Legal Complexities and Political Rationales*. (pp. 1-13). Oxford: Oxford University Press.
- Balch, A., and Geddes, A. (2012). *Connection between admission policies and integration policies at EU-level and given linkages to national policy making*. ICMPD. Retrieved from [http://research.icmpd.org/fileadmin/Research-Website/Project\\_material/PROSINT/Reports/WP1\\_CompRep\\_Final\\_Submitted.pdf](http://research.icmpd.org/fileadmin/Research-Website/Project_material/PROSINT/Reports/WP1_CompRep_Final_Submitted.pdf)
- Baldwin, R., and Cave, M. (1999). *Understanding Regulation. Theory, Strategy, and Practice*. Oxford New York: Oxford University Press.
- Barbou des Places, S., and Oger, H. (2005). Making the European Migration Regime: Decoding Member States' Legal Strategies. *European Journal of Migration and Law*, 6 (4), pp. 353-379.

- Beach, D. (2005). *The Dynamics of European Integration. Why and when EU institutions matter*. Palgrave Macmillan.
- Belmonte, M. (2015). *The EU Blue Card - is there a need for a more comprehensive approach?* Brussels: Institute for European Studies, Vrije Universiteit Brussel.
- Bennett, A., and Checkel, J. T. (2014). *Process Tracing. From Metaphor to Analytic Tool*. Cambridge: Cambridge University Press.
- Bertoli, S., Brücker, H., Facchini, G., Mayda, A. M., and Peri, G. (2009). The Battle for Brains: How to Attract Talent. Retrieved 04.07.2012, from Fondazione Roberto Debenedetti: [www.frdb.org/upload/file/Bruckeretal.pdf](http://www.frdb.org/upload/file/Bruckeretal.pdf)
- Betts, A. (2011). *Global Migration Governance*. Oxford University Press.
- Betts, A., and Cerna, L. (2011). High-Skilled Labour Migration. In Betts, A. (ed.), *Global Migration Governance* (pp. 60-77). Oxford University Press.
- Bjerre, L., Helbling, M., Römer, F., and Zobel, M. (2015). Conceptualizing and Measuring Immigration Policies: A Comparative Perspective. *International Migration Review*, 49 (3), pp. 555-600.
- Boeles, P., den Heijer, M., Lodder, G., and Wouters, K. (2009). *European Migration Law*. Antwerp-Oxford-Portland: Intersentia.
- Boeles, P., den Heijer, M., Lodder, G., and Wouters, K. (2014). *European Migration Law* (2nd edition ed.). Cambridge/Antwerp/Portland: Intersentia.
- Bonjour, S., Ripoll Servent, A., and Thielemann, E. (2018). Beyond venue shopping and liberal constraint: a new research agenda for EU migration policies and politics. *Journal of European Public Policy*, 25 (3), pp. 409-421.
- Borjas, G. J. (1989). Economic Theory and International Migration. *International Migration Review*, 23 (3), pp. 457-485.
- Boucher, A., and Cerna, L. (2014). Current Policy Trends in Skilled Immigration Policy. *International Migration*, 52 (3), pp. 21-25.
- Brandenburger, A., and Nalebuff, B. (1996). *Co-Opetition : A Revolution Mindset That Combines Competition and Cooperation*. Crown Publishing Group.
- Brinkmann, G. (2013). Transposition of the Blue Card in Germany. In C. Grütters, T. Strik (eds.) *The Blue Card Directive: Central Themes, Problem Issues and Implementation in Selected Member States* (pp. 43-52). Oisterwijk: Wolf Legal Publishers.
- Brunsdon, J. (2008). Czechs hold up deal on migration programme. 25 September 2008 *European Voice*. Retrieved 4 May 2017, from <http://www.politico.eu/article/czechs-hold-up-deal-on-migration-programme/>
- Castles, S. (2004). The Factors that Make and Unmake Migration Policies. *International Migration Review*, 38 (3), pp. 852-884.

- Cerna, L. (2008). *Towards an EU Blue Card? The delegation of National High Skilled Immigration Policies to the EU level*. Oxford University. ESRC Centre on Migration, Policy and Society.
- Cerna, L. (2009). The varieties of high-skilled immigration policies: coalitions and policy outputs in advanced industrial countries. *Journal of European Public Policy*, 16 (1), pp. 144 – 161.
- Cerna, L. (2013). Understanding the diversity of EU migration policy in practice: the implementation of the Blue Card initiative. *Policy Studies*, 34(2), pp. 180-200.
- Cerna, L. (2014). Attracting High-Skilled Immigrants: Policies in Comparative Perspective. *International Migration*, 52 (3), pp. 69-84. doi:10.1111/imig.12158
- Cerna, L. (2016). *Immigration Policies and the Global Competition for Talent*. London: Palgrave Macmillan.
- Cerna, L. (2018). European High-Skilled Migration. Trends and Challenges. In M. Czaika, *High-Skilled Migration: Drivers and Policies* (pp. 87-107). Oxford: Oxford University Press.
- Cerna, L., and Czaika, M. (2016). European Policies to Attract Talent: The Crisis and Highly Skilled Migration Policy Changes. In A. Triandafyllidou, and I. Isaakyan, *High-Skill Migration and Recession. Gendered Perspectives*. (pp. 22-43). London: Palgrave Macmillan.
- Chaloff, J. (2016a). *The Impact of EU Directives on the labour migration framework in EU countries*, OECD Social, Employment and Migration Working Papers, No. 180, OECD Publishing, Paris, <http://dx.doi.org/10.1787/5jlwxbzpw33-en>.
- Chaloff, J. (2016b). EU Blue Card reform 'counter-intuitive but necessary'. 8 June 2016, Euractiv.com Retrieved 27 November 2017: <https://www.euractiv.com/section/social-europe-jobs/opinion/eu-blue-card-reform-counter-intuitive-but-necessary/>
- Colussi, T. (2016), *The Impact of the Implementation of Council Directives on Labour Migration Flows from Third Countries to EU Countries*. OECD Social, Employment and Migration Working Papers, No. 181, OECD Publishing, Paris, <http://dx.doi.org/10.1787/5jlwxbzkbv1-en>.
- Czaika, M., and de Haas, H. (2013). The Effectiveness of Immigration Policies. *Population and Development Review*, 39 (3), pp. 487-508.
- de Lange, T. (2013). The EU Blue Card Directive: A Low Level of Trust in EU Labour Migration Regulation. In C. Grütters, T. Strik (eds.) *The Blue Card Directive: Central Themes, Problem Issues and Implementation in Selected Member States* (pp. 17-25). Oisterwijk: Wolf Legal Publishers.
- Desiderio, M. V. (2016). "Blue Card Redux: European Commission Plan to Recast Work Permit for Highly Skilled Holds Question Marks". Migration Policy Institute (MPI). Retrieved 9 March 2017, from: <http://www.migrationpolicy.org/news/blue-card-redux-european-commission-plan-recast-work-permit-highly-skilled-holds-question-marks>.
- Egnell, R. (2010). The organised hypocrisy of international state-building. *Conflict, Security and Development*, 10 (4), pp. 465-491.

- Eisele, K. (2010). Policy brief: *Making Europe More Competitive for Highly Skilled Immigration Reflections on the EU Blue Card*. Maastricht: Maastricht Graduate School of Governance.
- Falkner, G., and Treib, O. (2008). Three Worlds of Compliance or Four? The EU-15 Compared to New Member States. *Journal of Common Market Studies*, 46 (2), pp. 293-313
- Falkner, G., Hartlapp, M., and Treib, O. (2007). Worlds of compliance: Why leading approaches to European Union implementation are only 'sometimes-true theories'. *European Journal of Political Research*, 46 (3), pp. 395-416.
- Favell, A. (2002). Market against politics: migration, EU enlargement and the idea of Europe. *Journal of Ethnic and Migration Studies*, 28 (4), pp. 581-601.
- Freeman, G. P. (1995). Modes of Immigration Politics in Liberal Democratic States. *International Migration Review*, 29 (4), pp. 881-901.
- Freeman, G. P. (2006). National models, policy types, and the politics of immigration in liberal democracies. *West European Politics*, 29 (2), pp. 227-247.
- Fridriksdottir, B. (2016). What Happened to Equality? The Construction of the Right to Equal Treatment of Third-Country Nationals in European Union Law on Labour Migration. Nijmegen: Radboud University. Retrieved 18 February 2017 from: <http://repository.uibn.ru.nl/handle/2066/161003>
- Geis, W., Uebelmesser, S., and Werding, M. (2011). Why Go to France or Germany, if You Could as Well Go to the UK or the US? Selective Features of Immigration to the EU 'Big Three' and the United States. *Journal of Common Market Studies*, 49 (4), pp. 767-796.
- Geradin, D., and McCahery, J. A. (2004). Regulatory Co-opetition: Transcending the Regulatory Competition Debate. In J. Jordana, and D. Levi-Faur, *The Politics of Regulation. Institutions and Regulatory Reforms for the Age of Governance* (pp. 90-123). Cheltenham: Edward Elgar.
- Gross, D. M., and Schmitt, N. (2006). *Why do Low- and High-Skill Workers Migrate? Flow Evidence from France*. CESifo Working Paper Series No. 1797.
- Gross, D.M., and Schmitt, N. (2012). Low- and high-skill migration flows: Free mobility versus other determinants. *Applied Economics*. 44 (1). pp. 1-20.
- Grütters, C., and Strik, T. (eds.) (2013). *The Blue Card Directive: Central Themes, Problem Issues, and Implementation in Selected Member States*. Oisterwijk: Wolf Legal Publishers.
- Gümüs, Y. K. (2010). EU Blue Card Scheme: The Right Step in the Right Direction? *European Journal of Migration and Law*, 12 (4), pp. 435-453.
- Hailbronner, K., and Thym D. (eds.) (2016). *EU Immigration and Asylum Law. A Commentary*. (Second ed.). C. H. Beck - Hart - Nomos.
- Hamel, G., Doz, Y. and Prahalad, C. (1989), Collaborate with your competitors and win, *Harvard Business Review*, January-February Issue, pp. 133-139.

- Haverland, M. (2000). National Adaptation to European Integration: The Importance of Institutional Veto Points. *Journal of Public Policy*, 20 (1), pp. 83-103.
- Herzog-Schmidt, J. (2014). *Zuwanderung Hochqualifizierter. Die Blue-Card-Richtlinie 2009/50/EG und ihre Umsetzung in Deutschland*. Baden-Baden: Nomos Verlagsgesellschaft.
- Hix, S., and Noury, A. (2007). Politics, Not Economic Interests: Determinants of Migration Policies in the European Union. *International Migration Review*, 41 (1), pp. 182-205.
- Hollifield, J. F. (1992). Migration and International Relations: Cooperation and Control in the European Community. *International Migration Review*, 26 (2), pp. 568-595.
- Hollifield, J. F. (2011). *Governing migration: Public Goods and Private Partnerships*. Paper presented at the Conference jointly organised by the European Commission and the OECD. Growing Free Labour Mobility Areas and Trends in International Migration, Brussels, 14-15 November 2011.
- International Organization for Migration and European Parliament. (2009). *Comparative Study of the Laws in the 27 EU Member States for Legal Immigration*. Geneva: IOM.
- Kahanec, M. and Zimmermann K. F. (2011) *High-Skilled Immigration Policy in Europe*. Discussion Paper 1096. DIW (German Institute for Economic Research) Berlin.
- Kolb, H. (2017). From Brakeman to Booster: Policy change in Germany's EU Labour Migration Policy. *International Migration* Vol. 55 (S1), 11-21.
- König, T., & Mäder, L. (2012). Non-conformable, partial and conformable transposition: A competing risk analysis of the transposition process of directives in the EU15. *European Union Politics*, 14 (1), pp. 46–69.
- Král, D. (2008). Czech Republic Behind the Steering Wheel of The European Union: Exploring Challenges and Opportunities of the First Czech EU Presidency. *Romanian Journal of European Affairs*, 8(4), 36-48.
- Lado, A., Boyd, N., & Hanlon, S. (1997). Competition, Cooperation, and the Search for Economic Rents: A Syncretic Model. *The Academy of Management Review*, 22(1), pp. 110-141.
- Laubenthal, B. (2014). Europeanization and the Negotiation of a New Labour Migration Policy in Germany. The Goodness of Fit Approach Revisited. *Comparative Migration Studies*, 2 (4), pp. 469-492.
- Levi-Faur, D., and Jordana, J. (2004). The politics of regulation in the age of governance. In Levi-Faur, D., and Jordana, J. (eds.), *The Politics of Regulation. Institutions and Regulatory Reforms for the Age of Governance* (pp. 1-28). Edward Edgar Publishing and the Centre on Regulation and Competition, University of Manchester.
- Luo, Y. (2004). *Coopetition in International Business*. Copenhagen: Copenhagen Business School Press.
- Luo, Y. (2007). A coopetition perspective of global competition. *Journal of World Business*, 42(2), pp. 129-144. DOI: 10.1016/j.jwb.2006.08.007

- Martenczuk, B. (2014). Migration Policy and EU External Relations. In L. Azoulai, and K. de Vries, *EU Migration Law. Legal Complexities and Political Rationales* (pp. 69-105). Oxford : Oxford University Press.
- Martín, I., and Kalantaryan, S. (2015). *Reforming the EU Blue Card as a Labour Migration Policy Tool?* Migration Policy Centre. Florence: Migration Policy Centre, EUI. doi:10.2870/550159
- Martín, I., di Bartolomeo, A., de Bruycker, P., Renaudiere, G., Salamońska, J., and Venturini, A. (2015). *Exploring new avenues for legislation for labour migration to the European Union*. European Parliament, Committee on Civil Liberties, Justice and Home Affairs (LIBE). Brussels: Directorate General for Internal Policies, Policy Department C: Citizens' Rights and Constitutional Affairs.
- Mastenbroek, E. (2003). Surviving the Deadline. The Transposition of EU Directives in the Netherlands. *European Union Politics*, 4 (4), pp. 371–395.
- Mayer, M. M. (2013). *Attracting highly qualified and qualified third-country nationals*. Focussed Study of the German National Contact Point for the European Migration Network (EMN). Federal Office for Migration and Refugees. European Migration Network.
- Mayer, M. M. (2017). Bureaucratic Migration Politics: German Support for Common EU Policies on Labour Migration. *German Politics*, 26 (2), pp. 255-272.
- Menz, G. (2009). *The Political Economy of Managed Migration*. Oxford: Oxford University Press.
- Menz, G. (2011). Stopping, Shaping and Moulding Europe: Two-Level Games, Non-state Actors and the Europeanization of Migration Policies. *Journal of Common Market Studies*, 49 (2), pp. 437-462.
- Menz, G. (2015). Framing the matter differently: the political dynamics of European Union labour migration policymaking. *Cambridge Review of International Affairs*, 28 (4), pp. 554-57.
- Menz, G., and Caviedes, A. (eds.) (2010). *Labour Migration in Europe*. Palgrave Macmillan.
- Mendrinou, M. (1996). Non-Compliance and the European Commission's Role in Integration. *Journal of European Public Policy*, 3 (1), pp. 1-22.
- Meyers, E. (2002). *Multilateral Cooperation, Integration and Regimes: The Case of International Labor Mobility*. Working Paper 61, The Center for Comparative Immigration Studies (CCIS) University of California, San Diego.
- Moe, T. M. (1995). The Politics of Structural Choice: Toward a Theory of Public Bureaucracy. In O. E. Williamson, *Organization Theory: From Chester Barnard to the Present and Beyond* (pp. 116-153). New York Oxford: Oxford University Press.
- Money, J. (1999). *Fences and Neighbors. The Political Geography of Immigration Control*. Ithaca and London: Cornell University Press.
- Moravcsik, A. (1993). Preferences and Power in the European Community: A Liberal Intergovernmentalist Approach. *Journal of Common Market Studies*, 31 (4), pp. 473-524.

- Moravcsik, A. (2012). Europe After the Crisis. How to Sustain a Common Currency. *Foreign Affairs*, 91 (3), pp. 54-68.
- Obradović, E. (2014). *Monitor Kennismigranten. Kwalitatieve analyse*. Ministerie van Veiligheid en Justitie, Immigratie- en Naturalisatiedienst (IND). Retrieved on 11 February 2016 from <http://www.rijksoverheid.nl/bestanden/documenten-en-publicaties/rapporten/2014/07/03/bijlage-2b-monitor-kennismigranten-kwalitatieve-analyse/lp-v-j-0000005981.pdf>
- OECD. (2008). *The Global Competition for Talent. Mobility of the Highly Skilled*. OECD Publishing, Paris.
- OECD (2013). *Recruiting Immigrant Workers: Germany*. OECD Publishing, Paris. doi:10.1787/9789264189034-en
- OECD (2015). *International Migration Outlook 2015*, OECD Publishing, Paris, [http://dx.doi.org/10.1787/migr\\_outlook-2015-en](http://dx.doi.org/10.1787/migr_outlook-2015-en).
- OECD/EU (2016). *Recruiting Immigrant Workers: Europe 2016*, Recruiting Immigrant Workers, OECD Publishing, Paris, <http://dx.doi.org/10.1787/9789264257290-en>.
- Okura, M. (2007). Cooperative Strategies of Japanese Insurance Firms. A Game-Theory Approach. *International Studies of Management and Organization*, 37 (2), pp. 53-69.
- Padula, G., Dagnino G. B. (2007). Untangling the rise of cooperation: the intrusion of competition in a cooperative game structure. *International Studies of Management & Organization*, 37 (2), pp. 32-52.
- Paris, S. (2017). The European Commission and the Blue Card Directive: Supranational Policy Entrepreneurship in Troubled Waters. *Journal of Contemporary European Research*, 13 (2), pp. 1025-1042.
- Parsons, C., Rojon, S., Samanani, F., and Wettach, L. (2014). *Conceptualising International High-Skilled Migration*. Oxford: International Migration Institute. Retrieved 18 November 2017, from <https://www.imi.ox.ac.uk/publications/conceptualising-international-high-skilled-migration>
- Pascouau, Y. (2010). *La Politique migratoire de l'Union européenne. De Schengen à Lisbonne*. Paris: La Fondation Varenne.
- Paul, R. (2012). Limits of the competition state? The cultural political economy of European labor migration policies. *Critical Policy Studies*, 6 (4), pp. 379-401.
- Paul, R. (2013). Strategic contextualisation: free movement, labour migration policies and the governance of foreign workers in Europe, *Policy Studies*, 34 (2), pp. 122-141.
- Penninx, R., and Scholten, P. (2016). The Multilevel Governance of Migration and Integration. In R. Penninx and B. Garcés-Mascareñas (eds.), *Integration Processes and Policies in Europe* (pp. 91-108). Springer International Publishing AG.

- Pollack, M. (1996) *The engines of integration? Supranational autonomy and influence in the European Community*, Working Paper 2.41, Center for German and European Studies, University of California, Berkeley.
- Pollack, M. (2001) International Relations Theory and European Integration, *Journal of Common Market Studies*, 39 (2), pp. 221-44.
- Posse-Ousmane, S. (2017). *Les conditions d'admission et de séjour des travailleurs hautement qualifiés dans l'UE. Une analyse de la Directive Carte Bleue*. Berlin/Bern: Carl Grossmann Verlag.
- Putnam, R. D. (1988). Diplomacy and Domestic Politics: The Logic of Two-Level Games. *International Organization*, 42 (3), pp. 427-460.
- Reiner, C. (2010). Brain competition policy as a new paradigm of regional policy: A European perspective. *Papers in Regional Science*, 89 (2), pp. 449-461.
- Roos, C. (2013). *The EU and Immigration Policies. Cracks in the Walls of Fortress Europe?* Palgrave Macmillan UK.
- Salt, J. (1988). Highly-skilled International Migrants, Careers and Internal Labour Markets. *Geoforum*, 19 (4), pp. 387-399.
- Salt, J. (1992). Migration processes among the Highly Skilled in Europe. *The International Migration Review*, 26 (2), pp. 484-505.
- Sanahuja, J. A. (2013). Spain: Double-Track Europeanization and the Search for Bilateralism. In Ruano, L. (Ed.). *The Europeanization of National Foreign Policies towards Latin America* (pp. 36-61). New York: Routledge.
- Sánchez Iglesias, S. (2013). The Transposition of the Blue Card Directive in Spain. In C. Grütters, T. Strik (eds.) *The Blue Card Directive: Central Themes, Problem Issues and Implementation in Selected Member States* (pp. 67-80). Oisterwijk: Wolf Legal Publishers.
- Shaw, C. (2011). Classifying and mapping the OMC in different policy areas. In U. Dietrich, W. Reiners, and W. Wessels, *The Dynamics of Change in EU Governance* (pp. 50-79). Cheltenham, UK: Edward Elgar Publishing.
- Soroos, M. S. (1990). A Theoretical Framework for Global Policy Studies. *International Political Science Review*, 11(3), pp. 309-322.
- Sorroza Blanco, A., Ette, A., Gonzalez Enriquez, C., and Parkes, R. (2013). *The EU performance in the global competition for highly-skilled migrants*. Notre Europe – Jacques Delors Institute. Retrieved 17 November 2017, from <http://www.institutdelors.eu/media/highlyskilledmigrants-gonzalezparkessorrozaette-ne-jdi-feb13.pdf?pdf=ok>
- Spendzharova, A. and Versluis, E. (2013). Issue salience in the European Policy Process: what impact on transposition? *Journal of European Public Policy*. 20 (10), pp. 1499-1516. doi: 10.1080/13501763.2013.781802

- Stein, H. (2010). Literature Overview on the Field of Co-opetition. *Business: Theory and Practice / Verslas: Teorija ir Praktika*, 11 (3), pp. 256-265. doi:10.3846/btp.2010.28
- Thomson, R. (2010). Opposition through the back door in the transposition of EU directives. *European Union Politics*, 11 (4), pp. 577–96.
- Thym, D. (2016). Legal Framework for EU Immigration Policy. In K. Hailbronner, and D. Thym, *EU Immigration and Asylum Policy. A Commentary*. (pp. 271-299). C. H. Beck/Hart/Nomos.
- Tiebout, C. M. (1965, October). A Pure Theory of Local Expenditures. *Journal of Political Economy*, 64 (5), pp. 416-424.
- Toner, H. (2014). *The Lisbon Treaty and the Future of European Immigration and Asylum Law*. Oxford: Oxford University Press.
- Trauner, F., and Ripoll Servent, A. (2016). The Communitarization of the Area of Freedom, Security and Justice: Why Institutional Change does not Translate into Policy Change. *Journal of Common Market Studies*, 54 (6), pp. 1417-1432. doi: 10.1111/jcms.12397.
- Treib, O. (2008). Implementing and complying with EU governance outputs. *Living Reviews in European Governance*, 3 (5).
- van Riemsdijk, M. (2012). (Re)scaling Governance of Skilled Migration in Europe: Divergence, Harmonisation, and Contestation. *Population, Space and Place*, 18, pp. 344-358.
- Varvitsiotis, I. M. (2006). *Politique d'immigration en Europe. Vers une politique commune en matière d'immigration au sein de l'Union européenne. Evolution 1999-2005*. Brussels: Groupe du PPE-DE.
- Versluis, E. (2007). Even rules, uneven practices: Opening the 'black box' of EU law in action. *West European Politics*, 30 (1), pp. 50-67.
- Vink, M., Bonjour, S., and Adam, I. (2014). European integration, consensus politics and family migration policy in Belgium and the Netherlands. In: H. Vollaard, J. Beyers, and P. Dumont, *European Integration and Consensus Politics in the Low Countries* (pp. 193-212). Routledge.
- Vogel, D. (1995). *Trading Up: Consumer and Environmental Regulation in a Global Economy*. Harvard University Press.
- von Weizsäcker, J. (2006). Welcome to Europe: A European Blue Card Proposal. In K. Gmaj, and K. Iglicka, *Brain Drain or Brain Gain - a Global Dilemma* (pp. 13-32). Warsaw: Fundacja Centrum Stosunków Międzynarodowych (Foundation of the Center for International Relations).
- von Weizsäcker, J. (2008). *Divisions of labour: rethinking Europe's migration policy*. Brussels: Breugel.
- Wiesbrock, A., and Hercog, M. (2012). *Making Europe More Attractive to Indian Highly-skilled Migrants?: The Blue Card Directive and National Law in Germany and the Netherlands*. Robert Schuman Centre for Advanced Studies.

- Wind, M., and Adamo, S. (2015). Is Green Better than Blue? The Danish JHA Opt-out and the Unilateral Attempt to Attract Highly Skilled Labour. *European Journal of Migration and Law*, 17, pp. 329-360.
- Zaiceva, A., and Zimmermann, K. F. (2008). *Scale, Diversity, and Determinants of Labour Migration in Europe*. Discussion Paper No. 3595, IZA, Bonn.
- Zhelyazkova, A. (2013). Complying with EU directives' requirements: the link between EU decision-making and the correct transposition of EU provisions. *Journal of European Public Policy*, 20 (5), pp. 702-721. <http://dx.doi.org/10.1080/13501763.2012.736728>