

THE EUROPEAN UNION BLUE CARD DIRECTIVE

*What were the main reasons to introduce the EU Blue Card directive
and what was the final result after two years of political debate?*

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Abstract:

This Bachelor thesis is concerned with the European Union Blue Card directive. Given that the history of EU immigration policy did not start until the Treaty of Maastricht which incorporated immigration policy into the legal framework of the EU, the Blue Card can be considered an important breakthrough in the field of EU immigration policy. So far, only little research about the Blue Card directive has been done. Therefore, the central research question of this thesis is: What were the main reasons to introduce the EU Blue Card directive and what was the final result after two years of political debate? With the Blue Card directive, the EU managed to agree on a common regulation for legal migration at the EU level for the first time. Though immigration policy is a sensitive field for the EU Member States, the increasing global competition for highly skilled workers and the mid-term failure of the Lisbon Agenda demand that the EU comes up with a harmonious policy to manage economic migration. As the thesis will point out, the Blue Card directive was subject to controversial debates in the main institutions of the EU involved in the decision-making process. Much compromising had to be done till the directive was finally adopted on 25th May 2009. Different from the Commission's intention to create an exclusive system providing for a uniform entry and residence permit for highly qualified third-country nationals, the Blue Card became rather a symbol of good-will than a strong measure for attracting highly skilled migrants.

List of Abbreviations

CoR	Committee of the Regions
EC Treaty	Treaty establishing the European Community
EESC	European Economic and Social Committee
EP	European Parliament
EU	European Union
JHA	Justice and Home Affairs
LIBE	Committee on Civil Liberties, Justice and Home Affairs
MDGs	Millennium Development Goals
TFEU	Treaty on the Functioning of the European Union
UK	United Kingdom

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1. Introduction

Immigration policy has always been a highly debated policy area in the European Union (EU). It tends to touch upon issues that are sensitive for the 27 Member States like employment rates, social solidarity, welfare, cultural diversity, border controls, criminal prosecution and national security. It is often perceived as a threat and associated with negative effects such as decreasing the economic and social welfare of the host country's population. Thus, Member States are reluctant to give up parts of their national sovereignty in the field of immigration policy for common laws and policies at the EU level. Furthermore, the fact that all Member States have different regulations regarding legal migration makes it difficult to find an agreement. However, beyond the background of an increasing global competition for highly skilled migrants the EU needs a common and coherent immigration policy to be capable of managing economic migration successfully and strengthening its position in the world economy.

With "Council Directive 2009/50/EC of May 2009 on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment", commonly called "Blue Card directive", the EU managed to agree on a common regulation for legal migration for the first time. The legal basis of the directive is Article 63(3)(a) and (4) of the Treaty establishing the European Community (EC Treaty) (Article 79 Treaty on the Functioning of the European Union (TFEU))¹ and it is due to be implemented into national law till 2011. The directive aims to facilitate the admission of highly qualified third-country nationals that would like to take up employment on the territory of an EU Member State for more than three month by means of a fast-track procedure. Therefore, it introduces a single applicant procedure and a single residence and work permit, the so-called "Blue Card", for them. Moreover, it gives them a common set of rights, secures their legal status and provides for family-reunification. Overall, the directive can be considered a breakthrough in the field of legal migration.

As the Blue Card directive was adopted very recently, most of the scholarly literature is not directly concerned with the directive and only touches the topic. One rarely finds literature that deals with the directive as it was actually adopted. The purpose of this Bachelor thesis is to help closing this gap. Therefore, the central question of the thesis is:

¹ The EC Treaty was replaced by the TFEU on December 1st, 2009.

What were the main reasons to introduce the EU Blue Card directive and what was the final result after two years of political debate?

To find an answer to this question, the second chapter of this thesis will start by providing for an outline of the development of the EU's immigration policy towards the Blue Card directive. This background information is useful in order to understand why the Blue Card is an important breakthrough for the EU in the field of legal migration.

In the third chapter, the thesis will address the question why the EU is in need of the Blue Card. Given the difficulties involved in finding common agreements in a policy area as delicate as immigration, one might think it would be the best to leave it in the hands of the Member States. But as the chapter will point out, the challenges of demographic change, transformations of the labour markets, the Lisbon Strategy and the global competition for highly skilled workers require common policy measures for the EU.

The fourth chapter will turn to the controversies in the Blue Card debate. Policy-making in the EU always involves a number of actors. Therefore, the chapter will examine the positions of the different actors involved in the debate and highlight the conflicts regarding the key elements of the directive which were identified with the help of the literature. Given the limited scope of the thesis, the focus will be on the main actors. These are the European Commission, the European Parliament (EP) and the Council of Ministers. For the Council of Ministers, one should note that it represents the opinions of the 27 Member States. As it will be impossible to analyze the positions of all Member States in detail, they will be narrowed down to the most peculiar ones. Next to these main bodies, the thesis will have a glance at the opinion of the Committee of the Regions (CoR), representing the regional and local levels of the EU and the European Economic and Social Committee (EESC) whose position can be regarded as representing the interest of the civil society.

Having these different positions, the fifth chapter of this thesis will finally come to the question what the final directive, as it was adopted in 2009, looks like. This way, it will unravel the compromises that were made and point out their effect on the final Blue Card directive.

In the last chapter of this thesis, a conclusion will be given. It will reflect on what was found out in the course of the research and sum up the main results in order to come up with a final answer to the central research question.

The methodology that will be used for the purpose of this Bachelor thesis is “desk research”. One source of information will be literature related to the Blue Card directive like literature about the EU’s immigration policy and the role of highly skilled migrants more generally. Such literature is helpful to approach the topic and collect sufficient knowledge and background information about the broader context of the Blue Card. Moreover, the thesis will use literature that is directly concerned with the directive which will help to get a first impression about the directive and the points which deserve special attention. Another important source of information are policy documents, for example interinstitutional files from the Council to the Commission. These kinds of documents provide for a deeper insight. They are crucial for finding out opinions of the different actors involved in the process and reasons why they supported or opposed the Blue Card directive, respectively certain provisions. A huge help in that respect are the “Outcome Proceedings” from the Council’s Working Group on Migration and Expulsion. As they contain footnotes with the Member States’ comments on the Commission proposal, they are useful to identify the seemingly most important and controversial elements of the proposal. It should be remarked that especially for the Council, it is hard work to find out documents reflecting the positions in the Blue Card debate as much of its work is done quite intransparent at an informal level.

2. Background of the introduction of the Blue Card – The EU’s immigration policy

The EU Blue Card directive was adopted by the Council of Ministers of the EU on May 25th, 2009. To understand how the Blue Card fits into the broader context of EU immigration policy and why it is an important step for the EU, this chapter will sketch the development of the immigration policy at the EU level.

The starting point of the EU’s immigration policy can be scheduled in 1992, so one can say that its history is a rather recent one. Beyond the background of the Single Market, mobility and the freedom of movement of persons became increasingly omnipresent and pressing issues for the EU and its Member States. Therefore, the Treaty of Maastricht declared that the EU should become an area of freedom, security and justice and for the first time referred to immigration as a matter of common interest (Bias, 2004). It incorporated immigration policy into the intergovernmental third pillar of the Treaty, Justice and Home Affairs (JHA), and thereby made it part of the legal framework of the EU. The Council became the central actor in this policy field. It shared the right of initiating legislative proposals with the Commission

and needed to adopt acts by unanimity. The role of the EP was limited in that the Council only had to consult it before adopting legal acts.

The Treaty of Amsterdam slightly shifted this balance of power. It transferred immigration policy to Title IV of the supranational first pillar and thus made the Commission the initiator of legislation. But the Council kept its powerful position because immigration remained subject to unanimity voting and merely consultation of the EP which reflects Member States' sensitivity in this area concerning giving up their sovereignty in favour of the EU².

In the same year, the 1999 Tampere European Council urged the EU to develop measures for a common immigration policy. This aim became a milestone of the Tampere Programme and gave impetus to the Commission's efforts to initiate an in-depth discussion on a strategic project for economic migration. Within that context, the Commission examined a comparative study on the admission of third-country nationals for paid employment and self-employed economic activities in 2000. The study highlighted the complexity of national administrative rules and procedures within the EU that were faced by third-country nationals applying for an employment and by employers who would like to hire third-country nationals. Consequently, it illustrated the need for some harmonization. In response to the study, the Commission made a first attempt to propose a directive "on the conditions of entry and residence of third-country nationals for the purpose of paid employment and self-employed economic activities" in 2001. Though the target group of this directive was broader than that of today's Blue Card directive, one can call this directive the "forerunner" of the Blue Card because it had similar aims, amongst others a single application procedure for admission, common admission criteria and more rights for third-country nationals (European Commission, 2006). The Council defeated the proposal due to too diverging views of the Member States after a first reading despite positive feedback from the other EU institutions. Nevertheless, the Commission continued to stress the importance to investigate the legal means for third-country migrants in the 2003 Thessaloniki European Council.

The Commission became more concrete following the The Hague European Council in 2004 which envisaged the creation of common immigration policy guidelines and stressed the importance of an open debate on economic migration at an EU level. This way, it launched a

² With the TFEU, immigration policy became subject to co-decision procedure and qualified majority voting in the Council which finally placed the EP on a more equal footing with the Council. The TFEU calls the co-decision procedure the "ordinary legislative procedure" and defines it in Article 294 TFEU (ex Article 251 of the EC Treaty).

“Green Paper on an EU approach to managing economic migration” in January 2005. The Commission noted in the paper that the EU should establish admission schemes for special categories of workers like highly skilled workers (European Commission, 2005a)³. Several months later, the Commission’s “Policy Plan on Legal Migration” was adopted. The Commission was mandated by the European Council to set up such a plan within the The Hague Programme. The Policy Plan laid down a road map for the The Hague Programme and thereby produced a list of measures that should be adopted between 2004 and 2009. The plan was in line with the Commission’s earlier attempt to provide for common rules regarding the migration of third-country workers to the EU. It argued that given the Lisbon Agenda and the demographic deficit, the EU labour markets need workers from third countries to overcome labour and skill shortages in certain economic sectors (European Commission, 2005c). Thus, the plan stated that four specific directives concerning the entry and residence of the following categories of third-country workers would be presented by the Commission between 2007 and 2009: highly qualified workers, seasonal workers, remunerated trainees and intra-corporate transferees⁴.

Overall, the Commission’s plan constituted a fragmented approach and was different from the general expectations that a comprehensive plan embracing all skill levels would be established (Flamigni & Plaetevoet, 2009). The reason for dividing up the immigration of third-country nationals for employment purposes into sectors and proposing directives in this field step-by-step can be traced back to the failed adoption of the directive in 2001 (European Commission, 2006). Proposing again a universal directive covering the whole range of skills would have been too delicate given the remaining sensitivity of Member States when it comes to economic migration and its effects on national labour markets. A public consultation carried out with the Green Paper in 2005 revealed that a sectorial approach was more favoured and more flexible than a horizontal approach (European Commission, 2007d). Moreover, previous consultations from the Commission found out that the sector of highly qualified workers was more likely to get support from the Member States than that of lower skilled workers (Guild et al., 2009).

Thus, at the High Level Conference on Legal Migration in Lisbon in September 2007, Franco Frattini⁵, Commissioner for Justice, Freedom and Security, scheduled the proposal for the first directive from the Policy Plan.

³ At that time, the Commission had the idea of a creating an “EU Green Card”.

⁴ In addition, a framework directive guaranteeing a common framework of rights for third-country nationals that are legally employed in the EU but do not yet have a long-term residence status would be proposed.

⁵ Franco Frattini was Commissioner for Justice, Freedom and Security from 2004 till 2008.

On October 23rd, 2007 the moment arrived and the Blue Card directive, formally called “Council Directive 2009/50/EC on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment” was proposed.

As it will be illustrated in the following chapters of this paper, it took two years of political debates in the Council till the Blue Card directive, though much compromised, could be adopted in May 2009. Given that the directive faced more opposition than anticipated by the Commission, the propositions of the remaining directives of the Policy Plan were delayed and are supposed to follow in 2010.

The future EU immigration policy can be considered to become increasingly selective. This is reflected in the European Pact on Immigration and Asylum, a document of political intent that lays down a roadmap for the future EU immigration policy (Collett, 2008b). It was established by the European Council in 2008 and aims to pave the way for demand-driven legal immigration. Thus, the emphasis is on the immigration of workers and professionals whose skills fit to the Member States’ needs. At the same time, the combat of illegal immigration shall be tightened. The importance of the pact is reaffirmed by the European Council in the Stockholm Programme, the follow-up programme of the The Hague Programme which will lay down the guidelines for the EU Member States’ justice and home affairs from 2010 till 2014. Having the interests and needs of the citizens as focal point, one main priority of the programme is the “development of a forward-looking and comprehensive European migration policy” (Council of the European Union, 2009b, p. 3). Though the programme has no special emphasis on highly qualified employment, it stresses that the future EU labour migration policy needs to be flexible, demand-driven and responsive to the national labour markets, a course also reflected by the Blue Card directive.

3. Challenges for the EU - Why the EU needs the Blue Card

Having this background information, the question arises why the EU, particularly the Commission, considered it important to make the EU more attractive for economic migrants. Especially the Blue Card directive was given a special position as it was the first of four specific directives to be adopted within the Commission’s Policy Plan on Legal Migration. First of all, it was considered to be welcomed by the Member States. Globalization and the

ongoing need for technological innovations caused that the economies of the EU Member States transformed from industrial to knowledge-driven economies (Zaletel, 2006). This way, human resources became a central factor for encouraging economic growth. The Member States recognize that immigration of highly skilled workers can contribute to the accumulation of human resources. Furthermore, they are aware that imported human resources can have positive spill-over effects on the economy by transferring skills and technologies (Zaletel, 2006).

Secondly, and even more important, the special position of the Blue Card directive mirrors the significance the Commission attaches to the directive as a solution to current problems of the EU. These are on the one hand problems within the EU itself and on the other hand problems related to the EU's ambitious goals set out in the Lisbon Strategy and the global "battle for brains". Thus, in the following, the reasons for why the EU needs the Blue Card will be elaborated.

3.1. The demographic problem and shifts on the labour market

A core argument underlying debates about the creation of policy measures that aim to stimulate immigration is that the EU is suffering from a decline in population because the fertility rates within the EU have fallen sharply (Castles, 2006). According to calculations of Eurostat (2008a), the statistic agency of the EU, the EU's population will only continue to grow up to 521 million till 2035 compared to 459 million in January 2008 and then start to decline to 506 million in 2060. Already in 2015, the death-rates are considered to outnumber the birth-rates in the EU. This means that immigration is the only factor that can provide for economic growth and sustain the balance, at least till 2035 (Eurostat, 2008a). In some Member States, the decline of population already started in 2004. Especially the Eastern European Member States are seriously threatened by negative growth-rates: Bulgaria, Latvia, Lithuania and Romania will experience a population decline of more than 20% between 2008 and 2060 (Eurostat, 2008a). If one believes the forecasts, the only Member States that will continue to experience a population growth till 2050 are Luxemburg, Ireland, Cyprus, Malta and Sweden (Eurostat, 2005).

As the decreasing fertility is combined with an increasing live-expectancy, 30% of the EU population will be older than 65 in 2060 (Eurostat, 2008a). This implies that the workforce in the EU will decline and thereby slow down economic growth. Furthermore, the welfare-systems will increasingly get under pressure. While in these days, there are four persons of

working-age for every person aged 65 or more, the distribution will change till 2060 to only two persons of working age for every person aged 65 or more (Eurostat, 2008a).

Thus, there is basically a need for immigrants.

The special need for a policy measure that has its emphasis on highly qualified migrants arises from changes on the labour market. The labour markets of the EU, as mentioned above, developed to knowledge-driven economies. The downside of this transformation is that the demand for manual workers decreases while the demand for highly-skilled non-manual workers increases and has a remarkably high employment rate of 83,2% (European Commission, 2007c). The need for highly qualified workers will continuously increase in the future as the high education sectors in the EU experience an employment growth of 3% per year which is three times more than in other sectors (European Commission, 2007c). Given the demographic problems, the EU's human resources will not suffice to cope with these challenges in the future because there are already shortcomings today.

Consequently, the EU needs the Blue Card to attract highly qualified workers from third countries that fill the emerging gaps on the Member States' labour markets.

3.2. The Lisbon Strategy and the global race for talent

The Lisbon Agenda launched by the European Council in 2000 set the EU the ambitious goal to become the world's most competitive economy by 2010. The economic pillar of the strategy aimed at turning the EU into a competitive, dynamic, knowledge-based economy. However, in 2005 a report on the mid-term review written under the guidance of the former Dutch Prime Minister Wim Kok pointed out that the EU is still far away from fulfilling the targets set within the strategy. So also with regards to the failure of the Lisbon Agenda, it would be necessary for the EU to welcome more highly qualified workers in order to possess the human resources needed for a competitive and dynamic knowledge-based economy because the EU still did not give up these goals. It launched a new strategy, called "Europe 2020" in 2010. Though this strategy is less ambitious than the Lisbon Strategy, it aims to help the EU out of the current economic crisis and to ensure that it can conduct sustainable economic activities in the future. A priority of the new strategy is to provide for intelligent growth, meaning the development of an economy that is built upon knowledge and innovation. It foresees that till 2020, the number of workplaces for highly qualified migrants will rise to 16 million compared to an increase of only 12 million for lower qualified ones

(European Commission, 2010). Consequently, the population of the EU constantly needs to gain further qualifications and improve its skills. But given the demographic changes, one can assume that the domestic workforce will not suffice to fill the places of employment.

The problem arising at that place is that the EU seems to be quite unattractive for immigrants compared to other destinations. A “global competition” for highly qualified migrants emerged as the restructuring into a knowledge-driven economy is also experienced in other parts of the world. Traditional immigration-magnets such as the USA, Canada, Australia and New Zealand started to develop policies that target the attraction of highly skilled migrants much earlier than the European countries did (Shachar, 2006). The EU clearly lags behind compared to other immigrant-destinations. Only 1.75% of the total of the employee population in the EU are highly qualified workers from third countries. In contrast to that, the percentage of highly qualified workers from third countries in the total of the employee population is 9.9% in Australia, 7.3% in Canada, 3.2% in the USA and even 5.3% in the EU’s neighbouring country, Switzerland (European Commission, 2007f). These figures are three years old, but so far, no more recent data was published and it is reasonable to assume that also in 2010 the EU is lagging behind⁶.

A huge disadvantage of the EU vis-à-vis its global competitors is that it is no single actor but made up of 27 different Member States. All EU countries have special schemes which are demand-driven, the only exception being the United Kingdom (UK)⁷ (European Commission, 2007e). Moreover, all systems cover certain categories of highly skilled workers and follow the universal trend of liberalizing their schemes. Nevertheless, there are variations in pace and depth (Cerna, 2008). There is neither a common definition of what is a “highly qualified worker” nor are there common entry and residence conditions. Only ten Member States⁸ have schemes for highly qualified third-country nationals that cover more than scientists, artists, intra-corporate transferees, university professors, etc. (European Commission, 2007f). Furthermore, while some Member States like the UK, Ireland and the Netherlands have rather open programmes for highly skilled migrants, countries such as Sweden, Austria, Denmark, Italy and Spain are quite restrictive (Cerna, 2008). Overall, this causes that the admission procedures, rules and regulations are very complicated for potential immigrants. Also, the

⁶ Checked out by phoning Eurostat on 21 May 2010.

⁷ The UK has a system which does not require the presence of a job offer or working contract before admission is granted.

⁸ Austria, Belgium, Germany, Denmark, France, Greece, Ireland, the Netherlands, Portugal and the United Kingdom

intra-EU mobility of highly qualified workers from third countries is limited as they enjoy this privilege only after having acquired a long-term residence permit. According to Council Directive 2003/109/EC, such a permit requires five years legal and continuous residence in a Member State and even after the fulfillment of this requirement, the free movement may be limited by the second Member State (European Commission, 2007e).

A common regulation like the Blue Card simplifies the procedures and lowers the barrier for highly qualified third-country nationals, making the EU a more attractive destination and offering more transparency. In addition, via such an instrument, the EU represents itself as a common area for highly skilled migrants. On the one hand, this is beneficial because the natural advantage of the EU as a whole is bigger than that of single Member States (Zaletel, 2006). On the other hand, being a common area decreases the competition for highly skilled migrants between the Member States themselves (Kaden, 2009). This is an important contribution because there are already imbalances between the Member States: while in Ireland, Luxembourg and Sweden approximately half of the foreign-born population has a tertiary-education, that proportion is significantly smaller in southern Member States like Greece and Italy (Collett, 2008a).

4. The EU Blue Card – A controversial debate

The current situation of the European Union and the future predictions leave no doubt that a common action is needed. Nevertheless, the Commission's proposal for a Council directive on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment met with refusal from a variety of actors involved in its implementation process. In the following, it will become clear that the original proposal of the Commission was very ambitious and subject to many objections in the Council. Much compromising had to be done till the final text could be adopted in the Council in May 2009.

To unravel how the final Blue Card directive was established, one needs to ask what were the positions of the different actors involved in the Blue Card debate. This chapter will start with the position of the European Commission and introduce the core elements of the Commission's proposal. After that, the Council's, respectively the Member States' point of view regarding these issues will be analyzed. As the Blue Card directive is part of the sensitive field of EU immigration policy, the directive was due to be adopted unanimously by the Member States which makes the Council a key actor in the debate. The third section of the

chapter will then come to the position of the EP, though its role in the legislative process was limited to being consulted. Besides, the chapter will shed a light on the opinion of the CoR and the EESC regarding the proposal.

4.1. The ambitious proposal of the European Commission

The so-called Blue Card directive was proposed by the European Commission on 23rd October 2007. Given the problematic that was outlined in the third chapter, the Commission found that the Member States alone are not able to rise to the challenges and to face the global competition for highly qualified workers.

In the Commission's opinion, a Community action would on the one hand make sure that highly qualified workers from third countries are admitted under the same rules, granted the same rights throughout the EU and enjoy cross-border mobility. On the other hand, the Member States would maintain sufficient flexibility because the instrument chosen by the Commission was a directive, giving them discretion regarding how to achieve the result. Thus, according to the Commission, the proposed Blue Card directive neither hurt the principle of subsidiarity, nor the principle of proportionality. Moreover, the Commission noted throughout its proposal that the directive should not affect the principle of Community preference, meaning that before a highly qualified worker from a third country is admitted, it should be made sure that there is no one at the domestic labour market that could conduct the employment (European Commission, 2007d).

4.1.1. The Commission's prerequisites for becoming a Blue Card holder

A core element at the heart of the Commission's proposal was the definition of who is a highly qualified migrant that should be admitted to the EU under the directive.

Instead of giving a broad definition of the target group, the Commission opted for a split definition to make misgivings amongst the Member States less likely. In this manner, it provided first of all for a definition of the basic concepts involved in the directive. A key term in that respect is "highly qualified employment". According to Article 2(b) of the proposal, highly qualified employment "means the exercise of genuine and effective work under the direction of someone else for which a person is paid and for which higher educational qualifications or at least three years of equivalent professional experience is required" (European Commission, 2007d, p.19). Related to this is the term "higher professional

qualifications” which was defined in Article 2(h) as either qualifications attested by higher education qualifications or “at least three years equivalent professional experience” (European Commission, 2007d, p.19).

Secondly, the Commission linked higher professional qualifications to admission criteria. The criteria for admission were set out in Article 5 of the proposal. Next to basic requirements like a valid work contract or binding job offer for at least one year and evidence of a valid travel document as set out in Article 5(1), a main criterion prescribed by Article 5(2) for getting a Blue Card was meeting the salary threshold specified in the proposed directive. The Commission’s proposed threshold required that the gross monthly salary specified in the work contract or binding job offer is at least three times the minimum gross monthly wage set by national law. In cases where no minimum salary exists, the Commission proposed to set the threshold at at least three times the minimum income. It considered this threshold to be an important requirement to prevent Member States from setting a wage that would be too low to be accepted by highly qualified nationals or EU citizens. In addition, the threshold should enhance intra-EU mobility for those who acquired EC long-term residence by limiting Member States in their possibility to affect each others negatively with too low levels of wages which could cause that the workers have recourse to social assistance systems (European Commission, 2007d).

In order to be able to attract young professionals to the EU via the directive, the Commission provided for derogations from the general admission criteria for highly qualified migrants under the age of 30 in Article 6. As this group of persons usually lacks sufficient professional qualifications to claim high salaries, the Commission proposed in Article 5(2) to decrease their salary threshold to at least two-thirds of the national threshold. Article 6(b) allowed Member States to abandon the threshold completely for applicants that acquired the Bachelor’s or Master’s degree in the EU. Moreover, Article 6(c) stated that young professionals should not be required to have additional professional experience besides their higher education qualifications if not required under national legislation (Guild, 2007).

For persons fulfilling the conditions of Article 5 and 6, the Commission envisaged the issuing of a Blue Card by the competent authorities of the Member States. The Commission set period of validity of the Blue Card at two years and a renewal should cover the same period of time. In case the work contract expires at a period covering less than two years, Article 8(2) stipulated that the Blue Card should be valid for the term of the work contract plus three months.

As the admission of the Blue Card should be a “fast-track procedure”, Article 12(1) gave Member States a deadline of 30 days for making their decision whether or not to issue a Blue Card, counting from the day the application was made. Only in exceptional cases, the proposal granted an extension of the deadline to an additional period of 60 days.

It is important to note that though the Commission provided for a quite dense framework according to which Member States should determine who is eligible to enter the EU by means of the Blue Card, it also paid attention to national sovereignty concerns. Member States were not obliged to accept every Blue Card applicant fulfilling the criteria outlined above. According to Article 7, it still remained in the hands of the Member States to determine the volumes of workers that should be entitled with a Blue Card. Moreover, according to Article 9(2), Member States could apply an economic-needs test which means that they were allowed to reject workers for labour market reasons or could, in line with the principle of Community preference, prefer EU citizens for labour market reasons (European Commission, 2007d). Thus, the Commission left some discretion to the Member States.

4.1.2. The proposed rights and benefits of a Blue Card holder

Once entitled with a Blue Card, the proposal endowed Blue Card holders with special rights which formed another crucial element of the proposed directive.

The Commission aimed to link the rights of the highly qualified workers to their length of stay in the EU. This way, Article 13(1) provided that for the first two years of legal residence, the labour market access should be restricted in that the workers have to comply to the provisions of Articles 5 and 6. Furthermore, the authorities of the Member State concerned should have to authorize modifications of his/her work contract which affect the conditions for admission or changes in terms of the work relationship. After these two years, Article 13(2) stipulated that the Blue Card holders must be granted “equal treatment to nationals when it comes to access to highly qualified employment” (European Commission, 2007d, p 25). But one should remark at this point that the labour market access of third-country nationals should not hurt the principle of Community preference as it was set out in Article 13(5).

According to Article 15(1)(f), the owner of a Blue Card was also placed on equal footing regarding social law, e.g. in terms of receiving social assistance, though Article 15(2) and (3) stipulated cases in which the Member State could restrict equal treatment concerning study

grants and procedures for obtaining housing and social assistance. While for the former, equal treatment could be restricted to Blue Card holders having the right to stay in the territory of a Member State for at least three years, the latter could be restricted to Blue Card holders having acquired the long-term residence status in line with Article 17 (Council of the European Union, 2008d).

Furthermore, according to Article 16(3) of the proposal, the possession of a Blue Card entitled the holder to family reunification at the latest six month after the application had been lodged. This set him/her in a preferential position vis-à-vis other third-country nationals. For non Blue Card holders it might take up to nine months till receiving decision according to Article 5(4) of directive 2003/86/EC on the right to family reunification and the Member States could, in line with Article 8, require two years lawfully stay on their territory before allowing family reunification. Moreover, the proposal granted its holder and his/her family members the right to move to another Member State to execute highly qualified employment provided that he/she fulfills the conditions set out in Article 19 and 20 of the directive. A central condition for this right was the requirement of two years legal residence in the first Member State mentioned in Article 19(1). In case that a Blue Card holder makes use of this privilege, he/she could culminate the periods of residence in different EU Member States in order to fulfill the requirements of Article 17(2) for obtaining EC long-term residence status for Blue Card holders.

This gave him/her a clear advantage compared to other third country nationals that apply for permanent residence under directive 2003/109/EC. The Commission's reason behind this benefit was to promote intra-EU mobility of highly qualified workers. The Commission aimed to turn the disadvantage of being composed of 27 different labour markets into an advantage by giving workers the possibility to access every labour market within the EU. In addition, the Commission proposed to ease the allowed period of absence. While persons targeted by directive 2003/109/EC are allowed to be absent for a period less than six months and not exceeding ten months in total (Article 3), this criterion was relaxed for Blue Card holders in Article 17(3). For them, a period of absence was allowed in case that it is shorter than 12 months and in total not longer than 16 months. According to Article 17(4) of the proposal, Blue Card holders and their family members having EC long-term residence status may be absent from the territory of a Member State 24 consecutive months. This is twice as long as granted to individuals that are subject to Article 9(1)(c) of directive 2003/109/EC.

Thus, Article 17 aimed to stimulate geographical mobility and circular migration. The Commission considered that circular migration limits the negative effect of the brain drain for

developing countries by encouraging workers to return to their home country and providing for a spillover of new knowledge (European Commission, 2007d). This should ensure that the proposed directive does not endanger the achievement of the Millennium Development Goals (MDGs)⁹.

Article 20(1) provided for a further benefit for Blue Card holders. It protected Blue Card holders from Member States' right given by Article 14(4) of directive 2003/109/EC to limit the total number of persons entitled to be granted the right of residence if national legislation provides for such limitations. In case of labour market restrictions derived from Article 14(3) of directive 2003/109/EC, the Member State should give preference to Blue Card holders according to Article 20(2) of the Commission's proposal.

However, like the rights obtained by the Blue Card are coupled with the length of stay, holding a Blue Card was dependent on employment. The proposed directive stipulated in Article 14 that though unemployment itself is no reason for withdrawing the Blue Card, the period of unemployment of its holder may not be longer than three months (European Commission, 2007d). Thus, though the proposal granted generous rights and exceptions to Blue Card holders, it was not unconditioned and demanded some diligence from the individuals.

4.1.3. The Blue Card as an exclusive admission system for the EU

The most interesting feature of the proposal for the Blue Card directive was the relationship the Commission drew between the Blue Card and national programmes for highly qualified labour migrants. As Guild (2007) points out, the proposal was not clear about whether the Blue Card scheme should replace national systems or be complementary to them. This way, Article 3 on the scope of the proposal solely stated that the directive should apply only to highly qualified third-country nationals, but was silent regarding its effects on Member States' rights to issue permits for the purpose of highly qualified employment.

Reading Article 3(1), it seems like the directive should generally apply to all third-country nationals that apply for highly qualified employment in the territory of a Member State. Given that there was no definitive formulation like "who make an application under the Blue Card

⁹ The MDGs were set by the international community in the Millennium Declaration in 2000. The MDGs are due to be achieved till 2015 and aim to definitely reduce the aspects of extreme poverty.

scheme”, no differentiation between the Blue Card and national schemes was made. Furthermore, from its explanatory memorandum and Article 4 which was about the relationship between the Blue Card and more favourable provisions than the Blue Card, one could read that the Commission aimed to create a common system for labour migration of highly qualified third-country nationals. Though the approach done was rather vague, Article 4(2) of the proposal said that Member States are forbidden to allow for more favourable conditions for highly qualified workers from third countries in their national laws regarding the entry into the first Member State (Council of the European Union, 2008d). Consequently, the Commission wanted the Blue Card to be an exclusive system and no 28th scheme that exists as an optional scheme next to the national ones.

4.2. The positions of the Member States in the Council of the EU

The Council of the European Union, respectively its formation on JHA, had a first exchange of views regarding the Blue Card directive at its meeting on 8th and 9th November in Brussels. It decided in its meeting to address the Commission’s proposal again at a joint meeting with the EU employment ministers a month later and instructed its preparatory bodies to carry out further examinations of the text (Council of the European Union, 2007). This way, the negotiations concerning the Blue Card directive started in the Council’s Working Party on Migration and Expulsion under the guidance of the Slovenian Presidency in January 2008. Different from the general expectation that the decision-making process would run without problems because the proposal constituted a sectoral approach, it took till October 2008 that a political agreement on the directive could be reached by the Permanent Representatives Committee. Underlying the conflict between the Member States and the Commission were particularly two reasons: concerns about the national sovereignty and the hope for domestic potentials (Angenendt & Parkes, 2010). Especially Germany stressed that it should be a priority to exhaust the own potential of labour force and that immigration policy should remain a matter of the Member States (Bundesrat, 2007). These arguments were backed by Austria, the Netherlands, Denmark, the UK¹⁰ and Ireland. The latter three explained already at the very beginning that in case they could not block the proposal, they would opt-out because an EU Blue Card would be too much centralization in this sensitive policy field (Cerna, 2008). Quite another objection was made by the Czech Republic. As a couple of EU Member

¹⁰ For the UK, one might add that it is already quite successfully attracting highly qualified migrants. Thus, for the UK, the Blue Card adds too little value to the current system and is probably rather seen as a constraint (Cerna, 2008).

States still make use of the transitional arrangements which restrict the access to the labour market from workers of the Central and Eastern European Member States that joined the European Union in 2004 and 2007, it opposed an introduction of the directive before a disappearance of the barriers (Compsey & Haughton, 2009). This seemed to be quite a peculiar position, given the fact that the Blue Card does not override the principle of Community preference.

Overall, 14 delegations¹¹ entered general scrutiny reservation on the proposal during the first reading and as it will be shown in the following, the central elements of the Commission's proposal faced a lot of opposition.

4.2.1. The Member States' dissent on the admission requirements

Already the Commission's definition of who is a highly qualified migrant became subject to controversial debates in the Council. The Member States had twofold criticism on the Commission's proposition that higher educational qualifications are interchangeable with professional experience in order to prove professional qualifications.

First of all, a large group of Member States had general reservations concerning proving professional qualifications by means of professional experience. Germany, Austria and Latvia feared that the assessment of equivalent professional experience set out in Article 2(b) could be abused. It was questioned by Estonia, Greece, Lithuania and Slovakia by whom and under which criteria the equivalence should be tested (Council of the European Union, 2008d). Secondly, Slovakia, Greece, Estonia, Lithuania and Portugal were not satisfied with the Commission's proposition in Article 2(h) on number of years of equivalent professional experience needed to attest higher professional qualifications. After the first reading of the Working Group on Migration and Expulsion, Germany proposed to delete the reference to equivalent professional experience completely, while Poland suggested increasing the period of time from three to five years. The compromise suggestion by the Slovakian Presidency for the second reading in May 2008 followed the Polish delegation's proposition. However, still a large number of Member States had problems with the provision. Germany, Belgium, Denmark, Estonia, Latvia, Lithuania, Malta, Austria and Sweden pointed out that the focus for specifying professional qualifications should be on education, not on professional experience. Germany, supported by Estonia and Greece repeated its worries that allowing to substitute educational qualifications with professional experience runs the risk of being

¹¹ Czech Republic, Germany, Greece, Estonia, Greece, Finland, Hungary, Italy, Latvia, Malta, Romania, Austria, Poland and Sweden

abused. A new compromise suggested to give more discretion to the Member States regarding whether or not they allow Blue Card applicants to attest higher qualifications by professional experience by allowing for equivalent professional experience instead of educational qualifications only “by way of derogation” (Council of the European Union, 2008f). Still, the provision remained subject to discussion in the Council. The Commission as well as the Presidency insisted on including professional experience as a criterion because this would make the Blue Card more attractive than solely having educational qualifications as a criterion (Council of the European Union, 2008h). Overall, the compromise for the fourth reading made by the French Presidency¹² provided for clarification by stating that derogation should only be possible if national law foresees it. Thus, Member States’ discretion was further increased.

Also the admission criteria proposed by the Commission, respectively the salary threshold in Article 5(2), caused controversies. The basic problem with the provision was that the salary levels vary amongst the Member States and that those countries whose legislation was not in line with the minimum salary level in the proposal were reluctant to agree. A major opponent to the level proposed by the Commission was Germany. Instead of taking three times the minimum gross monthly wage, Germany argued in the first reading that the average threshold should be at least twice the average gross monthly salary of the Member State concerned (Council of the European Union, 2008d). In its opinion, the threshold proposed by the Commission was too low to avoid a race to the bottom between the Member States and to make sure that highly qualified third-country nationals are not hired for minor occupations (Bundesrat, 2007). This view clashed with the position of the Czech Republic and Hungary, who considered that the threshold would be too high to attract e.g. doctors from third countries (Bonse, 2008). A compromise of the French Presidency proposed a threshold of 1.5 times the average gross monthly wage, but the clash remained. The Czech Republic, Estonia and Slovenia still felt that the multiplication factor should be lowered, Poland and Slovakia preferred considering the minimum wage instead of the gross monthly wage. One should note that one can observe whether Member States would like to have a Blue Card directive with a broad or limited scope on the basis of the diverging views regarding the salary threshold. While Germany favoured an exclusive Blue Card, most Eastern European Member States wanted a broader directive. As the Working Group did not reach an agreement during its fourth reading and also the JHA Council and the Scientific Committee on Immigration,

¹² The French Presidency took over the chairmanship of the Council in July 2008.

Frontiers and Asylum could not solve the conflict, the issue was handed to the level of JHA Counsellors and to the Permanent Representatives Committee (Council of the European Union, 2008i).

Given that the salary threshold as general admission criterion already caused such problems in the negotiations, it comes without surprise that also the derogations for young professionals in Article 6 were criticized by the Member States. Finland, France, Austria and Sweden protested that a lower salary threshold for migrants under 30 would be discrimination (Council of the European Union, 2008d). This view was shared by Cyprus, the Czech Republic, Spain, Malta and Italy and contrasted from the Commission's proposal to allow for positive discrimination (Council of the European Union, 2008f). Moreover, Malta and Finland pointed out that these derogations should not be compulsory, while France questioned whether such derogations are beneficial for promoting circular migration. As it seemed difficult to find a compromise for the Article, particularly for the concerns about the principle of non-discrimination, the Commission and the Portuguese delegation proposed to delete the Article in the third reading which was supported by the Presidency.

Slightly more tempered were the Member States' positions regarding the issuance of the Blue Card because Article 7 and 9 of the proposal provided the Member States with sufficient leeway to refuse the issuance of a Blue Card even if an applicant fulfills the criteria. Some discussion came up about the period of validity of the Blue Card. A couple of Member States disliked the Commission's proposal in Article 8(2) to set the period of validity of the Blue Card at two years. Most notably were the positions of Sweden, the Netherlands, Greece and Poland and Spain which proposed to link the validity of the Blue Card to the work contract plus three months and to allow Member States to limit the validity to a maximum period between two and five years (Council of the European Union, 2008h). On the one hand, this suggestion reflects that the Member States would like to maintain as much discretion as possible. On the other hand, at least for Sweden, the reasonable for the objection was a practical one because under Swedish law, the residence permit is linked to the purpose of stay. Thus, if the person's work contract expired before the Blue Card, he/she would run into the risk of being an illegal migrant (Council of the European Union, 2008d). This Swedish example should make clear that a general problem of the Blue Card directive is that it is hard to find a common entry and residence permit at the EU level that is consistent with 27 different national legal systems and offers them sufficient discretion.

Another minor point of conflict in that respect was the deadline for adopting the decision on the application in Article 12(1). As the German Bundestag (2007) pointed out, there should be more time for examination and decisions and the development of discretion norms, a position that was shared by Estonia, Finland, Hungary, Lithuania, Latvia, the Netherlands, Poland Sweden and Slovakia who all considered that a time limit of 30 days for deciding whether or not to issue the Blue Card would be too short (Council of the European Union, 2008d).

In sum, it was difficult to find a common denominator on key requirements for the admission of a Blue Card given the national disparities.

4.2.2. National concerns about special rights for Blue Card holders

The rights of the Blue Card holders proved to be an even more controversial issue.

First of all, Article 13 on the rights to labour market access raised two kinds of criticism amongst the Member States. Some Member States like Finland, France, the Netherlands and Spain wished more flexibility regarding job changes of Blue Card holders (Council of the European Union, 2008d). While Spain proposed to shorten the period a person needs to be resident in a Member State before he/she enjoys equal treatment regarding labour market access, France and the Netherlands suggested that it was unnecessary for a Blue Card holder to inform authorities in the Member State about job changes. Moreover, it was stressed by Italy that not allowing a person to change a job for two years is against the principle of free choice of jobs. (Council of the European Union, 2008h). This contrasted from the opinion of Malta, the Czech Republic, and Cyprus who claimed that a period of two years is too short to allow for job changes and for granting equal treatment vis-à-vis nationals concerning access to highly qualified employment. The Article was compromised in the fourth reading by making equal treatment optional for Member States (Council of the European Union, 2008i).

Furthermore, the rights for a Blue Card holder and his/her family to move to another Member State constituted ground for debates. In this debate, one could identify two groups of Member States. On the one hand, there were Member States who argued that the Blue Card should be less restrictive. They preferred to allow for movement to a second Member State as soon as possible and that he/she is less bound by the criteria as it is the case with entering the first Member State. The Netherlands pointed out that a two-year waiting period to intra-EU mobility in Article 19(1) is quite contra-productive. Similar to that, Spain and Sweden had

reservations on the provision and proposed to reduce the period to one year (Council of the European Union, 2008h). This view was shared by Poland and Belgium which noted that the whole Article is quite meaningless if Blue Card holders need to fulfill the same conditions as for entry into the first Member State. On the other hand, there were Member States that favoured such restrictions. While the Commission proposed such restrictions to avoid abuses, the primary reason for Germany and Austria to oppose eased entry conditions to the second Member State was unwillingness to give up sovereignty over their labour markets (Cerna, 2009). Thus, Austria and Germany claimed that a Blue Card holder should notify his/her intention to move to the second Member State even before he leaves the territory of the first Member State (Council of the European Union, 2008f). They were rather unsatisfied that for the fourth reading of the Working Group, a compromise was made and the period of legal residence in the first Member State was cut down to 18 months (Council of the European Union, 2008i). But supported by Poland and Greece, they achieved that a Blue Card holder needs to present an application for the Blue Card to the authorities in the second Member State.

The sensitivity of the Member States regarding the potential effects of the Blue Card on their labour markets also becomes clear by their objections concerning Article 14(1). While the Czech Republic was of the opinion that the possibility for a Member State to withdraw the Blue Card due to unemployment should already be there after two months of unemployment, the Netherlands worried whether unemployment would have an impact on social assistance systems of the Member States (Council of the European Union, 2008d). Thus, for the same reason, the Netherlands, Slovenia and Greece argued that Article 14(1) should be clear about a Member State's right to withdraw a Blue Card in case the Blue Card holder becomes repeatedly unemployed (Council of the European Union, 2008f). This reflects the fear that the Blue Card holder might become a burden for the national welfare system. The compromised proposal for the third reading of the Working Group therefore added that unemployment which occurs more than once during the period of validity of the Blue Card might also lead to withdrawal (Council of the European Union, 2008h).

Moreover, the Member States issued criticism on the derogations from directive 2003/109/EC. Especially Germany opposed Article 20(1) of the Blue Card directive as this provision would limit their sovereignty to limit the total number of persons which are granted permanent residence (Council of the European Union, 2008d). The Commission's position that Blue Card holders should get a more preferential treatment than other third-country

nationals was seen with reluctance. This was also the case with Article 17. Germany pointed out that derogations of the Blue Card directive from directive 2003/109/EC run the risk of establishing a complex system that can hardly be managed by the Member States (Council of the European Union, 2008d). Similar criticism was issued on Article 16 on family members because most Member States did not see the reason for granting them more favourable conditions for residence permits than others falling under directive 2003/86/EC.

So besides the need to bring the Blue Card in line with the legal systems of the 27 Member States, the Council negotiations also hint at the need to make sure that the Blue Card does not conflict with other kinds of EU legislation regulating the rights of third-country nationals.

Overall, it should have become clear so far that the most of the central elements of the Commission's propositions regarding benefits that should be granted to Blue Card holders was not simply accepted by the Member States but subject to controversial debate.

4.2.3. National sovereignty versus an exclusive Blue Card

However, none of the above-mentioned issues was as much disputed as the Commission's idea to create the Blue Card as an exclusive system.

The silence of Article 3 regarding whether or not the scope of the directive affects Member States' rights to issue residence permits next to the Blue Card invoked misgivings amongst the Member States. It was noted by Germany in the first reading of the Working Group that Article 3(1) should be more precise and state that the directive is only relevant for third-country nationals that make an application for a Blue Card (Council of the European Union, 2008d). This implies that the Member States were reluctant to accept the Commission's vague formulation which could be interpreted as giving the Blue Card an exclusive status. Therefore, a fourth paragraph was added to the proposal for the second reading. This compromise suggestion by the Slovakian Presidency stated that "Member States may issue residence permits other than the EU Blue Card for the purpose of employment on terms that are different than those laid down by this directive" (Council of the European Union, 2008f, p. 7). The new paragraph was supported by the Czech Republic, Germany, Greece, Finland, the Netherlands, Austria and Poland because it offered more flexibility to them. In the opinion of the Netherlands, the provision could offer even more discretion to the Member States. Therefore, it proposed during the third reading that Member States should be allowed to issue residence permits other than the Blue Card "for any kind of employment" (Council of the European Union, 2008h, p. 7). The Commission was against Article 3(4) and in reply to this

suggestion openly expressed its wish to give the Blue Card a level of exclusivity. The Commission stuck to its idea of the Blue Card as an exclusive scheme, but given the fact that the Member States preferred a complementary system, the debate about Article 3 remained unsolved in the last reading of the Working Group. Thus, the French Presidency referred it to the level of JHA Counsellors and the Permanent Representatives Committee (Council of the European Union, 2008i).

Moreover, as already mentioned, one could interpret from Article 4 that the Commission did not want the national systems for highly qualified third-country workers being in force parallel to the Blue Card. Therefore, the Member States remarked in the first reading that Article 4(2) needs further clarification. First of all, the Member States were concerned about the scope of the provision. As it prohibits the “first Member State” to grant more favourable entry and residence conditions to potential Blue Card holders, it suspends the national scheme of the first Member State for issuing entry and residence permits. Thus, the provision touches significantly upon national sovereignty. Therefore, Germany, Finland and the Netherlands stressed that the national schemes should remain besides the Blue Card (Council of the European Union, 2008d). In order to mediate the conflict with this Article, the proposal was compromised for the second reading by reformulating the second paragraph so that the prohibition for first Member States to apply more favourable provisions than the Blue Card to the target group disappeared. Secondly, a minor point of conflict, particularly for the Czech Republic, Greece, France, Ireland and Portugal was that Article 4(2) was rather unclear about the effects of potential derogations from the Blue Card scheme due to the application of more favourable provisions. To provide for clarification, the Articles in respect of which derogation might apply were added to the proposal as compromise suggestion of the Presidency in the second reading. These were Article 5(2) and Article 6(1)(a) in application of Article 19 and Article 12 on the procedural safeguards, Article 13(1) and (2), Article 14, Article 15, Article 16, Article 17(4) which all deal with the rights of a Blue Card holder as well as Article 20 that governs the individual’s access to the labour market of the second Member State in case he/she got then residence permit “long-term resident – EC/EU Blue Card holder” (Council of the European Union, 2008f)¹³.

¹³ One should not that the compromise suggestion of the Working Group initially also included Article 6(1)(a) and Article 20, but this reference disappeared from the proposal with the deletion of the Articles in the third reading (Council of the European Union, 2008h).

Thus, in the course of the Council negotiations, it was all but clear which position the Blue Card had vis-à-vis national systems for highly qualified third-country nationals and a remarkable clash between the Commission idea of a exclusive model harmonizing the admission procedures on a EU level and the Member States demand for sovereignty and the option to apply their own national schemes could be observed till the final adoption.

4.3. The opinion of the European Parliament

Due to the fact that the Blue Card directive falls within the area of immigration policy and potentially has effects on national labour markets, the EP only had to be consulted for its opinion before the Council voted on the proposal¹⁴. As the Council is not bound to respond to its amendments under consultation procedure, the EP's role in the process establishing the Blue Card was quite limited.

The consultation report on the Blue Card directive was drafted in the Committee on Civil Liberties, Justice and Home Affairs (LIBE) by Ewa Klant from the Group of European People's Party and European Democrats. In addition, the LIBE Committee asked the Committee on Development and the Committee on Employment and Social Affairs to give their opinions which took place on September 3rd and September 11th 2008 (European Parliament, 2008e). The EP adopted the legislative resolution on the Commission's proposal for the Blue Card directive with 388 votes in favour of the proposal, 56 votes against and 124 abstentions on 20th November 2008 (European Parliament, 2008g).

Overall, the EP welcomed the Commission's proposal and acknowledged the Commission's reasoning. Nevertheless, it considers the attraction of highly qualified migrants from third countries to be only a short term solution for the employment and demographic problems of the EU. The EP stressed that in the long-run, the EU needs to employ more economic, employment and social policies to cope with the challenges of the future (European Parliament, 2008e).

¹⁴ This procedure is laid down in Article 192 of the EC Treaty. In the TFEU, Article 192 of the EC Treaty is replaced by Article 225 of the TFEU. Moreover, since the TFEU, immigration policy is subject to co-decision procedure/the ordinary legislative procedure defined in Article 294 TFEU.

4.3.1. The European Parliament's concerns about the admission requirements

Like the Council, also the EP had problems with the Commission's definition of who should be considered a highly qualified migrant and which admission criteria should be met by the applicants. Though the EP generally did not oppose the Commission's proposition that highly qualified employment could be proved either by higher education qualifications or by professional experience, it had concerns about the period of time of professional experience needed to compensate for higher education qualifications. Therefore, it suggested extending the period of three years of equivalent professional experience mentioned in Article 2(h) to five years like it was also proposed by Poland. In addition, and even stricter than the Member States' propositions, the EP added that these five years should include two years in a senior position (European Parliament, 2008h).

Regarding the admission criteria, the EP pointed out in its draft report that the salary threshold of 3 times the minimum gross monthly wage set by the Commission does not do justice to the purpose of the provision to the concept "highly qualified" (European Parliament, 2008b, p. 16). Therefore, it amended Article 5(2) by saying that the gross monthly wage set out in the work contract or job offer should be at least 1.7 times the gross monthly wage or annual average wage of the Member State concerned. Also, it should not be lower than the wages that apply to a comparable worker in the host country and the provision on Member States where no minimum level exists should be deleted (European Parliament, 2008d). One should note that the EP suggested including a provision on the avoidance of a shortage of highly qualified migrants in third countries in Article 5. According to the EP, the so-called "brain drain"¹⁵ should be limited by the Member States by refraining from an active recruitment of highly qualified workers from sectors that suffer or are expected to suffer from a shortage of such workers, in particular the health and education sectors (European Parliament, 2008e). This way, the EP, more than the Commission and the Council, paid attention to the brain drain problem. Especially the Committee on Development stressed that the Blue Card should not have a negative effect on the MDGs because already without the Blue Card, 25% of the highly skilled workers from African countries and 70% of the highly skilled workers from the Caribbean and Pacific area live in the EU (European Parliament, 2008a). In addition to the omission of active recruitment, the EP would like to see the EU developing agreements with third countries and offering them training of professionals in sectors weakened by the brain drain as supposed in amendment 9 (European Parliament, 2008h).

¹⁵ Brain drain means the emigration of highly qualified or very talented persons from a country and the economic loss due to this emigration.

Another criticism of the EP on the admission criteria concerned the potential derogations. Similar to the position of some Member States, it opposed Article 6 of the Blue Card directive because it found that such derogations would “lead to age-based discrimination” (European Parliament, 2008e, p. 21).

The period of validity of the Blue Card should, according to the EP’s legislative resolution, be changed to three years instead of two, and be renewed for two years. In case that the work contract expires before the regular period of validity of the Blue Card, the EP favoured a longer period of validity than the Commission. In that case, it proposed in amendment 32 for Article 8(2) to issue it for the duration of the work contract plus six instead of three months (European Parliament, 2008h).

The EP agreed in principle that Member States should be granted some discretion in order to refuse applicants a Blue Card even if he/she fulfills the criteria. However, it is interesting to observe that the EP, more than the Commission, had an eye on the principle of Community preference. Firstly, it amended Article 9(2) by stating that the Member States not only “may” give preference to Community citizens, but actually “shall” give preference to them for reasons of labour market policy. Secondly, the EP suggested adding to the Article that applications for a Blue Card should be rejected if they concern sectors that are subject to the transitional arrangements from the Acts of Accession in 2003 and 2005 (European Parliament, 2008h).

Thus, one can observe that the EP like the Member States had criticism on important parts of the features central for admission to the Blue Card, though it was more than the Council also concerned about the potential effect of these admission criteria on third countries.

4.3.2. The European Parliament and its commitment to generous rights

Coming to the EP’s opinion regarding the rights of a Blue Card holder envisaged in the Commission’s proposal, one can say that the EP had a more generous opinion than the Member States. While the initial proposal of the Commission required modifications of the work contract that affect the admission conditions or changes regarding the work relationship to be “subject to prior authorization”, the EP suggested in amendment 42 to relax Article 13(1) by saying that “a notification in advance, in writing to the competent authorities of the Member State” is sufficient (European Parliament, 2008h). In contrast to the Member States, the EP was not concerned about Article 13(2) which laid down that Blue Card holders should

enjoy equal treatment with nationals after the first two years of legal residence. Rather, the EP aimed to broaden the scope of the Article by deleting the provision that equal treatment should be granted regarding employment and that the Blue Card holder still needs to notify authorities about changes in the work relationship. Thus, in the opinion of the EP, a Blue Card holder should be placed on equal footing with nationals after two years of legal residence (European Parliament, 2008h). In line with that, amendment 47 of the EP's legislative resolution suggested to delete Article 15(2) which allows Member States to restrict the rights under paragraph 5(1)(c) and (i) concerning study grants and obtaining public housing. In addition, amendment 48 aimed to delete Article 15(3) on the Member States' right to restrict equal treatment regarding social assistance in certain cases.

Also with view to withdrawing the Blue Card due to unemployment, the position of the EP was more generous. In contrast to the Member States, it did not point to the risk that a Blue Card applicant might become a burden for the Member States social system in case he/she becomes unemployed. Therefore, the EP was of the opinion that a withdrawal of the Blue Card should be possible after six months of unemployment and not already after three months. According to amendment 45 of Article 14, the Blue Card holder should be allowed to stay in the territory of the Member States in case of unemployment, provided that he/she participates in training activities to increase his/her skills (European Parliament, 2008h)

Moreover, the EP issued no noteworthy criticism on Article 19. This is interesting given the fact that the Council was rather split regarding the conditions on residence in another Member State. Thus, the EP seemed to have a similar opinion as the Commission on intra-EU mobility of highly qualified workers and their families.

Likewise, the EP had a quite positive position concerning the proposed derogations from directive 2003/109/EC. It suggested in its amendments that Article 17(5) should emphasize that the derogations of Article 17(3) and (4) from the period of absence allowed in directive 2003/109/EC are a means to promote circular mobility of the highly qualified workers and to encourage that they get involved in training and research activities in their home country. So the EP's commitment to make sure that the Blue Card directive does not contribute to the brain drain was stressed once again in the legislative resolution.

Nevertheless, in the EP's opinion, Member States should also have some degree of discretion regarding the extension of the period of absence. Therefore, amendment 51 of the legislative resolution aimed to change the provision that Member States "shall extend the period of absence into "may extend the period of absence" as derogation from Article 9(1)(c) of

directive 2003/109/EC (European Parliament, 2008h). A similar position was taken by the EP regarding Article 20 of the Commission's proposal. While the EP had no criticism concerning the idea to put Blue Card holders in a more favourable position than workers falling under the scope of Article 14 of directive 2003/109/EC, it proposed to amend Article 20(2). According to the EP, a preferential treatment of Blue Card holders should be optional for the Member States and not a requirement. Moreover, the EP proposed in amendment 75 that such preferential treatment should only be granted if two candidates have the same qualifications. Thus, one can say that the EP alluded to a fair treatment of all workers (European Parliament, 2008h).

In sum, the EP's position on the rights a Blue Card holder should be granted was less concerned about effects on national labour markets, welfare and sovereignty, but more about providing for an adequate treatment of workers and limiting the brain drain.

4.3.3. The European Parliament's support for an exclusive Blue Card

The most important issue of the Commission's proposal was, as mentioned, the role of the Blue Card scheme vis-à-vis national admission systems for highly qualified third-country nationals.

The first thing to note is that the EP did not criticize that Article 3 on the scope of the Blue Card directive was rather vague. On the contrary, the EP was of the opinion that the Blue Card proposal should not only be relevant for third-country nationals that apply under the Blue Card scheme, but also for third-country nationals that are already resident in a Member State as written down in amendment 17. This amendment would even broaden the scope of the Commission's initial proposal. Moreover, with view on the scope of the directive, it was pointed out in the EP's amendments that the Blue Card directive should not exacerbate the brain drain in the developing countries. This way, the proposed amendment for Article 3(4) laid down that the directive was not meant to undermine future agreements of the EU or its' Member States which specify professions that should not fall under the Blue Card directive. The EP emphasized that an ethical recruitment should take place on the one hand in sectors that lack of highly qualified workers, but on the other hand also in sectors that are central for the achievement of the MDGs and sectors that are important for enabling developing countries to provide for basic social services (European Parliament, 2008h).

Regarding Article 4 of the Commission's proposal, the EP issued criticism on the second paragraph which deprived the first Member State of the right to issue more favourable

provisions regarding the entry and residence of third-country nationals than the Blue Card. Unlike the Member States, the EP did not express concerns about national sovereignty but rather stated in the draft report that there should be room for positive derogations for the first Member State (European Parliament, 2008e). Thus, the amendment of the EP proposed to allow derogations for Article 5(2), 6(1)(a), 12, 13(1) and (2), 14, 16, 17(4) and 20. This is much in line with the compromise from the Working Group's negotiations in the Council. Concerning Article 5(2) it should be noted that in the opinion of the EP, derogations on the salary threshold should only be allowed in case of residence in the second Member State. The EP's reasoning behind this amendment was that a departure from this very basic criterion should be avoided to make sure that the Blue Card directive provides for standardized access conditions (European Parliament, 2008e).

So overall, the EP, different from the Member States largely supported the introduction of an exclusive Blue Card scheme.

It should be remarked shortly that the support for the Blue Card and more specifically for the EP's amendments varied amongst the parties of the European Parliament. The two biggest parties, the Group of the European People's Party and European Democrats and the Group of the Party of European Socialists were rather satisfied with the legislative resolution on the Blue Card. For the Alliance of Liberals and Democrats for Europe, one can say that they would have liked to see the EP making the Blue Card directive even more ambitious and criticized that the amendments watered down the already "weak proposal". The Group of Greens/European Free Alliance would have liked the EP to pay more attention to the rights of workers and the brain drain problem, while the Confederal Group of the European United Left/Nordic Green Left considered the directive to be rather negative as it is limited to "immigration of the elite". Still different from that, some non-attached members like the French rightist extremist politician Jean-Marie Le Pen completely opposed the whole directive and the proposition to "import" highly qualified migrants from third countries as own citizens should be trained instead (European Parliament, 2008f). Consequently, the overall supportive position of the EP was not reflected in all political parties.

4.4. The opinion of the Committee of the Regions and the European Economic and Social Committee

The Committee of the Regions and the European Economic and Social Committee are consultative bodies of the EU. The CoR is a political assembly aiming to give a voice to the regional and local levels of the EU in policy developments and legislations. The EESC acts as a representative of the civil society, bringing together economic and social interest groups. When provided by the Treaties, the CoR and the EESC need to be consulted by the Commission, the EP and the Council before making decisions, though their recommendations are non-binding. As this was also the case with the Blue Card directive, a short outline of their opinion will be given in the following.

The CoR as well as the EESC welcomed the Blue Card directive as an important means to respond to the EU's need to attract more highly qualified third-country workers. Particularly the EESC regretted that such a directive was not adopted at an earlier time and refers to the failure of the directive proposed by the Commission in 2001¹⁶.

However, they also had criticism on the directive. Concerning the definition of what is a “qualified” and “highly qualified” migrant, the CoR found the Commission's proposal insufficiently clear and advised to incorporate criteria like the migrant's standard of education, work experience and language skills (Committee of the Regions, 2008). The EESC generally agreed with the criteria to assess a migrant's higher professional qualifications, but it felt that the requirement of three years equivalent professional experience should not be used as a definite criterion. Given that some professions might need more extensive higher education qualifications, the national authorities should have some discretion for making assessment. Moreover, it considered it problematic to use the salary level specified in Article 5(2) as an admission criterion. As there is no uniformity on the salary level between the Member States, the EESC advised to replace this criterion by requiring education certificates and qualifications or equivalent vocational skills instead (European Economic and Social Committee, 2008). According to the CoR, the directive should, like the EP stated, include measures promoting circular migration to limit the brain drain and ensure a brain circulation, though the CoR also stressed that in the long-run, the EU would also need permanent

¹⁶ As mentioned in chapter 2, the Commission proposed a directive on “the conditions of entry and residence of third-country nationals for the purpose of paid employment and self-employed activities in 2001. The directive failed in the first reading of the Council due to too diverging views.

migration. Also, it proposed like the EP to extend the scope of the directive to migrants that are already residing in the EU (Committee of the Regions, 2008).

The CoR as well as the EESC were of the opinion that the rights granted to the highly qualified third-country workers by the Blue Card directive should be more generous. Both considered that the requirement in Article 13 of two years legal residence in the first Member State should be relaxed. While the CoR was basically concerned about its negative effects on the Blue Card holder's mobility, the EESC pointed out that it conflicts with other international agreements of the Member States, e.g. the European Convention on the legal status of migrant workers from 1977 which set the maximal period at one year (European Economic and Social Committee, 2008). Referring to the same convention, the EESC criticized that the period of unemployment allowed before the Blue Card is withdrawn should be extended to six months to be in line with the convention. Furthermore, the EESC shared the criticism of some Member States that derogations from directive 2003/109EC on long-term residents and directive 2003/86/EC would threaten the consistency of the EU's immigration policy and the principle of equal treatment by creating two classes of workers. The same way, it argued against derogations for young professional under Article 6 in order to avoid discrimination (European Economic and Social Committee, 2008).

It is interesting that neither the EESC nor the CoR made a remark on the Commission's intend to create the Blue Card as an exclusive system. The CoR merely noted that it would like to see a greater involvement of local and regional authorities in determining the volume of highly skilled workers. Thus, overall, both bodies supported the introduction of an exclusive Blue Card for the EU.

5. The final Blue Card directive – More a symbol than an effective solution

Having analyzed the positions of the different actors involved in the political debate and negotiations concerning the Blue Card directive, the remaining question is how the final directive looks like. Therefore, this chapter will shed a light on the final directive and the effects of the compromises that were made to get the directive through the Council via unanimity voting. A main point of criticism on the final version of the directive is that it was compromised to the lowest common denominator which considerably weakened its potential (Cerna, 2009). It will be seen in the following whether this view can be supported.

5.1. Increased discretion for the Member States

The definition of who is a highly qualified migrant that should be admitted to the Blue Card was, as it was shown in the previous chapters, criticized by all actors involved in the Blue Card debate. The final directive in principle sticks to the compromise which was reached by the French Presidency for the fourth reading of the Working Group. This means that in line with the EP's proposition, the final Article 2(h) requires five years professional experience to compensate for higher education qualifications and that equivalent professional experience did not become a definite criterion (Council of the European Union, 2009a). It remains in the hands of the Member States to allow for this derogation which gives them sufficient discretion e.g. in case they think a profession needs more time of professional experience as it was remarked by the EESC. This deviation from the original Commission proposal generally constitutes a satisfying compromise for the actors involved. For scholars, the provision remains problematic. Cerna (2008) already criticized the Commission's proposal for missing a provision on how to deal with the problem of skill recognition. This problem was largely ignored during the debate, though the CoR proposed to incorporate some criteria on the migrants' standard of education. Given that the Bologna process¹⁷ still has problems to make sure that skills are equally recognized amongst Member States, it is reasonable to assume like Collett (2009) that the qualifications of Blue Card holders are unlikely to be equally recognized amongst Member States and will cause problems in the future.

Even more difficult was the agreement on the salary threshold as admission criterion that had to be reached to the level of JHA Counsellors and the Permanent Representatives Committee to solve the conflict in the Council. The threshold was finally set at 1.5 times the gross annual salary. The agreement made advances to the Eastern European Member States as the directive now contains a provision that allows for lowering the threshold to 1.2 times the gross annual salary for employment in professions that urgently need highly qualified workers from third countries in Article 5(4) (Council of the European Union, 2009a). As Member States have to inform the Commission about the professions that shall become subject to this derogation, it is questionable if this exception adds to the value of the directive or makes the Blue Card scheme more bureaucratic and thereby less attractive for both, Member States and applicants. Moreover, the EESC's remark that the salary level criterion is problematic, given that there is no uniformity on this criterion between the Member States, was ignored though it would have

¹⁷ The Bologna Process aims to smooth the recognition of skills amongst Member States.

been wise to reconsider it: while the average wages in Luxembourg are estimated at approximately €43000, those in Bulgaria are estimated at merely €2000 (Collett, 2009). Furthermore, the criterion is criticized by scholars because there is no prescription on how to calculate the “gross annual salary” which makes it a quite meaningless criterion (Collett, 2009).

The EP’s proposition to include a provision on limiting the brain drain into Article 5 was not followed. This is regrettable, though the recital of the directive states that Member States should not engage in an active recruitment from developing countries in sectors that suffer from a shortage of highly qualified workers. A commitment to limit the brain drain by a prudent recruitment would have been an important criterion with view to the MDGs and would have underlined the EU’s will not to exploit third countries for its own advantages.

Regarding the derogations for young professionals, the initial Article 6 misses in the final directive (Council of the European Union, 2009a). The adopted Blue Card scheme will be less attractive for young professionals than the Commission’s proposal, but the trade-off in favour for a more equal treatment of Blue Card applicants is reasonable given the resistance from the Member States and the EP on such discrimination.

The compromise on period of validity of the Blue Card grants much discretion to the Member States in that they may decide on “a standart period of validity” between one and four years (Council of the European Union, 2009a, p. 23). This implies that a Member State can limit the Blue Card’s attractiveness significantly by decreasing its validity to one year which would be quite contrary to the Commission’s intention. The EP’s suggestion to extend the period of validity was, like its proposition to make preference of Community citizens for labour market reasons obligatory, not considered for the final version (Council of the European Union, 2009a). It remains to be seen if the Member States exploit the flexibility of the new Article 7(2) and 8(2)¹⁸. Following Kaden (2009), the fact that the Blue Card is only a temporary work permit already decreases its attractiveness. If Member States cut down the period even further, the appeal of the Blue Card might indeed get completely lost.

Also concerning the deadline for adopting a decision on the application to the Blue Card the final Blue Card directive favours Member States’ discretion. The initial time limit of 30 days was extended to a deadline at latest within 90 days of the application being lodged in Article

¹⁸ Former Article 8(2) and 9(2). As Article 6 on derogations was deleted from the Article, the Articles had to be renumbered.

11(1)¹⁹. Imagining that a country sets the period of validity of the Blue Card at one year and makes full use of the deadline of 90 days, this would mean that the Blue Card holder is waiting nearly three months to get a permission to work in the EU for one year. It is more than disputable if the waiting period in such a case is still proportional. Rather, it can be assumed to discourage workers.

Thus, the final directive compromised the criteria for being admitted under the Blue Card scheme in favour of the Member States and offers them more discretion, but at the same time waters down its attractiveness for the target group.

5.2. The trade-off concerning the rights of a Blue Card holder

The compromising on the rights of a Blue Card holder in the final directive also followed the trend towards more discretion for Member States.

This way, Article 12(2)²⁰ basically remained as it was compromised for the first reading of the Council's Working group, meaning that Member States decide if Blue Card holders get equal treatment concerning access to highly qualified employment vis-à-vis nationals after two years legal residence. Even though the opinions from the consultation of the EP as well as the consultation of the EESC and the CoR revealed that more generous rights for Blue Card holders than granted in the proposal would be desirable, they could not make their way to the final Council directive. As feared by the EESC, this implies that the Blue Card directive conflicts with other international agreements which demand a more generous treatment of third country nationals. Moreover, the directive falls short of using the added-value which equal treatment would have with regard to attracting highly qualified workers. Similarly, the EP's proposal to ease the requirement of informing national authorities about changes in employer and the proposition to abolish Member State's possibility to restrict the rights concerning study grants, obtaining social housing and the right on equal treatment concerning social assistance in certain cases granted under former Article 15 was not respected (Council of the European Union, 2009a).

The final Article 18²¹ which splitted the Council's delegations during the reading of the Working Group basically sticks to the compromise reached in the fourth reading. Thus, Article 18(1) deviates from the Commission's proposal and the EP's agreement on allowing

¹⁹ Former Article 12(1)

²⁰ Former Article 13(2).

²¹ Former Article 19.

for movement to a second Member States after 18 months legal residence in the first Member State. Furthermore, Article 18(3) requires the worker to apply for a Blue Card again in the second Member State (Council of the European Union, 2009a). One can say that this criterion considerably weakens the Blue Card's potential to promote intra-EU mobility as it complicates and bureaucratizes the scheme. This is certainly contrary to the Commission's initial intentions, but according to Collett (2008), it is kind of unavoidable given the differences regarding central admission criteria such as the salary threshold mentioned in the previous section. Moreover, it was needed to counterbalance national sovereignty concerns.

Another compromise made to ease Member State's concerns about their sovereignty was the deletion of Article 20 from the final directive. The Commission was not able to push through its idea to give Blue Card holders a preferential position regarding Member States possibility to restrict the access to labour markets. As the Member States heavily criticized this cut into their sovereignty and also the EP considered it to be a step too far to make the wording from Article 20(2) obligatory, it was considered best to delete this provision.

An equally sensitive provision is Article 13²² on temporary unemployment. The compromise for the final directive, meaning that Blue Card holder may be unemployed only for a maximal period of three months and not more than once during the Blue Card's period of validity was already reached in the third reading of the Working Group. Given that some Member States aimed to cut down the period proposed in the Commission's proposal even more, the EP's amendment to extend the period to six months had no chance to receive support. Rather, Article 13(4)²³ had to be added to ease the Member States' fear that Blue Card holders become a burden to national welfare systems by stating that a Blue Card holder must immediately inform national authorities in case of unemployment (Council of the European Union, 2008a). However, particularly the limited time of unemployment allowed threatens a fair treatment of Blue Card holders. A reasonable criticism was made by Guild (2007). She already criticized with view to the initial proposal that a three months period of grace is not sufficient given the rapid changes on the labour market (Guild, 2007). Besides, it is contradictory to other international conventions, e.g. the European Convention on the legal status of migrant workers as the EESC remarked.

In the proposal, important benefits for Blue Card holders were the derogations from directive 2003/109/EC and directive 2003/86/EC. Under the final Blue Card scheme, the workers may still culminate their period of residence in different Member States to get the long term

²² Former Article 14.

²³ Former Article 14(4)

residence status. It is interesting to note that Article 16(3)²⁴ of the final version extends the period of absence allowed within the five years legal and continuous residence required to a total maximum of 18 months instead of 16 as proposed in directive 2003/109/EC. For Blue Card holders having obtained long-term residence status, the extension to 24 months remained (Article 16(4))²⁵ (Council of the European Union, 2009a). This might indeed create two classes of workers as feared by the EESC. Unfortunately, the EP's amendment that it should be stressed that this derogation is a means to promote circular migration and limit the brain drain was not added to the Article, though this reasonable would have been an adequate justification for the derogation. Furthermore, the derogation did not become optional for Member States as proposed by the EP. This is remarkable given the fact that it touches upon national sovereignty. Nevertheless, the positive effect of promoting intra-EU mobility via this provision is limited given the compromised version of Article 18 already mentioned above. In addition, Article 15²⁶ offers more favourable conditions for family reunification for Blue Card holders than set out in directive 2003/86/EC. Despite the criticism from Member States like Germany that such a derogation runs the risk of complicating the systems and the argument that such a derogation is not needed, one can say that at least the increased rights for family members of Blue Card holders are an important tool to make the Blue Card attractive. Thus, much of the rights the Blue Card could have offered to its holders had to be compromised in favour of national sovereignty. Moreover, one can say that the final directive entails a trade-off between simplicity and coherence with other systems on the one hand and providing for some attractive benefits for the Blue Card holders on the other hand.

5.3. The missed chance to create a common entry and residence permit

Coming to the central point of the Commission's proposal, the relationship of the Blue Card vis-à-vis national schemes for highly qualified third-country workers, the final Blue Card directive misses to provide the EU with a truly common entry and residence permit. It took much negotiation till the question regarding the vague formulation of Article 3 on the scope of the directive, meaning whether or not application under the Blue Card scheme should become the standard procedure for third-country nationals that apply for highly qualified employment under the Blue Card scheme, could be solved. Lately, the compromise in the final directive says in Article 3(1) that the directive "shall apply to nationals for the purpose of highly

²⁴ Former Article 17(3)

²⁵ Former Article 17(4)

²⁶ Former Article 16

qualified employment in the terms of this directive” (Council of the European Union, 2009a, p. 21). This implies that the Commission finally lost the fight for an exclusive Blue Card. It had to give in to Member States’ demands to maintain their national systems parallel to the Blue Card as the provision opens the possibility to choose to apply either under the Blue Card scheme or under any other national scheme. This way, the amendment of the EP to make the directive generally available for third-country nationals that are already on EU-territory was largely rejected.

The right of Member States to issue residence permits others than the Blue Card is explicitly stated in Article 3(4) of the final directive. Different from initial compromised versions, the final version of Article 3(4) does not even make the provision that the terms of employment need to be different than those laid down in the directive. Thus, the final Blue Card directive is in fact a 28th system, something that was definitely not wanted by the Commission.

The parallelism of national systems and Blue Card was further emphasized by means of the final version of Article 4. While the original proposal did not allow the first Member State to grant Blue Card applicants more favourable provisions than specified in the directive, the final Article remained similar to the compromise from the second reading of the Working Group (Council of the European Union, 2009a). Thus, preferential treatment is even allowed with respect to Article 5(3) on the salary threshold, despite the fact that besides the Commission also the EP had problems with this provision. The result is that Member States may even undermine this basic criterion which means that it is no fixed standard criterion anymore that can provide for harmonization.

Consequently as Angenendt and Parkes (2010) mention, the final Blue Card directive shows that Member States agree that measures to attract highly qualified workers are needed. This is also revealed by the fact that some Member States like the UK and the Czech Republic started to reform their immigration scheme for highly qualified workers quasi parallel to the introduction of the Blue Card. Nevertheless, they are not willing to follow a common policy by accepting an exclusive, EU-wide Blue Card scheme. Though an agreement on derogations from current legal frameworks was possible, the overall trend followed by the final directive compared to the initial Commission proposal was to change the central elements in a way broadening national discretion and thereby to ensure that national sovereignty is only slightly touched by the Blue Card.

6. Conclusion

This Bachelor Thesis was concerned with the EU Blue Card directive. The Blue Card directive was adopted in May 2009 and deals with the entry and residence conditions of third-country nationals that would like to take up a highly qualified employment in the EU. As the directive was adopted that recently, there is only little literature that sheds a light on the final Blue Card directive as it will be implemented into national law by 2011. Therefore, this thesis aimed to fill this gap by giving an answer to the question:

What were the main reasons to introduce the EU Blue Card directive and what was the final result after two years of political debate?

It was outlined in the second chapter that the Blue Card directive is part of the common immigration policy of the EU. This policy field is a rather young one and became subject at the EU level only 18 years ago with the Treaty of Maastricht. The first step towards the development of a common regulation of legal migration like the Blue Card was done by the Tampere European Council which demanded the EU to develop measures for a common immigration policy. This way, the Commission launched an in-depth discussion on a strategic project for economic migration which led to the “Policy Plan on Legal Migration” five years later. The Policy Plan constituted the road map for the The Hague Programme, which should provide for closer cooperation in justice and home affairs at the EU level from 2005 till 2010. It stated that till 2009, four specific directives on the entry and residence of third-country national would be presented by the Commission. Following a fragmented and sectoral approach, the first directive of this plan was considered to govern the entry and residence conditions of highly qualified third-country nationals. Thus, in October 2007, the moment arrived and the “Council Directive 2009/50/EC on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment”, informally called “Blue Card directive” was proposed.

The question arising at this point is: why does the EU need the Blue Card? The answer to this question was given in the third chapter. The chapter explained that the EU is suffering from a population decline. Given the decreasing fertility rates, the death-rates are considered to outnumber the birth-rates already in 2015. As the life expectancy of the EU-population is considered to increase, an aging of the population will take place. Thus, the workforce will decline and the economy will slow down. At the same time, the demand for non-manual skilled workers will increase due to the EU’s transition to a knowledge-driven economy. In

order to be able to fill emerging gaps on the labour market, the EU will need to attract more highly qualified workers from third countries. This is also an important means to make sure that the goals of Europe 2020 can be reached and do not fail like those of its forerunner, the Lisbon Strategy.

But as the third chapter pointed out, the EU seems to be much less attractive than other immigrant-destinations. It faces the disadvantage of being composed of 27 Member States which causes that highly qualified third-country workers are confronted with complicated rules and admission procedures and face significant barriers to intra-EU mobility. A common regulation like the Blue Card directive could help to decrease such problems by providing for some harmonization and increasing the EU's natural advantages.

Nevertheless, the fourth chapter revealed that the EU's main institutions have different positions regarding this issue. The Commission presented an ambitious proposal for the Blue Card directive because it was of the opinion that a common action is required to rise to the above-mentioned challenges. It aimed to create an exclusive Blue Card that replaces the national admission schemes. However, the chapter clarified that the Council negotiations on the directive were difficult as the Member States had diverging views on the central elements of the proposal. Though the Commission left some discretion to the Member States regarding the admission requirements, the Member States had problems to find a common denominator on the key criteria given the national disparities. It was hard for the Member States to agree on the rights a Blue Card holder should be granted, on the one hand because this touches areas that are preferred to remain subject to national sovereignty, and on the other hand because this is likely to run into conflict with other legal frameworks. Different from the Member States, the EP, but also the EESC and the CoR largely welcomed the Commission's proposal though they also had their criticism. For the EP, it was interesting to note that instead of issuing concerns about national sovereignty like it was done by the Council, its suggestions for amendments primarily pointed to the potential effects of the Blue Card on third countries and an equal and fair treatment of workers. It stressed several times that the Blue Card should not worsen the brain drain. Also the CoR pointed to the effects on the brain drain, while main concerns of the EESC were potential conflicts of the Blue Card with other international agreements.

However, the influence of the EP in the process of adopting the Blue Card was restricted to consultation, like it was the case with the CoR and the EESC. Thus, they had only limited influence on the final directive and the Council remained a key actor. As the Council had to

adopt the Blue Card directive via unanimity voting, it needed the consent of all Member States. Unfortunately, this is reflected in its final version.

It was highlighted in the fifth chapter that the Blue Card directive did not become an exclusive system, but rather a 28th scheme. Though the Blue Card has some strong aspects and puts its holders in a preferential position vis-à-vis non-holders, it failed to eliminate the barriers to intra-EU mobility. The Commission's idea to turn the EU's disadvantage of being composed of 27 different Member States failed.

What remains is indeed a weak directive which is hardly more than symbolizing that highly skilled workers are welcome in the EU. It might have been predictable that there is too much divergence between the Member States, their labour markets, to agree on a Blue Card as proposed by the Commission. Nevertheless, the Blue Card directive can be considered an important breakthrough in the field of legal migration because the Blue Card directive is the first time that the EU managed to agree on a common regulation in the field of legal migration, though only in a weak form. This is an amazing development given the recent history of the EU's immigration policy and as Farahat (2009) points out an important step towards the progressive inclusion of third-country nationals into the EU.

With view to future proposals, it could be a good option to treat national sovereignty and the divergence of the Member States with more care. A starting point could be for example cooperations between smaller groups of Member States. Instead of pushing for universal rules and procedures, maybe one finds a way to attract more highly qualified workers "united in diversity".

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