

# **The revision of the EU's Blue Card Directive and its competitiveness against the national high-skilled migration schemes**

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## Introduction

A country's ability to attract talent plays a crucial role in the world-wide race for innovation and competitiveness. Being a regional economic integration project with ambitions to become a key market power in the world, the EU has also made steps towards creating its own high-skilled immigration policy. This ambition was first expressed in its 2000 Lisbon Strategy, and was translated to a labour migration policy package proposed by the European Commission in 2005.<sup>1</sup> The policy-making process started with the proposal for a common high-skilled migration scheme, as it represented the least controversial area of migration among the Member States.<sup>2</sup>

This so-called 'Blue Card Directive' on the conditions of 'entry and residence of third-country nationals for the purposes of highly qualified employment' was proposed by the Commission in 2007 and after substantial changes, it was approved and came into effect in 2009. The Member States had two years to transpose it, however, only four of them managed to do so in time.<sup>3</sup> The Directive has been eventually implemented in all Member States by 2013.<sup>4</sup> The Blue Card was intended to be a skill-attracting instrument besides the national high-skilled immigration schemes<sup>5</sup> and aimed to offer a fast-track entry procedure for third-country nationals with high qualifications, who already secured a job in the EU.<sup>6</sup>

However, despite the Member States' common priorities in attracting talent, the Directive has not achieved its harmonisation objective. Its final version was substantially watered down compared to the Commission's proposal and left much leeway for the Member States in the implementation. Consequently, the Member States adopted 25 quite different Blue Card schemes that prevented real policy harmonisation.<sup>7</sup> The Blue Card issuance statistics between 2012 and

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<sup>1</sup> Lucie Cerna, "The EU Blue Card: preferences, policies, and negotiations between Member States", *Migration Studies*, 2013, 6.

<sup>2</sup> Ibid.

<sup>3</sup> The Netherlands, the Czech Republic, Estonia and Spain.

<sup>4</sup> Lucie Cerna et al., "European Policies to Attract Talent: The Crisis and Highly Skilled Migration Policy Changes" In *High-Skill Migration and Recession*, ed. Anna Triandafyllidou and Irina Isaakyan (UK: Palgrave Macmillan, 2016), 29.

<sup>5</sup> Ibid.

<sup>6</sup> Simona Bellini, "EU Blue Card: a promising tool among labour migration policies? A comparative analysis of selected countries", *Berlin School of Economics and Law, Institute for International Political Economy (IPE) Working Paper No.76*, 2016, 1.

<sup>7</sup> Denmark, Ireland and the United Kingdom opted out.

2016 have shown that most Member States, apart from Germany and France, use their national arrangements for admitting high-skilled third-country workers.<sup>8</sup>

Acknowledging the weaknesses of the Blue Card policy, the Juncker Commission came forward with a reform proposal in June 2016. However, its adoption is left to the new European Commission led by President Ursula von der Leyen, that has already expressed its intention to carry on with the ambitions of the previous Commission. Therefore, new discussions about the revision are expected in the coming years.

However, the question arises whether the Member States would be more willing to compromise today to develop an EU-wide high-skilled migration policy. The Commission's legislative proposal goes far to correct the flaws of the Blue Card policy in effect and suggests the abolition of the parallel national schemes to reduce policy heterogeneity and achieve harmonisation. Although the Commission has clear ambitions to develop common migration policies, the Member States have been traditionally very careful and did everything to prevent excessive centralisation in a policy field so closely associated with sovereignty.

This thesis attempts to explore whether the proposal for a new Blue Card policy provides for a viable point of departure to achieve the so far failing harmonisation of high-skilled migration policies in the EU. Assuming that the Member States with the most effective high-skilled migration schemes 'risk' the most by adjusting to the proposal and by abolishing their current policies, the 'adoption potential' of the proposal will be assessed. Drawing on the assumptions of the two-level games theory and the 'goodness of fit' approach, the paper addresses the following research question: *to what extent does the 2016 proposal for a new Blue Card Directive have potential for adoption in the Council in light of its competitiveness against the national high-skilled migration schemes?*

The paper particularly looks into the Dutch and the Swedish high-skilled immigration policies to compare them with the EU proposal, and attempts to explain (or perhaps predict) the Dutch and the Swedish position towards it based on the outcome of the question above. The paper is organised as follows. Chapter 1 discusses the applied theoretical framework based on the Europeanization literature and the two-level games theory and the 'goodness of fit' approach as well as explains the methodology. Chapter 2 presents the development of EU migration policies,

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<sup>8</sup> Sergio Carrera et al., "The cost of non-Europe in the Area of Legal Migration", *CEPS Paper in Liberty and Security in Europe*, 2019, 15.

the Blue Card Directive and its proposed recast as well as the current state of affairs of the proposal in EU politics. Chapter 3 is empirical and analyses the Dutch and the Swedish national high-skilled migration policies, while Chapter 4 presents the conclusion that summarizes the key findings of this thesis.

## 1. Theoretical considerations and methodology

### 1.1. Europeanization, two-level games and the goodness of fit approach

The theoretical framework of the present thesis builds on the Europeanization literature and the ‘two-level games’ theory and the related ‘goodness of fit’ approach that have useful elements for analysing the Member States’ preferences, inter alia, in labour migration policy, and provide for a practical tool for demonstrating how different national preferences can impact EU-level policy negotiations.

In general terms, the notion of Europeanization usually captures the adaptive process generated by the European integration as it happens through the adoption and implementation of EU legislations or rules, although Vink et al. argue that the term is not EU specific but can be understood in the context of any regional integration among countries that are in the geographical proximity of each other.<sup>9</sup> While the academic literature provides for a great variety of definitions of Europeanization, today it is widely accepted as a two-way process. As Menz suggests, instead of “conceptualizing Europeanization as a process of imposed implementation or ‘learning to cope with Europe’”, it should be understood as “the emergence of multiple arenas of governance”<sup>10</sup> that involves both ‘top-down’ and ‘bottom-up’ processes as termed earlier by Börzel and Risse.<sup>11</sup>

That is, Europeanization literature considers policy-making in the EU a ‘two-level game’, a concept developed by Putnam, where national decision-makers are “engaged in two types of games”.<sup>12</sup> As originally conceptualized by Putnam, “at the national level, domestic groups pursue

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<sup>9</sup> Maarten Vink et al. (eds.), *Europeanization: New Research Agendas* (Basingstoke, UK: Palgrave Macmillan, 2007) 7-8.

<sup>10</sup> Georg Menz, “Stopping, shaping and moulding Europe: Two-Level Games, Non-state Actors and the Europeanization of Migration Policies”, *Journal of Common Market Studies* Vol.49. No.2. (2011), 438.

<sup>11</sup> Tanja A. Börzel et al., “Conceptualizing the Domestic Impact of Europe” In *The Politics of Europeanization*, ed. Kevin Featherstone and Claudio M. Radaelli (New York, US: Oxford University Press, 2003) 57.

<sup>12</sup> Menz, “Stopping”, 439.

their interests by pressuring the government to adopt favorable policies, and politicians seek power by constructing coalitions among those groups. At the international level, national governments seek to maximize their own ability to satisfy domestic pressures, while minimizing the adverse consequences of foreign developments”.<sup>13</sup> While national ministers shape and decide about new EU legislations in the Council together with the other Member States, at home their policy-making aims to accommodate their domestic constituencies, represented by non-governmental actors such as employer organizations, NGOs and lobby groups. The process on the national level may precede the negotiations on the EU level, when national actors seek to influence a future EU regulation by suggesting elements of their national legislation as policy blueprints.<sup>14</sup> Even if they do not try to ‘upload’ their own regulation to the EU level, “governments attempt to maximize room for national manoeuvre and defend national regulation, delaying EU regulation”, a practice that is “remarkably successful” in the field of migration policy according to Menz.<sup>15</sup>

To gain competence in a policy area, including migration, the EU is fully reliant on the Member States’ will and the principle of conferral. However, national ministers in the Council have a strong interest in shaping EU policy according to their own national preferences, which are formulated based on the preferences of certain coalitions of domestic actors. Without the endorsement of the EU policy at the national level, Member States cannot support a proposal in the Council. As Knill et al. argues, policy change on the national level by virtue of Europeanization is most likely to take place if there is no dominant actor coalition facing the government and domestic interests in the national policy context are disputed among opposing coalitions.<sup>16</sup> Given the political sensitivity of migration and the different public perceptions of it across the EU due to cultural and historical reasons, the Member States’ preferences can vary to a great extent and they are usually well articulated in the EU arena. This is also mirrored in the relatively slow progress of creating common migration policies.

Complementing the stipulations of the two-level games theory in the European context, the concept of ‘goodness of fit’ between national regulation and EU legislation is a commonly applied approach in the Europeanization literature for explaining “the interaction of the EU and national

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<sup>13</sup> Robert D. Putnam, “Diplomacy and domestic politics: The logic of two-level games”, *International Organization* 42, 1988, 434.

<sup>14</sup> Menz, “Stopping”, 439.

<sup>15</sup> *Ibid.*, 458.

<sup>16</sup> Christoph Knill et al., “The National Impact of European Union Regulatory Policy: Three Europeanization Mechanisms”, *European Journal of Political Research*, Vol.41, No.2, 2002, 260-261.

context in bringing about policy change, and appreciating the preconditions for the Europeanization of migration policies”.<sup>17</sup> Based on the level of fit one can draw an ex ante hypothesis about the conditions under which national policies may be potentially adjusted to EU policies or where policy harmonisation efforts would likely to be aborted.<sup>18</sup> The regulatory compatibility of a proposed EU legislation and an existing national policy does not ensure that the respective country would support the EU policy in the Council, however, it is able to reveal if there is potential for that.

Several scholars argue that Europeanization can only bring about domestic policy change if there is a ‘misfit’ or ‘mismatch’ between EU and national policies as without any significant policy difference there would be a need only for minor adjustments to the EU level. The ‘goodness of fit’<sup>19</sup> between the national and the EU level then in turn “determines the degree of pressure for adaptation generated by Europeanization on the member states: The lower the compatibility between European and domestic processes, policies, and institutions, the higher the adaptational pressure”, as Börzel and Risse proposed.<sup>20</sup> Adaptational pressure is created by the difference between the national and EU policy as it implies that the Member State should make (significant) changes at the national level in order to adjust to the European policy. Accordingly, policy misfits create adaptational costs at the national level.<sup>21</sup> If the adaptational costs are low, changes triggered by an EU policy can be easily made in the national policy. However, if the adaptational costs are high, “European institutions seriously challenge the identity, constitutive principles, core structures, and practices of national institutions. In such cases, the institutional, material, and cultural adaptations are exceedingly costly and national institutions will be defended at great cost”, as Risse et al. argue.<sup>22</sup> That is, adaptational costs represent all ‘sacrifices’ that the Member State would need to make to comply with an EU legislation. Inter alia, this can involve the reorganization of its institutions, higher state expenditures as well as interference with long existing political or societal traditions that are extremely hard to change.

The above discussed theoretical framework is fully applicable to labour migration policy, where national governments build coalitions of their domestic non-governmental actors and

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<sup>17</sup> Barbara Laubenthal, “Europeanization and the Negotiation of a New Labour Migration Policy in Germany”, *Comparative Migration Studies* Vol.2, No.4, 2014, 472.

<sup>18</sup> Knill et al., “The National Impact”, 259.

<sup>19</sup> Thomas Risse et al. eds., *Transforming Europe - Europeanization and Domestic Change* (Ithaca, NY; London, UK: Cornell University Press, 2001), 6.

<sup>20</sup> Börzel et al., “Conceptualizing”, 61.

<sup>21</sup> *Ibid.*, 62.

<sup>22</sup> Risse et al., „Transforming”, 8.

attempt to ‘upload’ their formulated domestic preferences to the EU level. Although policies in many aspects of migration can be formally decided by a qualified majority voting in the Council, in practice, decisions are taken by consensus among the ministers, especially in the case of politically sensitive issues.<sup>23</sup> That is, decision-making in the Council is still of intergovernmental nature, where all Member States have the opportunity to issue a ‘veto threat’ before any formal decision, and thus where a decision is only taken after a consensus was found.<sup>24</sup>

By applying the framework to the research question of this paper, the following hypothesis can be formulated: the Member States would only support the recast proposal for the Blue Card Directive in the Council if the misfit between the proposed EU legislation and their domestic regulations is low, or in other words, if the adaptational costs for them are modest.

## 1.2. Methodology

To test the hypothesis, this thesis analyses and compares the proposed recast of the Blue Card Directive with the Swedish and Dutch national high-skilled migration policies in two case studies. These countries provide the examples for the two most effective high-skilled labour immigration policies in the EU in terms of the absolute number of issued residence/work permits. Additionally, they are known for their highly liberal labour migration policies concerning the high-skilled. The present thesis assumes that the Member States with the most effective and well-functioning high-skilled labour immigration schemes are the least motivated to abolish their existing national policies and adopt an EU legislation instead, as the proposal for a new Blue Card Directive suggests.

First, by determining the ‘goodness of fit’ between their national high-skilled migration policies and the proposed Blue Card Directive, one can predict if they would potentially support the recast of the EU legislation and have willingness for harmonisation, or if it would likely to be rejected by them. In case that little adaptational costs are found and thus there is a potential for agreeing to the EU policy, one can draw a conclusion about the likelihood of policy change based on the preferences of dominant non-governmental actors and their position towards the proposal of the recast Blue Card Directive.

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<sup>23</sup> Daniel Finke, “Underneath the culture of consensus: Transparency, credible commitments and voting in the Council of Ministers”, *European Union Politics* Vol.18 No.3, 2017, 357.

<sup>24</sup> *Ibid.*



The sources used in the present thesis include EU documents, primary and secondary literature as well as governmental information websites of Sweden and the Netherlands. Among the EU documents, the 2009 Blue Card Directive and the 2016 proposal for a new Directive has been used to demonstrate the contents of the policy and the policy proposal. Additionally, several other official documents issued by the European Commission, the Council, the European Parliament and the European Council were used to thoroughly present the topic of (high-skilled) labour immigration policy in the EU. For the case studies, the primary sources of information were the governmental websites of the two Member States that both offer information about their labour immigration regulations in English in a highly transparent and detailed way.

## **2. Placing in context the Blue Card Directive**

In this chapter the development of EU labour migration policies is presented to place the Blue Card Directive in a wider context and demonstrate the EU's complex journey towards the establishment of a common labour migration policy. From a policy-making perspective, developing a common policy in labour migration should be less complex than in other areas of migration as the Member States do not have to follow rules of binding international conventions when they decide about who they allow to come to live and work in the EU.<sup>25</sup> However, as all areas of migration, it still represents a politically sensitive topic.

### **2.1. Paving the way for common labour migration policies**

The development of a common migration policy was warranted by the creation of the Schengen area and the freedom of movement within the EU, which developments made the internal borders 'invisible' and the protection of the EU's external borders more important. Immigration policy concerning third-country nationals made its first important step forward from being a purely intergovernmental policy field in the EU towards communitarization in the Treaty of Amsterdam in 1997. The Treaty made migration and asylum policy a shared competence between the EU and

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<sup>25</sup> Camino Mortera-Martinez et al., "Why Europe needs legal migration and how to sell it", Centre for European Reform policy paper, December 2018, 6.

the Member States, and established a mandate for the Council to adopt measures, *inter alia*, concerning “the conditions of entry and residence, and standards on procedures for the issue by Member States of long-term visas and residence permits” as well as “measures defining the rights and conditions under which nationals of third countries who are legally resident in a Member State may reside in other Member States”.<sup>26</sup> In October 1999 at the European Council in Tampere the Member States made their first important commitments to develop a common migration policy as part of the planned kick-off of the EU’s Justice and Home Affairs policies. In the Tampere conclusions the European leaders have laid down strategic guidelines for the future common migration policy and determined the fair treatment of third-country nationals and the management of migration flows as core objectives. In Tampere the European Council has acknowledged the need for harmonising the national immigration policies with regard to “a shared assessment of the economic and demographic developments within the Union”<sup>27</sup>, paving the way for common economic immigration policies that address common challenges such as skills shortage and ageing society at the EU level. The European leaders also endorsed the objective that non-EU citizens, who have legally resided in the EU for a certain period, should be granted “uniform rights which are as near as possible to those enjoyed by EU citizens”, including the right to work as an employee or self-employed person throughout the EU.<sup>28</sup>

The Lisbon Strategy adopted by the European Council in 2000 reflected the EU’s ambitions to further enhance its identity of a market power and set a new strategic goal for the EU to “become the most competitive and dynamic knowledge-based economy in the world”<sup>29</sup> that implied the improvement of its ability to attract skilled labour from all around the world. In line with this objective, in July 2001 the European Commission proposed a “Directive on the conditions of entry and residence of third-country nationals for the purpose of paid employment and self-employed economic activities” which was its first attempt to harmonise labour immigration policies. This was an ambitious plan for a horizontal ‘economic migration directive’ that aimed to introduce “a set of common conditions for a joint residence and work permit”.<sup>30</sup> While the proposal did not make an explicit distinction between the skill levels of immigrants, the text suggested that “the

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<sup>26</sup> Treaty establishing the European Community (Amsterdam consolidated version), Article 63(3-4), (1997) OJ C340, 202.

<sup>27</sup> European Council, “Presidency Conclusions”, Tampere 15-16 October, 1999.

<sup>28</sup> *Ibid.*

<sup>29</sup> European Council, “Presidency Conclusions”, Lisbon 23-24 March 2000.

<sup>30</sup> Cerna, “The EU Blue Card”, 78.

Community should reinforce its competitiveness to recruit and attract third-country workers” due to the skill shortages it faces in certain segments of the labour market.<sup>31</sup>

Although the European Parliament gave green light to the proposal following the consultation procedure, in the Council the discussion did not go beyond a first reading of the text.<sup>32</sup> According to Meyer, the Member States expressed several concerns about the proposed legislation, inter alia regarding the “merging of residence and work permit into one, too little flexibility in the bureaucratic processes to recruit migrants, the possibility to file an application while in-country and the conditions under which a residence permit could be granted”.<sup>33</sup> However, they not only opposed certain provisions of the text, but also argued that the Community does not have competence to adopt such a legislation.<sup>34</sup> While most of the Member States received it half-heartedly, the main opponents of the proposal were Germany and Austria that found it too much of an intrusion in their domestic policies.<sup>35</sup> Besides the Member States’ general reluctance to harmonise policies, two other factors contributed to the proposals’ lack of success. On one hand, the 2004 enlargement was on the verge and some of the ‘old’ Member States worried about the influx of low skilled workers from Central and Eastern Europe that had the potential of putting downward pressure on their domestic wage levels.<sup>36</sup> On the other hand, the 9/11 terrorist attacks in the US had a negative impact on the public sentiment regarding immigration and enhanced the securitization of the issue in the political discourse.<sup>37</sup> Eventually, the European Commission officially withdrew the proposal in March 2006.

Building on the Tampere programme and the Lisbon strategy, the European Council adopted a new five-year plan for Justice and Home Affairs in 2004, the Hague programme. This document reinforced the Member States’ intentions to cooperate in the field of immigration policy and declared that “legal migration will play an important role in enhancing the knowledge-based economy in Europe, in advancing economic development”.<sup>38</sup> While emphasizing that the volumes of admission of labour immigrants should remain the competence of the Member States, the

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<sup>31</sup> European Commission, “Proposal for a Council Directive on the Conditions of Entry and Residence of Third-country Nationals for the Purpose of Paid Employment and Self-employed Economic Activities”, 2001.

<sup>32</sup> Cerna, “The EU Blue Card”, 78.

<sup>33</sup> Matthias Michael Mayer, “Bureaucratic Migration Politics: German Support for Common EU Policies on Labour Migration”, *German Politics* Vol.26 No.2 (2017), 259-260.

<sup>34</sup> *Ibid.*, 259.

<sup>35</sup> *Ibid.*, 260.

<sup>36</sup> Cerna, “The EU Blue Card”, 78.

<sup>37</sup> Meyer, “Bureaucratic”, 260.

<sup>38</sup> Council, “The Hague Programme” (2005) OJ C53, 4.

European Council invited the Commission to introduce ‘a policy plan on legal migration’ until 2005 that addresses the changing demand for migrant labour in the EU.<sup>39</sup>

After the failure of the horizontal ‘economic migration directive’ became obvious for the Commission, it launched a public consultation about the topic, based on which it published its Green Paper “on an EU Approach to Economic Migration” in January 2005.<sup>40</sup> In this document it introduced, inter alia, the idea of a less ambitious sectoral approach to labour immigration policies, and also suggested a plan for an ‘EU Green Card’ with “common fast-track procedure for specific labour and skills shortages”.<sup>41</sup> While the Council did discuss the Green Paper in June 2005, according to Menz, there was no consensus among the ministers “whether communitarisation was necessary on minimum admission standards and ‘fast-track’ admission”<sup>42</sup>, reflecting their serious reservations as regards harmonisation.

In December 2005, in line with the Hague Programme, the Commission presented its ‘Policy Plan on Legal Migration’ that suggested the sectoral approach to labour migration policy and split up the policy area into four different legislative proposals<sup>43</sup>: for highly qualified immigrants, intra-company transferees, seasonal workers, and remunerated interns and trainees. The European Council backed the new approach in December 2006 and invited “the Commission to present these proposals as part of the comprehensive EU Migration Policy”.<sup>44</sup>

From the previous public consultation procedure the Commission concluded that the Member States have a higher support for high-skilled immigrants than for others with lower skill levels, which was the main reason why it started the policy-making procedure with high-skilled migration.<sup>45</sup> It was expected that high-skilled immigration constitutes an area where consensus can be found more easily than in the case of other labour migrants.<sup>46</sup> As Cerna highlights, high-skilled immigrants are considered a smaller burden on the social security systems of the Member States and they are seen as welcomed taxpayers, and they are less likely to raise concerns among the native population as regards their potential impact on their cultural identity.<sup>47</sup>

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<sup>39</sup> Ibid.

<sup>40</sup> Menz, “Stopping”, 457.

<sup>41</sup> Ibid.

<sup>42</sup> Ibid.

<sup>43</sup> Meyer, “Bureaucratic”, 263.

<sup>44</sup> European Commission, “Simplified Admission Procedures and Common Set of Rights for Third-country Workers”, Press Release, Memo 07/422, Brussels, 23 October 2007.

<sup>45</sup> Meyer, “Bureaucratic”, 263.

<sup>46</sup> Menz, “Stopping”, 457.

<sup>47</sup> Cerna, “The EU Blue Card”, 78.

The Commission eventually proposed the ‘Directive on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment’ in October 2007 that is called the Blue Card Directive. For the above discussed reasons, the Blue Card Directive was the first piece of legislation dealt with in the policy-making process, however, the directives on intra-corporate transferees and on seasonal workers as well as a revised directive on students and researchers (based on two older directives) were also adopted between 2014 and 2016.

## **2.2. The 2009 Blue Card Directive**

### *2.2.1. Policy-making process*

Until the Lisbon Treaty came into force in December 2009, the adoption of EU migration policies required unanimity in the Council. This means that all Member States had to agree on the legislation to adopt it, and the European Parliament only issued an opinion about the proposal.

The 2007 proposal received general support from the Council at its meeting on 24-25 July 2008, however, the ministers expressed that they favour the “complementary application of the European Blue Card scheme” to national policies concerning the issuance of residence permits for employment purposes as well as they disagreed on certain provisions concerning pay and professional experience criteria.<sup>48</sup> By the end of September 2008, the French Presidency successfully found a common ground among the Member States regarding the Directive, and the Council gave its overall support for the modified version of the proposal.<sup>49</sup> Even though in the Parliament the ‘Klamt report’ about the proposal called for a clearer policy framing, more precise definitions and for greater flexibility for the Member States as well as highlighted the importance of avoiding brain drain in developing countries, MEPs gave their support for the proposal in November 2008.<sup>50</sup>

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<sup>48</sup> Council, “2887th meeting Justice and Home Affairs Brussels, 24 and 25 July 2008”, Press Release 11653/08 (Presse 205), 11.

<sup>49</sup> Council, “2890th meeting Justice and Home Affairs Brussels, 25 September 2008”, Press Release 12923/08 (Presse 250), 2.

<sup>50</sup> European Parliament, “MEPs support the European “Blue Card” proposal for highly-skilled immigrants”, Press Release Ref: 20081107FCS41562, 20 November 2008.

On 25 May 2009, the Council adopted the Directive<sup>51</sup> that came into effect on 19 June 2009. The Member States were required to implement the legislation until June 2011, however, many of them fell behind schedule.

### 2.2.2. *The content of the Blue Card Directive*

In its present form, the Directive ‘on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment’ aims to offer highly qualified third-country nationals a single application procedure for admission to the EU with employment purposes and intends to grant attractive residence and mobility terms for them and their families. However, it only constitutes a complementary scheme to the Member States’ own immigration policies concerning the issuance of work-related residence permits, meaning that they can always decide which scheme they wish to apply.

Based on the Directive, as a minimum criterium for admission, the applicant must present a valid work contract or a binding job offer for highly qualified employment for at least the duration of one year in one Member State. As regards professional qualification, the third-country citizen needs to have completed a higher education programme that required studies for at least three years, or, if the Member State chose to derogate in their implementation, has “at least five years of professional experience of a level comparable to higher education qualifications” that can be attested.<sup>52</sup> The Directive also sets the minimum gross salary threshold for the prospective third-country employee, which should be at least 1.5 times the average gross annual salary in the Member State (or at least 1.2 times it in certain sectors suffering from labour shortage) but can be higher based on the Member State’s choice. After an application was filed, the Member States have been provided a maximum limit of 90 days to adopt a decision about it.

Being an entirely demand-driven entry system with many ‘may clauses’, the refusal of a Blue Card application can be justified on many grounds by the Member States. It includes exhausted admission quotas, preference for nationals, the principle of Community preference under which EU citizens have priority to get work opportunity, unethical brain drain and most importantly

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<sup>51</sup> Council Directive 2009/50/EC of 25 May 2009 on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment.

<sup>52</sup> Ibid.

Member States can always assess their labour market situation and decide to rather apply their own national schemes for admission.

The legislation provides for much leeway as regards the Blue Card's duration of validity that can vary between one and four years. In terms of intra-EU mobility, after the person concerned spent eighteen months as a Blue Card holder in a Member State, (s)he may decide to move to another Member State with his or her family for the purpose of highly qualified employment, however, (s)he needs to be admitted for a new Blue Card in the second Member State. This intra-EU mobility element is vital in the Directive as it represents the greatest added value of a common EU high-skilled immigration policy compared to national arrangements, both for the Community's labour market as a whole and the Blue Card applicants. As regards short-term intra-EU mobility, Blue Card Holders can move freely within the Schengen area up to the duration of three months in line with the Schengen Borders Code.

### *2.2.3. Shortcomings of the present Blue Card Directive*

Although adopted, the final version of the 2009 Blue Card Directive “is based on the lowest common denominator” among the Member States as several scholars argue.<sup>53</sup> The Directive only laid down a minimum framework for a high-skilled immigration policy in the Member States. As Menz highlights, during the negotiations Austria, Germany and the Netherlands were the biggest opponents of any potential excessive centralisation, probably partly due to the fact that at that time “national initiatives were well underway to implement national high-skilled migration policies” in these countries and therefore they did not wish to restrain themselves by agreeing to a strong common EU policy.<sup>54</sup> However, as a consequence of the watered-down Directive, the national Blue Card laws that implement it vary greatly across the EU, and the main objectives of the policy, namely, to ensure mobility for the Blue Card holders in the labour markets of the EU and to enhance the competitiveness of the bloc have failed in practice. This has been revealed by the Commission as early as 2014 in its first implementation report that identified policy heterogeneity and the

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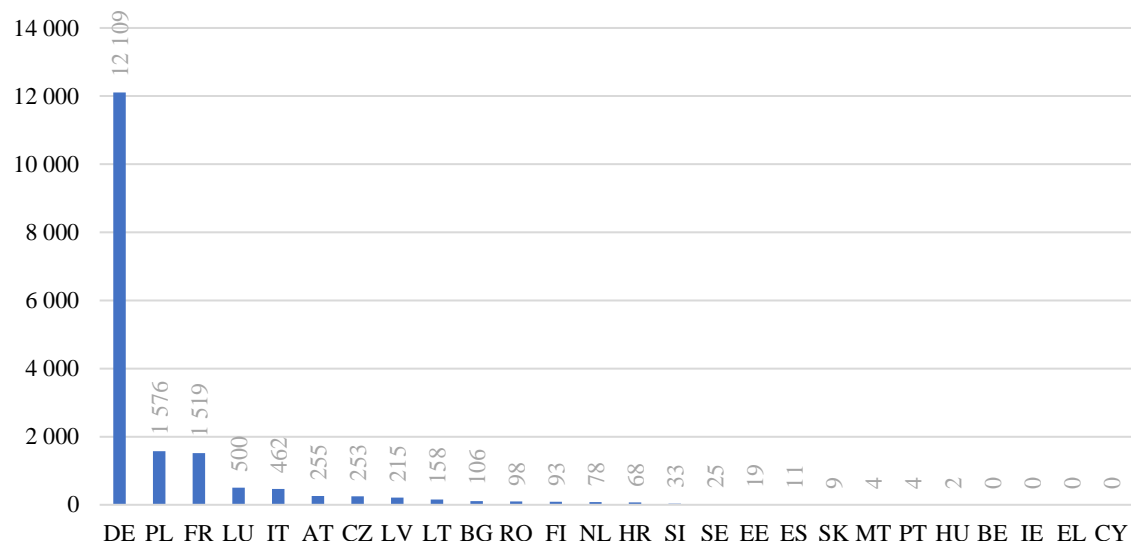
<sup>53</sup> Cerna, “The EU Blue Card”, 76.

Sona Kalantaryan et al., “Reforming the EU Blue Card as a Labour Migration Policy Tool?”, *Migration Policy Centre, Policy Brief 2015/08*, 2015, 8.

<sup>54</sup> Georg Menz, “Framing the matter differently: the political dynamics of European Union labour migration policymaking”, *Cambridge Review of International Affairs*, Vol.28, No.4, 2015, 564.

deficiencies of the national laws highly problematic. Meanwhile, scholars have also explored the weaknesses of the legislation.

*Figure 1: Number of issued Blue Cards by Member State in 2018*



Source: Eurostat

As Eisele pointed out, the coherence of the Blue Card scheme was first and foremost jeopardized by the provision that allows Member States to use their national arrangements for admitting high-skilled workers.<sup>55</sup> In its original proposal, the Commission set the objective to establish a level playing field in the EU in admitting high-skilled immigrants, however, the use of parallel national schemes has completely prevented the achievement of this goal<sup>56</sup>, which is reflected also in the most recent issuance statistics. For instance, the Netherlands has issued over 13,000, while Sweden over 6000 residence permits for highly qualified employment purposes through their national highly skilled immigration schemes in 2018, yet in the same year they granted only 78 and 25 Blue Cards respectively to non-EU citizens.<sup>57</sup> Out of the 17,600 Blue Cards issued in the EU in 2018 Germany accounted for 12,100 permits, which highlights that the EU scheme is widely underused (*see Figure 1 above*).<sup>58</sup> In fact, Germany is the only Member State that exclusively uses the Blue Card scheme to admit high-skilled non-EU citizens for employment

<sup>55</sup> Eisele, Katharina, “Why come here if I can go there? Assessing the ‘Attractiveness’ of the EU’s Blue Card Directive for ‘Highly Qualified’ Immigrants”, CEPS Paper in Liberty and Security in Europe, No-60, 2013, 15.

<sup>56</sup> Ibid.

<sup>57</sup> Eurostat, “First permits issued for remunerated activities by reason, length of validity and citizenship”, accessed 19 July, 2020, <https://ec.europa.eu/eurostat/data/database>.

<sup>58</sup> Ibid.



purposes, which can be explained by the fact that it lacked a high-skilled immigration policy at the time of implementation and decided to tailor the implementing national law according to its national preferences.

Another important shortcoming of the Blue Card is that it comes with cumbersome bureaucracy for the applicants as well as for the national authorities.<sup>59</sup> Meanwhile, Member States with national high-skilled migration schemes (such as Austria, the Czech Republic or the Netherlands) usually offer “fast-track procedures for permits and visas, exemptions from general immigration requirements and labour market tests, information campaigns and other incentives” for the high-skilled.<sup>60</sup> At the same time, a dozen Member States have added labour market tests to their Blue Card procedures, where the authorities need to check whether the vacancy could also be filled with a national or an EU citizen.<sup>61</sup>

The attractiveness of the Blue Card schemes varies significantly in terms of its duration of validity too. In some Member States, such as Spain, Cyprus or Bulgaria, the validity of the Blue Card is (the minimum) one year, while in Latvia it is 60 months.<sup>62</sup> In the countries issuing the most Blue Cards it ranges from 24 to 48 months.<sup>63</sup> As allowed by the Directive, there are great differences in “the definitions of ‘highly qualified employment’, ‘higher professional qualifications’, ‘higher education qualification’, ‘professional experience’ and ‘regulated profession’” across the Member States<sup>64</sup> that can significantly hinder the Blue Card holders’ mobility in the EU.

The salary threshold is also problematic as national average salaries can vary greatly across sectors and regions too, and a “single national threshold might not correspond to the competitive salary for a particular sector or occupation in a given place”.<sup>65</sup> As Kalantaryan et al. highlighted, the income-related criterion clearly discriminates small and medium businesses which might not be able to pay such high salaries but need high-skilled labour too.<sup>66</sup> Some countries also use their

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<sup>59</sup> Kalantaryan et al., “Reforming the EU Blue Card”, 8.

<sup>60</sup> European Commission, “Communication from the Commission to the European Parliament and the Council on the implementation of Directive 2009/50/EC on the conditions of entry and residence of third-country nationals for the purpose of highly qualified employment”, Brussels, 22.5.2014 COM(2014) 287 final, 4.

<sup>61</sup> Yvonne Giesing et al., “The EU Blue Card - Time to Reform?”, ifo Institute, ifo DICE Report 15(2), 2017, 40.

<sup>62</sup> Martina Burmann et al., “Highly Skilled Labour Migration in Europe”, ifo Institut, ifo DICE Report Vol.16, No.1 (2018), 45.

<sup>63</sup> Ibid.

<sup>64</sup> Commission, “Communication” “on the implementation of Directive 2009/50/EC”, 5.

<sup>65</sup> Kalantaryan et al., “Reforming the EU Blue Card”, 8.

<sup>66</sup> Ibid.

leeway to set the income threshold as high as they wish to restrict high-skilled immigration, for instance, Romania decided to require a gross salary of four times the national average.<sup>67</sup>

In 2014, the Commission found that the national high-skilled migration schemes compete with the Blue Card as well as with each other, and expressed its concerns about the “flaws in the transposition, the low level of coherence, the limited set of rights and barriers to intra-EU mobility” and committed to make efforts to put the Directive in ‘full use’.<sup>68</sup>

## **2.3. The 2016 proposal for a new Blue Card Directive**

### *2.3.1. Policy-making process*

In May 2015 in the European Agenda on Migration the Commission confirmed that it would review the Blue Card Directive to explore how to make it more effective as well as attractive for foreign talent. Between June and September 2015, a public consultation was held about the Blue Card, based on which the Commission made an in-depth assessment of the legislation. After European Commission President Jean-Claude Juncker announced a new package on legal migration with a reformed Blue Card Directive for early 2016 in his State of the Union Speech in September 2015, the Commission officially introduced its proposal for a recast Directive on 6 June 2016.<sup>69</sup>

The Presidency of the Council gave its support for making progress on the proposal in July 2016, and the same month the Council agreed on a mandate to start negotiations with the European Parliament. The first trialogue meeting took place on 12 September 2017, and although three more meetings were scheduled for the year, Justice and Home Affairs ministers could not agree on certain aspects of the proposal in the early phases such as “the inclusion of skills and the recognition of professional experience equivalent to education qualifications”, dismaying the Parliament.<sup>70</sup> The last attempt to go on with the negotiations was made by the Romanian Presidency in January 2019 that came forward with a compromise package regarding the proposal, however, the Parliament

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<sup>67</sup> Giesing et al., “The EU Blue Card”, 40.

<sup>68</sup> Commission, “Communication” “on the implementation of Directive 2009/50/EC”, 10.

<sup>69</sup> European Parliament, “JD - Revision of the Blue Card Directive”, Legislative Train – Towards a new policy on legal migration, May 2020, 2.

<sup>70</sup> Ibid.

informed it “that after discussions at a Shadows' meeting, substantial negotiations on the proposal could not take place on the basis of that package”.<sup>71</sup> The following Finnish Presidency report on the results of discussions on EU migration policy does not refer to the recast proposal of the Blue Card Directive, only calls for “making the most of the *acquis* in place”.<sup>72</sup> As the primary actor pursuing the revision of the Blue Card Directive was the Commission under the presidency of Jean-Claude Juncker, the future of the proposal now heavily depends on the ambitions of the new Commission.

### 2.3.2. *The objectives and content of the proposal*

The proposal presented in June 2016 was accompanied by an Impact Assessment of the proposed scheme that listed a range of policy options that the Commission considered with the aim to improve the current Directive. After balancing the implications of each of them, the Commission has chosen a ‘preferred option’ and has prepared the legislative proposal in line with it. The present thesis considers only this preferred policy option as it is the one that was laid down in the official recast proposal of the Directive. Accordingly, the official revision proposal is the main source of information for this subchapter.<sup>73</sup>

According to the Commission, the general objectives of the proposed legislation are to attract and retain foreign talent in order to improve the competitiveness and the demographic prospects of the EU as well as to address skill shortages by “better labour force (re)allocation through increased inflows, occupational and intra-EU mobility”.<sup>74</sup> According to the Commission’s argument, the EU can only become “as attractive as traditional immigration countries and compete for the limited supply of” high-skilled labour if it acts “as a single player” in the international arena.<sup>75</sup> Accordingly, it named the possibility for the high-skilled “to move easily across the EU to

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<sup>71</sup> Ibid.

<sup>72</sup> Ibid.

<sup>73</sup> European Commission, “Proposal for a Directive of the European Parliament and of the Council on the conditions of entry and residence of third-country nationals for the purposes of highly skilled employment”, COM(2016) 378 final, 2016/0176 (COD), Strasbourg, 7.6.2016.

<sup>74</sup> European Commission, “Executive Summary of the Impact Assessment accompanying the document Proposal for a Directive of the European Parliament and the Council on the conditions of entry and residence of third-country nationals for the purposes of highly skilled employment”, Commission Staff Working Document, SWD(2016) 194 final, Strasbourg, 7.6.2016, 2.

<sup>75</sup> European Commission, “Impact Assessment”, SWD(2016) 193 final Part 1/6, Strasbourg, 7.6.2016, 18.

work and reside in several Member States” the main added value of the proposed legislation<sup>76</sup>, which was also the main intention of the original Blue Card.

As regards the actual policy change and its extent, the Commission aims to make the Blue Card the ‘primary tool’ in the EU for admitting high-skilled labour and argues that this goal warrants substantial policy changes that can only be addressed by introducing a completely new directive and repealing the present one. That is, the proposal suggests the mandatory abolition of the parallel national high-skilled migration schemes that would mean that anyone who falls in the scope of the Directive could only be admitted to the Member State for employment purposes via the Blue Card procedure. In compliance with Article 79(5) TFEU, the Member States would still retain their right to determine the volumes of admission of third-country citizens who come from outside the EU to their territory for employment purposes. However, the Commission has proposed that this right would not apply in situations where the third-country citizen has previously been granted a Blue Card in one Member State and seeks to prolong its Blue Card holder status in the first or the second Member State.

Additionally, Member States would retain their right to reject a Blue Card application based on the above mentioned admission quotas as well as based on the outcome of a labour market test, a misconduct by an employer, unethical brain drain and if the person imposes a threat to public policy, public security or public health or if (s)he fails to comply with the special mobility rules that concern Blue Card holders.

An important change is that the Commission would modify the concept of highly qualified worker to highly skilled worker, which is also reflected in the renaming of the policy codification to ‘Directive on the conditions of entry and residence of third-country nationals for the purposes of highly skilled employment’. That is, the proposal would require all Member States to equally consider higher education diplomas and ‘higher professional skills’ in unregulated professions, where the latter would cover at least three years of professional experience relevant for the job. To support such practice, the Commission recommends the Member States to establish their system for the “formal validation of non-formal and informal learning”.<sup>77</sup>

As a key change, the Commission proposes to reduce the duration of the required work contract from 12 months to 6 months. As regards the salary threshold, the Member States would

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<sup>76</sup> Ibid.

<sup>77</sup> European Commission, “Proposal”, 22.

be allowed to set it between 1 and 1.4 times of the national gross salary. The proposal makes clear that the salary threshold should not be used to determine salary levels that derogate from the domestic practices or collective agreements. Member States should determine and fix their own threshold and allow for a lower threshold (80 percent of the general threshold) in shortage occupations and, as a new element, for fresh graduates for three years after obtaining their diploma. The proposal also introduces the right for self-employment for Blue Card holders, however, it would not substitute employment status that would remain an eligibility criterion for obtaining and holding a Blue Card.

The minimum duration of validity would be 24 months, or at least the duration of the work contract plus three months initially. However, after renewal the minimum duration would be two years in all cases. The maximum time for adopting a decision would be decreased from 90 days to 60 days. However, if an employer falls under the new concept of ‘Recognized employers’, the time limit would be 30 days. The proposal provides for a possibility in the Member States to introduce the ‘recognized employer status’ to whom a simplified procedure would apply for obtaining a Blue Card.

The proposal would strengthen the rights of Blue Card holders, particularly as it would provide for the right of equal treatment with nationals as regards social security. The Blue Card holder’s family must be exempted from any integration requirement measure before family reunification has been granted, and residence permits for them must be issued at the same time as for the applicant.

To facilitate the Blue Card holders’ occupational and geographical mobility, the key objective of the scheme, the proposal provides for simplified rules and procedure when they move to a second Member State. Most importantly, the Blue Card holder would be able to move to a second Member State already after 12 months of legal residence in the first. The person would have to apply for a Blue Card in the second country within maximum 30 days from the moving day and would be able to start working immediately after the day of submission. As regards professional qualification, the second time it would have to be only presented if the profession is a regulated profession where national laws provide for specific requirements. In any other case, only the valid (first) Blue Card, the work contract and the salary threshold criteria would have to be met by the applicant in the second Member State that would still ensure that the scheme remains demand driven. The family of the Blue Card holder would be able to move with him or her to the second

country based on their valid residence permits issued in the first Member State, and would be obliged to apply for a new residence permit in 30 days. When a Blue Card holder would relocate to a third Member State, the conditions would ease further as the person would be able to move after 6 months of legal residence in the second Member State.

As a new addition triggered by the mass influx of asylum seekers in 2015, the proposal would extend the scope of the Directive to high-skilled third-country nationals under international protection, who would be able to hold the two status in parallel but only their rights rising from the Blue Card status would be “mobile” within the EU in case of relocation.

## **2.4. Blue Card Revision: the current state of affairs**

The new European Commission that took office in December 2019 has already expressed its ambitions to enhance legal migration opportunities to the EU, and the revision proposal of the Blue Card Directive has been listed among the ‘Priority Pending Proposals’ in its Work Programme.<sup>78</sup> At the time of writing this thesis, the European Commission is working on a new ‘reinforced’ skills agenda for Europe as well as a new European Pact on Migration and Asylum. In its recent Communication it has committed to soon provide details for a renewed “approach to legal migration management in order for the EU to better attract skills and talents that the EU labour market needs”.<sup>79</sup> It explicitly declared that “relaunching and concluding swiftly the negotiations of the Blue Card Directive to attract highly skilled workers will remain a priority”.<sup>80</sup> However, while the ambitions are clearly there, progress remains to be seen as regards the proposal which has been proved to be extremely difficult in the past. A relatively recent note from the Presidency to the Strategic Committee on Immigration, Frontiers and Asylum acknowledges that the proposal is “in deadlock as no compromise has been reached yet between the co-legislators, despite the efforts of multiple Council presidencies”.<sup>81</sup> As it informs, the difficulties, that grew “in the context of the

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<sup>78</sup> European Commission, “Annexes to the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Commission Work Programme 2020”, COM(2020) 37 final, Annexes 1 to 5, Brussels, 29.1.2020, 23.

<sup>79</sup> European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Identifying and addressing barriers to the Single Market, COM(2020) 93 final, 6779/20, Brussels, 12 March 2020, 19.

<sup>80</sup> Ibid.

<sup>81</sup> Council of the European Union, Legal Migration – what can we do better?, Note 12269/19 LIMITE, Brussels, 4 October 2019, 2.

migration crisis that emerged in 2015 and the complex overall situation”, are primarily related to the parallel national schemes for high-skilled labour that the Member States wish to maintain, but not to the mobility provisions which would be the primary objective of the common policy.<sup>82</sup> However, it also acknowledges that the mutual recognition of residence permits constitutes a highly problematic issue due to the lack of trust among the Member States.<sup>83</sup>

### 3. Case studies of competitive national high-skilled migration schemes

The primary use of national high-skilled immigration schemes has been identified as the main obstacle to the EU-wide utilization of the Blue Card Scheme, which is the main reason why the Commission has proposed the abolition of such national policies. To estimate the ‘adoption potential’ of the proposed recast Directive in the Council, this chapter assesses the two most effective national high-skilled immigration schemes in the EU and compares them with the 2016 Blue Card proposal. *Table 1* in the end of this chapter summarizes the main features of the two national policies and the Blue Card proposal.

#### 3.1. Sweden

##### 3.1.1. *The Swedish labour migration policy*

Until 2008, Sweden used to have the most restrictive labour immigration policy among the OECD countries.<sup>84</sup> However, this has strikingly changed in December 2008, when a new labour migration law was implemented. This policy, which is still in effect today, turned out to be one of the most liberal labour immigration systems and probably the most attractive one in Europe for highly skilled migrants.<sup>85</sup>

However, in the case of Sweden, one cannot talk about a national high-skilled migration scheme as the country has a ‘general’ labour migration policy that is neither selective nor skill-

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<sup>82</sup> Ibid., 5.

<sup>83</sup> Ibid.

<sup>84</sup> Frida Boräng et al., “Constrained Politics: Labour Market Actors, Political Parties and Swedish Labour Immigration Policy”, *Government and Opposition*, Vol.54, No.1, 2019, 121.

<sup>85</sup> OECD/Bertelsmann Stiftung, “How do OECD countries compare in their attractiveness for talented migrants?”, *Migration Policy Debates* No.19, 2019, 1.

specific. Under this policy, the same rules apply for low- and high-skilled third-country citizens. However, as Menz points out, at the time of the policy's adoption, the employers' wish to easily attract high-skilled migrants was a key argument in the political discussion.<sup>86</sup> The general objective of the policy change was to ensure that the Swedish labour market can address short-term and long-term challenges easily such as labour shortage and ageing society.<sup>87</sup>

Today, labour immigration in Sweden is entirely employer-led and demand-driven and gives minimum room for the state to interfere as well as minimises the role of trade unions.<sup>88</sup> The system is considered highly liberal as there are no restrictions related to skills, occupations, industries or admission quotas as well as there is no labour market test required.<sup>89</sup> The underlying logic of this system is that it is the employers who can determine best their own needs, and by giving them maximum flexibility, they are able to satisfy their labour demand swiftly.<sup>90</sup>

As regards the procedure, prospective labour immigrants must apply for a job from outside of Sweden<sup>91</sup>, and once they obtain an employment offer, they have the key for immigration. As the principle of Community preference applies, the employer has an obligation to publicly advertise the position for at least ten days.<sup>92</sup> However, as the literature points out, the satisfaction of this condition is rarely checked in practice and the employers are free to hire workers regardless their nationality.<sup>93</sup> After successful recruitment, it is the employer that initiates the work permit application by filing an employment offer, however, the application fee of 2000 Swedish kroner must be paid by the applicant in most cases.<sup>94</sup>

To protect the domestic labour market and avoid any downward pressure on wages, the employment offer must reflect similar terms of employment to those enjoyed by the national workforce, including wage levels, insurance and further conditions. More concretely, the terms of

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<sup>86</sup> Georg Menz, "Building Pathways for the Highly Skilled: Adopting a Comparative Political Economy Approach to the Study of German, Austrian and Swedish Labour Migration Policies", *German Politics*, Vol.25 No.3, 2016, 340.

<sup>87</sup> Henrik Emilsson, "Labour Migration in a Time of Crisis Results of the New Demand-Driven Labour Migration System in Sweden", MIM Working Paper Series No.14:1, Malmö University, 2014, 3.

<sup>88</sup> Swedish Migration Board, "Attracting highly qualified and qualified third-country nationals to Sweden", Report from EMN Sweden 2013:1, 11.

<sup>89</sup> Emilsson, "Labour Migration", 6.

<sup>90</sup> *Ibid.*, 28.

<sup>91</sup> "Work Permit Requirements", Swedish Migration Agency, accessed 25 June, 2020, [www.migrationsverket.se](http://www.migrationsverket.se).

<sup>92</sup> "When you are employing someone from a country outside the EU", Swedish Migration Agency, accessed 25 June, 2020, [www.migrationsverket.se](http://www.migrationsverket.se).

<sup>93</sup> Sayaka Osanami Törngren et al., "Comparing the Experiences of Highly Skilled Labor Migrants in Sweden and Japan: Barriers and Doors to Long-term Settlement", *International Journal of Japanese Sociology* No.26, 2016, 70.

<sup>94</sup> "Work Permit Requirements".



employment has to be in line with the Swedish collective agreements or has to be “customary within the occupation or industry” and the employer must pay a salary that the employee can live on, determined as a minimum of 13,000 Swedish kroner per month before taxes in 2020.<sup>95</sup> Additionally, the employer has to provide health-, life-, occupational injury- and occupational pension insurances to the worker.<sup>96</sup> While the Swedish Migration Board is the authority reviewing the terms of the job offer and it grants the work permits in the end, the employer has to send the job offer to the relevant trade union to obtain its approval before submitting the application.<sup>97</sup>

Although filing an application is relatively simple, the general processing time of a work permit application can take time, between 6 and 12 months.<sup>98</sup> To speed up the process at least for certain larger recruiters, a system of ‘certified employers’ exists, under which the processing time is substantially shorter: 10 working days for first time applications and 20 for renewals, while 60 days for applications submitted without a trade union’s opinion.<sup>99</sup> An employer can apply for such certification if it has filed at least ten work permit applications in the last 18 months, but newly founded companies can be exempted from this condition.<sup>100</sup>

In 2020, the refusal rate of applications at all skill levels is around 30 percent, which can cover administrative mistakes or incomplete applications, inadequate employment terms or persons posing a public threat.<sup>101</sup> If the application is accepted, residence and work permits are usually issued for the duration of the employment contract, but maximum for two years at a time and it also cannot last longer than the validity date of the applicant’s passport.<sup>102</sup> After two years, the work permit is renewable one or more times.<sup>103</sup> However, in the first two years, the work permit is linked to the specific employer, while in the first four years it is linked to the specific occupation, meaning that in case the migrant wishes to change any of these during the restricted period, a new employer needs to submit a new application for a new work permit for him or her which it can do while the non-EU worker is in Sweden.<sup>104</sup> The labour migrant can apply for a permanent residence

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<sup>95</sup> Ibid.

<sup>96</sup> Ibid.

<sup>97</sup> Ibid.

<sup>98</sup> “How long does it take to get a work permit for Sweden?”, Relocate to Sweden, accessed 25 June 2020, [www.relocatetosweden.com](http://www.relocatetosweden.com).

<sup>99</sup> “Become a certified employer”, Swedish Migration Agency, accessed 25 June, 2020, [www.migrationsverket.se](http://www.migrationsverket.se).

<sup>100</sup> Ibid.

<sup>101</sup> “Work permit statistics”, Swedish Migration Agency, accessed 19 July 2020, [www.migrationsverket.se](http://www.migrationsverket.se).

<sup>102</sup> “After a decision has been made on a residence permit for work in Sweden”, Swedish Migration Agency, accessed 25 June 2020, [www.migrationsverket.se](http://www.migrationsverket.se).

<sup>103</sup> Ibid.

<sup>104</sup> Emilsson, “Labour Migration”, 7.

permit in Sweden if (s)he has had a work permit for 48 months in the last seven years.<sup>105</sup> If the employment contract is terminated earlier than planned, the work permit also terminates, yet a grace period of three months is offered for job search.<sup>106</sup> After that (s)he has to leave the country if (s)he does not have a new job.

As regards the labour migrant's rights, (s)he "enjoys the same rights as other residents when working and living in Sweden".<sup>107</sup> Family members can accompany the labour immigrant from the beginning given that they can be supported by the worker financially, and they are granted residence and work permits for the same period.<sup>108</sup>

Swedish labour immigration law is also generous towards university students, who can apply for a work permit if they have a residence permit for study purposes and if they have completed one study semester.<sup>109</sup> As regards asylum-seekers, they are given a temporary residence permit after submitting an asylum application that allows them to work if they have a valid travel document. In case their asylum application is refused, they can still have a ground to stay with a work permit if they have been employed at least for the last four months before the decision and they have a job offer from the same employer for minimum 12 more months.<sup>110</sup>

As the above discussed work permit is specifically linked to employment as well as to the employer and the occupation, this permit cannot be used for self-employed business activities. However, the Swedish laws also make it possible to obtain a residence permit for self-employment purposes, however, this is a distinct procedure with other specific conditions and with this type of residence permit one cannot take up employment elsewhere, only at his or her company.<sup>111</sup>

### *3.1.2. Comparing the Swedish policy and the Blue Card proposal*

When one compares the Swedish labour immigration policy and the Blue Card proposal, the most striking difference can be found in the scope of these policies. While the Blue Card

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<sup>105</sup> "After a decision".

<sup>106</sup> Emilsson, "Labour Migration", 7.

<sup>107</sup> Ibid.

<sup>108</sup> Ibid.

<sup>109</sup> "Students who have got a job and want to apply for a work permit", Swedish Migration Agency, accessed 25 June 2020, [www.migrationsverket.se](http://www.migrationsverket.se).

<sup>110</sup> "Former asylum seekers who have found employment and want to apply for a work permit", Swedish Migration Agency, accessed 25 June 2020, [www.migrationsverket.se](http://www.migrationsverket.se).

<sup>111</sup> "Residence permit for people who have their own business", Swedish Migration Agency, accessed 25 June, 2020, [www.migrationsverket.se](http://www.migrationsverket.se).

represents a skill-specific EU labour migration policy addressing a relatively narrow group of labour migrants, the Swedish system does not make distinctions between skill levels but provides for a completely market demand-driven immigration system that welcomes all low-, middle- and high-skilled workers given that employers need them. This is a fundamental difference between the two policies that implies a great ‘misfit’ and high adaptational costs for Sweden. To potentially adapt to the proposed EU policy, Sweden would have to change its approach towards labour immigration, and in many ways, it would have to introduce more complexity to its labour immigration system.

Most notably, in the Swedish system applicants do not have to present any proof of qualifications or professional experience during the work permit application procedure but ‘only’ need to secure a job offer from a Swedish employer. In a sense, a work permit application is completely in the hands of the employers as they have to initiate and arrange the process, and they have to offer employment terms that are in compliance with the regulatory requirements detailed above. While the role of the state is minimized in the Swedish system, the Blue Card warrants more checks by state authorities, for instance by applying the ‘higher professional qualification’ as an admission criterion. However, more state control is a prerequisite for a well-functioning EU Blue Card scheme that offers EU-wide labour mobility, because it implies that the Member States would need to recognize residence permits issued by other Member States which practice requires a high level of trust among the EU countries.

As regards other admission criteria, the Swedish system is also more liberal. It allows applications with job contracts of shorter durations than six months and the salary requirement is always linked to collective agreements or sectoral norms, and not to one specific national salary threshold. The minimum salary threshold of 13,000 SEK gross per month concerns jobs at all skill levels, therefore it is not relevant for policy comparison. The Swedish system does not provide for special rules for shortage occupations that the EU policy proposal would make mandatory, which also brings more complexity to the system. Another, more problematic point concerns the processing time that the EU policy would reduce to 60 days. In Sweden only certified employers receive decisions in such a short time, however, they represent only a smaller share of the total work permit applications.

However, the existence of ‘recognized employers’ in the Swedish system shows that certain aspects of the Swedish policy and the Blue Card proposal ‘fit’ well. The duration of validity rules

are also similar as the permit is or can be issued for the duration of the work contract initially according to both of them. While the Swedish system grants three months grace period for job search if one's job contract is terminated earlier, the EU scheme would automatically require adding three months to the duration of the Blue Card's validity. Additionally, the Swedish policy of maximum two years long work permits would comply with the EU proposal too.

Concerning people under international protection and graduates, the Swedish policies are already more liberal than the suggestions in the EU proposal, therefore in these aspects the proposal would probably not face opposition from Sweden given that it does not have to abolish its more favourable policies concerning these groups. However, the proposed right for self-employment with the Blue Card would require Sweden to introduce a new approach to work permits, and issue multi-purpose permits instead of employer- and occupation-specific ones.

To summarize, although the Swedish policy and the EU proposal show important similarities, they apply a completely different approach to the labour immigration procedure which implies a significant misfit between the two as well as high adaptational costs for Sweden. While based on the goodness of fit approach currently little potential can be seen for Sweden's adjustment to the Blue Card proposal, there is one recent political development in Sweden that can increase the chances of it. In February 2020, the Swedish government has formally decided to review its current work permit regulation, inter alia with the aim to make Sweden more attractive for high-skilled workers and to create a simpler and faster entry procedure for them.<sup>112</sup> It plans to introduce a special 'talent visa' to facilitate their immigration as well as it wishes to address the deportation problem that often arises from small administrative mistakes made by the employers during the application procedure.<sup>113</sup> Although the final report of the policy review is expected only for November 2021, the intention to introduce a skill-specific labour immigration policy is already an important sign that the misfit between the Swedish policy and the EU proposal can be reduced.<sup>114</sup>

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<sup>112</sup> "New governmental review into work permit regulation in Sweden", EY, accessed 28 June, 2020. <https://skattenatet.ey.se/2020/02/07/new-governmental-review-into-work-permit-regulation-in-sweden/>

<sup>113</sup> Ibid.

<sup>114</sup> Ibid.

## 3.2. The Netherlands

### 3.2.1. *The Dutch Highly Skilled Migrants Scheme*

The Netherlands is among those EU countries that has its specific national policy for admitting high-skilled third-country citizens. The Dutch Highly Skilled Migrants Scheme (Kennismigrantenregeling) was introduced in 2004 and is considered to be one of the most liberal immigration systems for ‘knowledge migrants’ in the EU.<sup>115</sup> This policy mirrors the Dutch government’s ambition “to transform the Netherlands into a knowledge economy”.<sup>116</sup>

According to the Dutch policy, migrants can be considered high-skilled if their salary reaches a certain level. In 2020, this income level is 4,612 euros per month before taxes for people over the age of 30, while 3,381 euros for people younger than 30 years.<sup>117</sup> The amounts are adjusted annually according to the changes of salaries in collective labour agreement.<sup>118</sup> Additionally, the salary level has to be “in conformity with what is a common salary in the Netherlands for the job to be performed” which requirement is sometimes checked during a “market conformity test” by the authorities.<sup>119</sup>

The Dutch government has chosen to apply only a salary criterion and does not require qualifications of studies or any proof of knowledge.<sup>120</sup> It considers the income level the most objective criterion as it directly reflects the contribution of the immigrant to the Dutch economy.<sup>121</sup> The government intentionally does not require the checking of the immigrant’s educational level as it believes that it is not “determining for the migrants’ level of productivity and the extent to which they would be innovative”.<sup>122</sup> Therefore, the Netherlands selects high-skilled immigrants exclusively based on their ‘market value’. However, there are also practical reasons for not

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<sup>115</sup> Ricky van Oers et al., “The Dutch position in the ‘battle for brains’ - An overview of Dutch policy and legislation on highly skilled labour migration”, Nijmegen Migration Law Working Papers Series 2012/01, 2012, 6.

<sup>116</sup> Ibid.

<sup>117</sup> “Required amounts income requirement”, Dutch Immigration and Naturalisation Service, accessed 25 June, 2020, <https://ind.nl/>.

<sup>118</sup> Maud Jenneskens, “Building a more attractive European Blue Card Directive: A comparison with the Dutch Highly Skilled Migrant Scheme”, Master Thesis, Tilburg University, 2019, 13.

<sup>119</sup> Tesseltje de Lange et al., “Labour Migration and Labour Market Integration of Migrants in the Netherlands: Barriers and Opportunities”, Annex D to SEO Report No.2019-24, SEO Amsterdam Economics, 2019, 17.

<sup>120</sup> Van Oers et al., “The Dutch position”, 7.

<sup>121</sup> Ibid.

<sup>122</sup> Ibid.

requiring any qualifications: the country did not want to deal with the administrative burden of evaluating qualifications that would prolong the immigration process to a great extent.<sup>123</sup>

There is another key requirement of the system that concerns the employers although. They can only hire high-skilled workers from third countries if they are a ‘recognised sponsor’. Without being recognized as a sponsor, the employer cannot use the Highly Skilled Migrants Scheme and must request a work permit through a general procedure that includes a labour market test.<sup>124</sup> Recognised sponsors and their future high-skilled employees can enjoy a fast-track procedure for obtaining the required residence permit that takes maximum two weeks from the time of submission. To obtain this status, the employer must apply for it for a fee of 4016 euros in 2020, but smaller businesses under 50 employees pay only half of this amount.<sup>125</sup> Once the employer is recognized as a sponsor, the residence permit application of the future high-skilled employee can be submitted after a job offer has been made.<sup>126</sup> The list of organisations that are recognized sponsors can be found in an online public register maintained by the government.

Under the Highly Skilled Migrants Scheme, workers get a residence permit for the duration of their employment contract, for minimum three months and maximum five years.<sup>127</sup> However, if anything changes in the terms of employment, both parties must report it to the authorities.<sup>128</sup>

As regards the rights of the high-skilled worker, (s)he enjoys equal treatment with Dutch nationals<sup>129</sup>. (S)he can also benefit from a special taxation concession if (s)he has specific skills or knowledge that is scarce or not available in the Netherlands.<sup>130</sup> This so-called “30% rule for labour migrants” provides for a tax-free income of 30 percent for a maximum period of five years.<sup>131</sup> The Dutch law also allows Highly Skilled Migrants to take up work as an entrepreneur besides their employment status without an additional permit if their core activity remains their job as an employee.<sup>132</sup>

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<sup>123</sup> Ibid.

<sup>124</sup> Tesseltje et al., “Labour Migration”, 17.

<sup>125</sup> “Recognition as a sponsor”, Dutch Immigration and Naturalisation Service, accessed 25 June, 2020, <https://ind.nl/>.

<sup>126</sup> Tesseltje et al., “Labour Migration”, 17.

<sup>127</sup> Ibid., 18.

<sup>128</sup> Ibid.

<sup>129</sup> Jenneskens, “Building”, 17.

<sup>130</sup> Ibid.

<sup>131</sup> Ibid.

<sup>132</sup> “New employment statuses allow for more room for entrepreneurship”, Dutch Immigration and Naturalisation Service, accessed 25 June, 2020, <https://ind.nl/>.

As regards family members, they can accompany the high-skilled worker to the Netherlands. The duration of their residence permit is the same as the worker's, and it also grants them access to employment.<sup>133</sup> However, as for the labour migrant and the family members as well, sickness insurance has to be arranged.<sup>134</sup> The high-skilled migrant and his or her family are exempted from any integration measures, yet if they wish to apply for a permanent residence permit or naturalisation after five years of legal residence, they need to pass an integration exam.<sup>135</sup>

The Dutch policy has special provisions for university graduates, who have the right for a so-called 'orientation year' after their graduation.<sup>136</sup> For bachelor graduates, the diploma has to be obtained at a Dutch higher education institution, however, at master level not only Dutch, but foreign diplomas can be eligible too if the issuing institution is among the top 200 universities in world rankings.<sup>137</sup> This is a special residence permit designed for fresh graduates who wish to stay and find a job in the Netherlands. The orientation year does not have to immediately follow the graduation but can be requested within three years after it.<sup>138</sup>

Asylum-seekers or people under international protection are not covered by the Highly Skilled Migrants scheme. According to the Dutch laws, asylum-seekers are not allowed to work in the first six months starting from the submission of their asylum-application, however, after that, if they still have not received a decision but hold a valid travel document, they can work for 24 weeks in a year.<sup>139</sup> Once they are granted a residence permit, they can work without any specific restrictions and without a labour market test.<sup>140</sup> As the Dutch Highly Skilled Migrant Scheme applies for high-skilled foreigners who live outside of the Netherlands at the time of application, refugees are not in its scope.

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<sup>133</sup> Jenneskens, "Building", 18.

<sup>134</sup> Ibid.

<sup>135</sup> Van Oers et al., "The Dutch position", 5.

<sup>136</sup> "Looking for a job after study, promotion or research", Dutch Immigration and Naturalisation Service, accessed 25 June 2020, <https://ind.nl/>.

<sup>137</sup> Ibid.

<sup>138</sup> Ibid.

<sup>139</sup> "Asylum Seeker", Dutch Immigration and Naturalisation Service, accessed 25 June 2020, [https://ind.nl](https://ind.nl/).

<sup>140</sup> Ibid.

### 3.2.2. *Comparing the Dutch policy with the Blue Card proposal*

It is quite apparent that the Dutch high-skilled immigration scheme and the Blue Card proposal have many similarities. Both policies are selective, address high-skilled labour immigrants, and aim to offer a fast-track procedure. However, the rationale behind the two schemes is different if one looks at the admission criteria. The Dutch scheme is highly liberal compared to the Blue Card proposal as it only sets a salary requirement for the prospective high-skilled immigrant and does not deal with professional qualifications or experience, similarly to the Swedish system. The specific salary criterion allows the Netherlands to select labour immigrants based on their ‘market value’, while employers are entrusted with selecting applicants who indeed have high-level qualifications or valuable professional experience with which they can contribute to their business activity and to the economy.

Although the ‘market value’ approach explains why the salary threshold is quite high (1.6-2.1 times higher than the median national gross salary in 2020) in the Dutch scheme, it represents an important misfit with the Blue Card proposal that would maximize the threshold at a level equivalent to 1.4 times the average national gross income. Despite this difference, there are also important similarities. Many elements of the Blue Card proposal are already used by the Dutch scheme such as the concept of recognized employers, the provisions concerning fresh graduates, or the right for self-employment. However, in terms of admission criteria, processing time, the duration of the required job contract and family rights, the Dutch scheme is simpler and more advantageous for the high-skilled. Just as for Sweden, adjusting its national high-skilled immigration policy to the current Blue Card proposal would imply great adaptational costs for the Netherlands. The Dutch scheme provides for a remarkably simple and effective immigration procedure for the high-skilled which is reflected in the high number of admissions. Abolishing this scheme and adjusting to the present form of the Blue Card proposal would materialize in great institutional costs and would probably lead to additional financial costs, as it would require greater bureaucracy.

While EU policy harmonisation in the field of migration has probably more chances when it is stricter than the national policy, the high level of difference between the two in terms of process simplicity seems problematic. For the Netherlands, adjusting to the EU proposal would probably lead to some loss of competitiveness in terms of talent attraction. Therefore, it cannot be



realistically expected that the Dutch government would agree to the abolition of its current national scheme and the transposition of a directive that is based on the current Blue Card proposal.

**Table 1. Comparing national admission policies concerning high-skilled labour immigration to the 2016 Blue Card proposal**

	<b>Swedish labour migration policy (2008)</b>	<b>The Dutch Highly Skilled Migrant Scheme (2004)</b>	<b>Blue Card Directive proposal (2016)</b>
<b>Approach</b>	Non-selective, non-skill specific Employer-led, demand-driven with minimum state interference	Selective, non-skill specific Employer-led, demand driven	Selective, skill-specific, only for high-skilled  Demand-driven with potential for high state interference
<b>Labour market test</b>	No	No	Yes if desired by the MS
<b>Job offer requirement</b>	Yes, minimum for 3 months	Yes, minimum for 3 months	Yes, minimum for 6 months
<b>Salary requirement</b>	Yes, compliance with collective agreements or normal wages, at least 13,000 SEK gross per month	Yes, 4612 euros monthly gross for persons older than 30 years, 3381 euros for persons younger than 30 years, conformity with the common salary for the job	Yes, 1-1.4 times of average gross national salary; in compliance with domestic collective agreements
<b>Professional qualifications requirement</b>	No	No	Yes, higher education qualification or at least 3 years relevant and equivalent professional experience
<b>Special provisions for shortage occupations</b>	No	No	Yes, mandatory lower salary threshold (80 percent of the general)
<b>System of recognized employers</b>	Yes, available for employers with at least 10 work permit applications in the last 18 months (exemption exists for new companies)	Yes, 'recognized sponsor' status is mandatory for using the scheme	Yes, recommended for the MS in order to simplify and shorten the application process

	<b>Swedish labour migration policy (2008)</b>	<b>The Dutch Highly Skilled Migrant Scheme (2004)</b>	<b>Blue Card Directive proposal (2016)</b>
<b>Processing time</b>	6-12 months (10/20/60 days for certified employers)	Maximum two weeks	Maximum 60 days (30 days for recognized employers)
<b>Duration of initial residence or work permit</b>	Duration of work contract, 3 months grace period if the holder loses his/her job Maximum 24 months at one time, renewable	Duration of work contract, maximum 5 years	Minimum 24 months, or initially at least the duration of the job contract plus 3 months
<b>Family rights</b>	Yes, slightly favourable than with a Blue Card (automatic work permit for spouse)	Yes, slightly favourable than with the Blue Card (family enjoys the same rights as the worker, gets automatic access to labour market)	Yes
<b>Self-employment rights</b>	Only with specific work permit, employment and self-employment need different permits	Yes, if employment remains the core activity	Yes, if employment remains the core activity
<b>Covering people under international protection in the MS</b>	Yes, more favourable than the Blue Card policy; even asylum-seekers with travel documents can work	No, only for persons recruited abroad	Yes
<b>Special provisions for graduates</b>	Yes, students are allowed to work; graduates can prolong their student residence permit for 12 months to seek employment	Yes, orientation year residence permit available for fresh graduates, can be used within 3 years from the date of graduation	Yes, mandatory lower salary threshold for young professionals for 3 years from date of graduation (80 percent of the general one)
<b>Conditions for acquiring long-term residence status</b>	After 4 years of employment (national long-term residence permit)	After 5 years of legal residence (national long-term residence permit)	After 3 years of continuous residence in one Member State or after 5 years cumulated in different MS as a Blue Card holder (EU long-term residence status)

## 4. Conclusions

Twenty years ago the Member States first expressed their support for creating common EU labour migration policies to address the economic and demographic challenges that the Community faces as well as to improve the EU's competitiveness by attracting talent. Although EU immigration policies have developed notably since Tampere, the harmonisation of labour immigration policies have still not been achieved due the Member States' reluctance. A common high-skilled migration policy, the Blue Card scheme was supposed to be created the most easily, however, the watered down Blue Card Directive adopted in 2009 with its many 'may clauses' and its implementation have shown that the Member States are highly protecting their national policies even in the case of high-skilled workers.

The development of common migration policies is primarily the ambition of the European Commission that sees it as a chance for furthering the European integration project as well as an opportunity to gain more competence. However, in such a sensitive and politically charged policy area as migration it traditionally has a hard time to put legislations in effect. It has become even more difficult to achieve progress in migration policies after the migration crisis in 2015. Nevertheless, the European Commission, as the driver of the European integration, has not given up its ambitions. In 2016 the Juncker Commission has introduced a proposal for a new Blue Card Directive that aimed to eliminate the flaws of the current legislation. Although this proposal has been in a political deadlock since the beginning of 2019, the newly elected European Commission has made commitments to carry on with the proposal.

As the primary use of national high-skilled admission schemes has been identified as the main obstacle to putting into effect a well-functioning common high-skilled migration policy, the Commission has proposed the abolition of the parallel national legislations. This thesis aimed to assess the competitiveness of the 2016 Blue Card Directive proposal against the national schemes and attempted to predict its chances for adoption in the Council. Building on the assumption that Member States with the most effective high-skilled migration policies have the lowest incentives to give up their national policies, the Swedish and the Dutch national schemes have been analysed and compared to the Blue Card proposal. These two Member States offer the most liberal national immigration policies for high-skilled workers and issue the most residence and work permits for them.

The case studies of Sweden and the Netherlands have revealed that both countries have a simpler and more open labour migration policy towards high-skilled workers than the Blue Card provides for. While in the case of Sweden this simplicity most notably appears in its policy's non-skill-specific and employer-led nature, in the case of the Netherlands, the straightforwardness comes from both the lack of qualification-related requirements and a remarkably fast processing time that is allowed by the mandatory 'recognized employer' status of recruiters. Based on the goodness of fit approach, the relatively high misfit between the national policies and the Blue Card proposal suggest that there is little chance that these Member States would agree to the current proposal and would abolish their well-functioning schemes.

This is particularly true for Sweden, which has opted for a non-skill-selective labour migration approach and applies the same scheme for all labour migrants. From a regulatory and institutional perspective, this is a much less complex approach than a skill-selective one such as the Blue Card. However, it seems that the misfit between the Swedish and the EU policy will probably be reduced in the following years, as the Swedish government has recently announced that it reviews its current work permit regulations and that it plans to introduce a 'talent visa' for the high-skilled in the future.

While the Dutch scheme and the Blue Card proposal have many similar or even identical elements, the former still offers more simplicity and involves much less bureaucracy. Although the Dutch policy does not require proof of qualifications from applicants, this quality of the immigrant labour is checked by the employers without a doubt. That is, the Dutch system implies a high level of trust between the authorities and the government. If such a system works well, it cannot be expected that the Netherlands would wish to make its policy stricter and introduce the proof of skills as an admission criterion.

All in all, the most competitive national high-skilled immigration schemes in the EU and the Blue Card proposal have several similar elements, yet domestic policies still provide for simpler arrangements and more flexibility for the Member States. Based on the findings of the current thesis, it can be expected that the proposal for the Blue Card Directive will be modified to some extent in the future, and there is a high chance that the Member States will not agree to the abolition of their national schemes. The main added value of the Blue Card, the intra-EU labour mobility is seemingly not a priority interest for the Member States but for the Commission. Therefore, national governments would probably keep on clinging to their national policies, just as they did before.

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