



# Policy brief: Making Europe More Competitive for Highly-Skilled Immigration - Reflections on the EU Blue Card<sup>1</sup>

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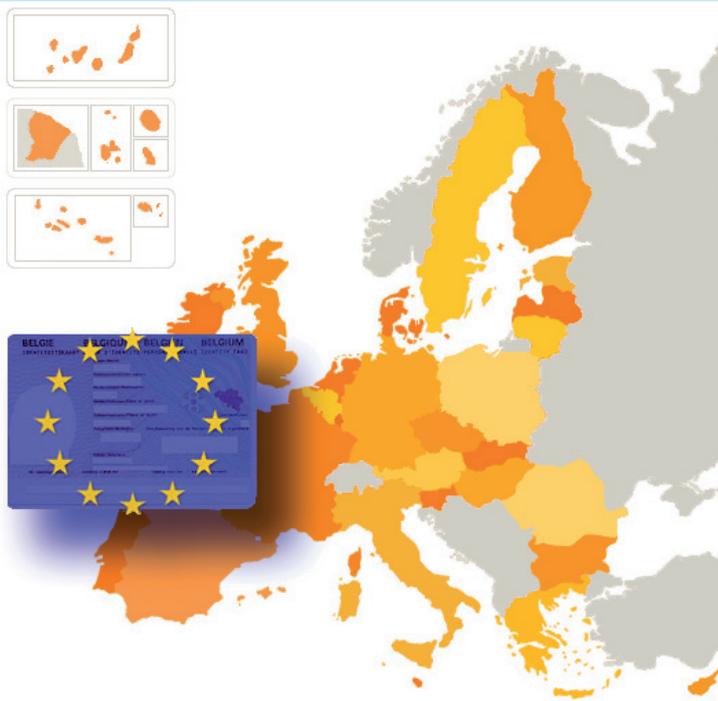
## Introduction

According to the Lisbon Strategy, the EU aims to become “the most dynamic and competitive knowledge-based economy in the world capable of sustainable economic growth [...] by 2010”. This statement was adopted at the European Council summit held in Portugal in March 2000. Ten years later the aim has proven to be too ambitious. Yet, steady economic growth does form the basis of market economies. One way to increase prosperity and enhance economic vitality relates to attracting highly qualified immigrants from abroad. In this respect, the adoption of the EU Blue Card directive in May 2009 demonstrated the EU’s eagerness to compete for global talent. But does the EU Blue Card as it stands offer greater incentive than comparable schemes to attract the brightest minds on a world-wide scale? This policy brief outlines the legal framework of the EU Blue Card and identifies the added value, the flaws and challenges of this initiative.

## Context

While economic considerations were certainly of paramount importance, the introduction of the EU Blue Card must also be considered in a broader context. Europe is faced with declining

fertility rates and an ageing population, and the demographic change will have a direct effect on the employment situation. In 2005, the Commission pointed out that between 2010 and 2030 the EU-25’s working age population will be reduced by some 20 million people if migration flows to EU Member States remain unchanged<sup>2</sup>. The 2009 Stockholm Programme, which sets out the novel multi-annual agenda for EU justice and home affairs, emphasises the creation of a flexible labour immigration policy that is demand-driven and responsive to the needs of the Member States’ national labour markets. This idea is not new. In a first attempt, the Commission put forward a proposal for a directive in 2001 concerning “the conditions of entry and residence of third-country nationals for the purpose of paid employment and self-employed economic activities<sup>3</sup>”. The Council did, however, not show a keen interest in the proposal and buried the initiative in the files<sup>4</sup>. As a consequence, the Commission issued a Green Paper dealing with an EU approach to managing economic migration in 2005<sup>5</sup>. Taking into account the feedback to the Green Paper, the Commission published a Policy Plan on legal migration one year later<sup>6</sup>. The document reiterates the need to manage effectively the influx of migrants to the EU considering the demographic shift and the labour shortage prevailing in the Member States. In response to these trends, the Policy Plan promotes a sectoral approach and sets out a package of



proposals including one general framework directive and four specific directives including a directive for the recruitment of highly-skilled workers from third countries.

### The EU Blue Card

#### Aims

Council Directive 2009/50/EC on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment, known as the EU Blue Card directive, was adopted on 25 May 2009<sup>7</sup>. The directive is the result of in-depth deliberations in the Council and the European Parliament, and the original proposal issued by the Commission has been subject to major amendments. By enhancing admission and mobility, the Community legal framework aims to attract highly-skilled third-country workers to the EU. The initiative corresponds to the objectives set out at the Lisbon European Council in 2000 and it constitutes an instrument to address labour market demands existent in the Member States<sup>8</sup>.

#### Scope

The EU Blue Card directive stipulates the rules for the admission and residence for third-country nationals for the purpose of highly qualified employment in the territory of a Member State, and of their family members for stays of more than three months. In addition, the directive determines the conditions for the entry and residence of the EU Blue Card holder and of his or her family in a Member State other than the first Member State<sup>9</sup>.

In order to be eligible for the Blue Card, third-country nationals have to comply with a number of admission requirements laid down in Article 5 of the directive. Firstly, the person in question must be in possession of a valid work contract or a binding job offer for higher qualified employment of at least a year. Higher qualified employment means the employment of a person, who is protected as an employee under national employment law for the purpose of exercising genuine and effective work for, or under the direction of, someone else in return for remuneration, and who disposes of higher professional qualifications<sup>10</sup>. Article 2 (g) of the directive defines higher professional qualifications as higher education qualifications or, when provided for by national law, at least five years of relevant professional experience.

Secondly, the third-country national must provide a document attesting the eligibility for a regulated profession, or for unregulated professions proof of the relevant higher professional qualification<sup>11</sup>. Thirdly, as a general rule the gross annual salary level must be at least 1.5 times the average gross annual salary in the Member State concerned. Finally, the Blue Card applicant must have valid travel documents, comprehensive sickness insurance and must not pose a threat to public policy, public security or public health<sup>12</sup>.

Rules on the procedures of the EU Blue Card are enshrined in Articles 7 to 11 of the directive. The Blue Card holder is entitled to enter, re-enter and stay in the territory of the Member State issuing the Blue Card<sup>13</sup>. Member States may reject an application for a Blue Card based on a number of reasons. These grounds relate inter alia to the non-fulfilment of the admission criteria in Article 5 of the directive, the labour market situation of the Member States, ethical recruitment policies, and the sanctioning of an employer for undeclared work<sup>14</sup>. As the Member States were keen to have the final say on the volume of admitted highly-skilled third-country nationals, a safeguard clause was inserted in this respect, which can also be invoked as a ground to consider a Blue Card application as inadmissible<sup>15</sup>.

The EU Blue Card provides for certain social and economic rights equal to those granted to the nationals of the host state. These rights concern labour market access, rules in case of temporary unemployment, equal treatment, family unity, and EC long-term resident status<sup>16</sup>. Member States shall restrict access to the labour market for the Blue Card holder during the first two years of legal employment in the Member State to the exercise of paid employment activities in conformity with the admission conditions set out in Article 5 of the directive<sup>17</sup>. The restrictions on access to employment activities may be retained in cases where these activities are reserved to nationals, Union citizens or EEA citizens. However, the principle of Community preference as stipulated in the Acts

of Accession of 2003 and 2005 must be observed. The equal treatment clause contained in Article 14 of the directive covers non-discrimination in view of a broad range of areas such as employment conditions, freedom of association, education, and the recognition of diplomas. The rules on family members of the EU Blue Card holder are governed by Directive 2003/86/EC<sup>18</sup> with the derogations stipulated in Article 15 of the Blue Card directive.

The document explicitly acknowledges the need to promote the mobility of highly qualified third-country workers between the Community and their countries of origin with a view of stimulating geographical and circular migration. Hence, derogations from Council Directive 2003/109/EC concerning the status of third-country nationals who are long-term residents<sup>20</sup> have been laid down: special provision is made for a longer period of absence from the territory of the Community without interrupting the time period of legal and continuous residence, which is required to obtain EC long-term resident status. The period of absence for an EU Blue Card holder is extended to a maximum of 12 consecutive months and it may not exceed 18 months in total in line with Article 16 (3) of the directive. This principle applies regardless of whether the Blue Card holder has made use of the right to take up residence in another Member State provided for in Article 18 of the directive. The EU Blue Card holder also enjoys more favourable treatment once he or she has acquired long-term resident status: the authorised period of absence from the territory of the Community is extended to 24 consecutive months. However, it lies within the Member States' discretion to restrict these more lenient rules to cases where the third-country national concerned has been absent in order to exercise an economic activity, or to perform a voluntary service, or to study in the country of origin<sup>21</sup>. In addition, Member States should abstain from active recruitment in developing countries regarding sectors under stress. In this context, the creation of ethical recruitment policies, to be observed by public and private employers in sectors such as health care or education, is encouraged. With regard to the health sector, the Council and the Member States had earlier pointed out a strategy concerning the critical shortage of health workers in developing countries<sup>22</sup>.

The EU Blue Card enables its holder and his or her family members to move to another Member State for highly qualified employment purposes after the first eighteen months of legal residence in the first Member State. Article 18 of the Blue Card directive specifies the procedures concerning residence in the second Member State and the application process for a new Blue Card. The rules regarding the residence for the family members of the EU Blue Card holder in the second Member State are indicated in Article 19 of the directive.

### Critical Reflections

The analysis of the EU Blue Card reveals certain discontinuities, which raise doubt as to whether the chief aim of the initiative – to enhance the mobility of the highly qualified to the EU – will actually be achieved. Some of the concerns on the final version of the “flexible and demand-driven entry system” are subject to discussion below.

The initial proposal was considerably watered down in the decision-making process. The role of the European Parliament was limited as it could only give its opinion on the draft version of the Blue Card. It voted and approved the proposal on 20 November 2008. However, the vote was characterised by differences in opinion as demonstrated by a large number of abstentions. The report of the European Parliament included modifications of the original proposal, especially with regard to the Blue Card eligibility requirements. The European parliamentarians took the view that the Blue Card applicant must have found a job in a Member State, have at least five years professional experience in the sector concerned or a university qualification recognised by the Member State, and earn at least 1.7 times the national average wage. Furthermore, the prevention of brain drain in third countries, in particular in respect to sectors under stress was underscored. In general, the European Parliament suggested a clearer set of definitions and more leeway for the Member States. Its recommendations were, however, only partially incorporated<sup>23</sup>.

Some of the definitions for the purpose of the Blue Card were fiercely discussed; these included “highly qualified employment” and the minimum national wage. Concerning highly qualified employment, an amended version of the Community law definition, which is formulated in a flexible way allowing for the possibility to substitute a higher education qualification with at least three years of equivalent professional experience, was eventually adopted: the Blue Card defines higher professional qualifications – required for highly qualified employment – as higher education qualifications, or when provided for by national law “at least five years of professional experience of a level comparable to higher education qualifications and which is relevant in the profession or sector specified (emphasis added) in the work contract or binding job offer”. Thus, the threshold was set at five instead of three years and the term “equivalent” was deleted<sup>24</sup>. Furthermore, as had been predicted the income criterion triggered disagreement due to the fact that the minimum wage across Europe differs significantly. It has been argued that a system based on age, linguistic proficiency, skills and work experience to assess the eligibility for an EU Blue Card would have been more suitable, since it is likely that such a system allows for agreement on access to the whole EU labour market<sup>25</sup>.

Next, the added value of the EU Blue Card was challenged considering that the Member States may apply their national highly-skilled admission systems parallel to the EU Blue Card as expressed in Article 3 (4) of the directive. On top of that, the Blue Card directive applies without prejudice to more favourable provisions of Community law and bi- or multilateral agreements concluded between one or more Member States and one or more third countries. The question arises as to what extent the EU Blue Card makes Europe more attractive for highly qualified manpower and how the legislative instrument in fact promotes mobility. Taking into account the bulk of admission requirements that third-country nationals have to comply with and the possible quotas Member States can impose, doubts are vindicated as to whether or not the Blue Card scheme provides for a flexible and fast-track admission procedure for highly-skilled migrants<sup>26</sup>. As opposed to the U.S. Green Card, the envisaged EU Blue Card neither provides for a right of entry and residence, nor for a right of access to the labour market<sup>27</sup>.

Moreover, concerns were raised as to how the EU Blue Card meshes with the transitional working restrictions that apply to the nationals of most of the Member States that joined the EU in 2004 and 2007. In this respect, it seems bizarre that the directive establishes procedures for entry and residence conditions for a selected group of third-country nationals, whereas EU citizens, whose free movement is restricted by transitional arrangements, are treated by comparison at a disadvantage.

Circular and temporary migration, as well as other measures, which incite so-called brain gain and which minimise the negative impacts of highly skilled immigration on developing countries are stressed<sup>28</sup>. The more favourable rules for acquiring long-term resident status have been mentioned above. Moreover, Article 3 (3) gives the Community and/or the Member States the option to conclude agreements with third countries, which exclude certain professions from the scope of the directive so as to ensure ethical recruitment in sectors that suffer from manpower. It is argued that this way, the workforce in the developing country, which is signatory to the agreement, is protected. Next, Member States can reject an EU Blue Card application from sectors exhibiting a shortage of skilled human resources in the country of origin. The use of ethical recruitment policies seems like a decent solution at first sight but all provisions on ethical recruitment in the Blue Card directive are optional. It is also questionable whether it is indeed "ethical" to reject the issuance of a Blue Card on the basis of a person's origin<sup>29</sup>. Thus, while the issue of brain drain is mentioned and marginally addressed in the EU Blue Card directive, it is inappropriate to speak of real safeguards to prevent the phenomenon of brain drain.

Notwithstanding these shortcomings, it is important to note that the EU Blue Card constitutes the first harmonising instrument in the area of highly-skilled recruitment and employment on the European level. The Blue Card also stimulates mobility within the EU as it integrates the option for the Blue Card holder to move to a second Member State after eighteen months of residence in the first Member State. It remains to be seen how the EU Blue Card directive will actually be transposed by the Member States into their national legal orders. The implementation date is 19 June 2011.

### Conclusion

Economic legal migration has always been a particularly sensitive field for the EU Member States. While the negotiations on a general directive on economic migration failed, agreement was reached in 2009 with regard to highly qualified workers. The question then arises: at what price was this agreement reached? The EU Blue Card scheme provides for the lowest common denominator. This could have been one reason why the Irish and the British governments decided not to opt-in. However, the world-wide competition for talents is hard-fought as the U.S., Canada and Australia are leading actors in attracting highly-skilled workers. Europe aims to catch up in this race but the final version of the EU Blue Card does not provide it with a strong position.



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- <sup>1</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>2</sup> COM(2004) 811 final, 11.1.2005, p. 3.
- <sup>3</sup> Proposal for a Council Directive on the conditions of entry and residence of third-country nationals for the purpose of paid employment and self-employed economic activities, COM(2001) 386 final, 11.7.2001.
- <sup>4</sup> See S. Bertozzi, "Legal Migration – Time for Europe to Play Its Hand", CEPS Working Document No. 257, February 2007, p. 6.
- <sup>5</sup> Green Paper on an EU approach to managing economic migration, COM(2004) 811 final, 11.1.2005.
- <sup>6</sup> Policy Plan on legal migration, COM(2005) 669 final, 21.12.2005.
- <sup>7</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>8</sup> See Recitals 3, 4, 6 and 7 of Council Directive 2009/50/EC.
- <sup>9</sup> See Article 1 of Council Directive 2009/50/EC.
- <sup>10</sup> Article 5 (1)(a) of Council Directive 2009/50/EC in combination with Article 2 (b) of Council Directive 2009/50/EC.
- <sup>11</sup> See Articles 5 (1)(b) and (c) of Council Directive 2009/50/EC.
- <sup>12</sup> Articles 5 (1)(d),(e) and (f) of Council Directive 2009/50/EC.
- <sup>13</sup> See Article 7 (4)(a) of Council Directive 2009/50/EC.
- <sup>14</sup> See Article 8 of Council Directive 2009/50/EC.
- <sup>15</sup> Article 6 of Council Directive 2009/50/EC.
- <sup>16</sup> See Chapter IV of Council Directive 2009/50/EC.
- <sup>17</sup> Article 12 (1) of Council Directive 2009/50/EC.
- <sup>18</sup> Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification.
- <sup>19</sup> Recitals 20 and 21 of Council Directive 2009/50/EC.
- <sup>20</sup> Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents.
- <sup>21</sup> Article 16 (5) of Council Directive 2009/50/EC.
- <sup>22</sup> Such a strategy should inter alia take into account the experience of the African Union and the New Partnership for Africa's Development, and promote the efforts made by the World Health Organization in setting up a regional observatory, networks, research, and training, see: European Programme for Action to tackle the critical shortage of health workers in developing countries (2007-2013), Conclusions of the Council of the European Union and the Representatives of the Governments of the Member States Meeting within the Council, 14 May 2007, para. 7.
- <sup>23</sup> See European Parliament legislative resolution of 20 November 2008 on the proposal of a Council Directive on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment, document number: P6\_TA(2008)0557.
- <sup>24</sup> E. Guild, "EU Policy on Labour Migration: A First Look at the Commission's Blue Card Initiative", CEPS Policy Brief No. 145, November 2007, pp. 2-4.
- <sup>25</sup> J. von Weizsäcker, "Strait is the Gate – Europe's Immigration Priorities", Bruegel Policy Brief No. 5, July 2008, p. 4.
- <sup>26</sup> A. Wiesbrock, "Making Europe more attractive to highly-skilled migrants? The deficiencies of the EU Blue Card Directive", 2009, publication forthcoming.
- <sup>27</sup> E. Guild, "EU Policy on Labour Migration: A First Look at the Commission's Blue Card Initiative", CEPS Policy Brief No. 145, November 2007, p. 4.
- <sup>28</sup> Recital 22 of Council Directive 2009/50/EC.
- <sup>29</sup> Article 8 (4) of Council Directive 2009/50/EC.

