

THE EUROPEAN UNION BLUES: WHY THE BLUE CARD WILL NOT HELP THE E.U. LABOR MARKET

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I. INTRODUCTION

In March 2000, the Lisbon European Council¹ established a strategic goal for the European Union “to become the most competitive and dynamic knowledge-based economy in the world” by 2010.² Five years later, the European Council adopted the Hague Programme, an agenda to strengthen freedom, security, and justice in the European Union, in which it recognized that “[l]egal migration will play an important role in enhancing the knowledge-based economy in Europe, in advancing economic development, and thus contributing to the implementation of the Lisbon strategy.”³ Halfway to the 2010 deadline, with little progress made toward achieving the Lisbon Strategy, a task force assembled by the European Commission recognized how ambitious the goal was.⁴ The ten-year deadline came and went, yet the European Union failed to reach any of the goals established by the Lisbon Strategy; instead of becoming “the most dynamic economy in the world,” the European Union has been “losing ground.”⁵ Now, under a slightly revised, but substantially similar goal for 2020—“to turn the EU into a smart, sustainable and inclusive economy delivering high levels of employment, productivity and social cohesion”—the European Union

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1. The European Council is an institution of the European Union (EU) composed of the heads of state of each of the Member States and is responsible for the “big and more strategic questions to do with the core new tasks of the EU.” Helen Wallace, *An Institutional Anatomy and Five Policy Modes*, in POLICY-MAKING IN THE EUROPEAN UNION 49, 64 (Helen Wallace et. al. eds., 5th ed. 2005).

2. Presidency Conclusions, Lisbon European Council (Mar. 23–24, 2000), available at http://www.europarl.europa.eu/summits/lis1_en.htm.

3. The Hague Programme: Strengthening Freedom, Security and Justice in the European Union, 2005 O.J. (C 53) 1, 4 [hereinafter Hague Programme].

4. See HIGH LEVEL GRP., FACING THE CHALLENGE: THE LISBON STRATEGY FOR GROWTH AND EMPLOYMENT 6 (2004) (noting slow progress due to failure to “act on much of the Lisbon strategy with sufficient urgency”).

5. Tito Boeri, *Europe’s Lost Decade*, PROJECT SYNDICATE (Mar. 23, 2010), <http://www.project-syndicate.org/commentary/boeri6/English>.

continues its efforts to improve its economy.”⁶

The Blue Card immigration scheme was adopted by the European Union to encourage the migration of “highly qualified” workers⁷ from “third countries”⁸ to the European Union to achieve these goals.⁹ The Blue Card, modeled after the U.S. Green Card but named for the blue of the European Union’s flag,¹⁰ is a type of residence and work permit.¹¹ In conjunction with other legislation on legal migration, the European Union hopes that the Blue Card will address the significant current and predicted future shortcomings in the E.U. labor market.¹²

The Blue Card program ultimately passed by the European Union is unlikely to achieve the desired impact. While drafting the Blue Card directive, the European Commission¹³ determined that allowing highly qualified workers holding Blue Cards to move across multiple Member States for employment purposes would be a major factor in increasing the attractiveness of the European Union for migrant workers.¹⁴ In addition, allowing this movement by Blue Card holders would result in more efficient allocation of the labor supply across the European Union.¹⁵ Nonetheless, while it technically provides for intra-E.U.

6. *Communication from the Commission: Europe 2020: A Strategy for Smart, Sustainable and Inclusive Growth*, at 5, 18, COM (2010) 2020 final (Mar. 3, 2010) (one way to achieve these goals is to “promote a forward-looking and comprehensive labour migration policy which would respond in a flexible way to the priorities and needs of labour markets”); *see also* Boeri, *supra* note 5 (commenting that the European Union has merely postponed the Lisbon Strategy).

7. The term “highly qualified” worker as used in the Blue Card directive refers to a person who has completed “a post-secondary higher education programme” lasting at least three years, or in the alternative, has “a least five years of professional experience of a level comparable to higher education qualifications.” Council Directive 2009/50/EC, art. 2, 2009 O.J. (L 155) 17, 21 [hereinafter Blue Card Directive].

8. The term “third country” is used throughout this Note to refer to any country outside of the European Union. *See also id.* art. 2 (defining a “third-country national” as “any person who is not a citizen of the [European] Union”).

9. *See id.* pmb. ¶ 7.

10. Leo Cendrowicz, *A Green Light for Europe’s Blue Card*, TIME (Oct. 24, 2007), <http://www.time.com/time/world/article/0,8599,1674962,00.html>.

11. Blue Card Directive, *supra* note 7, pmb. ¶ 2.

12. *See Communication from the Commission: Policy Plan on Legal Migration*, at 7–8, COM (2005) 669 final (Dec. 21, 2005) [hereinafter *Policy Plan on Legal Migration*]. The European Union also plans immigration legislation targeted at other categories of workers, including seasonal workers, Intra-Corporate Transferees, and remunerated trainees. *Id.*

13. The European Commission is a quasi-executive institution of the European Union. Wallace, *supra* note 1, at 50.

14. *Commission Staff Working Document: Accompanying Document to the Proposal for a Council Directive on the Conditions of Entry and Residence of Third Country Nationals for the Purpose of Highly Qualified Employment: Impact Assessment*, at 15, SEC (2007) 1403 (Oct. 23, 2007) [hereinafter *Impact Assessment*].

15. *Id.* at 44–45.

mobility,¹⁶ because the option to move between Member States is not guaranteed and there are a number of requirements a worker must meet to take advantage of it, the provision will not help attract highly qualified workers. As passed, the Blue Card fails to take advantage of the opportunity, unique to the European Union, to attract workers by offering highly qualified third-country nationals access to twenty-seven labor markets.¹⁷

As a result, the Blue Card system adds little value to the existing state of legal migration, which is largely controlled on a national level by the Member States.¹⁸ This Note explores the impact of the Blue Card on the attractiveness of the European Union for highly qualified migrant workers through the access it offers—or fails to offer—to the E.U.-wide labor market.¹⁹ The Note begins in Part II(A) with a brief history of the formation of the European Union and the fundamental right of free movement guaranteed to its citizens. Then, in Part II(B), it examines the state of legal migration law before the creation of the Blue Card. Part II(C) reveals the problems facing European labor markets, which underlie the need for more cohesive legal migration policies. Then, Parts II(D) and II(E) compare the identified potential for geographic mobility with the relevant provisions of the Blue Card directive as passed. Finally, in Part III, this Note concludes that, in order to make the European Union more attractive to highly qualified third-country nationals, the European Union must offer such workers more flexible access to the E.U.-wide labor market.

16. See Blue Card Directive, *supra* note 7, art. 18.

17. *Commission Proposal for a Directive on the Conditions of Entry and Residence of Third-Country Nationals for the Purposes of Highly Qualified Employment*, at 7, COM (2007) 637 final (Oct. 23, 2007) [hereinafter *Proposal*] (“The EU’s main attractiveness compared to its competitors is the possibility of accessing 27 labour markets, and thus to grow professionally while responding to EU companies’ concrete needs.”).

18. See Lucie Cerna, *The EU Blue Card: A Bridge Too Far?* 29 (2010) (paper presented to the Fifth Pan-European Conference on EU Politics, Porto, Portugal), available at <http://www.jhubc.it/ecpr-porto/virtualpaperroom/041.pdf> (“The final version of the Blue Card will not make much of a difference.”).

19. Although the provisions of the Blue Card Directive establishing favorable conditions for family reunification, see Blue Card Directive, *supra* note 7, pmbl. ¶ 23, and providing Blue Card holders equal treatment to citizens of the host Member State, *id.* art. 14, impact the attractiveness of the program to highly qualified third-country workers, those provisions are outside the scope of this Note.

II. BACKGROUND

A. *An Introduction to the European Union and the Right to Freedom of Movement*

The economic devastation of Europe following World War II created considerable desire and support for European integration in order to promote recovery and reconstruction and to avoid repeating the mistakes that led to the war.²⁰ European integration was initiated in 1950 with the creation of the European Coal and Steel Coalition, which established a common market for coal and steel among its six members: France, West Germany, Italy, Belgium, the Netherlands, and Luxembourg.²¹ In pursuit of further integration, the members signed the Treaty of Rome in 1957, establishing the European Economic Community, agreeing to create a complete common market, and referencing goals of additional integration.²² Primarily concerned with economic cooperation, the Treaty of Rome also includes an underlying political agenda, envisioning a supranational community that would supersede the individual Member States.²³

In 1967, the European Community was created by merging the European Coal and Steel Coalition and the European Economic Community.²⁴ Shortly thereafter, however, enthusiasm for European integration waned significantly, and, until the mid-1980s, the European Community was characterized by disagreement, lack of cooperation, and turbulence.²⁵ By the mid-1980s, the European Community rediscovered the ideas and objectives of those who had conceptualized European integration in the 1950s, in part because the Member States recognized how cooperation could benefit them economically.²⁶ Pressure for further integration culminated in the twelve Member States signing and ratifying the Maastricht Treaty, which created the European Union in 1992.²⁷ One of the most visible achievements of the economic

20. DAVID ARMSTRONG ET AL., FROM VERSAILLES TO MAASTRICHT: INTERNATIONAL ORGANISATION IN THE TWENTIETH CENTURY 140 (1996).

21. *Id.* at 143–45.

22. *Id.* at 149–51. The Treaty of Rome also created the European Atomic Energy Community. *Id.* at 149. Despite being considered the most important of the communities at the time, in hindsight, the European Atomic Energy Community’s “role in the process of European integration has ultimately been negligible.” *Id.* at 153–54.

23. *Id.* at 150.

24. *Id.* at 163.

25. *Id.* at 165.

26. *See id.* at 188.

27. *Id.* at 200–01. *See generally* Treaty on European Union, Feb. 7, 1992, 1992 O.J. (C 191) 1. The Maastricht Treaty is formally titled the Treaty of European Union; its common name

integration of the European Union was the 2002 adoption of the euro, a common currency currently used by seventeen Member States.²⁸

The European Union is unique among international organizations.²⁹ It has been described as “a hybrid form of ‘postnational constitutionalism’ without parallel or precedent in the modern world; a unique mix of intergovernmental and supranational institutions and actors that is more than an international legal order but does not quite fit any accepted category of governance.”³⁰ The European Union has the particular potential to “accommodate and overcome differences between its members.”³¹ Some of the goals and purposes of the European Union include “eliminat[ing] barriers which divide Europe” for economic and social progress, acting in concert “to guarantee steady expansion, balanced trade, and fair competition,” and “reducing differences existing between the various regions.”³² Nevertheless, there is continual tension between the desire for further integration at the European level and the concomitant reluctance by the Member States to relinquish national sovereignty.³³

In addition to the closer integration achieved by the European Union,

refers to the location at which it was signed. ARMSTRONG ET AL., *supra* note 20, at 201.

28. See Dermot Hodson, *Economic and Monetary Union: An Experiment in New Modes of EU Policy-Making*, in POLICY-MAKING IN THE EUROPEAN UNION 157, 158, 160 (Hellen Wallace et al. eds., 6th ed. 2010). The seventeen Member States of the European economic and monetary union (the Eurozone) are: Austria, Belgium, Cyprus, Estonia, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, Malta, the Netherlands, Portugal, Slovakia, Slovenia, and Spain. See *Map of Euro Area 1999–2011*, EUR. CENT. BANK, <http://www.ecb.int/euro/intro/html/map.en.html> (last visited June 18, 2012). The United Kingdom and Denmark have formal opt-outs from joining the Economic and Monetary Union, see Consolidated Versions of the Treaty on European Union and the Treaty on the Functioning of the European Union, Protocol Nos. 15–16, Mar. 30, 2010, 2010 O.J. (C 83) 1, 284–87 [hereinafter Consolidated Treaty], but the remaining E.U. Member States are required to join as soon as they meet certain criteria, although in practice they may choose when and whether to apply for membership in the Eurozone. Hodson, *supra*, at 165.

29. ARMSTRONG ET AL., *supra* note 20, at 218.

30. Cris Shore, *Government Without Statehood? Anthropological Perspectives on Government and Sovereignty in the European Union*, 12 EUR. L.J. 709, 717 (2006).

31. Roderick Parkes, *Embrace an Unromantic Union*, EUR. VOICE (Sept. 9, 2010), <http://www.europeanvoice.com/article/imported/embrace-an-unromantic-union/68814.aspx>.

32. Consolidated Version of the Treaty on the Function of the European Union pmbl., Mar. 30, 2010, 2010 O.J. (C 83) 47, 49 [hereinafter TFEU]. This version of the Treaty of Rome incorporates the amendments made by the Treaty of Lisbon in 2009. See Consolidated Treaty, *supra* note 28, at p. 2 of cover (Note to Reader).

33. See Mark A. Pollack, *Theorizing EU Policy-Making*, in POLICY-MAKING IN THE EUROPEAN UNION, *supra* note 1, at 13, 29 (describing cyclical nature of European integration between centralization at the supranational level and decentralization to return power to the national level).

the European Union has also expanded its membership.³⁴ Through a number of enlargements, the European Union has grown from the original six Member States to its current twenty-seven Member States.³⁵ Today, the population of the European Union exceeds 503 million.³⁶ It has a gross domestic product of \$15.39 trillion dollars, which is higher than the gross domestic product of any single country in the world.³⁷ The European Union has also become one of the most important agents of change with respect to policy-making in Europe.³⁸

Two important elements of the Treaty of Rome that remain a key foundation of the European Union today are the right of free movement within the Union and the abolition of discrimination based on nationality.³⁹ Although there were originally rules that applied specifically to the movement of workers, because workers are now considered a category of citizens, the rules granting all citizens of the European Union the right to move freely between and reside in any of the Member States apply equally to workers.⁴⁰ This freedom is considered an individual right of E.U. citizenship.⁴¹ “For E.U. citizens,

34. E.g., Ulrich Sedelmeir, *Enlargement: From Rules for Accession to a Policy Towards Europe*, in POLICY-MAKING IN THE EUROPEAN UNION *supra* note 28, at 401, 402.

35. TFEU, *supra* note 32, pmb. n.1. The twenty-seven Member States include the original six, Belgium, Germany, France, Italy, Luxembourg, the Netherlands, plus the countries that have since joined: Denmark, Ireland, the United Kingdom, Greece, Spain, Portugal, Austria, Finland, Sweden, Cyprus, Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovakia, Slovenia, Bulgaria, and Romania. *Id.*; see also *Countries*, EUROPA, http://europa.eu/about-eu/countries/index_en.htm (last visited June 19, 2012) (listing members of European Union and their year of entry).

36. *European Union*, CIA – THE WORLD FACTBOOK, <https://www.cia.gov/library/publications/the-world-factbook/geos/ee.html> (last updated June 8, 2012).

37. *Country Comparison: GDP (Purchasing Power Parity)*, CIA – THE WORLD FACTBOOK, <https://www.cia.gov/library/publications/the-world-factbook/rankorder/2001rank.html> (last visited June 19, 2012).

38. Helen Wallace et. al., *An Overview*, in POLICY-MAKING IN THE EUROPEAN UNION, *supra* note 1, at 3, 3.

39. TFEU, *supra* note 32, arts. 18, 45.

40. MASSIMO CONDINANZI ET AL., CITIZENSHIP OF THE UNION AND FREE MOVEMENT OF PERSONS 67 (2008). “Every person holding the nationality of a Member State is a citizen of the [European] Union.” *Id.* at 5 n.19 (citing TFEU, *supra* note 32, art. 17). “As a result, the acquisition (or loss) of the nationality of one of the Member States automatically leads to the acquisition (or loss) of Union citizenship.” *Id.* at 4–5.

41. *Id.* at 103; Hague Programme, *supra* note 3, art. 1.1 (“The right of all EU citizens to move and reside freely in the territory of the Member States is the central right of citizenship of the Union.”). Free movement was not universally enjoyed by all E.U. citizens; those in the newer Member States—the countries that acceded to the European Union in 2004 (Czech Republic, Cyprus, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovakia, and Slovenia) and 2007 (Bulgaria and Romania)—could still be subjugated to something less than full access to the labor markets of older Member States under transitional arrangements. See *Impact Assessment*, *supra* note 14, at 67. This concern is now moot because any transition arrangements with respect to the

the right to migrate to other Member States for reasons of work has since the creation of the European Community been promoted as one of the fundamental freedoms which form the basis of the common market.”⁴² The right is an often recognized benefit of E.U. citizenship; among E.U. citizens, the “freedom to travel, study and work anywhere in the [European Union]” is the most frequent response to the question “[w]hat does the European Union mean to you personally?”⁴³

Therefore, one possible way for the European Union to address skill shortages in the labor markets of its Member States is to encourage the geographic mobility of its citizens.⁴⁴ In 2005, 55% of the active, mobile E.U. citizens from the western Member States were highly skilled.⁴⁵ Yet, less than 2% of E.U. citizens take advantage of the opportunity to move to another Member State in pursuit of highly skilled work, in part because skilled E.U. citizens have reached high levels of employment within their own Member States.⁴⁶

2004 enlargement were required to come to an end by April 30, 2011. *See* Act Concerning the Conditions of Accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic and the Adjustments to the Treaties on which the European Union Is Founded, Annexes V, VI, VIII, IX, X, XII, XIII, XIV, Sept. 23, 2003, 2003 O.J. (L 236) 33, 803, 812, 824, 836–37, 846, 876, 906, 915 (Member States may apply national measures regulating new Member States’ access to their labor markets for five years after the date of accession and, “in case of serious disturbances of its labour market,” may extend the measures for an additional two years with notification to the Commission). With respect to the 2007 enlargement, transitional arrangements are required to end by December 31, 2013, at the latest. Protocol Concerning the Conditions and Arrangements for Admission of the Republic of Bulgaria and Romania to the European Union, Annexes VI, VII, Apr. 25, 2005, 2005 O.J. (L 157) 29, 104–05, 138–39 (same provisions as in the 2003 Treaty above with respect to Bulgaria and Romania). This raises valid concerns if a Member State still applying transitional measures to a new Member State were then to offer free access to its labor market to a highly qualified third-country national, but because the concerns are only of “temporary importance,” they will be disregarded for the remainder of this Note. *See Impact Assessment, supra* note 14, at 67.

42. PIETER BOELES ET AL., EUROPEAN MIGRATION LAW 225 (2009).

43. 1 EUROPEAN COMM’N, EUROBAROMETER 73: PUBLIC OPINION IN THE EUROPEAN UNION 126–31 (2010) (The “freedom to travel, study and work anywhere in the EU” was mentioned by 45% of people across the European Union and was the first response in seventeen countries, “particularly in central and eastern European countries . . . , the Nordic countries, . . . and Cyprus.” In the other ten Member States, which are all members of the Eurozone, “the euro” was the first response, followed by “freedom to travel, study and work anywhere in the EU” with respect to nine of the Member States.)

44. *Impact Assessment, supra* note 14, at 11.

45. *Id.*

46. *Id.*

B. *The State of European Immigration Law Before the Adoption of the Blue Card*

Labor migration is a major incentive for the movement of persons, but protecting national labor markets is a significant reason for governments to control migration.⁴⁷ Therefore, immigration is one policy area where there is considerable tension between national and supranational forces.⁴⁸ “Member States are reluctant to harmonize rules on access of third country nationals to their labor markets, precisely because of their insistence to preserve this fundamental area of migration law within their sovereign discretion.”⁴⁹

Before the impetus to develop more cohesive legal migration legislation in the European Union, immigration policy was largely handled on a national level.⁵⁰ At the time the Blue Card proposal was under consideration, only ten Member States had specific immigration schemes for admitting highly qualified workers.⁵¹ Currently, immigration policy within the European Union is increasingly developed through collaboration,⁵² although “[c]ompared to other areas of law, the position of the supranational institutions in this area is still rather weak.”⁵³

In contrast to E.U. citizens, who are guaranteed free movement throughout the European Union,⁵⁴ third-country workers are only granted intra-E.U. mobility once they obtain long-term resident status.⁵⁵ This status is only achieved after five years of legal and continuous residence in a Member State,⁵⁶ and the mobility may still be subject to limitations imposed by other Member States.⁵⁷

47. BOELES ET AL., *supra* note 42, at 225.

48. Elizabeth Collett, *The Proposed European Blue Card System: Arming for the Global War for Talent?*, MIGRATION POL’Y INST. (Jan. 7, 2008), <http://www.migrationinformation.org/feature/display.cfm?ID=667>.

49. BOELES ET AL., *supra* note 42, at 225; *see also* ANJA WIESBROCK, LEGAL MIGRATION TO THE EUROPEAN UNION 202 (2010) (“[M]igration policy is an area where the Member States have defended their sovereignty and have been reluctant to relinquish national control.”).

50. Cendrowicz, *supra* note 10.

51. *Proposal*, *supra* note 17, at 3; *see also, e.g.*, WIESBROCK, *supra* note 49, at 564–74 (discussing the provisions of the German and Dutch laws targeting highly skilled workers and the Swedish immigration laws, which do not include a separate scheme for such workers).

52. Sandra Lavenex & William Wallace, *Justice and Home Affairs: Towards a “European Public Order”?*, in POLICY-MAKING IN THE EUROPEAN UNION, *supra* note 1, at 457, 457.

53. WIESBROCK, *supra* note 49, at 202.

54. *See discussion supra* text accompanying notes 40–42.

55. *Impact Assessment*, *supra* note 14, at 15.

56. Council Directive 2003/109/EC, art. 4, 2004 O.J. (L 16) 44, 47.

57. *Id.* art. 14–15 (possible limitations include requiring applicants for residence in a second

C. *The Problem Facing the European Union Economy: "The 'Need' Scenario"*

The overall population of the European Union is predicted to fall slightly, and will age significantly, by 2050.⁵⁸ The statistics used when creating the Blue Card reflected that the working age population of the European Union was expected to decline by 2011.⁵⁹ This is consistent with the most recent projections.⁶⁰ At the same time, the European Union is seeing continuous growth of demand for employment in high-education sectors.⁶¹ The greatest labor shortages facing the European Union in the next twenty years are expected to be in highly skilled occupations.⁶² As a result, higher net immigration flows are necessary to compensate for the fall in eligible workers in order to maintain a consistent level of economic growth in the European Union.⁶³ One study suggests that over 20 million skilled workers will be needed over the next twenty years.⁶⁴ Thus, E.U. labor markets have been broadly described as being in a "need" scenario with respect to economic immigration.⁶⁵

Despite the demonstrated need for highly qualified workers, "[t]he [European Union] as a whole . . . seems not to be considered attractive by highly qualified professionals in a context of very high international competition."⁶⁶ European Commission President José Manuel Barroso stated, "Europe is an immigration continent. We are attractive to many. But we are not good enough at attracting highly skilled people. Nor are we young or numerous enough to keep the wheels of our societies and

Member State to provide evidence of sickness insurance and sufficient resources to support themselves or requiring them to attend language courses).

58. *Impact Assessment*, *supra* note 14, at 8.

59. *See generally Policy Plan on Legal Migration*, *supra* note 12, at 4.

60. *See* EUROPEAN COMMISSION: DIRECTORATE-GENERAL FOR ECONOMIC AND FINANCIAL AFFAIRS, THE 2012 AGEING REPORT: UNDERLYING ASSUMPTIONS AND PROJECTION METHODOLOGIES 20 (2011) ("The population aged 15-64 will start to decline as of 2010 in the EU and, over the whole projection period [2012-2060], it will drop by 14 per cent.").

61. *Proposal*, *supra* note 17, at 3; *see also* WIESBROCK, *supra* note 49, at 285 & n.198 (3% employment growth in high-education sectors compared to 1% in other sectors).

62. *Impact Assessment*, *supra* note 14, at 11-12. Engineering and computer technology are predicted to be most impacted by labor shortages. Yasin Kerem Gümüs, *EU Blue Card Scheme: The Right Step in the Right Direction?*, 12 EUR. J. MIGRATION & L. 435, 447 (2010).

63. *Impact Assessment*, *supra* note 14, at 8; *see also* WIESBROCK, *supra* note 49, at 285 (according to the European Commission, "the Lisbon goals can . . . only be reached if the EU manages to attract workers from outside the Union").

64. Gümüs, *supra* note 62, at 447.

65. *Policy Plan on Legal Migration*, *supra* note 12, at 4.

66. *Proposal*, *supra* note 17, at 3.

economies turning on our own.”⁶⁷ Only 1.74% of the European Union’s overall labor market consists of foreign skilled workers.⁶⁸ In comparison with the percentages of these workers in other countries, such as 9.9% in Australia, 7.3% in Canada, 3.2% in the United States, and 5.3% in Switzerland, there are very few foreign skilled workers in the European Union.⁶⁹ Although 85% of unskilled labor goes to the European Union and 5% goes to the United States, only 5% of skilled labor goes to the European Union and 55% to the United States.⁷⁰ This disparity has been attributed in part to the lack of a cohesive supranational immigration scheme:

The attractiveness of the [European Union] . . . suffers from the fact that at present highly qualified migrants must face 27 different admission systems, do not have the possibility of easily moving from one country to another for work, and in several cases lengthy and cumbersome procedures make them opt for non-[E.U.] countries granting more favourable conditions for entry and stay.⁷¹

In light of the above statistics, a supranational approach to immigration at the European level could help solve the labor problems facing the European Union.⁷²

Acting alone, Member States have little hope of competing internationally for highly skilled third-country workers.⁷³ Purely national immigration procedures would ignore a major advantage of the European Union as compared to some of its international competitors: the possibility to gain access to twenty-seven labor markets.⁷⁴ The goals of introducing a special admission procedure and establishing common conditions of entry and residence for third-country nationals seeking highly qualified employment “cannot be sufficiently achieved by the Member States, especially as regards ensuring their mobility between Member States, and can therefore be better achieved at

67. Cendrowicz, *supra* note 10.

68. *Id.*

69. *Id.*

70. Franco Frattini, Eur. Comm’r Responsible for Justice, Freedom and Sec., Speech at the High-level Conference on Legal Immigration: Enhanced Mobility, Vigorous Integration Strategy and Zero Tolerance on Illegal Employment: A Dynamic Approach to European Immigration Policies 2, SPEECH/07/526 (Sept. 13, 2007).

71. *Proposal, supra* note 17, at 3.

72. Frattini, *supra* note 70, at 2, 4.

73. *Impact Assessment, supra* note 14, at 20.

74. *Id.* “[T]he EU Blue Card is an attempt to compete in the global war for talent, a war mainly fought between the countries or regions with the highest GDP per capita.” Michael Philip Poulsen, *The EU Blue Card – The Quest for High Skilled Migrants*, 7 EUR. GEOGRAPHER 23, 23 (2011).

Community level.”⁷⁵ The Blue Card directive attempts to “create a level playing field, and to promote the efficient allocation and re-allocation of high[ly] skilled labor at the Union level.”⁷⁶

D. *Intra-E.U. Mobility as an Important Provision to Increase the Attractiveness of the European Union*

“The capacity of countries to attract [highly skilled workers] relies to a significant extent on the conditions of entry and residence offered to migrants.”⁷⁷ The European Commission identified one cause of the European Union’s difficulty attracting and retaining needed migrant workers as “the lack of clear and common rules regulating and encouraging the possibility of intra-E.U. mobility of third-country [highly skilled workers] between Member States.”⁷⁸ In addition, it noted “[t]he high barriers to geographic mobility for third-country [highly skilled workers] represent a specific weakness of the E.U. labour market and, more generally, of E.U. policy on economic immigration.”⁷⁹ At the time it promulgated the proposal for a directive to attract third-country nationals for the purposes of highly qualified employment, the European Commission determined that the best option to achieve the European Union’s objectives was a Blue Card that would foster intra-E.U. mobility.⁸⁰

Including provisions for intra-E.U. mobility for Blue Card holders would benefit both third-country nationals and the European Union.⁸¹ Facilitating such geographic mobility would encourage the “best and the brightest” to consider the European Union an attractive migration destination.⁸² In addition, because immigrants tend to be “more income-maximizing, more efficient in using employment opportunities and less tied to the country of residence” than citizens, they are more likely to be willing to move to an area with labor shortages than their less mobile E.U. citizen counterparts.⁸³

According to the European Commission, its preferred (but eventually

75. Blue Card Directive, *supra* note 7, pmb. ¶ 25.

76. WIESBROCK, *supra* note 49, at 285.

77. *Impact Assessment*, *supra* note 14, at 14.

78. *Id.* at 18.

79. *Id.* at 15.

80. *Id.* at 51. Initially, the idea was that the Blue Card would “provide a coherent, uniform and transparent application procedure that gave the immigrant access to the whole EU labour market,” instead of twenty-seven different national systems. Poulsen, *supra* note 74, at 24.

81. *Impact Assessment*, *supra* note 14, at 12.

82. *Id.* at 15, 20.

83. *Id.* at 12–13.

rejected) policy option was a Blue Card that would grant the holder a conditional right to move within the European Union for employment purposes.⁸⁴ Under this proposal, following a waiting period in the first Member State,⁸⁵ intra-E.U. mobility would be allowed with the fulfillment of certain conditions, including obtaining a job offer in the second Member State.⁸⁶ Such provisions could increase the competitiveness of the European Union, as compared to other major economies like the United States and Canada, by offering the prospect of an integrated E.U. labor market.⁸⁷ In addition, because highly qualified workers could move to locations with better standards of living, intra-E.U. mobility could positively impact their quality of life.⁸⁸ “The more the [highly skilled workers] would enjoy a freedom of movement similar to that granted to E.U. citizens, the more this option would be effective in attracting and retaining them and the more added value it will have.”⁸⁹ There is also a great benefit to the European Union from using this approach, because, on the whole, it would strengthen the macroeconomic environment of the European Union.⁹⁰ Providing for geographic mobility would also strongly enhance labor market efficiency, especially because it would allow small- and medium-sized private enterprises to recruit third-country highly qualified workers already present in the European Union, rather than having to recruit in their countries of origin.⁹¹

A general concern of passing migration legislation is that encouraging highly qualified workers to enter the European Union could create competition and displace E.U. citizens.⁹² Allowing intra-E.U. mobility would reduce this risk by promoting more efficient allocation of highly qualified workers.⁹³ Still, E.U. citizens would lose the comparative advantage they currently enjoy over migrant workers of being able to freely move to another Member State.⁹⁴ The provisions

84. *Id.* at 25.

85. Allowing intra-E.U. mobility from the outset was discarded as a possibility because this approach “would be hardly accepted from [Member States].” *Id.* at 45.

86. *Id.* at 25.

87. *Id.* at 44.

88. *Id.* at 47.

89. *Id.* at 44.

90. *Id.* at 46.

91. *Id.* at 45–46.

92. *Id.* at 47.

93. *Id.*

94. *Id.* The proposal never envisioned a right of intra-E.U. mobility for highly qualified workers comparable to the right of freedom of movement granted to E.U. citizens. *Id.* at 60.

establishing a waiting period before allowing intra-E.U. mobility and requiring a job offer in the second Member State—thereby ensuring that the worker's movement is demand driven—would protect E.U. citizens from such consequences.⁹⁵

The European Commission also acknowledged other possible negative implications of intra-E.U. mobility.⁹⁶ First, geographic mobility could lead to increased competition between Member States for highly skilled workers, which would especially burden Member States offering lower wages.⁹⁷ Second, small- or medium-sized employers may be harmed if they go through the procedure and cost of hiring highly qualified workers from abroad, only to lose them to larger employers with more lucrative offers.⁹⁸ Third, offering intra-E.U. mobility may provide an incentive for permanent settlement in the European Union, which would reduce the likelihood that third-country nationals would return to their countries of origin, thus contributing to the problem of brain drain from less-developed countries.⁹⁹

E. *The Relevant Provisions of the Blue Card Directive as Enacted*

The piece of legislation that created the Blue Card system has a long legislative history.¹⁰⁰ Following the establishment of the Lisbon Strategy, the European Commission issued a Communication on a Community Immigration Policy, asserting that E.U. immigration policy should strive “to grant persons admitted broadly the same rights and responsibilities as [E.U.] citizens.”¹⁰¹

A draft directive was put forth in 2001 detailing admission criteria and application procedures for third-country nationals seeking paid employment in the European Union,¹⁰² but it was withdrawn in 2006

95. *Id.* at 47, 58.

96. *Id.* at 46–47.

97. *Id.* at 46. Other factors such as quality of life and career opportunities are important considerations in addition to wage. *Id.*

98. *Id.* at 46, 48. Such employers would be protected, however, by the inclusion of a waiting period before intra-E.U. mobility is allowed. *Id.* at 46.

99. *Id.* at 46. But, the enhanced career opportunities that result from intra-E.U. mobility could increase the amount of remittances sent back to the worker's country of origin. *Id.*

100. See PIETER BOELES ET AL., *supra* note 42, at 228–30 (providing comprehensive overview of the route to the Blue Card directive starting with the 2000 Communication on a Community Immigration Policy and ending with the passed Blue Card directive of 2009); see also Wallace, *supra* note 1, at 50 fig.3.1 (institutional overview outlining the legislative process).

101. *Communication on a Community Immigration Policy*, at 15, COM (2000) 757 final (Nov. 22, 2000).

102. *Commission Proposal for a Directive on the Conditions of Entry and Residence of Third-Country Nationals for the Purpose of Paid Employment and Self-Employed Economic*

because it failed to garner sufficient support.¹⁰³ A directive is one possible type of European legislation, which is “binding, as to the result to be achieved, upon each Member State to which it is addressed, but . . . leave[s] to the national authorities the choice of form and methods.”¹⁰⁴ Member States are given a deadline by which they must implement a directive into their national legislation.¹⁰⁵ The Member States then communicate their national implementing measures to the European Commission, which verifies that the national law incorporates all provisions required by the directive.¹⁰⁶ In lieu of the failed directive, the European Commission advanced a Policy Plan on Legal Migration, which proposed advancing directives addressing only certain categories of economic immigrants, one of which would be highly qualified workers.¹⁰⁷

In 2007, the European Commission put forward a proposal for a directive concerning a Blue Card for highly qualified employment.¹⁰⁸ The European Commission also prepared a detailed impact assessment to accompany the proposal, in which the advantages of intra-E.U. mobility were discussed at length.¹⁰⁹ The European Parliament voted favorably on the proposal following some amendments¹¹⁰ and a debate.¹¹¹

The directive “on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment” was adopted by the European Council on May 25, 2009.¹¹² It provides for the creation of an E.U. Blue Card, which is a type of residence and work permit “entitling its holder to reside and work in the territory of a

Activities, COM (2001) 386 Final (July 11, 2001).

103. *Communication from the Commission to the Council and the European Parliament: Outcome of the Screening of Legislative Proposals Pending Before the Legislator*, at 12, COM (2005) 462 final (Sept. 27, 2005); see also Lavenex & Wallace, *supra* note 52, at 474.

104. TFEU, *supra* note 32, art. 288.

105. *Application of EU Law: Directives – Definitions*, EUR. COMMISSION, http://ec.europa.eu/u_law/directives/directives_en.htm (last updated June 11, 2012).

106. *Id.*

107. *Policy Plan on Legal Migration*, *supra* note 12, at 5.

108. See generally *Proposal*, *supra* note 17.

109. See generally *Impact Assessment*, *supra* note 14.

110. See generally European Parliament Legislative Resolution of 20 November 2008 on the Proposal for a Council Directive on the Conditions of Entry and Residence of Third-Country Nationals for the Purposes of Highly Qualified Employment, 2010 O.J. (C 16E) 224.

111. See generally EUR. PARL. DEB. CRE 19/11/2008 – 11 (Nov. 19, 2008).

112. Blue Card Directive, *supra* note 7; Press Release, Council of the Eur. Union, Council Adopts the “EU Blue Card”: More Advantages for High-Skilled Foreign Workers (May 25, 2009), available at <http://europa.eu/rapid/pressReleasesAction.do?reference=PRES/09/151&format=HTML&aged=0&language=EN&guiLanguage=en>.

Member State” of the European Union.¹¹³

In order to obtain a Blue Card, a third-country national must present several documents including “a valid work contract or . . . a binding job offer for highly qualified employment, of at least one year in the Member State concerned[.]”¹¹⁴ The gross annual salary the Blue Card applicant is to receive must be at least one and a half times the average gross annual salary for the Member State.¹¹⁵ Following the application, the authorities of the Member State have ninety days to decide whether to grant the applicant a Blue Card.¹¹⁶

Member States retain a high level of control over the Blue Card procedure;¹¹⁷ even if all of the above conditions are met, a Blue Card applicant does not enjoy a secure right to admission.¹¹⁸ In the national implementation of the directive, each Member State is free “to determine the volume of admission of third-country nationals entering its territory for the purposes of highly qualified employment.”¹¹⁹ Accordingly, a Member State may reject an application for a Blue Card when it has already admitted the number of immigrants established by its quota.¹²⁰ It can also reject an application if it determines that the employment vacancy that the third-country national is seeking to fill can be filled by one of its own citizens or a third-country national who has already been admitted to the country.¹²¹ If a Member State decides

113. Blue Card Directive, *supra* note 7, art. 2.

114. *Id.* art. 5.

115. *Id.* (providing a minimum threshold of 1.5 times average gross annual salary, but allowing each Member State to establish higher threshold).

116. *Id.* art. 11.

117. A directive is binding as to result, but leaves discretion over implementation to the Member States. *See supra* text accompanying notes 104–106.

118. WIESBROCK, *supra* note 49, at 564.

119. Blue Card Directive, *supra* note 7, art. 6. This includes the right to decide not to grant any residence permits for “employment in general or for certain professions, economic sectors or regions.” *Id.* pmb. ¶ 8. The right of Member States to limit the number of migrants admitted is in accord with the limits of common integration policy established in the Lisbon Treaty. *See Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Communities* art. 63a, Dec. 13, 2007, 2007 O.J. (C 306) 1 (stating that the development of an E.U. immigration policy “shall not affect the right of Member States to determine volumes of admission of third-country nationals coming from third countries to their territory in order to seek work”).

120. Blue Card Directive, *supra* note 7, art. 8.

121. *Id.* This discretion is in line with the Community Preference Principle:

Member States will consider requests for admission to their territories for the purpose of employment only where vacancies in a Member State cannot be filled by national and Community manpower or by non-Community manpower lawfully resident on a permanent basis in that Member State and already forming part of the Member State’s regular labour market.

Council Resolution of 20 June 1994 on Limitation on Admission of Third-Country Nationals to

to grant the applicant a Blue Card, the Blue Card will be valid for a standard period ranging from one to four years as determined by each Member State.¹²²

A holder of an E.U. Blue Card is entitled to enter, re-enter, and stay in the territory of the Member State that issued the Blue Card.¹²³ After the worker has legally resided in the Member State which issued her Blue Card for eighteen months, the possibility of moving to a second Member State for the purpose of highly qualified employment becomes available.¹²⁴ To do so, the worker must submit an application for a Blue Card to the Member State she wishes to move to, subject to all the same conditions and documentation requirements of the initial application, including a job offer.¹²⁵ As with the application in the first Member State, the second Member State has considerable discretion over whether to reject or grant the application and may take into account its own established immigration quota.¹²⁶

The actual impact of the Blue Card program remains uncertain. The next step following the passing of the directive is implementation by the Member States, through which specific elements of the admission process that are left to the discretion of each Member State will be resolved.¹²⁷ Through national implementation of the Blue Card directive, Member States can establish barriers to entry, such as quotas, which would impact the limited provision for an E.U. Blue Card holder to move to a second Member State after the eighteen-month waiting period.¹²⁸ Member States were required to implement the directive into their national legislation by June 19, 2011.¹²⁹ The directive does not apply to three Member States: the United Kingdom, Ireland, and Denmark.¹³⁰ At the time of writing, twenty-

the Territory of the Member State for Employment, 1996 O.J. (C 274) 3.

122. Blue Card Directive, *supra* note 7, art. 7.

123. *Id.*

124. *Id.* art. 18.

125. *Id.*

126. *Id.*

127. See *supra* text accompanying notes 104–106. See generally Gümüs, *supra* note 62, at 442–43 (summarizing the Member States who are more supportive of the Blue Card scheme—France, Spain, Italy and Sweden—and those more critical—Germany, the Netherlands, Austria); *EU Plan for U.S.-Style Green Card Met Coolly*, USA TODAY, Nov. 8, 2007, http://www.usatoday.com/news/world/2007-11-08-eu-blue-card_N.htm (describing national reception of Commission's 2007 proposal).

128. Blue Card Directive, *supra* note 7, art. 18.

129. *Id.* art. 23.

130. *Id.* pmb. ¶¶ 28–29. These countries were guaranteed the right not to participate in such legislation—that concerning the Area of Freedom, Security and Justice—in various earlier

three of the twenty-four Member States that the directive applies to have reported to the European Commission that they have implemented the directive: Austria, Belgium, Bulgaria, Cyprus, the Czech Republic, Estonia, Finland, France, Germany, Greece, Hungary, Italy, Latvia, Lithuania, Luxembourg, Malta, the Netherlands, Poland, Romania, Slovakia, Slovenia, Spain, and Sweden.¹³¹ National legislation in some Member States remains outstanding.¹³² The European Commission is currently in the process of following up with the non-implementing Member States; it formally requested compliance of six Member States via reasoned opinions on October 27, 2011.¹³³ Once all Member States have

treaties, but have the option of adopting such provisions if they choose. Consolidated Treaty, *supra* note 28, at Protocol Nos. 21–22. The United Kingdom noted in consideration of the 2007 proposal for a Blue Card directive that it may conflict with its existing national Highly Skilled Migrants Programme and work permit system. EUROPEAN SCRUTINY COMM., INCREASING THE ATTRACTIVENESS OF THE EU AS A PLACE FOR THIRD-COUNTRY NATIONALS TO LIVE AND WORK, 2007–8, H.C. 16–viii, ¶¶ 4.16, 4.17 (U.K.). Similarly, Ireland has noted that it already has a national policy to attract highly qualified workers that is “tailored to the particular characteristics and conditions of the Irish economy.” JOINT COMM. ON EUROPEAN SCRUTINY, EU SCRUTINY REPORT NO. 12 (Apr. 8, 2008) (Ir.). See generally WIESBROCK, *supra* note 49, at 574–84 (discussing national immigration laws in Denmark and the United Kingdom).

131. For a current list of reported national execution measures concerning the Blue Card directive, see *National Provisions Communicated by the Member States Concerning: Council Directive 2009/50/EC of 25 May 2009*, EUR-LEX, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:72009L0050:EN:NOT> (last visited June 25, 2012) [hereinafter *National Provisions*]. Inclusion in this list does not necessarily mean that the reported measures are in compliance with the directive. *Id.* For a current account of the Blue Card application process in each Member State, as well as other available national migration schemes, consult the EU Immigration Portal. See generally *EU Immigration Portal*, EUROPA, <http://ec.europa.eu/immigration> (last updated June 7, 2012) (on the left side panel, choose “I wish to migrate as ‘worker’” and work as “highly qualified worker” in the country of your choice).

132. Portugal still must implement the Blue Card directive. *National Provisions, supra* note 131. The European Commission is responsible for overseeing compliant implementation of E.U. directives by the Member States. *Application of EU Law: Infringements of EU Law*, EUR. COMMISSION, http://ec.europa.eu/eu_law/infringements/infringements_en.htm (last updated June 19, 2012). It follows a formal infringement procedure when a Member State fails to comply with an obligation under E.U. law: first, the Commission will issue a letter of formal notice, requesting the Member State’s position within two months. *Id.* If the Member State fails to convince the Commission that it has sustained its obligations under E.U. law or fails to respond entirely, the Commission may issue a reasoned opinion, allowing for an additional two months for compliance. *Id.* If the Member State still fails to comply with E.U. law, the Commission can take the case before the European Court of Justice, the decisions of which are binding on the Member States. *Id.*

133. Press Release, Eur. Comm’n, ‘Blue Card’ – Work Permits for Highly Qualified Migrants 6 Members States Fail to Comply with the Rules (Oct. 27, 2011), available at http://ec.europa.eu/dgs/home-affairs/what-is-new/eu-law-and-monitoring/infringements_by_policy_immigration_and_integration_en.htm (last updated May 3, 2012). The European Commission issued letters of formal notice to twenty Member States on July 18, 2011, almost one month past the deadline for implementation. See *EU Law Monitoring:*

enacted national legislation governing administration of the Blue Card program, it can be determined whether the directive is able to achieve the goals of an increased knowledge-based economy in the European Union.¹³⁴

III. ANALYSIS

Europe's aging population is jeopardizing the E.U. labor market, and the Blue Card program was adopted in part "to improve the European Union's ability to attract highly qualified workers from third countries."¹³⁵ The European Commission identified the "high barriers to geographical mobility for third-country [highly skilled workers]" as a "specific weakness . . . of [E.U.] policy on economic immigration."¹³⁶ The preamble to the Blue Card directive suggests that the new legislation will reduce these barriers: "The occupational and geographical mobility of third-country highly qualified workers should be recognised as a primary mechanism for improving labour market efficiency, preventing skill shortages and offsetting regional-imbalances."¹³⁷ Nonetheless, the language of the provisions of the directive concerning intra-E.U. mobility does little to eliminate the barriers to free movement and therefore will not make the European Union more attractive to third-country nationals seeking highly qualified employment. As a Member of European Parliament noted, "far too many restrictions have been introduced, which do not help in any way when trying to make the European Union more attractive to

Immigration and Integration Infringements, EUROPEAN COMM'N, http://ec.europa.eu/dgs/home-affairs/what-is-new/eu-law-and-monitoring/infringements_by_policy_immigration_and_integration_en.htm (last updated Mar. 5, 2012). Three Member States (Italy, Malta, and Portugal) did not respond and three other Member States (Germany, Poland, and Sweden) responded that their implementing legislation would not be effective until the following year, prompting the issuance of reasoned opinions. See Press Release, Eur. Comm'n, *supra*. On February 27, 2012, the Commission issued reasoned opinions to Austria, Cyprus, and Greece. Press Release, Eur. Comm'n, 'Blue Card' – Commission Warns Member States over Red Tape Facing Highly Qualified Migrants (Feb. 27, 2012), *available at* <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/12/167&type=HTML>. Slovenia also received a reasoned opinion on May 31, 2012. Press Release, Eur. Comm'n, 'Blue Card' – Commission Urges Slovenia to Apply Rules on Highly Qualified Migrants (May 31, 2012), *available at* <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/12/529&>.

134. By June 19, 2013 at the latest, the Member States are required to annually submit statistics on the volumes of third-country nationals to whom they have granted a Blue Card. Blue Card Directive, *supra* note 7, art. 20(2).

135. *Entry and Residence of Highly Qualified Workers (EU Blue Card)*, EUROPA, http://europa.eu/legislation_summaries/justice_freedom_security/free_movement_of_persons_asylum_immigration/114573_en.htm (last updated Aug. 18, 2009).

136. *Impact Assessment*, *supra* note 14, at 15.

137. See, e.g., Blue Card Directive, *supra* note 7, pmb1. ¶ 15.

highly qualified workers.”¹³⁸

A. *Restrictions that Limit the Blue Card's Appeal*

E.U. Member States have significant discretion in implementing the Blue Card directive; accordingly, they retain the right to place restrictions on admission that could make obtaining a Blue Card very difficult.¹³⁹ Even if a Blue Card applicant meets all of the admission criteria, including presenting proof of a work contract or binding job offer in an E.U. Member State that promises a gross annual salary 50% higher than the average gross annual salary for that Member State,¹⁴⁰ the Member State can still reject the application if it has filled its quota for highly qualified third-country nationals¹⁴¹ or if it determines that the job vacancy could be filled with a current E.U. citizen or member of the E.U. workforce.¹⁴²

Even if a highly qualified third-country national is issued a Blue Card, the worker gains no special treatment as compared to a worker outside the European Union if offered a job in a second Member State.¹⁴³ First, an eighteen-month waiting period applies before a worker may move to a second Member State for purposes of highly qualified employment.¹⁴⁴ Second, the worker must apply to the authorities of the second Member State for a Blue Card and is again required to meet all of the original admission criteria.¹⁴⁵ In deciding whether to issue a Blue Card, the second Member State may consider the condition of its national labor market as well as any quotas it has established on admission of third-country nationals.¹⁴⁶ This re-application requirement every time a Blue Card holder wishes to move to a second Member State of the European Union does not promote geographic mobility.¹⁴⁷ In contrast, this obstacle to mobility could lead

138. Remarks of Ms. Hennis-Plasschaert, EUR. PARL. DEB. CRE 19/11/2008 – 11 (Nov. 19, 2008).

139. See WIESBROCK, *supra* note 49, at 286.

140. Blue Card Directive, *supra* note 7, art. 5.

141. *Id.* arts. 6, 8.

142. *Id.* art. 8.

143. See *id.* art. 18 (requiring re-application in order to move to a second Member State).

144. *Id.* In addition, because the same timeline for application processing applies, the re-applicant may have to wait up to ninety days before taking up employment in the second Member State. WIESBROCK, *supra* note 49, at 292.

145. Blue Card Directive, *supra* note 7, art. 18.

146. *Id.*

147. WIESBROCK, *supra* note 49, at 292–93 (obstacles to obtaining Blue Card from second Member State “significantly reduce[] the attractiveness of making use of the free movement rights”).

to “brain waste”; without mobility, highly qualified workers might decide to leave the European Union for destinations considered more attractive, in terms of professional and residential opportunities.¹⁴⁸ The existence of this E.U.-level procedure adds no real value over the twenty-seven separate national procedures that existed before the adoption of the Blue Card.¹⁴⁹

With the Blue Card directive, the Member States of the European Union have indicated “that they are unwilling to establish a truly common [E.U.] policy” on recruitment of highly skilled workers.¹⁵⁰ The Member States have no incentive to coordinate their policies to attract skilled workers.¹⁵¹ As the Blue Card is being implemented in national legislation, it appears that the Member States are unprepared or unable, given their differences, to properly integrate their market practices to make the Blue Card a success.¹⁵² The Blue Card “does not bring about the much-needed change for legal migration but . . . confirms Member States’ protectionist practices instead.”¹⁵³ As a result, the Member States will continue to dominate immigration policy and the Blue Card will have minimal impact because it is “mainly a marketing tool.”¹⁵⁴

148. See *Impact Assessment*, *supra* note 14, at 69.

149. WIESBROCK, *supra* note 49, at 287 (directive “allows for the co-existence of national rules for highly-skilled migrants and the Blue Card scheme”). “[A]doption of the current proposal will simply add another layer to the existing 27 entry regimes.” *Id.*; Gümüs, *supra* note 62, at 446.

150. Steffen Angenendt & Roderick Parkes, *The Blue Card Impasse*, SWP COMMENTS, June 2010, at 1; Poulsen, *supra* note 74, at 25 (“[T]he Blue Card does not represent a common pan-European policy but rather reflects the member states['] reluctance to concede power to the EU.”).

151. Boeri, *supra* note 5.

152. Parkes, *supra* note 31 (predicting the Blue Card as “set to be a flop”); Gümüs, *supra* note 62, at 440; Press Release, Peter Verhaeghe, *Caritas Europa Comments on the New EU “Blue Card System”*, CARITAS EUROPA, June 11, 2009, available at http://www.caritas-europa.org/module/FileLib/CEcommentsBlueCard_June09.pdf (expressing doubt as to “whether the approved [Blue Card] Directive can reach its ultimate goal of attracting highly qualified workforce”).

153. Remarks of Ms. Hennis-Plasschaert, EUR. PARL. DEB. CRE 19/11/2008 – 11 (Nov. 19, 2008) (commenting that effective decision making is undermined by “the inability of the Member States to really work together in their mutual interest”); Poulsen, *supra* note 74, at 24 (concluding that the Blue Card provisions have the effect of maintaining national borders and severely restraining mobility).

154. Cerna, *supra* note 18, at 1. The Blue Card “remains a document issued by national authorities in compliance with largely nationally-determined requirements.” WIESBROCK, *supra* note 49, at 293.

B. *Reasons for Member State Resistance to Intra-E.U. Mobility*

More flexible provisions for access to an E.U.-wide labor market were excluded from the Blue Card directive for a reason: there was insufficient Member State support.¹⁵⁵ At least two reasons contribute to the absence of support for provisions allowing third-country nationals access to the E.U.-wide labor market.¹⁵⁶ First, Member States would prefer better use of the labor-market potential of immigrants already residing in the European Union before encouraging more immigration.¹⁵⁷ Second, there are concerns about national sovereignty.¹⁵⁸ Member States were highly reluctant to relinquish control of access to their labor market and give free access to Blue Card holders who have been admitted by authorities in other Member States.¹⁵⁹ Member States want to retain flexibility to determine labor market policy within their own borders, especially considering that there are structural differences between the labor markets of the Member States.¹⁶⁰

Nonetheless, if the goal is to attract migrant workers, access to a supranational labor market is necessary to be competitive against other markets, such as the United States, that are currently considered more attractive by highly qualified third-country nationals.¹⁶¹ As one Member of European Parliament commented:

[The Blue Card] should be braver. In addition to the legal channels of immigration, there should be true and effective free movement of workers on all of the European territory. Limiting this mobility would signify a myopic approach, influenced by national interests and against the idea of an open, economically and competitively

155. *Impact Assessment*, *supra* note 14, at 50.

156. Angenendt & Parkes, *supra* note 150, at 2.

157. Gümüs, *supra* note 62, at 448 (noting that countries against the Blue Card believe shortages of skilled workers should be filled with workers from within their own country); Angenendt & Parkes, *supra* note 150, at 3.

158. Angenendt & Parkes, *supra* note 150, at 2.

159. *Impact Assessment*, *supra* note 14, at 50.

160. Angenendt & Parkes, *supra* note 150, at 2.

161. Of course, differences between the immigration schemes of the United States and the European Union go beyond the size of the labor market an immigrant worker has access to. Another key distinction that makes it difficult for the European Union to compete with a system like the U.S. Green Card is that the United States' immigration policy is supply driven. By contrast, the European Union has a tradition of immigration systems that are demand driven. *Impact Assessment*, *supra* note 14, at 62. For a comparison of the E.U. Blue Card to the U.S. Green Card, see generally *EU Blue Card: Competing with the US Green Card?*, EXPATICA (Sept. 22, 2009), http://www.expatica.co.uk/employment/employment_information/EU-Blue-Card_-competing-with-the-US-Green-Card_14461.html.

advanced Europe.¹⁶²

Several of the most successful accomplishments of the European Union were achieved because internal boundaries between Member States were minimized or eliminated altogether. For example, the Schengen Agreement, to which several Member States are a party, removes internal border controls between the countries and increases cooperation in sharing information between Member States.¹⁶³ In another example, several Member States relinquished their national sovereignty with respect to currency and monetary policy by adopting the euro, which has quickly become a major global currency.¹⁶⁴ Nonetheless, in the field of immigration policy, while there has been some thinning of internal borders, for the most part “[t]he [E.U.] immigration policy concurs with the immigration policies of the [Member States], making multiple and overlapping categories of admission.”¹⁶⁵

Even though the concept of an E.U. Blue Card implies “a permit that can be used in order to reside and work in different Member State[s],”¹⁶⁶ such an option—a Blue Card issued by one Member State that would be valid throughout the European Union—was discarded at an early stage.¹⁶⁷ Under current E.U. law, a residence permit is merely a substitute for a visa and must be presented in conjunction with a passport to travel freely within the Schengen area.¹⁶⁸ It does not grant a right of residence in any Member State, except for the State that issued it.¹⁶⁹ A residence card that is valid throughout the European Union would contravene the subsidiarity¹⁷⁰ and proportionality¹⁷¹ principles of

162. *An EU ‘Blue Card’ for High-Skilled Immigrants?*, EURACTIV (Apr. 22, 2008), <http://www.euractiv.com/en/socialeurope/eu-blue-card-high-skilled-immigrants/article-170986> (comments of Italian Socialist Member of European Parliament Claudio Fava).

163. *See* Lavenex & Wallace, *supra* note 52, at 460. *See generally* Agreement Between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the Gradual Abolition of Checks at their Common Borders, 2000 O.J. (L 239) 13.

164. Hodson, *supra* note 28, at 175.

165. Francesca Strumia, *Tensions at the Borders in the US and the EU: The Quest for State Distinctiveness and Immigrant Inclusion*, 25 AM. U. INT’L L. REV. 969, 993–94 (2010).

166. WIESBROCK, *supra* note 49, at 293.

167. *Impact Assessment*, *supra* note 14, at 27.

168. *Id.*

169. *Id.*

170. For an E.U. measure to meet the principle of subsidiarity, “it must be assessed whether the objectives of the action cannot be sufficiently achieved by the Member States and/or if the Community can achieve the action better by reason of its scale or effects.” WIESBROCK, *supra* note 49, at 200.

171. For an E.U. measure to be proportional, it “must be suitable to achieve the objective

E.U. law and would have high implementation costs.¹⁷²

C. Proposed Solution

Eliminating the re-application requirement entirely and adopting a Blue Card, valid across all of the Member States of the European Union, would best attract third-country workers, by offering access to more job opportunities than those available in a single Member State. Completely eliminating the re-application requirement and adopting a Blue Card that is valid throughout the entire European Union would offer access to more job opportunities and would best attract third-country workers.¹⁷³ Given the historical consistency of European immigration measures as demand driven,¹⁷⁴ the applicant would still be required to produce a valid job offer in the second Member State. A formal application would be required because a Member State must issue a residence permit to a non-citizen wishing to reside in its territory,¹⁷⁵ but there should be fewer grounds on which the second Member State may refuse the application.

The Member State that issued the initial Blue Card has already determined that the Blue Card holder is a highly qualified worker, based on the common criteria of the Blue Card Directive, based on the common criteria established by the directive by the Member State that issued the initial Blue Card,¹⁷⁶ so there is no need to re-certify that the applicant's qualifications meet the criteria for admission. In addition, because there would be fewer grounds for refusal, the second Blue Card application should be processed within thirty days, instead of the current ninety days.¹⁷⁷ The second Member State would still have discretion to reject the re-application in extraordinary circumstances, for example, if it has concerns about illegal employment,¹⁷⁸ fraudulent documentation,¹⁷⁹ or public security or health.¹⁸⁰ It would, however, no longer be allowed to refuse a re-applicant for a Blue Card on more

pursued . . . [must be] the least restrictive alternative” and sometimes must meet a balancing of interests test. *Id.* at 194–95.

172. *Impact Assessment*, *supra* note 14, at 27. *But see Policy Plan on Legal Migration*, *supra* note 12, at 8 (calling such a permit “a more ambitious proposal” but not rejecting it).

173. *See supra* text accompanying notes 166–172.

174. *See Impact Assessment*, *supra* note 14, at 62.

175. *Id.* at 27.

176. Blue Card Directive, *supra* note 7, art. 5.

177. *Id.* art. 18.

178. *Id.* art. 8.

179. *Id.*

180. *Id.* art. 5.

subjective grounds, such as whether an E.U. citizen could fill the vacancy.¹⁸¹

From the perspective of a highly qualified third-country national seeking employment, the European Union under this proposal would become a more attractive destination. The worker would have the realistic possibility of employment in multiple Member States in the European Union. There would no longer be immense uncertainty attached to the application for a second Blue Card,¹⁸² and the Blue Card holder would be free to move throughout the European Union to maximize her income potential and quality of life.

At the same time, a simpler re-application procedure would serve the interests of the Member States. By retaining the demand-driven character of the immigration scheme, requiring the applicant to have a job offer in the second Member State, it is unlikely that there would be abuse of the system.¹⁸³ The preservation of a waiting period before allowing a Blue Card holder to move to a second Member State would alleviate the concerns of excessive intra-Member State competition.¹⁸⁴ The refined re-application procedure also adheres to the Community Preference Principle,¹⁸⁵ because the second Member State is better utilizing potential within the European Union rather than admitting additional third-country workers.¹⁸⁶ In addition, it would not interfere with the right of the second Member State to determine volumes of admission of third-country nationals into its territory, because it could still apply the quota, reduced by the number of Blue Card holders admitted, to initial Blue Card applicants.¹⁸⁷

Simplifying the re-application procedure when a Blue Card holder wishes to move to a second Member State, in pursuit of highly qualified employment, would attract more third-country nationals to seek employment in the European Union. This is much more likely to

181. *See id.* art. 8.

182. WIESBROCK, *supra* note 49, at 293.

183. *See* Blue Card Directive, *supra* note 7, pmb. ¶ 15 (citing, without explanation, the fear of “possible abuses of the system” as a reason to limit mobility of Blue Card holders).

184. *See Impact Assessment*, *supra* note 98, at 62.

185. *See* Council Resolution of 20 June 1994 on Limitation on Admission of Third-Country Nationals to the Territory of the Member State for Employment, *supra* note 121, pmb. ¶¶ 6, 15.

186. *Id.*

187. *See supra* note 119. Furthermore, the Lisbon Treaty guarantees that Member States can determine the volume of admission with respect to “third-country nationals *coming from third countries* to their territory in order to seek work,” which does not include Blue Card holders coming from other E.U. Member States. Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Communities art. 63a, Dec. 13, 2007, 2007 O.J. (C 306) 1, 62 (emphasis added).

combat the aging demographics—that will damage the European Union’s economy in the coming years—than the less attractive provisions contained in the Blue Card, as adopted in 2009.

IV. CONCLUSION

Given the widespread recognition of the European Union’s need for highly skilled labor, it is unfortunate that the Member States are unwilling to relinquish enough national sovereignty over labor market access to attract highly qualified third-country workers to the European Union. The European Union has the unique ability to offer access to a supranational labor market composed of twenty-seven national markets as an incentive for the immigration of highly skilled workers. Failure to take advantage of this ability may doom the European Union economy to suffer as its highly qualified labor forces shrink, and certainly makes it impossible to achieve its goal “to become the most competitive and dynamic knowledge-based economy in the world,”¹⁸⁸ regardless of how far the deadline for reaching this goal is extended.

188. Presidency Conclusions, *supra* note 2.