



European
University
Institute

Robert Schuman Centre for Advanced Studies

CARIM-INDIA – DEVELOPING A KNOWLEDGE BASE FOR POLICYMAKING ON INDIA-EU MIGRATION

Co-financed by the European Union

Making Europe More Attractive to Indian Highly-skilled Migrants?: The Blue Card Directive and National Law in Germany and the Netherlands

**Anja Wiesbrock
Metka Hercog**

CARIM-India Research Report 2012/09



Maastricht University



© 2012. All rights reserved.
No part of this paper may be distributed, quoted
or reproduced in any form without permission
from the CARIM-India Project.



CARIM-India
Developing a knowledge base for policymaking on India-EU migration

Research Report
Thematic Paper
CARIM-India RR2012/09

**Making Europe more attractive to Indian highly-skilled migrants?:
The Blue Card Directive and national law
in Germany and the Netherlands**

Anja Wiesbrock⁽¹⁾ and Metka Hercog⁽²⁾
University of Oslo⁽¹⁾, University of Lausanne⁽²⁾

© 2012, European University Institute
Robert Schuman Centre for Advanced Studies

This text may be downloaded only for personal research purposes. Any additional reproduction for other purposes, whether in hard copies or electronically, requires the consent of the Robert Schuman Centre for Advanced Studies.

Requests should be addressed to India-EU.Migration@eui.eu

If cited or quoted, reference should be made as follows:

[Full name of the author(s)], [title], CARIM-India RR [series number], Robert Schuman Centre for Advanced Studies, San Domenico di Fiesole (FI): European University Institute, [year of publication].

THE VIEWS EXPRESSED IN THIS PUBLICATION CANNOT IN ANY CIRCUMSTANCES BE REGARDED AS THE OFFICIAL POSITION OF THE EUROPEAN UNION

European University Institute
Badia Fiesolana
I – 50014 San Domenico di Fiesole (FI)
Italy

<http://www.eui.eu/RSCAS/Publications/>
<http://www.india-eu-migration.eu/publications/>
<http://cadmus.eui.eu>

CARIM-India – Developing a knowledge base for policymaking on India-EU migration

This project is co-financed by the European Union and carried out by the EUI in partnership with the Indian Council of Overseas Employment, (ICOE), the Indian Institute of Management Bangalore Association, (IIMB), and Maastricht University (Faculty of Law).

The proposed action is aimed at consolidating a constructive dialogue between the EU and India on migration covering all migration-related aspects. The objectives of the proposed action are aimed at:

- Assembling high-level Indian-EU expertise in major disciplines that deal with migration (demography, economics, law, sociology and politics) with a view to building up migration studies in India. This is an inherently international exercise in which experts will use standardised concepts and instruments that allow for aggregation and comparison. These experts will belong to all major disciplines that deal with migration, ranging from demography to law and from economics to sociology and political science.
- Providing the Government of India as well as the European Union, its Member States, the academia and civil society, with:
 1. Reliable, updated and comparative information on migration
 2. In-depth analyses on India-EU highly-skilled and circular migration, but also on low-skilled and irregular migration.
- Making research serve action by connecting experts with both policy-makers and the wider public through respectively policy-oriented research, training courses, and outreach programmes.

These three objectives will be pursued with a view to developing a knowledge base addressed to policy-makers and migration stakeholders in both the EU and India.

Results of the above activities are made available for public consultation through the website of the project: <http://www.india-eu-migration.eu/>

For more information:

CARIM-India

Robert Schuman Centre for Advanced Studies (EUI)

Convento

Via delle Fontanelle 19

50014 San Domenico di Fiesole

Italy

Tel: +39 055 46 85 817

Fax: + 39 055 46 85 770

Email: India-EU.Migration@eui.eu

Robert Schuman Centre for Advanced Studies

<http://www.eui.eu/RSCAS/>

I. Introduction

In the 21st century, human capital has turned into a major driver of economic growth and countries around the world are up in a ‘global race for talents’.¹ Many industrialised countries are changing their policies in order to become more ‘attractive’ for highly-skilled migrants. At the same time, migrants have become increasingly mobile and are ‘shopping around’, looking for the best country to work and live in. This has led economists to speak of an ‘immigration market’, where states seeking to attract migrants constitute the demand side, whereas potential migrants are on the supply side.² Whereas the ‘traditional immigration countries’ (Australia, Canada and the United States) have long offered flexible admission criteria and attractive residence rights to highly-skilled migrants, Europe has only recently emerged as an actor on the ‘immigration market’. It took the Member States several decades to abandon the ‘zero immigration’ policies adopted after the 1973 oil crisis. Only after the turn of the century awareness started to spread of the inevitable population decline facing Europe as much as other industrialized countries.³ Between 2010 and 2050 the EU’s working age population has been predicted to decline by -84 millions in a no-migration scenario and by -37 million in a scenarios where migration continues at pre-crisis levels.⁴ It is beyond doubt that so-called ‘replacement migration’ cannot be the sole option to deal with shrinking labour forces and an ageing population. Labour immigration can only be part of a ‘policy mix’ addressing these problems, next to labour migration policies, higher retirement ages, higher labour force participation rates of women and migrants and active family policies.⁵ Be that as it may, there is a growing recognition for the need of the EU and its Member States to implement more attractive migration policies for labour migration. There is a perceived need for highly skilled migrant in particular with a view to boost Europe’s competitiveness and economic growth. Europe has thus emerged as a new player in the ‘global competition for talent’, competing with traditional countries of immigration for the brightest migrants.⁶ European countries have become increasingly involved in changing their labour migration policies in order to attract highly-skilled migrants from third-countries, including India.

India is currently one of the most important players in international migration. In terms of overall numbers of emigrants, it has been amongst the most important emigration countries in the world for many years. Indians make up one of the largest diaspora and provide for the second largest annual flow of current migration worldwide.⁷ Although Indian experience with skilled migration has been quite well researched,⁸ there are new dynamics which have not yet attracted sufficient attention in the

¹ Kapur, D. and J. McHale, ‘Are we losing the Global Race for Talent?’, *Wall Street Journal*, 21 November 2005.

² Borjas, G.J., ‘The Economic Benefits from Immigration’, (1995) 9 *Journal of Economic Perspectives* 2, 17.

³ United Nations, *Replacement Migration: Is it a Solution to Declining and Ageing Populations?* (UN, 2000), see also L.F. Bouvier, ‘Replacement Migration: Is it a Solution to Declining and Aging Populations?’ (2001), 22 *Population and Environment* 4, 377-381.

⁴ Fargues, P., *International Migration and Europe’s Demographic Challenge*, Florence: EUI, p. 8.

⁵ Münz, R., “Demographic Change, Labour Force Development and Migration in Europe – Current Situation, Future Outlook and Policy Recommendation” (2009), *Labour Migration and its Development Potential in the Age of Mobility*, Swedish Presidency, Malmö, 15-16 October 2009, pp. 8-10.

⁶ Papademitrou, D., *Immigrant Selection and Admission Systems: Lessons from the Traditional Countries of Immigration* (2003), Italian EU Presidency.

⁷ For a comprehensive overview of Indian migration, see Khadria, B. (ed.), *India Migration Report 2009. Past, Present and the Future Outlook*, Cambridge University Press India.

⁸ See amongst others Li, W. and Lo, L., “Highly-skilled Indian Migrations in Canada and the US: The Tale of Two Immigration Systems” (2009), *IMDS Working Paper* No 4, pp. 1-24; Khadria, B., “Migration of Highly Skilled Indians: Case Studies of IT and Health Professionals” (2004), *OECD Science, Technology and Industry Working Papers* 2004/06, available at: <http://www.oecd-ilibrary.org/content/workingpaper/381236020703>; Purkayastha, B., “Skilled migration and cumulative disadvantage: the case of highly qualified Asian Indian immigrant women in the US” (2005), *Geoforum*

academic literature. In particular, insufficient account has been taken of the fact that destination countries are becoming more varied. While just a couple of years ago, a vast majority of skilled Indians were almost exclusively interested in migrating to the United States of America or the United Kingdom, their options are becoming more diverse. As we will show below, continental Europe is emerging as a new destination area. This is, however, a rather recent phenomenon, taking off mainly in the 1990s and 2000s. As a consequence, the topic of migration between Europe and India is particularly under-researched, with only a limited number of studies available, mostly focusing on the specific case of the UK.⁹ There has not been any in-depth research carried out on the potential of other EU Member States, who are increasingly eager to open up their labour markets, for attracting highly skilled migrants from India. In this paper the focus will be set on two countries that have seen a significant increase of highly skilled migration from India in recent years: Germany and the Netherlands.

Both countries have recently introduced national migration policies specifically targeted at highly-skilled migrants. National admission schemes were supplemented in May 2009 by the adoption of an EU instrument for the admission of highly qualified labour: Directive 2009/50/EC. In June 2011 the implementing provisions of the Blue Card Directive in Germany and the Netherlands were supposed to have entered into force. It is important to note that the implementing provisions supplement rather than replace national legislation on highly-skilled migrants.¹⁰ Member States remain free to adopt higher or lower standards than the Directive or a combination of both.¹¹ Few highly skilled migration policies adopted by the Member States, such as the unsuccessful German Green Card scheme, are explicitly targeted at Indian professionals. Nonetheless, India being a crucial source country of highly skilled migration, Indian professionals are implicitly a major target group of national and European schemes.

As mentioned above, despite the potentially significant societal and labour market implications of highly-skilled migration policies in Europe, the new dynamics have only been subject to few inquisitive studies in the academic literature,¹² none of them discussing the case of Indian migrants specifically. This paper seeks to close this gap by comparing the national schemes and programmes for highly-skilled migration in two EU Member States that have become increasingly important for Indian migrants, namely the Netherlands and Germany and analysing the newly introduced provisions of the EU Blue Card Directive. The findings will lead to conclusions on whether the implementation of the EU Blue Card Directive renders immigration to the Netherlands and Germany more attractive for highly skilled migrants from India.

The comparison of migration policies for our paper is done by looking at four different aspects of policies, which we consider to be relevant in migrants' decision to move to a particular country. The observed dimensions are: 1) eligibility criteria, 2) special provision for young migrants and options for transition to the labour market for former students, 3) validity of permits and access to permanent residence, 4) rules on family reunification. After a giving an overview of the scope and development

(Contd.) _____

36(2), pp. 181-196; Gayathri, V., "Rethinking high-skilled international migration: research and policy issues for India's information economy" (2001), in OECD, *International Mobility of the Highly Skilled*, Paris: OECD, pp. 201-212.

⁹ See Robinson, V. and Carey, M., "Peopling Skilled International Migration: Indian Doctors in the UK" (2000), *International Migration* 38(1), pp. 89-108; Castles, S., "Indians in Britain" (2009), *IMDS Working Paper* No. 11.

¹⁰ See Article 3(4) of Directive 2009/50/EC.

¹¹ Peers, S., "Attracting and Deterring Labour Migration: The Blue Card and Employment Sanctions Directives" (2009), *European Journal of Migration and Law* 11, pp. 387-426.

¹² Avato, J., *Dynamics in Highly Skilled Migration: A European Perspective* (2009), Doctoral Dissertation, available at http://tobias-lib.uni-tuebingen.de/volltexte/2009/3953/pdf/Dissertatione_Avato2.pdf; Geis, W., Uebelmesser, S. and Werding, M., "Why go to France or Germany, if you could as well go to the UK or the US? Selective Features of Immigration to four major OECD Countries" (2008), *CESIFO Working Paper* No. 2427; Shachar, A., "The Race for Talent: Highly Skilled Migrants and Competitive Immigration Regimes" (2006), *New York Law Review* 81, pp. 148-206; Zaletel, P., "Competing for the Highly Skilled Migrants: Implications for the EU Common Approach on Temporary Economic Migration" (2006), *European Law Journal* 12, pp. 613-635.

of Indian highly skilled migration to the EU, we will explain our choice of comparative criteria, followed by a comparative overview of national migration rules and the EU Blue Card regime.

II. THE SCOPE AND DEVELOPMENT OF INDIAN HIGHLY SKILLED MIGRATION TO THE EU

Indian migration to Europe remained relatively peripheral and transitory until the end of the Second World War. It was only in the late 1950s and 1960s that Indian nationals started to move to Europe on a more substantial and permanent basis. D.K. Giri¹³ has identified four waves of immigration of Indian citizens to Europe. Firstly, during the early 1960s Indian migration to Europe consisted largely of movements of indentured labourers from former colonies of the European powers. After reaching independence, several African countries saw a rise of nationalism and Africanisation, leading to a large movement of Indian migrants to the former European mother countries.¹⁴ The second wave of Indian migration to Europe occurred mainly during the European re-construction boom in the late 1960s and has been labelled the “new diaspora” movement. During this period a considerable number of labour migrants of Indian origin decided to settle in Europe. Whereas most migrants moved to the UK, other major destination countries included Germany, The Netherlands, France and Belgium. Thirdly, in the 1980s, following the restrictive immigration rules of European countries in respect of entry and residence of semi- or unskilled third-country nationals, a continuous stream of highly skilled professionals, such as doctors, engineers and scientists arrived from the Indian sub-continent. A fourth wave of immigration took place in the 1990s, consisting mainly of Indian IT software specialists. In this paper we focus on Indian migrants arriving in the third and fourth wave, i.e. highly skilled workers, in particular IT professionals, and their family members.

Today, Europe has a large Indian diaspora of about 5 to 8 percent of the entire European population. According to Eurostat estimates,¹⁵ Indian nationals were the third largest group of non-EU immigrants in the EU-27 in 2008 (behind Morocco and China). In 2008 the EU-27 received a total of 93,000 immigrants from India. Most people of Indian origin are living in Western Europe, in particular in the UK. In fact, the UK accounts for two thirds of the Indian community in the EU, with a diaspora of about 1.2 million.¹⁶

Among the OECD countries, attracting both low- and high-skilled migrants, Indians are predominantly concentrated in the United States. 69.1 percent of Indian-born immigrants in the US have completed tertiary education (Table 1). Skills composition in Australia and Canada is also leaning towards highly-educated migrants, with 53.3 percent and 40.7 percent of Indian migrants holding tertiary education, respectively. In comparison, the overall skills structure of Indian migrants in Europe is dominated by migrants with lower levels of education. In the United Kingdom and continental European OECD member states, half of Indian-born migrants hold only primary education or lower. Highly-educated Indian migrants are highly concentrated in only a few countries; 92.3 percent of all Indian migrants with tertiary education reside in only three countries: the United States, the United Kingdom and Canada. The United States by itself hosts 66.4 percent of all tertiary educated Indian migrants.

¹³ See Giri, D.K., “Indians in Europe” (2001), B. Vivekanandan, B./Giri, D.K., *Contemporary Europe and South Asia*, pp. 177 ff.

¹⁴ This included the movement of Indians from Surinam to the Netherlands, from East Africa to the UK, from Madagascar, Mauritius and Indo-China to France and from Mozambique and Angola to Portugal.

¹⁵ Available at: <http://ec.europa.eu/eurostat>, accessed on 15.02.2012.

¹⁶ Sinhvi, L.M. *et al.*, *Report of the High Level Committee on the Indian Diaspora*, 2001, Government of India, Ministry of External Affairs, p. 138.

Table 1. Distribution of Indian-born migrants in major OECD destination countries by educational level

Country of destination	ISCED 0/1/2	ISCED 3/4	ISCED 5/6	All levels of education
United Kingdom	51.3%	15.4%	33.3%	398,753
Canada	32.0%	27.3%	40.7%	306,860
Australia	18.8%	27.9%	53.3%	79,731
United States	12.8%	18.1%	69.1%	958,057
Other OECD European countries	49.7%	28.8%	21.5%	114,397
Other OECD countries ¹⁷	14.2%	36.8%	49.0%	20,828
OECD - Total	497,917 (26.5%)	381,411 (20.3%)	996,813 (53.1%)	1,876,141 (100%)

Source: DIOC, OECD.stat, extracted on September 26, 2010

Table 2 shows selected EU Member States, which have significant immigration from India. An increase in immigration flows from 1998 till 2009 is noticeable for all observed countries, especially for Spain, Sweden, Denmark and the Netherlands. Immigration of Indians to Spain increased twenty fold within this timeframe, predominantly with low-skilled migrants.

Table 2. Immigration flows to the selected EU member states from India as country of previous residence, from 1998 to 2009¹⁸ (absolute numbers)

Country of destination/ Year	1998	1999	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009
Denmark	383	449	476	467	410	589	653	766	866	1,494	1,130	883
Germany	4,964	5,279	6,718	:	9,413	:	9,030	8,303	9,375	9,855	11,378	:
Ireland	:	:	:	:	:	:	:	:	:	:	2,039	1,372
Spain	259	340	686	859	905	1,313	2,396	3,614	3,629	4,891	5,290	4,513
Italy	:	:	4,759	:	5,150	8,581	9,197	7,279	6,429	7,209	12,637	12,952
Netherlands	1,013	858	762	796	697	655	631	1,214	2,046	2,502	3,405	2,697
Austria	763	951	:	948	1,361	1,332	1,173	1,296	727	924	971	:
Sweden	377	375	447	587	567	881	881	1,039	1,029	1,128	1,679	1,832
United Kingdom	:	:	:	15,957	20,369	29,802	46,219	45,836	51,849	:	:	:

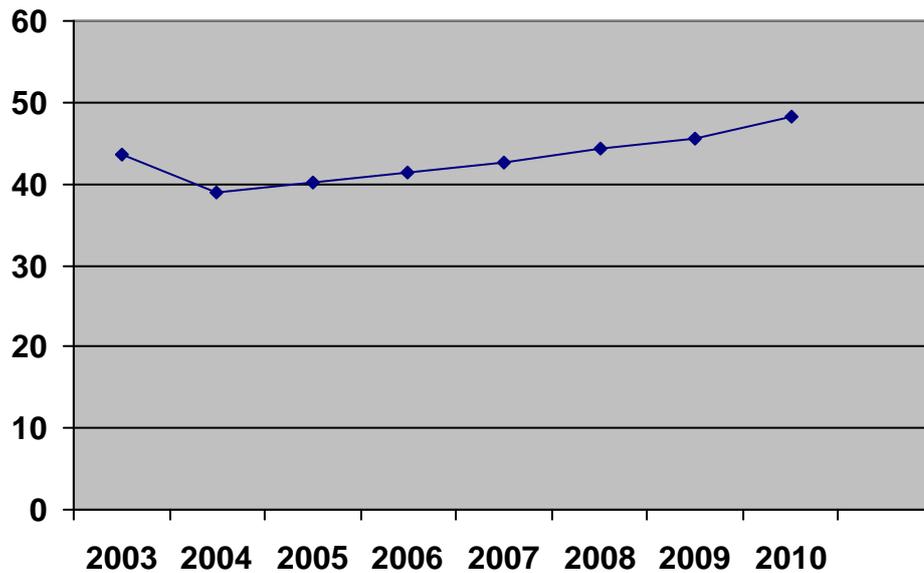
Source: Eurostat

Both Germany and the Netherlands have seen a notable increase in the number of Indian migrants in recent years. In Germany, there have been efforts to attract Indian IT-specialists in particular since the early 2000s. To date, Indians are still a relatively small group of migrants in comparison with other groups, but numbers are steadily growing in particular since 2004. In the last few years, the number of Indian migrants residing in Germany has grown from 38,935 in 2004 to 48,200 in 2010 (see Figure 2).

¹⁷ Other OECD countries are New Zealand, Japan, Turkey and Mexico.

¹⁸ Eurostat does not provide data for France for these categories. In certain countries, data are not available for all reporting years, which is marked in the table as a colon (:).

Figure 2. Indian migrant population in Germany, 2003-2010

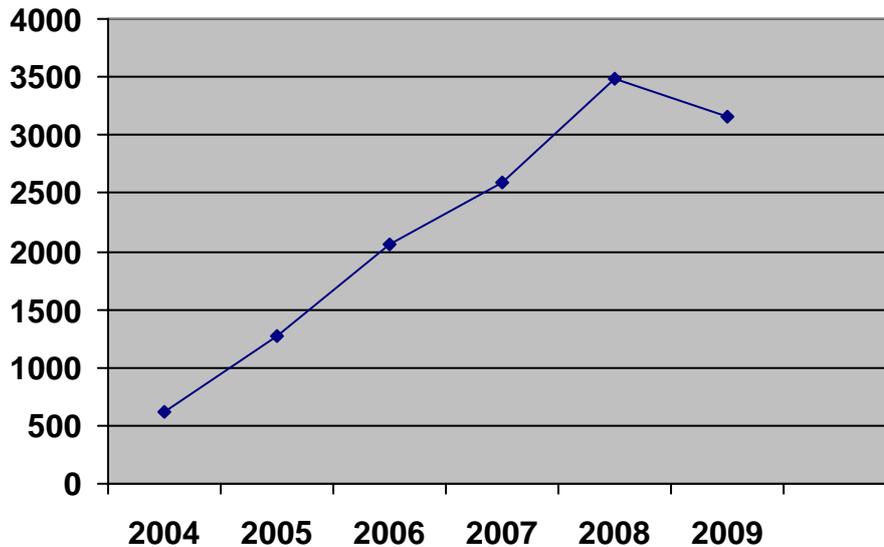


Source: Statistisches Bundesamt

What is remarkable in the case of Indian migrants is the large percentage of men. The female share of migrants is particularly low in comparison with other groups of migrants, even though it has gradually risen from 30.4% in 2003 to 36.1% in 2010. It appears from the data of the national statistics office (Statistisches Bundesamt), that the largest share of Indians residing in Germany under the 2004 Immigration Act are in possession either of a temporary residence permit for the purpose of employment (8,980 in 2010) or hold a settlement permit which allows for unrestricted access to the labour market (8,287 in 2010). This means that in total the number of labour migrants in 2010 was approximately 18,000 (out of a total of 30,839 Indians residing in Germany on the basis of the 2004 Immigration Act). A further major reason is family reunification (11,578, of which the largest share of 7,578 was acquired by female migrants) and studies (5,152). Under the old immigration act (1990), by far the largest number of Indian migrants (2,072 of 3,007 persons) have an unlimited right of residence. The overall average period of residence in Germany in 2010 was 8.2 years.¹⁹

Similarly, in the Netherlands the number of Indian migrants has been on the rise in recent years, in particular since the introduction of the knowledge migrant scheme in 2004. Whereas in 2004 the number of Indian migrants arriving to the Netherlands was marginal at 621, this number has increased gradually to 3,490 in 2008 and a slightly lower figure of 3,161 in 2009 (Figure 3). In 2010, The Netherlands had a documented population of 17,321 people born in India.

¹⁹ Statistisches Bundesamt, Bevölkerung und Erwerbstätigkeit. Ausländische Bevölkerung. Ergebnisse des Ausländerzentralregisters (2011).

Figure 3. Migrant population flows from India to The Netherlands, 2004-2009

Source: Centraal Bureau voor de Statistiek

The largest number of Indian migrants in 2009 were arriving to the Netherlands for the purpose of employment (1,451 out of 3,161) or family reunification (1,148). It is notable that the number of residence permits granted for the purpose of employment has decreased from 1,997 to 1,451 between 2008 and 2009, whereas the permits granted for the purpose of family reunification increased from 1,038 to 1,148 during the same time period. As in the case of Germany, we can see a large predominance of male labour migrants from India. By far the most important purpose of residence for male migrants is employment (1,256 out of 2,002 in 2009), whereas the majority of female Indians were residing in the Netherlands for the purpose of family reunification (817 out of 1,159 in 2009).

The growing importance of Indian highly skilled migration for the European Union has been illustrated by an increasingly intensive co-operation in this field. An India-EU Joint Working Group on Consular issues has been in place since the first EU-India Summit in 2000. The Working Group meets twice a year and deals *inter alia* with the question on how to facilitate the movement of persons between India and the EU. Even though the focus is set on more practical issues, such as the speedy delivery of consular and visa services, more general topics of interest in the area of migration are also discussed. The importance of the subject of migration in the context of EU-India relations was emphasised in the Strategic Partnership Joint-Action Plan²⁰ adopted at the EU-India summit in 2005 and revised in 2008.²¹ Behind the background of sizeable migratory movements between the EU and India, the government representatives identified the facilitation of movement of people as an important objective. Both parties voice their intention to hold dialogues on aspects related to migration and to encourage institutions to undertake joint studies on problems relating to skill-set shortages and the changing of demographic profiles.

More concrete measures of co-operation, going beyond mere political statements have come into existence at the bilateral level between India and certain EU Member States. India has concluded

²⁰ The India-EU Strategic Partnership Joint Action Plan of 7 September 2005, available at: http://ec.europa.eu/external_relations/india/docs/joint_action_plan_060905_en.pdf, accessed on 15.2.2012.

²¹ EU-India Summit, Marseille 29 September 2008, Global partners for global challenges: The EU-India Joint Action Plan (JAP), available at: http://eeas.europa.eu/india/sum09_08/joint_action_plan_2008_en.pdf, accessed on 15.2.2012

bilateral social security agreements with a number of countries, which provide exemption from social security contributions for migrant workers with a short-term contract and/or exportability of pensions at the event of relocation. The first bilateral social security agreement was concluded with Belgium in 2006, followed by agreements with France, Germany, Hungary, Denmark, Luxembourg and the Netherlands. Negotiations with other countries in Europe are underway.²² The agreements provide for social security coordination, and in some cases, an exemption from social security payments for foreign workers remaining for a period of up to 60 months.²³ In addition, the Indian government has signed a labour mobility partnership agreement with Denmark and similar initiatives are currently being negotiated with France, the Netherlands, Sweden and Australia.²⁴ The agreement with Denmark envisages cooperation between the two countries in various respects, including employment facilitation, organised entry and orderly migration, and exchange of information and cooperation on best practices for mutual benefit of employment for qualified workers.²⁵

Yet, apart from the social security agreements, it is notable that in spite of the mutual interest in encouraging highly skilled migrant flows between India and the EU, the Member States have been reluctant to make legal commitments going beyond mere political statements. Consequently, when considering the legal framework of Indian highly skilled migration to the EU, general rules on admission and residence of highly qualified workers in Germany and the Netherlands as well as the implementing provisions of the EU Blue Card Directive have to be considered.

III. COMPARATIVE CRITERIA

The selection of criteria for our analysis is based on different theoretical approaches on determinants for migration²⁶ as well as on the overview of earlier comparative studies in this field. One of the crucial aspects determining the attractiveness of EU countries for Indian highly-skilled migrants is the definition of who constitutes a highly-skilled migrant and the nature of eligibility requirements. As there is no agreed international definition of 'highly-skilled workers', the use of the concept varies amongst countries and is closely linked to national eligibility requirements.²⁷ Receiving states generally use a person's level of education and/or occupation in order to determine whether he/she falls within the category of 'highly-skilled migrant'.²⁸ The more open these criteria are for skilled migrants, the more attractive we consider that country's policy.

Secondly, we look at whether immigration policies give special provision for making entry for younger migrants more accessible. In comparison with other categories of highly-skilled workers, young professionals and students educated in the host state hold a great potential to be active in the labour market for a long period. Younger, educated people are the most likely to migrate because of the longer period they will be able to reap the returns of the migration decision. At the same time, young highly-skilled migrants at the beginning of their career often lack the required work experience and salary level to be admitted under the 'ordinary' highly-skilled migrant programmes. An additional advantage of foreign students transitioning to host country's labour market as highly-skilled workers is that they have already proven themselves in the host country's education system. Consequently, several

²² Ministry of Overseas Indian Affairs (MOIA), *Annual Report 2010-2011*, New Delhi: Government of India, p. 18.

²³ Ministry of Overseas Indian Affairs (MOIA), *Annual Report 2007-08*, 2008, p. 9.

²⁴ Ibid.

²⁵ Press release: "India and Denmark agree over labour mobility" of 19 June 2009, available at http://www.thaindian.com/newsportal/india-news/india-and-denmark-agree-over-labour-mobility_100206908.html, accessed on 26.8.2009.

²⁶ Hercog, M., *The Role of the State in Attracting Highly-Skilled Migrants: The Case of the Netherlands*, EIPASCOPE 3/2008.

²⁷ OECD, *International Mobility of the Highly Skilled* (2002), p. 2.

²⁸ IOM, *World Migration Report, Chapter 2: Highly Skilled Migration* (2008), pp. 52, 53.

countries have adopted special rules applicable to young migrants and in particular to former students, allowing them to benefit from less demanding entry requirements. It is a relatively new feature of immigration policies, which might be one of the reasons why special provisions for young migrants have not been included in the comparative studies so far. Inclusion of this sub-category substantially improves the framework for comparing immigration policies since it better captures recent developments in the policy area. According to the OECD, migrants are concentrated in the younger age groups and foreign graduates demonstrate high stay rates after the graduation in OECD countries.²⁹

The third policy dimension that we observe are the rules concerning the validity of the residence permit offered to highly-skilled third-country nationals. The opportunity to acquire a stable and secure residence status as well as access to permanent residence rights after a certain period of time have become a valuable ‘good’ that countries can offer to highly-skilled workers in exchange for their skills and knowledge.³⁰ The failure of the German Green Card to attract the expected number of highly-skilled migrants is often attributed to the terms applying to the period of residence, since this scheme did not allow for the possibility of permanent residence in Germany.³¹ Example of studies on skilled temporary migrants in Australia³² and on Slovakian return and potential skilled migrants³³ confirm the strong link between temporary and permanent migration. In general, both studies show that many migrants, especially those coming from developing countries, would like to become permanent residents. Moreover, many respondents in the Australian case study indicate the option of permanent residence as an important reason for initial migration. At the same time, temporary migration facilitates permanent migration; many people who initially came only for the purpose of international exposure later on change their initial plans and want to apply for permanent residence. There are numerous reasons why people want to become permanent residents. The significance of this option for prospective migrants has been accepted by the earlier literature,³⁴ which gives the edge in terms of attractiveness to countries with easier access to long-term residence. The maximum allowed duration of residence and conditions for access to a permanent residence status are therefore important in determining the attractiveness of national highly-skilled migrant programmes.

A further crucial factor influencing highly-skilled migrants’ considerations when considering moving abroad, concerns the possibility to be accompanied/joined by members of their family. Also the rights granted to family members upon arrival can play a decisive role in their decision-making process.³⁵ Research has shown that job relocation is a stressful event for employees³⁶ and even more

²⁹ OECD, “Recent Trends in International Migration” (2007), *International Migration Outlook*.

³⁰ Shachar, A., “The Race for Talent: Highly Skilled Migrants and Competitive Immigration Regimes” (2006), *New York Law Review* 81, pp. 148-206.

³¹ Zaletel, P., “Competing for the Highly Skilled Migrants: Implications for the EU Common Approach on Temporary Economic Migration” (2006), *European Law Journal* 12, pp. 613-635.

³² Khoo, S.E., Hugo, G. and McDonald, P., “Which skilled temporary migrants become permanent and why?” (2008), *International Migration Review* 42(1), pp. 193-226.

³³ Balaz, V., Williams, A.M. and Kollar, D., “Temporary versus Permanent Youth Brain Drain: Economic Implications” (2004), *International Migration* 42 (4), pp. 3-32.

³⁴ e.g. Christian, B.P., “Facilitating Highly-Skilled Migration to Advanced Industrial Countries: Comparative Policies”, *Working Paper of the Institute for the Study of International Migration*, Georgetown University; McLaughlan, G. and J. Salt, *Migration policies towards highly skilled foreign workers. Report to the United Kingdom Home Office*, London (2002); Zaletel, P., “Competing for the Highly Skilled Migrants: Implications for the EU Common Approach on Temporary Economic Migration” (2006), *European Law Journal* 12, pp. 613-635.

³⁵ Koser, K. and Salt, J., “The geography of highly skilled international migration” (1997), *International Journal of Population Geography* 3, pp. 285-303; Liebig, T., “Migration Theory from a Supply-side Perspective” (2003), *Discussion Paper* 92, Research Institute for Labour Economics and Labour Law, University of St Gallen; Guth, J., “Triggering Skilled Migration: Factors influencing the mobility of early career scientists to German” (2007), *Focus Migration Policy Brief* no. 6, HWWI.

for ‘trailing spouses’.³⁷ Highly-skilled workers usually have partners who are also interested in their own careers. Greenbury and Shortland list the following problems that a spouse could face: work permit restrictions, lack of job opportunities abroad, language and cultural differences, lost promotional opportunities, lack of transferable skills, and financial implications.³⁸ Offering the principal migrant’s spouse a possibility to work in the host country is an important factor in the decision to move of dual-career couples, which are very common among highly-skilled workers.

IV. COMPARING HIGHLY-SKILLED MIGRATION POLICIES

As mentioned above, several continental European countries have introduced special entry regimes for highly skilled migrants in recent years. In Germany, the rules on highly-skilled migrants were introduced with the enactment of the 2005 Residence Act (*Aufenthaltsgesetz*, AufenthG). The Netherlands introduced a Knowledge Migrant Scheme (*Kennismigrantenregeling*) targeted at highly-skilled migrants in October 2004. The Blue Card initiative introduces the Union (next to the Member States) as an actor in the global competition for talent. According to the preamble of Directive 2009/50/EC, the overall objective of the Directive is to increase the contribution of legal migration to enhancing the competitiveness of the European economy by improving the Union’s attractiveness to highly-skilled third-country nationals.³⁹ In its preparatory documents the Commission demonstrates its awareness of the EU’s deficiencies in terms of attracting highly skilled migrants and pays tribute to the fact that only by substantially altering their approach to labour migration and co-ordinating their efforts, the Member States have a chance to become attractive target destinations for highly skilled migrants. The preamble sets out the main grounds for, and objectives of, the Directive. One of the main concerns formulated by the European Commission is that around 85% of unskilled labour migrants settle in the EU as opposed to 5% in the USA. At the same time, the number of skilled migrants entering the EU amounts to merely 5%, whereas the USA takes up 55% of skilled labour forces.⁴⁰ Directive 2009/50/EC was adopted on 25 May 2009 and scheduled to be implemented by the Member States by June 2011. The Directive does not apply to Denmark, the UK and Ireland, which have an opt-out regarding instruments adopted under Title V TFEU. The implementing provisions in the Netherlands are already in force, whereas the relevant provisions in Germany still have to go through the legislative process in the upper and lower chamber of parliament.

IV.1 The definition of the ‘highly skilled’ and eligibility requirements

In spite of the objective of facilitating the entry and residence of highly qualified third-country nationals, the Blue Card Directive makes use of demanding eligibility criteria. In order for Directive 2009/50/EC to apply, third country national workers have to fulfil a number of requirements. Article 3 establishes that the Directive shall apply to third-country nationals seeking admission into a Member State for the purpose of ‘highly qualified employment’. Highly qualified employment within the

(Contd.) _____

³⁶ Anderson, C. and Stark, C., “Emerging Issues From Job Relocation In the High Tech Field: Implications for Employee Assistance Programs” (1985), *Employee Assistance Quarterly* 1(2), pp. 37-54; Munton, A.G., “Job Relocation, Stress and the Family” (1990), *Journal of Organizational Behaviour* 11, pp. 401-406.

³⁷ Harvey, M., “Dual-Career Expatriates: Expectations, Adjustment and Satisfaction with International Relocation” (1997), *Journal of International Business Studies* 28(3), pp. 627-658; Martin, R., “A Longitudinal Study Examining the Psychological Reactions of Job Relocation” (1996), *Journal of Applied Social Psychology* 26(3), pp. 265-282.

³⁸ Greenbury, L. and Shortland, S., “Employee relocation and the dual career couple” (1996), *Employee Relocation Report* 6, pp. 11-14.

³⁹ Recital 7 of the preamble.

⁴⁰ See the explanatory memorandum to the Commission proposal, as well as Franco Frattini, Speech held at the High-level Conference on Legal Immigration, 13-14 September 2007, Lisbon.

meaning of the Directive⁴¹ refers to the employment of a person for the purpose of ‘exercising genuine and effective work for or under the direction of, someone else’, for which a person is paid and for which adequate and specific competence, *proven by higher professional qualifications*, is required. The concept of ‘higher professional qualifications’ is further defined in Article 2(1)(g) as qualifications attested by evidence of higher educational qualifications or by at least five years of professional experience *when provided for by national law*. In terms of ‘higher educational qualifications’, any degree, diploma or certificate issued by a competent authority attesting the successful completion of a recognised⁴² post-secondary higher education programme is accepted, provided that it has lasted for at least three years. The possibility of replacing a higher education qualification with relevant professional experience must be foreseen by national legislation and only applies ‘by way of derogation’. Moreover, according to Article 5(1)(a), potential immigrants must be in possession of an employment contract or a job offer for at least one year. The salary of the highly skilled worker must reach a national threshold that is to be set by the Member State authorities in accordance with their individual labour market and immigration policies. Member States are, however, obliged under Article 5(2) of the Directive to set this threshold at a certain minimum level of 1.5 times the average gross annual salary. The salary threshold may be lowered to 1.2 times the average gross annual salary in respect of certain occupational branches listed in groups 1 or 2 of the International Standard Classification of Occupations, where third-country national workers are particularly needed.⁴³ This exception concerns mainly corporate and general managers and other business professionals as well as teaching staff and professionals in the fields of physics, mathematics, engineering, life science and health care.⁴⁴ Member States are obliged to submit a list of the professions for which this derogation is applied to the Commission on an annual basis. Member States remain free to apply labour market tests and other procedures to regulate their employment markets.⁴⁵ These include, in particular, the application of the principle of Community preference and the provisions of the Acts of Accession of 2003 and 2005. Moreover, national authorities can make use of quotas, as it remains within the competence of the Member States to ‘determine the volumes of admission’ of highly qualified workers.⁴⁶ According to recital 8 of the preamble, Member States retain the possibility not to grant any residence permits for employment in certain professions, economic sectors or regions. The Directive also allows the denial of a residence permit in order to ensure ethical recruitment in sectors suffering from brain drain in countries of origin.⁴⁷ A further possible ground for refusal mentioned in Article 8(5) is that the prospective employer has been sanctioned for undeclared or illegal employment.⁴⁸

Section 19 of the German Residence Act provides for the admission of “highly qualified” workers but does not contain a general definition of who is considered to be “highly qualified”. Three different categories of persons generally fall under the regime for highly qualified immigrants. The first category includes scientists and academics with outstanding qualifications. The second category refers to teaching personnel in high-rank positions (that is, tenured professors or academics who are leading

⁴¹ Article 2(1)(b).

⁴² The course must be given by an educational establishment recognised as higher educational institution in the state in which it is situated.

⁴³ Article 5(5).

⁴⁴ Major Group 1 includes legislators and senior officials, corporate managers and general managers. Major Group 2 refers to different kinds of physical, mathematical and engineering science professionals, life science and health professionals, teaching professionals and other professionals (such as business and legal professionals).

⁴⁵ In particular in the light of the Council Resolution of 20 June 1994 on limitations on admission of third-country nationals to the territory of the Member states for paid employment.

⁴⁶ Article 6.

⁴⁷ Article 8(4).

⁴⁸ This provision complements Directive 2009/52/EC of 18 June 2009 providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals [2009], OJ L 168/24, 30 June 2009.

scientific projects or research groups). Under category three, specialists and executive personnel are considered to be highly qualified if they have adequate professional experience and a certain annual minimum income. Currently the relevant annual minimum income is equal to at least the earnings ceiling of the general pension insurance system (€66.000 in 2011). In December 2011 the German federal government adopted a draft bill to implement the Blue Card Directive.⁴⁹ Next to introducing a new entry route according to the Blue Card scheme (see below), the government has proposed to lower the annual minimum income threshold for entry under Section 19 of the Residence Act to 48.000 EUR. This amount will be adapted each year.⁵⁰ Moreover, the draft bill identifies occupations with a particular need for qualified labour, for which the annual minimum salary will be lowered to half of the earnings ceiling of the general pension insurance system.⁵¹ Such occupations with a special need for highly skilled workers include science and engineering professionals, medical doctors and information and communications technology professionals.⁵² As stated above, the proposal still has to go through the legislative process and must be approved by the upper chamber of parliament (*Bundesrat*). In respect of these three categories of persons mentioned above, a prior approval of the Federal Labour Agency is not necessary for the granting of a settlement permit (Section 3 Employment Ordinance). In addition to being considered a highly qualified worker, there are four general conditions for the granting of a settlement permit. First, there must be a specific job offer (Section 18(5) Residence Act). Second, there must be reasons to assume that the immigrant will become well integrated into German society. This requirement is, however, mitigated by the fact that highly qualified workers (and their family members) are not obliged to pass a German language test prior to entry. Third, the immigrant must demonstrate that he can sustain himself without relying on state resources (Section 19(1) Residence Act). Finally, the entry of the person concerned must constitute a “special case” (“*in besonderen Fällen*”) in the sense of paragraph 1 of Section 19 AufenthaltG.

The draft bill published in December 2011 introduces a new residence title: the Blue Card EU.⁵³ Next to holding a German or recognised foreign university degree, applicants for an EU Blue Card must have a fixed job offer or employment contract with a gross minimum income of at least €44.000.⁵⁴ For professions where there is a lack of highly skilled personnel, a salary threshold of €33.000 applies.⁵⁵ The draft provision also provides for the possibility to admit on the basis of an administrative act (*Rechtsverordnung*) highly skilled migrants in certain occupation without a university degree, provided that they impose over at least five years of work experience. A prior approval of the Federal Labour Agency is not required for the granting of a Blue Card EU to applicants who fulfil the salary criterion.⁵⁶

The criteria to assess whether a person qualifies as a knowledge migrant in the Netherlands are exclusively based on the salary offered to the prospective migrant. Knowledge migrants are defined as immigrants who have been offered a position by an eligible employer and are set to receive a certain minimum income as stipulated by the Minister of Social Affairs and Employment on an annual basis. The prospective employer must have signed an agreement with the Immigration and Naturalization Service (IND) in order to become eligible for the accelerated procedure under the Knowledge Migrant

⁴⁹ Gesetzesentwurf der Bundesregierung. Entwurf eines Gesetzes zur Umsetzung der Hochqualifizierten-Richtlinie der Europäischen Union, 7 December 2011.

⁵⁰ Section 1(9) of the draft bill.

⁵¹ Draft Section 41a of the Residence Act.

⁵² Groups 21, 221 and 25 of the International Standard Classification of Occupations.

⁵³ Draft Section 19a of the Residence Act.

⁵⁴ This amount is equal to two thirds of the earnings ceiling of the general pension insurance system, see draft Section 41a(1) of the Employment Ordinance.

⁵⁵ This amount is equal to half the amount of the earnings ceiling of the general pension insurance system, see draft Section 41a(2) of the Employment Ordinance.

⁵⁶ Draft Section 3a(1) of the Employment Ordinance.

Scheme. For 2012, the minimum annual gross salary for knowledge migrants is stipulated at €1.239 for employees 30 years of age or older, and €7.575 for employees below 30 years of age. Since November 2006, an exception to the salary criterion is made for scientific researchers and foreign doctors completing their studies in the Netherlands to become a specialist.⁵⁷ On 1 January 2012 a pilot scheme for short residence as knowledge migrant entered into force.⁵⁸ Under the new scheme, employers registered with the IND may employ knowledge migrants for a short period of up to three months. For such migrants, the admission procedure is faster and less bureaucratic. There is for instance no labour market test and foreign workers do not have to provide their CV and diploma in order to be admitted. The same salary threshold of €1.239 applies. The pilot schemes runs for two years until 30 December 2013.

In addition, highly skilled workers can be admitted under the Dutch implementing rules of the EU Blue Card. The conditions for admission as a Blue Card holder are more difficult to fulfil than those applicable under the knowledge migrant scheme. Highly skilled workers must have an employment contract or binding job offer for a period of at least one year and with a gross minimum salary of at least €60,000 per year.⁵⁹ Moreover, as opposed to the knowledge migrant scheme, applicants for an EU Blue Card must demonstrate that they have successfully completed a University degree of at least three years in the Netherlands or in a comparable institution abroad.⁶⁰

IV.2 Special provisions for young migrants and former students

The Blue Card scheme does not differentiate between highly skilled workers on grounds of age. Under the Commission proposal, special rules were foreseen to apply to young workers under the age of 30. They would have been subjected to a lower wage requirement of at least two-thirds of the general national salary threshold. Moreover, the Commission proposal contained the possibility for Member States to waive the salary requirement in respect of third-country nationals who have studied in the Member State. Professional experience in addition to higher education qualifications would have generally not been demanded from young professionals, unless this would also be required from EU citizens. Neither of these provisions can be found back in the final version of the Directive.⁶¹

In principle, the German Residence Act does not distinguish between older and younger highly-skilled workers. This has been widely criticized, as the tough entry conditions and high income ceiling make it extremely difficult for young professionals to enter the German labour market.⁶² Section 19 *AufenthG* is clearly more directed to experienced scientific personnel (such as executive staff or executive managers) rather than graduates and young professionals who stand at the beginning of their career. Section 16(4) *AufenthG* makes it possible for foreign students who have successfully completed their studies in Germany to obtain a one-year extension of their residence permit to search for a job. The scheduled amendments to the Residence Act will allow foreign graduates to take up

⁵⁷ Article 1d(1)(b) and (c) Decree implementing the Law on the Employment of Foreign Nationals (*Besluit uitvoering Wet arbeid vreemdelingen*).

⁵⁸ Paragraph 19 of the Implementing Regulation Foreign Nationals Employment Act (*Uitvoeringsregels Wet arbeid vreemdelingen*) see also Regeling van de Minister van Sociale Zaken en Werkgelegenheid van 21 november 2011, nr. AV/SDA/11/8324.

⁵⁹ Article 3.30b Aliens Decree (*Vreemdelingenbesluit*) jo. 1i(a) Decree implementing the Law on the Employment of Foreign Nationals (*Besluit uitvoering Wet arbeid vreemdelingen*).

⁶⁰ Article 1i(b) Decree implementing the Law on the Employment of Foreign Nationals.

⁶¹ In the final version of the Directive, these derogations from the general rules, which were contained in Article 6 of the proposal, have been deleted. This amendment is based on comments by the European Parliament that the difference in treatment would amount to age discrimination.

⁶² Bundesministerium des Inneren, *Bericht zur Evaluierung des Gesetzes zur Steuerung und Begrenzung der Zuwanderung und zur Regelung des Aufenthalts und der Integration von Unionsbürgern und Ausländern* (Zuwanderungsgesetz) (2006), pp. 27-29.

employment during this period of time.⁶³ Moreover, since 1 January 2009 the following categories of third-country nationals may obtain approval from the Federal Employment Agency to acquire a residence permit for the purpose of carrying out work corresponding to their qualification: 1) foreign university graduates with a recognised diploma, 2) third-country nationals holding a comparable qualification in the IT sector, 3) foreigners holding a German university degree and 4) graduates of German schools abroad with a recognised university degree or a vocational qualification obtained in Germany.⁶⁴ In respect of the latter two categories approval will be given without the application of a labour market test.⁶⁵

Also with regard to the scheduled introduction of the EU Blue Card regime, a specific provision targeting young professionals educated in Germany states that approval of the Federal Employment Agency is not required for Blue Card applicants who possess a German university degree and a job offer in one of the occupations facing shortages of skilled labour.⁶⁶ Furthermore, according to the draft law, graduates of German Universities may be granted a settlement permit after having been employed in Germany for a period of two years.⁶⁷

The Dutch Knowledge Migrant Scheme takes into account that it is more difficult for younger migrants to reach the designated salary threshold. The required salary level is adjusted for people below 30 years of age, which makes it possible for younger people who are just starting their careers to reach the criterion.⁶⁸ For 2012, the lowered threshold for the minimum annual gross salary is €37,575 as compared to €51,239 for employees older than 30 years. An additional attribute of the Dutch migration policy is the job-search period after completion of studies at a university in the Netherlands.⁶⁹ Foreign students have one full year to look for positions as highly-skilled migrants after the completion of their studies in the Netherlands. Moreover, a different salary criterion applies to former students who find work at their education level immediately after the completion of studies. For 2012, the minimum starting salary for students, using a one-year job-search period, is stipulated at €26,931. The lowered salary criterion corresponds better to the actual salary levels of beginners on the labour market. Moreover, in January 2009, the Netherlands introduced a new Admission Scheme for Highly Educated Migrants which allows recent graduates to get an authorisation for temporary stay even without a job-offer.⁷⁰ A person who has completed a master's degree or a doctorate from a Dutch university or from a non-Dutch institution of higher education which ranks among the top 150 universities on the Times Higher Education list or the Academic Ranking of World Universities can within three years after graduation ask for a one-year residence permit and look for employment in the Netherlands without a prior job-offer. In addition to the academic-degree requirement, foreign nationals will be assessed on the basis of a point system, which awards points with regard to age, level of education and other performance indicators in the Netherlands.

⁶³ Draft Section 16(4) of the Residence Act.

⁶⁴ Section 27 Ordinance of Employment (*Beschäftigungsverordnung*).

⁶⁵ Section 27 Ordinance of Employment in conjunction with Section 39(2) No. 1 Residence Act; see also Laubenthal, B., 'The role of economic non-state actors in shaping labour migration policies: the German case in the European context' (2008), *CeSPO* Doc. 4/09, pp. 2, 3.

⁶⁶ Draft Section 3a(2) jo. 41a(2) of the Employment Ordinance.

⁶⁷ Draft Section 18b of the Residence Act.

⁶⁸ Article 1d(1)(a) no 1° Decree implementing the Law on the Employment of Foreign Nationals

⁶⁹ Article 1d (1) (a) no. 2 Decree implementing the Law on the Employment of Foreign Nationals.

⁷⁰ Besluit van de Staatssecretaris van Justitie van 12 december 2008, 2008/30.

IV.3 Validity of the permit and access to permanent residence

Article 7 of Directive 2009/50/EC provides that successful applicants will be issued an EU Blue Card,⁷¹ entitling them to enter, re-enter and stay in the Member State issuing the permit and to enjoy the rights awarded to them by the Directive.⁷² The Blue Card will be valid for a period of between one and four years, according to a standard period of validity set by the Member States and provided that the work contract has an equivalent duration.⁷³ If the work contract is valid for less than this standard period, the EU Blue Card will be issued for the duration of the work contract plus three months. During the first two years of legal employment, the right to work is restricted to highly qualified employment with the initial employer, unless a change of employment has been authorised in writing by the Member State authorities and the conditions for entry are fulfilled.⁷⁴ It is evident from Article 16 that, in respect of acquiring long-term residence status, highly skilled workers profit from more generous conditions than other third-country nationals. They are allowed to accumulate periods of residence in different Member States in order to fulfil the five-year residence requirement to obtain long-term residence status. They must, however, have been resident in the Member State issuing the long-term residence permit for at least two years prior to lodging an application.⁷⁵ In addition, and in contrast to other third-country nationals, Blue Card holders may be absent from EU territory for a period shorter than 12 consecutive months and 10 months in total, rather than six consecutive months and 10 months in total as applicable under Article 4(3) of Directive 2003/109/EC. When all the conditions for EU long-term residence are fulfilled they receive a long-term residence permit with the remark ‘former EU Blue Card holder’.⁷⁶ A loss of the status will occur less easily than for ‘ordinary’ long term-residents, namely after 24 consecutive months of absence from EU territory rather than 12 consecutive months under Article 9(1)(c) of Directive 2003/109/EC.⁷⁷ Moreover, periods of absence prior to and after acquiring a long-term residence permit that may not be counted as a period of absence in the case of highly qualified workers are those that are related to the exercise of an economic activity or to the performance of a voluntary service or study in the person/s country of origin.

Highly-skilled workers residing in Germany on the basis of Section 19 AufenthG have an unlimited right of residence in Germany. The draft amendments to the Residence Act will, however, introduce a rule whereby highly skilled migrants and their family members who are receiving social assistance within three years upon arrival may lose their settlement permit.⁷⁸ The permit is neither restricted in time nor in scope, allowing the worker to change his employment position as he wishes. Only a few professions are exempted and may not be taken up by foreigners, such as the medical profession and employment in the civil service.

Highly-skilled migrants to be admitted under the draft Blue Card EU will initially be granted a residence permit with a validity of up to four years. If the employment contract is concluded for a period of less than four years, the Blue Card EU will be granted for the duration of the employment contract plus three months.⁷⁹ Holders of a Blue Card EU may acquire a settlement permit after a period of two years, provided that they have contributed to the pension system during this period of time.⁸⁰ After five years of residence in Germany in possession of a residence title, both types of

⁷¹ Article 7(1).

⁷² Article 7(4).

⁷³ Article 7(2).

⁷⁴ Article 12(1) jo. 12(2).

⁷⁵ Article 16(2)(b).

⁷⁶ Article 17.

⁷⁷ Article 16(4).

⁷⁸ Draft Section 51a of the Residence Act.

⁷⁹ Section 19a(3) of the Residence Act.

⁸⁰ Draft Section 19a(6) of the Residence Act.

highly-skilled migrants (admitted under Section 19 or the draft Section 19a) can acquire an EU long-term residence permit.⁸¹

The validity of the residence permit in the Netherlands depends on the type of employment contract. A migrant gets a residence permit for a period of the work permit if he/she holds a temporary work contract. When a knowledge migrant holds an employment contract for an indefinite period, a residence permit is granted for the duration of five years.⁸² The EU Blue Card is granted for a period equal to the duration of the employment contract plus three months. The maximum validity of the EU Blue Card is four years.⁸³ The residence requirement to acquire EU long-term residence status is five years of uninterrupted legal residence for a non-temporary objective, such as employment or family reunification. Applicants for a long-term residence permit also have to fulfil certain material conditions. Sufficient and regular income to support his or her family is required. In addition, all non-EU/EEA immigrants have to pass an integration examination, which tests migrants for Dutch language skills and knowledge of Dutch society.⁸⁴ Blue Card holders can acquire long-term residence status after a period of two years, provided that they have legally resided for at least five years in one of the EU Member States and have been in possession of an EU Blue Card in another Member State for at least 18 months before entering the Netherlands. Moreover, all other general requirements for acquiring long-term residence status have to be fulfilled.

IV.4 Family reunification rights

Under the regime of Directive 2009/50/EC, Blue Card holders enjoy facilitated rules on family reunification by way of derogation from Directive 2003/86/EC. Family members of Blue Card holders will be granted immediate access to the territory of the Member State and receive a residence permit with the same validity as that of the sponsor. The possible waiting period of two years for family reunification and the requirement to have reasonable prospects of obtaining the right of permanent residence does not apply to highly skilled workers.⁸⁵ Moreover, the period for taking a decision and granting a residence permit on grounds of family reunification has been shortened from nine to six months. In addition, highly skilled migrants and their family members may only be subjected to integration requirements whilst living in the Member State concerned. Article 15(3) of the Directive precludes the application of so called 'integration abroad' requirements, imposed upon potential family migrants in their country of origin. Further advantages include the prohibition for Member States to restrict the access of family members to their labour market for a period of 12 months⁸⁶ and the possibility for family members to accumulate residence periods in different Member States in order to become eligible for an autonomous residence permit.⁸⁷ In the latter case residence periods shall equally be accumulated for the purpose of receiving EC long-term residence status in the Member State.

In principle, Article 19(1) of the Directive accords Blue Card holders the right to take their family members with them when moving to a second Member State. However, as in the case of the Blue Card holder himself, a number of conditions have to be fulfilled. The family members may be required to present the residence permit obtained in the first Member State, valid travel documents, evidence of

⁸¹ Section 9(2) No.1 Residence Act.

⁸² Artikel 3.59a Aliens Decree.

⁸³ Article 3.59c Aliens Decree.

⁸⁴ Article 21, Aliens Act (*Vreemdelingenwet 2000*).

⁸⁵ Article 15(1).

⁸⁶ However, during the Council negotiations, a clause was inserted which provides that this derogation from Article 14 (2) of Directive 2003/86/EC only applies thirty months after the entry into force of the Directive.

⁸⁷ Article 15(6) and 15(7).

the family relationship with the Blue Card holder and a valid health insurance.⁸⁸ Additional requirements imposed upon the Blue Card holder may include evidence of suitable accommodation for the entire family and stable and regular resources, which may be determined on the basis of the national minimum wages and pensions, as well as the number of family members. Even though these requirements should generally be unproblematic for highly skilled workers to fulfil, as in the case of the Blue Card holder himself, it is clear that family members have to fulfil almost the same conditions as for entry when moving to a second Member State, which makes the prospect of moving freely within the Union less attractive.

In Germany, family members of highly qualified workers within the meaning of Section 19 AufenthG are exempt from the requirement of proving a certain degree of German language proficiency before entry (Section 30(1) Residence Act), as long as the marriage already existed at the moment the highly qualified worker entered Germany and that the worker has shifted the central point of his life to Germany. The incoming family members of highly-skilled workers are automatically entitled to take up paid employment and can obtain an independent right to reside and work after marital cohabitation in Germany for at least two years. The same holds true for the family members of Blue Card holders, according to the draft amendments to the Residence Act.

The Dutch Knowledge Migrant Scheme subjects family members of the skilled worker to a facilitated procedure when applying for a residence permit, provided that the application is submitted simultaneously with the principal migrant. Initially spouses are granted a residence permit of one year which will be extended, upon renewal in the next year, to a period equal to that of the principal migrant.⁸⁹ For children, the residence permit is valid for the same period of time as for the principal migrant. Moreover, there are no restrictions for family members to perform in the Dutch labour market. Knowledge migrants as well as accompanying family members are also exempt from integration requirements before entering the Netherlands. Also the spouse/partner and minor children of an EU Blue Card holder have the right to enter the Netherlands together with their sponsor and to take up employment. The family members of EU Blue Card holders have the possibility to acquire an independence residence permit for ‘continued stay’ (*voortgezet verblijf*) after a period of two years (one year earlier than other types of family migrants), provided that they have resided for five years within the territory of an EU Member State.⁹⁰ Moreover, all other requirements for an independent permit have to be fulfilled.

V. THE ADDED VALUE OF THE BLUE CARD DIRECTIVE

The comparison of rules applicable at the European and national level shows that the implementation of the EU Blue Card regime will only marginally affect the attractiveness of Germany and the Netherlands as countries of destination for highly skilled migrants from India. The implementing provisions of the EU Blue Card Directive are in most respects more restrictive and less favourable than the pre-existing national rules.

In terms of eligibility requirements, in Germany and the Netherlands applicants have to impose over an employment contract and comply with a minimum salary threshold, which is higher in Germany than in the Netherlands. In both countries an exception to the salary requirement is made for high-level academic researchers and teaching personnel. The eligibility criteria in Directive 2009/50/EC are at least equally demanding. Admission under the Blue Card scheme is in many respects more difficult than admission under the national schemes in Germany and the Netherlands. Even though the salary threshold for an EU Blue Card is slightly lower than the threshold applied for a settlement permit in Germany, the

⁸⁸ Article 19(3).

⁸⁹ Article 3.67 Aliens Decree.

⁹⁰ Article 3.51(6) Aliens Decree.

additional requirements imposed upon applicants are very demanding. In particular, it is notable that Blue Card applicants may be subjected to labour market tests and quotas, which is not the case for the admission of highly-skilled migrants under the national schemes.

When looking at specific rules for young migrants and former students, the Netherlands has adopted favourable rules for these categories of applicants, as a lower salary threshold applies to migrants below a certain age and to former students from a Dutch or a high-ranking foreign university. Recently Germany introduced a new rule, exempting former students from the labour market test. In addition, all three Member States allow former students from respective countries' universities to search for a job within the highly-skilled category for a period of 12 months after graduation. The final version of Directive 2009/50/EC does not contain a special reduced salary threshold for young workers or former students. This renders an application under the Blue Card scheme 'less attractive' for these categories of highly-skilled migrants than under national schemes, where facilitated access is available.

Concerning the validity of the permit acquired and access to permanent residence status, in the EU Member States in principle a period of five years of residence is required in order to become eligible for a long-term residence permit or indefinite leave to remain. An exception is made for highly-skilled migrants in Germany, who are immediately granted a permanent residence permit. Thus, in terms of residence rights, Germany offers the most favourable conditions to eligible highly-skilled migrants. In the Netherlands, on the other hand, requirements for obtaining a long-term residence permit are rather demanding, including language and integration tests. In this respect, it is made quite difficult for migrants to settle down for longer periods of time which is contrary to generous possibilities for short-term settlement.

Also with regard to the validity of the permit and access to permanent residence rights, the Blue Card adds little if anything at all to national admission schemes. Since the Directive does not mention anything about possibilities of renewal, highly-skilled migrants are dependent upon national law in order to attain access to a permanent residence status. Rules are more favourable in the national legislation of Germany and the Netherlands. Both countries allow for access to permanent residence either directly upon arrival (G) or after the initial residence permit has been renewed (NL). An aspect that might come to the benefit of highly-skilled migrants applying under Directive 2009/50/EC is the possibility to accumulate periods of residence in different Member States in order to fulfil the five-year residence requirement to obtain long-term residence status⁹¹. In addition, highly-skilled migrants are permitted longer periods of absence from EU territory than other (potential) long-term residents. However, these benefits are partially undermined by the fact that the Blue Card will only be valid for up to four years, falling short of the necessary residence requirement for obtaining long-term residence status.

With respect to family reunification rights, it is notable that both the Netherlands and Germany operate very similar rules in respect of which categories of family members will be admitted (spouses and minor children) and do not apply waiting periods or integration requirements to family members of highly-skilled workers. Even though under Directive 2009/50/EC, Blue Card holders are privileged over ordinary family migrants, the Directive will not add any additional benefits to existing national schemes. Neither Germany nor the Netherlands apply waiting periods or integration abroad requirements to family members of highly-skilled migrants and direct access to the employment market is guaranteed.

The only visible advantage of the Blue Card scheme is the possibility to take up employment in a second Member State. Blue Card holders may, after eighteen months of legal residence, take up highly qualified employment in a second Member State.⁹² In order to receive a Blue Card in the second Member State, the same conditions as those for entry have to be fulfilled. This provision all but

⁹¹ They must, however, have been resident in the Member State issuing the long-term residence permit for at least two years prior to lodging an application, Article 16(2)(b).

⁹² Article 18.

demolishes the idea of a free circulation of labour between the Member States. Entry to a second Member States has become (at least) as difficult as first admission. Member States remain free to apply quotas in accordance with Article 6 of the Directive. Moreover, according to 18(2), Member States are free to prohibit Blue Card holders from another Member State from taking up employment as long as the application is still pending. As the deadline for dealing with applications in the second Member State equals the timeframe applied in the first Member State,⁹³ a highly skilled worker may be required to have to wait for up to 90 days before being able to take up employment in the second Member State. This reduces the attractiveness of making use of the free movement right. In addition, if the applicant's Blue Card issued by the first Member State expires during this waiting period, the second Member State is allowed, but not required, to issue the person a national temporary residence permit until a decision has been taken. Whilst awaiting a decision on the issuing of a Blue Card, the second Member State may also impose restrictions upon the equal treatment of the applicant, except for the freedom of association and the recognition of diplomas.⁹⁴ What is more, after having considered the application of the highly skilled worker, the authorities of the second Member States will either issue a Blue Card or refuse to do so. In the latter case, the first Member State must re-admit the migrant even if the Blue Card issued by the first Member State has expired in the meantime and applicants will be able to search for new employment for a period of three months after re-admission.⁹⁵ The costs related to return and re-admission of the Blue Card holder and his family members may have to be covered by the applicant or his employer.

All in all, it is highly questionable whether the prospect of moving to another Member State will appear attractive to highly skilled migrants, considering the great insecurities involved whilst awaiting a decision and the possibility to have to cover return and re-admission costs in the event that the decision is negative (which might even be related to the existence of national quotas, rather than a failure to meet the conditions for admission). Rather than constituting a permit that can be used in order to reside and work in different Member State, as the concept of an EU Blue Card implies, it remains a document issued by national authorities in compliance with largely nationally-determined requirements. When moving to a second Member State, applicants must fulfil the same conditions as those for admission, which means that they effectively have to apply for a second Blue Card. This leaves open the question of whether it is easier and more attractive for such migrant workers to apply for two separate Blue Cards, rather than to apply for two separate residence permits under national highly skilled migrant schemes.

VI. CONCLUSIONS

It appears from the preceding comparison that in recent years European migration policies have become increasingly favourable towards the admission of highly-skilled workers. Some EU Member States, such as Germany and the Netherlands have introduced special entry regimes for highly qualified migrants several years before agreement on a common legal instrument at the European level could be reached. According to the Commission in its explanatory memorandum to the Blue Card proposal,⁹⁶ the lack of attractiveness of the Union can be traced back to the difficulties faced by highly skilled workers, namely 27 different admission systems and the obstacles in moving from one Member State to another. The attractiveness of the EU is considered to be substantially diminished by the fragmentation of the labour market and national solutions. By harmonising the admission rules in respect of highly skilled workers the Directive is foreseen to promote the efficient allocation and re-allocation of high-skilled labour at the Union level.

⁹³ Article 18(4) refers to Article 11.

⁹⁴ Article 14(4).

⁹⁵ Article 18(4)(b) jo. 13.

⁹⁶ Recital 7 of the preamble.

It is questionable to what extent the introduction of the EU Blue Card is of added value to highly skilled migrants from India in Member States with pre-existing national schemes for the admission of highly qualified workers. The Directive is far from establishing the kind of legal certainty, clarity and predictability aimed at. This is the result of the Commission and the Member States trying to balance the desirability of a common system of entry and residence conditions with the need to accommodate divergent national labour market needs. As a result, the Directive provides for a minimum degree of harmonisation, while leaving as much flexibility and room for discretion as possible to the Member States. It must be stressed that the Directive will not create a right of admission for highly skilled workers. Member States maintain the right to control the number of highly qualified workers entering their territory. Moreover, there are several elements which make admission under the Blue Card regime less advantageous than admission under national schemes in the Netherlands and Germany.

Indian highly skilled migrants wishing to acquire a Blue Card are faced with rather demanding admission criteria. In comparison with the Knowledge Migrant scheme in the Netherlands, the applicable salary threshold is rather high and an additional requirement regarding qualifications applies. Moreover, the idea of the European Commission to introduce special rules for young professionals was abandoned during the Council negotiations. The Netherlands and Germany, to the contrary, have adopted specifically favourable rules for young migrants and former students. Furthermore, the Blue Card scheme is essentially a temporary system. The validity of the Blue Card ranges between one and four years and is not renewable. This differs from the approach in Germany, where a permanent residence permit is granted upon entry. The focus on temporariness runs counter to the findings of the OECD that indicate that many of the current and future labour needs are likely to be long-term in nature.⁹⁷

The Blue Card Directive also fails to address the problem of fragmented labour markets and falls short of providing for a common European admission scheme of highly skilled migrants. This is due to two major reasons. First, during the Council negotiations the Member States insisted on being able to apply (more favourable) national admission schemes for highly skilled migrants next to the Blue Card system. The Directive allows for the co-existence of national rules for highly-skilled migrants and the Blue Card scheme. This raises doubts as to the added value of the Blue Card scheme in countries with pre-existing rules. Indian migrants will most likely opt for a national entry route, if entry conditions are more favourable than under the Blue Card scheme. The co-existence of national and EU rules and the restriction of free movement rights severely limit the 'added value' of the Blue Card Directive in addition to national schemes. It means that the Blue Card will constitute an additional layer of possible entry routes in the EU, rather than harmonising the already existing ones. Second, the possibilities for highly skilled third-country nationals to move to a second Member State for employment after a certain period of time were considerably restricted during the Council negotiations. In the case of free movement the same conditions have to be complied with as for first admission. Member States may even apply quotas in respect of highly-skilled migrants moving from another Member State. These restrictions diminish the value of the free movement provision for highly-skilled workers to a significant extent. Consequently, neither the objective of harmonising admission systems nor the goal of allowing highly skilled migrants to move easily between national labour markets has been achieved.

In spite of all these deficiencies, to a certain extent the new Directive is a step forward in harmonising rules on economic migration in the European Union. There are several features of the Blue Card Scheme that will raise the attractiveness of the European Union for highly qualified workers from third countries. These include the deadline for dealing with applications for a residence permit, the provisions allowing highly skilled immigrants to accumulate residence periods in different Member States in order to acquire long-term residence status and favourable family reunification rules. However, when considering the fact that the Directive emerged out of a Commission Green Paper discussing the 'added value' of adopting a

⁹⁷ OECD, *SOPEMI International Migration Outlook* (OECD, 2008), 20.

common framework for admitting economic migrants,⁹⁸ it appears that the Blue Card Directive adds relatively little to already existing national admission schemes. The admission criteria applicable to highly-skilled migrants in several Member States (such as the Netherlands) are less demanding and the residence rights granted in others (such as Germany) are more extensive than those granted under Directive 2009/50/EC. The main added value of common European rules for Indian highly skilled migrants must thus be found in the introduction of special rules for highly skilled migrants in countries that did not previously have similar national rules in place.

⁹⁸ European Commission, Green Paper on an EU approach to managing economic migration of 11 January 2005, COM(2004) 811 final.