This analysis was drawn up by the Subsidiarity Monitoring Unit. It serves as a background document for the partners in the network. The Committee of the Regions is not, in any way, liable for its content.

Introductory remarks
on the analysis of subsidiarity and proportionality

General remarks

1) The consultation is based on the Protocol in force at present on the application of the principles of subsidiarity and proportionality (Treaty of Amsterdam).
http://subsidiarity.cor.europa.eu/not_subsi/quoi_subsi/tabid/219/Default.aspx

2) The main purpose of this consultation is to check whether and to what extent the proposals contained in the Commission texts

   – tally with the provisions laid down in the Treaty articles,
   – comply with the criteria/guidelines laid down in the Protocol, and
   – whether it is clear that the consultations (e.g. in accordance with the first indent of Article 9 of the Protocol) and the checks (e.g. impact assessment in accordance with the third indent of Article 9 of the Protocol) have been carried out properly and adequately by the Commission.

3) The main purpose of the test is not to find cases where Commission documents infringe the principle of subsidiarity or proportionality.

   The corresponding legal texts are to be found on the subsidiarity website http://subsidiarity.cor.europa.eu/Consulterlesanalysesfaireparvenirlesvôtres/tabid/208/Default.aspx?fieldid=11&dosearch=true&statusid=4

4) The analysis approving or questioning a Commission proposal or a part thereof within the framework of this test must always be based on arguments which relate to the relevant TEC articles (legal basis) or the criteria/guidelines contained in the Protocol. Any assessment not based on such arguments would be in contradiction with the purpose of this test.

   The subsidiarity assessment electronic form on the website therefore does not contain any new points but is based solely on the Protocol's criteria/guidelines, compliance with which has to be ensured by the EU institutions in accordance with Article 1 of the Protocol.

5) Four Commission documents are to be analysed as part of this test.

   1. **Commission Communication on circular migration and mobility partnerships between the European Union and third countries COM(2007) 248**
   2. **Proposal for a Directive of the European Parliament and of the Council providing for sanctions against employers of illegally staying third-country nationals COM(2007) 249 final**

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3. **Proposal for a Council Directive on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment COM(2007) 637 final**
4. **Proposal for a Council Directive on a single application procedure for a single permit for third-country nationals to reside and work in the territory of a Member State and on a common set of rights for third-country workers legally residing in a Member State COM(2007) 638 final**

All the above documents contribute to the gradual development of a comprehensive immigration policy in the EU. The "package" addresses both legal and illegal immigration. The first document on circular migration and mobility partnerships is non-legislative. The 3 remaining documents are of a legislative nature (the directive on sanctions against employers is to be adopted via the codecision procedure, the two other directives by the Council by unanimity after consulting the European Parliament). The directives would be legally binding and the Member States would have to transpose them into their national legal orders within 2 years.

General comments on the documents to be analysed

The following comments are not exhaustive are only intended as a starting point for more detailed reflections based on the Treaty, the Protocol, and the subsidiarity analysis form that you will find on the website.

- The most important elements of the EC documents are:

1. Development of mobility partnerships between the EU, certain Member States and certain third countries establishing overall frameworks within which legal migratory flows between the countries concerned and the EU would take place.
2. Promotion of circular migratory flows (i.e. migration managed in a way that allows some degree of legal mobility back and forth between the third country of origin and the EU country of admission). Bilateral agreements between interested EU Member States and certain third countries are also contemplated.
3. Prohibition of employment of illegal immigrants: to be achieved through the imposition of obligations on employers of all third country workers (hereafter "TCW") and sanctions (of an administrative or criminal nature) on those employers. Member States will be required to provide for complaint mechanisms and make inspections on companies.
4. Creation of a demand driven, fast-track and flexible procedure for the admission of highly qualified third country immigrants and proposition of attractive residence conditions for them and their family members (including certain facilitations to those who would wish to move to a second Member State for highly qualified employment).
5. Attribution of a common set of rights to all lawfully resident TCW in the Member States and introduction of a single application procedure leading to a single residence/work permit.

To have in mind

The authors of these introductory remarks advise the network partners to have the following aspects in mind, when analysing the documents:
(a) Is, and if yes in how far is the integration of immigrants into the EU Member States to be achieved through the attribution of rights through EC legislation?
(b) How do the proposals affect the right of Member States to determine the volumes of immigrants they intend to admit on their territories?
(c) In how far do the proposed measures comply with the principle of proportionality and the need to minimise costs?

Competence allocation. Immigration policy is a very sensitive issue for Member States and one of the priorities for the EU (see Article 2 of the EU Treaty). As Community law now stands the EC has a limited competence as regards immigration issues (see Article 3 and Title IV of the EC Treaty), covering aspects of legal and illegal migration, but not going as far as to include the integration of immigrants. Current Articles 63(3) and 63(4) of the EC Treaty provide the following:

The Council […] shall […] adopt:

> *3. measures on immigration policy within the following areas:*
> *(a) conditions of entry and residence, and standards on procedures for the issue by Member States of long-term visas and residence permits, including those for the purpose of family reunion;*
> *(b) illegal immigration and illegal residence, including repatriation of illegal residents;*
> *4. measures defining the rights and conditions under which nationals of third countries who are legally resident in a Member State may reside in other Member States.*

The scope of EU competence regarding immigration is set to be enhanced when the Reform Treaty has been ratified by all the Member States (art. 69b of Treaty on the Functioning of the EU).

The presently proposed measures cover a very wide range of issues, i.e. on the one hand conditions of admission procedures and residence of certain TCW, their rights once settled in a Member State (specifically equal treatment with Member State nationals as regards certain fields including *inter alia* education and vocation training, social security, pension rights and taxation), the right to move to and work in other Member States, the right to family reunification, and on the other hand sanctions (of an administrative or a criminal nature) aimed to curtail illegal immigration. The proposals even make references to the eventual "*integration*" of TCW.

Having the above facts in mind, do you think that the measures contained in the documents under examination respect the competences given to the EC by means of Articles 2 and 63 of the Treaty or would they lead the Community to exceed its powers for the moment? Would you think that other Treaty articles could be used as alternative or parallel legal bases, through which the intended objectives could be better achieved? According to Article 2 of the EU Treaty, Article 5 of the

EC Treaty on subsidiarity applies. It states: *"The Community shall act within the limits of the powers conferred upon it by this Treaty and of the objectives assigned to it therein"*. Would you think that other Treaty articles could be used as alternative or parallel legal bases, through which the intended objectives could be better achieved?

Competence allocation: As Community law now stands, many aspects of immigration policy are in the hands of the Member States, especially the determination of the volumes of immigrants they intend to accept. This will even be reinforced in the Reform Treaty (Article 69b paragraph 5 of the Treaty on the Functioning of the EU). How do the measures proposed by the documents under examination (especially the right of immigrants to move and work in other Member States under certain conditions) reconcile with the above Member State competence?

Clear Benefit Test. Do you think that the existing measures (at European or Member State level) are sufficient? If not, can the objectives of these new legislative proposals only be achieved by EC action? Would they bring value added to the EC economy overall? Have local or regional competences been taken into consideration/respected? Would your member state's interest be damaged if this legislation would not pass?

Quality of the arguments provided. Has the European Commission sufficiently explained in the legislative proposals why it believes that the proposals are in line with Article 5 of the TEC concerning the implementation of the principles of subsidiarity and proportionality? Has the Commission presented complete and coherent impact assessments? Do you agree with the policy options chosen?

Effectiveness Test. Commission proposals cover diverse issues of legal and illegal migration. Could the objectives of the proposed legislation be achieved in an alternative way? Is European harmonisation needed? If yes, in all suggested areas?

Effectiveness Test. Some of the proposals presented by the European Commission in these documents have an important impact at local and regional level, since local and regional authorities are major employers and responsible for the implementation of social or labour law. Moreover, not all Member States and regions experience the challenges posed by immigration in the same way and do not receive the same numbers of TCW. Therefore, does the institution that you represent consider that the different proposals take into consideration the diversity of situations in the EU regions?

Minimum Legal Constraint Test. According to Article 6 of the Protocol "*Directives (…) while binding upon each Member State to which they are addressed as to the result to be achieved, shall leave to the national authorities the choice of form and methods*". Moreover, Article 63 penultimate subparagraph of the EC Treaty clarifies that Member States still can maintain or introduce measures in the field of immigration (provided that these measures do not conflict with the Treaty or international agreements). Do you consider that the legislative proposals leave enough room to Member States' action?

Minimal Cost Test. The Protocol underlines in Article 9 that the Commission *should "take duly into account the need for any burden, whether financial or administrative (…) to be minimised and proportionate to the objective*". Some of the proposals will lead to extra costs. Proposals such as the new rights for third country nationals in education, vocational training etc. or the controls performed before the employment of third-country nationals will increase public spending (additional staff, management, IT, etc). Which financing or administrative costs are likely to arise for your regional or local authority from these legislative proposals?

Preparation of the proposal. Article 9, 1st indent, of the Protocol on the application of the principles of subsidiarity and proportionality obliges the Commission to *"carry out wide-ranging consultations before proposing legislative texts and [to] publish, wherever appropriate, documents concerning these consultations"*. Have regional and local authorities been sufficiently consulted in order that their diverse situations are taken into account?

Are there **other arguments** from the point of view of the principles of subsidiarity and proportionality which should be put forward as regards the present legislative proposals?

Specific comments on the 4 Commission documents

1. **Commission Communication on circular migration and mobility partnerships between the European Union and third countries COM(2007) 248** [refer to Articles 2, 4th indent of the EU Treaty and Articles 61 (b), 63 (3) and 63 (4) of the EC Treaty]

- The Commission acknowledges that mobility partnerships will be of a complex legal nature and will involve components some of which are within the remit of the EU and others of the Member States. Does the proposed framework respect the division of EU and Member State competences? In addition, does the proposed framework provide considerable value added in offering a comprehensive response to the challenges presented by immigration and leading to a homogenous common migration policy?
- It is envisaged that within the mobility partnerships job matching services will be developed in the third countries concerned, which would then help match vacancies in the EU with job-seekers in the country in question. Local and regional authorities play a significant role in receiving legal migrants. In this regard, it seems that local and regional authorities would have a significant stake in such eventual job-matching services. Which administrative or financial burden do you foresee for your authority? Do you have experience with such services as regards job matching with other EU countries? If yes, how would the new job matching exercise with third countries affect the job matching with EU countries?
- It is envisaged that Member States will be required to monitor the operation and effectiveness of established circular migration schemes. Do you foresee any financial or administrative burden arising from such an eventual responsibility for your regional or local authority?
- This document emphasises that the notion of circular migration is a central element of any future EU policy on immigration. This has to be seen against the backdrop of the Member States' responsibility to determine the volumes of immigrants they accept. Are the proposals in this

communication (i.e. the idea of having regulated immigration flows only between two countries) compatible with elements in the proposals for a Council directive calling for the mobility of legally admitted TCW in the EU (e.g. highly qualified TCW will be able to move to other Member States and access their labour market after fulfilling certain conditions)?

2. **Proposal for a Directive of the European Parliament and of the Council providing for sanctions against employers of illegally staying third-country nationals COM(2007) 249 final** [refer to Articles 2, 4th indent of the EU Treaty and Articles 61 (b) and 63(3) b of the EC Treaty]

- This proposal concerns the prohibition of the employment of illegally staying third-country workers (hereafter "*TCW*") and the imposition of sanctions of an administrative and/ or criminal nature on their employers. Do you consider that the Commission has supplied adequate reasons showing such an approach to be necessary and effective as a means to discourage illegal migration?
- As a general rule, sanctions have to be proportionate and commensurate to the seriousness of the offences. According to the proposal it will be for the Member States to identify the sanctions to be imposed. However the proposal itself sets the overall framework of employers' responsibility by introducing obligations and prohibitions. This framework would be binding for the Member States, which have to introduce it into their legal orders. In this regard the principle of proportionality is of great importance.
- According to Article 1 of the Protocol "*Community action shall not go beyond what is necessary to achieve the objectives of the Treaty*". The proposal applies to all employers in the EU, be they natural or legal persons. This also includes private individuals in their capacity as employers of illegally present TCW for the provision of services to their own household e.g. house cleaners, baby-sitters or companions for the elderly. The objectives of the proposal are *inter alia* to curtail illegal immigration by reducing the "pull factor" of illegal employment in the EU and to minimise the economic impact of illegal employment on competition, businesses and society at large. Does such an extension of employers' responsibility to household employers of illegally present TCW contribute to the achievement of these objectives in an effective way?
- The proposal creates a rebuttable presumption (for the purpose of calculating outstanding remuneration, taxes and social security contributions owed on behalf of the employer) that the work relationship between the employer and the illegally staying TCW had a duration of at least 6 months. Do you think that such a presumption contributes to the achievement of the proposal's objectives, especially if it is applied to small private employers?
- The proposals requires Member States to hold the main and intermediate contractors jointly and severably liable for administrative fines, outstanding remuneration, taxes and social security contributions with their sub-contractors, who employ illegally staying TCW. Do you think it is feasible for contractors (who in many cases could be local or regional authorities) to control whether subcontractors, to the services of which they resort, fulfil all the obligations imposed upon them by the proposed directive? Is the enforcement of this obligation by public authorities practically feasible?

- According to Article 7 of the Protocol Community action should respect "well established national arrangements and the organisation and the working of the Member States' legal system". The proposed directive requires that Member States ensure that legal persons can be held liable for the criminal offences provided for in the directive. Could this be achieved in your Member State or region without making changes to the criminal law system? If not, is it according to the subsidiarity principles of allocation of competence and subsidiarity up to the EC to introduce or initiate such changes?
- Article 9, 3rd indent of the Protocol calls the Commission to take due account of the need "*for any burden, whether financial or administrative, falling upon […] local authorities, […] to be minimised and proportionate to the objective to be achieved*". The proposed directive requires Member States to provide for mechanisms, whereby illegally staying TCW can file complaints against their employers, and to ensure that at least 10% of the companies established on their territory are subject to inspections? Were local authorities and economic actors in your region consulted in regard with the administrative and financial impact? Do you think there would be implications for your local or regional authority? Does the proposal minimise costs?

3. Proposal for a Council Directive on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment COM(2007) 637 final [refer to Articles 2, 4th indent of the EU Treaty and Articles 61(b), 63(3)(a) and 137(1)(g) of the EC Treaty]

- Are proposals aiming at a better integration of third country workers into the member states covered by the current Treaty provisions and in line with the principle of allocation of competences [Article 5 (1) TEC]?
- Based on Article 63 (3) and (4) the proposal attributes a set of labour related rights to highly qualified TCW admitted in the Member States (*inter alia* access to the labour market of the Member State of initial entry, access to other Member States labour markets, equal treatment with nationals in regard to social security, education and vocational training, recognition of diplomas and qualifications, tax benefits etc). These rights broadly correspond to rights granted to EU nationals in the context of the internal market and they aim to close the "rights gap" between EU workers and TCW. Do you think that Article 63(3)(a) TEC justifies that the rights granted to EC nationals in the framework of the internal market are extended to cover TCW? Would you think that an additional or alternative (existing) legal basis of the EC Treaty would be adequate?
- The proposal stipulates that Member States should set a national salary threshold equal to at least three times the national minimum wage. In order that an applicant TCW be admitted and be granted the "EU Blue Card" s/he must demonstrate that the gross monthly salary is higher to the aforementioned threshold (this requirement is "softened" for young professionals). In your opinion, does the imposition of such a threshold leave ample scope to the Member States to determine their immigration policies, especially in view of the fact that immigration is a shared competence and in view of the proposal's stipulation that the Directive would not prejudice the Member States' competence to determine the volume of admission of TCW for employment? In EU countries where there do not exist national minimum wages: would this EC legislation have

collateral consequences for the social policy in your country? If yes, would the initiation of these consequences fall in the remits of the EC and would you accept these consequences?

- Under the proposal highly qualified TCW and his/her family acquire the right to move and work to other Member States after a period of two years' legal residence in the Member State of initial admission, if they fulfil again the conditions required by the legislation of the second Member State based on the minimum standards of the Directive. How do you evaluate this possibility in relation to the concept of "circular migration"? In addition, do you think that the conditions required in order that this mobility right be granted, safeguard in an effective way the competence of the Member States to determine their admission volumes?
- Article 6 of the Protocol on the application of the principles of subsidiarity and proportionality calls for simplicity in the form of EC legislation. Framework directives should be preferred to directives and directives should be preferred to regulations. In addition Article 7 requires that EC action leaves as much decisional scope as possible to the Member States. Do you feel that the present proposal for a directive leaves ample scope to the Member States (and to their local and regional authorities) to make choices as to the best ways to implement its provisions?

4. Proposal for a Council Directive on a single application procedure for a single permit for third-country nationals to reside and work in the territory of a Member State and on a common set of rights for third-country workers legally residing in a Member State COM(2007) 638 final [refer to Articles 2, 4th indent of the EU Treaty and Articles 61(b), 63(3)(a), 63(4) and 137(1) (g) of the EC Treaty]

- Are proposals aiming at a better integration of third country workers into the member states covered by the current Treaty provisions and in line with the principle of allocation of competences [Article 5 (1) TEC]?
- The proposal attributes a set of labour related rights to TCW admitted in the Member States (equal treatment with nationals in regard to certain employment related issues, i.e. working conditions, social security, education and vocational training, recognition of diplomas and qualifications, tax benefits etc). These rights broadly correspond to rights granted to EU nationals in the context of free movement in the internal market and they aim to close the "rights gap" between EU workers and TCW. The present proposal is based on Articles 63(3)(a) TEC and 63(4). Do you think that these legal bases justify that the rights granted to EC nationals in the framework of the internal market should be extended to cover TCW? Would you think that an additional or alternative legal basis would be adequate?
- How do you evaluate the scope of these rights along with the exceptions thereto in regard to the principle of proportionality?
- Article 9, 3rd indent of the Protocol calls the Commission to take due account of the need "for any burden, whether financial or administrative, falling upon*[…] local authorities, […],* to be minimised and proportionate to the objective to be achieved". The proposal requires member states to designate a competent authority to receive applications for and issue the single residence/work permit. Do you foresee that this would have any implication for your regional or local authority? Can you quantify this? Has this burden been minimised by the proposal?

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