

Directorate for Consultative Work

Unit 3 – *Networks & Subsidiarity*



EUROPEAN UNION



Committee of the Regions

Subsidiarity Monitoring Network

**Consultation on Immigration & Employment
Report**



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Part I: Summary of main results	2
Part II: Subsidiarity & Proportionality Analysis / Results of the Consultation	7
1. Commission Communication on circular migration and mobility partnerships between the European Union and third countries COM(2007) 248 final	7
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	10
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	14
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	18

Note

This report was drawn up under the authority of the President and the First Vice President of the Committee of the Regions, in accordance with the decision of the CoR Bureau [CdR 86/2007 item 6b].

Part I: SUMMARY OF MAIN RESULTS

The consultation on the "*Immigration & Employment Package*", addressing both legal and illegal immigration, was launched on 21 November 2007 and ran until 11 January 2008. It includes a non-legislative document¹ and three documents of a legislative nature².

Participants were asked to prepare an analysis of the EC documents submitted to the consultation on the basis of the Protocol on the application of the principles of subsidiarity and Proportionality, which is annexed to the Treaty of Amsterdam.

Participants in the consultation

Two regional parliaments³, two regional governments⁴ and one association⁵ took part in the consultation. Meetings were organised within the framework of the consultation and in-depth political discussions and exchanges of views on the European immigration policy took place at the political level in partner organisations.

All the partners⁶ submitted contributions on the proposed Directive on sanctions against employers. The **German County Association** did not submit contributions on the Communication and on the proposed directive for a single permit for third-country nationals (hereafter "TCN"). However, only the **German County Association** and the **Austrian Partners** submitted observations to the proposal on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment

The **State Parliament of Lower Saxony**, the **Regional Government of the Azores**, the **National Assembly for Wales** and the **Parliament of the Brussels-Capital Region** explained that - even though immigration is a relevant topic for local and regional authorities - they could not contribute to the consultation due to their lack of a direct internal competence in the matter.

1 Communication on circular migration and mobility partnerships between the EU 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; 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 and 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.

3 Basque Autonomous Parliament, State Parliament of Vorarlberg.

4 Basque Government, Austrian State Governors' Conference.

5 German County Association

6 German County Association, Basque Parliament and Basque Government Austrian States' Governors Conference and State Parliament of Vorarlberg.

MAIN RESULTS OF THE CONSULTATION

Part II contains a more detailed account of the actual contributions. The full contributions of partners can be accessed via the subsidiarity monitoring network (<http://subsidiarity.cor.europa.eu/>).

Legal basis and competence allocation

Correct legal basis

Partners have identified the legal bases chosen by the Commission for its legislative proposals (articles 62, 63 and 64 of the TEC).

The **Basque Government** has also accurately underlined the new scope of EU competences regarding immigration, contained in article 63a of the Treaty on the Functioning of the EU as it is established by the Lisbon Treaty.

A point of controversy was exposed regarding the Directive on the conditions of entry and residence of highly qualified TCW⁷. Here, the **German County Association** questions article 63(3)(a) TEC as the accurate legal basis for regulating the access of TCN to the Member States' labour market.

In the same line, the **Austrian Partners** explain that the scope of article 63(3)(a) TEC is still an open legal question. In addition, the Austrian partners contest that the chosen legal basis by the Commission covers the export of social security benefits outside EU territory. The same concern is voiced as to the legal basis for the proposed directive on the single application procedure, permit and set of rights⁸.

Competence allocation: disagreement regarding the competence to impose sanctions

Even though the **Basque partners** consider essential to respect Member States competence in some of the issues presented by the proposals (i.e. determination of admission quotas), they do not see major problems in the competence allocation. Nevertheless, other partners⁹ put into question the EC competence in crucial points proposed by the Directives.

Some partners fear that measures such as sanctions against the employers of illegally third country workers (hereafter "TCW"), might lead the Community to exceed its current powers. In this respect and with reference to recent jurisprudence of the European Court of Justice, the **German County**

⁷ COM (2007) 637.

⁸ COM (2007) 638.

⁹ German County Association, Austrian States' Governors Conference and State Parliament of Vorarlberg.

Association and the **Austrian Partners** wonder whether the EC competence to enact Community sanctions in the environmental field can be extended to other policies, such as immigration¹⁰.

Shared competence

All partners¹¹ agree that the responsibility for immigration policy is a shared competence between the Community and the Member States and that, therefore, the principles of subsidiarity and proportionality apply. Partners, however, insist on the fact that, issues as the determination of the number of TCN admitted into the Member States for the purpose of work remains national competence¹².

Compliance with the principle of Subsidiarity

Necessity & Added Value of Community action

Regarding this point, partners appear to be in disagreement on the necessity and the added value of the Community action outlined by the proposals.

On the one hand, the **Basque partners** consider that the proposals have trans-national aspects and action at EU level would be better to achieve the objectives foreseen. Besides, the lack of community action could, in their opinion, be detrimental to the single market. Consequently, they argue that individual national action could give rise to important differences in the treatment of TCN within the EU. On the same line, any disparities in the sanctions regime could, in their view, distort the single market and facilitate the movements of illegal immigrants in the EU from one State to another according to the level of sanctions established by the Member States.

The **German County Association** and the **Austrian Partners** share the opposite view and in general consider that the necessity of Community action has not been proven. Therefore, they suggest to keep action on the individual Member States level. The only exception is the stance the **Austrian Partners** adopt vis-à-vis the "Blue Card" directive, which they receive positively on the basis of the principle of subsidiarity¹³.

Finally the **Austrian Partners** raise a very interesting point as regards the single application, permit and single set of rights proposal: although they do not view it favourably on subsidiarity grounds, they

¹⁰ For a full exposé of the arguments brought forward please see PART II – Section 2.1.

¹¹ German County Association, Basque Parliament, Basque Government Austrian States' Governors Conference and State Parliament of Vorarlberg.

¹² This is now expressly confirmed by article 63a of the Treaty on the Functioning of the European Union.

¹³ For details please see PART II, point 3.2.1.

do nevertheless propose that Member States wishing to go forward with this idea establish a mechanism of enhanced cooperation.

Quality of the Arguments Provided

To conclude, partners agree as to the fact that the Commission has brought forward few quantitative arguments to support the compliance of its proposals with the subsidiarity principle.

Compliance with the Proportionality principle

The partners from the Basque Country consider that the arguments brought forward by the Commission adequately substantiate the compliance of the Communication with the principle of proportionality. Conversely, the **German County Association** and the **Austrian Partners** appear to dismiss these arguments¹⁴. Moreover, these partners consider the proposed measures as going beyond what is necessary to achieve the intended objectives.

Choice of instrument

All partners agree with the choice of Directives as a legal instrument, since this leaves more room for Member States action. Moreover, they agree that the Commission has correctly justified their choice.

The **Basque partners** consider that the legal proposals only entail a minimum degree of harmonisation and that Member States will have flexibility in their incorporation and implementation.

The **German County Association** and the **Austrian Partners** – although in general agreeing with the choice of legal instrument – consider that some of the proposals do not leave much scope for decision to the member states. In addition **German County Association** cautions that the "Blue Card" proposal is overly restrictive of the Member States' freedom to determine the demand driven direction of their labour markets.

Costs of implementation

All partners identify that costs will be necessary in order to implement the proposals. Moreover, they are critical of the Commission for not addressing this issue and for not trying to keep the administrative and financial implications of the proposals to a necessary minimum.

The **Basque Government** underlines the necessary additional procedures inherent to the proposals. In the same line, the **German County Association** makes reference to the bureaucracy generated increasing the types of residence permits. Only the **Austrian Partners** refer to the Impact Assessment

¹⁴ Having in the majority of cases given a negative verdict on subsidiarity, the partners often refer to this and offer only a very brief analysis of the proposals' compliance with the proportionality principle.

and comment that it addresses the cost implications of all examined options for the authorities of the Member States.

Nevertheless, the overall verdict of the **Basque Government** and the **Basque Parliament** is that the administrative and financial costs would go beyond what is necessary for the implementation of the proposal.

Evaluation of the preparation for the legislative proposals

All partners agree that the impact analysis presented by the Commission to support the legislative proposals omit the regional and local dimension. They regret this fact and point out that no separate subsidiarity assessment has been presented which particular takes into account the impact on regional and local authorities.

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PART II: Subsidiarity & Proportionality Analysis – Results of the Consultation

This section of the Report contains a summary of the contributions of the Partners on the four Commission documents subject to this consultation. The full contributions in their original language can be accessed through the website of the Subsidiarity Monitoring Network (<http://subsidiarity.cor.europa.eu>).

1. Commission Communication on circular migration and mobility partnerships between the European Union and third countries COM(2007) 248 final

This Communication proposes the establishment of "Mobility Partnerships" between the EU, certain Member States and certain third countries establishing overall framework, within which legal migratory flows between the countries concerned and the EU would take place. It also promotes the concept of "Circular Migration" (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).

1.1 Legal basis & EU Competence (Questions 1 & 2 of the analysis grid)

As this is a non-legislative Communication, it does not contain an explicit reference to a specific legal basis in the EC Treaty. However, the Partners who chose to submit a full analysis of this document¹⁵ have made the following comments regarding its legal basis and questions of EU competence.

The **Basque Parliament** identifies article 62 TEC (which deals with the crossing of the EU's external borders) as the legal basis for the "mobility partnerships". This partner also highlights the relevance of articles 63(1) and (2) TEC on the EU's policy on asylum, refugees and displaced persons. The same legal bases are also mentioned by the **Basque Government**. In addition this partner makes reference to the panoply of existing legal instruments (mainly contained in secondary legislation), which regulate the status of all third country nationals present in the EU (hereinafter "TCN"), and concludes that only "*unprivileged*"¹⁶ *foreigners shall be the natural recipients of EU migration policy measures*". The Basque Government also refers to the new legal basis for the EU immigration policy, contained in article 63a of the Treaty on the Functioning of the EU as it is established by the Lisbon Treaty.

Both partners from the Basque Country identify immigration as a competence shared between the EU and the Member States. They additionally provide an informative analysis of the internal distribution of competences regarding immigration matters within Spain and so explain to what extent the regions are responsible for such matters¹⁷.

¹⁵ Basque Parliament, Basque Government.

¹⁶ By the term unprivileged foreigners this partners refers to TCN, whose status in the EC is not regulated by special secondary legislation or international agreements between the EC and third countries.

¹⁷ The analysis of the Basque Government does not limit itself specifically to the Basque Country, but also deals with the situation of other Spanish Autonomous Regions.

The **Austrian Partners**¹⁸ appear to accept the Commission's stipulation that mobility partnerships do not put into question the division of competences between the EU and the Member States and they are comfortable with the mixed agreements proposed by the Commission. In referring to the legal instruments cited by the Commission as aimed to foster circular migration (namely the proposed directive on the single application procedure, permit and the single set of rights for third country workers¹⁹), these partners mention that the comments they make under the latter proposal apply *mutatis mutandis* to the Communication examined in this section²⁰. Therefore, these partners chose not to make any further comments on this Communication.

1.2 Compliance with the Principle of Subsidiarity (Questions 3 to 6)

Only the **Basque Parliament** and the **Basque Government** have submitted detailed subsidiarity and proportionality analyses of this Communication, therefore the remaining part of this section will focus on their contributions.

1.2.1 Necessity & Clear Benefit of Community Action

Both partners agree that the issues related with migration partnerships and circular migration have trans-national elements. Therefore, they maintain that action only on the part of the Member States would not be enough to achieve the objectives envisaged by this Communication.

Similarly, the partners accept that Community action in the areas addressed by the Communication would provide value added in comparison to action taken only at Member State level. The **Basque Government** additionally cautions that – although EC action would be more efficient – the competences of the Member States should be respected, and that the mixity of the arrangements linked with the mobility partnerships should be taken into account (i.e. international agreements with the participation of the EC, certain member states and certain third countries). In relation to the necessity of the EC entering into international obligations, this partner also highlights that any community action on these matters needs to involve third countries in order to be viable.

1.2.2 Minimal Scope

The partners agree that the Communication respects well established national arrangements. The **Basque Parliament** highlights that the document under examination – in being a Communication – prioritises the competences and action on part of the Member States. Similarly, the **Basque Government** in referring once more to the mixed agreements for mobility partnerships makes an

¹⁸ Austrian States' Governors Conference, State Parliament of Vorarlberg (by virtue of the fact that these partners have submitted identical contributions, they will be collectively referred to as "Austrian Partners").

¹⁹ COM (2007) 638.

²⁰ See below, points 4.2 to 4.4.

implicit reference to article 300 TEC, which provides that the EC shall enter into international agreements based on a political mandate by the Council. It seems therefore to imply that such a mandate would guarantee the respect of well established national arrangements.

1.2.3 Quality of the Arguments Provided

Partners agree that the arguments brought forward by the Commission adequately substantiate the compliance of the Communication with the principle of subsidiarity. However, the **Basque Parliament** voices the request that in the future quantitative arguments be also provided.

1.3 Compliance with the Principle of Proportionality (questions 7 to 12)

1.3.1 Effectiveness & Efficiency of Community Action

The partners believe that the action proposed in the Communication is appropriate to achieve the set objectives and that it does not go beyond what is necessary to achieve them. In particular, the **Basque Government** underlines the importance of the Communication in that migration partnerships and the concept of circular migration contribute to covering the employment requirements of the EU whilst at the same time helping countries of origin to optimise the benefits and limit the negative effects of emigration. It also links this with the aim to curtail illegal immigration.

1.3.2 Minimum Legal Constraint & Cost of Implementing the Proposal

Partners judge the action brought forward in the Communication as leaving a wide margin of flexibility to the Member States. However, the **Basque Government** appears to be signalling that some elements of the action contemplated in the Communication need to be specified through guidelines, in order that they can be applied by the Member States. It is not stated whether this partner expects the Commission to issue the guidelines referred to.

As far as the costs connected with the implementation of the migration partnerships and the circular migration policy are concerned, the **Basque Parliament** considers that (administrative and financial) costs would not go beyond what is necessary for the implementation of the proposal. On the other hand, the **Basque Government** considers that such costs have not been sufficiently addressed by the Communication.

1.3.3 Quality of the Arguments Provided

Partners agree that the arguments brought forward by the Commission adequately substantiate the compliance of the Communication with the principle of proportionality.

1.4 Preparation of the Communication (Consultation & Impact Assessment)

The Commission has not prepared an Impact Assessment for this Communication. The **Basque Parliament** generally deplors the fact that a local or regional perspective is missing in the policy options contemplated in the Communication. The **Basque Government** refers to the Commission's intention to launch a consultation process in order to have an insight into the opinions and experience of other EU Institutions, the Member States and interested parties.

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**

This proposal aims at curtailing illegal immigration by reducing the "pull-factor" provided by the possibility of finding illegal work in the EU. This is to be achieved through the imposition of obligations on employers of all third country workers (hereafter "TCW"), the prohibition of employment of illegally present TCW and the imposition of sanctions (of an administrative or criminal nature) on employers who disregard the prohibition.

All the partners taking part in the consultation submitted contributions referring to this proposed directive²¹.

2.1 Legal basis & EU Competence (Questions 1 & 2 of the analysis grid)

Partners identify article 63 (3) (b) TEC concerning illegal immigration as they legal basis on which the Commission is submitting its proposal.

The **Basque Parliament**, in addition, draws attention to the fact that the co-decision procedure and a requirement of qualified majority voting in the Council apply to this proposal. This partner also makes reference to the new legal basis for the EU immigration policy, contained in article 63a of the Treaty on the Functioning of the EU as it is established by the Lisbon Treaty.

The **German County Association** and the **Austrian Partners** nevertheless question the existence of an EC competence to enact Community sanctions against the employers of illegally present TCW.

Both partners refer to the jurisprudence of the European Court of Justice (hereinafter "ECJ") to support their arguments: The ECJ has already pronounced that – although as a rule neither criminal law nor the rules of criminal procedure fall within the EC's competence – this does not preclude the Community legislator from taking measures which relate to the harmonisation of the criminal law of the Member States, where such action is considered necessary in order to ensure the full effectiveness

²¹ German County Association, Basque Parliament, Basque Government Austrian States' Governors Conference and State Parliament of Vorarlberg.

of the rules which the EC intends to lay down on environmental protection (*effet utile* argument)²². This finding has been recently reconfirmed by the ECJ²³.

In referring to the above ECJ jurisprudence the **German County Association** and the **Austrian Partners** point out that both judgments were related to EC/EU action in a field where environmental protection is relevant²⁴. They maintain that it is not certain if the same arguments in favour of EC competence as regards sanctions under criminal law can be applied in political fields other than the environment, including illegal immigration. These partners, therefore, effectively question the existence of a Community competence, which would allow the EC to accompany the prohibition to employ illegally present TCW with the threat of sanctions of a criminal nature on the employers.

The **Austrian Partners** in addition underline that, even if the existence of a Community competence in this regard were to be accepted, the questions pertaining to the right of TCN to stay in the EU are already sufficiently regulated by the laws of the Member States. Therefore in their view this would not give the Community at present the right to exercise any such competence. A similar argument is also put forward by the **German County Association**.

All partners identify matters of illegal immigration as belonging to the shared competence of the EC and the Member States²⁵. The **Basque Government** in particular notes that – despite immigration being classified as a shared competence – most actions still remain at the hands of the Member States and a true Community immigration policy has yet to be established. It also points to the fact that the determination of migration volumes remains in the exclusive competence of the individual Member States (both under the current Treaty and under the Lisbon Treaty). In this regard it draws attention to the risk that this proposal for a directive might actually affect the aforementioned competence of the Member States and it cautions that this may involve an infringement of the principle of allocation of competences.

It is finally worth to note that the partners from the Basque Country also make an interesting reference to the Spanish legal order and to the division of competences on immigration between the central government and the Autonomous Regions.

22 Judgement of 13/09/2005 on Case C-176/03 Commission v. Council, ECR 2005 p. I-07879, esp. points 47 and 48.

23 Judgement of 23/10/2007 on Case C-440/05 Commission v. Council, nyr, point 66.

24 In the first case the environment, while in the second case transport.

25 Of course, for the German County Association and the Austrian Partners this remark is qualified by the proviso that an EC competence as regards criminal sanctions in fact exists.

2.2 Compliance with the Principle of Subsidiarity (Questions 3 to 6)

2.2.1 Necessity & Clear Benefit of Community Action

Partners appear to be in disagreement as regards the necessity and the added value of the Community action outlined on the proposed directives.

On the one hand the partners from the Basque Country consider that the issue of illegal immigration poses trans-national elements, which cannot be successfully tackled only by action on behalf of the EU Member States. They thus advocate the necessity of EC legislation in this field. The **Basque Government** substantiates this view by referring to the number of illegal immigrants supposedly present in the EU and to the various problems posed by illegal migration. This partner also maintains that the lack of EC action would be detrimental to the requirements of the Treaty (in particular the internal market), inasmuch as the lack of a uniform sanctions regime in the EU would distort the single market and would facilitate the secondary movements of illegal immigrants in the EU to Member States, which have more relaxed sanctions or do not adequately enforce their sanctions.

On the other hand the **German County Association** and the **Austrian Partners** share the view that the Commission has not provided proof of the necessity or the added value of the measures included in the proposed directive. The **German County Association** is of the opinion that measures on the level of the individual Member States would be enough to achieve the intended objectives. In this regard EU action is deemed unnecessary. It also refers to the existing German legislation on this matter. Similarly the **Austrian Partners** appear not to be convinced by the internal market arguments brought forward by the Commission and they maintain that – even if Community competence were to exist – the measures foreseen would not be necessary and that the intended objectives could be sufficiently achieved by action only on the national level. They add that this would in no way conflict with the requirements of the EC Treaty, nor would it significantly damage the interests of the Member States.

2.2.2 Minimal Scope

The partners appear divided in their views as to whether the proposed directive respects established national arrangements or practices in the Member States.

The **Basque Parliament** comments that the proposal only entails a minimum degree of harmonisation and that – being a directive – it will provide certain flexibility in the incorporation and the implementation on the Member State level. The **Basque Government** also shares this view. In addition it draws attention to the penultimate paragraph of article 63 TEC, which in the field of immigration permits the Member States to maintain or enact measures under national law, provided that they are consistent with the Treaty and international agreements.

The aforementioned opinion is not shared by the **German County Association** and the **Austrian Partners**. The former mentions the existence in Germany of a balanced sanctions regime, which has

proved to be good, thus implying that the proposed measures would not respect this system. The Austrian Partners are concerned that the proposal ignores well established national legislation without providing any adequate justification.

2.2.3 Quality of the Arguments Provided

The **Basque Parliament** and the **Basque Government** agree that the arguments brought forward by the Commission adequately substantiate the compliance of the proposed directive with the principle of subsidiarity. Conversely, the **German County Association** and the **Austrian Partners** do not find the arguments brought forward by the Commission satisfactory. All partners however note the absence of quantitative indicators from the Commission's argumentation.

2.3 Compliance with the Principle of Proportionality (questions 7 to 12)

2.3.1 Effectiveness & Efficiency of Community Action

The partners from the Basque Country believe that the measures contained in the proposal are appropriate for and commensurate with the set objectives. In particular, the **Basque Government** considers that the application of similar and equally strict sanctions will act as an effective deterrent against illegal immigration and that it will help reduce the "pull-factor" exercised by the prospect of illegal work in the EU.

With reference to its analysis of the proposal from a competence and subsidiarity point of view the **German County Association** does not go into a very detailed evaluation of the proposed directive with regard to the proportionality principle.

The **Austrian Partners** adopt a similar stance. However they do mention that they consider the proposed measures as going beyond what is necessary to achieve the intended objectives.

2.3.2 Minimum Legal Constraint & Minimal Scope

The **Basque Parliament** comments that the proposal only entails a minimum degree of harmonisation and that – being a directive – it will provide certain flexibility in the incorporation and the implementation on the Member State level. The **Basque Government** also shares this view and it refers again to the penultimate paragraph of article 63 TEC.

The **German County Association** agrees with the choice of a directive as legal instrument (insofar as it would leave the Member States a certain freedom of choice as to the ways and means of its implementation) and it considers that adequate arguments have been put forward by the Commission to support this choice. It however complains that – in view of the existing German legislation sanctioning the employment of illegally present TCW – the proposed directive does not give Member States a large scope of national decision. The **Austrian Partners** voice concerns of a similar nature.

2.3.3 Cost of implementing the proposal

The **Basque Government** accepts that the implementation of the proposed directive would entail carrying out inspections of companies and an increase in administrative or criminal procedures, which would thus create additional financial and administrative burdens on the national and regional authorities (as well as on economic actors). However, together with the **Basque Parliament** the **Basque Government** believe that the (administrative and financial) costs would go beyond what is necessary.

The **Austrian Partners** consider that the Commission has taken little account of the need to keep to the necessary minimum the administrative and financial implications of its proposal.

2.3.4 Quality of the Arguments Provided

The partners from the Basque Country agree that the arguments brought forward by the Commission adequately substantiate the compliance of the proposal with the principle of proportionality. Conversely, the **German County Association** and the **Austrian Partners** appear to dismiss these arguments²⁶.

2.4 Preparation of the Communication (Consultation & Impact Assessment)

All the partners have taken notice of the Impact Assessment presented by the Commission. They do however regret that it does not take account of aspects which are of concern to local and regional authorities. Partners also point to the fact that no separate subsidiarity assessment taking into account regional and local authorities has been presented by the Commission.

Partners also refer to the consultations held before the publication of the proposal, but the majority of them remark that the local and regional dimension has not been taken into account in the consultation. In addition, the **Basque Government** criticises the paucity and simplicity of the information disseminated by the Commission and it regrets that no mention has been made of whether the full consultation results will be published.

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**

This proposal aims to deliver 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). These highly qualified TCW would become holders of a residence and work permit called the "EU Blue Card". The overall objective of the proposal is to render the EU a more attractive destination for highly skilled or qualified immigrants.

²⁶

The German County Association refer to their analysis of the proposal from the point of view of EC competence and subsidiarity.

Only the **German County Association** and the **Austrian Partners** have submitted observations to this proposal.

3.1 Legal basis & EU Competence (Questions 1 & 2 of the analysis grid)

The Partners acknowledge that the Commission bases this proposal on article 63 (3) (a) and (4) of the EC Treaty. Article 63 (3) (a) concerns legal immigration and in particular the conditions of entry and residence of TCN in the EU and the standards on procedures for the issue by Member States of long-term visas and residence permits. Article 63 (4) foresees measures defining the right of TCN already legally resident in a Member State to reside in another Member State and the conditions under which they can exercise this right.

The **German County Association** expresses doubts about the appropriateness of the legal basis: considering that the proposal also aims to regulate the access of TCN to the Member States' labour market, this partner is of the opinion that the proposed directive is not covered by article 63 (3) (a) TEC. The partner explains that regulating the access of TCN to the national labour market still remains in the hands of the Member States.

The **Austrian Partners** bring forward a similar argument pointing also to the legal literature, which highlights the disagreement on this issue. Some scholars believe that the regulation of access of TCN to the labour market of the Member States necessarily falls within the ambit of article 63 (3) (a) because otherwise a fully effective immigration policy could not be created²⁷. Others do not think that TCN access to the labour market of the Member States is covered by any current legal basis in the Treaty. In the opinion of the Austrian Partners this is an open legal question which needs to be settled.

In addition the Austrian Partners question the existence of EC competence as regards article 15 (1) (e) of the proposed directive (equal treatment with nationals in branches of social security). In these partners' view the legal basis chosen by the Commission do not cover the export of social security benefits outside EU territory.

Finally, it should be said that all partners identify matters of legal immigration as belonging to the competences shared by the EC and the Member States²⁸. Partners, however, point to the fact that that determination of the volumes of TCN admitted into the Member States for the purpose of work remains firmly in the hands of the Member States²⁹.

²⁷ *Effet utile* argument.

²⁸ This is irrespective of the questions they raise as regards the exact extent of these competences.

²⁹ This is now expressly confirmed by article 63a of the Treaty on the Functioning of the European Union, as it has been introduced by the Lisbon Treaty.

3.2 Compliance with the Principle of Subsidiarity (Questions 3 to 6)

3.2.1 Necessity & Clear Benefit of Community Action

The partners take different stances on this issue.

The **German County Association** appears not to be convinced about the necessity of the "EU Blue Card" proposal and the added value of such legislation on the European level. This partner refers to the already existing German legislation on the admission and the conditions of residence of highly qualified TCN and suggests that such legislation acts as a means for the Member State to determine their immigration policies and admission quotas. The Association goes on to say that legislation such as the kind contemplated by the Commission would be detrimental to the aforementioned possibility currently enjoyed by the Member States. It, thus, suggests that the issue of the admission and residence of highly skilled TCN in the EU can be adequately tackled by National measures alone.

Similarly the German County Association does not accept the Commission's arguments that its proposals would bring clear benefits as opposed to legislation solely on the level of the Member States. By mentioning that the destination of highly qualified immigrants is not "Europe" as a whole but the individual labour markets of the Member States this partner says that it cannot identify the added value offered by uniform admission and residence conditions. It also criticises the possibility given to highly qualified immigrants to take up residence in other Member States. The Association claims that such a possibility would not be compatible with the responsibility of the Member States (of second residence) to regulate the access of TCN to their labour market and ultimately to determine their immigration policies and admission quotas.

On the other hand, the **Austrian Partners** seem to accept the argumentation put forward by the Commission. They support that only measures taken on the EU level can adequately achieve the objective of making the EU attractive to highly qualified immigrants. However, at the same time they highlight the need to respect the competence Member States have to determine their admission quotas. These partners identify the trans-national aspects of the issues related with the admission, work and residence of highly qualified TCN in the EU (although they seem to consider that immigrants without university level qualifications and only 3 years' professional experience should not be classified as "highly qualified" and should therefore not be covered by the proposal). In addition, they accept the need to enhance the EU's overall competitiveness by attracting highly skilled immigrants and they consider that only measures on the Member State level would be less effective in attracting highly skilled immigrants to certain economic sectors. The Austrian Partners finally reply that the proposal under consideration would provide added value as compared with action only on the level of the Member States³⁰.

³⁰ Yet, at the same time they state that the lack of EC measures on this matter would not go against the requirements of the EC Treaty nor would it harm the interests of individual Member States.

3.2.2 Minimal Scope

The partners agree that the proposed directive takes due account of the well established arrangements and the legal systems of the Member States. The **German County Association** in particular draws attention to the fact that German law already provides for procedural safeguards similar to those included in the proposal.

3.2.3 Quality of the Arguments Provided

While the **German County Association** does not find the Commission's argumentation convincing, the **Austrian Partners** consider it sufficient. Nevertheless, all partners complain that the argumentation brought forward contains only qualitative (and not quantitative) factors.

3.3 Compliance with the Principle of Proportionality (questions 7 to 12)

3.3.1 Effectiveness & Efficiency of Community Action

The **German County Association** does not appear to have any doubts as to the suitability and appropriateness of the proposed measures in relation to the intended aims. However they raise a couple of objections as regards some concrete elements of the proposal: They consider the income threshold contained in article 5 (2) of the proposal as being too low and they propose that it be increased (they are of the opinion that a low threshold might not preclude Blue Card holders from relying on public funds for income support). In addition, they are also sceptical about the proof required for the inclusion of an immigrant in the "highly qualified" category, i.e. 3 years' professional experience.

The **Austrian Partners** also regard the proposal as suitable and appropriate, insofar as national competence for the determination of admission volumes is in fact respected and the proposal in fact concerns only workers who can correctly be classified as "highly qualified". These partners make clear that they only consider "highly qualified" workers as being the holders of university or higher education diplomas as well as highly skilled specialised workers. Seeing that the proposed directive would also cover workers with at least 3 year's professional experience, they consider it in that regard as going beyond what is necessary to achieve the intended objective.

3.3.2 Minimum Legal Constraint & Minimal Scope

Both the **German County Association** and the **Austrian Partners** agree with the choice of a directive as legal instrument (insofar as a directive leaves more room for flexibility to the Member States). Nevertheless, the **German County Association** stresses that considers the specific proposal as excessively restrictive of Member States' freedom to determine the demand driven direction of their labour markets, especially insofar as highly qualified workers are concerned.

3.3.3 Cost of Implementing the Proposal

As far as the costs linked with the implementation of the proposal are concerned, the **German County Association** makes an indirect reference to the bureaucracy, which an increase in the types of residence permits would give rise to³¹. They note that the reform of the German immigration law had set the opposite goal (i.e. to reduce the overall number of types of residence permit). The **Austrian Partners** refer to the Impact Assessment and comment that it addresses the cost implications of all examined options for the authorities of the Member States.

3.3.4 Quality of the Arguments Provided

Both the **German County Association** and the **Austrian Partners** consider that the arguments put forward by the Commission to explain the compliance of the "Blue Card" proposal with the principle of proportionality are adequate.

3.4 Preparation of the Communication (Consultation & Impact Assessment)

All the partners took notice of the Impact Assessment and of the consultation preceding the adoption of the proposal. They do however regret that neither the Impact Assessment nor the Consultation take account of aspects which are of concern to local and regional authorities. Partners also point to the fact that no separate subsidiarity assessment taking into account regional and local authorities has been presented by the Commission.

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**

The aim of this proposal is to introduce a single administrative procedure, leading up to a single residence and work permit, for TCW who wish to migrate to the EU. It also aims to provide a single set of rights to TCW legally residing in the Member States.

The **German County Association** did not submit a contribution on this proposal.

4.1 Legal basis & EU Competence (Questions 1 & 2 of the analysis grid)

The Partners acknowledge that the Commission bases this proposal on article 63 (3) (a) of the EC Treaty on legal migration.

The **Basque Parliament**, in addition, draws attention to the fact that the applicable legislative procedure is unanimity in the Council and consultation with the European Parliament. This partner

³¹ See answer to question 5.

also makes reference to the new legal basis for the EU immigration policy, contained in article 63a of the Treaty on the Functioning of the EU as it is established by the Lisbon Treaty.

The **Austrian Partners** express some concerns as to the choice of legal basis. The analysis made under point 3.1 above applies here *mutatis mutandis*.

Finally, all partners identify matters concerning legal immigration as belonging to the shared competence of the EU and the Member States. The **Basque Government** in particular notes that – despite immigration being classified as a shared competence – most actions still remain at the hands of the Member States and a true Community immigration policy has yet to be established. The partners from the Basque Country also make an interesting reference to the Spanish legal order and the division of competences on immigration between the central government and the Autonomous Regions.

4.2 Compliance with the Principle of Subsidiarity (Questions 3 to 6)

4.2.1 Necessity & Clear Benefit of Community Action

The partners from the Basque Country consider that the issue of legal immigration poses trans-national elements, which cannot be successfully tackled only by action on behalf of the EU Member States. They thus advocate the necessity of EC legislation in this field. The **Basque Government** draws attention to the fact that diverging legislation across the Member States results in differences in the treatment of TCW within the EU. It is of the opinion that the lack of EC legislation, such as the measures contemplated in the proposal, carries the risk of distorting the single market and provoking secondary migration movements towards the Member States, who offer more lax admission conditions and more rights to TCW. This partner also maintains that EC action will provide clear benefits as opposed to only action on the part of the Member States (which would in addition be detrimental to the requirements of the Treaty, the single market in particular).

On the other hand, the **Austrian Partners** are not convinced of the necessity or the added value of the proposal. In their view, there are no trans-national aspects insofar as the employment of non-highly-qualified TCW is concerned: the labour market for such TCW remains defined along national lines. Therefore, these partners are of the opinion that measures only on the national level would suffice and would not be contrary to the requirements of the EC Treaty. However, these partners propose that – those Member States that wish to go forward with the proposal – can establish a mechanism of enhanced cooperation (presumably within the framework of article 11 TEC).

4.2.2 Minimal Scope

The partners appear divided in their views as to whether the proposed directive respects established national arrangements or practices in the Member States. The comments made by the **Basque**

Government and the **Basque Parliament** in relation to the proposed sanctions directive³² apply here *mutatis mutandis* (see section 2.2.2 above). On the other hand, the **Austrian Partners** maintain that the proposal does not take due account of specific national situations (which inter alia are regulated by national constitutional arrangements). They also note that measures, such as those contemplated in the proposal, should not encroach upon the division of competences and powers within the national system.

4.2.3 Quality of the Arguments Provided

The **Basque Parliament** and the **Basque Government** agree that the arguments brought forward by the Commission adequately substantiate the compliance of the proposed directive with the principle of subsidiarity. Conversely, the **Austrian Partners** do not find the arguments brought forward by the Commission satisfactory. All partners however note the absence of quantitative indicators from the Commission's argumentation.

4.3 Compliance with the Principle of Proportionality (questions 7 to 12)

4.3.1 Effectiveness & Efficiency of Community Action

The partners from the Basque Country believe that the measures contained in the proposal are appropriate and commensurate with the set objectives. In particular, the **Basque Government** considers the single administrative procedure and permit would create synergies and would facilitate the control of legal immigration; the single set of rights would create a level playing field across the EU and would contribute to the reduction of unfair competition and the exploitation of TCW.

On the other hand, the **Austrian Partners** make reference to their analysis of the proposal as regards the principle of subsidiarity and they add that they consider these measures as inappropriate and as going beyond what is necessary to achieve the intended objectives.

4.3.2 Minimum Legal Constraint & Minimal Scope

The **Basque Parliament** comments that the proposal only entails a minimum degree of harmonisation and that – being a directive – it will provide certain flexibility in the incorporation and the implementation on the Member State level. The **Basque Government** also shares this view and it refers again to the penultimate paragraph of article 63 TEC.

The **Austrian Partners** seem to agree with the choice of a directive as legal instrument (insofar as it would leave the Member States a certain freedom of choice as to the ways and means of its implementation). They nevertheless consider the measures contemplated as being too restrictive of the Member States' decisional scope.

³² COM (2007) 249.

4.3.3 Cost of Implementing the Proposal

The **Basque Government** notes that the proposal does not mention the potential costs its implementation would entail for national governments, local and regional authorities, economic operators and citizens. The **Austrian Partners** refer to the Impact Assessment, which in their view gives information on the financial and administrative burden the implementation of the proposal would entail.

4.3.4 Quality of the Arguments Provided

The **Basque Parliament** considers the arguments put forward by the Commission in relation to the compliance of the proposal with the proportionality principle as adequate. The **Basque Government** notes, however, that an ex-post assessment of the financial impact of the proposals application would be needed, before the arguments provided could be evaluated. Finally, the **Austrian Partners** dismiss the Commission's arguments as inadequate.

4.4 Preparation of the Communication (Consultation & Impact Assessment)

All the partners are aware of the Impact Assessment and of the consultation preceding the adoption of the proposal. They do however regret that neither the Impact Assessment nor the Consultation take account of aspects which are of concern to local and regional authorities. Partners also point to the fact that no separate subsidiarity assessment taking into account regional and local authorities has been presented by the Commission.
