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CIRCULAR MIGRATION:

A LEGAL PERSPECTIVE

Marise Cremona

CARIM Analytic and Synthetic Notes 2008/30

Circular Migration Series

Legal Module

Cooperation project on the social integration
of immigrants, migration, and the movement
of persons (CARIM)

Co-financed by the European University Institute
and the European Union (AENEAS Programme)



CARIM
Euro-Mediterranean Consortium
for Applied Research on International Migration

Analytic and Synthetic Notes – Circular Migration Series
Legal Module
CARIM-AS 2008/30

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This publication is part of a series of papers on Circular Migration written in the framework of the CARIM project, and presented at two meetings organised by CARIM in Florence: *The Role of Circular Migration in the Euro-Mediterranean Area* (17 - 19 October 2007), and *Circular Migration: Experiences, Opportunities and Constraints for Southern and Eastern Mediterranean Countries* (28 - 29 January 2008).

Please follow this link to access all papers on Circular Migration: www.carim.org/circularmigration

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

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CARIM

The Euro-Mediterranean Consortium for Applied Research on International Migration (CARIM) was created in February 2004 and has been financed by the European Commission. Until January 2007, it referred to part C - “*cooperation related to the social integration of immigrants issue, migration and free circulation of persons*” of the MEDA programme, i.e. the main financial instrument of the European Union to establish the Euro-Mediterranean Partnership. Since February 2007, CARIM has been funded as part of the AENEAS programme for technical and financial assistance to third countries in the areas of migration and asylum. The latter programme establishes a link between the external objectives of the European Union’s migration policy and its development policy. AENEAS aims at providing third countries with the assistance necessary to achieve, at different levels, a better management of migrant flows.

Within this framework, CARIM aims, in an academic perspective, to observe, analyse, and predict migration in the North African and the Eastern Mediterranean Region (hereafter Region).

CARIM is composed of a coordinating unit established at the Robert Schuman Centre for Advanced Studies (RSCAS) of the European University Institute (EUI, Florence), and a network of scientific correspondents based in the 12 countries observed by CARIM: Algeria, Egypt, Israel, Jordan, Lebanon, Morocco, Palestine, Syria, Tunisia, Turkey and, since February 2007, also Libya and Mauritania. All are studied as origin, transit and immigration countries. External experts from the European Union and countries of the Region also contribute to CARIM activities.

The CARIM carries out the following activities:

- Mediterranean migration database;
- Research and publications;
- Meetings of academics;
- Meetings between experts and policy makers;
- Early warning system.

The activities of CARIM cover three aspects of international migration in the Region: economic and demographic, legal, and socio-political.

Results of the above activities are made available for public consultation through the website of the project: www.carim.org

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Abstract

The paper summarizes national reports received from the legal experts of the CARIM network on the adequacy of their national legal provisions with the general aims of Circular Migration as conceived by the EU Commission (Communication 2007). Those are envisaged, in the framework of a comparative study, both under the perspective of the country being an emigration and an immigration country. The paper evaluates if the legal and institutional framework generates a favourable climate for Circular Migration, in the South Mediterranean and the Middle East countries. Finally, it considers the EU legal competences and policy in the field of legal migration and draws some recommendations with regards both the EU receiving countries and the South Mediterranean

Résumé

Le papier synthétise les rapports communiqués par les juristes des pays couverts par le réseau CARIM sur l'adéquation du dispositif légal et institutionnel national eu égard aux objectifs de la migration circulaire telle qu'envisagée par la Commission européenne (Communication de 2007). Ces dispositifs légaux ont été analysés dans une perspective comparatiste, d'une part dans la perspective du pays considéré comme un pays d'émigration et d'autre part, comme un pays d'immigration. Le papier offre une appréciation du climat favorable à la migration circulaire, dans la région du Sud Est de la Méditerranée et du Moyen-Orient. Il traite également des compétences et politiques de l'Union européenne en matière d'immigration légale et adresse des recommandations aux pays d'accueil de l'Union européenne et d'envoi des pays de la région du Sud Est de la méditerranée et du Moyen-Orient.

I. Introduction*

In December 2006 the European Council conclusions addressed the issue of legal migration as a component of EU migration policy, with an emphasis on circular and temporary migration:

"While respecting the competences of Member States in this area, consideration will be given to how legal migration opportunities can be incorporated into the Union's external policies in order to develop a balanced partnership with third countries adapted to specific EU Member States' labour market needs; ways and means to facilitate circular and temporary migration will be explored; the Commission is invited to present detailed proposals on how to better organize and inform about the various forms of legal movement between the EU and third countries by June 2007".

The Commission's Communication on circular migration and mobility partnerships between the EU and third countries was a response to this invitation.¹

The concept of circular migration (CM) is relatively recent in terms of specific identification as a focus for migration and development policies, although as a factual phenomenon it is certainly ancient. Its definition is both uncertain and contested but the core of the concept is that of temporary migration involving either regular short-term visits to the host country, or a fixed term visit whether for work, study or other reasons, followed by return to the home country.² Given the policy background to this report, the working definition used will be that of the European Commission in its Communication of 16 May 2007 on circular migration:

Circular migration can be defined as a form of migration that is managed in a way allowing some degree of legal mobility back and forth between two countries.³

As the Commission points out, not only does this include different types of migrant (seasonal, short-term contracts, students, researchers and trainees), it also includes both those who are established in the EU and wish to be able travel to their country of origin on a regular basis, and those who are established outside the EU and wish to travel to the EU temporarily for work, study or training.

Two points may be made here. First, although this definition does not include a reference to the temporary nature of CM, elsewhere in the same document the Commission clearly indicates that it sees CM, at least insofar as it should be encouraged by Union policies, as temporary.⁴ Nevertheless, the Commission does include in its definition CM which combines permanent and temporary movement, as where a third country national permanently settled in the EU engages in temporary business, professional or other activity in their country of origin (or other third country) while retaining their main residence within an EU Member State.⁵

* Many thanks to Nathalie Jouant for her invaluable research assistance in preparing this report. Thanks as well to the participants in the CARIM Thematic Session on circular migration held in Florence on 17-18 October 2007 for their helpful comments.

¹ COM(2007) 248 final, of 16 May 2007.

² In the view of some authors, circular migration may involve four different combinations of permanent or temporary movement: permanent migration followed by (even in a different generation) permanent return; permanent migration and temporary return; temporary migration and temporary return; temporary migration and permanent return. Philippe Fargues, *Circular Migration: A concise overview*, background paper for the CARIM Thematic Session on Circular Migration, 17-19 October 2007, citing D.R. Agunias and K. Newland, *Circular Migration and Development: Trends, Policy Routes and Ways Forward*, Migration Policy Institute 2007.

³ COM(2007) 248 final, p.8.

⁴ "if not properly designed and managed, migration intended to be circular can easily become permanent and, thus, defeat its objective." COM(2007) 248 final, p.8.

⁵ *Ibid.*, p.9.

Second, it is notable that the Commission's definition refers to *legal mobility*. In factual terms, CM may be legal or illegal. Insofar as EU policy may be designed to facilitate CM, this will of course be framed in terms of legal migration. As will appear below, the perception on the part of the Union that the facilitation of legal CM is linked to the prevention of illegal migration is shared by a number of the national rapporteurs. We should also note the reference made in the Commission's definition to the management of migration: CM is presented as being *managed*; this makes sense in the context of the discussion in the Communication of "mobility partnerships" and of arrangements between sending countries and the EU and its Member States, as well as the discussion of establishing a EU legislative framework designed to facilitate CM.

This report will first of all offer a synthesis of the national reports received on the national legal provisions relevant to CM, both as sending (II.A) and as receiving countries (II.B); it will then briefly outline the EU policy context for a policy on CM (III); the position in relation to EU competence (IV.A) and the existing legislative framework (IV.B), including bilateral agreements (IV.C); and will finally draw some conclusions (V).

II. Synthesis of the national reports⁶

This report is prepared in the framework of the Euro-Mediterranean Consortium for Applied Research on International Migration (CARIM) and in particular the Thematic Session on Circular Migration held in Florence on 18-19 October 2007. In preparation for that meeting the CARIM team sent the national legal rapporteurs, in addition to the background papers, a detailed questionnaire designed to elucidate the legislative framework in the South and East Mediterranean (SEM) countries relevant to circular migration from both the sending and the receiving perspective.⁷ Reports and responses to the questionnaire were received from Algeria, Israel, Jordan, Libya, Mauritania, Morocco, Syria, Palestinian Territories, Tunisia and Turkey. No legal report was received from Egypt or Lebanon as a legal rapporteur had not yet been appointed in those countries. At the Thematic Session an initial version of the present report was presented to the group, together with some preliminary conclusions, and the national rapporteurs were able to comment on those conclusions as well as engage in a useful debate about the role of the law in relation to circular migration and legal/institutional changes that would be needed in both sending and receiving States in order to favour CM. This report has been revised in the light of that discussion, and has also taken into account the revised versions of the national reports received following the meeting in October.

As the reports are available individually what follows is not an attempt to provide a summary of the responses but rather to attempt to synthesise from them a picture of the way in which the legal framework may hinder or facilitate CM from the perspective of both sending and receiving countries. It should be noted that not all respondent SEM countries are simply sending countries; in several cases they are significant receiving countries (Israel, Turkey and Jordan, for example). It should also be noted that for many SEM countries, intra-SEM migration is important as well as migration from or to other third countries, including the EU. Each country has of course its own traditions, legal, political, sociological and demographic, and different historical links with particular EU Member States. This synthetic report must be read in that light and for that reason is cautious in offering generalised conclusions. In one case in particular, the Palestinian Territories, it has not always been possible to integrate the report's findings into the overall synthesis as the circumstances are very specific. However the legal issues raised by the report are important – in particular the link between migration policy and sovereign control over borders, territory and citizenship – and have been taken into account and referred to where especially relevant.

⁶ Please to access each of the national reports refer to the Circular Migration Series web page of the CARIM www.carim.org/circularmigration

⁷ See Annex for a copy of the questionnaire.

As noted above CM is not a new phenomenon in factual terms although it may be newly conceptualised, and it emerges clearly from the reports that there is no need for new legislation to address the issue of CM *per se*: CM is covered by existing legislation. However, to the extent that that legislation is not drafted with CM specifically in mind, if it is thought desirable to *facilitate* CM, some legal changes might be needed. As this suggests, we are here focusing on the role of law as a potential facilitator of (or obstruction to) policy: law in its instrumentalist role. Law has other functions, in particular in acting as a normative framework or context for policy development, for example by requiring compliance with certain standards or principles or by providing procedural guarantees. In line with the remit of the Thematic Session this report does not address these aspects of the role of law, although they may be relevant to the broader policy questions concerning the desirability of promoting CM, and the specific means adopted to facilitate different types of CM.

The focus of these reports is on the legal dimension; in addition to outlining the legal provisions applicable many reports addressed the question of the actual implementation of the law.

A. As sending countries

1. Obstacles to leaving the country

Overall, legal obstacles such as exit visas are not cited in the reports as a major problem, although as CM presupposes multiple exits, the requirement of an exit visa and the fee payable could be a real obstacle (unless, as in Turkey, it is waived in the case of those working abroad). An exception is the Palestinian Territories where the security dimension and Israeli control over the border means that the Palestinian Authority does not have full control over the right of Palestinians to leave its territory and in practice exit is difficult and unpredictable.

2. Visas and work permits required by receiving countries

Many reports (Algeria, Israel, Libya, Morocco, Turkey, Mauritania) highlight the need to facilitate visas for temporary work (short-term multi-entry visas), arguing that this would help reduce illegal immigration. Indeed, this is one of the suggestions made by the Commission in its Communication of 16 May 2007 on circular migration and mobility partnerships.⁸

More detailed information from the Member States as to the conditions and restrictions under which those with visas / residence permits are entitled to leave the country, for example to visit home, would be helpful in evaluating the legal climate for CM.

As far as work permits are concerned, there are significant differences in approach between EU Member States. From the perspective of the reports received, the UK is perceived as relatively open, and Spain, Belgium and Italy are also mentioned as open for seasonal workers. Certain Member States are important destinations for particular sending countries; for example, Italy is an important destination for workers from Libya, France for Morocco and Mauritania. The Mauritanian report however emphasises increasing difficulty in obtaining work permits and a growing emphasis by France on high-skilled migrants, with the attendant risks of increasing the brain-drain. The Commission's Communication points out that the facilitation of CM may help to reduce the risk of brain-drain.⁹

⁸ COM (2007) 248 final, p.7. In addition to general proposed improvements to the Visa Code (see Annex 1 of this Communication) the Commission suggests agreement within the framework of mobility partnership of (i) easing difficulties at the level of consular services of EU Member States within sending countries and (ii) visa facilitation agreements for specific categories of people.

⁹ COM (2007) 248 final, p. 12.

3. Laws combating illegal immigration – do these hinder CM?

Overall, the reports stress that the increased emphasis in the EU on illegal immigration is not working, that it hinders and discourages legal migration, and that facilitation of CM would help to relieve this pressure and would be likely to reduce recourse to illegal migration.

On the other hand, they also point out that an effective policy on CM implies strong enforcement against illegal working as otherwise the incentives will not be effective: employers might continue to favour using illegal labour unless disincentives are strong and effective.

4. Working conditions, coordination between country or origin and receiving country

Two types of agreement with receiving countries are mentioned. First, labour force agreements providing for quotas of workers in specific categories. For example, Turkey has a number of labour force agreements with EU Member States; Morocco has recently concluded an agreement with Spain on temporary agricultural workers. Second, bilateral agreements intended to improve coordination and ensure stability of social security rights. For example, Morocco gave examples of positive cooperation experiences with Netherlands on social security issues, implementation of new Dutch legislation; Turkey has bilateral agreements with a number of EU Member States (Germany, Belgium, France, the Netherlands, Denmark, the UK, Austria, Czech Republic, Luxemburg, Romania, Sweden) providing for equal treatment with respect to social security.

A couple of specific points are noteworthy:

First, Mauritania reported on a recent agreement on migration with Spain,¹⁰ which includes arrangements for different categories of migrant: longer-term, seasonal workers and trainees. No quota is allocated, but rather a preferential treatment based on coordination and selection by sending and receiving state authorities. There are no specific provisions for ensuring return other than the duration of the contract. The agreement is linked to a readmission agreement and cooperation from Mauritania in the fight against illegal immigration and, as the report suggests, it might be seen as a kind of model for future “mobility partnerships”.

Second, both the Libyan and Israeli reports, and other delegates in oral discussion, commented to the effect that although bilateral labour force agreements are useful, they also represent the interests of the State(s) concerned and not necessarily those of the migrant workers themselves. Caution should be exercised, therefore, in suggesting that CM should be governed by (and limited to) frameworks established by such agreements.

5. Political participation by MENA nationals

The reports contained no specific information on political participation in the host countries. As far as the political rights of non-resident nationals are concerned the picture is varied: in some cases non-resident nationals are entitled to vote (Algeria, Morocco, Syria, Tunisia); in some cases they are not (Libya, Mauritania). Israel and Turkey allow political participation by non-resident nationals, but not extra-territorial voting so migrants have to return home to vote.

6. Is the institutional framework in receiving countries generally favourable to CM?

Little was said about specific employment law issues in host countries. Although some reports mentioned gaps in the protection of temporary workers, it was also pointed out that where bilateral agreements exist, non-discrimination provisions cover temporary workers. More stress

¹⁰ Concluded 25 July 2007.

was put on the issue already raised: the effects of EU policy on illegal immigration and its negative impact also on legal migration. In particular, the tightening of immigration controls in the EU, including visa policies designed to combat illegal immigration, has the effect of discouraging potential migrants from attempting legal short-term migration (CM); either such migrants are discouraged altogether or only those who contemplate long-term residence in the EU feel it is worth the effort.

B. As receiving countries

1. Availability of short term or seasonal working visas

All reporting countries require a work permit / working visa. Some have provision for short-term visas (Algeria, Israel, Jordan, Syria, Tunisia). Others such as Turkey and Mauritania make no distinction, in that the same visa procedure is required even for short-term work. The issuing of a work permit will normally depend on possession of a contract (although in the case of Libya initial entry may take place without a contract of employment, a three month period being allowed to find employment) and is tied to the length of the contract.

2. Legal relationship between work permits and residence permits

All the reports appeared to indicate that a residence permit was a separate and additional requirement. In some cases the two are linked (e.g. Israel, Turkey), with, typically, entitlement to a residence permit being linked to possession of a work permit. The position in the Palestinian territories differs as authority for issuing residence permits and work permits is divided: Israel has control over the issuing of residence permits, whereas work permits can be issued by the Palestinian authority; as a result work permits may be issued to those with irregular residency status.

3. Sanctions against employers who employ irregular labour

As well as a prohibition on employing irregular labour the obligations on employers normally include reporting requirements with respect to foreign labour. All reports confirmed that sanctions exist but many said that they were ineffective or not applied (Jordan, Libya, Mauritania, Morocco). In some cases, sanctions are designed to counter trafficking and bound or other forced labour (Mauritania, Jordan). In Jordan the enforcement of employment laws in relation to domestic labour was said to be a problem; new regulations from the Ministry of Labour are expected to tighten up penalties on employers and agencies for violating rules, including those relating to contracts of employment. A new agreement between Jordan and Egypt on short-term migration (see below) has been combined with strengthened action against illegal working.

4. Coordination between country of origin and receiving country; bilateral agreements

Coordination between sending and receiving countries takes place largely through bilateral agreements although these reciprocal agreements are seen as more important from the perspective of rights of MENA nationals working in the EU, as opposed to foreign nationals working in MENA states. The Moroccan report indeed points out that although Morocco has agreements with a number of EU receiving states (as well as the Association Agreement), agreements between Morocco and sending states are rare. The Mauritanian report argues that absence of such agreements leads to exploitation of foreign workers. The Israeli report argues that, overall, bilateral agreements on social security coordination are not helpful to foreign workers in Israel as they have been concluded only with countries for whom Israel is a sending state, not countries for which it is a receiving state. The Israeli report gives the example of a recent agreement with Thailand, aimed at directing migrant workers to International Organisation of Migration rather than temporary work agencies (to avoid abuse). The

report from Jordan outlines a recent (March 2007) Memorandum of Understanding between the Jordanian Ministry of Labour and the Egyptian Ministry of Manpower and Immigration. The agreement is designed to increase control over migration for purposes of work between Egypt and Jordan and by linking work permits with specific contracts and recruiting procedures might be said to favour CM.

5. Political participation in the host country

Little was said in the reports concerning political rights of foreign workers within the reporting countries. Turkey has arrangements with some states (e.g. Iraq, Bulgaria) to allow their nationals to vote in their own national elections while in Turkey.

6. Employment laws

The questionnaire asked rapporteurs to assess the impact of employment protection on the job market, especially with respect to migrant labour; the extent to which the reporting countries' employment legislation reflected international employment norms including adherence to ILO conventions; and whether there existed a specific employment law regime for migrant workers. The responses did not point to a greater effect of employment laws on the job market for migrant workers compared with national workers. Recent trends may affect both productive and decent work ideals and objectives, but not in such a way as to affect labour mobility. Several reports (Algeria, Libya, Morocco, Syria, Tunisia, Turkey) mention their country's adherence to a number of ILO Conventions; the Jordanian report comments that labour law in that country reflects ILO concepts of decent work but does not detail specific ILO Conventions. However it was also noted that in Jordan at present employment protection does not apply to domestic work and these workers are thus very prone to exploitation.

In general national labour laws were not thought to affect mobility adversely. Almost all reports mentioned adherence to ILO conventions. While several state report national preference rules in recruitment and normally some restricted professions and jobs, most also report equality of treatment for foreign workers as far as general working conditions are concerned (in Jordan foreign workers may not join trade unions). In some cases discrimination in practice was said to take place (Israel, Mauritania).

7. Conclusions: overall climate for circular migration as receiving countries

Many reports (Libya, Mauritania, Morocco, Syria, Turkey) concluded that their employment laws do not hinder CM but do not facilitate it either. The important distinction in national law is rather that between all legal migration on the one hand, and illegal migration on the other. While most migration laws do not make specific provision for CM, in some reports such provision was felt to be a necessary part of an overall reform / updating of the law (Mauritania, Morocco), while in others it was argued that there was sufficient flexibility in current law to respond to CM (Syria) or that existing provisions tying a work permit to a contract of employment is an appropriate way of managing short-term migration. A number of reports, including in particular the Turkish report, pointed to the relevance of bilateral agreements and that special provision in such agreements is an effective way of encouraging and providing for CM.

In addition a few specific points emerge:

In Jordan a trend towards favouring CM rather than permanent migration is identified, in particular as regards new laws on domestic workers and those in the QIZ, as well as the new Jordan-Egypt MoU..

In Algeria the need for a reform of employment law, including reform to facilitate migrant work, is recognised as an integral part of the process of transformation of the economic system. There is a need too for the (re)negotiation of bilateral agreements with both sending and receiving States.

In Israel, as a receiving country, the “binding system” still creates obstacles, especially the role it gives to middlemen – they can positively hinder CM by (e.g.) their high fees, making it less likely that a short stay is worthwhile; the types of CM that are geared to seasonal or short-term work would require changes to these structures to make them work. Furthermore, the current system with its emphasis on low-skill workers is geared to needs of the state rather than the workers, and inter-state agreements do not always remedy this; there is no infrastructure for work/study CM programmes. In addition, although there is equality in terms of employment protection law, the same is not true of social provision: many benefits (such as access to national health care schemes) are conditional on residency and migrant workers are deemed to be non-resident. However, it is suggested in this report that - carefully managed with a view to benefiting the workers concerned - CM might “have important implications in the future for economic re-integration between Israel and Palestine. Assuming a two-states solution to the conflict, neither strict separation nor freely open borders may be the preferred solution”, and in such a case, CM might provide a viable “coordinated third way”.¹¹

III. The EU context

The Commission’s Communication on circular migration and mobility partnerships, as is made clear, has its own policy context. Three aspects of the EU context should be highlighted here:

A. The internal market

Title IV EC, which provides the legal basis for EU migration policy, is based on an internal market rationale: securing free movement internally, with sufficient action at EU level with respect to crossing external borders to make that possible. Thus, Art 61(a) EC refers in the context of the internal market objective of removing internal frontiers (c.f. Article 14 EC) to “directly related flanking measures”. This rationale affects not only the limits of EC competence (an emphasis on border controls, rather than, for example, access to labour markets) but also influences the perception by the Community institutions and Member States of the purpose of EU action: it has had an internal perspective.

This is changing somewhat. Migration is increasingly seen as an external relations issue as well as an internal policy.¹² However the legal basis for action has not changed and migration policy is still very much dictated by the Community’s interest, and (what are perceived to be) the needs of the Member States. Hence the emphasis on balancing the Member States’ labour market needs with Community preference (including preference for those Member State nationals who do not yet benefit from full free movement rights under the 2004 and 2007 Treaties of Accession).¹³

B. Integration of resident third country nationals into Member States

The EU’s Charter of fundamental rights says:

‘Freedom of movement and residence may be granted, in accordance with the Treaty establishing the European Community, to nationals of third countries legally resident in the territory of a Member State.’ Charter of Fundamental Rights, Art.45(2)

¹¹ Israel report, p.11.

¹² See for example the Strategy for the External Dimension of JHA : Global Freedom, Security and Justice, adopted by the Council in December 2005.

¹³ On Community preference, see Resolutions of 20/6/1994 and 30/11/1994 on Community preference and also Regulation 1612/68/EEC, Art 19.

The integration of legally resident third country nationals (TCNs) has been part of Commission policy since (at least¹⁴) 1998¹⁵ and appears in the Tampere Conclusions of 1999.¹⁶ This policy focus is partly based on the internal market rationale already mentioned, as making it easier for legally resident TCNs to engage in short-term travel within EU reduces need for internal border controls (c.f. the Commission's 2001 proposal, withdrawn in 2006¹⁷). It is also partly based on a policy of assimilation of long-term resident TCN migrant workers to EU nationals who exercise rights of free movement (see for example the Resolution on long-term resident TCNs of 1996¹⁸, followed by Directive 2003/109/EC¹⁹ and the family reunification Directive²⁰). This assimilation has already largely occurred in the case of TCN members of the family of an EU national migrant worker (Directive 2004/38/EC²¹).

For our purposes the result of this policy context has meant a focus so far on the long-term resident migrant worker within the EU, rather than on temporary residents.

C. The Global Approach to Migration

The so-called Global Approach to Migration strategy was adopted by the European Council in December 2005 and developed in December 2006. Indeed it was in the latter context that the European Council invited the Commission to present proposals designed to explore "ways and means to facilitate circular and temporary migration".²²

The hallmark of the Global Approach is *integration*:

(i) The linking together of different aspects of migration policy including legal and illegal migration (as we shall see, this poses challenges for the EU's constitutional and competence structures). So for example, the Communication on CM states that "mobility packages" may be "negotiated by the EC with third countries that have committed themselves to cooperating actively with the EU on management of migration flows, including by fighting against illegal migration, and that are interested in securing better access to EU territory for their citizens."²³ The *quid pro quo* linkage is clear in the way the Communication present the packages.

(ii) The integration of migration issues into the EU's geographic and thematic policies, including the ENP, the Mediterranean, South-East Europe and development cooperation policy. Again the CM Communication makes this clear: "Mobility partnerships will need to take into account the current state of the EU's relations with the third country concerned as well as the general approach towards it

¹⁴ See Commission Communication to the Council and to Parliament on Abolition of Border Controls, 8 May 1992, SEC/92/877FINAL.

¹⁵ Commission Communication on 'Towards an Area of Freedom, Security and Justice' COM(98)459 final.

¹⁶ Tampere European Council October 1999.

¹⁷ Proposal for a Council Directive relating to the conditions in which third-country nationals shall have the freedom to travel in the territory of the Member States for periods not exceeding three months COM(2001)388 final.

¹⁸ Council Resolution of 4 March 1996 on the status of third country nationals residing on a long-term basis in the territory of the Member States OJ 1996 C 80/2.

¹⁹ Council Directive 2003/109/EC concerning the status of third-country nationals who are long-term residents OJ 2004 L16/44.

²⁰ Directive 2003/86/EC of 22 September 2003 on the right to family reunification OJ 2003 L251/12.

²¹ Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States OJ 2004 L158/77.

²² European Council conclusions December 2006. See also Commission Communication "The Global Approach to Migration one year on: Towards a comprehensive European migration policy", 30 Nov. 2006, COM(2006) 73. See also Commission Communication on Integrating Migration Issues in EU Relations with Third Countries, COM(2002)703.

²³ COM(2007) 248 final, of 16 May 2007, p. 3.

in EU external relations”.²⁴ The prospective partnership must ensure “consistency with the existing legal and political framework for relations between the third country in question, the Community and the relevant Member States.”²⁵

Thus, although these external policy fields might be seen as frameworks for implementing a considered migration policy, it is also the case that migration policy will be influenced by and even designed to serve the objectives of policies such as the ENP. Ideally the two will be complementary but it needs to be borne in mind that there maybe competing policy agendas within the EU.

IV. Competence and the existing legislative picture

The separate status of third country nationals (TCNs) in EU law has given rise to a range of provisions governing their position within the Community. Apart from domestic immigration law, their status and rights may be derived from:

- the EC Treaty, secondary legislation made under the Treaty, the TEU, and intergovernmental agreements and Conventions;
- the relationship a third country national may have with a *Union citizen* (as a member of the family or employee); and
- international agreements between the EC and third countries (such as the EEA, or other association agreements).

A. Existing competences

The application of EC internal market law to TCNs is extremely limited. They are excluded from citizenship of Union and primary free movement rights are limited to Union citizens. TCNs are only covered if at all in a dependant capacity e.g. as members of the family of a Union citizen who has exercised his or her free movement rights,²⁶ or as an employee of a Community company or firm which offers services in another Member State.²⁷ As a result, rights of initial access to the labour market and rights of residence within Member States are still primarily a matter for individual Member States. However this position is now subject to Community initiatives under Title IV EC and as we will see some important residence, labour market access and free movement rights have been given to long-term resident TCNs.

The Treaty of Amsterdam introduced a new legal basis for EU action in relation to the entry and residence of TCNs, by way of a new Title IV of the EC Treaty. As we have already seen, the primary

²⁴ Ibid.

²⁵ Ibid.

²⁶ From the earliest stages of the establishment of what was then known as the common market, secondary legislation has granted certain rights of entry and residence to members of the family - no matter what their nationality - of Union citizens who are themselves entitled to freedom of movement under Community law. These are ‘derived rights’, in that they derive from family relationship and are intended to support the fundamental right of free movement for the Union citizen, as well as being justified on the basis of fundamental human rights. Their existence depends both on the right to freedom of movement possessed by the Union citizen from whom they are derived and on the existence of the family relationship. See cases 35 & 36/82 *Morson & Jhanjan* [1982] ECR 3723; C-370/90 *Surinder Singh* [1992] ECR I-4625; C-60/2000 *Carpenter v Home Secretary* [2002] ECR I-6279; C-109/2001 *Home Secretary v Akrich* [2003] ECR I-9607; C-200/2002 *Chen* [2004] ECR I-9925; Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States OJ 2004 L158/77. Under this Directive, family members (including those who are not EU citizens) may obtain a permanent right of residence after five year legal residence with the Union citizen in the host Member State.

²⁷ See C-113/89 *Rush Portuguesa* [1990] ECR I-1417; C-43/93 *Van der Elst v OMI* [1994] ECR I-3803; Directive 96/71 on Posted Workers in the framework of provision of services OJ 1997 L 18/1.

rationale for these provisions was to ensure border-free intra-EU travel. The link between the internal and external dimension of free movement is recognised in the provisions in the Treaty on immigration, visa and asylum policies. Title IV covers external border controls as well as issues of free circulation of third country nationals. Considerable complexity derives from the multitude of special provisions and opt-outs for different Member States and from the fact that the integration process involves incorporating not only the existing “third pillar” provisions from the TEU but also the Schengen Convention (which in turn involves the rights of third States).

The text of Title IV is largely enabling: it provides for further decisions to be taken by the Council rather than containing substantive rules. More specifically, these measures will cover (i) removal of internal border controls, (ii) common rules to be applied at the external borders of the Union, and (iii) provision for short term travel of third country nationals within the Member States:

Article 62

The Council, acting in accordance with the procedure referred to in Article 67, shall, within a period of five years after the entry into force of the Treaty of Amsterdam, adopt:

- (1) measures with a view to ensuring, in compliance with Article 14, the absence of any controls on persons, be they citizens of the Union or nationals of third countries, when crossing internal borders;
- (2) measures on the crossing of the external borders of the Member States which shall establish:
 - (a) standards and procedures to be followed by Member States in carrying out checks on persons at such borders;
 - (b) rules on visas for intended stays of no more than three months, including:
 - (i) the list of third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement;
 - (ii) the procedures and conditions for issuing visas by Member States;
 - (iii) a uniform format for visas;
 - (iv) rules on a uniform visa;
- (3) measures setting out the conditions under which nationals of third countries shall have the freedom to travel within the territory of the Member States during a period of no more than three months.

Provision is also made for:

- measures to be taken in the fields of asylum, refugees and displaced persons: Article 63(1)&(2);
- Measures in relation to longer-term (over 3 month) residence: Article 63(3);
- rights for legally resident TCNs to reside in other Member States (not merely to visit or pass through, which is covered by Art 62(3)): Art.63(4).

Article 63

The Council, acting in accordance with the procedure referred to in Article 67, shall, within a period of five years after the entry into force of the Treaty of Amsterdam, 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.

Measures adopted by the Council pursuant to points 3 and 4 shall not prevent any Member State from maintaining or introducing in the areas concerned national provisions which are compatible with this Treaty and with international agreements.’

The Council may also take decisions on conditions of employment for legally resident third country nationals: Article 137(1)(g) EC.

The Tampere European Council in October 1999 established ten “milestones towards a Union of Freedom, Security and Justice”:

- (1) partnership with countries of origin,
- (2) a common European Asylum System,
- (3) fair treatment of third-country nationals,
- (4) management of migration flows;
- (5) better access to justice in Europe,
- (6) mutual recognition of judicial decisions,
- (7) greater convergence in civil law;
- (8) preventing crime at the level of the Union,
- (9) stepping up co-operation against crime,
- (10) special action against money laundering and stronger external action.

It will be seen that three of these (partnership with countries of origin; fair treatment of third country nationals; management of migration flows) are particularly relevant for CM. Progress so far in achieving these goals has been mixed. Most progress has been made in the area of visas, for which at the time of the Treaty of Maastricht a new legal base had already been added to the Treaty, and some rights including labour market access and freedom of movement for those with long-stay residence status. Least progress has been made with respect to conditions of *initial* entry and residence for TCNs (apart from family members of Union citizens²⁸).

In the absence of an apparent desire on the part of the Member States to transfer substantive competence over policy on legal migration to the Union, the Commission has over the years tried a number of non-legislative mechanisms to coordinate national policies. The Communication on CM is an example of this, although it does have the potential to go further, if the Member States so wish.

1. In the so-called *Migrant Policy case*,²⁹ a number of Member States challenged a Commission Decision setting up a prior communication and consultation procedure in relation to immigration policies. Member States were required to notify the Commission of all draft measures and agreements relating to “entry, residence and employment, including illegal entry, residence and employment; the achievement of equal treatment in living and working conditions, wages and economic rights; the promotion of integration into the workforce, society and cultural life; and the voluntary return of such persons to their countries of origin”. The Member States contested the Commission’s competence under (then) Article 118 EEC. Under Article 118(1) the Commission had “the task of promoting close cooperation between member states in the social field”. Art 118(2) provides that the Commission is to act in close contact with the member states by making studies, delivering opinions and arranging consultations. The Court took the view that migration policy could fall within the scope of “social policy” as the former affects the latter; however it held that insofar as the decision covered cultural integration, this went beyond Article 118 as it had no direct link with employment or working conditions. The Court also held that although the Commission had the power to issue a binding decision requiring consultation, it could not require the Member States to conform to any common position agreed following such consultation.

²⁸ See note 24.

²⁹ Joined cases 281, 283, 284, 285 and 287/85, *Germany and others v Commission* [1987] ECR 3203.

2. In its Communication on a Community Immigration Policy of November 2000,³⁰ the Commission suggested a "two-tier approach": to define a common legal framework on admission of economic migrants and to launch an open coordination mechanism on Community immigration. In its Communication the Commission set out the main aims and principles upon which in its view the common legal framework should be based:

Transparency and rationality: laying down clearly the conditions under which third-country nationals may enter and stay in the EU as employed or self-employed workers, setting out their rights and obligations and ensuring that they have access to this information and that there are mechanisms in place to see that it is applied fairly.

Differentiating rights according to length of stay: the aim should be to give a secure legal status for temporary workers who intend to return to their countries of origin, while at the same time providing a pathway leading eventually to a more permanent status for those who wish to stay and who meet certain criteria.

Clear and simple procedures: application procedures should be clear and simple.

Respect for the domestic labour market situation: the principle that a post can only be filled with a third-country worker after a thorough assessment of the domestic labour market situation (unless international obligations and commitments of the EU and its Member States already provide otherwise) is currently applied in all Member States and it is not intended to touch this principle.

Availability of information: more extensive use of new communications technology could be used to provide information on job opportunities, conditions of work, etc.

Assist industry: in order to allow European industry, particularly small and medium-sized industries, to recruit - in cases where there is a demonstrated economic need for workers in a specific sector or for a specific job which cannot be filled from within the EU labour market - successfully and quickly from third countries, employers need a practical tool for demonstrating that there is a concrete shortage on the EU labour market.

3. In its Communication on an Open Method of Coordination (OMC) for a Common Immigration Policy,³¹ the Commission proposed the use of OMC, a method which has been used in a number of cases where Community competence is limited (employment strategy,³² pensions³³). This involves, instead of hard law, the establishment of common guidelines at Union level with reference points and targets, exchanges of good practice and national action plans with regular reporting and review timetables.

Since 2004 the initiative towards legislative proposals has picked up again, following the Hague Programme.³⁴ In considering an issue such as CM, therefore, we need to bear in mind the complex picture of competences, some aspects lying with the EC, some with the Member States as well as the fact that even the "Community" competences do not cover all Member States. In its Communication on CM the Commission is careful to emphasise this point:

"Mobility partnerships will necessarily have a complex legal nature, as they will involve a series of components, some of which will fall in the Community's remit and others in the Member States'. The EU needs to ensure that a coherent partnership can be put together in the most

³⁰ COM (2000) 757 of 22 November 2000.

³¹ COM (2001) 387 of 11 July 2001.

³² See Guidelines on Employment Policies (New Lisbon Agenda) Decision of 17 July 2005, OJ L 205, 6/8/2005.

³³ Commission Communication on supporting national strategies for safe and sustainable pensions through an integrated approach, COM (2001) 362.

³⁴ European Council, Hague Programme, adopted Brussels November 2004.

expeditious manner, while respecting the division of powers between the EC and Member States and ensuring consistency with the existing legal and political framework for relations between the third country in question, the Community and the relevant Member States.”³⁵

This last phrase is significant. Unlike some areas in which competence is shared between Community and Member States, in respect of mobility partnerships it is envisaged that “relevant” or interested Member States will get involved. As the Commission suggests, the partnership might involve “a consolidated offer by several Member States on a voluntary basis”. The Member States’ approach is likely to depend on the existing pattern of their relationship with the sending countries as well as their current policies on labour needs and migration more generally.

B. Existing legislation

What follows is not an exhaustive list of all legislation concerning migration policy, but seeks only to highlight the most significant legislation particularly in the context of circular migration.

1. The **Visa Regulation 453/2003/EC**³⁶ determines the third countries whose nationals must be in possession of visas when crossing the external borders of the Member States. Every country is now on either the “white” or “black” list. Criteria for including countries on white or black lists include illegal immigration, public policy and security, external relations with the third country, regional coherence and reciprocity. There are also Regulations establishing a uniform format for visas³⁷ and residence permits³⁸ for TCNs. The Regulation does not apply to the UK and Ireland.
2. **Regulation 1091/2001/EC**³⁹ on freedom of movement with a long-stay visa. Based on Arts 62(2)(b)(ii) and 63(3)(a) EC, it provides that a long-stay visa (over three months) issued by one Member State can be used as a short-stay visa in other Member States for an initial period of 3 months from its date of issue. After that, short-stay travel in other Member States is allowed on basis of residence permit. The Regulation does not apply to Denmark, UK or Ireland.
3. **Directive 2003/86/EC**⁴⁰ on the right to family reunification allows a TCN with a residence permit in a Member State to apply for family reunification entry for other TCN members of his/her family. The rights granted include not only entry and residence *per se*, but also access to employment, to education and training. The Directive applies to the nuclear family i.e. the spouse and minor children although Member States may extend to extended family including parents, adult unmarried children, unmarried partners. It does not apply to family members of Union citizens who are covered by Directive 2004/38/EC. The Directive does not apply to Denmark, UK or Ireland.
4. **Directive 2003/109/EC**⁴¹ on the status of third-country nationals who are long-term residents is based on Art 63(3)&(4) EC. The status of long-term resident (residence of over 5 years) carries rights to a residence permit and equal treatment in Member State of initial residence and also of free movement and residence to other Member States, together with family members. These rights

³⁵ COM (2007) 248 final, p.3.

³⁶ Council Regulation 453/2003/EC of 6 March 2003 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement OJ L 69, 13.3.2003, p. 10.

³⁷ Regulation on visa format 1683/95 OJ 1995 L 164/1, amended by Regulation 334/2002 OJ 2002 L 53/7.

³⁸ Regulation 1030/2002 laying down a uniform format for residence permits for third-country nationals OJ 2002 L157/1. Based on Art 63 point 3. Replaces Council Joint Action 97/11/JHA.

³⁹ Regulation 1091/2001/EC of 28 May 2001 on freedom of movement with a long-stay visa OJ 2001 L 150/4.

⁴⁰ Directive 2003/86/EC of 22 September 2003 on the right to family reunification OJ 2003 L251/12.

⁴¹ Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents OJ 2004 L16/44.

are subject to the possession of adequate resources and sickness insurance requirements. The Directive does not apply to Denmark, UK or Ireland.

5. **Regulation 859/2003/EC**⁴² is designed to implement the Tampere goal of fair treatment for TCNs and extends the application of the major Community Regulations on social security (Regulation 1408/71/EEC and Regulation 574/72/EEC) to TCNs who are legally resident in one Member State and who travel to another Member State. The Regulation applies to the UK and Ireland but not to Denmark.
6. **Directive 2004/114/EC**⁴³ on the conditions of admission of third-country nationals for the purposes of studies, pupil exchange, unremunerated training or voluntary service. This Directive covers limited access to the labour market to help support studies: a minimum of 10 hours per week, up to a maximum to be determined by the Member State. It also allows for mobility for study in another Member State (e.g. participation in an Erasmus programme). The Directive applies without prejudice to more favourable provisions in bilateral agreements with EC or Member States and does not preclude such agreements in the future. The Directive does not apply to Denmark, UK or Ireland.
7. **Directive 2005/71/EC**⁴⁴ on a procedure for admitting third-country nationals for the purposes of scientific research with a research organisation approved by Member State and subject to a hosting agreement between the organisation and researcher. The Directive grants equal treatment rights with respect to working conditions, tax, social benefits, as well as mobility to other Member States for up to 3 months. The researcher must have sufficient financial resources and health insurance. The Regulation applies to Ireland but not to the UK or Denmark.

In its **Policy Plan on Legal Migration** of December 2005,⁴⁵ produced as a response to the Hague Programme of November 2004, the Commission proposes a framework directive that would cover rights of those who do yet qualify under long-term residence directive but would not regulate entry or market access. Specific directives on categories of migrants (not sectors) such as skilled, trainees, seasonal workers, intra-corporate transferees. Emphasis too on cooperation with countries of origin.

In the **Communication on CM** of May 2007 the Commission proposes including into the above proposed legislation provisions which would foster circularity; such as a multi-annual residence/work permit for seasonal workers so that they can return each year; or return visits for trainees envisaged for updating or enhancing training.

Changes could also be made to existing legislation, for example ensuring that long-term residence status is not lost after a year's absence as now under Directive 2003/109, and multiple-entry rights for those falling under Directives on entry for study and research.

At the time of writing, two proposed Directives are worth mentioning as particularly relevant for CM:

⁴² Council Regulation 859/2003/EC of 14 May 2003 extending the provisions of Regulation (EEC) No 1408/71 and Regulation (EEC) No 574/72 to nationals of third countries who are not already covered by those provisions solely on the ground of their nationality OJ L 124, 20.5.2003, p. 1.

⁴³ Council Directive 2004/114/EC of 13 December 2004 on the conditions of admission of third-country nationals for the purposes of studies, pupil exchange, unremunerated training or voluntary service OJ L 375, 23.12.2004, p. 12.

⁴⁴ Council Directive 2005/71/EC of 12 October 2005 on a specific procedure for admitting third-country nationals for the purposes of scientific research OJ L 289, 3.11.2005, p. 15. See also Recommendation 2005/761/EC to facilitate the issue of uniform short-stay visas for researchers from third countries travelling within the Community for the purpose of carrying out scientific research OJ L 289, 3.11.2005, p. 23 and Recommendation 2005/762/EC to facilitate the admission of third-country nationals to carry out scientific research in the European Community OJ L 289, 3.11.2005, p. 26.

⁴⁵ COM(2005) 669 final of 21 Dec.2005.

First is a proposal for a Directive⁴⁶ based on Article 63(3)(a) EC (the “framework Directive”) which would grant a single set of right to all legally resident migrant workers within the Union Member States who do not yet qualify for rights under Directive 2003/109/EC as long-term residents. The Directive would also provide for a single residence/work permit and an application procedure for that permit; thus only one permit would be applied for and would grant the right to enter, re-enter and stay. Whereas Regulation 859/2003 (see above) only applies to TCNs who travel between Member States, this proposed Directive would apply to all TCNs who are legally resident workers in one Member State. The term “third country worker” is defined to include not only those admitted to the Union for the purposes of work, but also others (such as students, researchers, family members, refugees) who are also given access to the labour market (it thus includes those who are not actually in work as long as they are allowed to work legally in that Member State). Posted workers,⁴⁷ intra-corporate transferees and seasonal workers are not covered, nor are long-term residents who are covered by Directive 2003/109/EC. The Directive would grant equal treatment rights in the fields of (inter alia) working conditions, including pay and dismissal, education and training, recognition of qualifications, social security, tax, access to public goods and services, including housing.

Issues of initial entry and labour market access are not dealt with in this proposal. Here, the Union’s approach is based on legislation applying to certain specific categories of short-term migrant. Directives on researchers, students and unremunerated trainees have already been adopted (see above). A new Directive on highly-skilled workers has been proposed.⁴⁸ It applies to those who have a binding job offer or valid work contract for at least a year, at a salary level above a threshold to be set by the Member States. It does not create a right of admission but would establish a fast-track procedure for entry and certain rights once permission has been given, including rights of mobility to other Member States. Permit (“EU Blue Card”) holders would also be entitled to cumulate periods of legal residence in different Member States in order to qualify for long-term residence status, and derogations from Directive 2003/109/EC with respect to periods of absence from the EU are proposed in order to facilitate circular migration.

C. Bilateral agreements

As many reports mention, important provisions relating to migrant workers are contained in the association agreements between the EC and its Member States and the MENA countries. The legislation and proposed legislation considered above operates without prejudice to rights contained in these agreements.

While none of these agreements contain provisions giving rights of entry or initial access to the labour market (only the EEA agreement and the EC-Swiss agreement on the movement of persons do that, of all EC agreements), they do contain provisions relating to the rights of legally resident migrant workers in the EU in respect of non-discrimination in working conditions and in respect of social security (and these provisions are reciprocal). A number of such provisions have been found capable of direct enforcement via national (Member State) courts.⁴⁹

⁴⁶ 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/2007/0638 final, 23 Oct 2007.

⁴⁷ See note 26.

⁴⁸ Proposal for a Council Directive on conditions of entry and residence for third country nationals for the purpose of highly qualified employment, COM(2007) 637 final, 23 Oct 2007.

⁴⁹ See for example C-18/90 ONEM v Kziber [1991] ECR I-199; C-416/96 Eddline El-Yassini v Home Secretary [1999] ECR I-1209; C-97/05 Mohamed Gattoussi v Stadt Rüsselsheim [2006] ECR I-11917; C-336/05 Ameer Echouikh v Secrétaire d’État aux Anciens Combattants judgment 13 June 2006.

In addition, the Ankara Agreement, together with Decisions taken by the Association Council, grants labour market access rights after 4 years of legal employment, together with non-discrimination rights in relation to conditions of work and access to social benefits, and some ancillary rights for family members.⁵⁰ This does not, however, cover initial access to the Member State, nor movement between one Member State and another.

V. Conclusions and recommendations

At this stage, four overall conclusions can be drawn from the reports received and from a consideration of the existing EU policy and legislative framework:

1. There is a clear perception in these reports that there is a link between illegal and legal migration.⁵¹ The Commission also undoubtedly maintains the link between policy on legal and illegal migration, presenting at the same time as the proposals discussed above, a proposal for a Directive on sanctions against employers of illegally-staying TCNs.⁵²

At the moment the link is seen by the rapporteurs to be having detrimental effects: within the EU Member States concerns about illegal migration are “poisoning” the atmosphere in respect of legal migration; within the sending countries, potentially valuable and welcome legal migrants are discouraged and hindered by the tightening of controls designed to stop illegal migration.

However the reports also conclude that moves towards facilitation of legal migration, through *inter alia* CM, could help to reverse this trend. Facilitation of short-term legal migration will, it is felt, lessen the “need” for illegal migration. The Commission argues, for example, that “the promise of continued mobility in exchange for abiding by the rules and conditions will significantly reduce the temptation to overstay.”⁵³ One concrete example is the possibility of mobility partnerships including commitments from EU Member States to improve procedures for issuing short-term visas,⁵⁴ as well as move towards multiple-entry visas. Others include improvements in the procedures and conditions for short-term third country workers.⁵⁵

2. Second, when considering the national legal position in the sending countries and the extent to which it might favour or hinder CM – such as, for example, the possibilities of reintegration into national benefit, pension and welfare schemes – the reports are in general not very specific. This appears to be because as it stands at present, national laws are “blind” to CM and what might be its specific needs. They do not, on the whole, seem to present specific obstacles to CM but neither do they facilitate it. A policy designed to favour CM would therefore need to consider carefully what legal reforms might support that policy.

The Communication on CM does not have much to say about this issue either, merely referring to the possibility of EU assistance for “schemes to facilitate the economic and social reintegration of returning migrants”.

3. Third, when considering the characteristics of a legal framework that is conducive to and supportive of CM, the importance of bilateral agreements should be strongly emphasised. The

⁵⁰ See for example Case 12/86 *Demirel* [1987] ECR 3719; C-192/89 *Sevinçe* [1990] ECR I-3461; C-237/91 *Kus v Landeshauptstadt Wiesbaden* [1992] ECR I-6781; C-37/98 *R v Sec. of State for Home Department ex parte Savas* [2000] ECR I-2927.

⁵¹ See Commission Communication on links between legal and illegal migration, COM (2004) 412.

⁵² COM (2007) 249 final. See also the proposed Directive on common standards and procedures in Member States for returning illegally staying third-country nationals, COM (2005) 391.

⁵³ COM (2007) 248 final, p.11.

⁵⁴ COM (2007) 248 final, p.7.

⁵⁵ See the discussion of the proposal for a framework Directive, above note 45.

agreements may be part of a wider agreement such as an Association Agreement with the EU or they may be free-standing (more common with agreements with one Member State).

A comprehensive approach to CM would encourage bilateral agreements with individual Member States alongside possible EC + Member States agreements, and the inter-relation between them needs to be managed, as well as ensuring that the bilateral agreements conform to EC legislation and policy orientations. We should also stress here that it is not only agreements with the EU that are important but also agreements between MENA countries themselves.

They are of two kinds: first, agreements which aim to improve the position of migrant workers, including provisions on non-discrimination, access to social benefits and coordination of social security provisions.

Second, agreements which are directly concerned with access to the (labour market of the) host country, either for a specific category or worker (e.g. seasonal) or which attempt to manage the process to the benefit of both parties (such as the Israel-Thailand agreement).

Although autonomous EC legislation may to some extent lessen the need for the first type (legislation designed to set out basic rights for all legally resident migrant workers, for example) bilateral agreements are likely to remain important, particularly in facilitating contacts between social security authorities and providing for portability of benefits. Portability of contributory benefits is important not only in encouraging circular migration but also in encouraging legal migration (if credit for payments made cannot be transferred back home then there is an incentive to work illegally in the black economy). In addition, promotion of CM could be facilitated by using the institutional structures in existing agreements.

The second type is exemplified by the proposed mobility partnerships to the extent that they take the form of a formal agreement.

4. In its current policy documents and proposals the Commission is understandably focused on making a case to the Member States for the promotion of CM. However if the argument is accepted that CM is of benefit to the Union (*inter alia* in reducing the pressure for illegal migration and in filling Member States own labour market needs) then the sending countries also need to be persuaded of its benefits. The key factors for the sending countries appear to be a greater degree of flexibility over visas and work permits for short and medium term employment; facilitation of visa application procedures and multiple-entry visas; and the status and rights of short/medium term residents within the EU. As we have argued, legal conditions in the sending countries are a relevant factor in the facilitation of CM and at present CM is largely “invisible” to national laws; further study of the impact of national (sending country) legislation on CM would be useful.

Annex: Questionnaire

Legal Perspective: Institutional Changes Needed to favour Circular Migration ?

In sending countries⁵⁶

1. Should entry, stay and exit laws be revised to favour circular migration? In which direction?

Here we speak about the national laws and regulations on Immigration *stricto sensu*.

- a. Are there any legal obstacles for nationals, men as well as women, to leave the country? For example, getting a Passport.
- b. How is the exit of the nationals controlled? Border management consideration, passport policy, security of documents. Are nationals under an obligation to register them selves at their Embassy or Consulate?
- c. Do your authorities deliver visas for short term stay for seasonal or temporary work purposes?
- d. Relation between legal residence and work permit in your national immigration laws?
- e. Are any serious measures taken against illegal employment in your country?
- f. Are there any legal sanctions taken against the nationals expelled from receiving countries for illegal stay or public order reasons? Against nationals returnees which have left the country in an eventual illegal manner?
- g. Others comments?

2. Should the status of individual regarding work (social benefits and their portability) in both directions in the country of origin and in the host country be coordinated, how this may occur? If such coordination already exist how this is achieved? If not, should it be introduced and if so how? Which national institutions are or should be concerned?

Please keep in mind different hypotheses of circular migration: (i) your national has his main residence in an EU country and develop an accessory activity in his country of origin or (ii) your national has developed a strategy to work or study in an EU country with the idea/condition to return to his country of origin (with eventual facilities to go back for short periods in the EU) or (iii) your national keeps his/her main residence in his/her country of origin while working on a seasonal or temporary schemes on a regular pace in one or more EU countries.

3. Is political participation in the country of origin, possible for those working/living abroad? At which level may political participation take place (local, national, vote, eligibility)? Does the national Law or the Constitution allow for dual nationality?
4. Are there already bilateral agreements which favour potential mobility partnership and which provides incentives for return and enforcement of the agreement?
5. Questions regarding Labour Law in your country:
 - a. Would you say that Labour Law in your country is so protective regarding the worker that it would impede mobility inside and outside the country (See the Egyptian example in CARIM Annual Report 2005 p.100 available on our Website)? Please consider the idea of “*productive employment*” used by the COM(2007)248, p.5.
 - b. How do you assess national labour laws regarding the “*decent work*” concept also used by the COM(2007)248, p.5? How do they match with IOL standards?
 - c. Does Labour Law favour nationals? To what extend? Is there, in your country, any specific law regarding the conditions of work either self employed or salaried of foreign nationals?
6. Do you think that taking all the current legal dimensions together, the institutional setting of sending countries favours circular migration or not? Please give a comment.

In receiving countries

In this section we ask you to give your academic opinion on laws, regulations and practices in receiving countries mainly as to the way they affect the position of the nationals of your country, when they immigrate, while considering an eventual return or have adopted a circular migration scheme.

1. Should entry, stay and exit laws be revised to favour circular migration? In which direction?
 - a. The visa issue. Would you argue in favour of visa facilitation for short-term migrant workers? Do your nationals have already benefit from such kind of facilitation from an EU country? Would you argue in favour of the deliverance of multi-annual visas for short-terms workers? More generally on visas could you comment on difficulty/facility of getting them? Length of the procedure, conditions, cost, diplomatic representation in sending countries. Pertinence of the EU Common Consular Instructions.

(Contd.) _____

⁵⁶ I've divided the questionnaire in two Parts one for the sending and the other for the receiving Countries, both in the two Parts it's the point of view of our legal experts member which is asked.

- b. The work permit issue. What is your opinion on the national regulations of the EU member States regarding access to the labour market or independent work.? Are any receiving countries particularly deserving of comment, positive or negative?
 - c. Do the national regulations and policies of EU member States in relation to illegal employment obstruct access to temporary labour markets?
2. If the status of individual regarding work (social benefits and their portability) in both directions in the country of origin and in the host country has to be coordinated, how this may occur? If such coordination already exist how this is achieved? If not, should it be introduced and if so how? Which national institutions are or should be concerned?

Please keep in mind different hypotheses of circular migration: (i) your national has his main residence in an EU country and develop an accessory activity in his country of origin or (ii) your national has developed a strategy to work or study in an EU country with the idea/condition to return to his country of origin (with eventual facilities to go back for short periods in the EU) or (iii) your national keeps his/her main residence in his/her country of origin while working on a seasonal or temporary schemes on a regular pace in one or more EU countries

3. Is political participation in the host countries granted either by a special agreement with sending countries or by means of a general law ?
4. How effective is the level of protection of temporary workers in destination countries? Do the legal regimes in those countries distinguish between nationals and non-nationals? Are there any clear gaps in protection for temporary non-national workers?
5. Do you think that taking all the current legal dimensions together, the institutional setting of receiving countries favours circular migration or not?

NB: Some answers may overlap between the receiving countries and sending countries. Please, try to give a comprehensive answer even if material is divided between the two parts. Please do use cross-references.

Many thanks,