Chapter 4  The competence to conclude Community readmission agreements

This chapter discusses the competence of the European Community to conclude agreements with third countries on the readmission of unauthorised immigrants. The EC attained this competence with the entry into force of the Treaty of Amsterdam on 1 May 1999, although the Treaty does not contain an explicit legal basis. Section 4.1 determines the manner in which this legal basis is derived from Title IV TEC implicitly. Section 4.2 then discusses the controversy over the nature of the Community’s competence in the area of readmission. After establishing that the Community’s competence is in practice shared, section 4.3 considers whether the common readmission policy complies with the principle of subsidiarity. Section 4.4, finally, identifies the rules which govern the division of competence between the Community and the Member States.

4.1    The legal basis in EC law
The draft Constitutional Treaty,¹ signed in Rome on 29 October 2004, contains an explicit legal basis for concluding readmission agreements with third countries. Article III-168 reads:

    the Union may conclude readmission agreements with third countries for the readmission of third country nationals residing without authorisation to their countries of origin or provenance² [...].

At the time of writing of this book, it is uncertain whether the Constitutional Treaty will enter into force, and if so, in which form. Ratification by the Member States has been suspended after rejection of the Constitutional Treaty by referenda in France and the Netherlands. We will therefore only consider the current legal basis for the conclusion of readmission agreements under the Treaty of Amsterdam (ToA).

² The addition of the word “provenance” is curious, being a synonym of “origin”. At first sight, readmission to (third) countries of transit would therefore appear excluded from this legal basis.
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The European Council in Tampere in October 1999 confirmed that “the Amsterdam Treaty conferred powers on the Community in the field of readmission”, and invited the Council to conclude readmission agreements.³ The ToA transferred competence from the third to the first pillar concerning visas, asylum, immigration and other policies related to the free movement of persons. The Community’s powers in these fields are determined by Title IV of the EC Treaty. It would however appear that the drafters of the TEC did not anticipate the development of a common readmission policy. Title IV does not provide for the conclusion of treaties with third countries⁴, nor does it refer to “readmission” of unauthorised immigrants. The European Court of Justice has determined that in the absence of express external Community powers it may be possible to derive implied external powers from the treaties.⁵ A Treaty provision is thus required, which establishes relevant competence in the internal sphere, implying a competence to conclude agreements on readmission with third countries.

Given the lack of reference to “readmission” in either the TEC or TEU, the competence to conclude readmission agreements has been derived from the term “repatriation” in Article 63(3)(b) of the TEC. This article reads as follows:

The Council […] shall […] adopt […] measures on immigration policy within the [area of] illegal immigration and illegal residence, including repatriation of illegal residents.

In May 1999, the Council explicitly linked the conclusion of readmission agreements to the “Community objective of ‘repatriation of illegal residents’”, thereby determining Article 63(3)(b) as the relevant legal basis.⁶ Readmission agreements are instruments that may facilitate the repatriation of unauthorised residents, and can therefore be considered to be authorised by Article 63(3)(b). Repatriation, however, is a technical term, referring specifically to “return to the country of origin”.⁷ In order to account for the full personal scope of the readmission agreements as concluded by the Community, it would therefore be necessary to adopt a broad interpretation of the term repatriation, or to consider Article 63(3)(b) in its entirety.

³ Presidency Conclusions, Tampere European Council of 15 and 16 October 1999, para. 27.
⁴ We should note that the Protocol on the position of Denmark, which is annexed to the Treaty of Amsterdam and determines Denmark’s participation in measures adopted under Title IV TEC, refers in Article 2 to international agreements concluded by the Community. The conclusion of treaties pursuant to Title IV was therefore foreseen, even if not explicitly provided for.