Chapter 3

The Treaty basis for asylum legislation

In this Chapter I describe and analyse the competencies of the Community on asylum. Community legislation on asylum is, as any Community act, confined to “the powers conferred upon it by this Treaty and of the objectives assigned to it therein” (Article 5 TEC). Hence, in order to assess the validity of European asylum law, the scope of Community competence must be assessed properly. The analysis thus serves to answer the third question asked in paragraph 1.2 - to what extent can or must the Community issue legislation on asylum?

The various aspects of the legal basis for European asylum law in Title IV are discussed in paragraphs 3.1 to 3.7. In paragraph 3.8, I address the legal basis for asylum law in the draft Constitution for Europe.

3.1 Title IV in outline

[170] Title IV of Part III of the Treaty on European Community contains the legal basis for European asylum legislation. The basis of Community migration law is Article 61:

“In order to establish progressively an area of freedom, security and justice, the Council shall adopt:

(a) […] measures aimed at ensuring the free movement of persons in accordance with Article 14, in conjunction with directly related flanking measures with respect to external border controls, asylum and immigration, in accordance with the provisions of […] Article 63(1)(a) and (2)(a) […]

(b) other measures in the fields of asylum, immigration and safeguarding the rights of nationals of third countries, in accordance with the provisions of Article 63 […]”

The provision defines the objective of Title IV measures as “progressively” establishing an “area of freedom, security and justice”. The scope of Community powers to achieve this objective is further defined by the Articles 62 – 65 TEC. The Community powers on “asylum, immigration and safeguarding the rights of third country nationals” (cf. Article 61(b)) are laid down in Article 63. The provision mentions “areas” concerning “asylum”, “refugees and displaced persons”, “immigration policy” in which Community measures should be adopted.
Other Title IV provisions are also relevant for asylum law. Article 64(1) states that

“the exercise of the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security”

is not affected by Title IV. Article 64(2) addresses an issue closely connected to asylum, Community powers to respond to “an emergency situation characterised by a sudden inflow of nationals of third countries”. Article 67 establishes the legislative procedures that were discussed in paragraph 1.5.4. Article 68 addresses the scope of jurisdiction of the Court of Justice, to be discussed in Chapter 9. Article 69, finally, refers to the Protocol on the position of the United Kingdom and Ireland and the Protocol on the position of Denmark, which have consequences for the geographical scope of Title IV measures (see further paragraph 3.5).

[171] Article 63, then, attributes powers on asylum matters to the Community. These powers are conditioned in four respects. Firstly, by the objective laid down in Article 61, the creation of an area of freedom, security and justice. Secondly, Article 63 defines the degree of harmonisation that Community measures can produce. Thirdly, Article 63 imposes the obligation to adopt measures on most asylum issues within five years of the entry into force of the Treaty, i.e. before 1 May 2004. Fourthly, Article 63(1) sets a standard for measures adopted on the basis of its sub-paragraphs: they must be in accordance with the Refugee Convention and other relevant instruments of international law. In order to assess the scope of Community competencies on asylum properly, these aspects must be taken into account.

Below, I will first address the meaning of the objective laid down in Article 61 first clause for asylum measures (paragraph 3.2). Subsequently, I will discuss on what aspects of asylum the Community can issue legislation (par. 3.3). In paragraph 3.4, the degree of harmonisation measures that Community legislation on asylum can produce will be discussed. The geographical scope of asylum measures will be addressed briefly in paragraph 3.5. The consequences of the delimitation of the scope of asylum legislation in Article 63 for Community obligations under international asylum law are addressed in paragraph 3.6.

3.2 The “area of freedom, security and justice”

[172] Article 61, first clause defines the objective of Title IV measures as the