Introduction

The communitarisation of migration and other policies related to the free movement of persons has been one of the most widely debated issues during the 1996 IGC and the concluding Amsterdam Summit. In contrast to previous attempts, the Amsterdam Treaty endeavoured to provide a coherent and comprehensive solution, for the first time, within the EC framework. Most of the provisions that are relevant to migration policy were communitarised and were gathered under a new Title IV inserted into the EC Treaty. This communitarisation was the result of two contemporaneous operations: on the one hand, most of the provisions of the former third pillar have been transferred to Title IV TEC, whereas, on the other, these new Community legal bases would also host the Schengen acquis, which has been integrated into the EU framework via a Protocol annexed to the Amsterdam Treaty. At long last, a Community migration policy was supposed to take shape in principle within the five years following the entry into force of the Amsterdam Treaty.

1 Some of the material in this chapter has appeared in an earlier form in the Yearbook of European Law. See Papagianni G. “Free Movement of Persons in the light of the new Title IV TEC: from intergovernmentalism towards a Community policy”, YEL, 2002, p. 107-162.

2 Articles 61-69 TEC. While in principle the provisions of Title IV TEC reproduce the wording of Articles K.1 to K.6 of the former third pillar, there have been a few amendments, which in some cases might be indicative of the will of Heads of State with regard to certain issues. See infra at 6.1.2.

3 Protocol integrating the Schengen acquis into the framework of the European Union.

4 The existence of a five-year transitory period is provided by Articles 61 (1) and 67 (1) TEC. The legal bases regarding the central issues linked with the formation of an immigration policy are excluded from this deadline. The last paragraph of Article 63 TEC provides that “measures to be adopted pursuant to points … 3 (a) and 4 shall not be subject to the five year period”.


Chapter 2: The Institutional Framework

Post-Amsterdam
The divorce from intergovernmentalism was, however, neither abrupt nor smooth. Indeed, the concessions that the Heads of State and Government had to make in order to arrive at these developments were so numerous, and their impact on the evolution of this area, so important that one could convincingly argue that the achievement was merely a Pyrrhic victory. Moreover, the partial character of this communitarisation as well as the innovative legal solutions that the negotiators had to find in order to achieve political consensus are set to render the establishment of a Community policy a long and evolving process, which especially in the initial phases might appear to be an obstacle race.

The purpose of this chapter is to provide a comprehensive analysis of the institutional aspects associated with the establishment of a Community migration policy within the framework of Title IV TEC. In the course of this chapter, the passage from intergovernmentalism towards a Community policy will be sketched out as clearly as possible. Bearing in mind that the communitarisation of migration policy is still an evolving process, it will attempt to trace the remnants of the intergovernmental era and to analyse their causes as well as their impact on this ambitious on-going operation.

The chapter is divided into three sections. The first section provides a comprehensive overview of the institutional imbroglio of Title IV TEC. Emphasis will be placed on the effect of the ‘partial communitarisation’ of the relevant policies. The term ‘partial communitarisation’ is mainly used in the literature in order to stress the fact that only a part of the former third pillar issues are transferred to the first pillar.5 Certain other issues, mainly regarding judicial cooperation in penal matters and police cooperation, have remained under the intergovernmental third pillar.6 However, seeing this term au sens large, the partial character of this communitarisation concerns two other aspects as well. The first being that the communitarisation is partial since the number of Member States involved is variable. Two Member States are de facto ‘out’ and another one is bound exclusively on an international law basis. Thus, the number of Member States bound by a legal act depends quite often on the specific issue to be regulated and/or the wishes of the Member State concerned. In fact an innovative and rather complicated system of predetermined flexibility on the basis of Protocols was established in order to accommodate all national interests. The other aspect is that communitarisation is also partial since the newly communitarised former third pillar provisions have preserved many of their intergovernmental characteristics, placing the Title IV institutional framework in a ‘limbo’ situation between intergovernmentalism and the Community method.

The second section of this chapter will be devoted to a preliminary presentation of the problems stemming from this complicated institutional framework.

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5 Which is to say within the framework of the new Title IV TEC (Articles 61-69 TEC), Article 135 TEC and Article 280 TEC.
6 Articles 29-32 TEU.