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## **Explaining Ambition: The Elaboration of the Working Program for the European Asylum Policy, 1996-1999**

Bonjour, S.A.; Schneider H.

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# Migration, Integration and Citizenship

A Challenge for Europe's Future

Volume II

The Position of Third Country Nationals in Europe

Edited by Hildegard Schneider



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Forum Maastricht  
Post Box 616  
6200 MD Maastricht  
e-mail: [forum-maastricht@bu.unimaas.nl](mailto:forum-maastricht@bu.unimaas.nl)  
[www.unimaas.nl/forum-maastricht](http://www.unimaas.nl/forum-maastricht)

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## Explaining Ambition: the Elaboration of the Working Program for the European Asylum Policy, 1996-1999

SASKIA BONJOUR

### INTRODUCTION

In recent years, the first steps have been taken in the establishment of a European asylum policy. A number of directives have been adopted regarding, among others, the reception of asylum seekers and the content of asylum status and subsidiary protection. Although the level of harmonisation established by these directives is found disappointing by some,<sup>1</sup> the fact that asylum policies are now subject to Community law is far from self-evident.

The decision to develop a common asylum policy was made during the Intergovernmental Conference (IGC) 1996-97, which resulted in the adoption of the Treaty of Amsterdam. Until that time, co-operation between the Member States of the European Union in the field of asylum had remained strictly intergovernmental. Most measures agreed upon had the status of soft law, while as a whole, the policy developed was predominantly *ad hoc* and highly fragmented. European co-operation in the field of asylum policies was structured in a way that compelled the Member States to give up as little power as possible to Brussels. This changed with the Treaty of Amsterdam (1997). Asylum and migration policy were transferred from the intergovernmental third pillar to the communitarian first pillar. The Treaty laid down a catalogue of measures to be taken by the Council and fixed deadlines of two to five years for their adoption. These Treaty provisions were further specified and elaborated in the Vienna Action Plan<sup>2</sup> presented by Council and Commission in 1998 and in the Conclusions of the special European Council meeting on Justice and Home Affairs held in Tampere in 1999. The Treaty of Amsterdam, the Vienna Action Plan and the Tampere Conclusions together contain a 'Working Program' for the elaboration of a common asylum policy.<sup>3</sup> This Working Program sets out a coherent plan for the adoption of a number of specific measures, coupled with clear deadlines. It reflects the political will to formulate common policies and

1 Cf. Michal Gondek, in this volume.

2 Action Plan of 3 December 1998 on how best to implement the provisions of the Treaty of Amsterdam on the creation of an area of freedom, security and justice (O.J. 1999/C 19/01).

3 This working program is in fact broader in scope, as the Amsterdam Treaty, Vienna Action Plan and Tampere Conclusions present a policy program for the field of justice and home affairs, with the overall objective of establishing an Area of Freedom, Security and Justice. For the purpose of this contribution however, the term 'Working Program' will refer only to the policy objectives in the field of asylum.

thereby a willingness to transfer powers from the national to the European level that was thus far unknown in the field of asylum policies. The question that will be examined here is how the elaboration of such an ambitious Working Program can be explained.

This question is all the more intriguing since asylum policies are part of the wider field of immigration policy, 'that most sensitive and most jealously guarded of all state functions'.<sup>4</sup> Traditionally, the power to grant or deny access to national territory to foreigners is a core element of state sovereignty. The principle of equal rights that is fundamental in the political systems of modern liberal states is necessarily exclusionary, as it presupposes the existence of a bound community, tied together by a sense of belonging and solidarity. In modern nation states, the state is responsible for maintaining a certain degree of exclusion, thereby preserving the coherence of the community. Immigration policy consists of the regulation of access to the national territory, to the national community and to the political and social rights granted by the state to its subjects. On behalf of the national community, the state determines the limits of solidarity: who may share in rights, liberties and prosperity. Therefore, the right to determine who is granted access not only to the territory, but also to the labour market and the social security system, is crucial for the legitimacy of the modern West-European state in the eyes of its citizens, and a fundamental element of national sovereignty.

The relation between asylum and state sovereignty is complex. On the one hand, asylum is an exception to the discretionary power of the state over immigration policy, since it is codified in international law and rooted in universal human rights. The principle of *non-refoulement*, in particular, is a right of the individual to be held against the state. On the other hand, the international refugee regime leaves considerable room for the exercise of state authority, and the granting of asylum may be considered as an expression of state sovereignty. As a rule, states are very reticent to give up power over the movement of foreigners across their borders, in the field of asylum policy as much as in the broader field of immigration policy.<sup>5</sup>

Against this background, it is not surprising that until the mid-1990s, co-operation between the Member States of the European Union in the field of asylum has remained strictly intergovernmental. Rather, it is the high level of ambition reflected in the Working Program elaborated between 1996 and 1999 that calls for an explanation. Why did the Member States choose to develop a common asylum policy, if this meant giving up substantial competencies in a policy field that is so closely connected to national sovereignty? The most common explanation emphasises the functional link between common asylum policies and the free movement of persons: the abolition of controls on persons at the internal borders of the common market created the necessity to co-ordinate asylum policies. This explanation fol-

4 Joppke, 'Introduction', in C. Joppke (ed.), *Challenge to the Nation-State. Immigration in Western Europe and the United States*, (Oxford University Press, 1998), 2.

5 Cf. S. Lavenex, *The Europeanisation of refugee policies: between human rights and internal security*, (Ashgate, 2001), 8-16.

lows the line of neo-functional theories of European integration<sup>6</sup>, which emphasise the endogenous, expansive dynamic inherent in the integration process. Central in these theories is the concept of 'functional spill-over': in modern, highly integrated industrial economies, integration in one sector will inevitably lead to problems that can only be resolved by integrating other sectors. Neo-functionalism predicts that economic integration aimed at eliminating trade barriers will create the need for re-regulation on the European level, in other words, that negative integration will lead to positive integration. The European asylum policy is a typical example of such a functional spill-over. If controls on persons are no longer exercised at the internal borders, alternatives have to be found for the function these controls fulfil. Such alternatives can partly be found at the national level, for instance by increasing internal controls, but ultimately common measures, among others in the field of asylum, are inevitable. Thus, the negative integration of the free movement of persons has led to positive integration in the form of a common asylum policy.

However, as this contribution will show, the level of integration implied by the goals that are set by the Working Program exceeds the level that is required to prevent negative side effects of the abolition of internal borders. To explain the ambitious level of the Working Program's policy objectives, an explanation along neo-functional lines is not satisfactory. Neo-functionalism is to a large extent a deterministic theory, emphasising the endogenous, 'inevitable' dynamics of the integration process. It pays little attention to the preferences, choices and interactions of the actors involved in the process. In other words, neo-functionalism neglects politics. Especially in the field of asylum policy, which is closely connected to national sovereignty and therefore a highly 'political' issue, an additional perspective is required, which can be found in the classic counterpart of neo-functionalism, i.e. intergovernmentalism.<sup>7</sup> This theory emphasises the role of the Member States in the process of European integration, as well as the continuities between domestic and European policies. It argues that Member States will consent to pool or delegate their sovereignty if they find themselves in a situation of 'policy interdependence'. When policies in one country have consequences in other countries, the effectiveness of national policies depends on the decisions made by other governments. Such a situation may lead national governments to opt for international co-ordination, with the aim of improving their control over domestic policy outcomes. European integration is then used as an instrument to reach national policy goals. This is what Moravcsik means when he states that 'EC politics is the continuation of domestic politics by other means'.<sup>8</sup>

6 Cf. Tranholm-Mikkelsen, 'Neo-functionalism: Obstinate or Obsolete? A Reappraisal in the Light of the New Dynamism of the EC', 20 *Millennium: Journal of International Studies* 1 (1991).

7 Cf. Moravcsik, 'Preferences and Power in the European Community: A Liberal Intergovernmentalist Approach', 31 *Journal of Common Market Studies* 4 (1993).

8 Moravcsik, 'Negotiating the Single European Act: national interests and conventional statecraft in the European Community', 45 *International Organization* 1 (1991), 25.

Without going more deeply into theoretical debates on European integration, this contribution will show that the Member States' decision to develop a common asylum policy cannot be explained only in neo-functional terms. The European asylum policy is more than just a by-product of the common market project. It is also used by national governments to accomplish a domestic policy goal, namely to improve their control over asylum flows. To understand the high level of ambition reflected in the Working Program, one should take into account these continuities between domestic and European politics.

#### EUROPEAN CO-OPERATION IN THE FIELD OF ASYLUM BEFORE THE TREATY OF AMSTERDAM

The possibility to develop Community policies regarding the entry and stay of third country nationals was first suggested during the preparations for the Single European Act (1986). The SEA introduced a new article 8A in the Treaty, which stated that 'the internal market shall comprise an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of this Treaty'. Prior to the actual signature of the SEA, controversy arose over the scope of article 8A, a controversy that would last until the adoption of the Amsterdam Treaty in 1997. The issue at stake was whether the term 'persons' in article 8A should be interpreted as referring to citizens of the Member States only, or whether it included third country nationals. The Commission took a clear stand in favour of the latter interpretation, which implied that the Community was competent to develop immigration and asylum policies. However, a number of Member States, particularly the United Kingdom, Denmark and Greece, categorically refused to hand over authority over the entry and stay of foreigners to the Community. Agreement could not be reached on any form of integration that would involve the supranational institutions in the policy-making process.<sup>9</sup>

Nonetheless, the project of the common market did lead the Member States to opt for co-ordination in the management of external borders, asylum and migration. This co-ordination developed along two parallel tracks, both of which were placed outside the institutional and judicial framework of the Community. On the one hand, there was the development of a network of intergovernmental working groups and on the other, the co-operation within the framework of the Schengen Treaty. A network of working groups of national officials of the Ministries of Justice and Home Affairs had been developing since the mid-1970. After 1985, it was assigned the task of elaborating measures necessary to compensate for the abolition

9 A. Geddes, *Immigration and European Integration. Towards Fortress Europe?* (Manchester University Press, 2000), 73-80; J. W. de Zwaan & A. J. Bultena, *Ruimte van vrijheid, veiligheid en rechtvaardigheid. De samenwerking op het gebied van Justitie en Binnenlandse Zaken in de Europese Unie*, (Sdu, 2003), 7-9; N. Berger, *La politique européenne d'asile et d'immigration. Enjeux et perspectives*, (Bruyant, 2000), 21-23.

of internal border controls. Within this network, the Ad-hoc Group on Immigration (AHGI) was created in 1986. The AHGI was responsible for drafting the Dublin Convention and the Convention on External Borders, which were both signed in 1990. It took seven years for the Dublin Convention, which defined criteria for establishing which member state was responsible for examining an asylum application, to be ratified by the national parliaments of all Member States. The Convention on External Borders never entered into force, because of the conflict between Spain and the United Kingdom on the status of Gibraltar. The AHGI also played a major role in the preparation of the London Resolutions, adopted by the Member States in 1992. These Resolutions allowed for the application of accelerated procedures in case an asylum applicant had travelled through a 'safe third country' or came from a 'safe country of origin'.<sup>10</sup>

Parallel to the development of this network of working groups, a second framework for co-operation was set up. During the preparations for the Single European Act, it became clear that the Member States would not reach agreement on the free movement of Community citizens and third country nationals within the common market. France, Germany and the Benelux-countries then decided to proceed with the gradual elimination of controls on persons at the internal borders, outside the Community framework. To this end, the Schengen Agreement was signed in 1985. It took another five years to negotiate the Schengen Convention (1990), which set out the compensatory measures to be taken to prevent negative side effects to the free movement of persons. As far as asylum is concerned, the goals of the Convention remained limited. It established criteria to determine the state responsible for examining an asylum claim, quite similar to the criteria in the Dublin Convention. Thus, the Convention's provisions on asylum are limited to procedural regulations, and do not touch upon the content of the asylum law of the signatory states.<sup>11</sup>

This first stage in the development of European co-operation in the field of asylum was thus characterised by the reluctance of the Member States to relinquish competencies over the movement of third country nationals to the Community, even if the Treaty, as modified by the Single European Act, did allow for this in principle. The choice for ad-hoc intergovernmental co-operation, which excluded the European Parliament and European Court of Justice and accorded no more than an observatory role to the Commission, confirms the complexity and sensitivity of this policy area, which touches upon the core of national sovereignty.

Dissatisfaction with the functioning of ad-hoc co-operation in the field of asylum and migration in the 1980s led the Member States to place this issue high on

10 Geddes, *ibid.*, 73-80; Zwaan & Bultena, *ibid.*, 9-13; D. G. Papademetriou, *Coming Together or Pulling Apart? The European Union's Struggle with Immigration and Asylum*, (Carnegie Endowment for International Peace, 1996), 65-67; Guiraudon, 'European Integration and Migration Policy: Vertical Policy-Making as Venue Shopping', 38 *Journal of Common Market Studies* 2 (2000), 251-71.

11 Geddes, *Immigration and European integration*, 80-84; Zwaan & Bultena, *Ruimte van vrijheid, veiligheid en rechtvaardigheid*, 13-16; K. Poller, *Asielrecht in de Europese Unie. Ontwikkeling van een harmonisatieproces*, (MAKLU, 1994), 47-66.

the agenda of the IGC that would result in the Treaty of Maastricht (1992). In particular, the lack of democratic and judicial control was broadly criticised, as was the lack of efficiency of the co-operation, as revealed by the laborious processes involved in the ratification of the Dublin Convention and the Convention on External Borders. Member States like Germany, the Netherlands, Belgium and Italy pleaded for far-reaching reform, which should involve a substantial transfer of competencies to the Community and her institutions. However, these aspirations met with strong resistance from Denmark and the United Kingdom, which still insisted on keeping co-operation in the field of asylum and migration strictly intergovernmental. The result was a compromise. The Maastricht Treaty created the European Union, which would consist of one communitarian and two intergovernmental pillars, bound together by a single institutional framework. The network of intergovernmental work groups discussed above was formally integrated into the new European Union, namely in the third pillar. Title VI of the EU Treaty specified the content and procedures of the new third pillar, and set out a list of policy fields considered by the Member States as 'issues of common interest'<sup>12</sup>, among which asylum. The decision-making procedures in the third pillar were strictly intergovernmental. The Council of Ministers was the central actor and unanimity was required for a measure to be adopted. The Commission was accorded the right of initiative, but it had to share this right with the Member States. The European Parliament would be 'informed and consulted', while the European Court had no jurisdiction over the third pillar, except, in specific circumstances, over Conventions. The measures adopted by the Council between 1993 and 1999 include a Common Position regarding the interpretation of the refugee concept and a Resolution on minimum standards for asylum procedures. The judicial status of the policy instruments of the third pillar was unclear. Most Member States interpreted them as non-binding.<sup>13</sup>

The Maastricht Treaty formally integrates the field of asylum policy in the European Union and is therefore a document of importance in the development of European integration in the field of asylum. However, the fact that the Member States opted for a strictly intergovernmental institutional structure and that the measures adopted were limited to 'soft law' which carried few obligations for the Member States, clearly indicates that the Member States were still not inclined to give up their authority over the access and stay of foreigners on their territory.

<sup>12</sup> Art. K1 TEU/Maastricht.

<sup>13</sup> Papademetriou, *Coming Together or Pulling Apart?*, 50-53; Geddes, *Immigration and European integration*, 87-100; Zwaan & Bultena, *Ruimte van vrijheid, veiligheid en rechtvaardigheid*, 92-100; D. Dinan, *Ever Closer Union. An Introduction to European Integration*, (MacMillan Press, 1999), 443-444.

#### FROM AMSTERDAM TO TAMPERE: THE WORKING PROGRAM

Between 1996 and 1999, three documents were elaborated that meant a major step forward for European integration in the field of asylum policy. The Amsterdam Treaty, the Vienna Action Plan and the Tampere Conclusions together contain a Working Program that represents a real turning point in the development of the European asylum policy. The Treaty of Amsterdam transferred asylum and migration from the third to the first pillar and set out a list of measures to be adopted by the Council within two to five years. In Vienna, the list of policy objectives was complemented and the deadlines were sharpened. The Tampere European Council finally specified further what should be the Union's priorities and political guidelines in implementing the provisions of the Treaty. Particularly in retrospect, it appears that the Vienna Action Plan was an intermediate step, preparing the transition from Amsterdam to Tampere. As a frame of reference for the work of Commission and Council, it has been of little importance compared to the Treaty of Amsterdam and the Tampere Conclusions. The focus in this analysis will therefore clearly be on the latter two documents.

The Working Program is innovative in a number of respects. First, asylum policy is transferred to the communitarian pillar. In Amsterdam, a new Title IV concerning 'Visa, asylum, immigration and other policies related to the free movement of persons', was introduced in the EC-Treaty. Henceforth, the Community would be competent to develop policies in the field of asylum. However, the Member States had not fully overcome their reticence towards handing over competencies to the supranational institutions. As complete communitarisation was still not acceptable to all, a compromise had to be reached regarding the decision-making procedures in Title IV. The Treaty provided for a 'transition period' of five years, in which the Commission would share the right of initiative with the Member States, the Council would decide by unanimity and the Parliament would be consulted. Decision-making would in fact still be rather more intergovernmental than communitarian. After this transition period, the Commission would be given exclusive right of initiative and the Council could, by a unanimous vote, decide to apply the co-decision procedure to Title IV. The Member States' careful approach of supranationalisation is also apparent from the fact that the competencies of the European Court over Title IV are limited compared to other areas of the first pillar.<sup>14</sup> Notwithstanding these institutional restrictions, the communitarisation of asylum policies was a major step towards deeper integration. The 'soft law' that was produced by the intergovernmental co-operation under the Treaty of Maastricht had not imposed any real obligations upon the Member States to harmonise their asylum legislation. The transfer of asylum policies to the first pillar meant that common measures would henceforth have the status of Community law, directly binding upon the Member States. Their compliance would be subject to control by Commission and Court. In Amsterdam, the Member States thus took upon them the obligation to

<sup>14</sup> Cf. Monica Claes, in this volume.

adapt their national policies to future European policies. This reflects a willingness to part with national sovereignty that was hitherto unknown in the field of asylum.

The Working Program also represents a turning point in the development of European integration in the field of asylum, in that it establishes an elaborate list of specific measures to be adopted by Commission and Council. Article 63 of the EC-Treaty as modified in Amsterdam states that the Community will adopt criteria for establishing which member state is responsible for examining an asylum claim, as well as minimum standards for temporary protection, the reception of asylum seekers, asylum procedures and the qualification of a person as a refugee. The Vienna Action Plan added minimum standards for subsidiary protection to this list.<sup>15</sup> The deadline for the adoption of these measures was set on 1 May 2004, five years after the entry into force of the Amsterdam Treaty. In contrast, the Treaty of Maastricht only stated that asylum was considered an 'issue of common interest', but did not specify the content, scope, or depth of the policy to be developed. The objectives established by the Working Program were specific enough for the Tampere European Council to invite the Commission to keep up a biannual scoreboard of the progress made in their implementation. This shows that the Member States had a much clearer vision of what the content of the future policy should be than they did in Maastricht and that they wanted to see concrete results in the near future. By making binding arrangements on the adoption of common measures, the Member States have chosen for a substantial limitation of their freedom of action in formulating national policies. Again, this is a clear difference with their attitude towards European integration in the field of asylum before Amsterdam.

Finally, the Working Program represents a real turning point in the development of European integration in the field of asylum, in that it reflects the wish of the Member States to develop a comprehensive and coherent policy. Under the Treaty of Maastricht, co-operation had been fragmented. There was no overall policy plan and little attention was paid to the coherence between the different elements. Measures were adopted if and when the need was felt for co-ordination on the European level and depending on whether agreement on a proposal could be reached. In contrast, the Working Program does offer an overall policy plan and emphasises the necessity to develop a comprehensive and coherent approach to the different elements of both asylum and migration policies.<sup>16</sup>

Thus, the Working Program reflects the intention of the Member States to develop a communitarian asylum policy. It specifies the measures to be taken, sets clear deadlines and presents a comprehensive and coherent policy plan. It thereby shows a level of ambition regarding the scope and depth of European integration that is no less than baffling in a policy field that is so closely connected to national sovereignty. How can this high level of ambition be explained?

<sup>15</sup> Vienna Action Plan, para. 38b(ii).

<sup>16</sup> Presidency Conclusions of the European Council in Tampere, para. 10-11.

The choice of the Member States to delegate authority over access and stay of foreigners on their territory to the Community can partly be explained by emphasising the functional connection between the free movement of persons and common asylum policies. The free movement of persons is an integral part of one of the primary objectives of the European Union: economic integration. To reinforce their economic position and to increase the welfare of their citizens, the Member States wish to create a common market, where the obstacles to the movement of goods, services, capital *and persons* are removed. However, if the internal borders are abolished and control over access to territory is no longer exercised at the national level, the European level must assume this function. In other words, the abolition of internal borders requires compensatory measures at the external borders and co-ordination in the field of asylum and migration. Thus, the European asylum policy can be considered as a by-product of economic integration, since its purpose is to prevent negative side effects to the abolition of internal borders.

Indeed, as was described above, the first steps towards European co-operation in the field of asylum were taken in the wake of the Single European Act, which provided for the common market without internal frontiers to be created before 1992. However, these early forms of co-operation, both in the network of working groups and in the Schengen framework, were strictly intergovernmental. The Treaty of Maastricht formally integrated co-operation into the European Union, with the purpose of 'the realisation of the objectives of the Union, in particular the free movement of persons'.<sup>17</sup> Even then, the role accorded to the supranational institutions remained minimal. Thus, it is clear that the elimination of controls on persons at the internal borders of the common market has been an important push-factor for European co-operation in the field of asylum. However, for more than ten years it was not sufficient to convince the Member States to transfer competencies over asylum policies from the national to the supranational level. It was only in Amsterdam that communitarisation of asylum policies could be agreed upon. What happened in Amsterdam that can explain this change?

First, the Schengen Convention had finally entered into force in 1995. Within the territory of the signatory states, the free movement of persons was now a fact and the first experiences with Schengen were positive. This success created a certain momentum and enthusiasm, particularly with the five countries that had initiated Schengen. Their argument was: now that we have shown that it works – let us finally realise the free movement of persons within the Union as well.<sup>18</sup> In the IGC 1996-97, countries like the Netherlands, Germany and France pleaded for laying down the free movement of all persons, irrespective of their nationality, in the Treaty.

<sup>17</sup> Art. K1 TEU/Maastricht

<sup>18</sup> Interview Michiel Patijn, State Secretary for European Affairs in the first Kok cabinet (June 2003); Interview Gilbert Elkaim, French Permanent Representation to the EU (July 2003); Interview official at German Permanent Representation to the EU (July 2003).

They also argued that the European asylum and migration policy was so closely connected to free movement and therefore to the common market, that this policy field should be brought under the competence of the Community. However, the proposal to transfer asylum and migration to the first pillar met with undiminished resistance from the United Kingdom, Ireland and Denmark. The solution for this problematic situation was found by the Dutch presidency,<sup>19</sup> which came up with a complex judicial construction based on the new flexibility provisions in the Treaty of Amsterdam. A new Title VII in the EU-Treaty created the possibility to establish a co-operation within the judicial and institutional framework of the Union in which not all Member States participate. These new provisions made it possible to overcome the deadlock regarding the free movement of persons within the common market, a deadlock that by then had lasted more than twenty years. The new Title IV in the EC-Treaty states that persons 'be they citizens of the Union or nationals of third countries'<sup>20</sup> will not be subjected to controls when passing the internal borders. Simultaneously, regulations regarding the entry and stay of third country nationals were brought within the competence of the Community. The United Kingdom, Ireland and Denmark were able to agree to this, because they were granted opt-outs to the new Title IV. They would not participate in, nor be bound by, the common asylum and migration policies to be developed under this Title. The United Kingdom and Ireland do have the possibility to 'opt-in' on individual measures.<sup>21</sup>

Now that the free movement of persons had been established in the EC-Treaty, the separate Schengen co-operation seemed to have lost its purpose. The Dutch presidency therefore proposed to incorporate Schengen in the judicial and institutional framework of the Union, so as to guarantee the coherence of European policies in matters of justice and home affairs, as well as their judicial and democratic accountability. This proposal was accepted, but it again required special provisions for the United Kingdom, Ireland and Denmark.<sup>22</sup> The United Kingdom and Ireland, who did not participate in Schengen, were granted an opt-out on all EU-measures building on the Schengen acquis. Denmark was a member of Schengen but would not participate in policy-making in Title IV, in which part of the Schengen-acquis would be incorporated. After Amsterdam, Denmark would have the possibility of participating in measures building on the Schengen acquis even if they were placed under Title IV. If it chose to do so, these measures would not have the

19 Michiel Patijn considers this as maybe the most important achievement of the Dutch presidency: designing this judicial 'trick', which laid the foundation for the solution of a seemingly insoluble judicial problem (interview Michiel Patijn (June 2003)).

20 Art. 62 (1) EC.

21 These provisions were laid down in three Protocols to the Treaty of Amsterdam: *Protocol on the application of certain aspects of Article 7a of the Treaty establishing the European Community to the United Kingdom and to Ireland*; *Protocol on the position of the United Kingdom and Ireland*; *Protocol on the position of Denmark*. (O.J. C340, 10 November 1997).

22 Protocol integrating the Schengen acquis into the framework of the European Union (O.J. C340, 10 November 1997), art. 3-5.

status of Community law in Denmark, but the status of a classic agreement under international law.<sup>23</sup>

The economic objective of establishing a common market without internal borders has been an important pull factor for European integration in the field of asylum from the very start. Until Amsterdam however, far-reaching integration was not possible because a number of Member States were so attached to their national sovereignty in this area that they adhered to a restrictive interpretation of the free movement of persons. After twenty years of deadlock, the new flexibility provisions in the Treaty made it possible to overcome this obstacle and to bring asylum policies within Community competence. However, a closer look at the Working Program shows that the functional connection with the free movement of persons is not sufficient to explain the level of ambition of the Member States. The objectives of the Working Program exceed the level of integration necessary to compensate for the abolition of internal border controls.

The Treaty of Amsterdam gives a first clear indication for this. The new Title IV states that the Union will on the one hand take measures to 'ensure the free movement of persons (...), in conjunction with directly related flanking measures with respect to external border controls, asylum and immigration'<sup>24</sup> and on the other hand 'other measures in the fields of asylum, immigration and safeguarding the rights of nationals of third countries'.<sup>25</sup> The Union thus explicitly formulates the objective to develop asylum policies that do not result directly from the abolition of internal border controls. The Treaty also indicates which elements of the policy to be developed are directly related to the free movement of persons, and which are not. The first category comprises criteria for establishing which member state is responsible for examining an asylum application, as well as minimum standards for temporary protection. The latter category includes minimum standards for reception of asylum seekers, for asylum procedures and for the qualification of persons as refugees.

The Vienna Action Plan added minimum standards for subsidiary protection to the list of measures to be adopted. The Tampere Conclusions went even further, stating that the Union will develop a common asylum system, which in the longer term should lead to 'a common asylum procedure and a uniform status for those who are granted asylum valid throughout the Union'.<sup>26</sup> This would mean that with

23 For a more detailed account of flexible integration in the field of justice and home affairs, see G. Noll, *Negotiating Asylum. The EU Acquis, Extraterritorial Protection and the Common Market of Deflection*, (Nijhoff, 2000), 148-152; Zwaan 'Schengen and its Incorporation in the New treaty: The Negotiating Process', in M. den Boer (ed.), *Schengen's Final Days? The Incorporation of Schengen into the New EU, External Borders and Information Systems*, (EIPA, 1998), 34-36; Kerchove D'Ousselghem, 'Un espace de liberté, de sécurité et de justice aux dimensions incertaines. Quelques réflexions sur le recours aux coopérations renforcées en matière d'affaires intérieures', in Y. Lejeune (ed.), *Le traité d'Amsterdam. Espoirs et déceptions*, (Bruylant, 1998), 292-293.

24 Art 61 (a) EC.

25 Art 61 (b) EC, emphasis added.

26 Tampere Conclusions, para. 15.

regard to status and procedures, all differences in asylum law in the different Member States would be eliminated, which is a very ambitious objective.

A comparison with the provisions of the Schengen Convention seems quite revealing. As far as asylum policies are concerned, this Convention only foresaw criteria to determine which member state was responsible for examining an asylum application. Such an instrument was deemed necessary in an area without internal borders so as to prevent so-called 'asylum shopping'. The Convention did not touch upon the content of the asylum law of the signatory states. The purpose of the Convention was to elaborate the measures necessary to compensate for the abolition of internal border controls. Harmonisation of asylum policies was apparently not considered as a prerequisite to reach this goal. The Working Program, however, foresees far-reaching harmonisation in the field of asylum. It seems that the common asylum policy to be developed is meant to serve some other purpose besides preventing negative side effects to the free movement of persons.

#### A COMPLEMENTARY EXPLANATION: PRESSURE ON THE NATIONAL ASYLUM SYSTEMS

Until the 1970s, the number of asylum seekers in Western Europe had remained limited. Moreover, asylum seekers originated almost exclusively from communist dictatorships, which gave the 'free countries of the West' a strong ideological legitimisation to protect these refugees. This began to change in the 1980s. In a globalising world, distances became easier to overcome and increasing numbers of asylum seekers from problem areas in Africa and Asia found their way to Europe. The wars in the Balkan led to a further sharp increase in refugee flows. Between 1990 and 1999, the number of asylum applications filed in the EU tripled compared to the period between 1980 and 1989.<sup>27</sup> There was a widespread perception that the inflows largely consisted of economic migrants who abused the asylum channel to gain access to the welfare states of Western Europe. As asylum inflows increased, asylum systems became overburdened. In the eyes of the public, national governments seemed to have lost control over asylum inflows. As the distinction between 'economic migration' and refugee flows became blurred, the legitimacy of national governments came to depend on their ability to control asylum inflows, just as much as it depended on the control over entry and stay of foreigners in general. Rising pressure on national asylum systems can be a reason for Member States, when they find that they can no longer cope with it through national policies, to look for solutions on the European level. European integration is then considered as a means to realise national policy goals. The common asylum policy thus serves its own autonomous purpose, besides economic integration: the control of asylum flows.

Logically, the positions of the individual Member States are strongly influenced by the extent to which they are themselves affected by rising asylum inflows. To

27 Website of the UN High Commissioner for Refugees: [www.unhcr.ch](http://www.unhcr.ch) (Statistics).

illustrate this point, I will have a closer look at the positions adopted by the Netherlands, a member state that played an influential role in the elaboration of the Working Program. To complement this account, the positions of Germany, France and the United Kingdom will also be discussed briefly.

Between 1996 and 1999, the Netherlands was probably the most fervent advocate of far-reaching integration in the field of asylum.<sup>28</sup> In Amsterdam, the Dutch were among the strongest proponents of communitarisation of asylum policies and the most important driving force behind the incorporation of Schengen into the Union. Holding the presidency in the final stage of the IGC 1996-97, the Netherlands spent more time on Justice and Home Affairs than on any other subject.<sup>29</sup> In Tampere, the Netherlands was a forerunner too. The very ambitious objective to develop 'a common asylum procedure and a uniform status'<sup>30</sup> was included in the Conclusions mainly as a result of pressure from the Dutch delegation.

Rising pressure on the national asylum system is a crucial factor in understanding the Dutch position. Asylum was an issue of very high priority for the Dutch government.<sup>31</sup> The inflow of asylum seekers had risen from some 1,5 thousand per year in the early eighties to more than 20 thousand in the nineties, with peaks of 40 thousand in 1994 and 45 thousand in 1998. Between 1992 and 2001, the Netherlands received the second highest number of asylum applications per head of the population, after Sweden.<sup>32</sup> The legal system could not cope with the inflow, procedures took years and reception centres were overcrowded. Asylum was a prominent theme in media and politics, while public opinion was under the disturbing impression that the country was 'flooded' with refugees. Thus, the Dutch government was very keen to reduce asylum inflows, not in the last place because of the financial costs involved. Importantly, at the same time, it appeared that the policies of neighbouring countries were of direct influence on the fluctuations of the asylum inflow. The number of asylum applications had never been as high as in 1994, the year after Germany implemented a constitutional reform that allowed for a radical sharpening of German asylum policies. The situation was perceived as one of *interdependency*: it was assumed that the Dutch asylum policies exerted a strong attraction on people in other parts of the world seeking a safer or better future in Europe, because they were liberal *in comparison with* the policies of other Member States. However, the Dutch government was reluctant to enter into 'policy competition' with surrounding countries, out of fear that a downward spiral of ever more restrictive policies would eventually lead to a level of protection that was unaccept-

28 Interview German Permanent Representation (July 2003); Interview Friso Roscam Abbing, ECRE/European Commission (August 2003); Peltomäki, 'What Did Member States Actually Intend at Tampere?', *ERA-Forum* 3 (2002), 139.

29 B. McDonagh, *Original Sin in a Brave New World. An account of the negotiation of the Treaty of Amsterdam*, (Institute of European Affairs, 1998), 173-174.

30 Tampere Conclusions, para. 15.

31 Interview Friso Wijnen, Dutch Ministry of Foreign Affairs (July 2003); interview official in Dutch Ministry of Justice (August 2003).

32 [www.unhcr.ch](http://www.unhcr.ch) (Statistics).

able from a human rights perspective. The solution was sought in European policies. The main objective was to reach a more equitable distribution of the asylum inflow among the Member States. The Netherlands felt they had carried a disproportionate part of the burden in the 1990s and wished to share this burden with the other Member States.<sup>33</sup>

The Dutch government saw harmonisation of asylum policies as a way to achieve a more equitable distribution of asylum seekers. It was expected that eliminating the differences in the Member States' asylum policies would lead to a reduction in the differences in inflow. Common standards for reception, procedures and criteria for granting the refugee status were meant to prevent that one member state would be more attractive to asylum seekers than others. This is one of the reasons that the Netherlands was such a strong proponent of the communitarisation of asylum policies during the IGC 1996-97. It also explains why the Dutch were so disappointed that agreement could not be reached in Amsterdam on applying qualified majority voting in the field of asylum. The results of the intergovernmental co-operation under the Maastricht Treaty were found 'meagre', in terms of efficiency of decision-making as well as content of the decisions adopted. Communitarian decision-making procedures were deemed necessary to get common policies off the ground.<sup>34</sup> Perhaps the most important argument in favour of communitarisation was that this would reinforce the role of the Commission. The Netherlands knew from experience that the Commission, more than any other player in the European field, was able to lend the policy-making process a certain momentum.<sup>35</sup> During the IGC 1996-97, the Netherlands were also one of the Member States that pleaded for fixing specific policy goals in the Treaty, within the framework of a medium-term working program, instead of merely summing up policy fields as in the Maastricht Treaty.<sup>36</sup>

Indeed, a specific list of asylum measures, to be adopted within two or five years, was established in Amsterdam and completed in the Vienna Action Plan. However, the Member States had opted for harmonisation through minimum standards. This was not satisfactory to the Dutch government, since minimum standards still leave room for substantial differences between national policies. In Tampere, the Netherlands therefore lobbied for much more far-reaching integration in the field of asylum. The Dutch government wanted the Tampere Conclusions to declare that the establishment of minimum standards would only be the first phase in the development of a common asylum system and that the Union would thereafter strive for a much more pronounced uniformisation of asylum policies.<sup>37</sup> Not all

33 Interview Carmen Gonsalves, Dutch Ministry of Foreign Affairs (June 2003); interview Michiel Patijn (June 2003); interview Friso Roscam Abbing (August 2003).

34 Netherlands, *Europese Samenwerking op het gebied van Justitie en Binnenlandse Zaken*, Government Memorandum to the Upper Chamber (24 167, nr. 2), 22 May 1995, 8-9&16.

35 Interview Michiel Patijn (June 2003), interview German Permanent Representation (July 2003).

36 Netherlands, *Europese Samenwerking op het gebied van Justitie en Binnenlandse Zaken*, 13.

Member States however shared the Dutch ambitions. The French delegation, in particular, was strongly opposed to the perspective of developing a single asylum system. Asylum inflow in France in the 1990s was among the lowest in the Union, in fact not much higher than it had been in the eighties. For France, a more equitable distribution of asylum seekers would mean that it would have to take on a larger part of the burden. France did not expect to benefit from far-reaching harmonisation of asylum policies. Besides, the French attached more importance to their sovereign right to decide whom it did or did not offer protection than the Dutch did. In a press conference after the summit, Lionel Jospin stated: 'France has risen against the perspective of a single European system, wanting on the contrary to move towards common views but taking into consideration the responsibility of the sovereignty of the states'.<sup>38</sup> France was not the only member state to oppose the objective of a single asylum system, an objective that remains highly ambitious to this day considering the substantial differences between Member States that remain in this field. The eventual result of the discussion on the scope of the objectives for the European asylum policies was a compromise. Paragraph 15 of the Conclusions stated that 'In the longer term, Community rules should lead to a common asylum procedure and a uniform status for those who are granted asylum valid throughout the Union.' According to a Finnish senior official closely involved in the preparation of the Tampere summit, this paragraph was the key element in the negotiations. Once this formulation had been agreed upon, all the rest could fall into place.<sup>39</sup> The way out of deadlock was found in the phrasing 'in the longer term'. For the Dutch delegation this meant 'soon', at the latest after 1 May 2004, the expiry date for the current Working Program.<sup>40</sup> For less enthusiastic Member States however, this phrasing was completely harmless and therefore acceptable, since the paragraph mentions no date and therefore imposes hardly any obligations.<sup>41</sup> Thanks to the vagueness of this formulation, both Kok, Chirac and Jospin could return home to inform their Parliaments that their position had been confirmed in Tampere. Nonetheless, it is not entirely unjustified that the Dutch government claimed the incorporation of this paragraph in the Conclusions as a victory, even if it contains no binding agreements. The European Council is the highest political organ in the Union and if a delegation can support its proposals in later negotiations with a reference to its Conclusions, this significantly strengthens the national position in the negotiations.

The Dutch government was thus highly pleased with the results obtained in Tampere. In its declaration to the Parliament, the government stated: 'The high

37 Netherlands, *Benelux-priorities for the European Council in Tampere*, Letter from the Government to the Upper Chamber (21 501-20, nr. 96), 8 October 1999, 3; Speech Job Cohen, Dutch State Secretary for European Affairs, Stockholm, 7 September 1999.

38 Press conference by President Chirac and Prime Minister Jospin in Tampere, 16 October 1999, my translation.

39 Interview Mikko Puumalainen, Finnish Prime Minister's Office (October 2003).

40 Interview Friso Wijnen (July 2003).

level of Dutch ambition with regard to asylum and migration has finally found response in the Union.<sup>42</sup> Nonetheless, the members of parliament confronted the government with some critical questions: why had the Dutch government settled for harmonisation of asylum policies, instead of aiming at more direct forms of burden sharing?<sup>43</sup> A number of forms of burden sharing were discussed during the preparation of the Tampere Summit, mainly as a result of general discontent with the lack of co-ordination of the Member States' response to the inflow of refugees resulting from the Kosovo crisis. Material burden sharing, for instance through quota, was quickly dismissed as unfeasible both from a political and a legal perspective.<sup>44</sup> Proposals were then made for financial burden sharing. A common fund could be developed to support Member States with high inflows of asylum seekers in financing their reception. These proposals however were tabled by the Southern Member States, which in return wished to share the costs of external border control and the fight against illegal immigration with the other Member States. Prime Minister Kok dismissed these proposals as 'wild' plans. The Dutch government was only interested in a financial mechanism that would exclusively apply to asylum seekers and there was not sufficient support in the European Council for such a mechanism.<sup>45</sup> The Dutch government therefore opted for a gradual process of burden sharing, through minimum standards and the development of a common asylum procedure.<sup>46</sup>

The German position with regard to the European asylum policy was both complex and decisive. From the early years of co-operation, Germany had been a strong proponent of European integration in the field of asylum. Already during the IGC 1990-91, Germany had pleaded for the application of communitarian decision-making procedures to the European asylum policy.<sup>47</sup> In the early nineties, perhaps no other asylum system in the Union was under as much pressure as the German system. The number of asylum application had increased up to eightfold in comparison with the mid-1980s. Between 1990 and 1993, Germany received more than half of the total number of asylum applications in the Union.<sup>48</sup> Simultaneously, Germany was confronted with a major inflow of immigrants from Eastern Europe. These flows consisted of so-called 'Aussiedler', descendants of German emigrants who had a constitutional claim to German citizenship. This massive inflow of new-

41 Interview German Permanent Representation (July 2003), interview Friso Roscam Abbing (August 2003).

42 Netherlands, *Verslag van de Europese Raad te Tampere, 15 en 16 oktober 1999*, Letter from the Government to the Upper Chamber (21 501-20, nr. 98), 19 October 1999, 2, my translation.

43 Netherlands, *Debat naar aanleiding van de Europese Top te Tampere*. Upper Chamber, 28 October 1999, 15-1075-83.

44 Interview German Permanent Representation (July 2003), interview Friso Wijnen (July 2003).

45 Netherlands, *Debat naar aanleiding van de Europese Top te Tampere*, 15-1084-86.

46 Netherlands, *ibid.*, 15-1073.

47 Geddes, *Immigration and European integration*, 90.

48 [www.unhcr.ch](http://www.unhcr.ch) (*Statistics*).

comers exceeded the German reception capacity, created serious unrest in public opinion and led to one of the most serious political crises in the history of the Federal Republic. In the early nineties, Germany was therefore strongly in favour of European integration in the field of asylum. Like the Netherlands, it accorded high priority to harmonisation of policies, because it aimed for a more equitable distribution of asylum seekers among the Member States and expected to be able to achieve this goal by eliminating the differences between the Member States' asylum policies. However, this did not keep the German government from taking steps to reduce asylum inflow at the national level as well. In 1993, Germany adopted a rather restrictive reform of its asylum legislation.<sup>49</sup> In the years following this reform, the asylum inflow diminished significantly. The number of applications went down from over 300,000 in 1993 to under 130,000 in 1994 and continued decreasing in the course of the nineties. Germany remained one of the most important countries of destination for asylum seekers in the Union, but the worst pressure was off. The German government drew two conclusions from its experiences in the early nineties. First, it was very disappointed by the lack of solidarity shown by the Member States in receiving refugees, especially from the Balkan. Second, it was apparent that control over asylum flows could also be improved through national policies. Besides, the impression had arisen that other pull-factors, such as the presence of an extensive social network of Kurds in Germany, affected the size of asylum inflows at least as much as the question whether the German asylum law was more or less liberal than that of surrounding countries.<sup>50</sup> Germany still strove for harmonisation of asylum policies, as a means to achieve a more equitable burden sharing, but it was much more sceptical about the profits that Germany stood to gain from harmonisation.

This more reticent German attitude first became visible during the IGC 1996-97. A few weeks before the Amsterdam Summit, Germany, which had until then been one of the driving forces behind the communitarianisation of asylum and migration policies, changed its position. Under heavy pressure from the *Länder*, Chancellor Kohl withdrew the German assent to the application of qualified majority voting to asylum and migration. This was a major disappointment for the Dutch presidency and appears to have led to a hefty row between Prime Minister Kok and the Chancellor.<sup>51</sup> It was also a surprising turn-around from the side of a government that had

49 This reform required a change in the constitution, since the German *Grundgesetz* was exceptional in providing for a subjective right to seek asylum. The federal government could only convince the leftist political parties to agree to this constitutional reform by appealing to their pro-European views. It argued that reform was necessary to allow for German participation in the European cooperation in the field of asylum, since a number of measures, particularly the London Resolutions, were contrary to the constitutional right to asylum. This illustrates the ways in which a national government can make use of European cooperation to overcome parliamentary opposition, thus increasing its possibilities to implement restrictive policies.

50 Interview German Permanent Representation (July 2003)

51 Interview Michiel Patijn (June 2003).

thus far always proved to be a proponent of deeper political integration. In a declaration to the *Bundestag*, Kohl explained his government's position:

To protect our interests, we could and had to and must make sure that in matters of immigration and asylum, the principle of unanimity would and will continue to be applied in future. I am very well aware that this discussion was not easy for my colleagues from the other European countries either. There have been claims in Brussels that we, the Germans, would be conducting a re-nationalisation of EU-politics. This is absolutely out of the question. (...) We had 117 000 asylum seekers in Germany in 1996. That was 52 percent of all asylum seekers in the Union. (...) We are not tired of Europe, but we have enlightened self-interests to protect here.<sup>52</sup>

The argument was that the German government could not afford to let its authority slip over a policy field that had such impact on German society. Germany remained in favour of harmonisation of asylum policies, hoping that this would lead to a more equitable distribution of asylum seekers among the Member States<sup>53</sup> and thereby to a reduction of the asylum inflow in Germany. In this sense, the German standpoint was closer to the Dutch than to the French or British position. Germany supported the transfer to the first pillar, expecting as the Netherlands did that this would benefit the efficiency of decision-making. Qualified majority however was carrying the matter too far. In Tampere, Germany was more reticent than the Netherlands as well. For the moment, the objective of minimum standards was ambitious enough. Like France, Germany was in no hurry to develop a 'common asylum procedure and a uniform status'.<sup>54</sup>

The position of the United Kingdom towards the European asylum policy is interesting, because it illustrates quite clearly how the positions adopted by the Member States are directly affected by the size of the inflow. Traditionally, the United Kingdom is perhaps the most Euro-sceptic member state of the Union. Moreover, the British were convinced that their own border controls were more effective than a common border policy could ever be. The United Kingdom attached so much importance to its national sovereignty in this field, that it blocked the elimination of border controls within the common market for years. In Amsterdam, the United Kingdom was granted an opt-out, so that it could maintain border controls. In this statement to the House of Commons after the Amsterdam Summit, Tony Blair said:

52 Statement by Helmut Kohl in German Bundestag, *Plenarprotokoll 13/185 vom 27.06.1997, Seite 16737-16739*, my translation.

53 The federal government states, in answer to questions in the Bundestag: 'Eine gerechte Lastenverteilung ist ein erklärtes Ziel der Asyl- und Flüchtlingspolitik der Bundesregierung'. (German Bundestag, 12 April 1999, Drucksache 14/751).

54 Interview German Permanent Representation (July 2003).

First, we have attained legal security over our frontier controls, through a legally binding protocol to the Treaty. That is an achievement of lasting value, attained for the first time. (...) I know that that will be welcomed by the whole House. We have ensured that we, and only we, decide border policy, and that policies on immigration, asylum and visas are made in Britain, not in Brussels.<sup>55</sup>

Not only Blair's choice of words, but also the fact that he chose to open his statement with this 'success', illustrates how important this issue was for the British. In the course of the 1990s, the number of asylum applications in the United Kingdom had increased strongly in comparison to the 1980s, even if it did not even come near the inflow with which countries like Germany and the Netherlands were confronted at the time. This increased pressure on the asylum system however could not convince the British to give up their pronounced reticence towards a common asylum policy yet. They opted out in Amsterdam, while in Tampere priority was given to co-operation in the fields of police and justice over asylum and migration. In recent years however, the British have shown that even they are not immune to the pressure of rising asylum inflow. The number of asylum applications in Britain has risen sharply, to the extent that the United Kingdom is now the main country of destination for asylum seekers in the Union. Along with the asylum inflow, the British interest in common asylum policies has increased. Contrary to previous experience, the British are now actively involved in policymaking and a 'very pleasant partner' for the Commission.<sup>56</sup> The United Kingdom has made active use of the opt-in clause it was awarded in Amsterdam, and participates in almost all asylum measures adopted so far.

## CONCLUSION

The development of a European asylum policy is a special case of European integration. It is special because asylum is a politically sensitive issue, which touches upon the core of national sovereignty. It therefore comes as no surprise that the Member States have until recently proved unwilling to hand over competencies over this policy field to the supranational institutions. Nevertheless, between 1996 and 1999 a Working Program for a common asylum policy has been elaborated, which reflects the intention of the Member States to develop a coherent, substantial communitarian policy.

To understand the decisions made in the field of asylum policy between 1996 and 1999, it is essential to take into account the functional connection between European asylum policies and the free movement of persons within the common market. The new flexibility provisions in the Amsterdam Treaty allowed for the incorporation of the elimination of internal borders controls in the EC-Treaty,

55 United Kingdom, House of Commons Hansard: Debates, 18 June 1997, Column 313.

56 Interview Friso Roscam Abbing (August 2003).

which gave the development of common asylum policies a strong boost. However, it is no less important to emphasise the role of the individual Member States and the continuities between domestic and European politics. Rising pressure on national asylum systems, in a situation of perceived interdependence, led Member States to strive for harmonisation of policies. By reducing differences in asylum policies, they hoped to achieve a more equitable distribution of asylum seekers. European integration serves to achieve a domestic policy goal: control over asylum inflow.

The deadline for the implementation of the Working Plan that was discussed here expired on 1 May 2004. Not all goals were achieved: a directive on minimum standards for asylum procedures still remains to be adopted. Moreover, critics have argued that the level of harmonisation set by the policy instruments that have been adopted does not exceed the lowest common denominator.<sup>57</sup> Apparently, it is one thing for heads of state and government to agree upon ambitious policy goals, but quite another to translate these broad guidelines into concrete, detailed Community law. Moreover, the asylum directives adopted so far have been criticised for transposing restrictive tendencies existing at the national level to the European level. Such trends are better understood when one conceives of the development of common asylum policies not only as a by-product of the internal market, but also as an instrument used by national governments to achieve domestic policy goals.

<sup>57</sup> Cf. Michal Gondok, in this volume.