The European Dimension of German Reunification: East Germany's Integration into the European Communities

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Introduction

In 1989–1990, the German question, which had (again) been open since 1945[1], found a definite answer in the form of a reunification[2] of the Federal Republic of Germany, the German Democratic Republic (GDR) and the whole of Berlin. The answer was European in nature, and it partly

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Abbreviations: All E.R. = All England Law Reports; BGBl. = Bundesgesetzblatt; BL = Basic Law; BR-Drs. = Drucksachen des Bundesrates; BT-Drs. = Drucksachen des Bundestages; BullBReg. = Bulletin der Bundesregierung; BullEC = Bulletin of the European Communities; BVerfGE = Entscheidungen des Bundesverfassungsgerichts; CMEA = Council for Mutual Economic Assistance; C.M.L.Rev. = Common Market Law Review; CSCE = Conference on Security and Cooperation in Europe; DA = Deutschland Archiv; DtZ = Deutsch-Deutsche Rechts-Zeitschrift; EA = Europa-Archiv; EC = European Communities; ECJ = Court of Justice of the European Communities; ECR = European Court Reports; ECSC = European Coal and Steel Community; EEC = European Economic Community; EPIL Inst. = R. Bernhardt (ed.), Encyclopedia of Public International Law, Instalment; ERP = European Recovery Program; EuGRZ = Europäische Grundrechte Zeitschrift; EuR = Europarecht; EuZW = Europäische Zeitschrift für Wirtschaftsrecht; FAZ = Frankfurter Allgemeine Zeitung; FS = Festschrift; JZ = Juristen Zeitung; n. = note(s); NJW = Neue Juristische Wochenschrift; OJ = Official Journal of the European Communities; RIW = Recht der internationalen Wirtschaft; SEA = Single European Act; VVDStRL = Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer.

[1] Cf. D. Blumenwitz, What is Germany? (1989).

[2] The term "reunification" is used throughout this article because, in the legal as well as political sense, it describes the event more accurately than the term "unification" appearing in the official documents of the EC.

also answered the wider question of »Quo vadis Europa?«. The following remarks intend to illuminate the European aspects of the historic events, which also makes it necessary to deal with their historical roots[2a].

Part One: Before the 1989 Revolutions in Central and Eastern Europe

Before the 1989 revolutions in central and eastern Europe, the stage of the European political and economic theater was dominated by two sets of players[3]: the three European Communities[4], with their membership rising from six states including the Federal Republic of Germany in the 1950s to twelve in 1986, on the one hand, and the seven European states including the GDR[5] which since 1949 had coordinated their economic policies in the Council for Mutual Economic Assistance (CMEA), on the other hand. The relationship between these organizations and their member states including the two German states was generally speaking one of simultaneous attraction and repulsion, for political as well as economic reasons; the intra-German relationship, however, showed special features which require separate treatment.

I. The European Communities and the CMEA States in General: Attraction and Repulsion

A. The Idea of a "United States of Europe"

One of the sparks re-igniting the older European integration movement after World War II was Winston Churchill's famous Zurich speech on September 19, 1946[6]. There he called for the building of "a kind of United States of Europe" for the purpose of not only overcoming the destruction and misery of the immediate postwar period but of giving

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[2a] See already F. Tschofen/C. Hausmaninger, Legal Aspects of East and West Germany's Relationship with the European Economic Community after the Collapse of the Berlin Wall, Harvard International Law Journal 1990, 647.

[3] This excludes other players, as the Council of Europe and the military alliances NATO, WEU and Warsaw Pact.

[4] European Coal and Steel Community (Treaty of April 18, 1951, entered into force on July 23, 1952); European Economic Community (Treaty of March 25, 1957, entered into force on January 1, 1958); European Atomic Energy Community (Treaty of March 25, 1957, entered into force on January 1, 1958).

[5] Bulgaria, Czechoslovakia, Hungary, Poland, Rumania, the Soviet Union. The GDR acceded in 1950. Albania gave up its active membership in 1962.

[6] W. Lipgens/W. Loth (eds.), Documents on the History of European Integration, Vol.3 (1988), 662.

Europe a permanent structure under which it could "dwell in peace, in safety and in freedom". His objective was to facilitate reconstruction and to make tyranny and war impossible forever.

It is true that Churchill's call actually meant all of (continental) Europe, but he realized that a unification on that scale could not be achieved immediately. Though the cold war had not yet reached its later rigor, "skirmishes" had already taken place, and Churchill's appraisal of Soviet intentions was clear. He therefore excluded the Soviet Union from his European project and advocated a union of west European states including the former axis powers Germany, which had not yet been reorganized as an independent state, and Italy to resist further Soviet expansion. His project came down to an immediate west European integration with an open door towards the Soviet dominated eastern part of Europe: a full political, economic and military integration, but geographically limited for the time being.

B. The Schuman Plan

Churchill's federal plan for Europe could not be realized. French Foreign Minister Robert Schuman in 1950 became the protagonist of a counter-proposal developed by Jean Monnet, advocating a functional approach[7]. Under it, integration would start in the limited area of coal and steel production, but later grow into a full European federation. As to the geographical scope, Schuman started from an integration of the centuries-old adversaries France and Germany, nevertheless expecting other European states to join in.

By then a state reorganization had taken place in still-occupied Germany. In its western part, comprising the British, French and United States occupation zones, a pluralistic constitutional system had been established by the Basic Law of May 23, 1949, under the name Federal Republic of Germany[8], equipped with a free market economy modified by a comprehensive welfare-state system. Shortly thereafter, the Soviet occupation zone had been transformed into the GDR with a totalitarian political system of a Stalinist character and a strictly centralized planned

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[7] Statement of May 9, 1950 (Agence France Presse – Informations et Documentations, no.291 – May 13, 1950; J. Schwarze/R. Bieber [eds.], Eine Verfassung für Europa [1984], 394 [in German]). See R. Poidevin, Robert Schumans Deutschland- und Europapolitik zwischen Tradition und Neuorientierung (1976), 18 et seq.

[8] BGBl., 1. For an updated English version cf. U. Karpen (ed.), The Constitution of the Federal Republic of Germany (1988), 223.

economy run by the state which in the course of time eliminated nearly all forms of private enterprise[9].

In view of this development as well as the conditions in the other European countries under Soviet domination, Schuman knew that he would only be able to reach western European states with his appeal. But he still used the general terms "Germany" and "other European countries" instead of Federal Republic of Germany and other western European countries when he spoke of his proposal as being the first cornerstone of a European federation. Thus, he also in principle left the door open for those states that might one day be able to shake off the Soviet yoke. The adherents of the Schuman plan had in particular hoped that the favorable economic development which was to follow western Europe's economic integration would at last prove to be so attractive for the socialist states of central and eastern Europe that the division of the continent would come to an end[10]. The hope that a European federation would one day comprise all Europe was never given up[11].

C. Treaties Establishing the European Communities

The epithet "European" appearing in the name of all three European Communities, contrasted with the name of the Western European Union, already indicates those organizations' conception of themselves as nuclei of a future all-European integration. It was accordingly denounced by the socialist Eastern European states[12].

The ECSC, founded on the basis of the Schuman Plan, gives all European states the opportunity to apply for accession (Art.98 ECSC Treaty). The Organization's all-European disposition played an important role in

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[9] GDR Constitutions of October 7, 1949, and of April 9, 1968, as amended on October 7, 1974 (German texts in I. v. Münch [ed.], Dokumente des geteilten Deutschland [1968], 301, 525; *id.*, Vol.2 [1974], 463).

[10] K. Doehring, Die Wiedervereinigung Deutschlands und die Europäische Integration als Inhalte der Präambel des Grundgesetzes, Deutsches Verwaltungsblatt 1979, 633 (634). A similar hope had also imbued those who had stimulated the foundation of the Federal Republic of Germany (see T. Schweisfurth, Europabekenntnis und Wiedervereinigungsgebot des Grundgesetzes, in: Völkerrecht als Rechtsordnung – Internationale Gerichtsbarkeit – Menschenrechte, FS für Hermann Mosler (Beiträge zum ausländischen öffentlichen Recht und Völkerrecht, Vol.81) [1983], 861 et seq.).

[11] K. Adenauer, Erinnerungen 1945–53 (1965), 425; W. Hallstein, Die Europäische Gemeinschaft (1973), 43; BullBReg., no.58 (May 11, 1990), 460; address by US Secretary of State J. Baker on December 12, 1989 (EA 1990, D77 [D80]).

[12] Cf. A. Dost /B. Hölzer, Der politische Mechanismus der EG (1986), 17.

the West German parliamentary debates in preparation for the Federal Republic's ratification of the Treaty[13]. The EURATOM Treaty in its preamble expresses the desire to associate other countries and Art.205 contains an accession clause similar to the one in the ECSC Treaty. An equivalent accession clause appears also in Art.237 of the EEC Treaty, but in this case the preamble is even more conspicuous, stating that the founders of the EEC were "DETERMINED to lay the foundations of an ever closer union among the peoples of Europe, RESOLVED ... to eliminate the barriers which divide Europe, ... and calling upon the other peoples of Europe who share their ideal to join in their efforts ...". The last preambular clause referring to shared ideals of liberty, however, indicates that the central and eastern European states were only welcome as EEC members after a complete reversal of their constitutional and economic systems.

Even though European Community law leaves the member states a wide discretion to pursue different economic policies, there is no doubt that membership depends on a basic decision in favor of a market economy and against the type of centrally planned and administered economy with a state foreign trade monopoly prevalent throughout the former East bloc before the 1989 revolutions. Otherwise the membership obligations concerning the freedom of movement of goods, persons and capital could not be fulfilled. But EC membership is also conditional on the recognition and realization of certain basic constitutional principles within the member states: They have to be parliamentary democracies respecting human rights[14].

It is not clear whether these two unwritten conditions for EC membership have a legal or rather a political character[15]. In any event, they determine the exercise of discretion by the Council under Art.98(1) of the ECSC Treaty, Art.237(1) of the EEC Treaty and Art.205 of the EURATOM Treaty[16]. Experience anyhow shows that political liberty embodied in the constitutional principles mentioned is so closely related to a market economy that one cannot survive without the other.

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[13] Cf. Verhandlungen des Bundesrates. Stenographische Berichte, 61st session (June 27, 1951), 440 et seq.

[14] Declaration of the European Council on Democracy (April 7/8, 1978), BullEC 1978, no.3, p.5.

[15] C.-D. Ehlermann, Mitgliedschaft in der Europäischen Gemeinschaft, EuR 1984, 113 (114 et seq.); C. Tomuschat, Aller guten Dinge sind III?, EuR 1990, 340 (352).

[16] C. Vedder, in: E. Grabitz (ed.), Kommentar zum EWG-Vertrag, Art.237 no.5 et seq. (September 1989).

D. The Council for Mutual Economic Assistance

The formal economic coordination of the Soviet bloc states in Europe began with the establishment of the CMEA in January 1949, though the Council's Charter dates only from December 14, 1959[17]. After having rejected cooperation in the European Recovery Program, the Soviet Union intended to counterbalance the expected economic progress in western Europe that could profit from Marshall Plan funds[18], exploit the economic power of its satellite states and at the same time provide an economic clamp to complement the political and military grip on its sphere of influence[19]. According to the semi-official international law textbook of the former GDR, the setting up of the CMEA was an indispensable requirement in the international class struggle between socialism and capitalism[20].

The organization's main purposes were the coordination of the member states' economic plans, the organization of intra-bloc trade, the achievement of an international socialist division of labor which included specialization and cooperation concerning production, investment cooperation as well as scientific cooperation and the evening out of discrepancies in the level of economic development among the member states[21].

Even though the CMEA was accorded legal personality by Art.I of the Convention on the Legal Capacity, Privileges and Immunities of the Council for Mutual Economic Assistance[22] and its treaty-making capacity was expressly recognized in Art.III (2) (b) of its Charter, as amended by the Protocol of June 21, 1974, the Council was never able to attain inter-

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[17] UNTS Vol.368, 253 (as amended, GBl. DDR 1976 II, 142). See E. Lieser-Triebnigg/A. *Uschakow*, Die DDR in der osteuropäischen Wirtschaftsintegration. Eine juristische Analyse (1982), 9 et seq.; W.E. Butler, Council for Mutual Economic Assistance, in: EPIL Inst.6 (1983), 82.

[18] The ERP had originally been designed to benefit all of Europe but the Soviet Union and its satellite states had rejected the offer (T. Eschenburg, Jahre der Besatzung 1945–1949 [1983]; K.D. Bracher [et al.] [eds.], Geschichte der Bundesrepublik Deutschland, Vol.1 [1983], 443).

[19] Cf. Hallstein (note 11), 273; R. Schönfeld, Der Rat für gegenseitige Wirtschaftshilfe als Instrument sozialistischer ökonomischer Integration und sowjetischer Hegemonie, in: Sowjetsystem und Ostrecht. FS für Boris Meissner (1985), 687.

[20] Arbeitsgemeinschaft für Völkerrecht beim Institut für Internationale Beziehungen an der Akademie für Staats- und Rechtswissenschaft der DDR (ed.), Völkerrecht. Lehrbuch, part 2 (2nd ed. 1982), 91.

[21] H. Machowski, Rat für gegenseitige Wirtschaftshilfe (RGW), in: Bundesministerium für innerdeutsche Beziehungen (ed.), DDR Handbuch, Vol.2 (3rd ed. 1985), 1073.

[22] Of December 14, 1959 (UNTS Vol.368, 237) (as amended, GBl. [note 17]).

national importance of its own because its organs could only make recommendations which the member states were free to disregard (Art.IV of the Charter).

The ideological basis and function of the CMEA rendered it practically defunct when several important member states introduced the market economy. After the GDR had left the Council, it was decided to dissolve the organization and replace it with a new consultative body whose concrete shape is, however, still controversial.

E. The Relationship between the European Communities and the CMEA

The relationship between the EC and the CMEA and its state-trading member states had long been strained, with detrimental effects on the economic exchange of goods and services between eastern and western Europe[23]. The Soviet Union considered the EC as an unwelcome combination of economic power to resist its own political objective of hegemony over Europe and at the same time worried about the economic and social progress in liberty which the EC had come to embody and which might exercise a troublesome attractive force on parts of the Soviet sphere of influence[24]. Consequently the state-trading countries were not ready to support the western European integration by recognizing the EC's international legal personality. Ideologically the socialist states adhered to Lenin's doctrine that the unification of Europe under capitalist circumstances was bound to fail[25]. Finally, the economic exchange between western and eastern Europe was impeded by the military confrontation between the Warsaw Pact and NATO, the members of which imposed a strategic trade embargo on CMEA states to prevent high technology exports with potential military uses (COCOM list)[26].

On the other hand, the growing economic potential of the Common Market aroused the Soviet bloc's interest in strengthening economic ties. Before the end of the transitional period on December 31, 1969 (Art.8 of the EEC Treaty) this could be done by entering into bilateral relations with the individual EC member states without recognizing the Commun-

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[23] See generally E. Schulz, Moskau und die europäische Integration (1975).

[24] Hallstein (note 11), 338 et seq. See also address by Federal President R. v. Weizsäcker on January 17, 1990, BullBReg., no.12 (January 23, 1990), 81 (83).

[25] Hallstein, *ibid.*, 272.

[26] This embargo outside the EEC framework was based on a questionable interpretation of Art.223 (1) (b) of the EEC Treaty (cf. Vedder [note 16], Art.113 n.52–53).

ity's capacity to make international treaties. But then the common commercial policy set in according to Art.113 of the EEC Treaty, and commercial treaties with non-member states became a matter within the exclusive competence of the EEC[27]. The EC Council, however, on December 16, 1969, took Decision No.69/494/EEC[28] permitting member states until December 31, 1972, to enter into bilateral trade agreements irrespective of the EEC's exclusive competence[29]. All those agreements ultimately expired on December 31, 1974[30], and economic exchange was since then based on autonomous measures.

In 1972 the Soviet Union signalled its readiness to recognize "realities in western Europe" and thus opened the way for negotiations with the EEC[31] which extended over several years[32], but did not produce an agreement. The reasons for this failure were political – the EC's refusal to bolster Soviet hegemony in the CMEA and the Soviet invasion of Afghanistan[33] – but also legal: The state trading countries insisted that the CMEA as such also be one of the parties to the planned agreement while the EC denied the organization's treaty-making capacity because it lacked any competence of its own regarding trade. The eastern side also demanded that not only the EEC but also its member states ratify the agreement in spite of the Community's exclusive commercial policy competence. At last, with *perestroika* in the Soviet Union and the new political thaw in its wake, a Joint Declaration on the Establishment of Official Relations between the European Economic Community and the Council for Mutual Economic Assistance was signed on June 25, 1988[34], which opened the way for bilateral trade agreements between the EEC and the

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[27] ECJ, advisory opinion of November 11, 1975 (Case 1/75), ECR 1975, 1355 (1363 et seq.); advisory opinion of October 4, 1979 (Case 1/78), ECR 1979, 2871 (2910).

[28] OJ no.L 326/39.

[29] Cf. ECJ, judgment of December 15, 1976 (Case 41/76), ECR 1976, 1921 (1937).

[30] Vedder (note 16), Art.113 n.110 et seq., 166.

[31] Cf. J. Maslen, Stand und Perspektiven der Beziehungen zwischen EG und RGW sowie seinen Mitgliedstaaten [in English], in: G. Zieger/A. Lebahn (eds.), Rechtliche und wirtschaftliche Beziehungen zwischen den Integrationsräumen in West- und Osteuropa (1980), 89 (90 et seq.); Vedder, *ibid.*, Art.113 n.167.

[32] See Materialien zur Lage der Nation im geteilten Deutschland 1987, Verhandlungen des Deutschen Bundestages, 11. Wahlperiode, BT-Drs.11/11 (February 18, 1987), 219; J. Pfeffer, Analyse der Vertragsentwürfe zwischen EG und RGW, in: Zieger/Lebahn (note 31), 59.

[33] A.N. Zarges, Europäische Gemeinschaft und Rat für gegenseitige Wirtschaftshilfe (1988), 33 et seq.

[34] OJ no.L 157/35.

CMEA states[35]. On August 15, 1988, the GDR established diplomatic relations with the European Communities and was now willing to conclude a trade agreement with the EEC[36].

II. The European Communities and the German Democratic Republic in Particular: Triangular Relationship EC – Federal Republic of Germany – GDR

A. General Description

While the Federal Republic was integrated into the EEC and the GDR into the CMEA, both states participated in the difficult relationship between the two economic organizations. But the bilateral economic relations between the two German states had nevertheless also retained their special character from the immediate post-war period. As to the economic exchange with third CMEA states, the Federal Republic could not reap any special benefit from its economic ties with the GDR, due to the fact that the Eastern trading bloc had left the organization of foreign trade and payments to the individual member states. In this respect the distribution of competences in the CMEA differed fundamentally from that in the EEC system where the member states had totally ceded their foreign commerce power to the Community. Under these circumstances the Federal Republic faithfully observed its special responsibilities toward the other German state by ensuring that its EEC membership had no detrimental effect on intra-German economic relations. This from the very first gave the GDR certain benefits normally reserved for EEC member states.

B. The Organization of Intra-German Trade: The Federal Republic of Germany's Pre-Community Heritage

The Federal Republic for political rather than economic reasons never treated intra-German trade as foreign trade but as a special kind of inland

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[35] A. Kolinski, EEC-COMECON, Difficulties in Reaching an Agreement (1989), 8 et seq.

[36] W. Ersil, Die Politik der DDR gegenüber entwickelten kapitalistischen Ländern, in: Akademie für Staats- und Rechtswissenschaft der DDR, Institut für Internationale Beziehungen (ed.), Die Außenpolitik der Deutschen Demokratischen Republik in der Welt von heute, Vol.2 (1989), 59 (67 et seq.).

trade because it did not consider the GDR as a foreign state[37]. It took the trade régime for one of several instances showing that the bilateral relationship between the two German states was of a special nature[38].

The legal basis of intra-German trade in the Federal Republic of Germany went back to occupation law which was supplemented by a number of German regulations and directives[39]. In relation to the GDR, intra-German trade was transacted in accordance with the Berlin Agreement on Trade between the Currency Areas of the Deutsche Mark (DM-West) and the Currency Areas of the Deutsche Mark of the Deutsche Notenbank (DM-East) of September 20, 1951[40]. Under the Berlin agreement, trade between the two German states had the status of German inland trade; the intra-German border never was a customs frontier. Even though the GDR did not formally accord its economic exchange with the Federal Republic any special status, it readily took advantage of the preferential treatment granted to it by the Federal Republic of Germany[41].

C. All-German and European Options of the Federal Republic of Germany in Conflict – Real or Seeming?

As long as the division of Germany continued, the Federal Republic of Germany faced the difficult task of reconciling its all-German policy option and its European policy option, a task which was hardly made easier by the fact that both policy options had constitutional underpinnings.

1. Constitutional provisions on reunification and European integration

The Preamble of the Basic Law ended with the reunification clause, calling upon the entire German people "to perfect in free self-determination the unity and freedom of Germany". This clause, which was deleted by Art.4 (1) of the Treaty between the Federal Republic of Germany and the German Democratic Republic on the Establishment of the Unity of Ger-

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[37] BVerfGE 18, 353 (354); G. Ress, Grundlagen und Entwicklung der innerdeutschen Beziehungen, in: J. Isensee/P. Kirchhof (eds.), Handbuch des Staatsrechts der Bundesrepublik Deutschland, Vol.1 (1987), 449 (494 et seq.).

[38] BVerfGE 36, 1 (17).

[39] W. Vogel-Claussen, Das Recht des innerdeutschen Wirtschaftsverkehrs im Vorfeld der deutsch-deutschen Wirtschafts- und Währungsunion, DtZ 1990, 33 (34 et seq.). Cf. BVerfGE 18, 353–356. See also BVerfGE 62, 169 (181 et seq.).

[40] v. Münch (note 9), Vol.1, 218.

[41] See R. Dietz, Der Westhandel der DDR, Deutschland Archiv 1985, 294; Ersil (note 36), 70.

many (Unification Treaty)[42], had imposed a binding constitutional obligation on the political organs of the Federal Republic to work for reunification. They were left with a broad political discretion concerning the means by which to achieve the goal but strictly bound not to renounce any legal claim or title that might be used to further reunification nor to participate in the creation of any legal régime that might hinder reunification[43].

On the other hand, the Basic Law had opted for an "open statehood"[44], a form of sovereignty which was in particular open towards European integration: The Preamble also contained a clause proclaiming that in exercising their constituent power, the German People was not only "animated by the resolve to preserve their national and political unity" but also "to serve the peace of the world as an equal member in a united Europe". While the first part of this clause was also deleted by Art.4 of the Unification Treaty, the European option in its latter part has remained intact. Though there has been no clear statement by the Federal Constitutional Court as to what obligations might ensue for the West German political organs from the European integration objective, it appears that the clause has legal effects beyond a mere political postulate[45]. The Federal Constitutional Court accordingly underlined that the acknowledgment of a united Europe in the Preamble possessed legal value and had to be taken into account in interpreting other parts of the Basic Law[46].

The Preamble's mission concerning European integration is taken up by Art.24 (1) of the BL which provides the Federation with the integration power necessary to accomplish the European objective. Art.24 (1) of

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[42] Of August 31, 1990 (BGBl.II, 885, 889), entered into force on September 29, 1990 (*ibid.*, 1360), ratified domestically in accordance with the constitutional amendment procedure (Art.79 [2] BL). English translation in International Legal Materials 1991, 463 et seq.

[43] BVerfGE 5, 85 (126 et seq.); 36, 1 (17 et seq.); 77, 137 (149 et seq.). See also E. Klein, Die Staatsräson der Bundesrepublik Deutschland, in: Staat und Völkerrechtsordnung, FS für Karl Doehring (Beiträge zum ausländischen öffentlichen Recht und Völkerrecht, Vol. 98) (1989), 459 (471 et seq.).

[44] K. Vogel, Die Verfassungsentscheidung des Grundgesetzes für eine internationale Zusammenarbeit (1964); K. Stern, Das Staatsrecht der Bundesrepublik Deutschland, Vol.1 (2nd ed. 1984), 512 et seq.

[45] Doehring (note 10), 635 et seq. But see also D. Murswiek, Wiedervereinigung Deutschlands und Vereinigung Europas – zwei Verfassungsziele und ihr Verhältnis zueinander, in: D. Blumenwitz/B. Meissner (eds.), Die Überwindung der europäischen Teilung und die deutsche Frage (1986), 103 (104 et seq.).

[46] BVerfGE 73, 339 (386).

the BL authorizes the transfer of sovereign powers to inter-governmental institutions through a legislative act opening up German sovereignty so that legal norms from an extra-constitutional supranational source can be directly applied in Germany[47]. This integration power is not boundless, for Art.24 (1) of the BL must be interpreted in harmony with other constitutional provisions, including the Preamble. It does not open the possibility to change the basic structure of the Basic Law on which the identity of the constitutional order rests[48]. There has been no exact definition of the scope of those inviolable essential constitutional principles[49]. It has only been settled that the legal principles underlying the fundamental rights part of the Basic Law are among such principles[50].

In view of the two constitutional objectives concerning German and European unification, arguably of equal rank, and the bounds imposed on the integration power of Art.24 (1) of the BL by the context of all other constitutional provisions, the question was discussed whether the Preamble's all-German and European options contradicted each other and, if so, how to resolve the conflict of norms. As a matter of law, however, there was no conflict. A conflict could only arise between the reunification goal and the practical policy of the Federal Republic's participating in the western European integration, embodied in the European Communities, to which the concept of Europe had been reduced, although in 1949 it had comprised all Europe[51].

The members of the Parliamentary Council did not conceive that the German state reorganized temporarily only in the western part of the country would be forced to make a choice between German and European unity because their concept of "Europe" included the central and eastern parts of the continent under Soviet domination[52]. For them, the

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[47] BVerfGE 37, 271 (280); 58, 1 (28); 73, 339 (374 et seq.); C. Tomuschat, in: Kommentar zum Bonner Grundgesetz (Bonner Kommentar), Art.24 (2nd rev. ed. April 1981/July 1985).

[48] BVerfGE 37, 271 (279 et seq.); 73, 339 (375 et seq.).

[49] Cf. M. Herdegen, Europäisches Gemeinschaftsrecht und die Bindung deutscher Verfassungsorgane an das Grundgesetz, EuGRZ 1989, 309 (312f.); T. Stein, Europäische Integration und nationale Reservate, in: D. Merten (ed.), Föderalismus und Europäische Gemeinschaften (1990), 91 (97 et seq.).

[50] BVerfGE 73, 339 (376).

[51] Schweisfurth (note 10), 860, 866; A. Randelzhofer, Deutsche Einheit und europäische Integration, VVDStRL 1990, 101 (104). But see K. Doehring, Das Staatsrecht der Bundesrepublik Deutschland (3rd ed. 1984), 119 et seq.

[52] H.-P. Schwarz, Die Ära Adenauer 1949–1957 (Geschichte der Bundesrepublik Deutschland, Vol.2 [1981] [see note 18]), 459 et seq.; Murswiek (note 45), 111 et seq.

Basic Law's European and all-German objectives were not in conflict with but contingent upon one another[53].

A dispute early arose as to how the universally accepted goal of reuniting all of Germany and all of Europe could best be achieved. While the Government of Adenauer thought that a Federal Republic of Germany firmly rooted in the community of western European states and allied with the USA would have the better chances to remove the split through Germany and Europe[54], the opposition rejected the west integration, preferred a neutral stance between west and east[55], and advocated a "third way", meaning a "socialist" Europe, keeping equal distance to American capitalism and Soviet bolshevism[56].

The interlocking of German and European reunification was also touched upon in Art.7 (2) of the Convention on Relations between the Three Powers and the Federal Republic of Germany (General Treaty)[57]. Britain, France and the United States therein agreed to cooperate with West Germany, pending the conclusion of a peace treaty, to achieve, by peaceful means, their common aim of a reunified Germany enjoying a liberal-democratic constitution like that of the Federal Republic, and integrated within the European community. The term "European community" was not confined to the ECSC, already established when the treaty was concluded, or to the EEC and EURATOM, which were not yet conceived; it rather referred to a system of free and democratic European states as was expected to be in existence at the time when German unity would be achieved[58]. The reunified Germany was, according to the inten-

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[53] Cf. statement by Carlo Schmid in the Parliamentary Council: "Europe can only be established, if all of Germany takes part. The rift which today runs through Germany in fact runs through Europe, and to establish Europe recognizing this rift would mean to degrade Europe to a small Europe ... In demanding our unity we are conscious that we are fulfilling a European concern. Our demand is a European demand" (cited from Murswiek, *ibid.*, 112). See also Schweisfurth (note 10), 861 et seq.

[54] Adenauer (note 11), 535 et seq. See also E. Klein, Deutschlandrechtliche Grenzen einer Integration der Bundesrepublik Deutschland in die Europäischen Gemeinschaften, Die Öffentliche Verwaltung 1989, 957 (958).

[55] Schweisfurth (note 10), 864 et seq.

[56] Eschenburg (note 18), 176. But see also Schwarz (note 52), 457 et seq.

[57] Of May 26, 1952/October 23, 1954 (BGBl. 1955 II, 305), now suspended (BGBl. 1990 II, 1386 et seq.).

[58] E. Klein, Die deutsche Frage in der Europäischen Gemeinschaft, in: Blumenwitz/Meissner (note 45), 65 et seq. See also the Petersberg Agreement of November 22, 1949, between the three Allied High Commissioners and West German Chancellor Adenauer (v. Münch [note 9], Vol.1, 226) which clearly distinguishes between the European community and the western European states.

tions of the states parties to the treaty, to be firmly integrated into a European system so that it could neither attain hegemony over its neighbors nor threaten stability by behaving as a neutral "wayfarer" between the two worlds of the east and west.

History, however, seemed to take a different path as the west European integration of the Federal Republic intensified and German partition became deeper in the course of time[59]. West Germany's involvement in the EC had, according to some analysts, gradually passed the point of no return not only in terms of economic intertwinement but also as a matter of law[60]. Moreover, the Treaty on the Bases of Relations between the Federal Republic of Germany and the German Democratic Republic (Basic Treaty)[61] as well as the membership of both German states in the United Nations since 1973 for many observers seemed to have solved the German question for all practical purposes on a long-term basis[62].

While Art.24 (1) of the BL certainly allowed West Germany's practical policy of integration into what was only a part of Europe, the question arose what constitutional limits the reunification clause imposed on West Germany's ability to cooperate in the forming of "an ever closer union among the peoples of Europe", as provided in the preamble of the EEC Treaty[63]. The Federal Constitutional Court held that the reunification clause as well as Art.23 of the BL would be violated if the Federal Republic entered into a treaty relationship, including membership in an international or supranational organization, in which it would no longer be factually or legally able to decide independently about reunification[64].

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[59] Cf. W. Brandt, Erinnerungen (1989), 153 et seq.

[60] U. Everling, Sind die Mitgliedstaaten der Europäischen Gemeinschaften noch Herren der Verträge?, in: FS Mosler (note 10), 172 (183 et seq.). See also Ress (note 37), 453. But see BVerfGE 75, 223 (242).

[61] Of December 21, 1972 (BGBl. 1973 II, 423), entered into force on June 21, 1973 (BGBl.II, 559).

[62] R. Bernhardt, Deutschland nach 30 Jahren Grundgesetz, VVDStRL 1980, 7 (13 et seq.).

[63] See Doehring (note 10), 636 et seq.; *id.*, Die Wiedervereinigung Deutschlands und die europäische Integration, NJW 1982, 2209 (2211 et seq.); Tomuschat (note 47), Art.24 n.6; Klein (note 54), 959; Schweisfurth (note 10), 876 et seq.

[64] BVerfGE 36, 1 (28).

2. Consequences for West Germany's European policy

The Federal Republic's European policy had from early on been influenced by its obligation to work toward achieving reunification with the GDR. West Germany's concern for the eastern part of the country becomes apparent from three acts of international relevance: the declaration concerning reunification of February 28, 1957; the declaration concerning citizenship of the Federal Republic of March 25, 1957; and the Protocol on German Internal Trade and Connected Problems of March 25, 1957.

(i) Declaration concerning reunification of February 28, 1957

The German delegation chief at the negotiations resulting in the Treaties of Rome made the following declaration on February 28, 1957, which he had entered in the record:

> "The Federal Government proceeds from the possibility that in case of a reunification of Germany a review of the Treaties on the Common Market and on EURATOM will take place"[65].

The formulation "review of the Treaties" was carefully chosen to keep all options open: that the reunited Germany would remain a party to the unaltered Treaties, that it would leave the Communities, or – most probably – that, while continuing to participate in the integration, it would have the right to request an adjustment of the Treaties to the new situation[66], though not a definite right to demand the admission of the GDR[67].

The declaration was not made part of the Treaties, even though it did not meet with any protest but was acknowledged as self-evident by all states parties[68]. Nothing similar had namely been introduced into treaties concluded earlier by the Federal Republic of Germany, including the ECSC Treaty[69], and it was considered inappropriate to invite an *ar-*

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[65] Cf. Statement by the secretary of state in the Foreign Office, W. Hallstein, on March 21, 1957, reprinted in: J. Schwarz (ed.), Der Aufbau Europas (1980), 337 (344). See also Verhandlungen des Bundesrates, Stenographische Berichte, 176th session (May 3, 1957), 611. On the comparable GDR declaration when acceding to the CMEA cf. Uschakow (note 17), 11, 66 note 12.

[66] Hallstein, *ibid.*, 344.

[67] But see R. Scholz, Europäische Einigung und deutsche Frage, in: Merten (note 49), 283 (289).

[68] Hallstein (note 65), 344; P. Dagtoglou, Recht auf Rücktritt von den römischen Verträgen?, in: R. Schnur (ed.), FS für Ernst Forsthoff zum 70. Geburtstag (1972), 77 (90 et seq.).

[69] See Klein (note 58), 70.

gumentum e contrario in their regard[70]. Although one must keep in mind that the new European impulse of 1956/1957 creating the EEC and EURATOM was also intended to keep (West) Germany from relapsing into a nationalist policy with Rapallo-like consequences detrimental to common west European interests[71], this intention was not incorporated in any of the Treaty provisions either[72].

In any event, the formal status of the declaration was a matter of dispute. Some considered it as a reservation which in essence reflected the *clausula rebus sic stantibus*[73]. Others referred to the legal norm embodied in Art.31(2)(b) of the Vienna I Convention on the Law of Treaties of May 23, 1969[74], and suggested that the declaration be used as a means of interpreting the EEC and EURATOM Treaties[75]. Finally, some denied the declaration's legal effect altogether[76].

As far as one can tell from the published statements, the Federal Republic did not try to invoke the declaration during the political developments in 1989/90.

(ii) Declaration concerning citizenship of the Federal Republic of Germany

Due to the events in the aftermath of World War II, the German law on citizenship is rather intricate[77]. According to the basic rule in Art.116(1) of the BL, the main group of "Germans" in the constitutional sense consists of persons possessing German citizenship pursuant to the Reichs- und Staatsangehörigkeitsgesetz of July 22, 1913, as amended[78], and supplementary legislation.

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[70] Hallstein (note 65), 345.

[71] Schwarz (note 52), 340.

[72] Cf. the textual development of the General Treaty 1952/1954 (note 57) (H. Steinberger, Völkerrechtliche Aspekte des deutsch-sowjetischen Vertragswerks vom 12. August 1970, ZaöRV 1971, 63 [141 et seq.]); E. Klein, Wiedervereinigungsklauseln in Verträgen der Bundesrepublik Deutschland, in: Sowjetsystem und Ostrecht (note 19), 775 (778).

[73] M. Schweitzer/W. Hummer, Europarecht (3rd ed. 1990), 176. See also M. Schweitzer, in: Grabitz (note 16), Art.240 n.5.

[74] UN Doc.A/CONF.39/11/Add.2, BGBl. 1985 II, 926. See also *ibid.*, Art.4.

[75] Klein (note 58), 69 et seq.

[76] E. Grabitz/A. v. Bogdandy, Deutsche Einheit und europäische Integration, NJW 1990, 1073 (1077).

[77] Stern (note 44), 260 et seq.; R. Grawert, Staatsvolk und Staatsangehörigkeit, in: Isensee/Kirchhof (note 37), 663 (675 et seq.).

[78] Updated version in Sartorius, Vol.1: Verfassungs- und Verwaltungsgesetze der Bundesrepublik Deutschland (as of July 1, 1990), no.15.

Because German law on citizenship follows the *jus sanguinis* principle, and most Germans in the GDR were descended from German citizens born before the partition of Germany, the major part of the population of the former GDR had always had the same German citizenship as the people of the Federal Republic[79], irrespective of their simultaneous GDR citizenship. This was a special case of dual citizenship according to which East Germans' German citizenship was suspended until they were able and willing actively to make use of it. West Germany referred to the continuing existence of the German Reich as a legal person and the right of self-determination, as yet denied to the German people as a whole[80], to counter the GDR claim that this approach violated public international law[81].

The reunification clause in the Preamble of the Basic Law obligated the West German organs to preserve the common German citizenship of East and West Germans[82], and included a general obligation of the Federal Government to try to make the Basic Law's concept of German citizenship internationally as effective as possible. Concerning the European Community Treaties, this was crucial because the Common Market freedoms are attached to citizenship of a member state. The Federal Government accordingly made the following declaration when signing the EEC and EURATOM Treaties:

> "All Germans in the sense of the Basic Law of the Federal Republic of Germany are to be considered as citizens of the Federal Republic of Germany"[83].

Despite the fact that this was merely a unilateral declaration, it produced legal effects because the Treaties leave it to the member states to define their own citizenship within the bounds of international law[84]. The declaration's legal effects consisted in the GDR citizens' opportunity to avail themselves of all the freedoms of Common Market citizens, if

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[79] BVerfGE 36, 1 (29 et seq.); 77, 137 (148 et seq.); R. Hofmann, Staatsangehörigkeit im geteilten Deutschland. Der *Teso*-Beschluß des Bundesverfassungsgerichts, ZaöRV 1989, 257 et seq.

[80] BVerfGE 77, 137 (153 et seq.).

[81] Völkerrecht. Lehrbuch (note 20), part 1 (2nd ed. 1981), 220 et seq.; G. Riege, Die Staatsbürgerschaft der DDR (2nd ed. 1986), 184 et seq.

[82] BVerfGE 77, 137 (148 et seq.).

[83] BGBl. 1957 II, 764. Similar declarations were made when Greece (OJ 1979 no.L 291/189) and when Portugal and Spain (OJ 1985 no.L 302/484) acceded.

[84] Klein (note 58), 79 et seq. See also C. Tomuschat, EWG und DDR, EuR 1969, 298 (317 et seq.); A. Bleckmann /I. Erberich, Europarecht (5th ed. 1990), 853, refer to Art.31 of the Vienna I Convention (note 74).

they were able to leave their country and make practical use of them. In fact, many East Germans did so before the construction of the Berlin Wall in 1961, with the support of the Federal Republic of Germany and the acquiescence of the other member states[85]. Since then, disputes between the Federal Republic of Germany and the other member states on this matter could not arise due to the GDR's very restrictive granting of exit permits[86].

(iii) Protocol on German Internal Trade and Connected Problems

Trade between West and East Germany was transacted as internal trade when the EEC was founded. The Community set up a customs union with a Common Customs Tariff levied at its external frontiers and introduced a system of refunds on exports and price adjustment levies on imports regarding products subject to a common organization of the market. If the pertinent provisions of the EEC Treaty had been strictly applied, the border between the Federal Republic and the GDR would have become a customs frontier, and intra-German trade could no longer have been treated as domestic trade. Pursuant to Art.227 (1) of the EEC Treaty, the Treaty covered the territory of the Federal Republic but not the territory of the GDR which was neither a part of the Federal Republic[87] nor a European territory for the external relations of which the Federal Republic was responsible (Art.227 [4] of the EEC Treaty)[88]. It would, however, have been unacceptable to the Federal Republic – and moreover constitutionally impossible in view of the reunification mandate of the Basic Law – to subject intra-German trade to EEC norms and competences regarding external trade.

The problem had already come up when the ECSC Treaty was concluded in 1951. At that time it was solved by Art.22 of the Convention on the Transitional Provisions of April 18, 1951[89], which accorded to the Federal Republic the power to regulate intra-German trade in agreement with the Commission. But the Commission, apparently with the tacit consent of the other member states, never participated in the decision-

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[85] M. Beise, Die DDR und die Europäische Gemeinschaft, EA 1990, 149 (152).
[86] But see *infra* VI.B.
[87] ECJ, judgment of October 1, 1974 (Case 14/74), ECR 1974, 899 (906 et seq.).
[88] Tomuschat (note 84), 299 et seq.
[89] BGBl. 1951 II, 491.

making so that the West German Government could in fact act autonomously[90].

With regard to the EEC, the member states took a different course when they agreed on the Protocol on German Internal Trade and Connected Problems of March 25, 1957[91], and made it an integral part of the Treaty (Art.239 of the EEC Treaty). The Protocol determined chiefly (1) that the application of the EEC Treaty in Germany did not require any change in the existing system of intra-German trade, which was conceived as a German domestic matter; and (2) that, however, all other member states could take appropriate measures to prevent difficulties which might arise for them from the organization of that trade. The Protocol had the effect of releasing the Federal Republic from its obligation to apply EEC law to intra-German trade, but did not transform the latter into intra-Community trade[92]. Its purpose was to guarantee that the implementation of the EEC Treaty would not aggravate the partition of Germany.

The fate of the Protocol was put up for discussion in view of the completion of the internal market projected for the end of 1992[93]. Discussion intensified when, after the revolution in the GDR, a closer cooperation or even confederation between the two German states with the accompanying expansion of intra-German trade was expected[94]. With reunification on October 3, 1990, the Protocol became obsolete.

D. German Democratic Republic: Ideological Enmity and Practical Benefits

The attitude of the GDR towards the western European integration had always been ambivalent. It was at the same time determined by ideological enmity as well as the readiness to draw economic benefits. As a matter of theory, the GDR had adopted a position conforming to the Soviet Union's which had from early on opposed the European Com-

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[90] Klein (note 58), 72 et seq.

[91] BGBl. 1957 II, 984. There was no arrangement concerning EURATOM because fissionable material was not traded between the German states (Klein [note 58], 78).

[92] Klein, *ibid.*, 73 et seq. See also the ECJ decisions concerning the Protocol in ECR 1974, 899; 1979, 2789; 1987, 4199; 1989, 2937, and the survey by W. Vogel-Claussen, Der innerdeutsche Handel in der Rechtsprechung des EuGH, NJW 1989, 3058 et seq.

[93] M. Seidel, Innerdeutscher Handel und Europäischer Binnenmarkt (1989).

[94] G. Meier, »Innerdeutsches Protokoll« und Europäischer Binnenmarkt, Betriebs-Berater, Beilage 11 zu Heft 9/1990, 1.

munities[95]. GDR publications on international law called the EC a "state-monopolistic organization" in which the close integration of the power of economic monopolies and the power of the state had reached international dimensions, supporting the interests of large-scale capital against those of the working class[96]. They provided the economic basis of the imperialist military pacts of the West and thus imperiled the progressive social order established in the eastern part of Europe[97]. In accordance with the theory of "peaceful coexistence", this ideological enmity continued during the period in the 1970s in which there were attempts from both the CMEA and the EEC to establish a working relationship.

For economic reasons, however, the GDR had never tried to replace intra-German trade, providing easy access to the Common Market state Federal Republic of Germany, by a veritable system of foreign trade. Even though it had been eager to demonstrate that its relations with the Federal Republic were indistinguishable from its relations with any other "imperialist state", the GDR had in connection with the Basic Treaty agreed to maintain the existing trade arrangement[98].

In the second half of the 1980s, when under the influence of perestroika and the concept of a "Common European House" the relations between the CMEA and the EEC improved, the tone in the semi-official GDR publications on the Communities also changed[99].

E. Conclusion: Buried Hopes and Beginnings

On the eve of the revolutions of 1989, passivity toward central and eastern Europe reigned in the western part of the continent. Forty years after the enactment of the Basic Law the reunification goal, though still counted among the fundamentals of West German policy[100], was not given priority on the political agenda, nor was it actively pursued because the general political climate did not seem favorable. The German question was simply kept open. The European Communities had concentrated on their internal development and on the integration of other western-

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[95] I. Bailey-Wiebecke, Die Europäische Gemeinschaft und der Rat für Gegenseitige Wirtschaftshilfe (1989), 31 et seq.

[96] Dost/Hölzer (note 12), 11 et seq., 261 et seq.

[97] Völkerrecht. Lehrbuch (note 20), 154, 157.

[98] Protocol Additional to the Treaty on the Bases of Relations (BGBl. 1973 II, 426).

[99] Ersil (note 36), 67, 69.

[100] See the report of the Federal Government on the state of the nation (October 15, 1987), sub I (BullBReg., no. 106 [October 16, 1987], 909).

oriented European states. With regard to central and eastern Europe, their ambitions did not reach beyond the establishment of a working treaty relationship.

Part Two: After the 1989 Revolutions in Central and Eastern Europe

With the peaceful revolution in the GDR in October/November 1989 and parallel events particularly in Poland, Hungary and Czechoslovakia new light was suddenly shed on the Federal Republic's all-German and all-European options. The expectations of the founders of West Germany and the western European organizations were fulfilled in three respects: The division of Germany and Europe vanished when the Soviet Union allowed its long-time satellites self-determination; those newly independent states immediately sought a very close relationship to the fully-developed western European international and supranational organizations; and, specifically, German reunification proceeded within the framework of European integration as embodied in the European Communities. While in both parts of Germany considerations on how to master the events were concentrated on the constitutional aspects of reunification[101], the European dimension of the process played a major role.

I. European Background Determines West German Approach towards Reunification

A. Political Statements

After the Honecker régime in the GDR had been replaced, West German policy makers early insisted that a realistic rapprochement between the two German states would only be conceivable within the framework of the European Communities. This was often repeated to dispel doubts that had been voiced by concerned western European partner states[102]. In fact, the other member states of the European Communities worried about the prospect of a reunified Germany which might again strive for a dominant position in Europe while at the same time freeing itself from its

[101] See P.E. Quint, The Constitutional Law of German Unification, Maryland Law Review 1991 (forthcoming).

[102] Address by the Federal President on October 3, 1990, EA 1990, D 543 (D 551). See also N. Kohlhase, Die Europäische Gemeinschaft und die Deutschen, in: Auf der Suche nach der Gestalt Europas. FS für Wolfgang Wagner (1990), 73.

Community ties and seeking a close relationship with the Soviet Union[103]. In view of such concerns the West German Government repeatedly emphasized that the Federal Republic would remain integrated in the European Communities and continue to cooperate closely with the other member states[104].

In his address on November 28, 1989, Federal Chancellor H. Kohl presented his "Ten-Point Program for the Overcoming of the Division of Germany and Europe"[105] which he had not discussed in advance with any of the (West European) partners so that their concern actually increased. The Chancellor envisaged an ever closer rapprochement between the two German states which in the course of time would lead first to a "treaty community" (Vertragsgemeinschaft), then to confederative structures and finally to a federal state. He immediately emphasized that the development of intra-German relations would remain embedded in the all-European process[106]. It was advocated that the European Community, which had to be strengthened, should soon conclude a trade and cooperation agreement with the GDR to give East Germany easier access to the Common Market:

> "... we have always understood the process of regaining German unity also as a European concern. It must also be put in the perspective of European integration ... The EC must not end at the Elbe river but has to remain open also toward the east. Only then – we have always taken the Europe of the Twelve as a part and not as the whole – can the European Community become the basis of truly comprehensive European unification"[107].

The Chancellor also underlined that the EC was the successful model of a free union of European peoples which had a very strong attraction far beyond the present member states[108]. At that time, the manner in which the GDR would be integrated into the EC was still open. Possibilities ranged from an association with a later accession leading to a

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[103] Cf. L.V. Ferraris, Deutsche Einheit aus italienischer Sicht, Europäische Rundschau 1990, 15; A. Volle, Großbritannien und die deutsche Einheit, in: FS Wagner (note 102), 130; M. Mertes/N.J. Prill, L'Allemagne unifiée et l'Europe. Continuité ou nouvelle tentation du pouvoir?, Politique Etrangère 1990, 559.

[104] BullBReg., no.85 (May 6, 1955), 701 (702). See statement by Federal Chancellor H. Kohl on February 15, 1990 (BullBReg., no.26 [February 16, 1990], 201 [202 et seq.]).

[105] BullBReg., no.134 (November 29, 1989), 1143 (see in particular p.1147 et seq.).

[106] See also the statement made by the party convention of the opposition SPD (December 18/20, 1989), DA 1990, 152.

[107] See also further statements by the Chancellor, BullBReg., no.1 (January 3, 1990), 1 (2); no.4 (January 11, 1990), 25 et seq.; no.21 (February 6, 1990), 165 (167).

[108] See note 105, 1145.

separate membership[109] – with the incidental stabilization of the GDR as a separate state and the consequential increase in the "German" number of votes in the EC institutions – to automatic integration as a part of the Federal Republic by way of reunification[110].

When the first free GDR elections on March 18, 1990, had shown that a large majority of East Germans favored reunification with the Federal Republic as soon as possible, the Federal Government immediately began to prepare the ground for a smooth EC integration of the GDR via the reunification route. On March 19, 1990, the Federal Chancellor declared:

> "The future unified Germany will ... remain embedded in the European Communities ... As early as 1957 in the Treaties of Rome we have together with our partners kept open the door for the GDR. We proceed from the assumption that the unified Germany will be a member of the Community without any amendment to those Treaties and the subsequent Treaties. This will not hinder or delay European integration"[111].

So for political reasons the West German Government officially renounced all legal options such as withdrawal from the EC and renegotiation of the Treaties which it had arguably kept open pursuant to the declaration concerning reunification of February 28, 1957. As a *quid pro quo* it insisted that the integration of the GDR into the European Communities would not formally be treated as an accession of a new member state, which would have caused delay and uncertainty in view of the cumbersome admission procedure, but handled according to the principle of moving treaty boundaries. This was essential, as West Germany's EC commitment made a parallel attainment of an East German integration into the EC and the Federal Republic indispensable. In a political deal, the other member states also renounced their reciprocal option under the West German declaration to invoke the *clausula rebus sic stantibus*[112].

When on September 12, 1990, the Treaty on the Final Settlement with respect to Germany was signed by the two German states, France, the Soviet Union, the United Kingdom and the United States, the European foundation of the German reunification process was so firm that the four

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[109] Beise (note 85), 153 et seq. See also Randelzhofer (note 51), 119.

[110] Cf. D. Blumenwitz, Europäische Integration und deutsche Wiedervereinigung, Zeitschrift für Politik 1990, 1 (4 et seq.).

[111] EA 1990, D 213 (D 215).

[112] Cf. C. Tomuschat, A United Germany within the European Community, C.M.L.Rev. 1990, 424 et seq., 429; J.-P. Jacqué, L'unification de l'Allemagne et la Communauté Européenne, Revue Générale de Droit International Public 1990, 997 (1000).

main victorious powers were satisfied with referring to European unity in a preambular paragraph[113].

The Federal Government also made plain that the reunified Germany would not assume a passive role within the Community but would actively work for intensifying integration beyond the internal market concept of 1992 toward an economic and monetary as well as a political union. At the same time it would advocate closer ties between the EC and other European states, primarily the revolutionized CMEA states[114]. All those objectives reappeared in the policy statement of the first all-German Government of October 4, 1990, advocating the establishment of a United States of Europe and considering the political union, to be completed until December 31, 1992, as a firm basis on which all of Europe could grow together. The statement supported the French initiative to establish a European Confederation in which all European states would cooperate on the basis of equal rights and duties[115].

The strong pro-European approach that West Germany took with regard to reunification also had other than atmospheric reasons. The four main victorious powers, two of them EC members, having retained the final say in all matters concerning Germany as a whole, would not, in fact, have allowed a reunified Germany without firm roots in the EC[116], leaving aside the question whether their reserved rights extended thus far[117]. Furthermore, the major political forces in Germany had long considered a firm integration of Germany into the rest of Europe as the best assurance against any relapse into nationalistic mistakes. From an economic viewpoint, the interpenetration of the EC member states had reached such dimensions that the German economy was practically unable to withdraw. It is also arguable that the European integration clause

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[113] "Welcoming the fact that the German people, freely exercising their right of self-determination, have expressed their will to bring about the unity of Germany as a state so that they will be able to serve the peace of the world as an equal and sovereign partner in a united Europe ..." (BGBl.II, 1318).

[114] See note 111, D 215. Message of the Federal Chancellor to all governments of the world of October 3, 1990 (EA 1990, D 540 [541]).

[115] EA 1990, D 552 (D 553, D 561 et seq.). See also the policy statement of January 30, 1991 (BullBReg., no.11 [January 31, 1991], 61 [72 et seq.]).

[116] M.H. Hatzel, Amerikanische Einstellungen zur deutschen Wiedervereinigung, EA 1990, 127 (129 et seq.); interview by French President F. Mitterand on December 22, 1989, EA 1990, D 96 (D 98 et seq.); C. Weston, Die USA und der politische Wandel in Europa, Aus Politik und Zeitgeschichte, B 49/90 (November 30, 1990), 28 (33 et seq.).

[117] K. Hailbronner, Völker- und europarechtliche Fragen der deutschen Wiedervereinigung, JZ 1990, 449 (452).

of the Basic Law's Preamble compelled the Federal Government to do its part to achieve reunification within the Community framework[118].

B. West German Academic Discussion on Constitutional Ways to Achieve Reunification

The EC perspective also influenced the West German academic discussion on the constitutional way to achieve reunification. The Basic Law contained two provisions offering different ways toward that end, namely Art.23 clause 2, that was ultimately used, and Art.146[119]. Under Art.23 clause 2 of the BL, the GDR could accede to the Federal Republic, and the Basic Law would be put into force in its territory. Reunification via Art.146 of the BL would have required the adoption of an all-German constitution by the German *pouvoir constituant*. In the debates on these alternatives[120], the Federal Republic's EC membership was referred to in support of accession and to warn against the use of Art.146 of the BL: While a GDR accession pursuant to Art.23 clause 2 of the BL would guarantee the continuity of the Federal Republic's international legal personality on which its EC membership rested, an act of the German *pouvoir constituant* would[121] or might[122] bring about a new legal entity whose EC membership was questionable. At least, the process under Art.146 of the BL was said to provoke a dispute on that matter more easily[123].

Under international legal standards it is clear that the adoption of a new constitution as such does not affect the international legal personality of a state[124], that the unification of two states will normally create a new state

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[118] Cf. Bleckmann/Erberich (note 84), 857.

[119] Art.23 of the BL was eliminated and Art.146 of the BL reformulated by Art.4 nos.2, 6 of the Unification Treaty (note 42).

[120] C. Tomuschat, Wege zur deutschen Einheit, VVDStRL 1990, 70.

[121] W. Möschel, DDR – Wege aus der Krise, JZ 1990, 306 (310); J. Sedemund, Deutsche Einheit und EG, EuZW 1990, 11 (12).

[122] Statement by one hundred constitutional law professors at German universities: Vote for Article 23 of the Basic Law, reprinted in Die Welt (March 28, 1990); Scholz (note 67), 283 (287 et seq.).

[123] U. Everling, Der Weg nach Deutschland ist langwierig, FAZ (March 15, 1990), 14; J.A. Frowein, Rechtliche Probleme der Einigung Deutschlands, EA 1990, 237. See also J. Scherer, EG und DDR: Auf dem Weg zur Integration, RIW (Beilage 6 zu Heft 4/1990), 11 (12).

[124] Frowein (note 123), 235; D. Rauschning, Deutschlands aktuelle Verfassungslage, DVBl. 1990, 393 (402 et seq.).

only in case the two earlier states have such an intention[125], and that if the reunified state continues to reflect the legal personality of one of its component parts, it will normally be the personality of the largest[126]. As both the Federal Republic of Germany and the GDR intended to continue the international legal personality of the German state of 1867/1871, embodied in the Federal Republic, and as this intention was generally accepted by the international community, a reunification under the procedure under Art.146 of the BL would not have affected the Federal Republic's international legal personality and the EC membership tied to it[127].

The EC-Commission stated accordingly that the choice between Art.23 of the BL and Art.146 of the BL was a German matter, adding, however, that the procedure under Art.23 of the BL procedure was simpler as far as the Community was concerned[128]. This remark was not necessarily meant to call the legal identity of the Federal Republic and its continuing EC membership in question in case the Art.146 alternative was chosen. It may rather have referred to the fact that under Art.146 the entire constitutional order of the Federal Republic would have become temporarily uncertain. As the EC depends on a basic harmony among the constitutional systems of its member states[129], that was disagreeable. Viewed from this angle, the argument made in favor of Art.23 was essentially correct.

II. The Community Law Obligations of Consultation, Coordination and Adaptation in the Reunification Process

West Germany's pro-European stance had several Community law components. As German reunification was a matter deeply affecting the interests of the European Communities as well as the other member states, the Federal Republic did not enjoy complete freedom as to how it pursued the reunification objective. Rather, Community law imposed

[125] J.A. Frowein, Die Verfassungslage Deutschlands im Rahmen des Völkerrechts, VVDStRL 1990, 7 (25 et seq.). See also G. Dahm/J. *Delbrück*/R. Wolfrum, Völkerrecht, Vol.I/1 (1988), 154 et seq.; J.L. Brierly, The Law of Nations (6th ed. H. Waldock 1963), 151 et seq.

[126] Frowein (note 123), 233.

[127] Frowein (note 125), 25 et seq.; Tomuschat (note 120), 91; Everling (note 123), 14. See also J. Isensee, Staatseinheit und Verfassungskontinuität, VVDStRL 1990, 39 (47 et seq.).

[128] BullEC, Suppl.4/1990, 9. See also Randelzhofer (note 51), 118.

[129] H.P. Ipsen, Über Verfassungs-Homogenität in der Europäischen Gemeinschaft, in: Das akzeptierte Grundgesetz. FS für Günter Dürig (1990), 159.

procedural as well as substantive obligations on it, as well as on the EC and the other member states, which can be classified as duties of consultation, coordination and adaptation.

It cannot be assumed that the declaration concerning reunification entirely relieved West Germany from paying regard to its EC commitments[130]. Even if the declaration included a right to withdraw or to demand Treaty amendments, the Federal Republic, as long as it did not exercise those rights but on the contrary declared its determination to pursue the path of European unity, as it had done for years[131], remained bound to adhere to the procedural and substantive obligations flowing from its membership.

From the procedural point of view, reunification being a foreign policy matter of general interest, the Federal Republic was obligated under Art.30 (2) of the SEA to consult the other states parties before making a final decision[132]. Beyond these consultations, which took place outside the Community framework proper, the Federal Republic was under a substantive Community law obligation of coordination, meaning that it had to take care that the integration of the GDR would be effected with as little disruption of the European integration process as possible. For that purpose, West Germany was required to prepare the GDR for integration into the European system, so as to reduce the necessity for exemptions and transition periods with regard to secondary legislation. This coordination obligation was a consequence of the Federal Republic's general duty of loyalty under Art.5 of the EEC Treaty, owed to the Community as such as well to the other member states individually[133]. It goes without saying that the principle of Community loyality also has a procedural component requiring the Federal Republic to inform and consult with the competent Community organs[134]. On the other hand, the Communities and the other member states were under a reciprocal adaptation obligation: They had to facilitate as much as possible the incorporation of the GDR into the EC. The general duty of solidarity specifically required loyal cooperation by all sides concerning the inevitable adjustments of many acts of secondary

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[130] Tomuschat (note 112), 433 note 33.

[131] Hailbronner (note 117), 455; *id.*, VVDStRL 1990, 183. Cf. W. Fiedler, Unilateral Acts in International Law, in: EPIL Inst.7 (1984), 517.

[132] Grabitz/v. Bogdandy (note 76), 1075. See BullBReg., no.40 (March 27, 1990), 314.

[133] Grabitz (note 16), Art.5.

[134] Scherer (note 123), 15; Grabitz/v. Bogdandy (note 76), 1075, and Randelzhofer (note 51), 115, also refer to Art.105 of the EEC Treaty.

legislation to the special situation of the GDR. In concrete terms such adjustments entailed exemptions of the GDR for a transitional period from the strict Community standards with regard to product quality, environment protection, agriculture, state subsidies, etc.[135].

Generally the Federal Republic fulfilled its consultation and coordination duties. The Federal Government had early included the EC Council and the European Council as well as the EC Commission in the decision-making process concerning the rapprochement and later reunification of the two German states. Both German Governments closely cooperated with the Commission in drawing up the proposals for transitional measures intended to guarantee a gradual adaptation of the GDR to the *acquis communautaire*[136].

During the intra-German negotiations on the establishment of an economic and monetary union, the Commission insisted that it had to be fully involved from the outset in the process of German unification and that there was a need to move from information and consultation on the part of German authorities to real concerted action[137]. Irrespective of the legal substance of that claim the Commission actively participated in the subsequent negotiations resulting in the Unification Treaty[138].

On the other hand, the Commission never expressly claimed that the conclusion of the State Treaty, or the Unification Treaty, was subject to the prior consent of the EC even though both Treaties strongly affected Community jurisdiction, nor was such consent ever given in a formal legal instrument although it in fact existed. As the Treaties went clearly beyond German internal trade separated out of the EEC framework by the pertinent Protocol, one cannot base the argument that they constituted a German domestic affair on that Protocol[139]. Nor did the West German declaration concerning reunification by itself work a change in competences between the Federal Republic of Germany and the EC but at best gave West Germany a right to demand corresponding Treaty amendments[140]. The solution seems to lie in a rule of Community law implicit in Art.79 of the ECSC Treaty, Art.227 (1) of the EEC Treaty and

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[135] Sedemund (note 121); Bleckmann/Erberich (note 84), 858. But see I. Pernice, VVDStRL 1990, 185.

[136] Denkschrift zum Einigungsvertrag, BT-Drs.11/7760 (August 31, 1990), 355.

[137] BullEC, Suppl.4/1990, 12; see also *ibid.*, 17.

[138] *Ibid.*, 42.

[139] Randelzhofer (note 51), 115. See also C.W.A. Timmermans, German Reunification and Community Law, C.M.L.Rev. 1990, 436 (446).

[140] But see Hailbronner (note 117), 455; *id.* (note 131), 182.

Art.198 of the EURATOM Treaty leaving acquisition of territory, and consequently all steps leading to it, within the *domaine réservé* of the member states[141].

III. The Opinion-Forming Process within the European Council

At an informal meeting in Paris on November 18, 1989, the heads of state or government of the EC member states specifically discussed the developments in eastern Europe. They did not issue any formal proclamation but the French President made a short statement to the press. He indicated that they had specifically talked about the GDR or East Germany (*sic!*), where an unexpected and necessary evolution toward democratic reforms had taken place. Trade talks with the GDR would be initiated soon[142].

At the Strasbourg summit of December 8/9, 1989, the European Council made a carefully worded but unequivocal statement in favor of German unity within the EC framework after expressing the hope that the changes in the eastern part of Europe would help to overcome the division of the continent:

> "We seek the strengthening of the state of peace in Europe in which the German people will regain its unity through free self-determination[143]. This process should take place peacefully and democratically, in full respect of the relevant agreements and treaties and of all the principles defined by the Helsinki Final Act, in a context of dialogue and East-West cooperation. It also has to be placed in the perspective of European integration"[144].

On April 28, 1990, after the historic March election in the GDR, the European Council held a special session in Dublin[145] at which the unification of Germany, about to take place under a European roof, was warmly welcomed. The Community promised to take care that the integration of the GDR into the EC would be carried out smoothly and

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[141] See *infra* V.C.1. See also Tomuschat (note 112), 434. But see Grabitz/v. Bogdandy (note 76), 1075.

[142] EA 1990, D 4 (D 5).

[143] This formulation almost copied the wording of the policy statement in the letter concerning German unity presented by the West German Government to the Soviet Government when the Treaty of August 12, 1970, was signed (BGBl. 1972 II, 356) and to the East German Government when the Basic Treaty was signed on December 21, 1972 (BGBl. 1973 II, 425).

[144] BullEC 12/1989, 8 (14). See H. G. Krenzler, Die Europäische Gemeinschaft und der Wandel in Mittel- und Osteuropa, EA 1990, 89 (92).

[145] BullBReg., no.51 (May 4, 1990), 401.

harmoniously and without any amendments to the Treaties. This meant that on the one hand the incorporation of the GDR would not be treated as an accession of a new member state, which would have required Treaty amendments (Art.98 of the ECSC Treaty, Art.237 of the EEC Treaty, Art.205 of the EURATOM Treaty), but as a territorial expansion of a current member state, and that on the other hand the Federal Republic of Germany would not insist on an increase in the number of votes it had in the Council (Art.28 of the ECSC Treaty, Art.148[2] of the EEC Treaty, Art.118[2] of the EURATOM Treaty) or in the European Parliament (Art.2 of the Act concerning the election of the representatives of the Assembly by direct universal suffrage of September 20, 1976[146]). The Federal Government agreed to inform the Community about all important measures discussed and agreed between the two German states with regard to harmonization of policy and legislation. The EC Commission would fully participate in these discussions. It was also made clear that the Federal Republic would not make demands in favor of the GDR concerning Community subsidies for structurally weak areas (Art.130a et seq. of the EEC Treaty) but would alone shoulder the economic and financial burden of rebuilding the eastern part of Germany after reunification[147].

The results of the April Dublin summit could rightly be summed up in the observation by the West German Government that in accordance with K. Adenauer's idea German unity was not inconsistent with European unity but that the two goals constituted the two sides of the same coin. Both unification processes would run parallel and would be sped up[148]. A second Dublin summit on June 25/26, 1990, at which the freely-elected GDR prime minister L. de Maizière was given the opportunity to speak, confirmed the April results[149]. The conclusion of the Treaty between the Federal Republic of Germany and the German Democratic Re-

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146 OJ no.L. 278/1.

147 Declaration of May 10, 1990, by the Federal Government, BullBReg., no.58 (May 11, 1990), 453; statement by the Federal Chancellor in the European Parliament on May 16, 1990 (BullBReg., no.64 [May 22, 1990], 548). But see now Council Regulation (EEC) no.3575/90 of December 4, 1990 concerning the activities of the Structural Funds in the territory of the former German Democratic Republic (OJ no.L 353/19) according to which special appropriations of 3 billion ECU are provided for covering 1991–1993. See also OJ 1991 no.L114/30. J. Stremmel/W. Wedderkopf, EG-Regionalpolitik und Deutsche Einheit, Zeitschrift für Rechtspolitik 1990, 369; K.-P. Repplinger, Hilfen der EG für die Einheit Deutschlands, EuZW 1991, 79.

148 See preceding note.

149 BullBReg., no.84 (June 30, 1990), 717 (719).

public Establishing a Monetary, Economic and Social Union of May 18, 1990 (State Treaty)[150] was welcomed as it would promote and accelerate the integration of the territory of the GDR into the Community.

At the European Council meeting in Rome on October 27/28, 1990, the presiding Italian prime minister welcomed the regained unity of Germany and congratulated Federal Chancellor Kohl and Foreign Minister Genscher on their decisive contribution to this historical event, which they had consciously placed in the perspective of an acceleration of European unification[151].

IV. East German Moves Taking up the "European" Option

Immediately after the dismissal of E. Honecker in October 1989 and before reunification projects had been devised, the GDR Government established close contacts with the EC with a view towards entering into constructive cooperation and in particular concluding a trade agreement with the EEC without delay[152]. This was meant to remove existing trade barriers and prevent the development of new ones following the completion of the internal market in 1992. The intra-German trade was to be continued on the present treaty basis[153].

On November 17, 1989, GDR Prime Minister H. Modrow sent a memorandum to the EC heads of state or government on the eve of their Paris meeting in which he advocated overcoming the division of Europe while preserving the existing different social systems and the two German states in their present shape. He declared that the GDR was ready to cooperate in a comprehensive manner with the European Communities also in view of the future completion of the internal market. He favored an early start to negotiations on a trade agreement[154].

When West German Chancellor Kohl met East German Prime Minister Modrow in Dresden on December 19/20, 1989, both agreed that the in-

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[150] BGBl.II, 537 (International Legal Materials 1990, 1108), entered into force on June 30, 1990 (BGBl.II, 700). See *infra* VI.

[151] BullBReg., no.128 (November 6, 1990), 1333.

[152] There had been exploratory talks in the summer of 1989 (P. Scherer, Das Handels- und Kooperationsabkommen der EG mit der DDR, EuZW 1990, 241).

[153] Cf. talks held by EC Commission Vice-Presidents M. Bangemann on November 2, 1989 (Hauptabteilung Presse des Ministeriums für Auswärtige Angelegenheiten der Deutschen Demokratischen Republik [ed.], Aussenpolitische Korrespondenz, no.44/1989, 351), and F. Andriessen on December 4/5, 1989 (*ibid.*, no.47/1989, 373).

[154] EA 1990, D 2.

tra-German relations were part of an all-European process. Kohl emphasized that the Federal Republic of Germany considered the EC as the corner-stone of a new European architecture and the balance beam of a new European equilibrium. The Community was ready to develop close and comprehensive relations with those central and eastern European countries that were undertaking democratic reforms. The Federal Republic would support the early conclusion of an EEC-GDR trade and cooperation agreement[155].

An Agreement between the German Democratic Republic and the European Economic Community on trade and commercial and economic cooperation, modelled after recent agreements between the EC and other CMEA states, was in fact signed on May 8, 1990[156]. According to its Art.27, intra-German trade under the pertinent Protocol was to remain unaffected. Neither party, however, ratified the Agreement because it was overtaken by the reunification process[157].

On February 1, 1990, GDR Prime Minister Modrow for the first time presented a plan on steps by which to reach a (neutral) German federation via a German confederation. He conceived of German unification as a part of a European unification process and emphasized that steps towards German unity would have to be compatible with the obligations of each German state toward third states or state groups[158].

In the elections of March 18, 1990, those political forces which advocated an early accession of the GDR to the Federal Republic based on Art.23 of the BL obtained a large majority. On April 12, 1990, they entered into a coalition agreement[159] which made it a principal foreign policy task of the GDR Government under L. de Maizière to embed the German reunification process in the all-European unification process. Germany had to be firmly integrated into the EC. Until the unification of Germany the GDR Government would, in coordination with the West German Government, negotiate on the extension of the EC to the present GDR with a view to fix transitional periods within which the GDR would gradually assume full rights and obligations under the Community Treaties. Concerning

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155 DA 1990, 317 et seq.

156 The Agreement has not been published yet but reports exist about its contents (see Scherer [note 152]).

157 XXIVth General Report on the Activities of the European Communities 1990 (1991), 46.

158 DA 1990, 471.

159 Bundesministerium für innerdeutsche Beziehungen (ed.), Beilage zu »Informationen«, no.8/1990 (April 27, 1990).

the existing external trade commitments of the GDR particularly to the Soviet Union, solutions would have to be found within the EC framework that maintained the GDR's loyalty to treaties and contributed to the stabilization of the situation in central and eastern Europe[160].

Academic projects in the GDR also took up the "European" option[161].

V. The EC Commission's Contribution: Practical Realization of the GDR's Integration into the European Communities

A. Survey

The statements of the European Council on German reunification were based on several communications by the EC Commission which considered the process from a Community perspective while the Council had rather been dominated by the national interests of the member states. The Commission plans all proceeded from the assumption that German reunification would not affect the Federal Republic's EC membership as such. They dealt mainly with the application of the Treaties and of secondary legislation to the GDR territory as well as with the fate of the GDR's international treaties in so far as they affected EC competences.

A speech by Commission President J. Delors on January 17, 1990[162], in the European Parliament set the tone[163]: East Germany (*sic!*) constituted a special case, and it would have its place in the Community should it so wish. President Delors here referred to the conditions set by the European Council at Strasbourg[164] but emphasized that the form which the integration of East Germany would take was a matter to be determined by the Germans[165]. This address initiated an opinion-forming process

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[160] See also Government policy statement by GDR Prime Minister de Maizière on April 19, 1990 (DA 1990, 795 [808]).

[161] See Draft Treaty on the Foundation of a Confederation of Germany in Preparation of a Future German Federal State, EuGRZ 1990, 83; preamble and Art.44 (1) of a Draft Constitution of the GDR (Neues Deutschland, April 18, 1990, 7).

[162] See already his cautious reference to the German question as early as October 17, 1989 (BullEC 1989, 110 [117]).

[163] BullEC, Suppl.1/1990, 6 (9). See also his address on February 14, 1990 (OJ Annex no.3-386, 155). Cf. J. Falke, Die Erstreckung des Gemeinschaftsrechts auf das Territorium der DDR, in: N. Reich/C. Ahrazoglu (eds.), Deutsche Einigung und EG-Integration (1990), 23 (26).

[164] *Supra* note 144.

[165] I could not verify reports that J. Delors initially suggested treating the GDR's integration as an accession (cf. Randelzhofer [note 51], 105, 118; Tomuschat

within the Commission quite favorable to German unity[166] the establishment of which was considered as fulfilment of a long-standing political goal of West Germany as well as of the EC[167].

The Commission paved the way for a smooth integration of the GDR into the EC by means of two communications[168] and a final comprehensive report[169] to the European Council, the latter containing a multitude of proposals for legal instruments to be enacted with a view to allowing for a gradual introduction of European Community law into the territory of the GDR.

B. Three-Stage Integration Scenario

The Commission in its communication to the April Dublin summit[170] developed an integration scenario comprising three stages: an interim adjustment stage, beginning with the introduction of an inter-German monetary union, accompanied by a number of social and economic reforms; a second, transitional stage, starting with the formal reunification of the two German states; and the final stage, bringing about the full application of the *acquis communautaire*, to begin, as far as possible, no later than January 1, 1993.

During the interim adjustment stage, while the Protocol on German Internal Trade continued to apply, the GDR would already enact legislation necessary for later integration into the West German and Community systems and thus reduce the number of instances in which transitional arrangements would be needed for gradual adjustment to the *acquis communautaire*.

During the transitional stage the Commission would have to tackle a variety of problems concerning external relations as well as the internal

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[note 112], 418) but only that in the Commission's view the ensuing practical problems would be the same (*infra* C.1).

[166] See the repeated expressions of gratitude by the Federal Chancellor (e.g., Bull-BReg., no.34 [March 9, 1990], 265 [267]).

[167] See statement on German unification (October 3, 1990), BullEC, Suppl.4/1990, 7.

[168] The Community and German unification, Communication from the Commission to the special session of the European Council in Dublin on April 28, 1990 (SEC [90] 751 of April 19, 1990) (BullEC, Suppl.4/1990, 9). The Community and German unification: implication of the Staatsvertrag, Communication from the Commission to the European Council in Dublin on June 25 and 26, 1990 (SEC [90] 1138 of June 13, 1990) (*ibid.*, 17).

[169] The Community and German unification (COM [90] 400, 3 volumes (August 21/31, 1990) (BullEC, Suppl.4/1990, 27).

[170] BullEC, Suppl.4/1990, 9.

policies of the Community, primarily regarding the free movement of goods produced in the territory of the former GDR, avoidance of distortion of competition through West German aid necessary for rebuilding the economy, equal access of all member states' exports and investments to the relevant area, infrastructure improvements in the field of transport, and the environmental situation. The entire body of existing secondary Community law had to be reviewed in detail to identify where there were objective grounds warranting transitional measures (mostly temporary derogations) or possibly adjustments of Community law instead, and the active assistance of the German authorities was needed by the Commission to compare their respective legislation, assess the economic possibilities and verify the factual data[171]. The lack of reliable statistics and other information in the end proved to be one of the major obstacles when the transitional measures were drafted.

The Commission, however, saw no need to adapt any secondary legislation under the EURATOM Treaty[172], nor did it expect any serious legal problems in the ECSC field[173]. The following exposition will therefore be exclusively devoted to the EEC.

C. The Basic Assumption: Automatic Community Enlargement and Automatic Extension of Community Law to the GDR Territory after German Reunification

1. Automatic Community enlargement and extension of the European Treaties

(i) The Commission's position

The Commission proceeded from the basic assumption that the integration of the territory of the GDR into the Community by way of a German reunification constituted a "special" case so that Art.237 of the EEC Treaty relating to the accession of third states did not apply. On the other hand, this integration would involve practical problems on a par with those posed by the most recent enlargements of the Community. It would quite similarly have to proceed by stages, requiring transitional measures to facilitate the gradual application of the *acquis communautaire*.

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[171] BullEC, Suppl.4/1990, 29. Detailed analysis of the necessary adjustment measures, *ibid.*, 44 et seq.

[172] *Ibid.*, 93, 99.

[173] BullEC, Suppl.4/1990, 106 et seq.

The Commission expected the integration to be possible without the need to amend the Treaties, which would with reunification extend to the eastern part of Germany automatically, i.e. without the consent of the other member states being required[174].

(ii) Moving treaty boundary rule in Community law

The automatic extension of the Treaties could be considered as an application of the international legal principle of moving treaty boundaries. The Commission, however, assumed that the automatic extension would be effected by a norm of Community law not further specified. Thus, it was not compelled to deal with the question as to whether and how far the present international law of succession recognizes the above-mentioned principle[175]. Since all the member states as well as the GDR were agreed on the mode of integration, the international law problem did simply not arise[176].

According to Art.79 of the ECSC Treaty, Art.227 (1) of the EEC Treaty and Art.198 of the EURATOM Treaty, the Treaties apply to the whole of a member state's (European) territory, notwithstanding a limited number of exceptions. These Treaty provisions, which were not expressly invoked by the Commission, can be taken to constitute the Community law recognition, independent of public international law, of the principle of moving treaty boundaries[177]. But this dynamic interpretation, which would leave it entirely to the member states to define their

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[174] *Ibid.*, 43; Timmermans (note 139), 438. See already Ehlermann (note 15), 118 et seq. But see E. Klein, An der Schwelle zur Wiedervereinigung Deutschlands, NJW 1990, 1065 (1073).

[175] See S. Oeter, German Unification and State Succession, 349 et seq., in this issue.

[176] Cf. Klein (note 174).

[177] W. Hummer, in: Grabitz (note 16), Art.227 n.4; Everling (note 123), 14; D. Rauschning /R. Hach, Geltung des Rechts der Europäischen Gemeinschaften im Gebiet der DDR nach der Wiedervereinigung, EuZW 1990, 344; Tomuschat (note 112), 422; Hailbronner (note 117), 455 et seq.; H.-W. Rengeling, Das vereinte Deutschland in der Europäischen Gemeinschaft: Grundlagen zur Geltung des Gemeinschaftsrechts, DVBl. 1990, 1307 (1308). But see also J. Thiesing, in: H. v. d. Groeben [et al.], Kommentar zum EWG-Vertrag (3rd ed. 1983), Art.227 n.10 et seq. (renegotiation of the Treaty would be inevitable in the case of German reunification); Rauschning (note 124), 404; opinion of the Legal Committee of the European Parliament (June 1990), Doc.A 3-183/90/ Part C, 60 (61).

territory for the purposes of Community law, is not cogent[178]. A static interpretation, restricting the territorial scope of the Treaties to the member states' territorial extent at the time of their conclusion, would also do justice to the text of the cited provisions[179]. It would furthermore take better account of the fact that the Treaties bring the influence of small and large member states into a complicated balance not to be upset by the territorial expansion of one of them[180]. On the other hand, it does not seem practical to condition the effectiveness "with regard to European Community law" of acquisition of territory by West Germany on the consent of all the other member states[181]. The Federal Republic's declaration concerning reunification would, however, have given them a reciprocal right to a review of the Treaties[182].

(iii) Precedents: Saarland and St. Pierre-et-Miquelon

Two earlier cases of territorial expansion of a member state were handled as if there was a moving treaty boundary norm in EC law. It is uncertain, however, if the member states then had an *opinio juris* to this effect or rather acted according to a political rationale. Apart from this, neither of the two cases reached an order of magnitude comparable to German reunification.

The first case occurred in 1957 when the Saarland was incorporated into the Federal Republic of Germany under a treaty with France. At that time, the member states of the ECSC were apparently agreed that the ECSC Treaty would subsequently cover the Saarland as a part of the Federal Republic, while it had earlier been included as a part of the French economic territory[183]. A «Traité portant modification au Traité

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[178] Cf. Randelzhofer (note 51), 106 et seq.; A. Dost /B. Hölzer, EG-Integration der DDR – rechtliche und praktische Probleme, Staat und Recht 1990, 672 (673 et seq.).

[179] Jacqué (note 112), 1002.

[180] H. Rittstieg, Deutschlands Rechtslage nach dem Staatsvertrag, Demokratie und Recht 1990, 289 (295); Grabitz/v. Bogdandy (note 76), 1076. Cf. also J. Delbrück, A European Peace Order and the German Question: Legal and Political Aspects, Michigan Journal of International Law 1990, 897 (910). But see Randelzhofer (note 51), 111; Hailbronner (note 117), 456.

[181] But see Rittstieg *ibid.*

[182] Randelzhofer (note 51), 113; Tomuschat (note 112), 424 et seq. But see Timmermans (note 139) (who ignores the declaration).

[183] F. Münch, Zum Saarvertrag vom 27. Oktober 1956, ZaöRV 1957/58, 1 (13); *id.*, Saar Territory, in: EPIL Inst. 12 (1990), 334; Klein (note 58), 67.

instituant la Communauté Européenne du Charbon et de l'Acier»[184] that was actually concluded only effected some necessary formal changes and cannot serve to call in question the Community law principle of moving treaty boundaries[185]. On the other hand, the Saarland was not newly integrated into the ECSC so that the handling of this case does not sufficiently prove the automatic extension rule either.

The second case concerned the French islands of St. Pierre-et-Miquelon off Canada that had originally been treated as overseas territories not covered by the EEC Treaty (Art.227(3) of the EEC Treaty and Annex IV). On July 19, 1976, the islands' status was changed by a French law into one of an overseas *département*[186] which would bring them within the area of application of the Treaty if Art.227(1) of the EEC Treaty was interpreted dynamically[187]. The EEC Treaty was not amended and, though there was no express confirmation as to its automatic extension, St. Pierre-et-Miquelon was later omitted from the list of French overseas territories[188].

(iv) Result: legal uncertainty removed

Before German reunification, neither the text of the relevant Treaty provisions nor legal literature nor the Communities' practice offered a compelling argument for or against the existence of a moving treaty boundary rule in EC law. The reunification case has now settled the matter. The EC Commission expressed a legal opinion as to the existence of a moving treaty boundary rule of Community law, and the Council did not object but proceeded accordingly, nor was there any objection from individual member states. This tacit approval of the Commission's handling of the case bears sufficient testimony to a corresponding *opinio juris*.

It is also important to note that third states, including specially affected states like the CMEA countries, did not raise any protest either. Their conduct proves that the EC rule of moving treaty boundaries, now established beyond doubt, is compatible with international law.

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[184] Of October 27, 1957 (BGBl.II, 1875).

[185] Cf. Randelzhofer (note 51), 108 note 17; Scherer (note 123), 14.

[186] Scherer, *ibid.*, 14. In 1985, the islands' former status was restored (Randelzhofer [note 51], 107).

[187] The ECJ judgment of October 10, 1978 (Case 148/77, *Hansen*), ECR 1978, 1787 (1805), does not touch this problem.

[188] Cf. Annex I of the Council Decision of December 16, 1980 (80/1186/EEC), OJ no.L 361/1.

2. Automatic extension of secondary legislation and treaties concluded by the Communities

The Commission assumed that with the formal reunification not only the European Treaties but also secondary Community legislation would automatically apply in the territory of the former GDR, except where the Council specifically enacted temporary exceptions on a proposal from the Commission.

If one accepts the automatic extension of the Treaties to the territory accrued to the Federal Republic, the same will necessarily follow with regard to the whole body of secondary legislation. Regulations are directly applicable in and directives are binding upon each member state, i.e., with regard to their entire territory (Art.189[2],[3] of the EEC Treaty; Art.161[2],[3] of the EURATOM Treaty[189,190]. In the same way decisions are binding on the entire territory of those member states to which they are addressed.

The Commission went even further in stating, as a general principle, that the treaties concluded by the EC before German reunification also extended to the territory of the former GDR[191]. As those treaties are an integral part of Community law according to Art.228(2) of the EEC Treaty[192], the Commission's position is consistent from a Community law perspective. The question, however, whether the other party or parties to the Community treaties are bound to accept this rule of Community law depends on the pertinent norms of public international law.

In this regard, the Commission stated that public international law concerning state succession was in a state of flux. Still there was no inherent reason why the basic legal rules of succession to treaty rights and obligations, like the rule of moving treaty boundaries, though addressed to states, should not apply to an entity like the EEC having international personality and having been granted extensive treaty-making power[193].

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189 Art.14 of the ECSC Treaty is less specific in this respect.

190 But see Rauschning/Hach (note 177), 344 et seq. See also C. Starck, Deutschland auf dem Wege zur staatlichen Einheit, JZ 1990, 349 (356).

191 BullEC, Suppl.4/1990, 47. See also Vedder (note 16), Art.228 n.44; Hailbronner (note 117), 456.

192 Vedder, *ibid.*, Art.228 n.45 with reference to the case law of the ECJ.

193 But cf.Art.29 of the Vienna III Convention on the Law of Treaties between States and International Organizations or between International Organizations of March 21, 1986 (not yet in force; BGBl. 1990 II, 1415) which provides that each state party is bound in respect of its entire territory but does not contain an equivalent norm concerning international organizations.

But as the question of what those basic rules of international law provide is a matter of controversy, the Commission's reasoning is rather weak. As a practical matter, however, difficulties with the treaty partners of the EC will probably not arise over this issue.

3. Fate of treaties of the former GDR

Concerning the treaties concluded by the former GDR with third states[194], the Commission "rejects the application of the so-called negative aspect of the above-mentioned rule of moving treaty boundaries, which would lead to the automatic extinction of all GDR treaties with third States"[195]. The Community was bound by the legal principle of the continuity of treaty rights and obligations, except for personal treaties inextricably linked with the political "persona" of the former GDR. On the other hand, it was clear that the continuity of those treaties would have to be subject to (re)negotiation, as it was likely that they conflicted with Community law, including Community treaties.

The latter statement leaves the alleged legal principle in an uncertain state. The potential conflict of GDR treaties with Community law could not be invoked as a l e g a l ground to exonerate the EC from treaty obligations which would otherwise be binding upon it under an assumed succession rule of public international law[196]. The Commission's position must therefore be taken as an objection to the existence of such an international legal norm. It seems that the Commission instead advocated a succession rule binding the Community only to the extent that it must be ready to (re)negotiate those treaties in good faith. In contrast to this, the UN Conference on Succession of States in Respect of Treaties had entered a legal rule into the Vienna II Convention on Succession of States in Respect of Treaties[197], obliging the successor state in merger cases to honor even incompatible treaty obligations of the states which have

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[194] See the (incomplete) analytic inventory of GDR treaties affecting Community competence in BullEC, Suppl.4/1990, 48 et seq.

[195] *Ibid.*, 47.

[196] Cf. Art.27(2) of the Vienna III Convention (note 193) reflecting a general rule of international law (see also Art.27 of the Vienna I Convention [note 74]).

[197] Of August 23, 1978 (not yet in force) (UN Doc.A/CONF.80/31, reprinted in ZaöRV 1979, 279).

united. It added only a political recommendation that problems arising be resolved by mutual agreement[198].

In any event, Art.234 of the EEC Treaty, which the Commission does not even mention, is inapplicable, because it only covers treaties of the Federal Republic of Germany concluded before the EEC Treaty entered into force. Even if one were ready to support an analogy, perhaps because the reunification in practical effect meant that the new part of the Federal Republic belatedly acceded to the EEC Treaty, Art.234 would still presuppose that the Federal Republic was in fact bound by GDR treaties, which is doubtful[199].

The matter is made more complicated by the fact that the allocation of treaty-making power to the EEC and its member states does not always correspond to the subject-matter of the various treaties concerned. There may thus be GDR treaties touching upon a number of subjects within the exclusive competence of the EEC as well as others within the exclusive competence of the Federal Republic. The Commission assumed that in cases of such treaties of mixed competence, the Community and united Germany each succeeded to the extent of their respective competence, and, as the obligation to (re)negotiate treaties must correspond to the treaty-making power, were jointly responsible for (re)negotiation in a carefully coordinated manner[200].

Whether the EEC in fact succeeds to treaties of its member states in the case of devolution of competences is questionable[201]. When in the *Burgoa* case the Commission based such a claim on Art.234 of the EEC Treaty, the ECJ rejected it[202]. One should note that even under Art.106 of the EURATOM Treaty, which goes much further toward a succession by the Organization than Art.234 of the EEC Treaty, the Community assumes rights and obligations arising out of member states' treaties only as a result of agreements with the third states concerned.

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[198] H.D. Treviranus, Die Konvention der Vereinten Nationen über Staatensukzession bei Verträgen, ZaöRV 1979, 259 (271 et seq.).

[199] Frowein (note 123), 27 et seq.; W. Heintschel v. Heinegg, Die Vereinigung der beiden deutschen Staaten und das Schicksal der von ihnen beiden abgeschlossenen völkerrechtlichen Verträge (RIW [Beilage 12 zu no.7/1990], 9 (14 et seq.). But see Bleckmann/Erberich (note 84), 859; H.-J. Wolff, Schrittweise Herstellung der deutschen Einheit und Europäisches Gemeinschaftsrecht, NJW 1990, 2168 (2172).

[200] BullEC, Suppl.4/1990, 47. See *infra* VII for the German position.

[201] H. Krück, Völkerrechtliche Verträge im Recht der Europäischen Gemeinschaften (1977), 121 et seq.

[202] Judgment of October 14, 1980 (Case 812/79), ECR 1980, 2787 (2798, 2803); Vedder (note 16), Art.234 n.16.

Besides (re)negotiation, the Commission suggested four different ways to resolve conflicts between GDR treaties and Community law[203]. The GDR could, before reunification, denounce such treaties, if possible, and in fact did so in a number of cases. In other cases the united Germany could, until (re)negotiations were concluded, be authorized, in derogation of Community law, to exercise the rights and fulfil the duties under inherited treaties falling within the range of exclusive Community competence or mixed competence. If (re)negotiations failed, incompatibilities of inherited treaty obligations with Community law could be reconciled by autonomous adaption of Community law. The Commission finally referred to the present law of succession in respect of treaties which might open the possibility of restricting treaty rights and obligations to the territory to which they formerly applied[204]. Such a solution could be reasonable in the case of economic obligations of a limited duration and of economic rights specifically geared to GDR capacities like fishing rights. The Commission, however, noted that such a solution could only be the result of an understanding with the treaty partner concerned, and that it might be the most convenient legal technique to meet justified economic or political requests from third states outside the realm of legal obligation. These remarks clearly indicate that the Commission did not consider the régime proposed in the Vienna II Convention as an already binding rule of international law. The Commission further pointed out that the divided treaty régime would only be suitable for a brief period, since the former GDR territory could not be effectively isolated from the rest of the Common Market for any length of time.

D. Transitional and Interim Measures of the EEC and their Implementation by Germany

1. Outline of the problems

It had been obvious from the first that East Germany could not immediately be lifted to the *acquis communautaire* level in all fields but that considerable exceptions and adaptation periods would have to be allowed (transitional measures), concerning roughly 20 per cent of the secondary legislation, much the same as in the case of some recently acceded

[203] BullEC, Suppl.4/1990, 47 et seq.

[204] Cf. Art.31 (2) of the Vienna II Convention (note 197). See Treviranus (note 198), 271 et seq.

member states. Due to the growing pace of the German reunification process it was not possible to complete the necessary process of secondary legislation on time. Thus interim measures of an extraordinary character were required to bridge the gap.

The European Council's Dublin session on April 28, 1990, charged the EC Commission with drawing up the necessary transitional measures in accordance with the following standards: They had to "permit a balanced integration based on the principles of cohesion and solidarity and on the need to take account of all the interests involved, including those resulting from the *acquis communautaire*". The transitional measures had to be confined to what was strictly necessary and aim at full integration as rapidly and as harmoniously as possible[205].

Transitional measures in accession cases are included in the accession treaty made according to Art.237 of the EEC Treaty so that they attain the status of primary Community law. With regard to the GDR, however, the integration was to be accomplished solely on the level of secondary legislation, without any Treaty amendments. This raised questions heretofore unknown, namely concerning the Treaty bases of adjustment acts of secondary legislation and their compatibility with general principles of Community law. The necessary interim measures aggravated those problems because they had to take the form of large-scale delegations of legislative powers.

2. Admissibility of transitional measures

According to the Commission's view, transitional adjustments of secondary legislation had to be based on the respective enabling clauses of the Treaties carrying the original enactment[206], and not on Art.235 of the EEC Treaty[207]. The Commission held that such kinds of measures could be taken without departing in any way from the Treaties, and it relied on the principle of equality, recognized as a general principle of Community law in the case law of the ECJ[208].

This principle allowed and indeed required that rules of secondary legislation be modulated to take account of objective differences between

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[205] BullEC No.4/1990, 8.

[206] *Ibid.*, 44.

[207] But see Starck (note 190), 356.

[208] J. Schwarze, Europäisches Verwaltungsrecht, Vol.1 (1988), 610 et seq. See also Jacqué (note 112), 1013.

economies in different parts of the Communities. Since the SEA, the principle was even enshrined as follows in Art.8c of the EEC Treaty: If lesser developed national economies are unable to keep pace with the general integration progress, the Commission may under Art.8c(2) of the EEC Treaty propose those appropriate exceptional provisions of a temporary nature which cause the least possible disturbance to the Common Market, in derogation of the fundamental principle of uniform application of Community law[209]. Though Art.8c of the EEC Treaty is apparently designed to be applied to the whole of a member state's territory and not to a mere region, there is no objection to using the provision's fundamental concept in favor of only the eastern part of reunified Germany. This actually corresponds to the least possible disturbance condition.

The Commission tried to restrict the derogations from secondary legislation to those absolutely essential so as to uphold the principle of uniform application of Community law as far as possible. It therefore developed its adjustment program within a framework determined by three fixed points: (i) the acceptance of the *acquis communautaire* had to be both the starting point and the ultimate objective; (ii) any transitional arrangements had to be warranted on objective economic, social, or legal grounds; and (iii) all exceptions or derogations had to be temporary and cause as little disturbance as possible to the functioning of the Common Market[210]. According to the Commission's view, this was not only necessary to meet the conditions of Art.8c(2) of the EEC Treaty but also to enable it to base individual measures on the same Treaty provision that allowed for the original legal instrument from which derogation was granted. Apparently the Commission read into each Treaty article granting legislative power the implicit condition that the legal instrument to which it gave rise must have uniform application throughout the European Communities.

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[209] The importance of this principle has been continuously emphasized by the ECJ (see ECJ, judgment of July 15, 1964 [Case 6/64, *Costa* v. *ENEL*]), ECR 1964, 1251 (1269 et seq.); judgment of June 19, 1990 (Case C-213/89, *Factortame*), (1991) 1 All ER 70, 104 et seq.).

[210] BullEC, Suppl.4/1990, 44.

3. Interim measures

(i) Necessity of interim measures

The desire of the Community institutions to bring about integration of the GDR territory in parallel with German reunification ran into difficulties when the pace of reunification increased dramatically after the March elections in the GDR. As the completion of reunification would automatically put into effect the entire Community legislation in East Germany, all adjustments necessary to keep either the economy there from coming to a standstill or the Federal Republic of Germany from committing massive violations of Community law would have had to become effective before that date to prevent legal chaos[211]. When the East German Parliament on August 23, 1990, passed a declaration of accession to the Federal Republic according to Art.23 of the BL with effect from October 3, 1990[212], a close deadline was set for the passage of dozens of necessary legal instruments.

The Community legislative procedure requires collaboration of the Commission and the Council and normally participation of the European Parliament either in form of mere consultation or even cooperation (Art.149[2] of the EEC Treaty), depending on the pertinent enabling clause of the Treaties. It therefore is rather cumbersome and could not have been completed in time so that the Commission was compelled to propose that interim measures be enacted in an expedited procedure.

(ii) Commission proposals

The Commission presented, together with a large number of specific proposals for transitional measures geared to existing individual legal instruments or groups of closely related legal instruments, two comprehensive contingency proposals for interim measures that covered the whole field of secondary legislation requiring some kind of adaptation.

For reasons of form and procedure, the Commission submitted two separate contingency proposals: a Proposal for a Council Directive on interim measures applicable after the unification of Germany, in anticipation of the adoption of transitional measures by the Council in cooperation

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[211] The Commission instead apprehended a "legal vacuum" between German reunification and the final adoption by the Council of the necessary transitional and technical adaptation measures (*ibid.*, 29, 46). The term is technically incorrect.

[212] GBl. DDR I, no.57 (September 4, 1990), 1324.

with the European Parliament[213], and a Proposal for a Council Regulation on interim measures applicable after the unification of Germany, in anticipation of the adoption of transitional measures by the Council after consultation with the European Parliament[214]. Both were based on a number of EEC Treaty provisions. The proposed directive made use of all those enabling clauses that only permitted the enactment of legal instruments in the form of a directive and/or required cooperation with the European Parliament (Arts.49, 57, 66, 100a, 118a of the EEC Treaty). The proposed regulation rested on Treaty norms allowing regulations and requiring only consultation of the Parliament (Arts.28, 42, 43, 75, 103, 113, 130s, 235 of the EEC Treaty).

Arts.1 and 2 of the two Proposals provided in almost identical words that interim measures in derogation of secondary legislation should apply, corresponding to the transitional measures proposed by the Commission but not put into force in time before the reunification date. These interim measures were to consist of German legislation, enacted pursuant to an authorization by the Commission, which would keep in force in the East German territory legislation incompatible with secondary Community law. This solution amounted to a preliminary enactment, in an extraordinary procedure, of the transitional measures of the EEC by the German legislature, based on an authorization of the Commission from the Council, passed on to the Federal Republic by the Commission.

(iii) Interim measures ultimately enacted

On September 17, 1990, the Council enacted Regulation (EEC) No.2684/90 on interim measures applicable after the reunification of Germany, in anticipation of the adoption of transitional measures by the Council either in cooperation[215] or after consultation with the European Parliament[216], and Directive 90/476/EEC on interim measures applicable after the reunification of Germany in anticipation of the adoption of transitional measures by the Council in cooperation with the European Parliament[217]. The Regulation entered into force on September 26, 1990

[213] BullEC, Suppl.4/1990, 116.

[214] *Ibid.*, 118.

[215] This reference had to be added because the Council, departing from the original Commission proposal, included in the Regulation also measures based on Art.100a of the EEC Treaty.

[216] OJ no.L 263/1 (reprinted in the annex C.1).

[217] OJ no.L 266/1 (reprinted in the annex C.2).

(Art.191 [1] of the EEC Treaty); notification of the Directive was notified to the member states on September 20, 1990 (Art.191 [2] of the EEC Treaty). Though both follow the Commission Proposals' general approach, and in particular adopt the double authorization solution, they contain several amendments: Common Art.2 (2) includes a reference to the extraordinary character of the legal instruments, not to be subsequently cited as precedents, and sets December 31, 1990, as their ultimate expiration date. Art.4 (2) of the Regulation and Art.3 (2) of the Directive accord member states the right to refer difficulties arising from derogations made by the Federal Republic to the Commission, which is obligated to deal with these references as a matter of urgency. Moreover, separate provisions were added to enable the European Parliament to exercise at least some political control of the handling of East Germany's integration into the EC (common Art.2 [3]; Art.6 of the Regulation, Art.5 of the Directive).

In a multitude of legal instruments enacted mostly on September 27, 1990, the Commission made use of the authorizations[218]. While most of the instruments concern agricultural matters only, one also covers all the other fields requiring adjustments, namely Commission Decision 90/481/EEC introducing interim measures relating to the unification of Germany[219]. Taking the form of a decision addressed to the Federal Republic, it contains an authorization not to comply with a great number of regulations and directives listed in the Decision's annex. Ordinarily one should expect that derogations from regulations or directives be granted in the form of a regulation or directive while here the Commission took a decision. There is nevertheless no incompatibility of legal form, as the basic legal instruments, namely the Council Regulation (EEC) no.2684/90 and the Council Directive 90/476/EEC, were enacted in the appropriate form and do not bind the Commission as to the legal form in which it may make use of the authorization granted.

(iv) Admissibility of the interim measures

It is doubtful whether the EEC Treaty permits the kind of "highly unorthodox"[219a] double authorization that is at the heart of the interim

[218] See OJ nos.L 267 and L 317. See also Commission Regulation (EEC) no.3112/90 of October 26, 1990 (OJ no.L 296/51).

[219] OJ no.L 267/37 (reprinted in the annex C.3).

[219a] Cf. resolution of November 21, 1990, of the European Parliament, sub 4 (OJ no.C 324/136).

measures. The Treaty's only delegation norms, pertaining to the first or inter-organ authorization, are Art.145 cl.3 and Art.155 cl.4. Delegations of powers outside the scope of these provisions are considered impermissible pursuant to the *compétence d'attribution* doctrine[220].

Under these Treaty provisions, the Council is normally restricted to conferring on the Commission only powers for the "implementation" of rules enacted by itself. The Regulation and Directive on interim measures, however, confer on the Commission power to authorize derogation from existing secondary legislation. This amounts to a transfer of original legislative power and effects a shift in the institutional balance, the maintenance of which is one of the unwritten fundamental constitutional principles of the Treaties[221].

At the outset it should be noted that the ECJ has interpreted the term "implementation" broadly[222]. Account should also be taken of the emergency situation and the fact that the derogation power was granted for only about three months and circumscribed in detail in common Art.2 (1) subsection 2 by way of reference to the individual proposals of transitional measures annexed to the instruments. The Commission was the only body capable of acting quickly enough to guarantee that the necessary interim measures were in force by the deadline of October 3, 1990. With regard to all this, the authorization of the Commission can be considered as compatible with the EEC Treaty.

But if the Commission proposals for the necessary transitional measures had already been submitted, why did not the Council itself put them provisionally into force instead of authorizing the Commission to do so? This objection seemingly casts doubt on whether the Council was really "unable to act", as it asserts in Art.1 of the Regulation and Directive. Actually, however, it misconceives the political content of the term "ability to act". The Council had a legitimate interest not to preempt in any way its political discretion with regard to the transitional measures by prematurely approving the Commission proposals, and be it only provisionally, before it had had sufficient time to deliberate[223]. If one considers the sensitivity of dispensing with the fundamental principle of uni-

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220 W. Hummer, in: Grabitz (note 16), Art.155 n.46.

221 Cf., e.g., ECJ, judgment of May 22, 1990 (Case C-70/88, *European Parliament* v. *Council*), ZaöRV 1990, 832.

222 ECJ, judgment of October 30, 1975 (Case 23/75, *Rey Soda*), ECR 1975, 1279 (1302); judgment of May 15, 1984 (Case 121/83, *Zuckerfabrik Franken*), ECR 1984, 2039 (2058).

223 Cf. the last recital of both legal instruments (in the annex).

form application of Community law throughout the EC which was at stake, the Council's political interest was not devoid of a legal basis.

The second authorization concerning the relationship Commission/ Germany is less problematic. There are precedents for the authorization of member states by the EEC temporarily to maintain legislation incompatible with the Treaty[224]. Even though the EEC Treaty does not contain an express enabling clause to this effect, the *compétence d'attribution* principle is not violated. It serves namely only to protect the member states against power arrogations by the Community institutions which impair the states' residuary competences and not against an expansion of the states' capacity to act in areas of Community jurisdiction.

As far as legalizing the maintenance of national laws incompatible with Community law is concerned, practicability also dictates the granting of a corresponding authorization to the member states concerned. This holds even more true in an emergency situation like the one on hand. The alternative would namely be to enact a Community legal instrument containing all the necessary derogations. Misgivings with regard to legal certainty can be removed by obliging the member state to notify the Commission of any use made of the authorization (cf. common Art.2 (3) of the instruments).

(v) Implementation acts by Germany

Art.4 (1) of the legislative act of assent to the Unification Treaty of August 31, 1990, took up the EEC authorizations and turned them into a legislative authorization under Art.80 of the BL of the Federal Government to enact by way of executive regulation the necessary measures[225]. The Federal Government made use of this authorization by the »EG-Recht-Überleitungsverordnung« (EC Law Transitory Regulation) of Sep-

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[224] Cf. the regularly renewed authorizations of member states to maintain trade agreements with third states long after the devolution to the EEC of the exclusive treaty-making power in the field of foreign commerce (cf., e.g., Decision of the Council of February 12, 1990 [90/61/EEC], OJ no.L 42/59).

[225] Of September 23, 1990 (BGBl.II, 885), entered into force on September 29, 1990. Art.4 (1) reads: "The Federal Government is hereby authorized, in making use of authorizations by the Council of the European communities or according to relevant legal instruments of the European communities, by way of regulation temporarily to postpone or facilitate the application and implementation of European Community law or of federal law enacted on the basis of such law, or to adjust the legal provisions concerned ...".

tember 28, 1990[226], that had been drawn up even before the Commission passed the authorization acts[227].

The Regulation's § 1 in conjunction with Annex 1 modified several directly applicable EEC regulations. § 2 in conjunction with Annexes 2 and 3 modified a large number of German statutory provisions transposing EEC directives. Under § 3, products made in derogation of EEC standards could only be brought in circulation within the territory of the former GDR or exported to third states not members of the EC, as required by the pertinent EEC authorizations.

The EC Law Transitory Regulation entered into force on October 3, 1990, and expired on December 31, 1990. Its operative parts nevertheless contained many provisions which were to remain effective beyond that date. This contradiction was presumably due to the fact that the Federal Government hurriedly copied the Commission proposals for the transitional measures ultimately to be enacted by the Council which were to extend beyond December 31, 1990.

4. Survey of the ultimately adopted transitional measures

The transitional measures ultimately adopted by the Council or Commission after German reunification in general assume two different basic forms[228]. They either leave an act of secondary legislation untouched and authorize the Federal Republic of Germany to make specified derogations for a certain period of time[229], mostly until December 31, 1992, but

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[226] BGBl.I, 2117, retroactively amended by Regulation of November 14, 1990 (BGBl.I, 2502). See also the draft regulation with supporting arguments of September 18, 1990 (BR-Drs.628/90 [September 18, 1990]).

[227] See BR-Drs.628/90, 45.

[228] On the legislative procedure cf. XXIVth General Report (note 157), 43 et seq. See also R. Priebe, Die Beschlüsse des Rates zur Eingliederung der neuen deutschen Bundesländer in die Europäischen Gemeinschaften, EuZW 1991, 113.

[229] See, e.g., Council Decision of September 3, 1990 authorizing the Federal Republic of Germany to grant an exemption from Arts.14 and 15 of the Sixth Directive 77/388/EEC on the harmonization of the laws of the Member States relating to turnover taxes for Soviet armed forces stationed on the territory of the Federal Republic of Germany (OJ no.L 349/19); Council Regulation (EEC) no.3571/90 of December 4, 1990 introducing various measures concerning the implementation of the common fisheries policy in the former German Democratic Republic (OJ no.L 353/10); Council Directive of December 4, 1990 on transitional measures applicable in Germany in the context of the harmonization of technical rules for certain products (90/650/EEC) (OJ no.L 353/39).

sometimes until December 1, 1995[230], or they amend the Community legal instruments themselves, normally also for a certain period of time[231], sometimes, however, permanently[232].

The Federal Republic made use of the derogation authorizations when on December 18, 1990, the Federal Government enacted a new EC Law Transitory Regulation that entered into force on January 1, 1991, and contains no expiration date[233]. Its provisions are in line with its predecessor, except for § 3, allowing German authorities to admit certain products from CMEA states which do not meet Community standards into the territory of the former GDR without levying customs duties according to the Common Customs Tariff. This provision is based on additional EEC authorizations[234], enacted to enable Germany to honor treaty arrangements of the former GDR with its CMEA trading partners[235].

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[230] Cf. Council Directive of December 4, 1990 on transitional measures applicable in Germany with regard to certain Community provisions relating to the protection of the environment (90/656/EEC) (OJ no.L 353/59).

[231] See, e.g., Commission Regulation (EEC) no.2776/90 of September 27, 1990 on transitional measures to be applied in the wine sector after the unification of Germany in the territory of the former German Democratic Republic (OJ no.L 267/30); Council Regulation (EEC) no.3577/90 of December 4, 1990 on the transitional measures and adjustments required in the agricultural sector as a result of German unification (OJ no.L 353/23); Commission Decision no.3788/90/ECSC of December 19, 1990 on the introduction of transitional tariff measures for products covered by the Treaty establishing the ECSC for Bulgaria, Czechoslovakia, Hungary, Poland, Romania, the Soviet Union and Yugoslavia until December 31, 1992 to take account of German unification (OJ no.L 364/27).

[232] See, e.g., Commission Regulation (EEC) no.3784/90 of December 19, 1990, amending Regulation (EEC) no.610/77 on the determination of prices of nature bovine animals on representative Community markets and the survey of prices of certain other cattle in the Community (OJ no.L 364/21).

[233] BGBl.I, 2915.

[234] Council Regulation (EEC) no.3568/90 of December 4, 1990 on the introduction of transitional tariff measures for Bulgaria, Czechoslovakia, Hungary, Poland, Romania, the Soviet Union and Yugoslavia until December 31, 1992 to take account of German unification (OJ no.L 353/1); Council Directive of December 4, 1990 on transitional measures applicable in Germany in the context of the harmonization of technical rules (90/657/EEC) (OJ no.L 353/65).

[235] See also Commission Regulation (EEC) no.3714/90 of December 19, 1990 on transitional measures on trade in certain fishery products with the Soviet Union after the unification of Germany (OJ no.L 358/36).

VI. EC Aspects of the Treaty Establishing a Monetary, Economic and Social Union (State Treaty) of May 18, 1990

A. Preparing the Ground for the GDR's Integration into the EC

The first decisive step towards reunification was made when the two German states concluded the Treaty Establishing a Monetary, Economic and Social Union[236]. The Treaty's preamble, in which both parties committed themselves to achieve unification according to Art.23 of the BL, contains clauses to the effect that German unity was to be embedded in a European peace order, that it was to contribute to European unity, and more specifically that the Treaty provisions were to safeguard the application of the law of the European Communities following the establishment of national unity.

The State Treaty was decisive also in that it enabled the GDR to fulfil several indispensable conditions to which its integration into the EC, and, for that matter, its accession to the Federal Republic of Germany[237], was subject. Those conditions concerned the GDR's economic, political as well as legal system.

With regard to the economic system, Art.1 (3) of the Treaty provided that the common economic system of the two parts of Germany was to be the social market economy, i. e., a system determined particularly by private ownership, competition, free pricing and, as a basic principle, complete freedom of movement of labor, capital, goods and services, taking into account the requirements of environmental protection. The hardships of the market economy were to be mitigated by the principle of social justice, realized primarily through a comprehensive system of social security (Art.1 [4]). The GDR thus agreed completely to reverse its economic system and bring it into line with the common standard of the EC countries. With the establishment of a monetary union on July 1, 1990, the GDR was already *ipso facto* included in the European Monetary System.

But the GDR also underwent a total remodelling of its political system when it agreed to introduce a free, democratic, federal and social basic order governed by the rule of law[238] and to abolish all constitutional

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[236] *Supra* note 150.

[237] Cf. Art.28 (1), (3) BL; Randelzhofer (note 51), 114.

[238] Cf. BVerfGE 2, 1 (12 et seq.).

provisions to the contrary (Art.2 of the State Treaty)[239]. The GDR formally complied with Art.2, even before it ratified the Treaty, by the Act on the Amendment and Supplementing of the Constitution of the German Democratic Republic (Constitutional Principles) of June 17, 1990[240]. Art.8 of the Act furthermore provided that the GDR could by constitutional amendment transfer sovereign powers to inter-governmental institutions and institutions of the Federal Republic or consent to limitations upon its rights of sovereignty.

Finally the GDR agreed to introduce a great number of laws of the Federal Republic already in line with Community law pertaining to currency, credit, money and coinage, competition, commerce, corporations and partnerships, workers' participation in management etc. in full or in part (Art.3 of the State Treaty in conjunction with Annex II). Thus a considerable part of the *acquis communautaire* was adopted by the GDR before formal reunification. Pursuant to Art.4 of the Treaty, the GDR moreover had to adjust its entire legal system to the principles of a free democratic basic order and a social market economy[241].

In Art.11 (3), the GDR specifically agreed, taking into consideration its foreign trade relations with CMEA states, to bring its policy progressively into line with the law and the economic policy goals of the European Communities. Concerning customs duties the GDR was obliged, notwithstanding Art.11 (3), to adopt gradually the EC customs law including the Common Customs Tariff (Art.30 [1] of the Treaty). According to Art.30 (2), the intra-German border did, however, not become an EC customs frontier[242].

Art.12 of the State Treaty adjusted intra-German trade to the requirements of the monetary and economic union. While the Protocol on German Internal Trade remained formally in force, the two German states undertook in Art.12 (2) to guarantee that goods of third-state origin, not covered by the Protocol, would be transported across the intra-German bor-

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[239] Art.2 may have only been declaratory of constitutional changes already effected by the 1989 revolution as such and/or the developments since then (D. Rauschning, Der deutsch-deutsche Staatsvertrag als Schritt zur Einheit Deutschlands, Aus Politik und Zeitgeschichte, B 33/90 [August 10, 1990], 3, 12).

[240] GBl. DDR I, no.33 (June 22, 1990), 299.

[241] See also Principle A.I.1 of the Joint Protocol on Guiding Principles annexed to the Treaty providing that the law of the GDR would be remodelled and guided by the legal order of the EC.

[242] See Denkschrift zum Staatsvertrag (BT-Drs.11/7350, 97). See also Stiehle/Suwalski, Zum Stand der Neugestaltung des Zoll- und Verbrauchsteuerrechts der DDR, DtZ 1990, 270.

der only under customs supervision[243]. They promised to cooperate in foreign trade matters while observing the competences of the European Communities (Art.13 [3] of the Treaty). Under Art.13 (2), the developed external economic relations of the GDR, particularly existing treaty obligations, enjoyed protection regarding legitimate trade expectations *(Vertrauensschutz)*. They would be further developed and extended in accordance with free market principles, and, where necessary, adjusted in agreement with the other contracting parties.

Concerning agriculture, according to Art.15 of the State Treaty, the GDR had to introduce a price support and external protection scheme in line with the EC market organization, so that agricultural producer prices became adjusted to those in the Federal Republic, and to refrain from introducing levies or refunds with regard to trade with the other eleven EC member states, provided that the Community did likewise *vis-à-vis* the GDR.

Art.35 eventually provided that the State Treaty did not affect treaties concluded by the Federal Republic or the GDR with third states, which amounted to a general proviso also in favor of the EC Treaties[244].

B. The Schengen Problem

Art.12 (3) of the State Treaty deserves some closer examination. In view of EC rules concerning the free flow of persons, goods, services and capital within the Community, the two German states agreed in this article to create as soon as possible the preconditions for complete abolition of controls at the intra-German border. For the implementation of the undertaking, the Government of the Federal Republic and the Government of the GDR on July 1, 1990, concluded an Agreement on the Termination of Passport Controls at the Intra-German Borders[245].

This agreement came relatively late so that it could not be incorporated into the State Treaty because the Federal Republic of Germany was a party to the Schengen Accord, an executive agreement of June 14,

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[243] See the Regulation concerning the Movement of Goods and Services between the German Democratic Republic and the Federal Republic of Germany of July 4, 1990 (GBl. DDR I, no.48 [August 8, 1990], 859).

[244] Cf. Arts.4, 30 (2) Vienna I Convention (note 74).

[245] BGBl.II, 570. The agreement was put into force in an abbreviated procedure based on Art.35 of the act assenting to the State Treaty of June 25, 1990 (BGBl.II, 518).

1985[246]. In it, Belgium, France, Luxemburg, the Netherlands and the Federal Republic had agreed to simplify controls at their common borders and work for their complete abolition. This was to serve as a model for the entire EC where with the completion of the internal market on January 1, 1993, all internal border controls should be eliminated while controls at the Community's external frontiers should at the same time be intensified. In this Schengen I Accord, no specific account was taken of the Germans in the GDR who then did not enjoy freedom to travel. The West German Government considered them as German nationals and without hesitation issued West German passports to those few able (and willing) to apply for them, a practice to which the other parties to the Accord did not object.

Soon after Schengen I, talks began between the five states parties to reach a new accord on the total abolition of border controls for the sake of the free movement of persons, goods and services. At the end of 1989, the Schengen II Accord was ready for signature. But the signing ceremony was postponed at the request of the Federal Republic[247] after the GDR had opened its borders on November 9, 1989. More and more East Germans thereupon tried to cross the West German border with France etc., using their GDR passports, and many were rejected because they did not have the necessary visas. The West German declaration concerning citizenship of 1957 arguably did not cover East Germans using GDR passports[248] because they had not "activated" their dormant (West) German citizenship. It did not extend to the Schengen system either, which was deliberately kept outside the Community framework. The Federal Republic insisted that the East Germans benefit from the freedom of movement in the Schengen area while the four other parties to the system feared that the opening of the intra-German border, which was an external frontier for the purposes of the Schengen system, would lead to an uncontrolled influx of third-country aliens.

On June 19, 1990, the Schengen II Accord was finally signed[249]. Pur-

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[246] Agreement between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on gradual abolition of controls at frontiers, reprinted in Archiv des Völkerrechts 1989, 487.

[247] W. Schäuble, Europa ohne Grenzen – eine sichere Gemeinschaft, EA 1990, 203 (205, footnote).

[248] But see Bleckmann/Erberich (note 84), 853.

[249] Agreement on the Implementation of the Schengen Accord of June 14, 1985, between the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic concerning the Gradual Reduction of Controls at their Common

suant to its Art.136 bilateral agreements of any signatory with third states on the reduction of border controls are prohibited unless the other parties give their consent[250]. The attached protocol contains a joint declaration with regard to the territorial scope of the Accord:

"The States Parties declare: After the unification of the two German States the binding effect of the Accord under public international law will also extend to the present territory of the German Democratic Republic".

The Federal Republic made the following unilateral declaration:

"1. The Accord is being concluded with the unification of the two German States in view. The German Democratic Republic is not a foreign country in relation to the Federal Republic of Germany. Article 136 does not apply to the relation of the Federal Republic of Germany to the German Democratic Republic ...".

The GDR expressly consented to the view that the Accord would be applicable to its territory after reunification. Beginning July 1, 1990, the Benelux states and France permitted East Germans entry without a visa for visits of up to three months[251].

The Agreement on the Termination of Passport Controls at the Intra-German Borders, which became obsolete with formal reunification[252], expressly refers to the two Schengen Accords in its preamble and in Arts.4 and 5, dealing with visa regulations and controls at the external frontiers with regard to third-country aliens.

C. Compatibility of the State Treaty of May 18, 1990, with Community Law

In its communication of June 14, 1990, to the European Council[253], the EC Commission examined the implications of the State Treaty for the Communities. It considered the Treaty to be both the legal framework and the main instrument for the gradual integration of the GDR into the legal order of the Community before the formal unification of the two German states. The Treaty's general content was compatible with Community law, and even Art.13 on foreign trade and payments, entering an

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Borders (not yet in force; not yet published). Italy signed the Accord on November 27, 1990 (EUROPE, no.5379, November 28, 1990, 3).

250 Cf. Art.28 of Schengen I Accord.

251 See the Federal Government's draft memorial on the Schengen II Accord, p.3 (not yet published).

252 See Art.40 (2) Unification Treaty.

253 *Supra* note 168.

area of exclusive Community jurisdiction, was acceptable as it took account of the allocation of competences in its Sec.3[254].

The Commission also considered the general proviso in favor of international treaties in Art.35 of the Treaty, in particular its relevance to the arbitral tribunal provided for in Art.7. It criticized that no specific stipulation had been made to the effect that the tribunal should seek preliminary rulings from the ECJ pursuant to Art.177 of the EEC Treaty when a dispute between the contracting parties involved questions of Community law. But it could be argued that Art.35 also referred to Art.177 of the EEC Treaty, particularly if interpreted in the light of the State Treaty objective to make preparations for the formal integration of the GDR into the EC[255]. The Commission nevertheless expected the Federal Government to give an undertaking that it would defend this point of view in any procedure before the arbitral tribunal. There has, however, been no such procedure so far, and there probably never will be.

In another respect, Art.7 (3) of the Treaty established a connection between the arbitral tribunal and the EC providing that if the tribunal's members were not nominated within the period prescribed, the President of the ECJ would make the necessary appointments, a precautionary measure that proved unneccessary.

A further objection made by the Commission concerned the fact that the State Treaty did not contain an express provision guaranteeing the principle of equal treatment for Community nationals and firms. When signing the Treaty, the GDR had declared that it would, on a basis of reciprocity, accord nationals and firms from all Community member states the same treatment as natural persons and firms from the Federal Republic, if the matter concerned might affect the area of EC jurisdiction and if there was no express provision to the contrary in the State Treaty[256].

Finally, according to Art.4 (1) of the State Treaty in conjunction with Annex IV No.7, the GDR was actually bound to introduce the West German road-tax for trucks the legality of which was being contested by the Commission in a procedure under Art.169 of the EEC Treaty still pending before the EEC. Following an interim order by the Court[257], the road tax was suspended in all of Germany.

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[254] See also Bleckmann/Erberich (note 84), 859 et seq.

[255] *Ibid.*, 854.

[256] BGBl.II, 567. See N. Reich, Die Bedeutung des EG-Wirtschaftsrechts für den deutschen Einigungsprozeß, in: Reich/Ahrazoglu (note 163), 61 (65 et seq.).

[257] Order of July 12, 1990 (Case C-195/90R), OJ no.C 199/7.

D. Community Reaction: Establishment of a *de facto* Customs Union

The Commission interpreted the State Treaty, in conformity with the principle of equal treatment, to the effect that the GDR would not apply levies, refunds, customs duties and quantitative restrictions to the member states other than the Federal Republic of Germany, provided that the EC offered reciprocity[258]. Consequently, the Commission proposed legislation authorizing it to suspend customs duties and agricultural levies in the light of measures applied in the GDR.

The Council gave such authorization in Regulation (EEC) No.1794/90 of June 28, 1990 on transitional measures concerning trade with the German Democratic Republic[259], based on Arts.28, 113 of the EEC Treaty. Technically, the Council itself determined that customs duties and charges having equivalent effect, as well as quantitative restrictions were suspended if the Commission determined, under a specific procedure with the assistance of a committee composed of representatives of the member states, that certain conditions were met by the GDR. The Commission accordingly enacted Regulation (EEC) no.1795/90 of June 29, 1990 concerning the methods of implementation of Council Regulation No.1794/90 on the transitional measures for trade with the German Democratic Republic[260].

Concerning agricultural products, a separate Council Regulation (EEC) No.2060/90 of July 16, 1990[261] on transitional measures concerning trade with the German Democratic Republic in the agriculture and fisheries sector had to be made because under Art.43 (2) of the EEC Treaty consultation with the European Parliament was required, which caused some delay[262]. Acting on the authorization thus given, the Commission then on July 31, 1990, made Regulation (EEC) No.2252/90 concerning the methods of implementation of Council Regulation No.2060/90[263].

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[258] BullEC, Suppl.4/1990, 20, 23.

[259] OJ no.L 166/1. Concerning the ECSC, the Commission took the corresponding Decision no.1796/90/ECSC of June 29, 1990 on the suspension of customs duties and quantitative restrictions for products falling within the ECSC Treaty coming from the German Democratic Republic (OJ no.L 166/5) (see Timmermans [note 139], 449).

[260] OJ no.L 166/3. This Regulation was also based on the ECSC Decision (note 259).

[261] OJ no.L 188/1.

[262] See J. Schultze, Errichtung einer de facto-Zollunion zwischen EG und DDR ab 1.7.1990, RIW 1990, 679 et seq.

[263] OJ no.L 203/61. J. Heine, Les mesures prises dans le secteur agricole pour l'intégration de la RDA dans la Communauté, Revue du Marché Commun 1991, 199 et seq.

The GDR on June 22, 1990, enacted a new Tariff Act[264], in accordance with Art.4 (1) and Annex V no.6 of the State Treaty, and on July 4, 1990, adopted the Regulation on the Trade in Goods and Services between the German Democratic Republic and the Federal Republic of Germany which abolished controls concerning the movement of goods in free circulation in the member states of the EC[265].

Thus, by unilateral but reciprocal acts, a *de facto* customs union[266] was established between the EC and the GDR from July 1, 1990, or, with regard to agricultural products, from August 1, 1990, which included a blanket suspension of all quantitative restrictions for an unlimited period, in fact lasting until the formal reunification of Germany on October 3, 1990. The GDR had thus attained a kind of "unofficial membership" in advance[267]. If it had not been for this *de facto* customs union, the intra-German border would have remained a Community external frontier, and the Federal Republic would have been compelled to maintain controls in spite of the economic union of the two German states[268].

After the conclusion of the State Treaty, the GDR was also given access to the financial instruments of the EC[269].

VII. EC Aspects of the Unification Treaty

A. General Survey

The two German states concluded the Unification Treaty, "(s)eeking through German unity to contribute to the unification of Europe", as stated in the preamble. Art.1 of the Treaty declares that upon the accession of the GDR to the Federal Republic in accordance with Art.23 of the BL, the reconstituted five states of the GDR would become *Länder* (constituent states) of the Federal Republic. Art.3 put the Basic Law into effect in those five states and East Berlin, subject to certain modifications. Art.8 did the same with regard to the entire body of West German federal law, subject to a great number of exceptions and modifications listed in

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264 GBl. DDR I, no.37 (June 30, 1990), 451.

265 GBl. DDR I, no.48 (August 8, 1990), 859. The Regulation applied to all legal relations created on or after July 1, 1990 (§ 8).

266 J. Sack, Anmerkungen zur Zollunion zwischen der EG und der DDR, EuZW 1990, 309.

267 BullEC, Suppl.4/1990, 28.

268 Schultze (note 262), 678.

269 XXIVth General Report (note 157), 43.

Annex I. Art.9 (2), in conjunction with Annex II, provides that certain parts of GDR law shall remain in force, subject to their being compatible also with the directly applicable EC law. As Community law prevails in any event over national law in cases of conflict, this condition is merely declaratory[270].

Art.10 directly deals with EC law, declaring in Sec.1 that the Treaties establishing the European Communities, amendments and additions thereto and international agreements, treaties and decisions which have been brought into effect in connection with these Treaties would apply in the territory of the former GDR including East Berlin[271]. Art.10 (2) states that all acts of secondary legislation shall apply in this territory from October 3, 1990, save where exceptions are made by the competent organs of the European Communities. Art.10 (3) obligates the Länder to transpose or implement all those acts of secondary legislation the transposition or implementation of which falls within their jurisdiction. There was never an express provision of this kind in federal law before. To establish such a Länder obligation it had always been necessary to refer to unwritten general constitutional principles like the duty of federal loyalty which the Länder owe the Federation derived from the general norm of Art.20 (1) of the BL *(Bundestreue)*[272].

Art.12 of the Unification Treaty regulates the fate of the treaties of the former GDR[273]. It declares the readiness of the reunified Germany to (re)negotiate them in good faith, subject to the competences of the EC, and thus corresponds to the Commission's position[274]. However, it stops short of acknowledging an international legal obligation to this effect. Art.12 reads:

> "(1) The contracting Parties are agreed that the international treaties of the German Democratic Republic shall, in the course of the establishment of the unity of Germany, be discussed with the contracting partners of the German Democratic Republic under the aspects of the protection of legitimate expectations, the interests of the states concerned and the treaty obligations of the

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270 Rengeling (note 177), 1312.

271 The Commission considered Art.10 as a helpful clarification, though the provision was unnecessary on purely legal grounds (BullEC, Suppl.4/90, 43).

272 See B. Langeheine, in: Grabitz (note 16), Art.100 n.65.

273 Notice of this provision was given to the Foreign Ministers of Britain, France, the Soviet Union and the United States by the joint letter of the West and East German Foreign Ministers in connection with the Treaty on the Final Settlement with respect to Germany of September 12, 1990 (BullBReg., no.109 [September 14, 1990], 11).

274 *Supra* V.C.3.

Federal Republic of Germany. The discussion shall take into account the principles of a free democratic basic order founded on the rule of law, observe the competences of the European Communities and shall be aimed at regulating or determining those treaties' continued applicability, adjustment or expiration.

(2) The united Germany shall define its position concerning the devolution of international treaties of the German Democratic Republic after consultations with the contracting parties concerned as well as the European Communities, if the latters' competences are affected.

(3) If the united Germany intends to accede to international organizations or other multilateral treaties to which the German Democratic Republic but not the Federal Republic of Germany is a party, an agreement shall be reached with the contracting parties concerned and with the European Communities, if the latters' competences are affected".

Art.29 contains specific provisions on the GDR's external trade relations (CMEA) which follow a similar policy and also take account of EC competences. The Commission emphasized in this regard that the continuation of traditional trade flows was important for maintaining good political and commercial relations with eastern European countries[275].

B. The Problem of State Aid

Art.28 of the Unification Treaty on the promotion of economic development touches a problematic issue in view of the strict rules on state aid in Arts.92 et seq. of the EEC Treaty. Art.28 at least acknowledges the jurisdiction of the EC in this field. The Commission was of the opinion that the Community state aid rules should, with some exceptions, be immediately applied to the territory of the former GDR. It expected the German Government to comply with them in full after reunification, referring to Arts.14 and 28 of the State Treaty[276].

An argument can, however, be made that financial assistance flowing to East Germany is covered by the exemption in Art.92 (2) (c) of the EEC Treaty. This clause, which has always covered the special Berlin and zonal border area assistance now being phased out, could, by way of a dynamic interpretation, be extended to the new kind of assistance which can also be considered as "aid granted to the economy of certain areas of

[275] BullEC, Suppl.4/1990, 13. See already Art.13 (2) of the State Treaty. The necessary GATT waiver was obtained in December 1990 (EuZW 1991, 134).

[276] BullEC, Suppl.4/1990, 23 et seq., 74 et seq. See also Council Directive of December 4, 1990 amending Directive 87/167/EEC on aid to shipbuilding (90/652/EEC) (OJ no.L 353/45), based on Art.92 (3) (d) and 113 EEC Treaty.

the Federal Republic of Germany (still) affected by the (former) division of Germany, in so far as such aid is required in order to compensate for the (continuing) economic disadvantages caused by that division"[277]. On the other hand, Art.92 (2) (c) of the EEC Treaty was apparently only intended to compensate for economic disadvantages due to the geographical location of certain German regions cut off from their hinterland by the intra-German border. The economic disadvantages endured by the territory of the former GDR were, however, caused by the disastrous former economic system[278]. In any event, on November 22, 1990, the EC Commission provisionally approved an aid-package for the former East German territories[279].

It is also arguable that means flowing from the "Fund for German Unity"[280] to public bodies rather than private undertakings are not state aid in the sense of Art.92 of the EEC Treaty but belong to the intra-federal fiscal equalization outside the scope of the EEC Treaty[281].

VIII. The European Parliament and the GDR's Integration into the European Communities

A. Parliamentary Cooperation

The European Parliament took a favorable position on German reunification[282]. It set up a Temporary Committee to consider the impact of German unification on the European Community which worked in close consultation with the Commission and the German authorities. It also moved as quickly as possible wherever its consultation or cooperation was required to enable the other organs to enact the necessary pieces of secondary legislation in time. On the other hand, the Parliament also emphasized that German unification had to take place within a Community framework and that it must not slow down the process leading to the

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277 D. Carl, Die Gemeinschaft und die deutsche Einigung, EuZW 1990, 561 (564); Rengeling (note 177), 1311; Scherer (note 123), 15. See also S. Richter, Das Recht der EG und die Gebiete der ehemaligen DDR, in: B. Messerschmidt (ed.), Deutsche Rechtspraxis (1991), 1012 (1013).

278 Bleckmann/Erberich (note 84), 862.

279 EUROPE, no.5376 (November 23, 1990), 7.

280 Established by Art.31 of the Act assenting to the State Treaty of May 18, 1990, of June 25, 1990 (BGBl.II, 518).

281 Carl (note 277). Resolution by the German Bundesrat, EuZW 1991, 86, 87.

282 See XXIVth General Report (note 157), 41 et seq.

completion of the internal market and an economic and monetary as well as a political union. It also resolved that, though the European Community should make a contribution to the restructuring of the GDR economy, this should not be done at the expense of the Communities' other disadvantaged regions. The Parliament finally insisted that its own right of participation be observed[283].

B. Representation of the East German Population in the European Parliament

A serious problem arose with regard to the representation of the territory of the former GDR in the European Parliament. The parliamentary organ of the EC is based on the system of representative democracy (Art.137 of the EEC Treaty) in the sense that the political will of the peoples of the member states in their entirety must be reflected in the composition of the European Parliament. According to Art.2 of the Act concerning the election of the representatives of the Assembly by direct universal suffrage of September 20, 1976[284], the Federal Republic of Germany has 81 representatives, like Britain, France and Italy. In the last elections held between June 15 and 18, 1989, all the German representatives were elected from the former West Germany. As the next direct elections in which the East Germans could participate would not be held before 1994, how could the requirements of representative democracy be satisfied in the meantime?

The GDR Parliament had already sent 18 members to the September session of the European Parliament who had observed the work from the visitors' gallery[285]. Based on Art.13 of the Act, proposals were made for new election of just the 81 German representatives by an all-German electorate[286]. But another route was eventually taken when on October 24,

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[283] Resolution of April 4, 1990 (OJ no.C 113/97). Resolution of October 24, 1990 (OJ no.C 295/31).

[284] OJ no.L 278/1, amended by the Treaty of May 28, 1979, concerning the accession of Greece (OJ no.L 291/1) and the Treaty of June 12, 1985, concerning the accession of Portugal and Spain (OJ no.L 302/1).

[285] EUROPE, no.5353 (October 19, 1990), 3. The Unification Treaty, Annex II.B Chapter II, Subject A, Sec.III.2.f) provided that those members were, for the purposes of German law, temporarily accorded the status of a Member of the European Parliament.

[286] Scherer (note 123), 13; Bleckmann/Erberich (note 84), 860 et seq.; Timmermans (note 139), 441 et seq.

1990, the Parliament amended its Rules of Procedure, adding Art.136 (a)[287]:

> Transitional provisions concerning observers from the territory of the former GDR
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> 1. The European Parliament may, on a proposal from its President, invite the German Bundestag to nominate observers from the territory of the former German Democratic Republic who have been elected at democratic elections.
>
> 2. These observers may take part in the proceedings of the European Parliament without the right to vote or to stand for election. Such participation may not have any legal effect on the conduct or conclusions of these proceedings or on decisions connected with the number of Members in each political group. Detailed arrangements shall be determined by the Bureau and the enlarged Bureau.
>
> 3. The number of such observers shall be fixed by Parliament on a proposal from its President.
>
> 4. This rule shall cease to apply at the latest on the date of the first sitting of the European Parliament following the elections in 1994.

On November 21, 1990, Parliament adopted a proposal by its President to set the number of observers at 18[287a]. Only after a dispute between the German Bundestag and the European Parliament on the nomination procedure could the 18 East Germans already named by the former GDR Parliament take their seats on March 12, 1991[288].

There was a tacit consent that these observers would have no right to speak in plenary sessions, but that they could fully participate in committee sessions and within the parliamentary groups[289]. It is doubtful whether this temporary solution satisfies the requirements of Art.137 of the EEC Treaty, as the East German part of the German population will not be represented in the Parliament on equal terms for over three years[290].

Another question was whether after German reunification the allocation of parliamentary seats to the member states should be adjusted so that the principle of equal representation of all Common Market citizens would be better realized[291]. Proposals to this effect have been made from

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287 OJ no.C 295/78.

287a OJ no.C 324/116.

288 FAZ, November 28, 1990, 6; March 13, 1991, 2.

289 Das Parlament, no.50 (December 7, 1990), 11.

290 Dost/Hölzer (note 178), 675 et seq.

291 While one Luxemburg member represents 62,000 inhabitants, one member from reunified Germany represents nearly a million.

within the Parliament[292], but any change in the number of representatives would require an amendment to the 1976 Act concerning their election that would have to be ratified by all member states (Art.21 [3] of the ECSC Treaty, Art.138 [3] of the EEC Treaty, Art.108 [3] of the EURATOM Treaty).

IX. Result and Outlook

The German reunification process was in all its stages deeply embedded in the European Community context. The GDR became as much a part of the EC as it became a part of the Federal Republic of Germany. Remaining within the European framework was a political condition for reunification readily fulfilled by Germany and all its European partners. German unity and European unity proved to be in a symbiotic relationship.

From the very first the GDR wanted to belong not only to the Federal Republic but also to the Communities. In this respect, the GDR's intentions, proving the Communities' attractive force, were in tune with the long-term goals of other CMEA countries, particularly Czechoslovakia, Hungary and Poland. For them a successful integration of the eastern part of Germany into the EC will serve as a model. The Communities' leadership in the recovery of central and eastern Europe is symbolized in the EC Commission's coordination of economic aid granted by the group of 24 OECD states[293] and by the establishment of the European Bank for Reconstruction and Development by the Treaty of May 29, 1990[294].

But German reunification within the EC framework was not only significant in a quantitative respect, in view of a future eastern extension of the European Communities. It also gave an important impulse to the quality of European integration. In pursuit of the goal of binding the united Germany firmly into the EC, and at the same time preparing for the economic and political challenges involved in the reconstruction of central and eastern Europe, the project of establishing an economic and monetary union was carried further than ever. The closely related project

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[292] FAZ, November 22, 1990, 2; December 4, 1990, 16.

[293] G. van Well, Zur Frage der EG-Mitgliedschaft der mittel- und osteuropäischen Staaten, FS Wagner (note 102), 94 (96 et seq.); Krenzler (note 144), 93 et seq.

[294] OJ no.L 372.

of a political union was stimulated by the image of German unity[295]. The Dublin special session of the European Council on April 28, 1990, both approved the German reunification, effecting the GDR's integration into the Common Market, and initiated concrete studies concerning the establishment of a political union[296]. It remains to be seen whether the two conferences instituted in December 1990 to draft the treaties for realizing the two European union projects will be successfully concluded.

The concept of "Europe" comprises the whole continent, not only its western part. Accordingly, French President F. Mitterrand's concept of a European Confederation, expressly approved at the Franco-German summit on September 17/18, 1990[297], is addressed to all European states. And Italian Foreign Minister G. de Michelis has projected a Europe of four concentric circles[298], the innermost circle being formed by the political union of the European Communities; the second by the EFTA states which would enjoy a privileged relationship with the EC and would be potential candidates for membership at some later date; the third circle by the central and eastern European CMEA countries the relations of which with the EC were, by way of special association agreements, to be strengthened up to a point at which EC membership might be possible; and the fourth circle consisting of the so-called "CSCE Europe" of the Thirty-four.

It was no accident that the same Dublin summit of April 28, 1990, which approved the German reunification and the establishment of a political union also sanctioned the project of association agreements ("European agreements")[299] with the CMEA states and advocated a leading role for the EC in developing new CSCE structures[300]. The CSCE

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295 Cf. the underlying Franco-German initiative of April 18, 1990 (EA 1990, D 283) and the follow-up initiative of December 6, 1990 (BullBReg., no.144 [December 11, 1990], 1513).

296 BullBReg., no.51 (May 4,1990), 401 (402 et seq.).

297 BullBReg., no.111 (September 19, 1990), 1169 (1170).

298 G. de Michelis, Die EG als Gravitationszentrum: Für ein Europa der vier Kreise, Integration 1990, 143. See the earlier and very similar "vision of Europe" by M. Mertes/N.J. Prill, FAZ, July 19, 1989, 8; *id.* (note 103), 565.

299 Conclusion of the European Council's Rome session (December 14/15, 1990), EA 1991, D27 (D38). Cf. the EC Commission's model of association agreements with central and eastern European states (COM[90]389, August 27, 1990). B. Lippert, Etappen der EG-Osteuropapolitik: Distanz – Kooperation – Assoziation, Integration 13 (1990), 111 (120 et seq.); A. Deen/D.A. Westbrook, Return to Europe, Harvard International Law Journal 1990, 660.

300 BullBReg., no.51 (May 4, 1990), 401 (402 et seq.). See also the results of the European Council's special session in Rome on October 27/28, 1990 (BullBReg., no.128 [November 6, 1990], 1333).

Paris summit on November 21, 1990, in turn adopted a Charter for a New Europe[301] in which the unity of the German state was approved and called an important contribution to a lasting and just peace order of a united democratic Europe. The Charter also acknowledged the important role of the European Communities in the political and economic development of Europe.

[301] EUROPE/Documents, no.1672 (December 14, 1990).