

German Unification and the European Community

Jean-Paul Jacqué *

The rapid evolution of relationships between the two Germanies, marked particularly by the State Treaties of 14 June 1990 on economic, monetary and social union and of 31 August 1990 on political union, led naturally to the questioning of the position of the former German Democratic Republic, and of unified Germany, *vis-à-vis* the European Community.

Given that both the FRG and GDR felt that unification should be achieved within the framework of the Community, the essential question related to the method to be followed to extend the Community treaties to the territory of the ex-GDR. Could the theory of the geographical extension of the area of territorial application of the treaties find a place here, thus resulting in automatic application of Community law to the whole of the territory of the two Germanies immediately after unification? The answer depended partly on the way unification came about, but more particularly on Community law itself and on international law. Were we going to see an integration of the GDR into the FRG, or the creation of a new State resulting from the merger, or indeed the reappearance of Germany?

In internal respects, the line taken was to employ Article 23 of the Basic Law of the FRG, which is as follows:

For the time being, this Basic Law shall apply in the territory of the Länder of Baden, Bavaria, Bremen, Greater Berlin, Hamburg, Hesse, Lower Saxony, North Rhine Westphalia, the Rhineland Palatinate, Schleswig-Holstein, Württemberg-Baden, and Württemberg-Hohenzollern. In other parts of Germany it shall be put into force on their accession.

This was the procedure followed in 1956 for accession of the Saar. Its use has, in the present case, been preceded by negotiations leading up to a State treaty between the two Germanies that specified the details of accession, particularly the application of FRG legislation (including those provisions implementing Community law) on the territory of the ex-GDR. In this case, the Federal Republic of Germany has persisted, and united Germany does not constitute a new legal subject. The problem of the FRG's succession to the GDR's obligations does not even arise.

The other possibility would have been to apply Article 146 of the Basic Law, which provides for entry into force of a new constitution adopted by the free decision of the German people. Article 146 could have been, moreover, combined with Article

* Professor, Robert Schuman University of Strasbourg. This is a revised version of an article which appeared in French in 94 *Revue générale du droit international public* (1990) 997-1018.

23, i.e. with a new constitution drawn up subsequently to accession achieved using Article 23. In this case, the question would be whether the State that would then have appeared would have been a new State or whether, in accordance with the case-law of the German Constitutional Court, united Germany would not have been distinguished from the former FRG.¹

In any case, the German Basic Law postulates the existence, specifically in the Preamble, of a Germany not confined to FRG territory. This was also manifested firstly in the Treaty of 23 October 1954 between the Western Powers and the FRG, reserving to the Westerners the rights and responsibilities they had exercised and held regarding Germany as a whole, particularly in connection with the reunification or an act of the nature of a peace treaty, and, secondly, in the Treaty of 20 September 1955 between the USSR and the GDR, which refers to the obligations of both States under international agreements in respect of Germany as a whole. It would thus be possible to imagine two distinct but possibly consecutive situations: extension of FRG territory to East German territory and/or the reappearance of Germany. For practical reasons, it is the first case that eventuated.²

It seems hard to give answers to the various positions that might arise by referring exclusively to West German internal categories. These are only factual elements, undoubtedly important, within an analysis that has to be done with respect to both Community and international law.

At the present stage, the essential question has been whether after German unification extension of the territorial area of application of Community law to GDR territory required amendment to the Community Treaties. The answer has to be seen on two levels: principles and practical arrangements. As far as principles go, do Community law and international law authorize extension of the territorial area of application of Treaties without their amendment? If so, do the Treaties allow for the new situation created by unification?³

I. The Extension of the Territorial Area of Application of Community Law

In political terms, agreement has been reached to avoid any amendment to the Treaties. Here the interest of the Federal Republic, or more specifically of its governing coalition, coincided with that of other Member States. For the Federal Republic, the path of amendment would have made the extension of the area of ap-

¹ See the Federal Constitutional Court Judgment of 31 July 1972 and the article by Koenig, 'Le traité fondamental entre les deux Républiques allemandes et son interprétation par le tribunal constitutionnel allemand', *AFDI* (1973) 147.

² As is known, the path chosen was to use Article 23 of the Basic Law, with the clarification, designed to reassure the Polish State, that this was to be the final use of Article 23, which would be eliminated from the Basic Law. This elimination was expressly provided for in the Treaty of Political Union.

³ Cf. Glaesner, 'Les problèmes de droit communautaire soulevés par l'unification allemande', *Revue du Marché Commun* (1990) 647-654.

plication of the Treaties subject to completion by all Member States of national ratification procedures. This operation, naturally long in any case, could be lengthened still further by an adverse stance by a State or a national parliament, not because it opposed ratification, but because it would seek to link acceptance to the securing of advantages elsewhere. The German government did not want to leave achievement of unification to the mercy of some other Community member. It is, in this regard, easy to imagine the difficulties a united Germany would have encountered despite the protocol on German internal trade, if Community rules had not been applied to the whole of its territory, *de facto* imposing maintenance of a border. For other Member States, non-amendment implies acceptance by Germany of all the Treaty rules, particularly those regarding the institutions, avoiding renewed questioning of weighting at the Council of Ministers and the distribution of European Parliament seats. It is no doubt because of agreement reached on this point that no thorough legal analysis was done. The question could have been considered from the view points of both Community law and international law.

A. Community Law

It cannot be maintained that the authors of the EEC Treaty clearly perceived that its area of application could automatically, and thus without amendment, be extended to the territory of the GDR after German unification. It is true that the issue of relationships between unification and European integration was not absent from their thinking; the preamble to the Bonn Convention of 26 May 1952 between France, the US, Britain and the FRG contained the following wording:

Whereas the Three Powers and the Federal Republic recognize that both the new relationship to be established between them by the present Convention and its related Conventions and the Treaties for the creation of an integrated European Community, in particular the Treaty on the Establishment of the European Coal and Steel Community and the Treaty on the Establishment of the European Defence Community, are essential steps to the achievement of their common aim for a unified Germany integrated within the European Community.

However, apart from the fact that this declaration of intent only defines the objective without stating ways to reach it, it never entered into force, failing French ratification, and the Paris Convention of 23 October 1954 replacing it did not contain any such clarification.

During negotiation of the EEC Treaty, the Federal Republic seemed concerned to ensure that the commitments it was about to make would not become a barrier to reunification in the future. This is why, in agreement with the other delegations, Ophüls declared at the meeting of heads of delegation on 28 February 1957 that the German Government regarded it as possible to amend the Treaties should Germany reunify. According to explanations given to the *Bundestag*, this formula left the

German Government's hands free in the event of reunification, so that united Germany would retain the freedom to be in the EEC and EURATOM or not.⁴

At a political level it must be concluded that the EEC members were not unaware of the problem and undoubtedly had a preference for participation by a united Germany in Community Europe. For its part, the Federal Republic hoped to keep its hands free. In these circumstances, it has to be considered that the authors of the Treaty wished neither to exclude amendment nor impose it.

Considering the text of the Treaties themselves, it is evident that they covered only the territory of the contracting parties, the FRG among them (Article 227 EEC and 198 ECSC). The Protocol on German internal trade⁵ shows that the Treaties applied only to the territory of the FRG as it existed at the time at which they were concluded, and not to the territory of Germany. This is also the way the Court interpreted the Treaty when stating in connection with the Protocol that:

The dispensation thus granted does not have the result of making the German Democratic Republic part of the Community, but only that a special system applies to it as a territory which is not part of the Community.⁶

Thus nothing in the text of the Treaty allows us to infer that it could apply *ipso facto* to the whole of united Germany without amendment.

What of subsequent practice? First of all, any reference to the precedent of the Saar should be excluded. In fact, after the Saar became an integral part of the FRG through application of Article 23 of the Basic Law, the ECSC Treaty called for no amendment since, as Paul Reuter noted, it already previously applied to Saar territory because of the French Government's powers regarding Saar external policy and the position taken in this respect by the authorities of the Saar. The Franco-German exchange of letters of 18 April 1952 indicated that by signing the ECSC Treaty the French Government was acting on behalf of the Saar, but that its status would be settled subsequently.⁷

When Algeria became independent, the Treaty ceased to be applicable to Algerian territory without treaty amendment being required. The effect of independence operated, though with some delay.⁸ A number of other changes in the territorial area

⁴ Deutscher Bundestag, 2. Wahlperiode, Drucksache 360, Nachtrag zu 3440, 3615, Verhandlungen des Deutschen Bundestages 2. Wahlperiode 1953, Stenographische Berichte 38, 5 July 1957, annex 2, p. 13386. On this point cf. H.J. Küsters, *Fondements de la Communauté économique européenne* (1990) 286.

⁵ Or similarly Article 82 EEC.

⁶ Case 14/74, *Norddeutsches Vieh- und Fleischkontor v. Hauptzollamt Hamburg-Jonas*, Judgment of 1 October 1974, [1974] ECR 899 at 907.

⁷ *La Communauté européenne du charbon et de l'acier*, (1953) 108.

⁸ The problem of relations between the EEC and Algeria after the latter's independence aroused controversy relating to the nullity, in respect of the new state, of Treaty Article 227(2) until such time as conclusion of an association agreement put relations into a new framework. Cf. Tavernier, 'Aspects juridiques des relations entre la CEE et l'Algérie', *RTDE* (1972) 1.

have been due to changes in the status of non-European territories of the Community, which shifted from overseas department to overseas territory status, for instance. But is this not merely application of the legal categories provided for by the Treaty?⁹ The precedent most often cited is the change made in 1984 when the Treaty ceased to apply to the territory of Greenland. Apart from the fact that this was a reduction, not an increase, in the area of territorial application of the Treaty, it may be asked whether it was really necessary to follow the procedure of Article 236, and if so, whether this was because of Greenland's 'departure' or else because of the specific arrangements to apply to it thereafter.¹⁰

Summing up, the inclusion of the GDR's territory in the area of application of Community law is not organized by the Treaties. Community law gives no obvious answer to the question whether the operation can only be accomplished by amending the Treaty. Failing a specific solution, it is appropriate to refer to international law.

B. International Law

There are precedents as to the effects of a merger of States on participation by the State resulting from the merger in international organizations. As in both the union between Egypt and Syria and the merger between Tanganyika and Zanzibar, the new State automatically replaced the old ones in world organizations. Where one of the merged States was not a member of those organizations, the State resulting from the merger was able to participate in world organizations without re-admission. However, the territorial application of ILO conventions was not changed by merger; union treaties contained specific clauses to this effect.¹¹ But these precedents are not of much use, firstly because in the German case unification does not give rise to a new State, and more particularly because of the difference in nature between the Community (as an organization of regional integration) and cooperation organizations on a universal level.

One must therefore ask whether German unification does not fall under one of the cases provided for in the 1978 Vienna Convention on Succession of States in respect of Treaties. As is known, this convention scarcely innovated in the matter, taking up existing customary rules. It is for this reason that we do not share Glaesner's doubts as regard the customary aspects of the various rules of the Vienna Convention dealing with these problems.¹² In effect, unlike other parts of the convention, the provisions

⁹ Cf. Dewost *et al.*, *Le droit de la Communauté économique européenne*, vol. 15, Les dispositions générales et finales (1987) 482.

¹⁰ The question of Greenland's 'withdrawal' was complicated by the whole controversy over the impossibility of a State's withdrawing from the Community, which could have legitimated recourse to amendment; on the question, see *Les dispositions générales...* *ibid.*, at 491, Harhoff, 'Greenland's Withdrawal from the European Communities', *CML Rev.* (1983) 13 and Wiess, *EL Rev* (1985) 173.

¹¹ Cf. H.G. Schermers, *International Institutional Law* (1980) 56ff.

¹² *Supra* note 3.

governing the union of States and the transferral of territory are limited to a codification of existing practice.

Can the provisions on annexation or partial transfer of territories be invoked? In this case, the principle of moving treaty boundaries can be applied. To the extent that the personality of the State benefitting from the transfer persists, treaties it concluded are extended to the transferred part. On the contrary, treaties previously applying to this territory cease to have effect. Applied to the German situation, these rules would imply automatic extension of the area of application of the Community treaties, but also the cessation from effect of all treaties concluded by the GDR. But in our opinion it is difficult to regard German unification as a territorial transfer. Article 15 of the Vienna Convention on the Succession of States in respect of Treaties specifies that the case of transfer covers situations '[w]hen part of the territory of a State or when any territory for the international relations of which a State is responsible, not being part of that State, becomes part of the territory of another State.' The GDR cannot be regarded as part of the territory of another State. Some have considered that it was part of the territory of Germany, which has not ceased to exist, but can it in this case be claimed that Germany is a third party in relation to the FRG? Moreover, in partial transfer of territory, the State from which the transferred territory is detached continues to exist, which is not the case in the German instance. The theory of moving treaty boundaries recognized by Article 15 is not, we feel, capable of being applied here.¹³

Must recourse be had to the rules on unification of States (Article 31 of the Vienna Convention)? In a union of States, the international personality of the components disappears in favour of the creation of a new personality, that of the successor State. But it is obvious that German unification, while leading to disappearance of the GDR, allows the international personality of the FRG to persist. Moreover, some would argue that it cannot be a union of States since the two Germanies were not States foreign to each other, but two parts of the German nation, united by specific links.¹⁴ But for third States, is it not a case of two States recognized as such, and both UN members? Whatever be the reservations that might be formulated because of the continued existence of the former Germany, the situation can be treated like a union of States.

However that may be, Article 31 of the Vienna Convention provides that, in the event of union, the treaties concluded by one of the States remain in force *vis-à-vis* the successor State but retain their previous area of territorial application. The successor State may decide to extend the area of application of a treaty to the whole of its territory. However, this rule of extension linked to the mere wish of the successor

¹³ On the Convention, see Z. Meriboute, *La codification de la succession d'Etats aux traités* (1984), particularly on Article 15, at 168 and on Article 31, at 186.

¹⁴ Cf. Koenig, *op. cit.*; The German Constitutional Court found that where law on relations between the *Länder* and the Federation had lacunae, recourse should be had to international law, thus legitimating recourse to the arrangements for succession in the event of a union of States.

finds an exception in the case of restricted multilateral treaties, for which the consent of all parties is necessary.¹⁵ And the Community Treaties do constitute restricted multilateral treaties both because of their object and goal.¹⁶ Extending the Treaties to the territory of the GDR would only therefore be possible with the agreement of all EEC members.

To sum up, we are faced with two solutions, one in favour of automatic extension, the other subordinating extension to agreement by all parties. It should be noted that Treaty revision is not necessary in either case. Clearly, neither solution corresponds exactly to the actual situation; though the closest analogue is that of the union of States. This leads us to say that unanimous consent of the parties may render recourse to revision superfluous and allow extension of the territorial area of application of the Treaty. Even were the thesis of automatic extension adopted, ought determination of the territorial field of application not to be regarded as one of the essential bases of consent by the parties, given the specific nature of the Treaties, aimed at achieving an economic union? If so, any change in territorial area would be subordinated to the absence of objections by any of the parties.

It should also be noted that opting for application of Article 15 would automatically entail cessation of Treaties concluded by the GDR with third parties.

Having regard to the spirit of the Convention on these specific points, which runs against the *tabula rasa* line generally followed by the Convention, it would be best to assert the rule of continuity.

For in the event of transfer of part of the territory of a State, the personality of the State from which territory is detached persists. Treaties concluded by that State remain in force, but with restricted territorial application. This explains why the Convention can provide for both automatic extension and cessation of effects of previous treaties on the territory transferred. The rights of third parties are preserved by continuance of the same treaties on the part of the territory not affected by transfer. In the case of a union of States, the rule of continuation in force is explained by the disappearance of both States. Rights of third parties would be affected were continued effect not mandatory.

In our view, it should be concluded that in the context of German unification neither the FRG nor the GDR can put forward merger in order to terminate their previous obligations.¹⁷ Extension to the whole territory of the enlarged state of

¹⁵ Article 31(2)(a).

¹⁶ According to Article 30(2) of the Vienna Convention on the law of treaties, a treaty is regarded as a restricted multilateral treaty where it follows from the restricted number of States that have taken part in negotiating it and from the object and goal of the Treaty that its application in its entirety among all the parties is an essential condition for the consent of each of them to be bound by it.

¹⁷ Which of course does not rule out their re-negotiation. They could be terminated by application of Article 31(1)(b) on condition that it 'appears from the treaty or is otherwise established that application of the treaty in respect of the successor State would be incompatible with the object and purpose of the treaty or would radically change the condition for its operation'. A German amendment aimed at providing for cessation of effects of treaties incompatible with other

treaties concluded by either component is, as in the case of union of States, possible, with a reservation as to rules relating to restricted multilateral treaties, for which agreement of all parties is necessary to bring it about.

The European Council was well aware of this since, without taking a position on the substance of the debate, it closed the dispute when at its special meeting in Dublin on 28 April 1990 it indicated that application of the Community Treaties to the FRG after unification would take place without revision. Whatever the assumption one may take, the Heads of State or Government, acting on behalf of the States they represented and not as a Community agent, accepted extension. Their declaration may be analysed either as the act necessary according to Article 31(2)(a) to bring about extension of the Community Treaties or as renunciation pursuant to Article 15 of their right to call for a formal amendment to the essential basis for their consent constituted by the territorial area of application of the Treaties as set in 1958.

But this renunciation of Treaty revision constrains the Community to settle the problems arising from application of Community law to the territory of the ex-GDR with the existing instruments.

II. Application of Community Law to the Territory of the ex-GDR

Treaty revision would have allowed the new situation created by German unification to have been approached from an undisputable legal basis. A general provision could have been included empowering the Community to take transitional measures and temporarily to derogate from Community law. Failing this, the Treaty has had to be used in its present wording. Thus, in order for the unification to be carried out taking account of Community legislation and for the Community to be informed of the course of negotiations, the Commission has, pursuant to the conclusions of the Dublin Council, followed the negotiations and was associated where Community interests were at stake. However, there was no question of awaiting political unification before adopting necessary measures, since the Treaty on Economic and Monetary Union already called for a number of decisions.

A. Economic and Monetary Union

The Treaty on Economic and Monetary union was profoundly marked by the Community concerns. Given the functional character of the Community, there was a clear overlap between Community competences and the matters dealt with in the Treaty. Right from the preamble, the parties declared themselves

Aware of the fact that the arrangements provided for by this Treaty are to guarantee the application of European Community law once State unity is established.¹⁸

Convention obligations (particularly in commercial, customs and extradition respects) has been withdrawn (Meriboute, *op. cit.* at 202).

¹⁸ 'In dem Bewußtsein, daß die Regelungen dieses Vertrages die Anwendung des Rechts der Europäischen Gemenischaften nach Herstellung der staatlichen Einheit gewährleisten sollen.'

Further, Article 35 states that

The provisions of this Treaty are without prejudice to the international treaties concluded by the Federal Republic of Germany or the German Democratic Republic with third parties.¹⁹

Unification could not then dispense the Federal Republic of Germany from respecting its obligations towards the Community. The same applies for the German Democratic Republic as regards its commitments towards third parties, particularly COMECON members. Article 13 of the Treaty devotes a paragraph to this point, being based on a principle often invoked in this connection, that of legitimate trust. The GDR's obligations will accordingly be respected, and if some must be altered, that will be by agreement with the third parties concerned. Continuity is essential, but taking account of the existence of a Common Commercial Policy, since paragraph 3 of the same Article states that

For the defence of their external economic interests the contracting parties shall closely cooperate, while respecting the powers of the European Communities.²⁰

Article 30 of the Treaty provides for progressive adoption of European Community legislation, including the common customs tariff, while Article 15 indicates that the GDR will introduce 'a price-support system and external protection system corresponding to the Community system of market organization'. Neither levies nor restitutions will be introduced in relation to the Communities 'to the extent that they themselves do not introduce them'. For its part, the Council of the European Community, in its Regulation of 28 June 1990, empowered the Commission to suspend application, in relations between the Community and the GDR, of customs duties and all charges of equivalent effect, as well as quantitative restrictions and all restrictive measures resulting from instruments of the Common Commercial Policy, since the GDR had assured adequate protection at the frontier in its relations with third parties and guaranteed free access to Community products. The delegation granted to the Commission was subordinated to monitoring by a management committee; that is, in the event of disagreement between the Commission and a committee made up of Member State representatives on measures to be taken, the measures proposed by the Commission would enter into force unless the Council within one month and by qualified majority adopted a different decision.²¹ Since 1

¹⁹ 'Dieser Vertrag berührt nicht die von der Bundesrepublik Deutschland oder der Deutschen Demokratischen Republik mit dritten Staaten abgeschlossenen völkerrechtlichen Verträge.'

²⁰ 'Zur Vertretung der außenwirtschaftlichen Interessen arbeiten die Vertragsparteien unter Beachtung der Zuständigkeiten der Europäischen Gemeinschaften eng zusammen.'

²¹ Council Regulation No. 1794/90 EEC of 28 June 1990, Commission Regulation No. 1795/90 of 29 June 1990, Commission Decision (ECSC) No. 1796/90, OJ L 166, at 1ff. For agricultural products, see Regulation (EEC) No. 2060/90 of the Council of 16 July 1990 (OJ L 188 at 1) and Commission Regulation (EEC) No. 2252/90 (OJ L 203). It should be noted that these texts explicitly preserve application of agreements concluded by the GDR with third States.

July 1990, GDR merchandise and agricultural products have entered Community territory freely, and the Community grants reciprocity. It is known that this measure aroused considerable ill feeling among Community producers, particularly French beef and veal producers, and measures had to be taken to prevent the whole of GDR output being sent to Community markets, producing considerable disruptions.

The achievement of economic and monetary union implies radical changes to GDR legislation. Where this involves extension of FRG legislation, as in the sphere of taxation, particularly VAT, compatibility with Community law is *ipso facto* assured. By contrast, in other cases the Treaty provides for adaptation of GDR legislation. This adaptation is to be in accordance with a protocol on the guidelines binding upon the parties:

The law of the German Democratic Republic shall be organized in accordance with the principles of a free, democratic, federal and social order and those of the rule of law and shall be oriented upon the European Community legal system.²²

Finally, given the special situation in the GDR, the problems both of aids and of competition are particularly acute. As for aids, the FRG is to inform the Commission of measures taken, which the latter will consider in the light of Article 92. In connection with competition, the GDR seemed to agree to apply Community policy before unification. The Commission, for its part, closely followed the situation and opened an examination procedure.

Thus, integration of the GDR into the Community in part preceded formal unification.

B. Political Unification

As a result of the position taken by Member States at the Dublin Council, Community law automatically applied upon entry into force of the Unification Treaty. It is therefore for the Community to take specific measures should it regard application of transitional measures as being necessary. It is thus in the same position *vis-à-vis* the ex-GDR regarding application of the Community law as is unified Germany regarding application of FRG law. The principle adopted is identical: automatic application failing specific contrary enactment. This principle is clearly stated in Article 10 of the Unification Treaty:

- (1) When accession takes effect, the European Community Treaties, including their amendments and additions, and international conventions, treaties and agreements that have come into force in connection with those Treaties shall apply to the territory mentioned in Article 3.
- (2) Legal acts adopted in virtue of the European Community Treaties shall from the date of effect of accession apply to the territory mentioned in Article 3, as long as the competent

²² 'Das Recht der Deutschen Demokratischen Republik wird nach den Grundsätzen einer freiheitlichen, demokratischen, föderativen, rechtsstaatlichen und sozialen Ordnung gestaltet und sich an der Rechtsordnung der Europäischen Gemeinschaften orientieren.'

institutions of the European Communities shall not have adopted provisions in derogation. Such provisions in derogation shall take account of administrative necessities and serve to avert economic difficulties.

(3) Legal acts of the European Communities whose transposition or implementation falls in the *Länder* competence shall be transposed or implemented in *Länder* provisions by the latter.²³

It has been wondered on the Community side whether this provision was really necessary. In our view, it establishes without ambiguity the agreement by both parties to extension of the Community Treaties to the territory of the ex-GDR. In the light of the principles of succession in the event of unification of States, such extension is not automatic, and comes about on the request of the State that emerges from the unification. The effect of the Unification Treaty is to clarify this point and provide an undisputable basis for such extension. This provision, which meets the wish expressed at Dublin to allow extension without revision, thus constitutes the legal foundation for application of Community law to the whole of the unified territory. By contrast, the existence of measures of derogation cannot find a legal basis in the Unification Treaty, and the provisions it contains to that effect are nothing but the expression of a wish that does not bind the Community. Article 10 does not in any case impose recourse to measures of derogation, but provides for the possible existence of such measures, and the Unification Treaty recognizes Community competence in the matter. Moreover, where the Unification Treaty on certain points provides for continued application of GDR law in derogation from the principle of immediate application of FRG law on the date of entry into force of unification, this is subject to compatibility with Community law of the provisions kept in force.

As far as the substance of these derogations is concerned, the Dublin Council had mandated the Commission to submit a comprehensive report containing proposals for the transitional measures, which according to the Council should be limited to that which was strictly necessary and aimed at as speedy and trouble free a harmonization as possible. In its communication of 21 August 1990, the Commission listed all the difficulties and proposed solutions for each point.²⁴ This is not the place for analysis by sectors, so we shall keep to principles that seem to emerge today, distinguishing secondary law and international agreements.

23 '(1) Mit dem Wirksamwerden des Beitritts gelten in dem in Artikel 3 genannten Gebiet die Verträge über die Europäischen Gemeinschaften nebst Änderungen und Ergänzungen sowie die internationalen Vereinbarungen, Verträge und Beschlüsse, die in Verbindung mit diesen Verträgen in Kraft getreten sind.
(2) Die auf der Grundlage der Verträge über die Europäischen Gemeinschaften ergangenen Rechtsakte gelten mit dem Wirksamwerden des Beitritts in dem in Artikel 3 genannten Gebiet, soweit nicht die zuständigen Organe der Europäischen Gemeinschaften Ausnahmeregelungen erlassen. Diese Ausnahmeregelungen sollen den verwaltungsmäßigen Bedürfnissen Rechnung tragen und der Vermeidung wirtschaftlicher Schwierigkeiten dienen.
(3) Rechtsakte der Europäischen Gemeinschaften, deren Umsetzung oder Ausführung in die Zuständigkeit der Länder fällt, sind von diesen durch landesrechtliche Vorschriften umzusetzen oder auszuführen.'

24 COM (90) 400 final.

1. Secondary law

The application of secondary law on the territory of the ex-GDR came about *ipso facto* upon entry into force of the Unification Treaty. Moreover, application of FRG law, which is, in principle, in conformity with Community law, should facilitate the process. It nevertheless remains the case that in view of the rapidity with which unification has come about, adaptation to Community rules cannot be accomplished instantaneously. Thus, *Länder* were created on the former territory of the GDR only after unification, and they will only gradually be able to adapt Community law in the areas falling within their jurisdiction. Transitional measures were therefore necessary. Were they legally possible?

Revision of the treaties would have offered a sure legal basis. Failing this, legitimation should be sought in present Community law. Article 8C, introduced by the Single Act, permits temporary derogations in favour of the least developed economies during the period of establishment of the internal market. It was aimed particularly at Spain, Portugal and Greece, but can be applied in the present case without difficulties since it is aimed at economies with differences in development. However, its scope is limited to implementation of the internal market within the meaning of the Single Act. In cases where recourse to Article 8C would not be conceivable, it would be appropriate to refer to case-law of the Court on the principle of equality. The Court legitimates some differentiation in the treatment applying to Member States where such different treatment applies to objectively different situations.²⁵ In this case, differentiation is justified only insofar as it is proportionate to the difference in position. The Commission summarizes the principles applying as follows:

- acceptance of the *acquis communautaire* must be both the starting point and the ultimate objective;
- any transitional arrangements must be warranted on objective economic, social, or legal grounds;
- any exceptions or derogations must be temporary and cause as little disturbance as possible to the functioning of the common market (proportionality).²⁶

If the principle of derogations is accepted, their effect will vary according to the sector. Their duration would in principle be limited to 31 December 1992, except in cases of permanent technical adaptation, such as already exists in favour of certain

²⁵ Cf. Capotorti, *Le principe d'égalité en droit économique: rapport communautaire*, report presented at the 1984 FIDE Conference in the Hague; 'L'intégration différenciée', *Journée d'études de l'ULB du 13 décembre 1985*. Cf. also the study by Ehlermann, 'How flexible is Community Law? An Unusual Approach to the Concept of "Two Speeds"', 82 *Michigan Law Review* (1984) 1274ff.

²⁶ COM (90) 400, IV.1. It was in this sense that the Commission drew up its proposals. Thus in its proposal for a directive on transitional measures applicable in Germany in the context of harmonizing technical rules, it refers to Article 8C (OJ L 266/4). In other proposals it considers that if 'it proves necessary to make certain adjustments to Community acts ... to take account of the special situation on that territory ... derogations to that end should normally be temporary in nature and cause the least possible disruption... (cf. in agriculture, OJ L 263/12).

Member States. It is possible that derogation will entail marketing of products not conforming to Community rules. In this case, it will be necessary to ensure that such products are not marketed outside the territory of the ex-GDR. But this can be only a short-term solution if the territory of the former GDR is not to be fenced off from the rest of the Community.

As far as decision-making procedure goes, two types of measures are provided for. Since adoption of transitional measures takes some time and had not come about by the time of unification, the Commission proposed that it be granted the power to authorize the FRG provisionally to keep in force the regulations applying in the territory of the former GDR, being an area identified as requiring transitional measures. A special consultation procedure between Commission and FRG has been set up to avoid difficulties, and any Member State may refer to the Commission in the event of problems. The Commission is assisted by a management committee, but it should be noted that Parliament is more specifically associated with the implementation procedure, since it may invite

... the Commission to give further information on the scope of this authorization, so that it may give its views either on the specific use made of it or any related measures that may need to be taken at Community level.²⁷

The provisional measures could have effect only until the end of 1990, when the Community institutions adopted the transitional measures applying in general till the end of 1992. The end of the transitional system should coincide with completion of the internal market, except for the environment sector where the situation is such that the 1992 deadline cannot be met.²⁸

2. International agreements

The question arises at two levels. In the case of treaties concluded by the Community, the rule is the same as for secondary legislation. They apply, apart from provisional measures, as from unification. The situation is more complex in respect of treaties concluded by the GDR. Article 234 (EEC), which provides that obligations entered into by Member States prior to entry into force of the Treaty shall not be affected by it, cannot be applied here, since it could operate only in the context of accession. The

²⁷ Article 3 of the Council directive of 17 September 1990 on provisional measures applicable after German unification and before adoption of the transitional measures to be adopted by the Council in cooperation with the European Parliament, OJ L 266/1; Council Regulation (EEC) No. 2684/90 of 17 September 1990 on provisional measures applicable after German unification and before adoption of the transitional measures to be adopted by the Council either in cooperation or in consultation with the European Parliament, OJ L 263/1. It should be noted that the fact that the whole procedure between Parliament and Council on adoption of these texts was completed between 11 and 13 September 1990, shows that accusations of slowness of the cooperation procedure are in need of considerable qualification.

²⁸ The transitional measures were adopted on 4 December 1990, see OJ L 353 of 17 December 1990 at pp. 1-8.

Commission did not in any case refer to this in its communication. It is therefore appropriate to refer to the general rules on the unification of States and succession to treaties. The principle is that of retention in force of treaties. As the Commission notes:

There is no inherent reason why the basic rules of succession to treaty rights and obligations should not apply to an entity having international personality and having been granted extensive treaty-making powers such as the Community, insofar as the treaties concerned fall within its recognized sphere of competence. The Commission rejects the application of the so-called negative aspect of the above-mentioned rule of moving treaty boundaries, which might lead to the automatic extinction of all GDR treaties with third states. The Community is bound by the legal principle of continuity of the treaty rights and obligations. A fundamental exception is to be made for 'personal' treaties, i.e., those which are inextricably linked with the political *persona* of the former GDR.²⁹

It should be noted that the Community has not to date identified any treaty forming part of this last category.

The position on succession to treaties is important since to date the Court has accepted recourse to succession only, in relation to Article 234, in the case of GATT.³⁰ The Commission's analysis confirms that, in view of the Community's specific nature, the rules of international law applying to States also apply *mutatis mutandis* to the Community.³¹ The modalities of succession vary according to the parties to treaties and follow the breakdown of powers between the Community and Member States. Where the GDR, FRG and the Community or the GDR and the Community are parties to treaties it is sufficient to notify the other parties of incorporation of the GDR into Community territory and to consider along with them, where there is a weighting system, the changes to be made. For other treaties, particularly those connected with the COMECON, succession may apply in varying ways. In some cases the obligations contracted with the GDR are not compatible with Community law. Continuity will then apply only to the territory of the ex-GDR, in accordance, moreover, with Article 30 of the Vienna Convention on the Succession of States in respect of Treaties. Some agreements will have to be renegotiated, others will go to term, which is soon, and not be renewed. As regards relationships with the East, the political idea is to include renegotiation of the GDR's agreements in the

²⁹ COM (90) 400, part. II, I.1.

³⁰ See case 21/72 *International Fruit Co et al v. Produktschap voor Groenten en Fruit*, Judgment of 12 December 1972, [1972] ECR 1219, and case 812/79, *Attorney General v. Burgoa*, Judgment of 14 October 1980, [1980] ECR 2787. Cf. Rideau, 'Les accords internationaux dans la jurisprudence de la Cour de Justice des Communautés européennes', 94 *RGDIP* (1990) 289, in particular at 315ff.

³¹ In the preamble to the regulation on fisheries policy the Commission unambiguously affirms the principle of succession: 'Whereas the Community will succeed to the former German Democratic Republic in respect of the Fishery agreements and other international agreements concluded by the latter with non-Community countries and international organizations; whereas the rights and obligations for the Community contained in these agreements will remain unaffected during the period for which these agreements in their present form are maintained, until such time at the latest, as they expire unless they are renegotiated', OJ L 353/10.

broader context of relationships between the EEC and the East. This is why succession founded upon maintenance of legitimate trust is insisted on.³² As the Commission notes:

Any destabilization arising, or perceived as stemming from immediate application of the EC commercial policy would run the risk of contradicting other major EC initiatives in Eastern Europe ... which aim at establishing a Pan-European free trade area in the long term...

Ways had therefore to be found to reconcile traditional trade patterns with the legal, political and economic integration of the GDR into the Community. They combine transitional exemptions with the necessity to transform rapidly the GDR into a market economy fully integrated into the EC. The application of the different measures proposed may be the beginning of very close economic cooperation between the EC and the countries of Central and Eastern European countries. The GDR's external commitments will thus have served as a catalyst for Pan-European economic cooperation.³³

Conclusion

For quite understandable political reasons, Member States have preferred to do without treaty revision. However, they have not clearly opted for either the rule of extension of the area of territorial application of the treaty or the theory of succession in the event of union of States. This uncertainty might have caused difficulties. It has to be stated that, for the moment, the arrangements set up allow adequate adaptation of Community law to the situation, while placing the mechanism under the control of the Court. Additionally, the rapidity with which the process has come about would not have been compatible with revision, which would have implied ratification by the twelve Member States. As concerns relations with third parties, the absence of explicit reference to a principle of succession could have been prejudicial to legal certainty, but both the provisions of the inter-German Treaty and the Commission's position offer third parties the necessary legal security. At the political level, the absence of treaty revision leaves the question of representation for the population of the ex-GDR in the European Parliament unanswered. To be sure, according to basic constitutional law principles, with unification the present FRG members will

³² Article 24 of the Unification Treaty likewise insists on this notion: '(1) Die Vertragsparteien sind sich einig, daß die völkerrechtlichen Verträge der Deutschen Demokratischen Republik im Zuge der Herstellung der Einheit Deutschlands unter den Gesichtspunkten des Vertrauensschutzes, der Interessenlage der beteiligten Staaten und der vertraglichen Verpflichtungen der Bundesrepublik Deutschland sowie nach den Prinzipien einer freiheitlichen, demokratischen und rechtsstaatlichen Grundordnung und unter Beachtung der Zuständigkeiten der Europäischen Gemeinschaften mit den Vertragspartnern der Deutschen Demokratischen Republik zu erörtern sind, um ihre Fortgeltung, Anpassung oder ihr Erlöschen zu regeln beziehungsweise festzustellen.

(2) Das vereinte Deutschland legt seine Haltung zum Übergang völkerrechtlicher Verträge der Deutschen Demokratischen Republik nach Konsultationen mit den jeweiligen Vertragspartnern und mit den Europäischen Gemeinschaften, soweit deren Zuständigkeiten berührt sind, fest.

(3) Beabsichtigt das vereinte Deutschland, in internationale Organisationen oder in sonstige mehrseitige Verträge einzutreten, denen die Deutsche Demokratische Republik, nicht aber die Bundesrepublik Deutschland angehört, so wird Einvernehmen mit den jeweiligen Vertragspartnern und mit den Europäischen Gemeinschaften, soweit deren Zuständigkeiten berührt sind, hergestellt.'

³³ COM (90) 400, parts II, 3.

represent the whole people of Germany; but is this solution politically acceptable? Short of an early election of German representatives (which would entail amendment of the Treaty or of the Act on the elections of Parliament) the only possible solution, which was eventually adopted by Parliament, was to provide for a consultative participation of representatives of the former GDR territory in parliamentary debates.

Finally, at political level, it is regrettable that the formula chosen has never at any time allowed the peoples or their representatives to express their opinion on such a fundamental question for the Community's future. The only intervention will have been the European Parliament's. On its own initiative it set up an *ad hoc* committee to follow developments, but was able merely to express its opinion on the principle of unification.³⁴ However, Parliament has been and will be broadly associated with adoption, then implementation, of the provisional and transitional measures. Finally, it is satisfying to note, that here the Community's decision-making process, about whose slowness some like to complain of, functioned with outstanding effectiveness.

³⁴ Session of 12 July 1990, interim Report on *The impact of the process of German Unification on the European Community*, Doc. A3. 183/90 of 9 July 1990 and final report, Doc. A3. 203/90 of 10 September 1990 by Mr A.J. Donnelly.