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The Passage Trough the Community's Legislative System of Emergency Measures Related to German Unification

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article concludes by briefly examining some of the lessons Council, Commission and Parliament might draw from the experience.

2. The Historical and Political Context

The extraordinary chain of events, briefly summarised here, that began about 9 November 1989, is well known. For the purposes of this article, what is important to note is that the timetable for unification, which was first mooted as a possibility and only later as a probability, became increasingly telescoped. Each change of date effectively presented the Community with a *fait accompli*, ultimately imposed by the democratic wishes of the GDR's *Volkskammer*.

By the early autumn of 1989, following the opening of the Hungarian border, an estimated thirty thousand GDR citizens had emigrated to the West. A number of popular demonstrations took place, most notably in Leipzig, with increasingly open and insistent calls for democratic reforms. With this expectant atmosphere at its height, the European Council met in Strasbourg on 8 and 9 December 1989. The EC Heads of State and Government gave out a clear political signal by reaffirming their commitment to German unification. Within two months, with the unexpected, historical, official announcement on 9 November that 'all border crossings ... can be used and are now open', German unification, for so long an unlikely possibility, became a distinct probability. Nevertheless, though distinct, the probability seemed distant.

The FRG Chancellor, Helmut Kohl, made little secret of his ambition to become the first chancellor of a unified Germany. He swiftly outlined a ten-point plan for a stage-by-stage reunification of the two Germanies. A key element in this plan, as in all speculative outlines of progress towards eventual unification, was the institution of all-German elections, both as a symbolic and as a normative step preceding unification itself. The holding of elections before 1991 seemed unlikely because of the external geo-political constraints involved. The basic attitude of the USSR seemed ambiguous, and it was in any case not clear that the two Germanies and the four wartime victor powers (the US, USSR, UK and France, collectively

1. Introduction

The passage of emergency interim measures related to German unification through both their first and second readings during the European Parliament's 10 to 14 September 1990 plenary session provided an extraordinary, if not unique, example of inter-institutional and inter- governmental cooperation. This cooperative spirit, together with a generous institutional readiness to overlook the letter of hard-won or previously hard-defended conventions, demonstrated how the Community institutions were collectively able to rise to a historic occasion, and gave the lie to the oft-stated perception of the Community as a hide-bound, monolithic bureaucracy.

The basic problem involved was simple. The pace of German unification was faster than the Community's capacity to legislate. It had therefore to adopt provisional, or emergency interim, measures to act as a stop-gap until due legislative process had provided the Community and the German authorities with a more permanent means of absorbing the former territories of the German Democratic Republic (GDR) into the Community.

The purpose of this article, therefore, is *not* to consider the substance of the vast negotiating process, equivalent to an accession, set in motion by the GDR's decision to effectively dissolve itself and to accede to and unite with the Federal German Republic (FRG); others working far closer to the coalface will surely set down their experiences once the process is over. Rather, this article will be more narrowly concerned with the extraordinary procedural event which saw two Parliamentary and two Council readings, together with a Commission reconsideration, taking place within the space of just seven days where, especially on such substantive issues, they would normally have taken months, thus creating for the former territories of the GDR, together with the FRG, the legal framework and tools necessary for a gentle and protected entry into the Community.

This was a quiet but great victory for the Community institutions, both individually and collectively, and although the context was necessarily *sui generis*, the

known as the 'four plus two') could quickly settle the external complications of German unity.

Events thereafter moved with unexpected and steadily-increasing rapidity. The first democratic elections in the GDR were held on 18 March 1990, and resulted in electoral success for those parties favouring German unification on the most rapid possible basis (see Fitzmaurice, 1991, and Müller-Rommel, 1991). This was a watershed. The Dublin I European Council responded by endorsing the principle of German unification under a 'European roof'. More significantly, the Heads of State and Government decided that EEC Article 237 was inappropriate; in other words, that the GDR's absorption into the FRG would not be treated as a classic accession to the Community (see 3.i below) (1). Negotiations between the new GDR coalition government and the government of the FRG proceeded apace, resulting in the signing of a State Treaty, the *Staatsvertrag*, which provided a framework for the introduction of economic, monetary and social union. The *Staatsvertrag* was concluded on 18 May 1990 and, after ratification by the FRG *Bundestag* and *Bundesrat* and the GDR *Volkskammer*, entered into force on 1 July 1990.

Although, at the beginning of July, dates as far away as 1991 were still being mooted (the all-German elections had been provisionally scheduled for 2 December), by the end of the month it had become clear that the date for unification was going to be brought much further forward. Two vital agreements had made this possible. First, on 16 July, at Stavropol in the USSR, Kohl and President Gorbachov came to a formal agreement on the four sticking points between their two countries: the new Germany's membership of and status within NATO; the size of the new Germany's army; the timetable for the departure of Russian forces from the former territories of the GDR; lastly, financial and other compensations for the USSR. The next day, in Paris, in the 'four plus two' context, Kohl was able to give categoric assurances on respect for the integrity of the German-Polish (Oder-Neisse) border. The consequent agreement meant that, although the USSR might hold out to extract maximum financial advantage, a green light from the 'four plus two' was all but a formality. The next 'four plus two'

meeting was scheduled for 12 September in Moscow, and it was widely expected that no strategic, geo-political barriers to unification would remain after it.

Meanwhile, a confused debate was taking place within both Germanies about electoral mechanics. At stake were the fortunes of a series of smaller GDR political parties, as coalition partners in the East and West jockeyed for maximum advantage. For example, the FRG SDP (the SDP was in opposition in Bonn, but part of the governing coalition in the GDR) wanted all-German elections with a five per cent threshold, calculating that this would blot out the small GDR German Social Union Party (it had won 6.3 per cent of the votes cast in March), an ally of the Bavarian Christian Social Union. The GDR Prime Minister, Lothar de Mazière, argued against the GDR joining the FRG before the pan-German elections because it would obliterate the hopes of *all* the smaller GDR political parties. Ultimate agreement on an electoral formula was not reached until 1 August.

Following Malcom Muggeridge's dictum that 'a row is never about what it's about', the arguments about electoral systems hid a more fundamental argument about the date of the elections themselves. The row was precipitated by the virtual collapse of the East German economy. Unemployment doubled in July to 270,000, and three times that number were on short time. Rather than stepping altruistically into the breach, as had been perhaps naively expected, Western entrepreneurs preferred to wait for bankruptcy before starting from scratch on their own terms, and former national monopolies simply crumbled. By the first week of August, de Maizière, supported by Kohl, had suggested that all-German elections be brought forward from the initially envisaged date of 2 December to 14 October, which was the date on which the five East German *Länder* were to be reconstituted and elections held in them. The FRG SDP leader, Oskar Lafontaine, argued for 15 September, immediatedly after the 'four plus two' talks, although he clearly preferred the original December date, since the costs of unity would by then be evident and, he calculated, voters drifting away from Kohl. Kohl himself wanted both elections and unification on 14 October, arguing that it would be 'disruptive and undemocratic to decouple the two'. However, an earlier polling date would have required constitutional change, which would have obliged him to seek SDP

support in order to muster a sufficient majority. Since the SDP had always maintained that Kohl's 1 July terms for economic and monetary union (GEMU) would rapidly prove deleterious, Kohl knew he was unlikely to get that support. Despite his earlier pronouncements and protestations, he had now seriously to contemplate decoupling elections and unification. Unification couldn't wait, and he lacked the support to change the election date.

The final decision lay in the GDR *Volkskammer*, where political jockeying continued throughout August, as Kohl's political stablemate, de Mazière, sought the best deal for the Christian Democrats. In protest against the Kohl/de Mazière preference for 14 October, the GDR SDP withdrew from the governing coalition. At last, in the early hours of 23 August, the *Volkskammer* settled for 3 October as the date for unification. With the formal conclusion of the 'four plus two' talks in Moscow on 12 September (the USSR holding out, as expected, for last-minute financial concessions), the way was clear for formal ratification of the Unification Treaty (*Einigungsvertrag*). The new Germany came into being on 3 October 1990. As has been seen, in the space of little more than a month, the date for unification was brought forward from early 1991 to 14 and then 3 October. Whilst welcome, these changes demanded nimble political footwork from the Community and its institutions.

3. Institutional Responses

i. The European Council

As the highest Community political instance, the European Council was responsible both for giving the green light to unification and for creating the consensual framework within which the Community institutions could begin to formulate pragmatic and practical responses to the increasingly rapid pace of events in the GDR. At the practical level, the European Council relied heavily on the Commission.

As noted above, at the 8 and 9 December 1989 Strasbourg European Council, the Heads of State and Government declared their approval in principle of the unification process, this in the context of a reinforced peace in Europe in which the German people might find their own 'free determination'. The European Council encouraged the speedy conclusion of a trade agreement with the GDR which, at the time, seemed the most appropriate way of helping matters forward.

Events developed so fast after the fall of the Berlin wall that the Irish presidency felt obliged to call a special Council in Dublin (Dublin I) on 28 April 1990. The Council was largely devoted to German unification and political and economic liberalisation in other Central and Eastern European countries. The Heads of State and Government enthusiastically welcomed the prospect of German unification as a positive factor for the development of Europe and the Community. The Council undertook to ensure that the integration of the GDR territories into the Community would be done gently. No revision of the EEC Treaty would, they considered, be necessary; in other words, integration into the FRG would amount *ipso facto* to integration into the Community. At the time, this decision vexed the Parliament, which felt it had been cheated of its assent rights under EEC Article 237, which governs the mechanics of applications for membership of the Community. (Enlargement is one of the few areas in which the Parliament enjoys full assent powers.) However, the FRG Basic Law, which was drafted before the establishment of the GDR, always provided for the enlargement of the FRG to include other German territories, meaning those then occupied by the Russians. (The 3 October *Einigungsvertrag* contained a constitutional amendment which did away with Article 23 of the Basic Law; Germany is now whole.) Lastly, the European Council called upon the Commission to make appropriate proposals for transitional measures and derogations to the Council and, following the Commission's pragmatic prompting, decided that these should be presented together, in one 'global report'. This decision also found its critics in the Parliament, who felt that one opinion on an overall package amounted to far less than separate opinions on each of its components.

The second Dublin Council (25 and 26 June 1990) welcomed the conclusion of the *Staatsvertrag*, shortly to enter into force. It heard a report from Kohl on progress in the unification negotiations, and later met informally with the GDR Prime Minister, de Mazière. On the substance, the Heads of State and Government welcomed the fact that the Commission had been 'able to accelerate its preparatory work', so that the package of proposals could be expected for September 1990, and called upon the Council to make a rapid decision on the basis of these proposals, in line with the decisions taken at Dublin I.

Before the European Council could meet again, unification had taken place. But, like the apocryphal John Wayne character, it had done what it had to do.

ii. The Commission

Until July 1990, the Comission pragmatically rode two legislative trains, one relatively fast, and one relatively slow. The slow train was the negotiation of a trade agreement with the GDR, as encouraged by the 1989 Strasbourg Council, and following in the wake of the Community's pioneering agreement with Comecon. The fast train was unification which, folllowing Dublin I's decisions, was not to be considered an enlargement but was nevertheless tantamount to one.

From the outset, the Commission recognised the need for close and centralised cooperation, both at political and at administrative level. At the political level, an ad hoc working group was established within the Commission college early in 1990, consisting in principle of all Commissioners but in practice of those whose fields of competence were in any way affected by the unification process. The college group was chaired by the German Vice-President of the Commission, Martin Bangemann (Bangemann's affiliations with the FDP, and hence with the FRG's governing coalition surely facilitated relations and dealings with the German government). At the administrative level, a specialised coordinating 'task force', composed of a small secretariat and specialists from the various services, was set up within the Commission Secretariat General in May 1990 (Commission decision 26 April), and corresponding units were designated in those Directorates-General most affected.

Confirming the political importance the Commission attached to this 'dossier', the task force was to report directly to the Secretary General, David Williamson, and was headed by the Deputy Secretary General, Carlo Trojan.

The Commission produced a first Communication to the Council on 19 April 1990, in which it set out 'scenarios' for the unification procedure and integration into the Community, and identified the chief problems likely to arise. This Communication also attempted a first quantification of the enormous amount of negotiation and legislative adaptation that would be needed. On 13 June 1990, the Commission adopted a proposal for a Regulation (duly adopted by the Council of 28 June) which permitted the creation of a *de facto* customs union between the Community and the GDR in the period after the *Staatsvertrag* and before the *Einigungsvertrag* (that is, after economic, monetary and social union, but before total unification). The proposal was accompanied by two measures, one on controls, and one on special quota arrangements for steel and textiles.

When negotiations between the GDR and FRG authorities had reached a late stage, the Commission drafted a further Communication, on 14 June 1990, analysing the implications of the *Staatsvertrag*. In the wake of the 1 July 1990 implementation of the *Staatsvertrag* and the advancement of the date of unification to 3 October, the Commission advanced adoption of its overall legislative package (as called for by the Dublin I Council) at a special meeting on 21 August 1990. The package consisted of three 'volumes'; Volume I was an explanatory memorandum, Volume II contained the legislative proposals, and Volume III contained an analysis of the financial implications of unification. (Because of this division, the legislative package was sometimes referred to simply as Volume II.) Following the Commission's integration scenario, as elaborated in its 20 April Communication, the legislative package consisted of a series of legislative measures and technical adaptations, designed to facilitate a gentle integration of the former GDR territories into the FRG and the Community during a transitional phase. The sheer scale of the Commission's achievement - akin to that involved in the formal accession of a new Member State - should not be underestimated. In effect, the Commission carried out a detailed and accelerated review of the entire body of

existing Community law in order to identify where there were objective grounds warranting technical adjustments and/or transitional measures (chiefly derogations). With a weather eye to the gathering pace of events, the Commission also proposed two emergency interim measures, designed to tide the FRG and EC authorities over were formal unification, and hence application of Community law, to take place before the transitional measures could be adopted.

iii. The Parliament (2)

By a Resolution of 15 February 1990, the Parliament decided (Rule 109(2) of its Rules of Procedure) to institute a 'Temporary Committee on the Implications of German Unification for the European Community'. The Resolution referred to the Commission's decision to set up its own working group. Clearly, the initial intention was that the Temporary Committee should act as a parliamentary monitor and counter-balance. Composed of twenty members, the Committee held its first meeting on 1 March in Brussels. A Spanish Christian Democrat, Fernandez Albor, was elected Chairman, and a young British Labour MEP, Alan Donnelly, was appointed rapporteur. (Donnelly, part of the 1989 intake, had rapidly won his parliamentary spurs as rapporteur on an important report on Central Bank cooperation, part of the preparations for Stage One of EMU, as elaborated in the Delors Report.) At the outset, when unification seemed a fairly distant prospect, it was supposed that the Committee would make Parliament's views known through an 'initiative report' (that is, not drafted as part of a formal consultation process), the traditional method in the absence of formal Commission proposals. However, because of the clear potential for rapid change in the situation, Parliament's Enlarged Bureau authorised the Temporary Committee to draft both an interim and a final report. The views of Parliament's standing committees were solicited throughout March, and the Interim Report was adopted on 12 July 1990.

Meanwhile, in response to events unfolding in the GDR, Parliament adopted several Resolutions. A first, adopted on 4 April 1990, responded enthusiastically to the results of the 18 March GDR elections, and began a first tentative analysis of

the needs and consequences of unification. A second Resolution, adopted on 17 May (de Mazière had given an informal address to MEPs the day before), supported the general conclusions of the special Dublin I European Council. These Resolutions provided the plenary and the political groups with a first means of expressing their views on the rapidly-changing political and economic situation.

Although the 12 July Donnelly Interim Report attempted a sectoral analysis of the consequences of unification, its chief demands and complaints were procedural in nature. As stated above, Parliament regretted that the European Council had not decided in favour of the new Treaty approach as, under the provisions of EEC Article 237, it would have required Parliament's assent and ratification by 'all Member States in accordance with their respective constitutional requirements'. It also identified the need for an inter-institutional agreement on the calendar and working methods. Appended to the Interim Report was a Resolution which made the Temporary Committee the competent committee, in the sense of Parliament's rules, for the consideration of the legislative proposals ('Volume II') that the Commission had been charged to prepare by the European Council. This represented a major concession by Parliament's standing committees, and was only granted after protracted debate. The standing committees were jealous of their legislative prerogatives, and were only reluctantly won over to the argument that the pace of events would otherwise risk outstripping Parliament's capacity to respond. The Dublin I proposal for an overall legislative package was also only grudgingly accepted. Several MEPs had argued strongly in the Temporary Committee for separate parliamentary scrutiny of each Commission proposal. Again, practical arguments about limited timetabling won the day. Two further procedural considerations, 'comitology' and the conciliation procedure, are dealt with separately below.

Following the Commission's 21 August adoption of Volume II, and the bringing forward of the date of unification to 3 October, Parliament was urgently consulted on the two Commission proposals for emergency interim measures. Donnelly's rapporteurship was rapidly extended to the two proposals and, although Parliament was only formally consulted by the Council on 6 September, the Committee was

able to begin its consideration on the basis of informally-transmitted texts. These were first examined at a hybrid meeting of Heads of Political Groups and the Temporary Committee on 29 August. What then happened to the emergency interim measures is considered in detail below (7.i and 7.ii). The Commission's major package of proposals on transitional measures and technical adaptations, 'Volume II', was given its first reading in the 22-26 October parliamentary session, and its second reading in the 19-23 November session, and was adopted by the Council on 4 December 1990.

a. 'Comitology'

Although ultimately overcome, a fundamental parliamentary objection surfaced in relation to the envisaged method embodied in the Commission's proposals. It was championed in the Temporary Committee by Sir Christopher Prout, leader of the European Democratic Group (composed of British and Danish Conservatives), and an acknowledged constitutional expert within the Parliament. The problem focused on the proposed delegation of powers to the Commission to adapt legislation and authorise derogations. The Commission argued that the legislation had to include provision for the delegation of implementing powers, 'so that any adjustments needed in the light of new information or developments in the former GDR can be made promptly' (Volume I). It based its proposal on EEC Article 145 and Council Decision 87/373. These dry figures hide one of the most arcane and yet simultaneously one of the most hotly contested areas of inter-institutional dispute, known to insiders by the bastardised French jargon of 'comitology' (3).

Since it *is* very arcane, great detail will not be entered into here. In short, Council Decision 87/373 laid down three standard formats (seven variants altogether) for the Committees established to 'assist' the Commission in exercising delegated powers. These Committees are composed of national civil servants. The fundamental point is that Parliament has no say in these Committees at all; according to the three formats, the Commission has more or less power, but the Parliament none at all. In general, therefore, Parliament is deeply suspicious of

delegated powers and, where unavoidable, favours those Committee variants that give the Commission more power, on the basis that at least it has indirect control over the Commission. The basic institutional positions on 'comitology' are defended with almost religious fervour, and there was no difference on this occasion, with Parliament's suspicions focusing on the apparently open-ended *carte blanche* the Commission was proposing for itself. In the end, a majority in the Committee accepted the Commission's explanation that the sort of flexibility the *sui generis* situation necessitated could only be guaranteed through such a broad delegation of powers, but one of the Parliament's earliest formulated demands (a particular concern of the French Liberal Group member and former President of the European Parliament, Simone Veil) was that these special powers should be strictly limited to an absolute minimum in time.

b. The Conciliation Procedure

Prout also led demands for another procedural innovation. After the adoption of the Single European Act in 1986, Parliament undertook a thorough overhaul of its Rules of Procedure, particularly in regard to the newly-constituted cooperation procedure. Prout had been Parliament's rapporteur on that occasion, and one of the innovations he had sought to introduce was an extension of the conciliation procedure (previously restricted to certain measures in the budgetary field) to the new cooperation procedure (4).

The old conciliation procedure, established by a joint institutional declaration (4 March 1975), created a 'Conciliation Committee', consisting of the Council and representatives of the Parliament, assisted by the Commission, in which serious differences about Community acts having 'appreciable financial implications' could be whittled down until the positions of the two institutions were sufficiently close for Parliament to be able to give its opinion.

The Prout-inspired Rules 43 and 44(1) sought unilaterally to introduce a more light-weight conciliation mechanism for cooperation procedure first readings, where Council intended 'to depart from the opinion of Parliament'. In the budgetary

sphere, Council and Parliament are twin arms of the budgetary authority. In fact, it is the nearest Parliament gets to being a true co-legislator. Clearly, Prout hoped that the Parliament might gain similar status through the functioning of the cooperation procedure, but Council had never accepted Rule 43. Prout now argued that the unique nature of the German unification legislative package put Parliament in a powerful position to exact Council recognition of Rule 43, and thus to create a precedent for the future application of the conciliation procedure. As is discussed in Section 9, although what occurred was not a literal application of Rule 43, Parliament did gain a sort of variation on the conciliation procedure (Parliament-Presidency) at both first and second reading stages.

iv. The Council

Although theoretically uninvolved until in reception of the Commission's proposals, the Council was naturally deeply involved from the very beginning, both because the affected Member State and the Commission reported back constantly on developments in negotiations with the GDR authorities, but also because of the general enthusiasm and concern of all Member State governments for the unification process, as first iterated at the Strasbourg European Council and then emphatically underlined at the Dublin I Council, together with the more general geopolitical considerations involved, particularly for the three Member States that were also part of the 'four plus two' process.

With the exception of the 28 June adoption of the Commission's proposed Regulation for the creation of a customs union with the GDR, the Council first became involved at a formal, procedural level in the first, post-21 August 'trialogue' between the three institutions on the legislative timetable, which was to culminate in the three Presidents' joint statement on the outcome of the Trialogue (Section 5) and, at the outcome of a specially-organised 4 September COREPER meeting, in consulting Parliament on the emergency interim measures. A further COREPER meeting on 6 September approved the provisional timetable agreed by the Italian Presidency in the context of the Presidential Trialogue. With regard to Volume II

itself, Council established an ad hoc German unification working group to consider the proposed legislation in specialised detail (external aspects, internal market, environment, structural funds, and so on).

4. The Commission's Integration Scenario and the Need for Provisional Measures

In its 20 April Communication on German unification, the Commission had foreseen three distinct stages for the integration of the GDR into a unified Germany, and hence into the Community:

- an interim adjustment stage, which would begin with the introduction of inter-German monetary union, accompanied by social and economic reforms (what was to become, in effect, the *Staatsvertrag*);
- a second, transitional stage, beginning with the formal unification of the two Germanies;
- a final stage, in which the *acquis communautaire* would fully apply to all German territory.

During the interim adjustment stage, the GDR was expected to gradually bring in the legislation necessary for step-by-step integration into the FRG and Community system. The start of the transitional stage would coincide with the formal unification of the two German states. Community legislation would then automatically apply in the former territory of the GDR except where specifically decided otherwise.

In its 4 June Communication on the implications of the *Staatsvertrag*, the Commission recognised that the interim adjustment stage would begin with the entry into force of the *Staatsvertrag* on 1 July. It was impossible to set a timetable for full unification, and thus to foresee exactly how long the adjustment stage would last. Donnelly's Interim Report, adopted as late as 12 July, stated that 'unification could well take place by early 1991'. As has been pointed out, by the time the Commission met, on 21 August, to consider Volume II, it had become clear that the

adjustment stage would be very much shorter than had been envisaged; so short, in fact, that unification would be achieved before the Community institutions had had time to conclude their examination of the necessary legislation. As the Dublin I Council had been aware, a serious problem would have arisen, particularly in the East, after 3 October if Community law had been in full application, without the necessary derogations in place, and with no practical possibility for the German authorities to meet all of their obligations. To avoid this situation, the Commission had put forward its two proposals (a Directive and a Regulation) for emergency interim measures. Even so, the timetable was always going to be extremely tight, since only one Parliamentary plenary session was scheduled between the Commission's August meeting and the date ultimately chosen for unification and, since the legal base of the proposed Directive included EEC Article 100A, an unprecedented two readings would have to take place during that one September week.

5. The Presidential Trialogue

The Commission's 14 June *Staatsvertrag* Communication had underlined the importance of close institutional cooperation, as had Parliament in its several Resolutions and Interim Report. This now became imperative. In addition to constant concertation on legislative timetabling at the administrative level, there was need for a political level agreement. At the initiative of Parliament's President, Enrico Baron Crespo, a 'trialogue' was organised between the Presidents of the three institutions involved. The Presidential Trialogue took place on 6 September, with Jacques Delors attending for the Commission, and Gianni De Michelis for the Italian Presidency-in-Office.

The three Presidents adopted a series of conclusions and undertakings related both to the overall legislative package, and to the passage of the emergency interim measures. They agreed that all measures in the overall package should have entered into force 'by the end of 1990 at the latest', thus providing an outer envelope for the application of the emergency measures. With regard to those measures, the

Parliament undertook to hold a first reading on Tuesday, 11 September and, 'if necessary', a second reading on Thursday, 13 September. The Council meanwhile undertook to consider Parliament's amendments on Wednesday, 12 September. The Presidential Trialogue had given the necessary political clearance, but there was clearly no room for error, and therein lay the rub. The political heads of the institutions had collectively raised their stakes. From then on, no institution would want to be seen to be reneging on the agreement lightly, for fear of being accused of wrecking the legal process of unification itself.

6. The Substance of the Commission's Emergency Proposals

i. The Underlying Process

As pointed out in Section 4, the Dublin I Council's decision against application of EEC Article 237, and the FRG's decision to use Article 23 of the Basic Law meant that unification would entail the incorporation of the GDR *ipso jure* into the Community legal order. In other words, the entire panoply of Community law would automatically apply. Such integration would not involve any amendment of the Treaties or any other act constituting primary law. By contrast, an immediate, comprehensive application of secondary legislation was not possible. As with any accession, various technical adjustments were needed on account of the specific features of the former GDR's socio-economic and legal system. More numerously, particular difficulties in several sectors necessitated transitional arrangements to allow the former GDR's legislation to be gradually adapted to the Community system. These adjustments and transitional arrangements formed the bulk of the Commission's Volume II. However, since unification was to take place before the package was adopted, the Commission sought special temporary powers to authorise the German authorities to retain existing legislation applicable in the territory of the former GDR which did not conform to Community law, but which would ultimately be covered by Volume II transitional measures.

ii. Scope

The temporary powers the Commission sought were contained in two provisional measures, a Regulation and a Directive. The draft Regulation (which, in its original proposed form, was subject to the classic consultation procedure) consisted of interim measures to be applied in such fields as relations with Eastern European countries, information exchange on consumer products, and the environment. The draft Directive (which was to be subject to the cooperation procedure) was to cover: transitional internal market measures based on EEC Article 100A; transitional measures concerning the recognition of professional qualifications; transitional measures, based on EEC Article 118A, related to workers' health and safety; and some environmental matters related to the internal market.

iii. Method

The substance of the two texts was broadly similar. Article 2 of both the draft Directive and the draft Regulation granted to the Commission the power to 'authorise the Federal Republic of Germany to provisionally keep in force in the territory of the former GDR legislation which does not comply with a Community act'. The Commission powers were to be carefully circumscribed: legislation kept in force this way had to conform to a Volume II transitional measure, as listed in annexes; the authorisation was to remain in force only until the Council had taken a final decision on Volume II; the FRG and the Commission had to notify the Parliament, the Council and the Economic and Social Committee of any use made of the authorisation; and, lastly, Article 4 of the Directive (with a cross-reference to Article 5 in the Regulation) provided for a Regulatory (type 'IIIA') Committee to adopt any measures required at Community level.

7. The Legislative Passage

i. First Reading

As noted in Section 3.iii, although Parliament was not formally siezed by the Council until 6 September, the Temporary Committee was already able to begin an informal consideration of the emergency proposals at its 29 August meeting. This gave the Commission additional warning of the likely sticking points and problem areas, and together with the Italian Presidency it was able to pass this information on to the 4 September COREPER meeting. With the legislative timetable firmly established by the 6 September Trialogue, the Temporary Committee met again on 10 September in the margins of the Strasbourg plenary. By then Parliament had officially received the proposals and decided to refer them to the Temporary Committee. (In a further example of helpful rule-bending, the deadline for amendments in committee had been set at 6 September; that is, four days *before* Parliament had been officially consulted.)

In the Temporary Committee's 29 August and 10 September meetings, Donnelly had supported the idea of emergency measures and the delegation of extraordinary powers to the Commission as the only possible way forward, but he had also sought guarantees on four principle issues, announcing his intention to table amendments to cover these. First, he insisted that the emergency procedure should not prejudice Parliament's position on the substance of the Volume II derogations and measures. Secondly, he sought a strict time limit on the Commission's extraordinary powers, to 31 December 1990. Thirdly, he favoured a direct dialogue with the FRG and the GDR authorities, and demanded that the Commission and the German authorities should inform Parliament of any measures taken under the emergency powers. Lastly, on the 'comitology' issue, the rapporteur insisted that, while not wishing to re-open the traditional inter-institutional conflict, he had reservations on the proposed committee variant. (The Commission, caught between 'the devil and the deep blue sea', had proposed a Regulatory Committee to avoid conflict with the Council.)

In order to allay the Committee's misgivings about the FRG authorities' capacity to deal with the practicalities of maintaining an interim regime within an essentially unified structure, and to assure Parliament of the FRG's intentions of maintaining a dialogue, the FRG Deputy Foreign Minister, Irmgard Adam Schwätzer, attended the 10 September Strasbourg meeting, on the eve of the first reading. Her visit provided vital reassurance for the Temporary Committee, and enabled the rapporteur to confidently pass on this reassurance to the plenary. Neither Council nor the Commission raised any fundamental difficulties with the no-prejudice clause and the limiting date, which left the familiar issue of 'comitology'. The Commission was essentially indifferent on the matter, and its representative in the Temporary Committee, Deputy Secretary General Carlo Trojan, urged the two institutions not to prejudice agreement on the basis of such an arcane dispute.

The first reading plenary debate took place the next day, with Delors and Bangemann representing the Commission, the Italian Deputy Foreign Minister, Vitalone, representing the Council, and a delegation of *Volkskammer* representatives attending as observers. Although several speakers sounded notes of caution, the debate revealed a remarkable degree of consensus, later reflected at the vote, where the Temporary Committee's amendments were voted through on large majorities. Parliament adopted amendments in four principal areas, largely reflecting the misgivings voiced by Donnelly in committee: a non-prejudice clause; introduction of the limiting date of 31 December 1990; information on the use of the emergency powers; and 'comitology', where Parliament proposed a different committee variant ('management', or 'IIa') that gave the Commission slightly more power. In addition to these 'key amendments', which Donnelly referred to as 'pre-conditions', Parliament sought concessions or reassurance in three other areas: a statement of intent from the Commission on how it would use the emergency powers; practical undertakings on monitoring; and reassurances on the financial implications of unification.

Delors took on board most of the Parliament's demands and, at the end of the debate, Bangemann assured Parliament on the financial aspects. In turn, Vitalone assured Parliament of the Italian Presidency's 'availability, close attention, and

absolute respect' for Parliament's views, promosing to transmit them faithfully to the next morning's specially convoked Council meeting. Parliament's first reading report was adopted 257:35:6, with a few members of the far right and the far left abstaining or voting against.

ii. Second Reading

Parliament's amendments were officially transmitted to the Council later the same evening. As expected, 'comitology' proved the major sticking point, but here the Italian Presidency and the Commission had been able to forewarn the Council, and a compromise in line with Parliament's amendments was taken up. One substantial decision was to change the legal base of the Regulation to contain EEC Article 100A. The two Council texts were then translated and transmitted back to the Parliament on the Wednesday evening.

Two potential procedural problems arose. Firstly, the only reading on what had formerly been a Regulation had been delivered on the Tuesday evening, but now that EEC Article 100A had been added to the legal base, it became subject to the cooperation procedure, thus creating an almost theological problem. Could the text adopted by the Council be considered as a Common Position? A polite fiction was maintained whereby the Parliament considered it had given its first reading. A second potential problem arose in relation to the Commission's commentary on the Common Positions. According to the conventions established between the institutions, this should have been delivered in written form, duly translated into all the Community languages, but there was insufficient time for this. In the event, Parliament authorised the Commission to communicate its comments orally to the Temporary Committee.

The Committee met immediately after the Wednesday sitting. Vitalone introduced the Common Positions, and Trojan communicated the Commission commentary, as arranged. This was short and sweet. In the Commission's opinion, Council had met all of the Parliament's demands, and it therefore recommended approval. In another departure from institutional convention, Council informally

provided Parliament with copies of the statements made for insertion in the Council minutes that had accompanied the adoption of the Common Positions. This was a considerable departure. Unilateral, bilateral and multilateral statements in the minutes are a vital device for reaching agreement in the Council and, although they might occasionally leak out to parliamentarians, are usually considered to be highly confidential. However, on this occasion the ten statements formed an integral part of the institutional compromise and, as such, were referred to both in the Commission's commentary and by the rapporteur.

The second reading debate took place on schedule the next day, with Bangemann representing the Commission and Vitalone the Council. Donnelly announced that his 'preconditional' amendments had all been taken on board, and that other parliamentary preoccupations had been met by clear statements in the Council minutes. Since the Council had introduced two minor changes to the text, Parliament exercised its prerogative in introducing two new minor amendments. Bangemann promptly took these on board, and Vitalone assured the Parliament of the Presidency's support. At the end of it all, Bangemann spoke of 'the exemplary spirit of conciliation' which had guided the inter-institutional dialogue throughout, and underlined the importance of this for future discussions on the extension of Parliament's powers. The rapid political process had, he affirmed, been an 'acid test' for the Community, refuting perceptions of bureaucratic rigidity and underlining Community solidarity.

EEC Article 149.2(d) provides that 'The Commission shall, within a period of one month, re-examine the proposal on the basis of which the Council adopted its Common Position, by taking into account the amendments proposed by the European Parliament'. In fact, the Commission was able to transmit its re-examined proposal the next day, 14 September. At its meeting on Monday, 17 September, the General Affairs Council was able to adopt the Commission's re-examined proposals as they stood. Thus, just twenty-seven days after the Commission had adopted its original draft proposals, and only ten days after the Council formally consulted the Parliament, the emergency legislation had been adopted, leaving the Community and FRG authorities fifteen clear days before German unification took place.

8. Institutional Flexibility

Those who have seen the Community's institutions and its legislative process at close quarters would be entitled to ask 'how was it done?' After all, in giving a second reading opinion within twenty-four hours of receiving the Council's Common Positions, Parliament was doing what it could have done within three, or even four, months, had it so wished. On a purely administrative level, constant concertation between the three institutions on timetabling required an extraordinary degree of coordination, the more so since the uncertainties about the date of unification presented the legislative process with a moving target. How, then, was it done? Three factors - centralisation, political preparation, and, above all, institutional flexibility - were of particular importance.

At the political level, institutional positions were effectively channelled through just a few key actors; Delors and Bangemann, Baron Crespo and Donnelly, Vitalone, and Adam Schwätzer. This concentration of political power (in the sense of freedom to manouevre) and responsibility (each had to go back and convince the members of his or her respective organisation of the merits of any agreement reached or concession made) in the hands of just a few key players clearly facilitated compromise and and cooperation. Concentration at political level was matched at administrative level. Small, competent and dedicated units were set up within each of the three Community institutions (the task force in the Commission's Secretariat General, the secretariat to the Temporary Committee in the European Parliament, and latterly the secretariat to the Council ad hoc working group), and key officials designated in the German, Irish and Italian permanent representations. Enjoying priority within their own institutions and privileged access to information and resources, sharing long hours, and constantly rubbing shoulders in negotiating rooms with each other and with the FRG authorities, these administrative concentrations permitted rich and constant flows of information, discouraged bureaucratic rigidities (sometimes to the chagrin of their colleagues), and facilitated rapid problem solving.

A second important factor was the degree of political preparedness of the institutional actors involved. Here, the Commission and the Council Presidency played vital roles in explaining positions and informing Parliament's rapporteur and Temporary Committee, COREPER and the Council, and in trying to head off potentially divisive issues by laying early foundations for compromise. On the 'comitology' issue, for example, the Commission had already won provisional agreement from COREPER on what was to become the final compromise with Parliament (the halfway house of a Management Committee) even before the Temporary Committee had tabled its amendments. In the weeks leading up to the September plenary, there were several informal meetings between Parliament's rapporteur, the Council Presidency, and the Commission, at which minor problems were boiled off, and more substantial differences distilled down to their essentials; in effect, an informal conciliation procedure. The Commission and the Italian Presidency acted as constant go-betweens. In addition, the three institutions demonstrated preparedness to re-organise their internal work around the agreed timetable in such a way as to facilitate the process of compromise. Thus, for example, the Parliament's 29 August Temporary Committee meeting had been preceded by a meeting of the Enlarged Bureau, with Bangemann attending both.

A third vital factor was an extraordinary institutional flexibility, apparent at both the political and administrative levels, and a preparedness to bend the letter of hard-won or hard-defended institutional conventions. Examples have been scattered throughout this account: clearing Parliament's over-charged and back-logged legislative agenda of much other important legislative work in order to make space for two readings; agreeing to two readings within a week; setting deadlines for amendments that preceded official reception of the proposals; the organisation of extraordinary meetings of the Council and COREPER; making statements in the Council minutes available to the Parliament; changing the Regulation's legal base, and the polite fiction of a first reading; allowing the Commission to make its first reading commentary orally in committee; compromise on the vexed 'comitology' issue; the cooperation of the German Deputy Foreign Minister; and, despite real misgivings on all sides about the danger of precedents being set, universal

acceptance of the Commission's logic in requesting temporary exceptional powers. Clearly, the institutions were locked into a tight timetable by this logic, and by the undertakings given by the three Presidents at the Trialogue (although in theory only Delors could entirely commit his institution in this way). Clearly, this flexibility had much to do with a sense of historical occasion, and all sides had much to lose if things went wrong. Nevertheless, the institutions proved that they were equal to the occasion by temporarily leaving aside their differences and by adopting the 'exemplary spirit of conciliation' and of 'constructive participation' that Bangemann and Vitalone had emphasised in their speeches to the Parliament.

9. Conclusion: Lessons for the Institutions

The procedural and political repercussions of the concessions given in September 1990 may take a long time to work their way through the Community system since, despite disclaimers on all sides, it will be difficult to defend principles temporarily conceded with the same degree of plausibility and intensity as was possible before. Ultimately, however, the process itself will be largely forgotten, and the urgent measures adopted on 17 September will be seen in retrospect as a minor element in the unification and integration process. As stated at the outset, their adoption represented a quiet victory for the Community institutions, both jointly and severally. At the collective level, it demonstrated graphically how they were able to rise to the particular demands of a unique historical situation. But the *sui generis* nature of the situation does not mean that lessons of possible future relevance cannot be drawn from the experience at the individual institutional level.

For the Council, or at least for the Council Presidency, there was a new experience of entering into real ministerial dialogue outside the classic budgetary process. As was seen in 3.iii.b, application of the conciliation procedure, previously considered to be restricted to the budgetary field, had been one of Parliament's earliest demands once the vast extent and short timetable of the unification process became evident. Though it was never officially referred to as such, the repeated ministerial dialogue with the Parliament, in plenary and in committee and on

several occasions in informal talks with the rapporteur, amounted to a conciliation procedure. The historical backdrop against which this procedure was taking place clearly discouraged relatively minor institutional differences and preoccupations from taking on major significance as leverage in negotiations, as can sometimes otherwise be the case. But two lessons remain clear for the Council. Firstly, ministerial dialogue did not lead to any inflationary tendencies in Parliament's position, which was initially realistically couched and remained consistent and reasonable throughout. Secondly, ministerial dialogue was a positive experience in itself, facilitating agreement on most outstanding issues. (The situation is reminiscent of a schoolboy comic book scene, where the surly and aloof boy, who had previously kept his classmate at arm's length, is obliged by circumstances to join forces to achieve a commonly-desired aim. The caption underneath would read something like 'By Jove! Old Parliament's not such a bad chap after all!')

There is a possible lesson for the Commission to draw in the more general context of institutional reform and, in particular, the two Inter-Governmental Conferences. Parliament has been consistent in its demands for a move towards shared co-decision-making power with the Council. As most recently outlined in the third Martin Interim Report (Parliament's proposals to the Inter-Governmental Conferences), this would amount to some version of an extension of the powers that Parliament currently enjoys in the budgetary field, including recourse to a conciliation procedure. It may be thought that co-decision for the Parliament would necessarily amount to a diminution in the Commission's power and influence. Experience with the passage of the emergency measures showed that these apprehensions might be misplaced. Article 1 of the 1975 Declaration on the conciliation procedure foresees the 'active participation' of the Commission, and this language is taken up in Parliament's Rule 43. In the events recounted above it is clear that the Commission played a vital and indispensable role as go-between, negotiator and honest broker, in addition to its traditional role as drafter of the proposals, and as intended recipient of the requested special powers. In the constellation of institutional powers, constitutional reform need not necessarily be a zero-sum game.

Parliament can draw several lessons from its experience. The early life of the Temporary Committee was marred by fractious and at times ugly disputes over its role and powers relative to the standing committees. These differences were finally overcome, though grumbles resurfaced regularly (5). Parliament's experience showed that the decision to grant the Temporary Committee ad hoc *chef de file* powers was not only appropriate, but vital. The lesson is clear. Parliament can only succeed where centralised political and technical coordination can overcome internal rivalries, and where mechanisms for formulating and expressing consensus are allowed to function freely.

At the inter-institutional level, Parliament may draw another lesson; that it can only hope to influence the other institutions if it possesses sufficient leverage in matters that are as salient to the other institutions' interests as they are to the Parliament itself. The time factor clearly gave Parliament additional leverage (as well as imposing additional restraint), but its chief arm was the other institutions' fear of failure and public embarrassment on a matter that both considered to be of extreme importance.

All three institutions have together learnt two important lessons that, as Bangemann intimated, may be of great relevance in the context of the *ouverture* towards other East European countries, but are also of more general and everyday application; flexibility is not necessarily synonymous with weakness, and direct institutional dialogue is the most effective early-warning device and problem solver.

Notes

(1) For two early considerations of the legal issues involved, see Tomuschat, C., 'A United Germany within the European Community', and Timmermans, C., 'German Unification and Community Law', in *The Common Market Law Review* N ° 27, 1990, pp. 415-436 and 437-449, respectively.

(2) Parliament's and the Temporary Committee's activities have been summarised in an internal Parliamentary document. See Fernandez Albor, G., and Donnelly, A., 'Draft Report on Activities for the Enlarged Bureau', PE 145.035, 28.11.90.

(3) The term 'comitology' was probably first coined in English by C. Northcote Parkinson ('it is surprising more attention has not been paid to the science of comitology'), in *Parkinson's Law*, John Murray, London, 1959, p. 39. For a general explanation of 'comitology', see Nicoll, W., 'Qu'est-ce la <<comitologie>>?' in *Revue du Marché Commune*, N ° 306, 1987, pp. 185-187 and, for an exposition of Parliament's view, Reich, C., 'Le parlement européen et la <<comitologie>>', in *Revue du Marché Commune*, N ° 336, 1990, pp. 319-323.

(4) On the conciliation proceduree, see Forman, J., 'The Conciliation Procedure', in *Common Market Law Review*, N ° 293, 1986, pp. 3-10.

(5) For example, the Commission's proposals for the creation of a *de facto* Customs Union between the Community and the GDR were sent to Parliament's Committee on Agriculture, Fisheries and Rural Development so that 'Since it was not the committee responsible and the proposals had not been referred to it for an opinion either, (the Temporary Committee) was unable to set out its position in formal terms'. (PE 145.035, p. 6).

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NB: various texts referred to will not be or have not yet been published officially. In these cases, the internal numbers of the various institutions have been cited.

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* SEC (90) 751, SEC (90) 1138 and COM (90) 400 have been published together in a special supplement to the EC Bulletin (4/90).

ii. The European Council

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iv. The Parliament

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- Resolution of 4.4.90, B3-691/90 and OJ C 113, 7.5.90.
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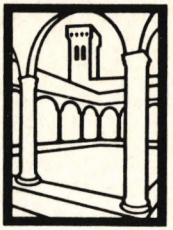

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