German Unification and European Community Environmental Policy

Maria J. Ionata
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INTRODUCTION

The opening of the frontier between East and West Germany in November 1989 provided the West's first real glimpse of the condition of the East German environment. The former Communist regime in the German Democratic Republic (GDR)\(^1\) had been reluctant to monitor and release information about the environment.\(^2\) Data released by the GDR in connection with "Eco-Glasnost,"\(^3\) and subsequent to the collapse of the Berlin Wall and German reunification, verify that East Germany faces a serious environmental crisis.\(^4\)

The European Community (EC or Community) has eagerly supported German unification and has encouraged that it take place within the framework of Community law.\(^5\) Accordingly, the Commission of the European Communities (Commission) has examined EC environmental law to determine the feasibility of applying these rules to a unified Germany.\(^6\) In light of the vast disparity in the condition of the environment between East Germany and other member states, the Commission has determined that immediate German compliance with EC environment standards is impossible. Therefore, the Commission has proposed a

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\(^1\) This Note will use German Democratic Republic (GDR) and the Federal Republic of Germany (FRG) to designate the former East and West German Governments, and will refer to the current unified state as Germany.

\(^2\) Environmental Protection Issues in Eastern Europe, 13 Int'l Env't Rep. (BNA) No. 6, at 258 (June 13, 1990) [hereinafter Environmental Protection Issues].

\(^3\) Eco-Glasnost is a term used to describe a policy of emerging environmental openness.

\(^4\) Id.


\(^6\) See Explanatory Memorandum, supra note 5, at 2, 109–12.
series of transitional measures. These proposals apply to areas where interim measures are necessary for a smooth and harmonious transition.

The proposals primarily apply to EC directives governing air and water pollution and waste disposal, providing adjustment periods determined by the degree of environmental damage present. Because of the urgency of the East German environmental situation, the Commission has proposed that the period in which unified Germany must comply be shorter than the periods permitted the other member states in the original directives, but long enough for unified Germany to adapt to Community standards. While the proposals are specific to German unification, they are also designed to promote tighter enforcement of environmental legislation throughout the Community by subjecting existing environmental standards to closer scrutiny.

This Note examines the draft proposals for applying EC environmental law to unified Germany. Part I considers the current state of the environment in the GDR. Part II then discusses the proposed transitional measures and the framework for their implementation. Part III evaluates the measures in light of the objective of full European integration and the prospect of improving Community-wide compliance with existing environmental regulations. This Note concludes that while these proposals do strike a balance between the objective of immediate environmental reform and the difficulties incident to such reform, they may be too flexible to achieve significant results.

I. THE ENVIRONMENTAL CRISIS IN THE GDR

Socialist economic policy has turned "the rivers into sewers, made the air visible and smelly, and poisoned the soil." The
flow of data from the GDR reveals a gloomier environmental picture than Western analysts had predicted.\textsuperscript{11} In fact, these data are still only approximations because the former East German Government lacked the facilities to accurately analyze and measure the extent of the damage.\textsuperscript{12} Several factors contributed to the East German environmental crisis including the use of brown coal, low grade gasoline, and outmoded production methods, the uncontrolled dumping of waste, and the lack of environmental regulation.\textsuperscript{13}

A. Brown Coal

A major factor behind the GDR's environmental problems was that it lacked varied, indigenous energy resources, particularly crude oil and natural gas.\textsuperscript{14} As a result, the GDR powered its massive post-war industrialization through the use of lignite, or brown coal.\textsuperscript{15} This widespread use of brown coal has had disastrous consequences for the environment. Ecological hazards including the open-cast mining of brown coal have severely limited the amount of land available for agricultural development and have led to the extinction of plant and animal species.\textsuperscript{16} Furthermore, the burning of brown coal emits enormous amounts of sulfur dioxide ($\text{SO}_2$).\textsuperscript{17} Brown coal is an inefficient energy source that is rich in sulfur and produces relatively few calories of energy.\textsuperscript{18} As a result, East Germany has the highest levels of $\text{SO}_2$
emissions in Europe, with an average of 300 kg of SO₂ emitted per capita per year, as compared with the Community average of 70 kg.

The severe environmental damage is also attributable to reliance on antiquated power stations and domestic stoves. One such station emitted more SO₂ than all of the stations in Norway and Denmark combined. While the Federal Republic of Germany (FRG) has halved SO₂ emissions since 1980, these emissions have increased in the GDR by approximately 20 percent, making the GDR the largest exporter of SO₂ to the EC.

B. Low Grade Gasoline

The high level of air pollution in East Germany is also attributable to reliance on low grade gasoline to fuel the nation’s 3.5 million automobiles. Automobiles lack catalytic converters and may be the world’s dirtiest form of transportation, emitting high levels of nitrogen oxides (NOₓ) and carbon monoxide. One East German automobile emits as much carbon monoxide as 100 Western automobiles equipped with catalytic converters.

C. Outmoded Production Processes

Another cause of environmental damage was the GDR’s reliance on outmoded production processes in energy intensive industries. The combination of inefficient methods to produce goods that require high levels of energy input and the use of brown coal to fuel these methods has proven extremely damaging. A significant percentage of the energy conversion machinery in East Germany is over 20 years old. These inefficient machines

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19 Report to Parliament, supra note 4, at 78.
20 Explanatory Memorandum, supra note 5, at 110.
21 Cleaning East Germany, supra note 11.
22 Report to Parliament, supra note 4, at 78.
23 Explanatory Memorandum, supra note 5, at 110. One commentator noted that the burning of brown coal in the GDR has produced “air quality reminiscent of London at its Dickensian worst.” Pollution Report, supra note 15, at 17.
24 See Environmental Protection Issues, supra note 2, at 259. The GDR’s lack of indigenous crude oil and natural gas forced the country to depend on Soviet imports of these resources. But Soviet pricing mechanisms required the countries of Eastern Europe to pay higher prices for Soviet oil and gas. As a result, the GDR was forced to rely on cheaper domestic energy sources such as brown coal. See id. at 258.
25 See Report to Parliament, supra note 5, at 78.
26 Id. The Report to Parliament states that 59 percent of steam generators and 36 percent of steam turbines are over 20 years old.
power industries that rely on energy intensive products, such as aluminum. In light of the absence of market forces, there was no incentive for the GDR to convert machinery used for industry and transportation to the energy efficient equipment used in the West.\textsuperscript{27} If it is to allow for industrial growth in energy intensive industries without relying on destructive production methods, the GDR's system of industrial energy supply and use must be overhauled.\textsuperscript{28} This is especially important because East Germany's per capita energy consumption is now third highest in the world, exceeding that of West Germany by 25 percent.\textsuperscript{29}

D. Dumping of Industrial and Agricultural Waste

Uncontrolled dumping of industrial and agricultural waste has severely damaged the water supply in East Germany. East Germany has the lowest ground and surface water potential in Europe,\textsuperscript{30} and 30 percent of its water is "ecologically dead."\textsuperscript{31} Only 20 percent of the water supply is fully usable for drinking water; 35 percent of the water could be used after expensive, advanced treatment, and 45 percent is completely unusable even after treatment.\textsuperscript{32} Furthermore, uncontrolled waste disposal has made the Elbe river in East Germany the most polluted in Europe.\textsuperscript{33}

Sixty percent of industrial wastes are disposed of at dumps that are not subject to any government control.\textsuperscript{34} There are ten times more unauthorized dumps than authorized dumps in East Ger-

\textsuperscript{27} Pollution Report, supra note 15, at 17. The oil crisis of the 1970's drove up the price of oil, forcing the industrial sector in Western nations to develop energy efficient machinery to reduce energy costs.


\textsuperscript{29} Id.; Report to Parliament, supra note 4, at 78.

\textsuperscript{30} Explanatory Memorandum, supra note 5, at 110.

\textsuperscript{31} Current Report, East, West German Environment Ministers Call for Unification of Laws, Practices, 13 Int'l Env't Rep. (BNA) No. 5, at 200 (May 9, 1990) [hereinafter Environment Ministers].

\textsuperscript{32} See Explanatory Memorandum, supra note 6, at 110; Community Gives East Germany Until 1996, supra note 10, at 355.

\textsuperscript{33} Explanatory Memorandum, supra note 5, at 110. Mercury is a particularly common pollutant. Cleaning East Germany, supra note 11. A single East German chemical plant releases ten times more mercury into the Saale river daily than the West German chemical company BASF releases into the Rhine annually.

\textsuperscript{34} Community Gives East Germany Until 1996, supra note 10, at 355. Existing data on the volume and nature of waste are unreliable. Explanatory Memorandum, supra note 5, at 110.
Cautious estimates suggest that 90 percent of disposal sites fail to meet EC standards. Furthermore, despite the lack of space for waste disposal, the GDR had been importing waste from the FRG—some of it toxic—in order to earn Western currency.

E. Failure of the GDR Government to Regulate the Environment

The low priority given to environmental precautions by the GDR Government and the lack of funding for environmental protections further contributed to the environmental crisis. The GDR pursued a policy of rapid industrial growth that depended on available natural resources. The GDR's rigid planned economy allowed for long-term indiscriminate use of natural resources with virtually no consideration for environmental ramifications. Spending on environmental protection amounted to only 0.4 percent of the GDR's gross national product in 1988, compared to 1.34 percent in the Netherlands and 1.07 percent in the FRG.

II. The Proposed Transitional Measures

A. The Need for Transitional Measures

Recognizing that the GDR would need time to comply with Community environmental rules, the Commission suggested

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35 Explanatory Memorandum, supra note 5, at 110. It is difficult to assess the practical difference between authorized and unauthorized dump sites because even the authorized sites do not comply with GDR standards.

36 Id. at 109.

37 See Cleaning East Germany, supra note 14. Existing dump sites will be filled to capacity within a decade. Explanatory Memorandum, supra note 5, at 110.

38 Report to Parliament, supra note 4, at 86.

39 Explanatory Memorandum, supra note 5, at 109. See also Pollution Report, supra note 15, at 17.

40 See Explanatory Memorandum, supra note 5, at 109; Community Gives East Germany Until 1996, supra note 10, at 355.

41 Community Gives East Germany Until 1996, supra note 10, at 355. The result of these combined factors is an “environmentally bankrupt” East Germany. Environment Ministers, supra note 31, at 200. A particularly troublesome consequence of the environmental situation in East Germany is the serious threat to human health. Explanatory Memorandum, supra note 5, at 111. In areas with high levels of air pollution, the number of children with respiratory diseases has risen from every fourth or fifth child in 1974 to every second child in 1989. Report to Parliament, supra note 4, at 79. Thirty percent of the children in these areas suffer from endogenous eczemas. Residents of industrial areas have a life expectancy five to eight years lower than the national average. Community Gives East Germany Until 1996, supra note 10, at 355.


Because immediate application of EC environmental legislation would not be feasible, the Commission has proposed transitional measures.\footnote{\textit{Id}. at 30.} These measures are limited to what the Commission considered to be "strictly necessary."\footnote{\textit{Id}. at 1.} Transitional measures must be warranted by economic, social, or legal grounds.\footnote{\textit{See id}. at 30.} In addition, the measures must be temporary and they must cause as little disruption as possible to the operation of the internal market. The flexibility accorded to Germany can be justified by the general principle of equality in Community law.\footnote{\textit{See id}. This principle is now codified in Article 8c of the EEC Treaty. EEC Treaty, \textit{supra} note 43, at art. 8c.} This principle allows modification of Community rules to account for economic disparities among the member states.

\footnote{The first stage of German unification, monetary, economic, and social union, began on July 1, 1990 with the adoption of the Staatsvertrag (State Treaty). Explanatory Memorandum, \textit{supra} note 5, at 3; Vertrag über die Schaffung einer Währungs-, Wirtschafts- und Sozialunion zwischen der Bundesrepublik Deutschland und der Deutschen Demokratischen Republik, \textit{Bulletin}, Presse und Informationsamt der Bundesregierung, No. 63, at 517–44, May 18, 1990. In effect, this is the most important stage of the unification process. Maxeiner, \textit{Germany Unites: A Legal Primer}, N.Y.L.J., July 5, 1990, at 1, col. 3. The State Treaty addressed the legal substance of unification, cataloguing the FRG laws that the GDR was required to adopt, and establishing the preeminence of Community law over German law. \textit{Id}. at 4. Subsequent stages provided a framework for the adoption of substantive changes in GDR law. Accordingly, during the interim adjustment phase, the GDR gradually adopted the legislation necessary for unification with the FRG and integration with the Community legal system. Explanatory Memorandum, \textit{supra} note 5, at 4. During this stage, the Commission granted the GDR unofficial membership in the EC even though it remained formally outside the Community. This stage ended with the Treaty of Union, which established the constitutional conditions for unification, specifically, the reestablishment of states in the GDR. \textit{Id}. at 4, 26. Formal unification on October 3, 1990 marked the beginning of the transitional stage. Explanatory Memorandum, \textit{supra} note 5, at 4; \textit{Common Market}, \textit{supra} note 42, at 11. The entire body of Community law automatically applies to East Germany. Explanatory Memorandum, \textit{supra} note 5, at 4. The only exceptions to this blanket application of Community law are those areas of secondary law that the Commission decided warranted technical adjustments or transitional measures because of specific features of the GDR's former socio-economic or legal system. \textit{Id}. at 30.}
B. The Scope of Transitional Measures

The Commission examined nearly 200 Community environmental documents to determine areas that required adjustment or transitional legislation. The examination led to a proposal for a Council directive to regulate standards for air, water, and waste. The Commission limited the scope of these measures to situations in which the condition of the environment suggested that immediate compliance with Community standards was not feasible. Because “there can be no new industry with old rules,” transitional measures apply only to existing installations and quality standards. All measures contain an adaptation clause to allow the Commission to adapt the regulations to new circumstances and developments.

Significantly, the Commission did not propose transitional measures in the area of nuclear safety. Thus, Germany must comply with all primary and secondary legislation relating to nuclear safety as of the date of unification. This inflexibility is a response to public concern in the West about the safety of outdated Soviet-designed reactors. Examination of the five East German reactors revealed that they were poorly constructed and improperly maintained. The result was the immediate closing of four reactors, and the subsequent closing of the remaining unit after it was decided that proposed modernization would be prohibitively expensive.

48 See Explanatory Memorandum, supra note 5, at 112. As of May 7, 1990, 191 directives, 38 regulations, and 113 resolutions had been adopted by the Community. Report to Parliament, supra note 4, at 84.

49 See Proposed Directive COM(90) 400 final, supra note 7. Other areas covered by the measures are the sale of dangerous substances, major accident hazards, asbestos, and the protection of endangered bird species. See Explanatory Memorandum, supra note 5, at 113a-113g.

50 Explanatory Memorandum, supra note 5, at 112.

51 Environment Ministers, supra note 31, at 200.

52 Explanatory Memorandum, supra note 5, at 112.

53 ld. Because the environmental data on East Germany is unreliable, it is possible that new information would require a change in compliance periods. ld. at 110.

54 Germany to Shut Nuclear Reactors in East, Boston Globe, Oct. 22, 1990, at 2, col. 1 [hereinafter Germany to Shut Reactors]. See also Common Market, supra note 42, at 11.

55 Germany to Shut Reactors, supra note 54, at 2. Four of the reactors were located at the Greifswald power plant in northeastern Germany. The fifth reactor was located at the Rheinsberg plant just north of Berlin.


57 See Germany to Shut Reactors, supra note 54, at 2. The Rheinsberg reactor and three of the Greifswald reactors were shut down immediately.
The majority of transitional measures are concerned with establishing standards for waste, water, and air. Recognizing the extent of improvements necessary before East German waste dumps can comply with Community standards, and the impracticality of total closure of these dumps, the Commission has given Germany until the end of 1995 to bring dump sites into compliance with Community standards so that they may be fully authorized. Toward this end, Germany must present an improvement program to the Commission by the end of 1991.

The transitional measures concerning the reduction of water pollution include deadlines for compliance that extend beyond the date set for harmonization of Community laws. The Commission considered these lengthy compliance periods to be necessary in light of the abysmal water situation, especially the quality of water used for human consumption. Germany does not have to meet water quality objectives until 1996. Germany is required to submit complex improvement plans for drinking water to the Commission by the end of 1991, and for classification of water by the end of 1992.

Reducing air pollution requires a similarly complex solution. Because of the poor air quality in industrial areas of East Germany, compliance with EC standards will require a substantial period of time, but improvement plans must be submitted by the end of 1991. The proposals regulating the emissions of SO$_2$ and NO$_x$ set deadlines for compliance at 1996 because the energy and chemical sectors of the economy will need to be restructured.

C. Encouraging Compliance Throughout the Community

Member states have been notoriously uncooperative in complying with EC environmental law despite widespread public demand for the enactment of more stringent legislation. As a result, the European Parliament recently drafted a resolution on the application of environmental legislation to the member states. This resolution requests that the Commission develop a plan for

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58 See Explanatory Memorandum, supra note 5, at 113a–113g.
59 Id. at 113a.
60 Id. at 113b. See supra notes 30–33.
61 Explanatory Memorandum, supra note 5, at 113d.
implementation and enforcement of Community environmental legislation in those states that have refused to comply.\textsuperscript{63}

The transitional measures would afford the Commission an opportunity to police member states' compliance with environmental directives by focusing attention on existing environmental standards.\textsuperscript{64} The Community cannot act as a strict environmental taskmaster toward Germany while allowing the transgressions of more environmentally conscious and economically developed members to go unchecked. The measures would force member states to address existing Community legislation to determine whether their own standards for environmental protection conform to those of the Community. The measures would also encourage noncompliant member states to implement Community standards before the deadlines established in the transitional measures.\textsuperscript{65} Community attention to the progress of German compliance would thus encourage compliance in other member states.

\textbf{III. Analysis of the Proposed Transitional Measures}

The transitional measures proposed by the Commission address both the need to protect the population threatened by environmental hazards in East Germany, and the concern of the EC that its standards be implemented as quickly as possible.\textsuperscript{66} The provisions permit unification to occur under Community auspices by extending deadlines for compliance with Community law. Although these measures do allow temporary noncompliance with Community law,\textsuperscript{67} the Commission has attempted to ensure that the transitional measures do not substantially undermine the Community objective of an integrated single market.\textsuperscript{68}

With these measures, the Commission has tried to appease the environmentally concerned citizens of Europe without imposing upon the German government the Herculean task of an immediate environmental cleanup. The Community's environmental

\textsuperscript{63} \textit{Id.} There are currently more than 300 infringement proceedings in the European Court of Justice concerning the failure of member states to implement EC environmental legislation.

\textsuperscript{64} See Explanatory Memorandum, \textit{supra} note 5, at 112.

\textsuperscript{65} See \textit{id.} at 113.

\textsuperscript{66} See \textit{id.} at 112.

\textsuperscript{67} See \textit{id.} at 2, 113a–113g.

\textsuperscript{68} See \textit{id.} at 112.
consciousness has been heightened through extensive media coverage of the environmental damage in East Germany.\footnote{See Cleaning East Germany, supra note 11.} The Commission and the German government realize, however, that the condition of the environment has deteriorated to an extent beyond immediate improvement,\footnote{See id. Klaus Töpfer, German Environment Minister, has predicted that East Germany's environment would still be in abysmal condition at the beginning of the next century. Id. Recently, Mr. Töpfer asserted that East German environmental conditions would be comparable to those in West Germany by the year 2000. See Community Gives East Germany Until 1996, supra note 10, at 355. This comment, however, has been dismissed as mere "wishful thinking and vote catching." Id.} even if supported by massive funding for environmental cleanup.\footnote{See Explanatory Memorandum, supra note 5, at 113. Conservative figures estimate that the FRG alone will invest DM 130–220 billion in the clean-up of East Germany. Report to Parliament, supra note 4, at 86.} The interim measures may be a suitable response to East Germany's environmental problems because they attempt to establish cautious, attainable objectives. Accordingly, the compliance periods for the proposed measures are shorter than those provided in the original environmental directives, perhaps indicating that the Commission appreciates the urgency of the problem and will conscientiously enforce the time limits.\footnote{See Explanatory Memorandum, supra note 5, at 113.}

Nevertheless, the flexibility written into the measures may make real environmental progress unlikely. Certainly, some measure of flexibility is necessary given the magnitude of the clean-up required. But the lack of strict standards and deadlines may not provide sufficient compulsion for timely and effective clean-up efforts. Furthermore, while the difficulty of accurately assessing the extent of the environmental damage may warrant a degree of flexibility, the lack of concrete standards and restrictions in the proposed transitional measures may impair enforcement efforts.

In part, the success of these measures will depend on the Community's commitment to monitoring Germany's progress in complying with Community laws and on realistic assessment of that progress. It would be shortsighted, however, to assume that these measures alone will be able to remedy decades of environmental neglect. Instead, the transitional measures should mark the beginning of a series of laws to enable economically and environmentally sustainable development.

\footnote{See Cleaning East Germany, supra note 11.} \footnote{See id. Klaus Töpfer, German Environment Minister, has predicted that East Germany's environment would still be in abysmal condition at the beginning of the next century. Id. Recently, Mr. Töpfer asserted that East German environmental conditions would be comparable to those in West Germany by the year 2000. See Community Gives East Germany Until 1996, supra note 10, at 355. This comment, however, has been dismissed as mere "wishful thinking and vote catching." Id.} \footnote{See Explanatory Memorandum, supra note 5, at 113. Conservative figures estimate that the FRG alone will invest DM 130–220 billion in the clean-up of East Germany. Report to Parliament, supra note 4, at 86.} \footnote{See Explanatory Memorandum, supra note 5, at 113.}
CONCLUSION

The Commission's proposed transitional measures are designed to strengthen and accelerate the process of European integration. The transitional measures are an attempt to strike a balance between harmonization of EC environmental law, on the one hand, and the feasibility of German compliance, on the other. Potentially, these measures could improve environmental conditions throughout the Community by promoting renewed Community enforcement efforts and by forcing member states to reexamine existing standards. Nonetheless, the significant flexibility built into the proposed measures could well undermine meaningful progress toward the enormous environmental cleanup of East Germany.

Maria J. Ionata