

# The Need for an Internal Market Ombudsman\*

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## Foreword

This article arises from private conversations with industry and other sources<sup>1</sup> over the past 5 or so years about their general impressions of the workings of the European Union (EU) Internal Market. Those discussions concerned primarily the development and cementing of the *level playing field* in the manufacture, sale and use of products subject to EU New Approach directives intended to abolish technical barriers to trade. Those directives are made under Article 100A of the Treaty of Rome and provide a framework for the manufacture and supply of such products. Whilst the directives themselves are considered generally to be working well, making the *level playing field* a clearer reality is proving more troublesome. There are many possible reasons for this. One of the most likely is that serious attention is only just starting to be paid to the need for concerted action by the current 15 EU member States to ensure that measures are in place and working properly to check that directives are being fairly and evenly implemented and administered across the EU. However, who or what checks the enforcers to ensure that they understand directives' requirements properly and place no unnecessary burdens on those affected by them? Government officials in the Member States have policy responsibility for ensuring that directives are implemented and administered faithfully. But disputes concerning a product's right to bear the CE marking or alleged barriers to trade in such products, for example, are more likely to be referred to lawyers ..... and ultimately the Courts, ending with the European Court of Justice. This is a lengthy and expensive process. Business is calling increasingly for measures to avoid such experiences; to provide faster remedies, and to weed out only the most contentious cases for consideration by the Courts. An Internal Market Ombudsman (IMO) possibly provides one remedy. Such a facility is not without precedent and could hold one of the keys to Making the Internal Market Work!

Further dedicated research is required to crystallise the issues and to assist informed debate. If papers such as this start that ball rolling, they will have achieved much.

## Introduction

Fifty years ago the visionaries responsible for the Treaty of Rome enshrined in its text the framework for the establishment of the Common Market: an area without geographical frontiers where the citizens of Europe would be able to move, work and trade freely without undue restrictions. Such an aim was more evolutionary than revolutionary – although listening to critics as the process has progressed might encourage one to believe the latter rather than the truth of the former.

## How the Market has developed

No doubt anxious to avoid being hoist by their own petard, the drafters of the Treaty of Rome took care to be as least prescriptive as possible and to offer maximum flexibility so that their basic wishes could be achieved within a reasonable timescale. The Treaty, which was signed in Rome in 1958, does not define “the Market”. Rather, the sense of what the Founding Fathers desired to achieve can be found early on from reading about the Treaty's aim to create an ever closer union among the peoples of Europe to preserve peace and to facilitate easier (i.e. less restrictive) trading practices. Whilst Article 2 effectively establishes “a common market and an economic and monetary union”, Article 3 starts to put flesh on those bones by requiring the elimination of customs duties and quantitative restrictions “and of all other measures having equivalent effect.”. It goes on, inter alia, to require the abolition of obstacles to the free movement of goods, persons, services and capital. Most significantly for this paper, Article 7 states “The common market shall be progressively established during a transitional period of 12 years.”

Of course, translating those ambitious words into reality has not been an easy process. There is no blueprint for introducing and managing the massive changes they required either to the order of things generally or the structures and procedures on which they rely. Much has depended upon mutual respect and co-operation – openness and transparency in today's jargon. In times of particular difficulty, major political leaders have set examples and given public leads. Mitterrand and Kohl were particularly notable in recent years for having staked so much personally to speed the development of economic and monetary union. But Thatcher too made an important mark by championing caution and reaffirming national sovereignty. Such “opposites” might be thought to be counterproductive. In reality they provide the necessary checks to ensure a proper balance is maintained without losing sight of the overall long-term objectives. The arguments they foster (and cause !)

\* *Un bref résumé de cet article en français figure à la fin.*

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encourage considered debate in the light of which opinions can be weighed and conscious decisions made. Media interest and speculation might increase tensions. But greater public awareness and understanding, coupled with more detailed specialist analysis, must improve the end result. The converse would be ill-thought out policies; hardly considered; adopted on the nod and implemented without any particular thought or care. In short, chaos at best ..... anarchy at worst!

Clearly, Europe's political leaders over the last four decades were determined not to be blown off course. In 1968 the Acceleration Decision introduced the common customs tariff and required the elimination of all customs duties on trade between member States 18 months ahead of schedule. This assisted the Common Market's becoming operational by 1970 (as required in the Treaty). But entrenched national practices and human reluctance to change slowed the process, hindering the development of necessary harmonisation. Many non-tariff barriers therefore remained – and in some instances have still not totally disappeared even today, although the increasing involvement of the European Court of Justice (ECJ) is helping to clarify and confirm the supremacy of European over national law.

In addition, the European Commission (sometimes referred to as the Civil Service of European Commissioners and Parliamentarians) has also been gaining experience and growing in confidence. Some critics complain about “Brussels” (however they define that term) imposing its will on the rest of Europe. Their basic discontent lies in “Brussels” being unelected, unaccountable and largely anonymous. As with every argument, these are not wholly without some foundation – certainly in so far as Commission officials are concerned. But, in the Commission's defence, it has to be said that its achievements in these uncharted waters outweigh the criticisms made against it. Each member State is represented, at all levels, in the Commission. So “Brussels” is not such an alien enterprise. That said, actually dealing with and working in such a culturally and linguistically diverse organisation is bound to hold difficulties. But sharing a common identity – being first and foremost European – provides the Commission's staff with its greatest strength. From that basis they work together to promote and encourage true integration and harmonisation throughout Europe. The example they set spreads to the member States, first at official level and then filtering down through commerce and industry to the men and women in the street. Naturally, national preferences still continue to make themselves felt. But, as time passes and we gain more experience of the practical benefits of integration (without necessarily losing individual identity), more of the original aims are materialised.

### **A New Approach**

In its early years the Commission had necessarily to adopt a proactive rôle; to suggest ideas and to be provocative in order to spur interest and encourage support. They were also very much in a chicken and egg

situation. Policies had to be developed to implement the requirements in the Treaty. But who should start those policies, national governments or the Commission? The stark reality is that in most instances, policies developed through a partnership (informal or otherwise) between the two. Having heard national politicians and officials views, the Commission usually developed a policy document for consideration with interested partners. From discussions on those early (often crude) policy issues a vehicle had to be found, when sufficient agreement had been reached, to implement them and to provide necessary checks to ensure that the vehicle kept on course. Numerous directives were then proposed by the Commission (at the behest of the Member States, who, in turn, had often been prompted by relevant interest groups and lobbyists) and negotiated with officials from relevant government departments in the Member States prior to formal adoption by the Council of Ministers. As knowledge of and interest in the Market has grown, so too has the work and power of the Commission. Such has been the extent of this in recent years that the European Parliament too has had to grow to protect the interests of all EU citizens and check that the Commission plays its proper role.

When EEC (now EU) directives were developing, the Commission worked hard with the Member States to encourage clear understanding and to promote awareness. The degree of success achieved depended largely on the amount of work invested and the interest (i.e. commitment) of the people involved – at all levels: official; legal; technical; commercial and so on. The earlier (Old Approach) directives were highly prescriptive and often attached annexes listing the sole standards in conformity with which manufacturers had to make their products. Naturally, this gave rise to discontent. Faster technological advances were not made at the same (slower) pace of standards development. This and purchasers increasingly sophisticated demands, led manufacturers to argue that the Commission was thwarting business and progress. An important result from these comments was that the Commission together with the European standardisation bodies and others developed a new type of directive. The so-called New Approach introduced in the mid-1980s provided a more flexible régime for compliance with the directive's requirements. They were not at all prescriptive and offered those subject to their requirements the option of either manufacturing goods in accordance with the directive's essential health and safety requirements (ESR), or with the relevant Harmonised European Standard(s) which carry with them a presumption of conformity with the ESRs. Again, Commission officials worked with those in the member States to ensure the timely and smooth implementation of these directives.

### **A level playing field?**

Given such lengthy and detailed negotiation (including consultation with interested parties outside of government), one might be forgiven for thinking that the *level playing field* was assured as a result of the

adoption of the various directives designed to create a common régime for the manufacture and marking of products for sale and use within EU markets. Perhaps it should have been. But to many in business, it has long seemed a far distant goal.

What does the term “level playing field” actually mean? To understand the concept, one has to take a step back and consider what gave rise to it. In this context, we are considering EU directives which contain equal (horizontal) requirements for the manufacture, conformity testing and marking of goods subject to those relevant directives for their sale and or use in one or more of the current 15 EU member States markets. This is achieved primarily as a result of technical harmonisation processes, principally the development and adoption of harmonised European standards to support particular directives. However, as indicated above, in the event that no such standards are available or should manufacturers feel able to demonstrate compliance by other preferred means, the directives also provide the option of compliance with general *essential safety requirements*. Whichever compliance route is chosen, it (and the choice) is available equally to all those subject to the requirements of relevant directives and offering their goods for sale or use on the Community market. Thus transparency and equality should be ensured, resulting in uniform requirements to reduce the costs on business and so encourage greater and fairer competition.

The Commission’s 1985 White Paper on the Completion of the Internal Market set out the legislative programme and timetable for the removal of remaining barriers to trade by 1992 i.e. the preparation for the real opening of the Internal Market (as the Common Market had come to be known). Arguably, the main reason for this initiative was to commit Member States to relinquish measures (i.e. tariff barriers) which had been introduced to protect national interests and hinder competition from other countries. Such measures may have been (and probably were) entirely justifiable given the special circumstances which gave rise to them originally. But the world had changed. In post-war Europe, a new spirit of unity and mutual recognition was growing. Earlier justifications for national protectionist measures were fast redundant. In their wisdom, the political leaders and the Commission saw the danger of relying only on human goodwill to achieve their aims – they saw the need for disciplines to be introduced to ensure that their objectives were met ..... properly and on time. The White Paper provided just such a discipline. It provided for innovation on a massive scale. Never before had so many countries joined voluntarily to create a political, legal and economic environment for the mutual acceptance and recognition of each others products. Negotiations on the development of New Approach directives therefore accelerated so that they were formally adopted in good time for the Member States to transpose their requirements into their own national laws AND to provide sufficient transitional arrangements while those affected by them adapted their manufacturing

and other processes to the changed requirements before those directives entered fully into force and their requirements became obligatory on those subject to them.

This gave lawyers and administrators heavy workloads to meet deadlines for transposition of directives into national laws. (Failure would surely result in infraction proceedings being taken against the Member State(s) concerned by the Commission under Article 169 of the Rome Treaty. Something which Member States prefer to avoid if at all possible.) It also set manufacturers the task of understanding the “new” legislation and making their goods in total compliance with it in order to benefit from the new trade opportunities available in Europe.

No administrator or lawyer could (or should) encourage the breaking of the law. But, experience shows that it is unrealistic to assume that everything will work properly the first time when there has been no previous experience of or dress rehearsal for the changes brought about by the creation of the Internal Market. Seeing sometimes differing national approaches and significant differences between the different language versions of the directives entering into force, some counseled against early compliance – preferring instead to wait for the necessary clarifications and uniformity to be obtained. Sometimes the directives’ scopes were called into question. For example when does a toy stop being a toy and instead merit classification as a machine? Equally, questions arose (and still arise) about the categorization of a product under the directive. The Personal Protective Equipment (PPE) Directive (89/686/EEC, as amended) is a case in point. That text of that directive names only two categories of PPE within its scope. But, on reading the conformity assessment procedures, it becomes clear that there is an unnamed third category which also has to be tested by a properly approved and appointed organisation before the manufacturer may properly affix the CE marking to the goods in question. Who decides whether the manufacturer and/or the Test House have understood and complied with the relevant directive properly when the wording of the directive is not entirely clear? And to whom do fellow manufacturers turn when apparently identical products are treated differently, yet each is freely available on the Market?

### **Clarity and Certainty**

Made aware by Governments and others that they are legally responsible for complying properly with the requirements of relevant directives (including the CE marking), manufacturers and their representative organisations started to seek guidance on how to comply with directives (“the new European legislation”) affecting their businesses and products. Some Governments felt perhaps even more vulnerable than the manufacturers at whom their legislation was directed, knowing that, in the event of dispute, the manufacturer would claim he had only done what the Government had told him! Naturally, no Government wished to risk

embarrassment and even less to be subject to Court proceedings. Other Governments genuinely wished to help their industries, but lacked sufficient resources to do anything much more than to introduce the transposing legislation. Often, they also suffered both from very limited resources and were dealing with a more sceptical public. The British Government felt a duty not only to implement the directives properly but also to encourage correct compliance. The many and varied imperfections of the former increased the need for the latter. It seemed that as the numbers of those working with the new legislation grew, so too did the number of questions (and possible solutions) about that legislation. Suddenly, one found numerous “experts” – but on what was their expertise founded? As ever, some were better (and more reliable) than others. For example, those who had long been associated with an industry sector and the development of particular directives affecting it could be more safely relied upon than perhaps some of the more recent newcomers. Those involved in the technical standardisation process had particularly valuable knowledge, yet it is only comparatively recently that some of the national (and European!) standardisation bodies have entered the business of providing guidance and advice on matters of interpretation and compliance. Apart from a few Governments, it was largely the Test Houses who took this lead initially. And cynics have argued that they only did so because it cemented their business and gave them a free hand to require tests which perhaps the directive(s) did not strictly require. Perhaps there may be some truth in that. But, if the Test Houses misunderstood directives, they risked losing their reputation and thus their business. Apart from perhaps an odd few who saw the chance of making a fast buck, most adopted a more realistic and responsible approach to their work. Not only did they work with the Commission and government officials to make sense of the often strange language used in directives, they also collaborated with each other to develop common test methods or to agree a common understanding of test methods specified in relevant harmonised European standards. By these means, in addition to the others mentioned previously in this article, manufacturers’ faith started to grow in the directives to which they were subject and the single Market whose base they formed.

Despite all those efforts, significant problems still arose. And the more questions that were asked, the more potentially correct answers there appeared to be – and the more experts appeared to provide those answers! The main difficulty lay in the fact that only the texts of the relevant directive(s) and its(their) implementing legislation was authoritative in law. Any guidance issued by government officials (e.g. the UK Department of Trade and Industry’s “Product Standards” booklets), standards-makers or testing authorities was therefore purely informal and subject to change in the light of experience. (And considerable care was taken to remind readers of the fact lest they should forget it!)

It has to be said that many initial fears were found to be groundless as experience increased of working with

directives and many manufacturers found that the new requirements placed on them were shared by their compatriots and counterparts across the EU. This did not happen immediately, but when it did, it eased Ministerial and official concerns enormously. Instead of every conceivable question being referred to the Government concerned or to the Commission for clarification and guidance, only those involving significant policy issues were referred to those higher authorities for consideration. After due reflection, the Commission might issue guidance. Or, more likely, it would refer the matter to the official Working Group established under directives to consider matters of interpretation and policy. Each Member State is represented on such Groups and outside experts are brought in for specialist comment and advice as circumstances demand. Ultimately, the Group votes on the proposed solution(s) and thereafter those affected by that decision are expected to work according to the interpretation it offered. In many cases that was the end of the matter. But what if a manufacturer disagreed with the decision reached? What bound him to comply with it? Legally, nothing – although, of course, the background and prevalent practice would no doubt be taken into consideration. Supposing he decided to fly in the face of convention. What sanction(s) might be imposed to bring him back into line? There are many informal possibilities (peer pressure, etc.) but the ultimate sanction lay in the hands of those responsible for ensuring that the national laws implementing directives were being properly observed and obeyed i.e. the enforcement authorities.

Unfortunately, laymen anxious for clarification of the law were often disappointed when the enforcement authorities were unable to provide the answers sought. There are many reasons for this. Firstly, most politicians advised against the heavy hand of enforcement when directives were only just settling into place. They knew that public opinion was greatly divided on most questions affecting “Europe” and they did not wish to rock the boat. Many enforcement authorities therefore found themselves in difficult positions. They had to ensure that laws were properly enforced if they were not to be ignored or fall into disrepute. But how could they enforce laws when they themselves were perhaps not expert in the matters at issue and definitive interpretations or advice were a comparative rarity. (The issue of enforcement authorities limited resources also needs to be taken into account, but that merits separate consideration elsewhere.) Soon one found that “rebellious” manufacturers and enforcement agencies found themselves to be most unexpected bedfellows in the quest for clarification and certainty. But where was it to be found?

### **The need for an IMO**

Given the lack of any legal authority to change a directive, other than an amending directive or similar instrument, and given the general desire to avoid further (constantly changing) legislation, calls started to grow

for measures to be introduced to provide the necessary clarification WITHOUT the expense or delay involved in instituting legal proceedings for complaint and restitution. Normally, the only recourse complainants have against alleged offenders is through the Courts. No doubt, in the clearer cut cases, that course would be taken. But the issues involved here are, by definition, not clear. They are complicated by a lack of experience, although this is now improving fast as compliance grows. Furthermore, the Commission has found that not all Member States implement and administer directives in exactly the same way – although of course they should and usually do. Differences are due to three main reasons: different legal systems established in the Member States; differing texts in the various language versions of the directives addressed to the Member states and limited resources. (There are also other reasons such as the “gold-plating” of directives when transposing them into national laws, but these are usually more easily identifiable and their correction is thus perhaps more straightforward. “Gold-plating” means including in transposing legislation requirements not contained in the directive being transposed into national law. This defeats the object of harmonization; re-establishes inequality and could give rise to new barriers to trade – all contrary to the aims of the Internal Market.)

If formal legal proceedings are to be avoided, what else can be done to obtain the clarification and certainty being sought for the benefit of all of the parties involved? Suitable cases might be sent to an Internal Market Ombudsman (IMO) to provide impartial guidance on the interpretation and application of relevant directives.

### **What is the Ombudsman? Doesn't the EU have one already?**

As with many puzzles, the answer to the second question is both yes and no – and both are equally correct, in context.

The normal dictionary definition of an Ombudsman is “an official investigator of complaints against government bodies or employees”. Dictionaries often credit the Swedes with this institution. However, Danish colleagues claim that the Ombudsman was originally theirs – but readily adopted by the Swedes as their own! Whatever the history, the office has proved its worth many times in supporting and protecting individual's rights against the State.

The Treaty of Maastricht (Article 138e) states that “The European Parliament shall appoint an Ombudsman empowered to receive complaints from any citizen of the Union or any natural or legal person residing or having its registered office in a Member State concerning instances of maladministration in the activities of the Community institutions or bodies, with the exception of the Court of Justice and the Court of First Instance acting in their judicial role”. Thus the EU does indeed have an Ombudsman. Furthermore, the European Ombudsman is required by the EC Treaty to publish annual reports – and does so.

Cases involving the alleged non-implementation or

wrongful application of EU directives transposed into national law may be suitable for reference to the Ombudsman. But these are normally sorted out between the Commission and the member State concerned.

Cases concerning the need for impartial guidance on directives requirements would seem inappropriate for reference to the European Ombudsman. A new, different office is therefore needed – that of an Ombudsman specifically for the Internal Market.

### **Arguments for an IMO**

Manifestly, the single major factor in favour of the creation of the office of an IMO is that, in the absence of much EU case law currently in this area, it would speed the process for obtaining clarifications and interpretations of directives' requirements by lifting this growing workload from the Commission and officials in the member States (who are often reluctant to express definitive views). In this sense, the IMO effectively becomes a mediator, facilitator and arbiter all rolled into one. The IMO's Opinions would be both considered and impartial. They should be sent to the Commission and the member States governments simultaneously, thereby assisting uniformity and the development of the *level playing field*. Depending upon the issues concerned and the circumstances involved, this “fast track” service could cut industry's, the Commission's, governments' and enforcement agents' uncertainties – saving all both time and money. Lengthy and costly legal proceedings could be avoided, leaving only truly deserving cases for the attention of the Courts and ultimately the European Court of Justice (ECJ).

However, the benefits do not end there as those Courts would no doubt draw upon the IMO's previous investigations and Opinions when considering cases, thereby again speeding the process.

Finally, at a time when “Brussels” is criticised for creeping bureaucracy and increased centralisation, the IMO could usefully play a rôle in helping the Internal Market to succeed. A rôle which some in the Commission foster because of a lack of other suitable alternatives.

### **Arguments against an IMO**

Probably, the single biggest factor against the creation of an IMO is that it might introduce a new layer of bureaucracy. This goes against the current trends for deregulation and simplification. Admittedly, these are normally concerned with the legislative act itself. But they could be argued to apply equally to the legislative process and so the point has to be considered. In the final analysis, popular support for and the comparison of benefits against costs would have to be weighed before any decision were to be made.

However, what is there to say that an IMO would be any better able to fill the knowledge chasm than Commission or government officials – especially when the IMO would no doubt need to call on their specialist knowledge of the history and development of directives! Rather than speed and assist the clarification process, might the IMO's involvement only serve to further

delay and complicate the process? Might it not simply replace the existing machinery with something virtually identical in terms of lack of technical expertise and bureaucratic delay? Might the intended “fast track” therefore prove unrealistic? If so, this could add to the delay in bringing deserving cases before the Courts.

### **Cost Benefits**

Of course, any of the above scenarios can be no more than speculation until further research is undertaken and actual experience has been gained of their working in practice. The Commission and Member States governments are equally cautious about introducing any new policies or developments until they gauge sufficient consideration has been given to all the possibilities and the chosen course emerges as that likely to bring the most benefits at the cheapest costs. It may therefore be some time before the case for (or against) an IMO receives wider debate. But it is certainly a possibility which is meeting with growing support both from the business world and in some political quarters – including among some Members of the European Parliament.

Other implications also need to be considered. In the first place, is it right to mix legal issues with administrative and technical practice and guidance? Some might argue that any clarification of the present situation would be a welcome advance. But, depending upon the precise rôle and powers of the IMO, it may be that the IMO’s Opinions are no more binding than the informal guidance currently issued by the Commission or the member States’ governments. If so, that would seriously curb the benefits and do nothing to resolve the current administrative impasse. More worryingly, what if the IMO’s findings fail to gain popular support. At best the public would ignore them. At worst, the Courts might overrule them – losing totally whatever credibility the IMO might deserve or merit in future. And what of the businesses and enforcement authorities who saw the IMO as their saviour? They would surely become even more disillusioned and sceptical; which feelings would spread as all bad news does, calling the Internal Market itself into question because hopes of easier (less burdens), increased business were dashed. This scenario assumes that the IMO lacks legal weight and might be influenced by popular opinion. Of course, if laws are popular they are more likely to be respected and obeyed. But, the IMO should be impartial and judge each issue on its merits, relating back directly to the directive(s) in question.

Finally, to more practical issues: how would the IMO be established; funded; staffed and run? These questions would need to be considered fully when the principle of the creation of an IMO is itself formally agreed. But, recent initiatives by the Commission and the Member States may be helpful here. For example, keen to improve the enforcement of EU legislation (for which read directives), the Commission has concentrated on transparency, co-operation and access to justice. A first priority had to be identifying relevant contact

points for particular directives. (These are now largely available on the Commission’s Europa Website.)

The aforementioned themes were also central to the Commission’s 1994 Framework for Enforcement Co-operation, which developed its calls for increased Administrative Co-operation (and was reinforced by a Council Resolution in mid 1996). The same themes also featured prominently in the 1997 Single Market Action Plan and were priorities in the UK and Austrian EU Presidencies last year – and will likely continue to do so under future Presidencies.

### **The advantages of an IMO**

Whether or not the above Administrative Co-operation efforts succeed, an IMO may still be needed to help resolve persistent significant issues. In its simplest, cheapest and most easily manageable form, the IMO might comprise a single person, perhaps with a small supporting staff based in a single office in Brussels. Given the amount of cases likely to be referred to the IMO, how could such an office be expected to cope? The financial advantages would soon be lost in the disrepute into which the office would surely fall. The IMO and his/her staff would rapidly become demoralised and the quality of their Opinions made questionable simply as a result of being unable to give issues due consideration.

At the other end of the spectrum, perhaps the above should comprise the core, co-ordinating office, linking with the Commission and the member States at Ministerial level to provide policy steer and practical guidance on procedures to be followed etc.? To make the IMO more easily within the reach of ordinary people, the office should ideally have branches in each of the member States (possibly as an extension of the EU Information Centres). This would improve accessibility and facilitate a better understanding of the issues in question because they are being considered in the mother tongue against familiar backgrounds. Those sub-offices might well be able to resolve certain issues themselves, perhaps by correcting misunderstandings or redirecting enquiries to the proper channels. The matters remaining would then represent the cases for consideration at a higher, European level e.g. by the IMO.

Of course, such a network multiplies the costs and could turn creeping bureaucracy into sprinting bureaucracy. To whom would the IMO and the supporting staff be answerable? How would their work be organised on a uniform basis and how would they be managed? Some officials argue such considerations kill the proposal even before it has properly developed. In reply, they might consider the benefits to outweigh the costs. The sure answer can only be given in the light of experience. But, the perceived need of such a service ought not to be dismissed lightly.

A more acceptable solution might be a combination of the above whereby the IMO’s central office liaises directly with Administrative Co-operation contact points in each of the Member States, calling joint meetings (with external experts, if necessary) to consider issues

on which directives Standing Committees cannot agree or in which they have no role. Most, if not all, Member States are also understood to have Single Market Compliance Units (SMCU) to which EU trade barrier and related difficulties may be referred for consideration and investigation at the EU level. Such Units and officials may also prove helpful to an IMO.

With regard to cost, experience shows that the public will pay for a good service or product providing it is properly marketed and meets (or surpasses) expectations. Considering legal services have to be bought, why should the services of an IMO not have to be paid for by those using them? But, were that to be the case, other possibilities come to mind. For example, as mentioned above, in most member States, government offices exist to consider questions relating to compliance with directives, possible new barriers to trade and so on. With a little imagination, what is to prevent those offices from forming the nucleus of the IMO's sub-office in that country? The benefits here would be that the staff already exist; they are trained in their fields of responsibility and their costs are met by the home authority. By furthering the administrative co-operation which the Commission increasingly encourages, it could be that these staff have at their fingertips the solution to many current problems. However, turning that key requires political will and commitment. Official support for such proposals may be luke warm, but the case for an IMO deserves to be considered on its merits. The day may well be not so far off when the same sceptical officials will be required by their political masters to do what is currently unthinkable – or administratively undesirable.

## RÉSUMÉ

*Cet article traite de la façon dont le public perçoit le fonctionnement du marché intérieur de l'UE en matière de libre circulation des biens couverts par les directives prises en vertu de l'article 100 A du Traité de Rome et visant à abolir les entraves techniques aux échanges.*

*Dans la phase préparatoire pour le lancement du marché intérieur le 1er janvier 1993, de nombreuses directives dites de "nouvelle approche" furent négociées avec la Commission européenne et adoptées formellement par tous les Etats membres. L'objectif de ces directives était (et est encore) d'encourager l'émergence d'une situation comparable dans les secteurs couverts, notamment les jouets, les équipements techniques, etc.*

*Selon les rapports de la Commission européenne, la plupart de ces directives ont été à présent transposées correctement dans la législation nationale des Etats membres. Toutefois, le respect de la "nouvelle" législation est souvent irrégulier. La formulation de certaines directives est floue et le sens (y compris la portée et les exigences) diffère parfois dans les différentes versions linguistiques. Dès lors, les directives sont mises en oeuvre et appliquées de manière différente*

*dans la législation nationale des Etats membres.*

*Les difficultés qui en résultent, ajoutées à la résistance naturelle au changement, ont ralenti le rythme de la mise en conformité des produits (y compris le label européen) par les fabricants vis-à-vis des directives concernées. Par ailleurs, cela a sérieusement retardé l'émergence d'une situation comparable, en dépit de documents d'orientation et d'autres aides fournis par la Commission et les autorités nationales compétentes.*

*Pour pouvoir atteindre plus rapidement le degré de clarté et de certitude recherché, sans devoir recourir à des procédures juridiques longues et coûteuses, de nombreuses voix s'élèvent pour réclamer l'institution d'un Médiateur du marché intérieur (MMI), qu'il s'agit de ne pas confondre avec le médiateur européen. Ce médiateur du marché intérieur devrait examiner les cas qui lui sont soumis pour donner une orientation impartiale sur l'interprétation et l'application des directives concernées. Une telle orientation pourrait contribuer au processus d'harmonisation européenne, accélérer la conformité accrue par rapport à ces directives, éviter d'inutiles actions en justice et permettre d'identifier les questions litigieuses qui méritent d'être portées devant les juridictions compétentes.*

*Dans ce sens, le MMI devient un médiateur, un facilitateur et un arbitre. En dehors de son rôle premier, qui consiste à donner une interprétation impartiale pour aider à la fois l'industrie et le processus juridique, le MMI pourrait aider "Bruxelles" en détournant les critiques grandissantes au sujet de la "bureaucratie rampante" et de la centralisation accrue. Quel que soit le résultat final, la question de la nécessité d'un MMI doit être considérée à sa juste valeur. Il s'agit de le faire assez rapidement si l'on veut éviter de saper la confiance du public dans le marché intérieur et de compromettre l'apparition d'une situation comparable dans l'ensemble de l'UE. Cependant, il ne faut pas oublier que seuls les textes des directives et leur législation d'exécution font foi en la matière.*

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## NOTE

<sup>1</sup> The author especially thanks Giandomenico Majone, Visiting Distinguished Professor, Graduate School of Public and International Affairs, University of Pittsburgh, for his interest in and support for this paper, which builds on themes in his own work concerning "The Agency Model" in which he observes that Agencies are increasingly used to perform the executive tasks of government. That background may prove useful when considering issues concerning an IMO. □