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The European Ombudsman

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Introduction

The European Ombudsman is one of the most important institutional novelties introduced by the Maastricht Treaty. Its origins can be found in the Spanish proposal on European Citizenship, submitted in the framework of the Intergovernmental Conference on Political Union in 1991. According to the Spanish proposal, the adoption of a catalogue on special rights of the citizens of the European Union should have been accompanied by the establishment of special bodies responsible for safeguarding these rights.

It can hardly be denied that the criticisms regarding the bureaucratization and remoteness of the Community institutions, with the exception of the European Parliament, are reasonable and justified. The ongoing process of European integration and the decisions on closer political union adopted in Maastricht led to debates regarding transparency in the functioning of the Council and the Commission. The process of European integration and the further enlargement of the European Union can only succeed if they have the full support of the citizens of the Union. It was in this context that the establishment of the European Ombudsman was decided upon two years ago in Maastricht.

The European Ombudsman, along with the Committee on Petitions of the European Parliament, are non-judicial bodies, competent to safeguard citizens' political, civil and social rights *vis-à-vis* the Community institutions. These non-judicial bodies, together with the judicial system of the Community, constitute a broad spectrum guaranteeing the participation of the citizens in the everyday life of the Union.

The Tradition in the Member States

Non-judicial surveillance of public administration is very well known in the majority of Member States of the European Union. The models already followed comprise the Committees on Petition of the national parliaments as well as the national Ombudsmen.

The functioning of the national Ombudsmen does not exclude, in the framework of certain Member States, the parallel functioning of the Committee on Petitions of the national parliaments. The office of Ombudsman was established for the first time in Scandinavia as a means for people to defend themselves against administrative abuse.

It was as early as 1809 when the Swedish Constitution established a justice Ombudsman responsible for supervising public officials and protecting the citizens from bureaucratic practices. In 1915 an independent military Ombudsman was established in Sweden and in 1919 Finland introduced provisions for the establishment of an Ombudsman into its new Constitution. With the introduction of a military Ombudsman in 1952 by Norway and a general Ombudsman in 1953 by Denmark, Scandinavia confirmed its historical contribution towards the protection of citizens' rights.

The Scandinavian experience was followed by the controversial establishment of a military Ombudsman in the Federal Republic of Germany in 1957 and the establishment of general Ombudsmen in the UnitedKingdom in 1967, in France in 1973 and, later on, in the other Member States. Sweden, Denmark, the UK and Spain have demonstrated their preference for Parliamentary Ombudsmen. In Germany, the Petitions Committee of the *Bundestag* receives thousands of petitions every year, while in France the *Médiateur de la République* enjoys considerable reputation. Ombudsmen also function in The Netherlands and Ireland. In

Portugal, the Ombudsman coexists with the Committee on Petitions of the Portuguese Parliament. In Belgium, the Ombudsman of the Flemish Community and the Ombudsman of the city of Antwerp function in parallel with the Committee on Petitions of the Belgian Parliament. Luxembourg has demonstrated its preference for a Committee on Petitions of the *Chambre des Députés*, while Italy, following its tradition, has introduced the institution of Regional Ombudsmen. Over the last decade, Ombudsmen have also proved to be the tendency in the framework of corporations. To this extent, General Electric and Belgacom have established their own Ombudsmen.

The Intergovernmental Conference on Political Union

The historical tradition in the Member States of the European Union is such that it can hardly be surprising that proposals for a European Ombudsman were submitted at supranational level. The establishment of a European Ombudsman is closely linked to European Citizenship.

The idea of introducing provisions relating to European Citizenship into the Treaty on European Union was launched by Philippe Gonzales on 4 May 1990, in a letter addressed to the other members of the European Council.

Following this letter, on 24 September 1990 the Spanish Delegation submitted, in the framework of the Intergovernmental Conference on Political Union, a note on citizenship entitled The Road to European Union'.

According to the Spanish proposal, the adoption of a catalogue on special rights of the citizens of the European Union should have been accompanied by the establishment of special bodies responsible for safeguarding these rights. To this extent, the Spanish Delegation proposed that European citizens should receive greater protection of their rights within the framework of the Union by submitting petitions or complaints to a European Ombudsman whose function would be:

- firstly, to protect the special rights of the European citizen, and

- secondly, to help safeguard these rights.

Furthermore the Ombudsman for European citizens could either act through individual Ombudsmen or their equivalents in the various Member States.

The Spanish proposal on the European Ombudsman was further endorsed by Denmark, a Member State where the Ombudsman has proved to be a highly successful institution. In the Memorandum which the Danish Government issued on 4 October 1990, it stated that in order to strengthen the democratic basis of Community cooperation, an Ombudsman system should be introduced under the aegis of the European Parliament.

The institution of the European Ombudsman was approved at political level by the European Council in Rome. Meeting on 14 and 15 December 1990, the Heads of State and Government of the Twelve stated that consideration should be given to the possible institution of a mechanism to defend citizens' rights as regards Community matters (Ombudsman). In implementing such provisions, appropriate consideration should be given to particular problems in some Member States.

A few months later, on 21 February 1991, the Spanish Delegation submitted a new and more detailed proposal on European Citizenship. This proposal envisaged European Citizenship as one of the three pillars of the European Union and the foundation of its democratic legitimacy.

The proposal comprised 10 Articles. While Articles 1-8 of the proposal were concerned with the substantive rights of European citizens, Article 9 was concerned with the machinery for safeguarding these rights. It provided that in each Member State a Mediator was to be appointed in order to assist the citizens of the Unon in the defence of their Union rights before the administrative authorities of the Union and its Member States and to invoke such rights before judicial bodies, either on his own account or in support of the persons concerned. Furthermore, the mediators would also have the task of making clear and complete information available to the citizens of the Union concerning their rights and the means of enforcing them.

At the same time the Spanish Delegation indicated, in the form of a footnote, that consideration would also be given to two other possibilities:

- firstly, entrusting the above functions to a European Ombudsman as an independent organ of the Union or one answerable to the European Parliament, and

- secondly, reinforcing the actions of the national Mediators with an Ombudsman acting at European level.

The creation of the European Ombudsman had to cope with reality, that is to say, to coexist with the Committee on Petitions of the European Parliament, the national Ombudsmen and the Committees on Petition of the national parliaments; it had to respect the functioning of these bodies and, furthermore, take care not to jeopardize it.

Accordingly the Luxembourg Presidency issued its draft Treaty on European Union which can be characterized as a masterpiece of compromise.

To this extent the draft Treaty provided for the first time a legal basis in Community law for the right to petition the European Parliament, which until just recently had been characterized as a custom.

At the same time it significantly restricted citizens' rights to petition the European Parliament by introducing a condition under which petitions to the European Parliament would not be admissible unless they directly concerned the petitioner as an individual.

On the other hand, while the draft Treaty provided for the creation of the European Ombudsman, it limited his jurisdiction only to examining instances of maladministration in the activities of the Community institutions or bodies. At the same time, it subordinated the Ombudsman to the European Parliament by providing that the latter should elect the European Ombudsman.

It could hardly be argued that this compromise had not satisfied both Community and national actors. However we could question whether this compromise was in the interest of the citizens of the Union for whom, in the final analysis, the European Ombudsman was supposed to have been established.

The Treaty on European Union

The European Ombudsman established by the Maastricht Treaty follows the Parliamentary Ombudsman model.

He or she is appointed by the European Parliament for the duration of the latter's mandate. The Ombudsman is eligible for reappointment and he has to cease to exercise his duties in the event of resignation or dismissal. Should the Ombudsman no longer fulfil the conditions

required for the performance of his duties or be guilty of serious misconduct, the European Parliament may ask the Court of Justice of the European Communities to dismiss him.

Article 6 of the European Parliament's Decision on the Ombudsman's duties provides for the qualifications required for the appointment of a person as Ombudsman. Accordingly the Ombudsman must:

- have Union citizenship;

- have full civil and political rights;

- offer every guarantee of independence;

- meet the conditions required for the exercise of the highest judicial office in his country or have the acknowledged competence and experience to undertake the duties of Ombudsman.

The Ombudsman has the same rank in terms of rights and privileges as a judge at the Court of Justice of the European Communities and must perform his duties with complete independence in the general interest of the Communities and of the citizens of the Union. The Ombudsman has to be completely independent in the performance of his duties and must neither seek nor take instructins from any government or other body. Moreover he is obliged to refrain from any act incompatible with the nature of his duties. During his term of office, he may not engage in any political or administrative duties, whether gainful or not.

Articles 12 to 15 and Article 18 of the Protocol on the Privileges and Immunities of the European Communities are to apply to the Ombudsman.

The right to apply to the European Ombudsman is explicitly provided for in the Treaties establishing the European Communities, as amended by the Treaty on European Union. According to Article 8d of the EEC Treaty, every citizen of the Union may apply to the Ombudsman established in accordance with Article 138e.

Article 138e of the EEC Treaty empowers the European Ombudsman to receive complaints 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. This means that the Ombudsman is competent to examine cases of maladministration occurring in the framework of:

- The Council, the Commission, the European Parliament and the Court of Auditors;

- The Court of Justice and the Court of First Instance when not acting in their judicial role;

- The Economic and Social Committee and the Committee of the Regions;

- The European Central Bank and the European Investment Bank;

- All other Community bodies.

According to Article 2 of the European Parliament's Decision on the Ombudsman's duties, no action by any other authority or person may be the subject of a complaint to him. The following are eligible to submit complaints:

- Any citizen of the Union;

- Any natural person residing in a Member State;

- Any legal person having his registered office in a Member State.

Complaints are referred to the Ombudsman either directly or through a Member of the European Parliament. The complaint must be made within two years of the date on which the facts on which it is based came to the attention of the person lodging the complaint and must be preceded by the appropriate administrative approaches to the institutions and bodies concerned.

Action to be undertaken by the European Ombudsman could be limited under the following circumstances:

- If the complaint concerns the soundness of a court's ruling;

- If the complaint refers to facts which have been subject to legal proceedings in progress or concluded;

- If the complaint concerns cases relating to labour relations between the Community and its officials and other servants where the possibilities for the submission of internal administrative requests and complaints have not been exhausted by the person concerned and the time-limits for replies by the authority thus petitioned have not expired.

If the complaint has been declared admissible, the European Ombudsman must, without delay, inform the person lodging the complaint in writing of the action he has taken on it. In this framework the European Ombudsman has the right to conduct *inquiries* which he deems necessary to clarify the instance of maladministration constituting the subject of the complaint.

It is worth mentioning at this point that the Ombudsman can also undertake the same action on his own initiative. In this case, action on the European Ombudsman's initiative could be justified if he receives cognizance of certain instances of maladministration due to reports in the press or on the television, or due to a European Parliament Resolution.

We could describe this first stage of action as *a preliminary investigation*. The main purpose of this stage is to gather the information required in order todraft a preliminary conclusion on whether or not the alleged instances of maladministration have taken place.

The Ombudsman is obliged to inform the institution or body concerned, which may submit any useful information to him.

According to Article 3 of the European Parliament's Decision on the Ombudsman's duties, the Community institutions and organs concerned are obliged:

- to supply the European Ombudsman with the requested information;

- to give him or the members of his secretariat access to the files concerned.

It is worth mentioning that in such circumstances Community institutions and bodies have the right to refuse only on duly substantiated grounds of secrecy. Moreover they are obliged to provide access to documents originating in a Member State and classed as secret by law or regulation only where that Member State has given its prior agreement.

Regarding other documents originating in a Member State, Community institutions or bodies must provide access only after the Member States concerned have been informed.

The Ombudsman may request, via the Permanent Representations of the Member States to the European Communities, the Member States' authorities to provide any information that may help to clarify instances of maladministration by Community institutions or bodies. In such cases the Member States's authorities are obliged to provide the information requested. They can refuse only if such information is covered by laws or regulations on secrecy or by provisions preventing it from being communicated.

Should the assistance which he has requested not be forthcoming, the Ombudsman must inform the European Parliament which will make the appropriate representations.

The main purpose of the European Ombudsman is to seek a solution with the institution concerned in order to eliminate the instance of maladministration and to satisfy the request of the person lodging the complaint.

Should the Ombudsman find that there has been maladministration, he must inform the institution or the body concerned and may suggest ways of remedying the matter. In this case the institution thus informed is obliged to send the Ombudsman a reasoned opinion within three months. For each case of maladministration found the European Ombudsman must send a report to the European Parliament and to the institution concerned. The Ombudsman may propose solutions and measures to be taken in the future. Furthermore, the Ombudsman informs the person lodging the complaint of the outcome of the inquiries, of the opinion expressed by the institution concerned and of any recommendations made by him.

At the end of each annual session, the Ombudsman has to submit to the European Parliament a report on the outcome of his inquiries.

The Ombudsman and his staff are obliged not to divulge information or documents which they may obtain in the course of their inquiries. They are also obliged to treat in confidence any information which could harm the person lodging the complaint or any other person involved. If in the course of inquiries the Ombudsman learns of facts which he considers might relate to criminal law he shall immediately notify the competent national authorities via the Permanent Representation of the Member States to the European Communities.

The European Ombudsman must cooperate with the Ombudsmen of the Member States and with the Committees on Petitions of the national Parliaments.

The relationship of the European Ombudsman with the Committee on Petitions of the European Parliament and the establishment of the boundaries between them is quite crucial for the functioning of the Ombudsman. In this context the European Ombudsman should restrict his activities to regarding only instances of maladministration in the activities of the Community institutions, and should refer any complaint relevant to the political control of the Community institutions to the Committee on Petitions of the European Parliament.

The European Ombudsman is an institution which, if used properly, can provide the citizens of th Union with an important and costless means to defend themselves against Community bureaucracy. This is very important to consolidate the transparency which is an essential element for the development of mutual trust between the Union and its citizens.

Possible Implications of Accession to the EC and The Complexity of Enlargement Negotiations Seen from an Austrian Perspective*

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The so-called Austrian success story' after the Second World War is based on - and has been achieved through - Austria's participation in Western European integration.

The difficult, cumbersome and time-consuming aspects of this participation in the Western European integration process can best be demonstrated by describing the numerous steps leading to the opening of Austria's negotiations for EC membership on 1 January 1994.

After concluding the State Treaty of 1955, through which it gained its independence, Austria also joined the Council of Europe and was a founding member of the European Free trade Association (EFTA) in 1960. Austria has been described as *un pays fondateur manqué*' in relation to the European Economic Community (EEC) for, as early as 31 July 1961, the Austrian Government decided to open negotiations for an association agreement with the EEC pursuant to Article 238 EEC.

After the French veto against the British application for EEC membership, Austria reasserted its desire for an EEC association agreement. Austria had to face an Italian veto in 1967, which was withdrawn in 1969 after the conclusion of the South Tyrol package, as well as a French veto in view of its fears for the institutional autonomy of the EEC. It was not until 1972 that Austria was finally able to conclude an Interim Agreement (1.10.72 to 1.7.73) as well as a Global Agreement along the same lines as the bilateral free trade agreements between the other EFTA countries and the EEC and ECSC.

The first meeting of foreign ministers of the EFTA countries and of the EEC and EC Commission did not take place until 9 April 1984. The meeting adopted the Luxembourg Declaration and the target of creating a dynamic European Economic Area' comprising the EFTA countries and the EEC was mentioned for the first time.

The EFTA countries tried, in the so-called Luxembourg follow-up', to establish common fields of cooperation by setting up over 24 joint committees, but soon encountered EEC reservations as these joint committees worked out specific but not always compatible proposals. The EEC side accused the EFTA side of raisin picking' and of not standing up for the other obligations of European integration, such as the implementation of the four freedoms.

Following a proposal by the President of the EC Commission, Jacques Delors, on 17 January 1989, the EC Member States and EFTA countries commenced the complicated negotiations leading to the European Economic Area (EEA) agreement. This agreement was signed in Porto on 2 May 1992 and entered into force - after the necessary adaptations resulting from the non-participatio of Switzerland - on 1 January 1994. The EEA - comprising the 12 EC Member States and 6 EFTA countries representing 372 million inhabitants with a GNP of $6,351 billion - is larger than the North American Free Trade Association (NAFTA).

From the economic point of view, the EEA can be considered as satisfactory, in that it enables the EFTA countries to participate in the EC Internal Market process by accepting the *acquis communautaire* relating to the four freedoms, including the necessary flanking policies. The EEA agreement also incorporated the acceptance of the content of about 11,000 pages of the *acquis communautaire*, namely approximately 1,300 EC legal acts. This, however, could be implemented in Austria by changing only 99 Austrian federal laws.

The institutional part of the EEA negotiations was referred to as the squaring of the circle', in that essentially a compromise had to be found between the following three divergent requirements:

- decision autonomy of EC institutions should remain unchanged;

- sovereignty of EFTA countries should be maintained;

- EFTA countries should participate fully in the EC Internal Market.

A compromise solution was reached whereby the EFTA countries could make the formal decision whether to accept EC legal acts by joint decision (EFTA speaking with one voice'), or not to accept them at all, which could then lead to EC retaliation, thus endangering the homogeneity of the EEA for economic operators.

For Austria, the EEA represents a preparatory step on the way towards EU membership. It cannot replace EU membership as it does not permit equal participation in the EU decision-making process, nor does it include customs union (border controls and certificates of origin are still required for the EEA free trade area), agriculture, EU third-country policy, Economic and Monetary Union or several other aspects of the European Union.

The new Austrian coalition government (SPÖ + ÖVP) stressed the following in its legislative programme on 28 January 1987:

- the primary importance of Austria's participation in the further development of the European integration process;

- the further development of its relations with the EC;

- full and comprehensive participation in the new EC internal market.

With the aim of working out a more dynamic relationship with the EC, the new Austrian government established the internal Working Group for European Integration' on 3 February 1987 under the chairmanship of the former and present Austrian Ambassador to the EEC, Manfred Scheich. It was assigned the following tasks:

- to undertake a comparative analysis of the *acquis communautaire* in relation to the existing Austrian legislation; and

- to elaborate concrete proposals required for new steps in the integration policy.

It was the first time that such a comprehensive working group had been established in Austria, and it included all politically relevant institutions, namely all government ministries, the representatives of the Austrian provinces, the so-called social partners' i.e. Federal Chamber of Commerce, Chamber of Labour and the Chamber of Agriculture, as well as interest groups such as the Federation of Austrian Industrialists and the Labour Union. With the help of 18 subgroups chaired by the highest ranking civil servants in the different ministries, a substantive report was finalized relating to the reforms necessary in Austria for possible participation in the EC Internal Market.

Furthermore, the Council of Ministers decidedon an EC compatibility clause' for all new Austrian legislation, with the aim of gradually harmonizing Austrian legislation with the EC *acquis communautaire.*

Austrian Foreign Minister Mock agreed with EC Commissioner de Clercq in 1987 to organize regular meetings at ministerial level and to appoint an EC Ambassador in Vienna.

On 1 December 1987, the Austrian government decided not to exclude the option of EC membership'. The abovementioned report by the Working Group on European Integration and its recommendations were accepted by the government in 1988. This new Austrian integration policy was also fully supported by the social partners'.

The government decided on 17 April 1989 to apply for EC membership and after receiving the necessary support of the parliament (175 votes in favour; 7 against), Foreign Minister Mock submitted the three Austrian applications to join the EEC, ECSC and EURATOM to the acting President of the EC Council of Ministers, the French Foreign Minister, Roland Dumas, on 17 July 1989.

Ten days later, the 12 EC Member States decided to initiate the necessary procedures by requesting the Commission of the EC to work out an opinion on the Austrian application for membership. This opinion was elaborated by an interdepartmental group of the Commission, and came to a very positive conclusion *vis-à-vis* Austrian EC membership; it was submitted to the EC Council of Ministers on 31 July 1991.

At the meeting of the European Council in Maastricht on 10 December 1991, it was decided that negotiations for membership of the European Union (EU) could only commence after agreement had been reached in the EC on the new budgetary requirements and after the Treaty on European Union had entered into force. The Council requested the Commission to prepare a report on the implications of an EU enlargement for the European Council in Lisbon in June 1992.

When the Maastricht Treaty was signed, the Austrian Foreign Minister Mock stressed Austrian readiness to accept the *acquis*' of the Maastricht Treaty including its perspectives, namely participation in the European Union.

On 27 June 1992 the Lisbon European Council decided that the extension of the EC could be achieved on the basis of the Maastricht Treaty and requested the EC institutions to conclude the negotiations on pending questions within the EC.

The EC Council of Foreign Ministers accepted the Opinion of the EC Commission on 6 October 1992 and, at the same time, requested the COREPER to prepare the necessary general negotiating mandate for the membership negotiations.

This preparatory work enabled the European Council of Edinburgh, on 12 December 1992, to decide upon opening membership negotiations at the beginning of 1993.

The opening meeting of the membership negotiations at foreign minister level took place in Brussels on 1 February 1993.

The EC membership negotiations were facilitated by the fact that Austria had already taken over a considerable part of the *acquis* through the EEA. Of the 29 negotiating chapters up to November 1993, 9 chapters were finalized. However, substantive problems remain unresolved, namely transit, secondary residences, agriculture, regional policies and higher standards and norms.

As Austria will be organizing a referendum on its EU membership, the negotiations are conducted under great pressure with the aim of achieving results which will find the necessary support of the Austrian population.

In view of the target set by the European Council in Copenhagen that the EFTA countries applying for EU membership should be EU members by 1 January 1995, the negotiations should now be speeded up, with the aim of finishing the text of the accession treaty by February 1994.

Preparing for EU membership also requires careful preparation on the part of the applicant country at national level over several years. The fact that integration starts at home' is often underestimated. It is necessary *inter alia*:

- to prepare, by means of a bottom-up approach', the national institutions for the new challenges of Euroean integration;

- to prepare the national economy gradually for the obligations of European integration by limiting protectionism (it is often overlooked that freeing trade does the most good for those who open their own markets; competition raises efficiency, lowers prices and the signals from trade channel investment into the firms that are the strongest and into activities at which a country is best);

- to prepare the national legislation by introducing an EU compatibility clause' for EU membership;

- to familiarize civil servants in different ministries, journalists and other opinion leaders as far as possible with the general questions and practical aspects of European integration through participation in EU seminars, traineeships in the various EU institutions, etc;

- to establish departments of European law in the national universities, in order for there to be a sufficient number of lawyers and judges who are trained in European law by the time of EU membership;

- to expand the staff of the EU Mission in Brussels with representatives from other ministries, with the aim of preparing for its possible transformation into an effective Permanent Representation from the date of EU membership;

- to ensure support for leading government representatives, even if there is an unavoidable crisis in the membership negotiations, with the aim of concluding the negotiations within the required time-frame.

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* Lecture delivered at an EIPA Seminar in Ljubljana

La politique communautaire des consommateurs

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La relance d'une priorité négligée

La politique de protection du consommateur a démarré relativement tard, le premier programme n'ayant été lancé qu'en 1975.

Cette politique a eu du mal à s'affirmer face à une Communauté qui était trop penchée sur la libéralisation du marché pour les produits économiques.

Ainsi les droits fondamentaux des consommateurs arrêtés par divers programmes en 1975, 1981 et 1985 sont restés au niveau de simples principes sans conséquences pratiques.

La suppression des frontières intérieures et la réalisation, depuis le 1er janvier 1993, du Marché unique (programme législatif mis en oeuvre par la Communauté en vue d'éliminer un très grand nombre d'obstacles techniques, juridiques et fiscaux dans les échanges entre les Etats membres) a ouvert une phase nouvelle de l'action communautaire concernant la politique européenne des consommateurs.

Cette relance semble motivée par deux réflexions fondamentales:

- d'une part, le fonctionnement du Marché unique se trouvait en jeu.

La Commission a pris conscience du fait qu'il ne suffisait pas d'assurer la libre circulation des marchandises et des services, mais qu'il fallait aussi veiller à ce que les consommateurs aient suffisamment confiance en ces produits pour les acquérir.

- d'autre part,dans un Marché unique avec plus de 340 millions de consommateurs qui pourront avoir accès à tous les produits, capitaux et services qui circuleront librement, des règles d'accompagnement ont été indispensables afin d'assurer les aspects qualitatifs des conditions de la vie quotidienne, d'autant plus que ces consommateurs auront eux-mêmes la liberté de circuler pour acheter ces mêmes produits ou services dans l'Etat membre de leur choix.

La Commission a réalisé ces règles à travers la promotion et la protection des intérêts des consommateurs (c'est-à-dire le droit à la protection de la santé et de la sécurité, à la protection de leurs intérêts économiques, à la réparation des dommages encourus, à l'information et à l'éducation et à la représentation ou le droit d'être entendu).

L'Acte unique - le traité réformateur et prédécesseur du traité de Maastricht - exigeait que toutes les propositions faites dans le cadre de l'achèvement du Marché unique touchant aux intérêts des consommateurs revêtent un niveau de protection élevé.

C'est ainsi que le Conseil des ministres a adopté en 1990 le premier plan d'action qui couvrait la période 1990-1992.

Ce plan d'action a été un compromis équilibré: ambitieux pour les uns, modeste pour les autres.

Néanmoins, le bilan de cette période se traduit par la mise en place d'un important socle législatif, constituant un véritable droit communautaire pour la protection des consommateurs.

La complexité de la notion de consommateur

Avant d'exposer les détails des dispositions communautaires relatives au droit pour la protection des consommateurs, il convient d'examiner la complexité de la notion même de consommateur.

Il serait trop restreint de limiter la notion de consommateur à la définition suivante:

"les consommateurs sont des personnes, physiques ou morales, dotées d'un pouvoir d'achat plus ou moins élevé, qui se procurent ou qui utilisent des biens ou des services pour un usage non professionnel".

Car pour le citoyen-consommateur de la Communauté, nombreuses sont les mesures adoptées dans le cadre de la réalisation du marché intérieur qui constituent des avantages, directs ou indirects.

Ainsi il existe un lien très étroit entre la politique des consommateurs et celle de l'environnement, car la réalisation des objectifs relatifs à la protection de l'environnement réclame une adaptation des comportements des consommateurs afin d'utiliser les ressources de façon rationnelle et de lutter contre le gaspillage.

Un autre exemple en est la politique de concurrence dont la libre concurrence est, en effet, le principe régulateur qui permet, dans une économie de marché ouverte, d'allouer les facteurs de production de façon optimale au profit des consommateurs; en effet, ceux-ci sont, en définitive, les destinataires exclusifs de tous les biens et services fournis par les entreprises et les collectivités publiques.

L'interdépendance ainsi constatée entre la politique des consommateurs et les autres politiques communautaires met en évidence la complexité de la notion même de consommateur.

En conséquence, une bonne articulation enre la protection des intérêts des consommateurs et les autres politiques de régulation et d'accompagnement du marché unique apparaît ainsi comme une exigence essentielle au plan communautaire.

L'acquis législatif communautaire en faveur des consommateurs

L'adoption du 1er plan d'action en faveur des consommateurs et la création en 1985 au sein des services de la Commission du Service Politique des consommateurs ont contribué à la prise de conscience de l'importance de la dimension "consommateurs" au niveau communautaire et dans le cadre de la préparation du marché unique.

Ainsi la période 1990-1993 a-t-elle été marquée par l'adoption des textes suivants:

- directive relative à la sécurité générale des produits;

- plusieurs directives relatives au rapprochement des législations des Etats membres concernant l'étiquetage et la présentation des denrées alimentaires destinées au consommateur final;

- directives concernant les voyages, vacances et circuits à forfait;

- directives concernant les clauses abusives dans les contrats conclus avec les consommateurs;

- amendement de la directive Cosmétique;

- directive relative au rapprochement des dispositions législatives, réglementaires et administratives des Etats membres en matière de crédit à la consommation.

Par ailleurs, une série de propositions ont été présentées par la Commission qui n'ont pas encore été adoptées par le Conseil.

Ces directives viendront ainsi compléter le socle actuel du droit communautaire pour la protection des consommateurs.

La mise en oeuvre du droit communautaire pour la protection des consommateurs

Au premier janvier 1993, les Etats membres devaient avoir transposé 42 directives qui concernent la politique des consommateurs.

Le taux moyen de transposition est de 94%. Mais les progrès de la protection des consommateurs ne se mesurent pas seulement au nombre de textes qui sont adoptés ou qui entrent en vigueur.

L'essentiel, c'est que les mesures prises au plan communautaire soient perçues par les consommateurs comme une protection nouvelle et effective.

Cet objectif ne peut être réalisé que si les droits des consommateurs conférés par les mesures communautaires leur sont effectivement attribués au niveau national et qu'ils peuvent les exercer pleinement.

Cela suppose un suivi attentif par la Commission à la fois de la transposition et de l'application du droit communautaire.

La Commission souligne à cet égard le nombre élevé de plaintes qu'elle reçoit dans ce domaine, lesquelles révèlent les difficultés d'application des dispositions surtout dans le cas des pratiques transfrontalières. Ainsi la situation en ce qui concerne les produits cosmétiques, les voyages à forfait et le crédit à la consommation, demeure insatisfaisante.

La Commission doit donc continuer à porter une attention particulière au processus de mise en oeuvre des règles du droit communautaire par les Etats membres et à utiliser les moyens traditionnels de contrôle prévus par le traité, tout en recherchant une meilleure concertation et un véritable partenariat avec les autorités nationales sur ces questions juridiques.

Une telle concertation devrait s'avérer particulièrement fructueuse pour la recherche d'une application optimale des règles prévues, qu'il s'agisse des pratiques administratives (comme la sécurité des jouets) ou de la jurisprudence (dans le cas de la publicité trompeuse) notamment lorsque des différences notables sont encore constatées d'un Etat membre à l'autre.

Des priorités sélectives pour élever le niveau de protection des consommateurs

Le deuxième plan d'action triennal de la Commission du 28 juillet 1993, qui couvrira les années 1993 à 1995, a pour objectif de mettre effectivement le marché unique au service des consommateurs européens et de valoriser les autres politiques communautaires du point de vue des intérêts des consommateurs.

Ce deuxième plan d'action triennal s'inscrit dans la perspective de la mise en oeuvre du Traité sur l'Union européenne.

Le traité qui vient d'entrer en vigueur le 1er novembre 1993 hisse, en effet, la protection des

consommateurs au rang de véritable politique communautaire.

L'article 3 s) fixe ainsi comme objectif à l'action de la Communauté "une contribution au renforcement de la protection des consommateurs".

L'article 129 A précise que "la Communauté contribue à la réalisation d'un niveau élevé de protection des consommateurs par:

a) des mesures qu'elle adopte en application de l'article 100 A dans le cadre de la réalisation du marché intérieur;

b) des actions spécifiques qui appuient et complètent la politique menée par les Etats membres en vue de protéger la santé, la sécurité et les intérêts économiques des consommateurs et de leur assurer une information adéquate".

L'insertion de ces textes juridiques dans le contenu du Traité sur l'Union européenne a connu des hauts et des bas.

Au conclave de Noordwijk des 12 et 13 novembre 1991, la présidence néerlandaise avait supprimé l'article intéressant les consommateurs dans le cadre du compromis global sur les compétences nouvelles de la Communauté.

Ensuite, le "lobby" des consommateurs a obtenu que cet article - l'article 129 A - réapparaisse dans le texte finalement adopté à Maastricht.

Les Etats membres initialement défavorables à cet article - le Royaume-Uni, les Pays-Bas notamment - arguaient qu'il était toujours possible de protéger les consommateurs par les directives d'harmonisation prises au titre du marché unique.

Les autres délégations favorables à l'article sur la protection des consommateurs ont fait valoir que le Traité n'offrait pas de base juridique spécifique en faveur des consommateurs.

Ce ne serait que par ricochet que le marché unique, dont ce n'était pas l'objet en soi, intéresserait la protection des consommateurs.

Le Conseil adopte donc dans le futur des mesures particulières à la majorité qualifiée.

Les Etats membres peuvent établir des règles de protection plus strictes dès lors qu'elles sont compatibles avec le Traité et notifiées à la Commission.

Il ne faudrait pas que la protection des consommateurs offre en fait un prétexte pour camoufler des mesures protectionnistes d'un Etat membre.

Parmi les priorités du deuxième plan d'action, il faut citer:

A. L'information du consommateur

B. Le renforcement de la concertation

C. L'accès à la justice

D. Les services financiers.

L'information du consommateur

L'information est en effet essentielle pour permettre aux consommateurs de bénéficier des avantages du marché unique.

D'une manière générale, la liberté de choix ne peut être effective si les conditions du marché ne sont pas connues et si les informations existantes ne sont pas diffusées.

Un manque d'information place le consommateur dans une situation d'infériorité face aux fournisseurs et empêche le jeu de la concurrence.

Les actions déjà entreprises en matière d'information aux points de vente sur les caractéristiques techniques des produits, seront poursuivies et renforcées par la Commission.

Suite à la résolution du Conseil des ministres du 2 mars 1993 concernant les mesures futures en matière d'étiquetage des produits dans l'intérêt des consommateurs, la Commission entreprendra une série d'actions destinées à sa mise en oeuvre et à assurer un bon étiquetage informatif.

En outre, la Commission met actuellement la dernière main à la publication d'un guide du consommateur européen dans le grand marché et amorcera prochainement la réalisation, dans le cadre d'un partenariat avec les associations de consommateurs intéressées, de guides sectoriels ou nationaux liés à l'achèvement du marché intérieur.

Les centres transfrontaliers d'information des consommateurs constituent une expérience qui a déjà démontré tout son intérêt.

Installés dans les régions frontalières, ces centres on pour mission de fournir des informations concernant les offres, les prix, le droit applicable et tout autre renseignement pratique, dans la région, c'est-à-dire des deux côtés de la frontière.

Ces initiatives ont besoin d'être complétées par des actions médiatiques de sensibilisation des consommateurs à leurs nouveaux droits dans le grand marché.

Accroître et élargir la concertation

Depuis 1989, le Conseil consultatif des consommateurs est l'instance qui permet aux organisations de consommateurs de formuler des avis sur tous les problèmes relatifs à l'information et à la protection des consommateurs.

La Commission entend maintenir cette structure et s'efforcer d'améliorer son efficacité.

Toutefois, l'organisation actuelle de ce Conseil limite son rôle à une fonction purement consultative.

Favoriser l'accès à la justice et le règlement des litiges

Force est de constater que pour un bon fonctionnement du marché intérieur les consommateurs doivent avoir accès à la justice.

A cet égard, relevons que les différences de culture juridique entre les Etats membres rendent difficilement envisageable une harmonisation des procédures civiles nationales, alors que les opérateurs auront de plus en plus besoin de recourir à la justice dans les autres Etats membres.

La Commission recommande d'introduire des solutions pour assurer l'efficacité de la protection des droits des consommateurs, par l'établissement de mécanismes de conciliation extrajudiciaire et l'accès à la justice au bénéfice des associations de consommateurs.

Un Livre vert sur l'accès des consommateurs à la justice sera élaboré à cette fin.

Adapter les services financiers aux besoins des consommateurs.

La Communauté a déjà adopté une série de mesures importantes qui permettent aux institutions financières de commencer à appliquer sans entraves sur le marché unique les dispositions appropriées aux contrôles nécessaires.

Les consommateurs en bénéficieront aussi largement, en particulier dans le secteur bancaire, celui des assurances et celui des titres.

Il subsiste néanmoins quelques domaines problématiques. A ce titre, l'effectivité des moyens de paiement transfrontaliers constitue une priorité pour le bon fonctionnement du marché unique, car ils sont une condition de la confiance du consommateur.

Le domaine des responsabilités liées à l'utilisation des cartes de banque est également essentiel.

Dans le cas des paiements transfrontaliers, certains progrès ont été réalisés en coopération avec la communauté bancaire.

Cependant, la Commission procède actuellement à un réexamen de la situation en vue d'établir une évaluation claire de tous les problèmes en suspens.

Conclusion

L'essentiel pour la Commission dans les années à venir est de gagner la confiance des consommateurs dans le fonctionnement du marché unique.

Mais le succès de la politique des consommateurs nécessite à plus forte raison la coopération de tous les opérateurs économiques et tout particulièrement l'effort du citoyen-consommateur qui devra s'informer à tous les niveaux et défendre ses droits soit à travers les associations nationales de consommateurs, soit en justice devant le juge national.