

The ombudsman and application of EU law

The subject of this article is the role that an ombudsman plays in oversight of application of EU law in the light of both the experiences of ombudsmen in various EU countries and the case law of the Office of the Parliamentary Ombudsman. It is also appropriate to examine the effect that Community law has on the ombudsman's own activities. "Application" in this context means legislative and administrative application as well as application of EU law in authorities and by courts. (Regarding terminology, see, e.g., Tuomas Ojanen's article *Perus- ja ihmisoikeudet EU-säädösten toimenpanolakien säätämisessä*, in: *Puhuri käy*, Edita, p. 129).

First, however, it is best to go briefly through the instances that offer individuals legal remedies in a situation where they believe that their rights under EU law have not been appropriately safeguarded.

Where is legal protection to come from?

An individual person or a community can only in exceptional cases bring a suit in an EU court. A private legal subject has the right to refer a decision affecting his or her rights or obligations directly to the EU courts, the Court of First Instance or the Court of Justice, only in a situation in which the matter at issue is a complaint against a decision by an EU institution – principally the Commission.

The post of European Ombudsman was established in the Maastricht Treaty in 1993. He or she oversees the implementation of good administration in the EU's own institutions and agencies. Article 228 of the Treaty on the Functioning of the European Union regulates the powers of the European Ombudsman. The right to complain to the European Ombudsman is enshrined in Article 24 of the Treaty. The right of every citizen of the Union to appeal to the European Parliament is provided for in the same article.

The procedure for appeals to the European Parliament – unlike complaints to the European Ombudsman – applies also to the actions of national authorities when they apply Community law. All citizens of the European Union, all natural persons resident in the Member States and all legal persons domiciled in the Member States have the right to appeal. An appeal can be made in a matter within the sphere of the Community's activities and which affects a person directly. The Parliament's Appeals Committee examines whether the appeal is founded. When the Committee drafts its statement on an appeal that it considers grounded, it may ask the European Commission to provide it with documents and information. The Appeals Committee can also inform other committees of the Parliament so that they will take action with respect to the matter. In some exceptional cases the Committee can draft a report to the Parliament, to be adopted at a plenary session. The Committee can also conduct an investigation.

From the perspective of implementation of the individual's legal remedies, however, the oversight procedure regulated in Article 258 of the Treaty on the Functioning of the European Union (formerly Article 226 of the EC Treaty) is important on the level of the EU institutions in national application of Community law. Under Article 17.1 of the Treaty on European Union, the Commission ensures that the provisions of this treaty as well as the regulations and orders issued by the institutions on its basis are observed to ensure the flawless functioning and development of the Single Market. The Commission discharges this task both on its own initiative and on the basis of complaints. Complaints can be lodged by citizens, companies, civic and sectoral organisations and other Member States. The Commission is not obliged to initiate an oversight procedure arising from a complaint it has received, but can exercise the discretionary power given to it in Article 258 of the Treaty on the Functioning of the European Union as to whether or not to initiate a one. Complainants must, however, be informed of all measures to which their complaints have given rise and also of the fact that measures will not be taken. The oversight procedure can ultimately lead to the Commission taking the Member State to the Court of Justice for its breach if it fails to comply with the Commission's reasoned opinion within the period given to it to do so.

Breaches can be, as a general rule, of the following kinds: incorporation of a directive into national law (transposition) has been delayed or done defectively, administrative application reveals shortcomings (e.g., administrative arrangements do not guarantee implementation of Community law), or in an individual case an authority or court has not applied Community law appropriately, but has instead applied, for instance, national norms that conflict with Community law.

Alone from the perspective of implementation of the EU principle of subsidiarity and in order to ensure effective legal remedies for the individual, it is essential that first-instance means

of legal protection be guaranteed nationally in official procedures and above all in courts. Principles in accordance with which national courts, their a priori process autonomy notwithstanding, guarantee the effective implementation of Community law have been confirmed in the case law of the Court of Justice. The Court has on several occasions stated that:

“Pursuant to the case law of the Court of Justice, in the absence of Community rules governing a matter, it is for the domestic legal system of each Member State to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive from the direct effect of Community law. These detailed procedural rules may not, however, be less favourable than those governing similar domestic actions nor render virtually impossible or excessively difficult the exercise of rights conferred by Community law.” (C-312/93, Peterbroeck, point 12)

This stance is an expression of the principle of equivalence and effectiveness in EU law.

The supreme overseers of legality, the Parliamentary Ombudsman and the Chancellor of Justice of the Council of State, can also be seen as a legal remedy that supports and complements this system. The Commission has stated in its Communication (COM (2002) 725) “Better Monitoring of the Application of Community Law” that independent and specialised national authorities assist in certain cases the Commission to perform its task as an overseer of the Founding Treaties. National ombudsmen are among the examples mentioned in the Communication. An ombudsman’s role in oversight is in a certain sense flexible, because the Parliamentary Ombudsman has the special task under the Constitution of Finland of overseeing implementation of fundamental and human rights and if necessary recommending amendment of legislation.

Different views on an ombudsman’s role

The role of an ombudsman has been deliberated at annual conferences of the European Ombudsman and national ombudsmen. For the gathering in The Hague in 2005 Professor Rick Lawson of Leiden University in the Netherlands had drafted a summary, based on a questionnaire addressed to national ombudsmen in the EU Member States, of their experiences of overseeing compliance with Community law.

A noteworthy feature of the survey results in Lawson’s view was the paucity in all agencies of cases with a bearing on Community law. He considered this surprising in especially discrimination- and environment related cases. In his assessment, the national perspective was accentuated in the replies; for example, the Charter of Fundamental Rights of the European

Union was not invoked nor regarded as an independent source of law. It can be noted with respect to this that the Charter was not then legally binding, but a politically approved declaration. In the Lisbon Treaty, however, the Charter is accorded the same legal weight as the Founding Treaties. In several cases, ombudsmen had reservations about whether they should refer to Community law in their assessments if national regulation is in conflict with it. Lawson saw this as problematic. After all, the Court of Justice has repeatedly reaffirmed the primacy of Community law. Lawson emphasised that an ombudsman must intervene in a conflict irrespective of national regulations concerning his or her powers. Another view expressed in the discussion was that it would be best to avoid situations in which a stance adopted could be regarded as including, in excess of the limits of the ombudsman's powers, an evaluation of the legislator's action. Also those who adopted this position said that the stance should emphasise initiative to amend legislation in a conflict situation rather than be reproachful in tone.

A paucity of cases subject to interpretation was accentuated in also the replies by the Parliamentary Ombudsman, something that was seen as being in part attributable to the good situation with respect to application of legislation in Finland. Complaints had concerned especially agriculture, the actions of the customs authorities, and foreigners. Also matters other than customs dues and environmental matters had been brought up. The social affairs and health care category included complaints containing criticism of shortcomings or other errors in legislative application of Community law.

The ombudsmen at that meeting emphasised their own role as an alternative legal remedy in cases where Community law is breached. An aspect vigorously highlighted on that occasion was the ombudsman's pedagogic role vis-à-vis, on the one hand, officialdom and, on the other, "the general public" in increasing awareness of Community law. The view taken was that this could promote especially realisation of free movement of people.

Decisions from various sectors of law

In the following I shall try to outline the contents of complaints with a Community law dimension and present in greater detail some decisions by sector of action from 2002 onwards.

Something that must be taken into account in an ombudsman's oversight of legality – as in application of Community law in general – is that the linkage between legislation and Community law is not always obvious. When what is involved is application of a national provision based on legislation harmonised in the EU, the laws are often completely national

in their a priori premises and effects. Yet what is involved in evaluation is application of Community law. Issues of this kind that have cropped up in the ombudsman's work have concerned value added tax and excise duty as well as assessment of environmental impacts. In addition, Community law has an influence also in questions of applying national legislation in which a decision by an authority has discriminatory, preventive or restrictive effects on rights stipulated in Community law or on the legal principles underpinning Community law. In decisions made by the Parliamentary Ombudsman in Finland, questions of this kind have often related to car tax and its application.

Complaints concerning the agricultural sector have most often contained criticism of the actions of authorities in decision making in relation to rural development subsidies, fishing and hunting when applying EU law. The stances adopted by the relevant Deputy-Ombudsman often contain observations relating to the complexity of subsidy systems and the challenges that this sets for consultation. In some of his decisions the Deputy-Ombudsman has underscored the importance of clear and understandable information on subsidies to assist the livelihood economy and subsidy procedures. In his view, a letter addressed to professional fishermen by the fishery unit of an Employment and Economic Development Centre (TE Centre) can be regarded as being to some degree unintelligible (361/05).

Complaints concerning actions by the Customs Authority have often related to how an individual official has in the course of conducting a customs check or a personal examination taken the requirements of EU law into consideration when applying the regulations of the Customs Act concerning free movement of people and goods across borders within the EU.

The Deputy-Ombudsman noted the following in his statement of position on the legality of a customs check on an EU internal border:

The Founding Treaty of the EC requires that free movement of inter alia goods and people between Member States of the Community be guaranteed. Articles 30 (formerly 36) and 296 (formerly 223) of the Treaty make it possible for justified national restrictions to be set for such reasons as ensuring morality, public order and security and protecting health and life. Thus it is possible also to intervene in movements of goods and people within the Community, but then the threshold for intervention has been regarded as being higher. Checks of a random nature are forbidden in internal transport.

The way in which the provisions of the Founding Treaty have been interpreted in the guidelines for customs checks is that inspection measures are possible when, in individual cases and after overall consideration, there are grounds for the suspicion that a breach of a regulation imposing a prohibition or restriction (for example on drugs) may exist.

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The preconditions for stopping a person and inspecting a vehicle, in common with the preconditions for exercise of the other powers based on Section 14 of the Customs Act, have been set out rather loosely in the Act. The Founding Treaty of the European Community sets stricter conditions with respect to the purpose of checks on internal borders, but likewise says nothing about the intervention threshold. In the case law of the Court of Justice, the provision concerning restriction of fundamental rights must be interpreted narrowly and a measure must not restrict fundamental rights more than is essential to achieve the objective.

Since no specific threshold for conducting an inspection has been set in either the Customs Act or Community law, the interpretation adopted in the customs control guidelines could not, in the view of the Deputy-Ombudsman, be considered unlawful. Whether a measure threshold should be provided for in an Act is another question.

In the view of the Deputy-Ombudsman, there would be a need to explicate regulation of the measure threshold. The higher the threshold is set, the better it safeguards free movement and at the same time also the personal integrity and protection of privacy that are guaranteed as a fundamental right. On the other hand, the lower the measure threshold is, the more effective the customs control it makes possible. In the view of the Deputy-Ombudsman, the legislator should indicate at what level the intervention threshold is set (256/03).

Complaints concerning taxation of imported used vehicles and especially delays in appeals concerning taxation have been common in recent times. Matters relating to the imposition of tax are referred to administrative courts for resolution in conjunction with an appeal, but the question of systematic delays in handling can be relevant from also the perspective of Community law. Since the times taken to handle demands for rectification and appeals have been of considerable length in the Customs and Helsinki Administrative Court, has the right of free movement of goods that is enshrined in Article 34 of the Treaty on the Functioning of the European Union (formerly Article 28 of the EC Founding Treaty) been implemented with sufficient effectiveness in the manner that Community law requires? This question has been taken up in several decisions by the Deputy-Ombudsman (e.g., 1708/04).

As early as 2006, the Deputy-Ombudsman was examining complaints concerning delays by the Customs in handling demands for rectification of car tax assessments. The times taken to handle matters had stretched in some cases to as long as five years, although on average they had succeeded in reducing backlogs from the previous year's level.

The Deputy-Ombudsman stated in his decision that handling of a taxation appeal had been protracted in the same way as in general handling at that time of all rectification demands and appeals in which the amended regulations of the Car Tax Act on the amount of vehicle tax had been taken into account. Taking so long to deal with appeals

and rectification matters may have imperilled realisation of the principle of free movement of goods that is enshrined in EU law insofar as effective application of this law was jeopardised. Thus the Deputy-Ombudsman took the view that the overall handling time for car taxation should be taken more clearly into account in each individual case when dealing with appeals and rectifications. He informed the Customs Central Administration and the Southern Customs District of this opinion.

Especially implementation of EU citizens' freedom of movement and registration of right of residence have in recent times been highlighted in complaints concerning immigration and asylum questions, in some complaints also the granting of a visa and the procedure followed in visa matters. The following statement of position by the Deputy-Ombudsman related to residence permit matters:

Criticism of the procedure followed by the Espoo Court District police service was expressed by the complainant in his letter. He reported that on 27.3.2006 the police service had refused to take delivery of his residence permit application, which was based on the EU Council's Directive on the status of long-term citizens of third countries.

The Member States should have brought the Acts, Decrees and Administrative Orders that the Directive requires into force by 23.1.2006. Implementation of the Directive was delayed and the changes that it required were not brought into effect in national law until 1.5.2007.

A Directive can, on certain preconditions, have a direct legal effect if it has not been implemented by the deadline or if it has been implemented incorrectly. In the view of the Deputy-Ombudsman, the Directive now in question had had a direct legal effect.

However, the Espoo Court District police service could not grant a residence permit, which was based on a directive, but which neither national legislation nor the national registration system recognised. Thus effective implementation of EU law did not take place, because the Ministry of the Interior had not given police stations that take receipt of residence permit applications, for example, administrative guidelines to ensure realisation of the direct legal effect of the Directive.

In the view of the Deputy-Ombudsman, he did not have grounds to criticise the action of the Espoo Court District police service. The problems associated with handing in a residence permit application were more attributable to the failure by the Ministry of the Interior to ensure appropriate national application of the Directive. Because the Commission, in its capacity as the authority that oversees compliance with Directives, had already drawn the attention of the Finnish authorities to the delay in implementing the Directive on the national level, the Deputy-Ombudsman only emphasised to the Ministry the importance of observing timetables for application of Directives.

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The Deputy-Ombudsman drew the Ministry's attention also to the fact that if a Directive has a direct legal effect, but its national application is delayed, the necessary measures must be taken to ensure implementation of those rights of individual for which the Directive provides. In this case, for example, the police service should have been given guidelines on what to do if a residence permit application based on an EU Directive is handed in at a police station (1046/06).

Environmental matters that deserve mention are complaints relating to safeguarding the habitats of animal species listed in the Nature Directive or a favourable level of protection for certain predatory species. There have also been complaints about protection of a Natura area being jeopardised. An example of these is the following statement of position by the Deputy-Ombudsman in the flying squirrel protection issue that prompted lively discussion:

The opinion expressed in the complaint was that compliance with Section 49 of the Nature Conservation Act had not been appropriately monitored and that as a result of the authorities' inactivity flying squirrel habitats had been destroyed and impaired in felling operations. The complainant referred also to the reasoned opinion that the European Commission had sent to Finland on 2.4.2003 and in which the Konikallio tree felling operations were especially cited as an indication of actions contrary to the Nature Directive.

Arising from complaints lodged with it, the European Commission had launched an oversight procedure. On 2.4.2003 it gave Finland a reasoned opinion based on Article 226 of the Founding Treaty. In the view of the Commission, Finland had when transposing the provisions of sub-section 1 d of Article 12 of the Nature Directive (92/43/EEC) into national legislation incorporated into it a ground that did not belong to the sub-section of the Directive, namely "clearly observable in nature", and had not, as noted in the reasoned opinion, inter alia implemented the necessary measures mentioned in the sub-section in question to adopt and implement a strict and effective protection system to ensure that the flying squirrel's breeding and resting areas are not impaired or destroyed. In the view of the Commission, Finland had thereby failed to meet its obligations under the Nature Directive.

The Deputy-Ombudsman pointed out inter alia the following: When account was taken of the objective in the Nature Directive of adopting a strict protection system in accordance with sub-section 1 d of Article 12 and concerning the animal species listed in Annex IV (a) and the Directive's interpretation effect as well as the final outcome of the complaint case concerning the planned tree fellings on the Konikallio estate, it would have been appropriate for the Environment Centre to arrange the monitoring for which Section 49 of the Nature Conservation Act provides and tasks relating to administrative sanctions in accordance with Section 57 in such a way that already from the initial stages of the matter onwards it would have been possible to ascertain, on the basis of forest-use notifications, in greater detail and more carefully than happened in this case the location of

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flying squirrel breeding and resting areas in forest patterns and ensure their preservation by clearly and precisely demarcating individual objects (nesting trees).

The Deputy-Ombudsman drew the attention of the Häme Environment Centre to especially the interpretation effect of the Nature Directive in applying Section 49.1 of the Nature Conservation Act when handling administrative sanctions cases in accordance with its Section 57 (3130/2002).

The Council of State information unit reported in a bulletin dated 20.12.2004 that the EU Commission had ended the above-mentioned oversight procedure in relation to protection of flying squirrels. Despite having taken a decision to do so, the Commission did not initiate a suit against Finland.

National application of Community law in legislation has been addressed also in some complaints concerning health care. In the following case the Ombudsman criticised the procedure that had been followed in applying an EU regulation:

The complainant criticised the fact that in Finland sex between men is a permanent impediment to donating blood. The impediment was based on guidelines issued by the blood transfusion service of the Finnish Red Cross and the complainant took the view that these violated the constitutional prohibition on discrimination.

On 22.3.2004 the Commission issued Directive 2004/33/EC implementing Directive 2002/98/EC of the European Parliament and of the Council as regards certain technical requirements for blood and blood components (hereinbelow "the Commission Directive". The Commission Directive was implemented in Finland through Order 6/2005 of the National Agency for Medicines. According to a Government proposal, the Commission Directive contains minimum requirements, and in addition to that it is possible to set complementary national quality and safety requirements.

The eligibility criteria for donors of whole blood and blood components are regulated in the Commission Directive. One of the grounds for a permanent prohibition on donation listed in the Commission Directive applies to persons whose sexual behaviour puts them in great danger of contracting serious infectious diseases that can be transmitted in blood.

The National Agency for Medicines used a reference technique when implementing the Commission Directive. Through an Order that it issued under the authorisation provisions of the Blood Transfusion Service Act, the Agency put the Commission Directive into effect. Under the Order, the Agency provides, upon request, guidance and advice on application of the Order.

In the assessment of the Ministry of Social Affairs and the National Agency for Medicines, the text of the Commission Directive is precise, technical and applicable as such, for which reason it was possible to implement it through an Order by the National Agency for Medicines.

The Ombudsman could not concur with the view of the Ministry and Agency. In her perception, the text of the Commission Directive is not in all respects applicable as such with respect to the grounds for prohibiting donation. For example, the malignant diseases and sexual behaviour that are mentioned in the Commission Directive as grounds for prohibiting donation presuppose more precise definition. In the Ombudsman's opinion, this applies to, for example, the malignant diseases and sexual behaviour specified in the Commission Directive as grounds for a permanent ban. These presuppose more precise definition and are not applicable as such.

The Commission's oversight procedure and the Ombudsman

In practice, investigation of complaints ceases in many cases when an oversight procedure concerning the same matter has been initiated against Finland by the Commission or the issue involved is pending before the Court of Justice either because the Commission has filed a suit for breach there or a national court has requested a precedent decision. Here, the procedure followed is the same as when a person has referred the same matter to a competent court or authority for resolution.

In a national complaint procedure, by contrast, the fact that a matter is pending does not prevent the Ombudsman – at least when administrative authorities are concerned – from beginning an investigation if there is reason to do so. That appears to be the case also when a Commission oversight procedure has been initiated. The stage that an oversight procedure has reached is also important. The actual oversight procedure (Article 258 of the Treaty on the Functioning of the European Union) is preceded by an unofficial examination of a complaint or investigation launched on the Commission's own initiative, but it is difficult for outsiders to obtain information about this on even a general level due to the confidential nature of handling of complaints. In this respect, the Office of the Parliamentary Ombudsman has shown initiative in examining how the flow of information from the Commission to the ombudsman could be improved without violating the confidentiality of individual complaints.

A Commission oversight procedure appears to be a ground for not investigating a complaint or not proceeding with an investigation already under way.

A question that arises in conjunction with investigation of a complaint in some cases is whether, in order to clarify the matter, a statement on the matter should be requested from the Commission and, if this is done, what importance should be accorded the statement when a decision is formulated.

In practice, this has not been done, but because the Ombudsman is not entitled to request a precedent decision on interpretation of Community law from the Court of Justice, it may become necessary to ask the Commission for an "expert opinion" in order to clarify the matter. Development of such forms of cooperation calls for development of cooperation between, on the one hand, the European Union ombudsmen and, on the other, the Commission. In any event, it is ultimately the Court of Justice that determines whether a procedure is in accordance with Community law, and the position adopted by the Commission can have no more weight from the Ombudsman's point of view than can be accorded an expert opinion.

The primacy of Community law and the powers of an ombudsman

As long ago as the 1960s, the Court of Justice confirmed the principle of primacy, the content of which has been formulated more precisely in subsequent case law. The principle means that in a situation of conflict between the norms of EU law and those of national law, those who apply the law have an obligation to ensure the effectiveness of Union law and if necessary officially refrain from implementing a norm of national law irrespective of its status in the hierarchy of provisions.

It is obvious that where the subjects of oversight or the sanctions available are concerned, the Ombudsman remains within the powers that the Constitution gives her. However, the content of these powers can be influenced by how the influence of Community law on national competence rules (the competence effect) is evaluated. The effectiveness principle may require – at least where a national court is concerned – that power is exercised in a way that goes beyond the limits set by national procedural legislation.

A complaint to the Ombudsman is in any event flexible as a legal remedy in the sense that when investigating complaints within the scope of her powers or deciding on her own initiative to examine questions of this kind, the Ombudsman can draw the attention of the Government to *inter alia* deficiencies that she has observed in application of EU law (Section 11.2 of the Parliamentary Ombudsman Act). As required by the Constitution, the Ombudsman also

gives the Eduskunta an annual report on, in addition to her activities, also the state of application of the law and any shortcomings she has observed in legislation.

Thus there does not seem to be any reason to regard the primacy of Community law or questions concerning the competence effect as problematic in practical oversight of legality when one thinks of the Ombudsman's own role as an applier of Community law. Deputy-Ombudsman Jääskeläinen has outlined the principle of primacy of EU law as follows:

EU law has as such primacy vis-à-vis national law. The question of when there is such a conflict between EU and national law that an administrative authority has on this basis a right or obligation to ignore a norm of national law must, however, be assessed and resolved separately in each suspected conflict situation.

If a conflict has not been bindingly established in a decision by the competent EU institution (the Court of Justice) in the same or a similar matter, evaluation must take account of inter alia how open to interpretation or obvious the conflict is. Aspects that must also be taken into consideration are what kinds of effects different resolutions of this conflict will have from the perspective of, on the one hand, EU law and, on the other, the national legal order and especially the system of fundamental rights.

Another matter that can be of relevance is how the suspected conflict situation or a national norm that is suspected of conflicting with EU law has come into being. If the Eduskunta, as the supreme organ of state, has explicitly adopted a position on the conflict that it is believed may exist, it follows, according to the Deputy-Ombudsman, from the principles underpinning the Finnish constitutional system that an administrative authority can not at its own discretion adopt a different stance on the same matter, unless the matter has been altered in some legally relevant respect since the Eduskunta made its decision. This applies also to a situation of the kind in which the Eduskunta has, on the basis of considerations associated with protection of the individual's fundamental rights, perhaps compromised on maximal application of EU law (1515/04).

Blameworthiness of an official's action

Something that can be asked in oversight of compliance with Community law is what kind of "level" of conformity with this law can be expected of a subject of oversight, i.e., what would be the threshold for blameworthiness in oversight of compliance with EU law in individual administrative decisions by officials or authorities.

The view taken in decisions by the Parliamentary Ombudsman and the Chancellor of Justice is that the threshold for an action by an authority or individual official is crossed only if the action is manifestly contrary to Community law.

An instance of neglect in the legislative implementation of EU law must also meet the criterion of obviousness in general before it can be intervened in. If all or most of a Directive has not been implemented, the error is obvious. If transposition is erroneous or defective, obviousness can probably also be a prerequisite. It is necessary to intervene in official actions in a situation in which an authority systematically fails to take the requirements of EU law into consideration in its decision on some or other matter. For example, an authority does not take any account whatsoever of Community law in the reasoning for a decision, although it is as such obvious that the matter is included in the sphere of application of this law, or that it is otherwise essential to examine the matter also from the perspective of EU law (viz. in this respect a decision of the Supreme Administrative Court concerning the reasoning underpinning a Government decision in a gaming licence matter, KHO 2005:37). In application of Community law, a breach is obvious also if the law has not been ignored, although it is manifestly in conflict with community law or a right of an individual that Community law clearly safeguards has been impeded or delayed.

Next I shall mention three examples of determination of the intervention threshold in these individual cases.

1) The Court of Justice found that a Member State is not fulfilling its obligations under Articles 28 and 30 of the Founding Treaty when it requires a person resident in the state in question and who wishes to import a motor vehicle legally registered and used in another Member State to obtain a transfer permit to use the vehicle in question before its registration and before payment of taxes leviable on vehicles.

The Deputy-Ombudsman noted that before the ruling by the Court of Justice there had been no case law in relation to precisely this matter. He took the view that, until the ruling, the provisions of the Car Act could not be seen as so obviously contrary to those of the Founding Treaty that the action of the administrative authority involved, in this case the Customs, could be deemed blameworthy (1000/07).

2) The Deputy-Ombudsman issued a reprimand to the Alien's Police in Helsinki for having acted unlawfully in not allowing EU citizens to leave the country and go to the other EU Member that they wanted to.

It had been decided to refuse the EU citizens entry to Finland. However, the Alien's Police did not return their passports, because they did not wish to return to their home country,

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but rather to another EU country. Under the Alien's Act, EU citizens have the right to leave the country voluntarily within at least a month of having been ordered to leave. The police may not then limit their right under Directive 2004/38/EC to move and reside freely within the territory of the Member States.

The Deputy-Ombudsman pointed out that the Alien's Police interpreted the Alien's Act and the Directive erroneously when they took the view that persons who have been refused entry can leave voluntarily only to return to their home country. The blameworthiness of the Alien's Police in committing the error was mitigated by the fact that the Directorate of Immigration (nowadays the Finnish Immigration Service) had stated in a decision that EU citizens who have been refused entry are returned by it to specifically their own country (1657/07).

3) In 2002 the Ombudsman adopted a position on the flawed character of legislation in relation to marketing of medicines. Regulation is guided by Community legislation, in which marketing of medicines is regulated by Directive 2001/83/EC of the European Parliament and Council. This Directive and its precursor 92/28 have earlier been implemented through Orders of the National Agency for Medicines. By means of Amendment 700/2002 of the Medicines Act, the central provisions of the Directive were transposed into the Act. Under Section 92.2 of the Act, persons who have the right to prescribe or dispense medicines may not request nor accept incentives that are prohibited elsewhere in the law.

The Ombudsman regarded this explication of legislation as a positive thing. According to her observations, however, the new legislation contained some deficiencies relating to implementation of Community law as well as the new legislation's system of oversight and sanctions.

The purpose of the amendment of the Medicines Act was to incorporate Directive 2001/83's central provisions on marketing medicines into the Act. However, a provision corresponding to Article 95 of the Directive was not included in the Act. The article regulates the hospitality provided at events provided for professional or scientific purposes; in other words, contributing to supporting the kind of professional training and scientific congresses that were the focus of the Ombudsman's investigation. The Ombudsman considered it problematic from the perspective of both implementation of legislation and the legal security of professional health care personnel that the content of Article 95 of the Directive is not expressed in the legislation. She recommended to the Ministry of Social Affairs and Health that the legislation be explicated in this respect (1082/99).

Conflict between EU law and fundamental rights

The question of conflict between EU law and fundamental rights is also of key importance from the perspective of the Ombudsman's work, because systematic monitoring of EU legislation's compliance with the Community's fundamental rights has not been included in the EU's legislative drafting. However, attention has been paid to the matter in recent years [viz. Communication from the Commission COM (2005) 172 on Compliance with the Charter of Fundamental Rights in Commission legislative proposals as well as the Better Regulation in the EU project launched in 2000]. In, for example, the sector of justice and home affairs and possibly in immigration and asylum matters, the future is likely to bring situations in which intervention will require, viewed from the perspective of reconciling application of Community law with safeguarding fundamental rights, stances by the Ombudsman.

In Finland, safeguarding fundamental and human rights has in a few situations meant compromising on "maximal" application of an EU provision. Noteworthy examples include the European arrest warrant, the Framework Decision on combating terrorism and implementation of the Farm Subsidies Decree. Of the stances adopted by the Constitutional Law Committee, a statement to the effect that no compromise on the demands of domestic legislation may be made in the application of Community law is particularly relevant in this respect (PeVL 9/2004 vp HE:stä sähköisen viestinnän tietosuojalaiksi ja eräiksi siihen liittyviksi laeiksi/Constitutional Law Committee report on a Government proposal introducing an Act on Data Protection and certain Acts associated with it). In this respect, I refer to the decision mentioned earlier (1515/04), which is outlined under the sub-heading "The primacy of Community law and the powers of an ombudsman".

The future role of oversight of legality

EU law is a part of the body of legislation compliance with which by authorities and courts the Parliamentary ombudsman is tasked with overseeing on the basis of the Constitution of Finland. The Ombudsman can, if necessary, actively urge authorities to make their decision without delay especially when what is involved is implementation of the fundamental principles of EU law. The possibility than in exceptional circumstances the Ombudsman could bring a matter to the Commission's notice does not seem to be ruled out. However, it appears that in practice there is rarely a need for this.

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Something that has often featured in discussions among ombudsmen is development of cooperation between ombudsmen and the European Commission in exchanging information and examining the problems that citizens and other parties have with respect to legal remedies. With a view to making handling more effective, the Commission has itself tried to transfer complaints received by it to the national authorities with which it cooperates. Towards this purpose, it has launched a pilot project for handling complaints with several Member States, including Finland. The Commission has also developed the so-called SOLVIT network, in which a national authority establishes a SOLVIT Centre [the one in Finland is in the Ministry of Employment and the Economy, see Commission Communication COM (2001/702)], in which the aim is a rapid resolution through conciliation in situations where private persons and companies encounter problems with the operation of the Single Market. Organised forms of cooperation between ombudsmen and these instances are only in the planning stage on the basis of a study by the European Ombudsman.

Developing national fundamental rights in the sector of EU law by increasing cooperation will depend first and foremost on it being possible to improve the flow of information between the Commission and Ombudsmen. In any event, it can be said that questions relating to application of Community law will increase and become more diverse in character when the Lisbon Treaty comes into force and especially when police cooperation and legal cooperation in criminal cases become part of Union law according to the same principles as other matters included in the Union's competence. – This development has already now been in evidence in decisions by the Ombudsman. ☐