GENERAL QUESTIONS OF OVERSIGHT OF LEGALITY

Mikko Sarja

Does it belong or doesn´t it? – Observations on the ombudsman´s powers

Introduction

When a legal adviser at the Office of the Parliamentary Ombudsman is given a complaint case to deal with, one of the first things that have to be done is deciding whether the action to which the complaint refers is one that the Ombudsman can examine, whether it falls within the scope of her powers. Often, answering this first question is more difficult than the actual principal matter.

The Ombudsman's work is founded on the Constitution, Section 109 of which states inter alia that the Ombudsman shall ensure that the courts of law, the other authorities and civil servants, public employees and other persons, when performing a public task, obey the law and fulfil their obligations." The Parliamentary Ombudsman Act contains a provision with a similar content. It does not necessarily even occur to persons going about their everyday business that they are having dealings with an instance that falls within the scope of the Ombudsman's oversight of legality. Many persons who only rarely have dealings with authorities of the traditional kind may, however, in numerous conjunctions come in contact with an instance that performs a public task.

I shall now go on to present a tentative outline of the complexity of the Ombudsman's field of tasks by means of an exam-question-type narrative. The assignment reads as follows: "Distinguish between the functions that are included within the scope of powers and those that are not".

> Once upon a time there was a carless person who decided to get a car. Towards this purpose, he boarded a bus belonging to the city transport service and sped off to a car dealership. Once the deal had been concluded, the pleasant salesperson said he would be able to take care of the red tape associated with registering the vehicle while the happy car owner enjoyed some coffee and a bun. Satisfied, our person left the dealer-

ship and decided that he would now also take care of the insurance matters with an insurance company that he knew well.

Later, our main character felt an urge to go to a traditional national defence camp in the North, in conjunction with which he would also have an opportunity to try his luck at fishing. As part of his preparations for the trip, he popped down to the nearest branch of the R-kioski retail chain and did one line in the Lotto and bought an Ässä (Ace) lottery, in addition to paying the fisheries management fee. When he got back home, there was a notice from a chimney cleaning company on the threshold telling him that they could be expected to come round and clean his flue.

When the day of the trip was dawning, our hero drove to the airport and on the way got a verbal warning from a policeman for having failed to use his indicator when turning; he had momentarily relaxed his attentiveness while listening to the radio. At the airport he went through the security inspection and then flew to Lapland in a plane bearing the blue-and-white livery of the national carrier.

Having spent his time camping and fishing, our man sent a postcard to his friend from a newly opened sub-post office in a retail outlet belonging to the Siwa retail chain to report all of the latest news. He planned to make the return trip by train, stopping on the way to greet a relative studying at a private art institute and see his new rental dwelling.

The following answer, for example, will earn full marks:

- Municipal transport services are, as municipally owned commercial enterprises, an integral part of the municipality's organisation and are therefore subject to oversight of legality (e.g. 1581/06).
- A car dealership is subject to oversight of legality insofar as it performs, under an agreement it has made with the Finnish Vehicle Administration AKE on the basis of the Act on Vehicle Registration Functions, the task of a contract registrar. A task of this kind can also be performed by other instances, such as insurance companies (e.g. 2402/06).
- Insurance companies fall within the scope of the Ombudsman's powers also when what is involved is the granting of statutory or compulsory traffic insurance (e.g. 1448/09).
- The R-kioski retail outlets belonging to the company Rautakirja Oy were deemed in the 1990s to be within the scope of the Ombudsman's oversight when they sold car tax stickers (2068/94). At time of writing in September 2009, a complaint with a bearing on the R-kioski chain's status as a place where the tax-type fisheries management fee is paid was under evaluation (2567/07).
- The arrangement of gambling games by the State-owned company Veikkaus Oy has not been regarded as being within the scope of the Ombudsman's powers (e.g. 2055/98).

- The National Defence Training Association of Finland (MPK), which is a body constituted under public law, performs tasks connected with voluntary national defence training. With respect to its statutory public administrative tasks, it falls primarily within the scope of the Ombudsman's powers under the legislation setting out the division of labour between the Chancellor of Justice and the Ombudsman.
- Chimney sweeps perform fire safety-related tasks in the meaning of the Rescue Act. Under the Act, a regional rescue body can procure chimney-sweeping services from a service producer. The outsourcing of a statutory basic service has traditionally been subject to the Ombudsman's oversight. In my view, not even sweeping chimneys constitutes an exception here, although I am not aware of any decisions having been made in this matter.
- Oversight of police activities is a traditional part of the Ombudsman's work.
- The Finnish Broadcasting Company falls under the Ombudsman's powers insofar as what is involved is the performance of a public service task in the meaning of the Broadcasting Act (e.g. 724/95).
- The arrangement of security inspections at an airport is a public (administrative) task that is subject to oversight (1242/07).
- The State-owned company Finnair Oyj is a joint-stock company operating on commercial principles and, since it does not perform a public task, is not subject to the Ombudsman's oversight. From the perspective of the Ombudsman's powers, State ownership is not of significance (e.g. 1508/92).
- Siwa performs a public task when what is involved is the provision of a general postal service in the meaning of the Postal Services Act under a sub-post office contract with Itella Oyj. By contrast, its current consumer goods business is not subject to the Ombudsman's oversight.
- What has been written above about Finnair likewise applies to the VR Yhtymä railway company (e.g. 2265/09).
- Private educational establishments are subject to oversight when, inter alia, they have been granted permission by the educational authorities to arrange training leading to a qualification in the meaning of the relevant legislation (2404/04).
- Examining the principles in accordance with which publicly funded housing companies choose tenants for their rental dwellings falls within the scope of the Ombudsman's powers (e.g. 446/06).

The Ombudsman's powers can sometimes have to be assessed in very minute detail, which can cause very special situations. To present somewhat exaggerated examples, there could be a situation in which a person takes out both voluntary household insurance and compulsory traffic insurance from the same company, or one where both patients who are footing

the bill themselves and others who have been admitted under a payment commitment by a municipality are receiving treatment in the same ward in a private hospital. In those pairs of situations, it would be possible to investigate a complaint relating only to the latter client contact.

Thus changes in the way public tasks are organised are reflected also in the Ombudsman's activities. Privatisation of commercial activities earlier performed by public authorities, first by basing them on commercial principles and ultimately hiving them off in corporate form, as well as producing public services in especially the social welfare and health care sector under agreements between authorities and private providers pose challenges for oversight of legality. The scope of powers must be continually reassessed to respond to the challenges of a changing operating environment. New interpretation situations are continually cropping up in other respects as well. At time of writing in September 2009, an issue that was having to be appraised was (in addition to the question relating to the R-kioski outlets that I have already mentioned) that of whether, for example, the guide dog school run by the Finnish Federation of the Visually Impaired was subject to oversight (3535/09). The school functions as a promoter of the UN-defined rights of persons with a handicap by providing guide dog services for the visually impaired.

As an example of a recent change in the operating environment, a restructuring of the organisation of universities deserves mention. Under the new Universities Act, universities will become, with effect from the beginning of 2010, autonomous institutions constituted under public law or foundations under the Foundations Act rather than the "accounting offices" of the State that they have been until now. Especially the latter category are noteworthy from the perspective of the Ombudsman's powers, because with them new instances that were fundamentally built in a form based on private law will be brought within the scope of the Ombudsman's oversight. Looked at from a juridical perspective, foundation universities are legal persons in the meaning of the Foundations Act that have been entrusted, under the provisions of the Universities Act, with the public tasks that a university performs. These foundation universities are, according to the Act, the Aalto University Foundation, which operates as the Aalto University, and the Foundation of Tampere University of Technology, which operates as the Tampere University of Technology. The change does not as such lessen the Ombudsman's powers with respect to universities in oversight of their public tasks.

My intention in the following is to outline in greater detail the foundation of norms concerning determination of the Ombudsman's powers and especially individual interpretation situations that have defined the public task concept. It has not been possible to include all of the powers-related cases that have been resolved over the years, but I have tried to highlight

those situations that in my view best illustrate the complexity of the field of matters that the Ombudsman has to investigate. I have looked at the cases examined up to the end of September 2009.

General premises underlying the Ombudsman's powers

The powers of the Ombudsman – in common with those of authorities in general – are determined geographically and in terms of degree and their substantive content. The geographical scope of the Ombudsman's powers includes all subjects of oversight within the territory of the Finnish State, including the autonomous region of Åland, in addition to which the subjects of oversight beyond the national borders of Finland are Finnish diplomatic missions overseas and persons serving abroad in various peacekeeping tasks. Thus it has not been possible to assess, for example, whether the Estonian police had acted in accordance with the regulations binding on them when they rendered executive assistance to the Finnish police in a matter involving the collection from Estonia of a car that had been stolen in Finland (617/96).

From the perspective of the degree of powers, the Ombudsman is, along with the Chancellor of Justice, a supreme general overseer of legality in Finland. Taken broadly, oversight of legality means the requirement that is enshrined in Chapter 10 of the Constitution also for courts not to apply a provision of any law that is evidently in conflict with the Constitution (Section 106) as well as the obligation on courts and other authorities not to apply a Decree or other statute of a lower level than an Act that is in conflict with the Constitution or an Act (Section 107). In addition, oversight of legality can be regarded as including oversight of their subordinate organisations by the highest authorities in various sectors of administration, the oversight of State economic management and electoral funding conducted by the State Audit Office, the activities of the police, the internal oversight for which Municipal Boards are responsible and the oversight conducted within their respective spheres by special ombudsman-type officials (the Ombudsman for Equality, the Ombudsman for Minorities, the Ombudsman for Children, the Data Protection Ombudsman and the Bankruptcy Ombudsman). Despite the status of the post as a supreme overseer of legality, the Ombudsman is not an appeal instance of highest resort, one to which it would be possible to refer the decisions of lower appeal instances – let alone official decisions in general – for the purpose of having them quashed.

The substantive content of the Ombudsman's powers is most cases that arrive each year in no way unclear or open to interpretation; in other words, when what is involved is an official

action in the traditional sense, such as by courts, the police, the social welfare and health authorities, the Defence Forces or the prison authorities. However, the work of legal advisers in the Office very often requires that a matter be examined in the light of whether a public task in the meaning of the regulations on the Ombudsman's powers is involved.

Development of regulation of powers

The concept of a public task that is mentioned in the present provision on powers, and which has proved to be very open to interpretation, has guided the Ombudsman's actions for nearly 20 years. The concept was added to the powers provision in the Form of Government Act constitutional document through an amendment that entered into force at the beginning of 1991 and which detached the Ombudsman's power of oversight from the concept of a public servant in the Penal Code. However, it was assumed in the Government Bill proposing the amendment that in expanding the scope of oversight the concept of public power, the core of which had been regarded on an established basis as involving decisions on someone's benefits, rights or obligations, had been the principal consideration (HE 72/1990 vp, pp. 13–15).

The concept of a public task was included in the provision only when the Bill was being deliberated in the Eduskunta, and it was hardly defined at all in this conjunction (viz. PeVM 9/1990 vp and SuVM 179/1990 vp). However, the expression did occur in the legislative documents, for example in the observation that the great majority of public tasks and most exercise of public power are for State authorities to perform, but that public tasks can also be taken care of, on the basis of separate regulations, by organisations constituted under private law or private persons.

In conjunction with the 1995 revision of the fundamental rights provisions in the Constitution, when oversight of fundamental and human rights was added to the Ombudsman's duties, no position on the concept of a public task was separately adopted. However, the intention with the reform was not to broaden the scope of the Ombudsman's oversight (HE 309/1993 vp, p. 77). When the transition to a system of two Deputy-Ombudsmen was being made just over ten years ago, what was said about the concept of a public task was that it is generally associated with so-called indirect public administration, which is performed by, for example, independent institutions constituted under public law, associations constituted under public law and joint-stock companies in which the State has a majority holding. The nature of the task was regarded as the decisive factor (HE 129/1997 vp).

The concept of a public task was taken unchanged from the earlier Form of Government Act into the provisions of the present Constitution, which entered into force in 2000, concerning the powers of the supreme overseers of legality, and no further analysis of it was made in this conjunction, either. However, there was a reference in the Government Bill proposing the change, in connection with the reasoning underlying the provision on the task of the Chancellor of Justice, to the proposed Section 124, which concerns the delegation of public administrative tasks to others than authorities (viz. HE 1/1998 vp, s. 165). The concept of a public task appears also in Section 111.1 of the Constitution, which concerns the right of the Ombudsman to receive information. This Section states that the Ombudsman has the right to receive from public authorities and others performing public tasks the information necessary for oversight of legality. The concept further appears in Section 118.3 of the Constitution, which provides for the right of anyone who has suffered a violation of his or her rights or sustained loss through an unlawful act or omission by a public servant or other person performing a public task to request that the offender be sentenced to a punishment and held liable for damages. Thus the right of an individual to demand a punishment and compensation does not depend on whether the performance of a public task has been entrusted to a public servant or to a party outside the machinery of officialdom (HE 1/1998 vp, pp. 172–173).

Public task and public administrative task

The legislative drafting documents referred to in the foregoing do not so far contain any particular mention of, firstly, what the concept of public task that the provisions on the powers of the overseers of legality contains or could contain in concrete terms. Something that is likewise not evaluated is whether there is a difference between a public task and a "public administrative task" in the meaning of Section 124 of the Constitution, and if there is, of what kind it is.

By contrast, an effort was made when the Constitution was being enacted to define what a public administrative task is. By it is meant a comparatively extensive totality of administrative tasks, which includes, for example, functions associated with the enforcement of laws as well as with decision making that impinges on the rights, obligations and benefits of private persons and bodies. The provision covers both the delegation of tasks that now belong to authorities and the entrustment of new tasks in the sphere of administration to parties other than authorities (HE 1/1998 vp, p. 179).

Although the concept of a public administrative task is as such new in the Constitution, privatisation of official tasks was possible already earlier. While the Form of Government Act

was still in force, the Constitutional Law Committee had in its interpretations developed the so-called principle of administration by public servants, according to which public power in Finland can be exercised only by authorities and, in the name of authorities, by legally appointed officials. On the other hand, the principle in question did not mean an absolute bar on entrusting, on a limited basis, public power and public tasks to parties other than authorities, such as State-owned commercial enterprises and bodies constituted under private law. Then, however, the Constitutional Law Committee had stipulated the proviso that sufficiently detailed regulations on the discharge of the tasks and the procedures followed in doing so be issued, that aspects of legal remedies be taken into consideration and that persons performing public tasks be included in the sphere of official accountability under criminal law (viz. HE 1/1998 vp, p. 178). Where actual activities are concerned, the importance of the training and skill of the person performing the task is underscored.

In the Constitutional Law Committee's interpretations over the years, the concept of a public administrative task has acquired a broad content of meaning, which includes such matters as sea rescue functions (PeVL 24/2001 vp), the activities of security companies (PeVL 28/2001 vp), the arrangement of elections of student representatives to the board of a polytechnic and a multi-member institution (PeVL 39/2004 vp), receipt of a radio amateur qualification (PeVL 44/2004 vp), examining impediments to marriage (PeVL 28/2006 vp), serving as a place where the civilian alternative to non-military national service is performed (PeVL 18/2007 vp), using the services of an outside expert in studying a matter (PeVL 28/2008 vp) and handing out population data (PeVL 3/2009 vp). On the other hand, the Committee's interpretations can also change. For example, in its statement 2/2002 the Committee took the view that the provision of quality certificates in the meaning of the Act on Electronic Signatures constitutes the performance of a public administrative task, whereas in its statement 16/2009 it concluded that there was nowadays no longer a need to regard this function as being of such a nature.

Examples of private persons who perform public administrative tasks include, in turn, a public inspection and appraisal person in the meaning of the Maritime Act, a fisheries inspector in the meaning of the Fishing Act, a sworn game warden in the meaning of the Hunting Act and a quality inspector in the meaning of the Auditing Act. Tasks associated with teaching and health care have also been entrusted to private parties through, e.g., outsourcing contracts.

Thus the concept of a public administrative task has been explicated on a case-by-case basis through the interpretations presented in legislative drafting documents. The situation is different in the case of a public task. Nor is it easy to formulate the difference between these concepts at least by examining the current legislation, because, according to my observa-

tions, they are used partly inconsistently. On the one hand, there is legislation enacted before the present Constitution and which contains the expression public task (as examples of general administrative laws, the Act on the Openness of Government Activities and the Archives Act) just as in the provisions on the powers of the supreme overseers of legality. On the other hand, the phrase public administrative task mentioned in Section 124 of the Constitution is consistently used in the general administrative laws that entered into force subsequent to the enactment of the Constitution (the Administrative Procedure Act, the Language Act). Thus, the terminology used in general administrative laws varies depending on when they were enacted, although the a priori assumption could be that the laws in question would be applied in the same manner in privatised administrative functions.

There are also laws enacted since the entry into force of Section 124 of the Constitution (for example the Chambers of Commerce Act) in which the concept "public task" appears on the level of a legal provision without the reasoning for the Act setting forth specifically and clearly whether the reference to a public task is in the meaning of the provision on the powers of the overseers of legality or of the activities covered by Section 124. The concept can also appear in the reasons presented in support of laws enacted since the entry into force of the Constitution although they do not appear on the level of a provision. A good example is the Act on the Federation of Finnish Learned Societies, in the Government Bill concerning which it is stated that the organisation in question is a body constituted under public law and performing public tasks (HE 104/2006 vp). It should not be forgotten, either, that a reference to the concept of a public task was contained already in the reasons presented in support of Section 124 of the Constitution.

Among the factors adding to the diversity of terminology is the fact that in Section 4 of the Statistics Act, which concerns the principles to be observed in data compilation, the phrase task of public administration is used when determining the kinds of tasks the performance of which should primarily generate the data to be used in statistics. The Act on the Chancellor of Justice of the Council of State, for its part, contains the expression oversight of public activities, although the powers of the Chancellor of Justice are as such defined in the Constitution in the same way through the concept of public task as are those of the Ombudsman.

Are we, thus, dealing mainly with terminological instability or with a conscious distinction being made between the concepts of public task and public administrative task? The fact that when enacting the Constitution the legislator adopted the position that there exist both public tasks in the sense of oversight of legality and public administrative tasks from the perspective of evaluating the preconditions for their privatisation might, in my view, provide a ground to at least suspect that there is a difference between the concepts. Indeed, the

coalescence of a budding difference between the concepts has in recent times been perceptible in both legislative drafting and the legal literature.

An example on the legislative drafting side is a revision of the legislation on *consumer advice*, under which responsibility for providing this advice was transferred from municipalities to the State. The initial premise in the Government Bill was that consumer advice would be mainly a public service task in character, one that would not have the nature of a public administrative task (HE 54/2008 vp). On the other hand, however, the Administration Committee pointed out in its statement to the Finance Committee that the contents of consumer advice include legal advice and mediation, the provision of which can be regarded on contentual grounds as constituting a public administrative task in the meaning of Section 124 of the Constitution (HaVL 26/2008 vp). An attempt to find a difference has also been made in the legal literature by noting that a public task is a kind of superordinate term, which covers also the narrower concept of public administrative task. On the other hand, the partial overlapping of the concepts and the difficulty of discerning the difference between them has, however, been acknowledged (e.g. Marietta Keravuori-Rusanen: Yksityinen julkisen vallan käyttäjänä, 2008, pp. 139–159).

The concept of a public task was embraced in the provisions on the powers of the overseers of legality using very largely the same arguments that were later used when Section 124 of the Constitution was being drafted. The ultimate aim was to prevent the powers of the overseers of legality being narrowed as a result of tasks traditionally performed by authorities being increasingly entrusted to private instances. Thus power of oversight is extended also to persons who perform a public task, but who in so doing are not necessarily exercising public power in the meaning of the regulations concerning accountability under criminal law for misconduct in the performance of their duties. Thus the concept of a public task that determines the Ombudsman's powers is broader than the criminal law concept of public power, which in turn is linked to deciding on someone's benefits, rights or obligations.

That being the case, the discussion of concepts that I have highlighted in the foregoing is not as such ultimately of significance from the perspective of the scope of the Ombudsman's power to investigate, because in any event it is determined according to the most broadly defined alternative. On the other hand, however, I do not believe the difference between the concepts is entirely without significance when the matter is examined from the perspective of which laws should be the basis for evaluating an activity within the scope of the power in each particular case.

In situations where a public task and a public administrative task can be equated with each other, I do not believe that there are any problems. Then the Ombudsman can evaluate an action also from the perspective of compliance with general administrative laws. However, not all functions that have been interpreted in the Ombudsman's decisions as public tasks are of such a nature that they would fit, at least self-evidently, into the framework of the areas of application of the general administrative laws that are founded on the concept of a public administrative task, such as those regulating broadcasting and postal services, which the Ombudsman evaluates in the light of criteria enshrined in separate legislation. If a public task is regarded as being a broader concept than that of a public administrative task, problematic interpretation situations could arise with regard to the extent to which general administrative laws could become applicable to the performance of a public task that is of such a nature that it does not clearly involve the performance of also a public administrative task at the same time. However, this is a theme that would merit an article in its own right.

Introduction to recognition of power and various interpretation situations

How open to interpretation the Ombudsman's power is in each particular case depends on what kinds of stances by the legislator can be found. In my view, no openness to interpretation is associated with situations in which the legislator has, on the level of norms, clearly shown what in the activities of a particular organisation constitutes the performance of a public administrative task from the perspective of the preconditions for privatisation. Examples of this are the National Defence Training Association of Finland (MPK) and the Central Chamber of Commerce. Then the Acts usually contain also references to general administrative laws and accountability under criminal law for official actions, although making a reference of this kind is not, in the Constitutional Law Committee's interpretation, essential. References of this kind are already sufficient in themselves to recognise an activity as a public (administrative) task even if the concept can not be found in the provisions (e.g. the quality controller mentioned in the Auditing Act). On the other hand, it can also have been expressly mentioned in legislative drafting documents that the activities of some or other instance do not involve a public administrative task (for example, Svenska Finlands folkting – the Swedish Assembly of Finland). When actual activities have been concerned, it has been possible to write into an Act certain demands with respect to the eligibility or professional skill of the person to whom a task is entrusted – such as an appropriate vocational qualification in the case of a chimney sweep – something that also can hint in the direction of the Ombudsman having power in the matter.

Thus, although for example the Constitutional Law Committee evaluates Acts only from the perspective of the preconditions for privatising a public administrative task and not, as it were, in the light of the Ombudsman's powers, a legal adviser at the Office of the Parliamentary Ombudsman who wishes to obtain analogous interpretation aid would find it useful constantly to follow the interpretations that the Committee makes with respect to Section 124 of the Constitution. Since, however, the Committee is not asked for a statement on all Government Bills, the interpretations of a public administrative task presented in other legislative drafting documents may also be of use in recognising where power exists.

When "auxiliary stances" of this kind can not be found, the matter has to be evaluated independently and on a case-by-case basis. In the light of my own observations, the more of the following criteria are met in the activities of a private instance that is the subject of a complaint, the closer we are to the performance of a public task that is subject to the Ombudsman's oversight, although, in my view, no single criterion is sufficient on its own to resolve the basic question:

1) there are separate legislative provisions on the activity
2) some or other instance is separately designated in the norms as the practitioner of the activity, either directly or in such a way that the party to perform the task can be determined by virtue of an Act in the manner laid down in greater detail in it
3) there is some or other connection between the private instance and a public-sector actor, such as an operating licence or a commitment relating to the production of a service
4) there is some or other close connection between the activities of the private instance and some or other stage of an official process
5) the public sector contributes to funding the activity
6) the public sector directs or oversees the activity
7) the public sector is represented in the decision-making bodies of the instance engaged in the activity, and
8) the activity is in some or other way of significance from especially the perspective of the legal status of a private person or group or on some other basis.

This can be described in concrete terms by using postal services and broadcasting as examples as follows (in the above-mentioned order):

1) the provision of postal services is regulated by the Postal Services Act and broadcasting by the Act on Yleisradio Oy

2) Yleisradio Oy (the Finnish Broadcasting Company) is regulated by an Act directly concerning precisely it, whereas under the Postal Services Act an operating licence granted by the Government is required to engage in the provision of postal services
3) Itella Oyj provides postal services under an operating licence granted by the Government
4) no example
5) Yleisradio Oy's operations are financed out of a television and radio fund maintained by the State
6) Yleisradio Oy must give the Finnish Communications Regulatory Authority an annual report on the public service that it provides; correspondingly, the Finnish Communications Regulatory Authority oversees compliance with the Postal Services Act in Itella Oyj's operations
7) the Board of Itella Oyj includes a representative of the Ownership Steering Department of the Prime Minister's Office, and
8) both Yleisradio Oy and Itella Oyj take care, in their respective sectors, of a basic societal service that is important from the perspective of the individual. I shall outline decisions concerning these companies in greater detail below.

Based on my experience and simplifying matters somewhat, situations concerning applicability of power can be divided into easy and difficult categories, each of which can be further divided into two sub-categories. Although the framework within which an activity is arranged, i.e. organisational forms, are nowadays no longer as such decisive in determining whether power exists, in practice it is nevertheless the manner in which the activity is produced that in the initial stage largely determines how open to interpretation the activity has to be regarded as being. What can, namely, be taken as the basic starting point is that if a complaint concerns some or other authority, the action mentioned in the complaint can also be regarded as falling within the scope of the Ombudsman's powers unless special reasons to the contrary exist.

Easy cases are, on the one hand, those in which the action to which the complaint refers is clearly, on the basis of both the organisation and the task that it performs, within the scope of the Ombudsman's oversight. An example of a basic situation would be a complaint concerning the time taken by court to process a case. A second category of easy cases is those where neither the organisation nor the task that it performs are subject to the Ombudsman's oversight. The customer service provided by a hardware store would serve as an example of this. However, situations of this kind that are completely beyond the scope of the Ombudsman's powers are not particularly common relative to the overall number of complaints.

Difficult cases, on which I shall concentrate in the following, can be divided first of all into those in which the organisation to which the complaint refers falls in and of itself within the scope of the Ombudsman's oversight, but its action in the case mentioned in the complaint can not be evaluated. A second sub-category consists of cases in which the subject of the complaint would not appear on the basis of its organisational form to fall within the scope of the Ombudsman's oversight, but in which a certain activity can by its nature be regarded as a public task. This category includes also instances with respect to which whether or not the Ombudsman has power has not yet been resolved in all respects.

The organisational form would speak for there being power of oversight, but the activity can not always be overseen

Some situations impinging on the Eduskunta (the Finnish Parliament)

In terms of oversight of legality, the Eduskunta is a complex institution. From the perspective of the Ombudsman's power, a distinction must be made in the Eduskunta's functions between, on the one hand, Representatives as exercisers of legislative power together with their assistants and, on the other, the officials there. The function of a Representative is regarded as including, in addition to legislative work proper, the discharge of also such tasks as those for which the Eduskunta has chosen the Representative and for which no person other than a Representative can be chosen (1854/00).

Thus the Ombudsman's remit does not include examining an action by a Representative in his or her capacity as a member of the Board of the Eduskunta Library, because serving as a member of this Board has been regarded as discharging a duty belonging to a Representative's function, which the Ombudsman has no power to oversee. By contrast, persons from outside the Eduskunta are subject to the Ombudsman's oversight when they are performing an equivalent task (1579/00). Nor has the Ombudsman the power to examine the legality of actions by the Speaker of the Eduskunta or the Speaker's Council, whereas parliamentary officials are subjects of oversight in the performance of their duties (1910/99). However, the actions of Representatives in ministerial office are subject to oversight insofar as what is involved is oversight of the legality of official actions in the meaning of Section 112 of the Constitution. Oversight of this kind is narrower than under the Ombudsman's general power of oversight (920/01). Representatives' personal assistants, on the other hand, have not been regarded as being within the scope of the Ombudsman's oversight (1294/07).

Some situations impinging on universities

Noteworthy examples of interpretation situations concerning universities include cases relating to a conferment committee and the Yliopiston Apteekki (University Pharmacy) company. The association of the activities of both with universities – which have traditionally been included in the scope of oversight of legality – could lead without closer examination to a misjudgement with regard to the Ombudsman's power.

There are no separate statutory provisions on either degree conferments or the bodies participating in arranging them; instead, it is a matter of an old academic tradition, in which responsibility for the practical arrangements resides with a committee that is independent of the university and whose members are voluntary doctoral and master's graduands. Although there is a linkage between a conferment, as the festive concluding event of studies, and the university' statutory task, attending it is neither compulsory nor a prerequisite for receiving a degree certificate. Thus a conferment committee does not perform a public task (955/08). The dispensement of medicines by Yliopiston Apteekki, which is constituted as a joint-stock company, and the associated customer service belong, in turn, to a pharmacy's business operations and are not subject to oversight (2365/07). If, on the other hand, Yliopiston Apteekki were to have educational functions, the question of power of oversight could, in my view, be evaluated differently in this respect.

Some matters based on contracts

Remuneration systems based on evaluation of the degree of difficulty of the work and personal performance have been adopted on an extensive scale in also the public sector, and this has brought with it a new category of complaints. Complaints concerning remuneration systems have been evaluated with great restraint (e.g. 1855/07), because they are based on sector-specific service and employment contracts and remuneration matters are a key component of the contractual procedure followed by the labour-market parties within the system of service contracts that is founded in law. To deal with situations of disagreement, the contract systems contain their own rights-protection mechanisms, and dissatisfaction can always be referred in the final instance to a court of law for resolution. Public-sector officials and workers also have their own organisations to promote, protect and oversee their interests. Thus individual, task-specific evaluations of degree of difficulty and personal performance have been regarded as being outside the scope of oversight of legality (with respect to the police administration, e.g. 3186/06).

However, one case that deserves mention as an exception was a complaint concerning the introduction of the university remuneration system, which was investigated because of its special features. The matter at issue was what impact the new remuneration system had on the autonomy of universities, which is enshrined in law, and on freedom of science and education (1122/05). Equally exceptionally, a procedure adopted by virtue of an agreement between employer and employee parties can be taken under evaluation if the procedure thus agreed can have an indirect effect on, in addition to the parties to the agreement, also a party outside the administrative sphere, i.e. on a client of administration. An example of this is a complaint case that involved in part the handling of an official appointment matter through a codetermination procedure, which was based on a codetermination agreement under the provisions of the Cooperation Act (2982/05). Deciding what matters belong to the sphere of a codetermination procedure is, however, not a task for the Ombudsman (2294/96).

Experts used by authorities

When dealing with matters, authorities often have a right directly enshrined in an Act to use experts, whose activities may appear from the outside to be part of the authorities' decision making and create the impression that also the experts are a part of the totality of that authority. From the perspective of the Ombudsman's power, what is involved in the final analysis is evaluating how closely the experts in question are linked into the authority's decision-making process. For example, experts used by a consumer disputes board have not been deemed to fall under the Ombudsman's power of oversight (3858/06), whereas the actions of expert doctors working for companies that take care of social or other statutory insurance (e.g. 2238/97) and those with the Finnish Patient Insurance Centre (3546/04) have been evaluated differently.

Lawyers used by authorities

The lawyers used in various connections by the public sector can likewise appear outwardly to be part of official activities. Nevertheless, for example a lawyer engaged by a municipality has not been regarded as having been performing a public task when acting for and commissioned by the municipality in an administrative court in an appeal case brought by the complainant (2904/01). The same applies, in my consideration, also to, for example, an outside agent used by the Finnish Patient Insurance Centre in patient injury court cases. By contrast, the performance of a public task is regarded as being what is at issue when deciding whether the Finnish Patient Insurance Centre is represented in court proceedings by its own lawyer or an outside one (2938/04).

A public servant as a witness

Public servants can find themselves in a role in relation to their actions in which the Ombudsman may have to refrain from proceeding with an investigation. An example would be a situation in which a public servant has been heard as a witness in a criminal investigation and the subject of a complaint is the public servant's action in this connection. The view taken in the Ombudsman's decisions is that a public servant heard in this capacity must a priori be examined from the perspective of the obligations that flow from this role. Consideration of the significance of the statements presented in a criminal investigation is primarily a task for the public prosecutor and possibly a court, if a criminal case proceeds to that point. It is possible to evaluate a witness's action in a separate criminal trial. The practice in making decisions has in fact been to adopt a fairly restrained attitude to evaluating the contents of witnesses' accounts even when the witness has been a public servant (e.g. 557/07).

The organisational form does not indicate power, but the activity can in part be overseen

State-owned companies

Corporatisation is a part of the trend towards privatisation and has often been preceded by a commercial activity practised in the form of a Government office being entrusted to a State-owned commercial enterprise and official functions being hived off as a separate unit. A priori, State-owned companies are, their proprietary base notwithstanding, joint-stock companies operating on principles of private law, and State-ownership as such has no influence on the Ombudsman's powers in one way or another.

Owner-direction of companies that operate on market terms is entrusted centrally to the Office of the Prime Minister. These include companies in which the State has a majority holding (at least 50.1%) and associated companies in which the State's shareholding is less than 50.1%, whereas owner-direction of companies that perform special tasks for the State is the responsibility of various ministries. However, this division is not of decisive significance from the perspective of the Ombudsman's powers, either; what matters are the obligations that may have been imposed on the companies through separate legislation. For example, Itella Oyj has been deemed to fall within the scope of oversight, although in the classification outlined above it is defined as a State-owned company operating on market terms. Now I shall outline decisions concerning three State-owned companies.

Yleisradio Oy (the Finnish Broadcasting Company) is a model example of a joint-stock company that performs a special task in society and has been deemed to come within the scope of the Ombudsman's power insofar as the tasks in question are special public service ones in the meaning of the Broadcasting Act. Powers have been defined in greater detail first of all in such a way that the production of programmes for broadcasting has been regarded as a public task insofar as what is involved is fulfilment of the special requirements that are set in the Broadcasting Act for the content and transmission of public service programming (e.g. 2622/05). Then, an assessment has been made of, for example, implementation of equitable treatment of political parties in election programmes (1767/07) as well as giving equal treatment to Finnish- and Swedish-speakers in the results service for European Parliament elections (coverage of results) (757/04). By contrast, oversight of the contents of individual programmes is not as such included in the Ombudsman's powers (e.g. 315/07).

Yleisradio's activities provide an excellent example of how changes in society and news mediation put also interpretation of the provision on the Ombudsman's powers to the test. One example is a complaint case concerning the exclusion of the complainant from a discussion forum run by the YLE Radio 1 channel. The matter could be approached from the angle of the discussion forum's central function. It is intended for discussion of YLE Radio 1 programmes and the themes associated with them and with objectives that include gathering feedback from the audience. That makes it possible to plan programming so that it suits the needs of the audience better. For this reason, the view was taken that the activity was linked to the public service task that is within the scope of the Ombudsman's oversight. However, the Ombudsman's powers are limited to examining only whether or not a user of the service has been treated on a basis of equality (3896/06). A stance was also taken on the appropriateness of the rules for using this discussion forum (1156/08).

Itella Oyj serves also as an example of a State-owned company some of whose operations have been interpreted as falling within the scope of the Ombudsman's powers. The view has traditionally been taken that the provision of the postal services regulated by the Postal Services Act is subject to oversight of legality. Thus, for example, disruptions in delivery of letter post have been examined (2811/06) and wheelchair accessibility in sub-post offices (1569/07). By contrast, the company's operations do not fall within the scope of the Ombudsman's powers when it comes to transporting and delivering daily newspapers, because this is a business activity that is not included in the postal services in the meaning of the Act (1295/06). Nor are the company's actions in its capacity as an employer (369/96) or the operations of its Philatelic Centre as a supplier of philatelic material (1775/07) the performance of a public task.

A recent manifestation of Itella's openness to interpretation has been associated with development of the electronic operating environment and the services offered by the company, NetPosti. This is an electronic transactions service, which offers an alternative to postboxes and file folder archives. A letter formerly delivered in paper form to a postbox can be received electronically using NetPosti. It is not e-mail or a substitute for it, but rather an electronic letter that replaces a traditional one in paper form. Because NetPosti is an electronic alternative way of sending a traditional paper letter, something that is within the area of application of the Postal Services Act, also the provision of this service constitutes the performance of a public task (4015/08).

Also concerning Finnvera Oyj, the Ombudsman's powers were recently evaluated from a new angle. This is a State-owned limited liability company that performs a special task and came into being in the late 1990s through a merger of the limited liability company Kera Oyj and the Finnish Guarantee Board. Finnvera's purpose is to promote and develop financial services by providing, in accordance with the legislation on State-owned specialist financing companies, finance to support the operations of small and medium enterprises as well as to help companies internationalise and boost their export activities. The company is required in its operations to promote implementation of the State's regional policy objectives and its activities must be devised to redress the shortcomings that exist in the provision of financing services. Thus the company can be regarded as an instrument of regional policy. Regional policy, in turn, has traditionally been an activity that belongs to the public authorities, i.e. the State. The law also allows a ministry to entrust to a company the research, study and other tasks that it considers necessary and which are compatible with the company's sector of operation. The latter tasks could, in my view, be among those subject to the Ombudsman's oversight, although formulating the question is at this stage premature.

The view long taken in the Ombudsman's decisions is that Finnvera Oyj's activities – like those of its precursor Kera Oyj – in making individual financing decisions are not within the scope of the Ombudsman's oversight, because these commitments are private-law contracts. In autumn 2009, however, the view was taken that the Ombudsman does have the power on a general level to evaluate the financing products that the company puts on the market from the perspective of fundamental rights, because by offering these products the company is in practice performing the regional policy-related task that is statutorily entrusted to it. Thus the matter has been evaluated in the light of whether the company performed its statutory duties in a manner that is acceptable from the perspective of the system of fundamental rights when it offered a certain form of loan (a female entrepreneur loan) only to an applicant representing one gender. The action was not found to be unlawful (2957/09). It must further be pointed out that the Constitutional Law Committee has found the company's export guaran-

tee operations, i.e. the granting of export guarantees to be - the strong private-law features of this activity notwithstanding – a public administrative task in the meaning of Section 124 of the Constitution (PeVL 2/2001 vp), whereby it, too, is subject to the Ombudsman's oversight.

State-owned commercial enterprises

Like State-owned companies, commercial enterprises are a part of the trend towards privatisation. Often, a commercial enterprise serves as an intermediate stage between a commercial activity being performed by a Government office or agency and corporatising it outright. At time of writing in autumn 2009 there were about half a dozen State-owned commercial enterprises and the number will become smaller at the beginning of 2010, when some of them are converted into corporate form.

Metsähallitus has public administrative tasks that are specifically enshrined in law (Chapter 6 of the Metsähallitus Act), and which are therefore also subject to the Ombudsman's oversight. Tasks of this kind include a variety of nature conservation functions on which there are separate statutory provisions and the acquisition of nature conservation areas, producing nature and hiking services, implementing game and fisheries projects, protecting wilderness areas, tasks associated with procurement of seeds for forest tree species and maintaining stockpiles, a variety of duties connected with log floating as well as tasks provided for in certain other Acts. Metsähallitus has a separate unit for taking care of these tasks.

By contrast, the activities of commercial enterprises that are purely of a business nature are not subject to the Ombudsman's oversight. One example of this that features in decisions by the Ombudsman is Senaatti-kiinteistöt, which is a State-owned commercial enterprise operating within the Ministry of Finance's sector of administration. Its task is to produce and develop property services and closely associated other services primarily for Government offices and institutions as well as to manage the property assets under its care. Senaatti-kiinteistöt does not have any of the functions of an authority nor perform any actual official tasks. Owning property assets and renting them to other bodies is furthermore an activity that comes under private law (HE 108/2003 vp), and which therefore is not subject to the Ombudsman's oversight, either (2256/08).

With respect to Finavia (the Civil Aviation Authority), the view taken has been that the arrangement of security inspections, which has been entrusted to this commercial enterprise, constitutes the performance of a public administrative task. However, regulation of the arrangement of these inspections has been found to be somewhat defective, because there are no specific regulations concerning this public administrative task in the Act on the Civil

Aviation Authority (1242/07). The Civil Aviation Authority has been a joint-stock company since the beginning of 2010.

In my assessment, however, the question of the Ombudsman's power to oversee the activities of commercial enterprises has not yet been finally resolved in other respects, either. Namely, Section 7 of the Act on State Enterprises, as a general law, also applies to them, and according to it, an appropriation to fund a commercially unprofitable activity that has been assigned to a commercial enterprise can be included in the State budget. For example, in conjunction with the legislative drafting concerning Senaatti-kiinteistöt, the Finance Committee pointed out that separate financing of this kind would probably continue to be needed with respect to, among other objects, buildings of outstanding architectural, cultural and historical merit in a situation where basic renovation of such buildings required extensive investment and the buildings' use as normal work premises did not make it possible to charge a rent commensurate with the investment (VaVM 34/2003 vp). Thus, although a commercial enterprise's basic function, i.e. to engage in commercial activities, is not subject to the Ombudsman's oversight, her powers could if necessary be activated once again with respect to tasks requiring the separate funding mentioned above.

Associations constituted under public law

An association constituted under public law is a body that has been organised under an Act or by virtue of one for a special purpose. Most statutory associations mainly take care of the voluntary activities of their members and protect and promote their members' interests. However, they may additionally have public tasks that have been statutorily assigned to them and the right to exercise public power, such as disciplinary power or power of oversight, that is associated with those tasks. Associations constituted under public law are many in number, and they are all subject to the Ombudsman's oversight to the extent that they perform public (administrative) tasks. By contrast, oversight of legality does not extend to their voluntary activities in accordance with the Associations Act.

A recent example of a decision concerning an association of the kind under discussion here is one concerning an action of the Finnish Bar Association's Disciplinary Board (1317/09). The function of this body is to perform a public administrative task, in the meaning of Section 124 of the Constitution, that is clearly defined in the arguments supporting a Government Bill to amend the Advocates Act (HE 54/2004 vp). Although the tasks of the Chancellor of Justice in relation to overseeing the legal profession are expressly and separately set forth in the Advocates Act, overseeing the legality of the Disciplinary Board's actions is not defined as his exclusive right. Therefore the Finnish Bar Association's Disciplinary Board is subject to

the oversight of also the Ombudsman. However, this power of oversight is factually narrower than that of the Chancellor of Justice; the Ombudsman can not investigate the actions of individual lawyers nor – unlike the Chancellor of Justice – initiate a disciplinary matter in the Bar Association's relevant bodies or appeal against decisions by these bodies. For these reasons, it may be best in most cases to transfer a matter to the Chancellor of Justice for him to examine it.

Another good example is the Slot Machine Association RAY, with respect to which the view has been taken that the performance of a public task may be involved at least when the Association deals with matters relating to the distribution of grants out of its profits. By contrast, the practical arrangement of various money games is not subject to oversight (609/08).

Other private instances that perform public tasks

According to my observations, the actions of Euroclear Finland Oy (formerly Suomen Arvopaperikeskus Oy) have so far had to be evaluated on at least two occasions. This body is a company that operates as a securities clearing centre under a licence granted by the Government. It has been entrusted under the Act on the Book-Entry Securities System with several tasks, such as maintaining a book-entry register, various other statutory lists and information systems that facilitate an insider register as well as oversight of securities and the right to issue guidelines concerning the book-entry securities system. The company also has the task of dealing with applications concerning the rights of account operators.

In one of the cases dealt with by the Ombudsman, a public guardian criticised the company for having disclosed information about his principal's securities holdings (2393/07). What made the case interesting was that the company called into question the Ombudsman's power to examine its action. A significant fact in evaluation of the matter was that the company takes care of, on the one hand, statutory licensing and oversight tasks and at the same time acts as an account operator in a similar manner to, for example, a deposit bank. In the case in question, the company acted above all in the role of an account operator comparable to that of deposit or investment banks, not in the performance of a public (administrative) task. Thus the final outcome in the decision with respect to powers was similar to what the company had asserted in its report. By contrast, whether the other tasks listed in the foregoing come under the Ombudsman's oversight can be evaluated differently. Indeed, in the other decision concerning the company, an action that it had taken was evaluated with respect to the registers that it maintains (314/01). Thus the question of the Ombudsman's powers with respect to the company has not yet been resolved in all respects.

Housing-related questions have caused their own interpretation situations. The view taken in decisions (e.g. 2942/06) has been inter alia that the appropriateness of the principles in accordance with which tenants are selected and rents increased by rental housing companies whose properties have been built with public funding are among the matters that the Ombudsman has the power to examine. By contrast, practical management of affairs by rental-housing companies, the actions of their employees or their arrangement of personnel administration have not been examined (e.g. 1599/96). A further matter that the Ombudsman does not have power to decide on concerns the preconditions for rescinding a rental contract. However, it has been possible to evaluate the actions of municipal officials from the perspective of whether they have, when performing their duties with respect to, for example, rescinding a rental contract and dealing with matters associated with rent collection, complied with the procedural rules by which they are bound under the Act on Rental Dwellings and remained within the limits of their discretionary power (3998/08 and 532/08).

Whether or not private educational institutes are subject to the Ombudsman's oversight is likewise a matter that has to be evaluated in a highly nuanced way. If an establishment of this kind receives authorisation from the authorities to arrange education leading to a qualification in the meaning of the legislation on education, it is subject to oversight. However, it is also my view that an establishment is probably subject to oversight even if it doesn't provide education of this kind if, for example, a municipality has, under the provisions of the Act on Basic Art Education, purchased educational services from a private institute. If, on the other hand, the matter involves visual arts education for adults that does not lead to an official qualification, the Ombudsman has no power even if the Social Insurance Institution Kela has equated a private educational institute to the ones that are subject to public oversight and decided to grant support for studies in such an establishment (2404/04).

Pelastakaa Lapset ry (Save the Children Finland) is likewise an example of a private instance that performs a public task. It is a non-governmental organisation, founded in 1922, that promotes implementation of children's rights. It is also one of three bodies authorised by the Ministry of Social Affairs and Health to provide an international adoption service. This service is one that requires an official licence and takes care of tasks in accordance with Article 21 of the UN Convention on the Rights of the Child in addition to fulfilling the obligations by which Finland is bound under an international convention. When acting as a provider of a service of this kind, Save the Children Finland has been deemed to fall within the scope of the Ombudsman's oversight (1044/06).

A further example of private organisations that deserve mention for their performance of a public task are private debt-collection agencies, which have been deemed to be subject to

the Ombudsman's oversight when they collect taxes and charges as well as other public-law cash receivables in the meaning of the Act on Collection of Tax and Charges through Distraint Measures (1964/03). One of the reasons presented in support of this stance was that, owing to the restrictions in legislation on debt-collection, receivables by the State are excluded from debt-collection commissions, whereas various payments that municipalities have ordered collected are left for private agencies to collect. Features that hinted at a status of dependence typical of exercise of public power could be identified in the relationship between a public body and the person liable to pay.

A good example of the private persons who perform a public task is a mediator appointed by a district court under the provisions of the Act on Enforcement of a Decision concerning Child Custody and Visitation Right (2726/07). This person has the task of striving to ensure that the parties involved voluntarily implement the solution that is the object of implementation. If this is not done, the mediator must in the report that he or she makes to the district court set out impartially and truthfully the facts that may be of relevance in resolving the matter. The safeguarding of the child's interest that is associated with a mediator's work is, in my view, an interest broader than that of resolving a disagreement between the individual parties and of such a nature that because of it the mediator can be evaluated from the perspective of power of oversight differently from, for example, an examiner appointed under the provisions of the Act on Debt-Arrangement for a Private Person, because an examiner's task has to do with the private-law relationship between creditor and debtor. An examiner of this kind has not been regarded as being within the scope of the Ombudsman's oversight (e.g. 2567/97).

Interpretations can change and evolve

Because the provision on the Ombudsman's powers is flexible and can be interpreted in different ways, it also makes it possible that as legislation changes, the question of power even in the same matter can be re-evaluated – in one direction or another. Looked at from this perspective, what I believe is a good example is provided by first of all goods inspection, or evaluation of the action of a chamber of commerce goods inspector and the Central Chamber of Commerce's Committee of Goods Inspectors. In a goods inspection, an attempt can be made to resolve differences of opinion over damaged or faulty items without having to resort to litigation.

The public tasks of chambers of commerce and the Central Chamber of Commerce are separately regulated by the current Chambers of Commerce Act. The duty of a chamber of

commerce is to perform the tasks entrusted to it under the Auditing Act and certify foreign trade documents insofar as it has been entrusted with a task of this kind under or by virtue of another Act. The Central Chamber of Commerce, in turn, has the duty of performing the tasks entrusted to it in the Accounting Act, appointing mediators in situations separately provided for in the Companies Act and performing the tasks assigned to it in the legislation on real-estate and rental premises brokers.

When an earlier Chambers of Commerce Decree was in force, for example in decisions issued in 1995 (2388/94), goods inspection activities in their entirety were categorically excluded from the scope of the Ombudsman's powers. Also in 1999 it was ruled that oversight of a goods inspector was not included in the Ombudsman's powers (2573/99). In 2001, however, the interpretation with respect to the Committee of Goods Inspectors changed (939/01). The Ombudsman ruled then that the task entrusted to chambers of commerce in the Chambers of Commerce Decree – namely that of promoting the conditions for successful practice of business activities – had to be regarded as a public task insofar as with it a fundamental rights-related obligation is imposed on the public authorities in Section 18 of the Constitution (the right to work and the freedom to engage in commercial activity). Thus also the Central Chamber of Commerce's Committee of Goods Inspectors performed a public task when, in order to fulfil one of the duties of a chamber of commerce, it oversaw the activities of goods inspectors. It exercised this oversight by, among other things, examining complaints concerning the actions of goods inspectors.

As I see it, what was involved then was a conscious broadening of powers on a fundamental rights ground. However, the view has subsequently changed to the effect that the activities of the Committee of Goods Inspectors is not subject to the Ombudsman's oversight (2689/03). It was possible to arrive at this conclusion because, in conjunction with an amendment of the legislation on the chambers of commerce system that had been enacted since the earlier decision, a clear distinction was made in the Act between public and other tasks. The public tasks are exhaustively listed in the Chambers of Commerce Act, and goods inspection activities are not mentioned in this conjunction. After all, goods inspection is a contract-based arrangement to which no one is compelled to resort. It is a procedure that has some features of an arbitration process, which likewise is not included in the scope of oversight of legality.

Re-evaluation of the Ombudsman's powers is associated also with the development of legislation on the procedure followed in determining Representatives' remuneration. This remuneration is based on legislation regulating the salaries of our parliamentarians. Under an amendment to this regulation in 2000, an outside remuneration committee made a proposal

concerning salaries. The Eduskunta's Chancellery Commission then confirmed the committee's proposal. The view then was that questions relating to the remuneration of Representatives were not included in the scope of the Ombudsman's powers, because what was factually at issue was the legality of a decision announced by the Eduskunta's Chancellery Commission (1854/00). However, the legislation on Representatives' remuneration was again amended in 2003 and under its revised provisions the decision on salaries is made solely by the remuneration committee. Because what is involved is no longer decision making that belongs to the representative function, the Ombudsman has within the framework of the present system adopted the starting point that oversight of the remuneration committee is included in the Ombudsman's powers, because decision making, based on an Act, concerning the remuneration that Representatives receive, is a public task (2458/4/06).

The activities of security companies serve likewise as a good example of an area with respect to which the stances taken in interpretations by the Ombudsman have changed and been explicated. A noteworthy case from the early days of regulation of powers vis-à-vis a public task is a case in which guarding of premises belonging to a property company under a commission contract between a private security firm and the property company was not deemed to be a public task (1093/92). The interpretations of the operations of a security company subsequently presented by the Constitutional Law Committee have also here, in my view, contributed to how these activities have been interpreted from the perspective of the Ombudsman's powers. When the legislation on the provision of private security services was being revised just under ten years ago, the Constitutional Law Committee, in its evaluation of the constitutional aspect of the matter, considered it indisputable that security activities, when viewed on the whole, must be regarded as a public administrative task in the meaning of the Constitution (PeVL 28/2001 vp). Factors that influenced the evaluation were the obvious overlapping on the practical level of guard functions with the tasks entrusted to the police under the Police Act, as well as the powers assigned to security guards and especially the extension of these powers to guarded areas which enjoy protection of public peace.

Something that I believe can be seen as a significant turning point in the Ombudsman's interpretations concerning security companies was an evaluation presented around five years ago to the effect that the powers of both stewards and security guards contain elements of exercise of public power of such a kind that their actions can in some individual cases be subject to also the Ombudsman's oversight. The view taken then was that the Ombudsman's powers included paying attention to the training and guidelines that stewards and also security guards receive (405/4/03). Since then, the actions of a private security guard have been regarded as coming within the scope of the Ombudsman's powers in, for example, a situation in which, under the commission contract, the security company is tasked with ensuring

security in a location where public health care is provided. What was at issue in this case was the guard's action in a situation where he had protected health care professionals while they were performing medical procedures (3285/04).

The State Railways *(VR)* are an example of an organisation in the case of which societal and legislative development has in practice narrowed the Ombudsman's power of oversight. Until 1989, VR operated as a central agency-type body in subordination to the Ministry of Transport and Communications, after which it was converted into a so-called new-form state commercial enterprise. This, in turn, was abolished in 1995, when its official functions were entrusted to the Finnish Rail Administration and its commercial activities were corporatised. The change with respect to powers was intertwined with this development in that, for example, VR's action in granting a discount for pensioners was examined (1283/93), whereas the action taken by the VR Group (a joint-stock company) in the same matter was not examined (3422/04).

Similarly, also commercial banks (mainly the Post Office Bank and later the limited liability company Leonia Oyj) have shifted out of the reach of the Ombudsman's oversight for the reason that in a competitive market situation maintenance of the State's payments traffic is no longer designated in the law as a special task of an individual commercial bank. However, credit institutions may experience a new coming of oversight of institutions. For example, under legislation on structural subsidies for agriculture that entered into force at the beginning of 2008, the Agency for Rural Affairs may approve a credit institution in the meaning of the Credit Institution Act as a credit provider. In addition, the Agency may approve a credit provider mentioned in the foregoing as a so-called central financial institution. However, the question of whether this will fall within the scope of the Ombudsman's power is still premature at this stage.

Interpretations can influence legislation

The Ombudsman is not bound in her work of oversight by whether or not a particular function is, as it were, already officially designated in legislation as a public (administrative) task to be taken care of by some or other instance. It is, namely, possible to find gaps, or situations on which legislation has not adopted any stance at all. There are also situations in which legislation, looked at from the perspective of the preconditions for privatisation of a public administrative task, can not be regarded as being in accordance with the requirements of the Constitution. In such cases, the Ombudsman can recommend to the legislator that this gap be patched in order to ensure protection under the law.

The Ombudsman's interpretations of a public task have led also to legislation being amended. A good example is voluntary national defence. As long ago as 1993, the Ombudsman drew attention to the fact that it was difficult to notice the difference between the statutory training that the Defence Forces provide and some of the courses that belong to the category of voluntary national defence training and are arranged in contingents of the Defence Forces. Cooperation between national defence organisations and the Defence Forces had become closer over the years. Voluntary national defence training had developed in a more martial direction and had included weapons training, conducted under the direction and responsibility of Defence Forces personnel in accordance with guidelines issued by the Defence Staff. The Ombudsman took the view that voluntary national defence training could, when looked at as a totality, be regarded as a public task, because national defence as such was a traditional function that belonged to the State and which the voluntary system complemented (557/92).

In the opinion of the Ombudsman, the tasks and responsibility of the Defence Forces with respect to the arrangement of voluntary national defence training should be laid down in legislation. As a result of this, the Defence Forces Act was amended by adding a provision to the effect that the Defence Forces have the task of supporting voluntary national defence training in the manner laid down in a Decree or an order of the Ministry of Defence or, depending on the nature of the matter, a decision of the Defence Staff. Subsequently, a completely new Voluntary National Defence Training Act was passed and entered into force at the beginning of 2008. In it the public administrative tasks of a national defence training organisation constituted under public law, and which are subject to the Ombudsman's oversight, are defined.

Another good example is provided by a legislative proposal concerning water bailiffs, although so far at least it has not led to legislation being changed. The point made in the proposal was not that there was any openness to interpretation about whether or not these bailiffs were subject to the Ombudsman's oversight, but rather about the appropriateness and up-to-dateness of regulation of the activities of these persons, who perform a public task and exercise public power. The stance serves as an example of also how established conditions should be re-evaluated when necessity demands. Where water bailiffs are concerned, the need to re-evaluate regulation arose when the Constitution entered into force. Section 124 of the Constitution emphasises the importance of the training and expertise of persons who perform public administrative tasks as well as the necessity of public oversight of these persons being appropriate (HE 1/1998 vp s. 179). What was considered unsatisfactory in a decision was that the Fishing Act did not contain regulations on the eligibility and competence of water bailiffs or on oversight of their activities. A further matter that could

not be found acceptable was that guidelines for and training of water bailiffs had long been allowed to remain the responsibility of a fishery organisation constituted in accordance with the Associations Act (785/04).

Summarising aspects

Creation of the world has still not been fully completed with respect to determination of what instances fall within the Ombudsman's oversight, either; instead, the spectrum of oversight subjects is changing along with society. Evaluating the Ombudsman's powers is more than just referring to earlier stances; completely new interpretation situations are continually cropping up – in my own case, half a dozen or so in 2009 alone. This assessment is often a more demanding task than dealing with the actual main question. Recognising the question of power is a matter of professional skill, and the organisational mode of the subject of a complaint must not be allowed to confuse this recognition, which is done by familiarising oneself with above all the legislation relating to the activity in question in each individual case, legislative drafting documents, the interpretations that the Constitutional Law Committee has made and earlier decisions. The legal literature can also be of help in some situations. In situations that are open to interpretation, it lies in the interest of the instance that is counted as being within the sphere of oversight that the stance on power is reasoned thoroughly; in other words, I do not believe it is sufficient for the Ombudsman merely to state that she has a locus in the matter.

Changes in the spectrum of oversight subjects manifest themselves in the appearance of completely new instances, not least because of our membership of the EU. The activities of traditional subjects of oversight are also changing in a way that may call for a re-evaluation of powers. Sometimes – albeit more rarely – the trend of development leads in such a direction that some or other organisation or field of activity shifts right out of the scope of oversigh

Thus the effects that changes in legislation have on the Ombudsman's powers and on earlier interpretations must be constantly appraised. That is the case if, for example, the legislator, subsequent to the Ombudsman having taken a stance, in accordance with the provisions on her own powers, on the question of that power, specifically assigns the public administrative tasks of some or other organisation in a way that deviates from the Ombudsman's earlier interpretation. Thus if the legislator specifically defines the public administrative tasks of, for example, an association constituted under public law, one can ask whether there is any longer justification for evaluating that sphere of tasks more broadly, i.e. interpreting, in ac-

cordance with the provisions on the Ombudsman's power, something that would not belong to the category of public administrative tasks, as intended by the legislator, as being a public task.

Although the Ombudsman has the special task of overseeing implementation of fundamental rights, the 1995 revision of the constitutional provisions with respect to these rights was not intended to broaden the scope of the powers of the overseers of legality nor, therefore, to add to the duty of oversight vis-à-vis the private sector. Thus, for example, oversight of associations constituted under public law must be limited to the public (administrative) tasks that are statutorily assigned to an association, and there can be no intervention in purely free activities in the meaning of the Associations Act. Indeed, the way I would see the obligation to oversee fundamental rights in this context is that attention must be paid to implementation of these rights also in those situations in which a public (administrative) task has been privatised. In other words, what is involved is, for example, overseeing how Itella Oyj takes the requirements of wheelchair accessibility, i.e. factual equality in the availability of postal services, into consideration when concluding sub-post office contracts, or how the Finnish Vehicle Administration AKE takes care that car dealerships or insurance companies functioning as contract registrars are able to comply with the quality requirements that are set for their activities in general administrative laws. Thus it is not possible to narrow the scope of oversight by merely changing the form of organisation, which is partly what is involved in privatisation. It is a different matter if some or other activity – such as providing quality certificates for electronic signatures – is regarded as having over time lost its character of a public (administrative) task.

I believe that the legislator's stances on a public administrative task – either on the level of legal provisions or in legislative drafting documents one way or another – are in most cases suitable also as a foundation for evaluating the Ombudsman's powers. However, clear "auxiliary stances" of this kind do not always exist, and instead the matter has to be evaluated independently and on a case-by-case basis. Then, attention can be paid also to such aspects as how an activity engaged in by a private instance and the manner in which it is practised are regulated, what kind of link exists between the public sector and that private actor, what the linkage is between the private actor and an official process in its various stages, and what is the importance of the activity for especially a private person, but also for some other instance.

Giving a content to the concept of a public task in the meaning of the provision on the Ombudsman's powers has been and, within the framework of the present regulation, will remain the Ombudsman's exclusive right. Thus at base it is ultimately the Ombudsman who can

freely define also to what extent the content of a public task in the meaning of the provisions on the Ombudsman's powers is the same as or different from that of the concept of a public administrative task that limits privatisation of official functions.

On the other hand, I do not believe that the situation is necessarily satisfactory if an instance that is to be interpreted in the Ombudsman's oversight of legality as the performer of a public task does not conceive of itself as subject to oversight or indeed even disputes the power of the overseer of legality. Nor would it be an advantage from either the perspective of the legal security of the subject of oversight or more broadly that of supreme oversight of legality if the interpretations with respect to powers that the Ombudsman and the Chancellor of Justice arrived at were to differ radically from each other, given that the powers of both are defined in the same way in the Constitution. On the other hand, because oversight of legality is a human endeavour and different reasoned interpretations are as such possible, it would not significantly bother me if there were differences between interpretations. But that would be a theme meriting a study and monograph of its own.