FOLKETINGETS OMBUDSMAND

The Danish Ombudsman and EU law

By Danish Parliamentary Ombudsman Niels Fenger

1. EU law and administrative law

According to Section 21 of the Act on the Danish Parliamentary Ombudsman, the Ombudsman shall assess whether authorities or persons falling within his jurisdiction act in contravention of existing legislation or otherwise commit errors or derelictions in the discharge of their duties. 'Existing legislation' also covers EU law, and since a large part of the rules applied by administrative authorities are rules and provisions in Danish law implementing EU legislation, it becomes an important task for the Ombudsman to ensure that the Danish administration interprets and applies EU law correctly.[1]

2. Development in Ombudsman practice

The Ombudsman's approach concerning the Danish administrative authorities' application of EU law has undergone significant changes over the years. Originally, Denmark's membership of the EC did not significantly affect the Ombudsman Office. In 1981, the Ombudsman stated that the fact that the legal basis of a complaint consisted of EU law did not in principle prevent him from considering the complaint. However, he found it necessary:

> '(…) to show some caution in this area, since the office of the Ombudsman in my opinion must generally be considered a less suited forum for clarifying matters of dispute concerning the scope of EU rules. In particular, I noted in this regard that the Ombudsman is unable to bring such matters before the European Court of Justice for a preliminary ruling, as is the right – and to some extent the obligation – of national courts according to Article 177 of the EC Treaty. I further stated that caution on the part of the Ombudsman is especially indicated when, simultaneously with the Ombudsman's processing of a complaint, a procedure has been

[1] The focus in this article is on the Ombudsman's review of the administrative authorities' application of EU law. I do not deal with the fact that the Ombudsman Office itself is subject to EU law and applies EU rules in its own activities on a daily basis. For example, this could be notification of collection of personal data under the General Data Protection Regulation, the layout of the Ombudsman's website with respect to observing Directive 2016/2102 on the accessibility of the websites and mobile applications of public sector bodies or the design and administration of the Ombudsman's whistleblower scheme under Directive 2019/1937 on the protection of persons who report breaches of Union law.

initiated that may result in an authoritative decision of the matters of dispute raised by the case.'[2]

A similar reason had previously been advanced by none other than Denmark's first judge at the European Court of Justice, Max Sørensen, in a commemorative article for the first Danish Ombudsman.[3] However, soon the cautious review standard became criticised.

First, also in cases concerning Danish law, the Ombudsman risks being overruled by the courts. Second, also most administrative appeal boards are not able to make a reference for a preliminary ruling.[4] Finally, we know today – in the unbearably clear light of hindsight – that the Ombudsman's view was incompatible with the principle of equivalence in EU law according to which any national authority must apply EU law as vigilantly as it applies national law, even if the authority concerned is not competent to make a preliminary reference to the Court of Justice.[5]

If one were in a teasing mood, one might say that the Ombudman's statement concerning his engagement with EU law unintentionally confirmed his fear that he might not always be able to apply EU law correctly.

At the same time, it must be acknowledged that a proper review of the administration's application of EU law requires that the Ombudsman possesses sufficient expertise within EU law. After all, the opinions of the Ombudsman are not binding and thus possess only argumentative value. To a significant extent, the respect for the Ombudsman and his opinions stems from the quality of his legal argumentation. This respect could be jeopardised through statements that expose a lack of expertise within the legal field in question.

Perhaps because of the above-cited statement, but probably mainly for other reasons, there were only very few Ombudsman cases concerning Community law before the turn of the millennium. Still, in Case FOB 1985.97, the Ombudsman criticised that a ministry did not comply with the requirement to

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[2] Case FOB 1981.12. See also Cases FOB 1985.97, FOB 1989.148 and FOB 1991.65.

[3] Max Sørensen in Jon Palle Buhl, Alfred Bexelius & Stephen Hurwitz (eds.): Festskrift til Folketingets Ombudsmand Stephan Hurwitz, 1971 p. 499, 513f.

[4] This especially applies after the Court of Justice of the EU's newer practice, cf. Morten Broberg and Niels Fenger, The European Court of Justice's transformation of its approach towards preliminary references from Member State Administrative Bodies, Cambridge Yearbook of European Legal Studies 2022, p. 1.

[5] Case C-349/17, Eesti Pagar, ECLI:EU:C:2019:172, Case C-378/17, Workplace Relations Commission, ECLI:EU:C:2018:979, and Case C-177/20, Grossmania, ECLI:EU:C:2022:175.

state reasons under Directive 64/221 on the coordination of special measures concerning the movement and residence of foreign nationals. Another example is Case FOB 2000.142 where the Ombudsman overruled the administration's interpretation of Regulation 1251/70 on the right of workers to remain in the territory of a Member State after having been employed in that State.

In 1996, the Ombudsman Act was revised, and in the preparatory works it was stated that the number of EU rules had now reached such an extent that the reticient approach to EU law hitherto applied by the Ombudsman implied a risk that his control with administrative authorities would be undermined. For that reason, EU law should be applied in the same manner as national law.[6]

In the years following the revision of the Act, the Ombudsman still did not receive many complaints about EU law. Moreover, some legal scholars argued that, in practice, the Ombudsman continued not to apply EU law on an equal footing with Danish law. According to those scholars, the Ombudsman was not only reluctant to open cases concerning the interpretation and application of EU law. He also – sometimes openly, other times more indirectly – applied a more cautious review standard in the cases he did take under substantive investigation.[7]

Purely quantitatively, it was indisputable that EU law did not take up much space in the published practice. However, quite significantly, the critical scholars did not point to any specific case where, according to them, the Ombudsman had applied EU law incorrectly or too hesitantly. Nor did the critics bring forward any examples of justified complaints concerning compliance with EU rules that the Ombudsman had refused to take up. And indeed, the claim that the Ombudsman continued to take an unduly cautious approach to EU law was refuted by the Ombudsmen Hans Gammeltoft-Hansen and Jørgen Steen Sørensen.[8]

3. The situation today

3.1. Standard of review

Whatever one might think about the Ombudman's practice in the years following the revision of the Ombudsman Act in 1996, this discussion has been obsolete for years.

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[6] Cf. FT 1995-96 (the Office of the Folketing Hansard), tillæg A, question 1712f., and report 1272/94 on the revision of the Ombudsman Act, p. 21 and 113ff.

[7] Michael Gøtze, The Danish ombudsman – A national watchdog with selected preferences, Utrecht Law Review, 2010, p. 33.

[8] Hans Gammeltoft-Hansen in Jens Hartig Danielsen (ed.): Max Sørensen 100 år, 2013 p. 525, 533ff., and Jørgen Steen Sørensen, 'Ombudsmanden anno 2012', Juristen, 2012 p. 169, 174.

Today, EU law is a basis for review in bascally the same way as Danish rules. Thus, independently of arguments from the parties, the Ombudsman includes EU law where relevant to the assessment of the case.[9] Moreover, in his interpretation of EU rules and Danish implementing rules, the Ombudsman refers to the case law of the Court of Justice (and sometimes also suggestions from Advocates-General) in basically the same way as he refers to judgments from Danish courts or from the European Court of Human Rights.[10] Recent practice also shows that the Ombudsman is aware of the increasing significance of the preparatory works to an EU rule and of the need to include all language versions as well as Commission notices and opinions to the European Parliament.[11]

No particular reticence is exercised when reviewing the authorities' application of EU rules. The lack of access to the preliminary referencing procedure thus no longer leads the Ombudsman to be cautious in setting aside the authorities' abstract interpretation of EU law. In addition, the margin of appreciation that the Ombudsman accords the administration in the concrete application of EU law is the same as the one found in cases that only concern Danish law.

According to Section 23 of the Danish Ombudsman Act, the Ombudsman may recommend that a complainant be granted legal aid, so that the case can be resolved by the courts instead of finding its solution with the Ombudsman. I cannot rule out that the Ombudsman may, one day, make use of this procedure if faced with a case where the interpretation of EU law gives rise to particular doubt. Indeed, such an approach could be appropriate in cases where it is found that the question of interpretation ought to be clarified by the Court of Justice through a reference for a preliminary ruling. But so far it has not happened.

The activities of the Danish Parliament (and the Legislator as such) fall outside the Ombudsman's jurisdiction. Therefore, formally, the Ombudsman does not have competence to review whether a Danish statutory provision is in accordance with EU law.[12] This means that the Ombudsman cannot fully comply with the Court of Justice's case law according to which the effects of the principle of primacy of EU law are binding on all the bodies of a Member State, without, *inter alia*, provisions of domestic law relating to the attribution

[9] Cases FOB 2023-37, FOB 2021-15 and FOB 2021-12.

[10] For examples of the latter, read Cases FOB 2021-21, FOB 2021-6, FOB 2020-19, FOB 2020-16 and FOB 2019-15.

[11] Respectively Cases FOB 2017-22, FOB 2021-8, FOB 2022-24 and FOB 2021-21.

[12] Case FOB 2023-19.

of jurisdiction, including constitutional provisions, being able to prevent that.[13] Instead, the Ombudsman must proceed under the same rules as those that would apply if he found that a piece of Danish legislation violated the Danish Constitution or the European Convention on Human Rights, namley to notify Parliament according to Section 12 of the Ombudsman Act that there may be doubts as to whether the legislative act in question complies with the Constitution or Denmark's international obligations. So far, it has not been necessary to use this approach in relation to EU rules, which could possibly be combined with the above-mentioned option to recommend free legal aid.

In a recent case, the Ombudsman chose, instead, to write to the Danish Minister of Labour, drawing the Minister's attention to the fact that a provision in an Act on social assistance raised issues in relation to the Union rules on free movement. This led the minister to propose a bill for Parliament changing the said provision. Moreover, the Ministry sent a letter to the local authorities advising them not to apply the provision in question where this could be in conflict with EU law.[14]

It often happens that the Ombudsman finds in favour of the citizen, basing his opinion solely on Danish law even if EU law also applies to the case, but where EU law does not add anything (certain) to the solution of the case, for instance because EU law seems to require less of the authorities than what already follows from Danish administrative law. A typical example is EU law's unwritten principles of procedural law regarding the obligation to hear a party before an administrative decision is taken, the parties' right of access to documents and the obligation of the administration to state the reasons for their decisions.[15]

Some might argue that there is a supplementary informative value in emphasising EU law and its importance to the administrative bodies. However, whereas the Ombudsman, in relation to Danish law, is expected to develop unwritten principles of good administration and, moreover, has an important

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[13] Joined cases C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19, Asociaţia 'Forumul Judecătorilor din România' ECLI:EU:C:2021:393, and Case C-497/20, Randstad Italia SpA, ECLI:EU:C:2021:1037. The restrictions on the Ombudsman's competence also mean that he cannot assess whether an EU rule is in conformity with the Danish Constitution. Therefore, in Case FO 22/04056, the Ombudsman declined to pronounce a view on whether Council Regulation 833/2014, which ordered telecommunications companies to block websites from the Russian media Russia Today and Sputnik, was in conformity with Section 77 of the Danish Constitution relating the right to free speech. The Ombudsman noted that it was not a case of assessing the legality of an act or omission on the part of a Danish administrative authority.

[14] Case FO 22/05128.

[15] Respectively, Case C-39/20, Jumbocarry Trading, ECLI:EU:C:2021:435, Case C-298/16, Ispas, ECLI:EU:C:2017:843, and Case C-54/18, Cooperativa Animazione Valdocco, ECLI:EU:C:2019:118.

role in clarifying existing legislation, he does not have the same leading role in relation til EU law. Furthermore, there is normally no need for the Ombudsman to express himself on tricky legal issues not yet resolved by the courts if the right result can be achieved by using more prosaic legal sources. This pragmatic approach is especially well-founded in the not so few cases where it may be more difficult to apply vague and flexible European legal principles than more uneqvivocal national legislation. The Ombudsman should not risk undermining his own authority by offering answers to undetermined legal questions that are without concrete importance for the protection of the citizens and the resolution of the case at hand and where his conception of law may turn out to be overruled by the Court of Justice.

3.2. The number and nature of cases relevant to EU law

3.2.1. Examples from practice

In the last decade, not only the standard of review has changed. Also the number of Ombudsman cases concerning EU law has been increasing.[16]

Directive 2003/4 on public access to environmental information is by far the EU legislative act that the Ombudsman has most frequently considered.[17] Another legislative act that the Ombudsman often interprets is Regulation 883/04 on the coordination of social security systems (and the previous Regulation 1408/71).[18] As regards the General Data Protection Regulation, these cases are typically solved by the Danish Data Protection Agency, but the Regulation's rules on, *inter alia*, access have been subject to interpretation in numerous cases.[19]

In a number of cases on working conditions in the public sector, the Ombudsman has referrred to the Transfer of Undertakings Directive, Directive

[16] For recent examples of non-published opinions concerning EU law see Case FO 19/00308 regarding a complaint that an administrative tax tribunal refused to make a preliminary reference to the Court of Justice, Case FO 19/00166 on the rejection of a CITES certificate for sale of rhinoceros horn, Case FO 15/00207 on Article 24 b in Regulation 4/2009 relating to maintenance obligations aims at ensuring the effective and swift recovery of maintenance, and Case FO 21/01862 on whether rules on storage of boats on the beach constituted an unjustified restriction on the free movement of goods.

[17] Cases FOB 2023-13, FOB 2022-24, FOB 2021-13, FOB 2021-12, FOB 2020-5, FOB 2020-1, FOB 2019-21, FOB 2019-20, FOB 2019-8, FOB 2018-34, FOB 2018-17, FOB 2018-4, FOB 2018-2, FOB 2017-29, FOB 2017-28, FOB 2017-6, FOB 2016-6, FOB 2014-27, FOB 2014-8, FOB 2014-4, FOB 2012-21, FOB 2011 14-5, FOB 2011 11-2, FOB 2011 11-1, FOB 2009 9-4, FOB 2009 9-1 and FOB 2006.529.

[18] Cases FOB 2021-21 and FOB 1988.32.

[19] Cases FOB 2023-37, FOB 2021-18 and (concerning the Personal Data Directive) FOB 2009 5-2.

1999/70 concerning the framework agreement on fixed-term work, and Directive 2000/78 establishing a general framework for equal treatment in employment and occupation.[20] The same applies to EU rules on age discrimination.[21]

In Case FOB 2017-22, the central point of the case was Regulation 261/2004 establishing common rules on, *inter alia*, compensation of passengers in the event of cancellation of, or a long delay to, a flight. In Case FOB 2021-8, the main question was whether the Ministry of Transport had acted illegally when not supporting an application for EU aid under Regulation 1316/2013 establishing the Connecting Europe Facility. In Case FOB 2019-34, the Ombudsman interpreted the rules concerning information of available remedies in Article 22 of the EU Customs Code, cf. Regulation 952/2013. And in Case FOB 2015-1, the main issue concerned Directive 2003/98 on the re-use of public sector information. In Cases FOB 1996.75 and FOB 1997.432, the EU competition rules' importance to the competence requirements were examined.

Also in his monitoring activities, the Ombudsman includes EU rules. For example, in Case FOB 2016-40 on accessibility to train stations, Regulation 1300/2014 on the technical specification for interoperability relating to disabled people and people of reduced mobility in the EU's rail system formed part of the legal basis for the Ombudsman's assesment.

In multiple recent cases, the Ombudsman examines unwritten EU law principles, sometimes because they are important to the result of the case, other times in order to establish that EU law does not regulate the issue in question.[22]

The Ombudsman has also dealt with many cases where the administrative authorities acknowledged that they had applied EU law or Danish implementing rules incorrectly and where the question before the Ombudsman was resticted to the legal consequences of this misapplication. In these cases, the relevant legal basis has primarily been Danish law, such as the Danish rules on period of limitation or the unwritten administrative principles on reopening of wrongly decided cases.[23] The same applies in relation to cases concerning information and guidance on EU law and to cases on the

[20] Case FOB 2012-22, FOB 2012-15, FOB 2009 8-1, FOB 2008-4-5, FOB 2006-578 and FOB 2005.507.

[21] Case FOB 2009 8-1.

[22] Cases FOB 2021-15, FOB 2021-8 and FOB 2016-24. See also Case FOB 2023-37 concerning Article 8 of the Charter on Fundamental Rights.

[23] Cases FOB 2021-15 and FO 21/01491.

requirement that the administrative authorities inform the public about changes to their administrative practice due to amended EU rules and new case law from the Court of Justice.[24]

The Ombudsman has also delivered opinions concerning the administration's application of Danish rules on access to information in cases relating to EU legislative acts. And he has expressed his views in cases concerning self-incrimination in relation to information exchanged under Directive 2003/48 on taxation of savings income in the form of interest payments and in cases relating to the length of administrative proceedings in disputes where EU law was applicable.[25]

3.2.2. Reflections on caseload

As already indicated, the number of complaint cases concerning EU law has risen substantially in recent years. However, it is still low considering how significant a part of the total Danish legislation that originates directly or indirectly from Brussels.

One may speculate about the possible reasons for the small number of cases. However, an investigation from 2005 showed that the situation in Denmark is in no way unique.[26] Moreover, if one compares the situation in Denmark with that in Sweden or in Norway, one will see that the Danish Ombudsman engages much more with EU law (EEA law) than his Scandinavian colleagues.[27]

One of the main reasons for the small number of cases concerning EU law is probably that much EU law is business-related. The Ombudsman only rarely has cases in this field, also in relation to purely Danish law. It is probably also relevant that one may complain directly to the European Commission and the SOLVIT service. Thus, the EU has alternative control bodies that can be used for free and which, as far as the SOLVIT service is concerned, will typically process the complaint at least as quickly as the Ombudsman.

If a complaint to the Ombudsman concerns an issue that has already been brought before the European Commission, the Ombudsman will normally

[24] Cases FOB 2018-9, FOB 2016-24, FOB 2008.238, FOB 2007.289 and FOB 2003.309.

[25] Cases FOB 2017-11, FOB 2019-33 and FOB 1984.27.

[26] The role of ombudsmen and similar bodies in the application of EU law, 5th Seminar of the National Ombudsmen of EU Member States and Candidate Countries, 2005, General Report of the Seminar, Annex III; QK7606674ENC.en (1).pdf.

[27] Some illustrative Norwegian cases are SOM-2018/4638 and SOM-2018-3193 on breach of case processing times set out in Directive 2004/38 and SOM-2018-4518 on the principle of aggregation under Regulation 883/2004.

either decline to take up the case or postpone his assessment until after the Commission has taken a position.[28] However, I doubt that this practice keeps many from going to the Ombudsman with complaints about EU-relevant issues.

I can rule out, though, that the small number of cases is related to a lack of attention on possible EU elements in a case. On the contrary, as mentioned above, it is a natural part of the Ombudsman's review to consider on his own initiative if a case raises EU law aspects, even if these are not mentioned by the parties in the case.

So far, the Ombudsman has not started general own-initiative investigations concerning issues pertaining specifically to EU law.[29] However, this has not been a choice of principle. It is merely a reflection of the fact that the Ombudsman's resources are limited due to a still increasing number of complaint cases. The Ombudsman therefore usually only opens own-initiative cases in areas where he – through the processing of complaint cases or by other means of information – has reasons to suspect that an investigation will reveal errors or derelictions. So far, that has not been the case in situations where the legal basis has only or mainly pertained to EU law.

4. Cooperation with EU bodies

4.1. Requests for preliminary rulings

As already implied in item 2 above, the Ombudsman is not a 'court' according to Article 267 TFEU. Therefore, the Ombudsman cannot seek guidance from the Court of Justice when he is to assess whether administrative authorities have complied with existing EU law.

As a substitute, a special procedure has been implemented – on the initiative of former Danish Ombudsman Hans Gammeltoft-Hansen – by which the members of the European Network of Ombudsmen can submit requests to the European Ombudsman concerning issues which have arisen during an investigation and which concern EU legislation and politics.[30] More specifically, the European Ombudsman assists by retrieving expert assessments from the relevant EU institution, typically the European Commission.

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[28] Case FO 20/03476.

[29] In Case FOB 2019-34, the legal basis pertained partly to EU law, partly to purely Danish law.

[30] Statement adopted at the Sixth Seminar of the National Ombudsmen of EU Member States and Candidate Countries held in Strasbourg on 14-16 October 2007. Read more about the Network in item 4.2 below.

At first glance, the procedure seems akin to the preliminary reference procedure in Article 267 TFEU. In practice, however, it is more similar to the cooperation procedure estabilised in Article 15 of Regulation 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty. According to this provision, the courts of the Member States can, in connection with cases under Articles 101 and 102 TFEU, request the European Commission to give statements on questions concerning the application of EU competition rules.

Contrary to what applies under Article 267 TFEU, the reference procedure to the European Ombudsman can also be used where the requesting ombudsman is not resolving a concrete dispute, but is dealing with the case in the context of a general own-initiative investigation. The scheme is also different from the preliminary reference procedure in that the opinion from the European Commission and the European Ombudsman is not binding for the requesting ombudsman. At the same time, it is important to note that the opinion is not delivered by an independent and impartial court, but, in reality, by the European Commission. Moreover, one cannot be certain on which level the Commission's statement has been processed and thus whether the reply necessarily reflects the opinion of the College of Commissioners.

Lastly, when reading the opinion, it should be kept in mind that the European Commission is making its assessment without having heard the parties in the case, including the affected Member State. Therefore, there might occasionally arise issues in relation to the right to a fair hearing as well as doubts as to whether the opinion is based on a full understanding of the facts of the case and the context of national law.

Still, there is no doubt that the Commission's assessments can be very useful for the requesting ombudsman. Furthermore, the scheme is nice and quick, as the requesting ombudsman can expect a reply within a few months.

The Danish Ombudsman has used the scheme with good results in several cases concerning the Directive on Access to Environmental Information[31] and in a case on free movement.[32] In this connection, it might be worth pointing out that the Danish Ombudsman is one of the ombudsmen in the EU who most frequently makes use of the reference procedure. Indeed, the Danish Ombudsman has not only relatively but also in nominal figures referred more questions to his colleagues in Brussels than, for instance, the German and

[31] Case FOB 2012-21, FOB 2018-34, FOB 2020-1.

[32] Case FOB 2000.142.

French ombudsmen. So also in this respect, he has shown his readiness to take a European perspective in his monitoring activities.[33]

4.2. Other cooperation

As mentioned, the Ombudsman is part of the European Network of Ombudsmen.

In addition to the reference scheme described above, one of the Network's most important activities is to exchange information about EU legislation and best practice. A number of joint events are arranged every year, and mechanisms have been implemented by which the members of the Network (the ombudsmen) can obtain information from the other members concerning pending cases or the state of law in other jurisdictions. Furthermore, complainants can be referred from an ombudsman who does not have jurisdiction in the relevant case to the ombudsman – national or European – who has jurisdiction to process the case.

Through parallel investigations, the European Ombudsman and members of the European Network of Ombudsmen occasionally cooperate in dealing with issues concerning shared administration between the EU institutions and the national administrative bodies. Moreover, the Danish Ombudsman has on several occasions replied to enquiries from the European Ombudsman for the purpose of her own-initiative investigations of EU institutions.[34]

Lastly, the Ombudsman has since 2017 participated in a pool of monitors that supervises forced-returns organised by Frontex in accordance with (now) Article 51 of Regulation 2019/1896 on the European Border and Coast Guard Agency.

5. Conclusion

Looking back at the development in the Ombudsman's application of EU law, it is remarkable how similar it has been to the development in the administrative authorities' and the courts' approach to EU law.

In the first decades since Denmark joined the European Community, only few authorities were affected by European law. In those cases, evasive manoeuvres would sometimes be made to avoid deciding a case based on a

[33] The total annual number of requests from all members of the Network was 5-9 from 2017 to 2021. For comparison, the Court of Justice received 556 references for preliminary ruling in 2020.

[34] E.g. in relation to the European Ombudsman's own-initiative investigation of the functioning of the European Border and Coast Guard Agency's (Frontex) complaints mechanism for alleged breaches of fundamental rights and the role of the Fundamental Rights Officer (OI/5/2020/MHZ).

set of rules that appeared complex and hard to predict. Today, EU law claims a bigger share of the total amount of rules applied by both administrative authorities and review bodies. Moreover, EU law is much less seen as something alien that one might preferably avoid.

The same tendency can be seen in the Ombudsman's review. Originally, various ombudsmen were quite reticent in setting aside the administration's understanding and application of EU law. Through the years, there have been both a fundamental paradigm shift and a *de facto* intensification in the review of administrative authorities' application of EU law. Today, the Ombudsman consumes neither painkillers nor champagne when it turns out that a case includes EU law. EU law has become 'business as usual', albeit not 'very usual buisness'.