Public administration, civil servants and implementation

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13. Public administration, civil servants and implementation

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Abstract

This chapter examines how the Danish public administration responds to the European Union (EU). First, it does so first on a more general account in the EU policy cycle, but narrows the focus down to concern the role played when EU policies are implemented. Secondly it examines implementation of EU obligations within two policy areas; healthcare and environment. For both areas, the administrative autonomy to implement has been considerable, but depends on the political, judicial and societal checks and balances that the executive encounters when transposing EU obligations into national acts and practices. Furthermore, the analysis substantiates that whereas Danish compliance with EU obligations is high when it comes to formal transposition and official scoreboards, the sufficiency of implementation becomes contestable and deficits identifiable regarding practical application. De facto compliance depends on external checks and balances with administrative autonomy and the ability to scrutinize how the civil service interprets and acts upon its EU obligations.

Introduction

European integration has introduced new and gradually intensified demands to the whole spectrum of public administration. Previous research has shown that almost all policy areas are affected by EU regulation, albeit to varying degrees (Blom-Hansen

and Grønnegaard Christensen 2003). The national executive – and hence the administration - is involved in all parts of the EU policy cycle (Kassim 2003). National civil servants give expert advice when policies are drafted. They represent one decision-maker out of 27 when policies are adopted. In the final stages of the policy cycle, they implement decisions and respond when national compliance is evaluated. In fulfilling these responsibilities, the national administration plays a key role. The public administration constitutes a key actor concerning all parts of EU affairs, as it delivers expert advice, decides under flexible mandates and implements our EU obligations.

This chapter examines how the Danish public administration responds to the European Union (EU). First, it does so first on a more general account of the role played in the EU policy cycle, but subsequently narrows the focus down to consider the role played when EU policies are implemented. Secondly, it examines implementation of EU obligations within two policy areas; healthcare and environment. The two policy areas examined have been selected because the Danish engagement in supranational regulation has traditionally differed. Denmark has traditionally had strong reservations against EU intervention in welfare policies such as health care (Martinsen 2005b), but has on the other hand acted proactively when it comes to environmental regulation and been seen as a 'green leader' (Börzel 2000; Liefferink & Andersen 1998).

The analysis finds that for both policy areas, the administrative autonomy to implement has been considerable, but depends on the political, judicial and societal checks and balances that the executive encounters when transposing EU obligation

into national acts and practices. Furthermore, the analysis substantiates that whereas Danish compliance with EU obligations is high when it comes to formal transposition and official scoreboards, the sufficiency of implementation becomes contestable and deficits identifiable regarding practical application. De facto compliance depends on external checks and balances with administrative autonomy as well as the ability of societal actors and institutions to scrutinize how the civil service interprets and acts upon its EU obligations.

The Public Administration and EU Governance

The national public administration is omnipresent in the EU policy cycle. National civil servants advice and act as experts when new initiatives are taken by the Commission. They are key actors in the Council's decision-making process, representing their member state in the working groups, in COREPER and sometimes representing their minister at Council meetings. When EU directives, regulations or case-law by the European Court of Justice are implemented back home, national bureaucrats continue to be key actors. In addition, national civil servants are participating in the Commission's commitology committees. In sum, the national public administrators take part in all stages of the continuous policy-making process of the EU. There are thus good reasons to 'rediscover bureaucracy' in EU studies (Olsen 2005) or join in on the 'public administration turn in integration research' (Trondal 2007).

The many arenas of national administrative participation in EU governance mean that to view the national and European administrative orders as separate, misguides our understanding of the degree of bureaucratic Europeanization. Whereas there may be

no structural convergence between national administrative polities in EU 27 (Kassim et. al. 2000; Trondal 2007), tasks, policies and responsibilities between the national and the EU administration are interwoven indeed. In order to grasp how the EU and the national executive intersect, it may be useful to distinguish between the *Brussels segment* and what happens when 'Europe hits home' (Börzel and Risse 2000), i.e. when national administrators are to *implement* and assure *compliance* with EU obligations. That is the distinction between the 'upload' and the 'download' of EU policies (See Miles and Wivel 2011, Introduction to this volume).

Bureaucratic segmentation in Brussels

The many committees of EU governance integrate national civil servants and the EU core executive, i.e. the European Commission (Egeberg et al. 2003). The committees are steady and active features of EU governance at all stages of EU policymaking. Danish civil servants are part of a Brussels segment of multi-level administration, where they enter the European capital as representatives of national points of view, but met, interact, argue, learn, adapt and socialize with their European counterparts (Trondal 2007, p. 964). Egeberg et al. find that such interaction evokes multiple preferences, roles and identities, instead of either clear-cut national or supranational ones (Egeberg et al. 2003, p. 30). In their study, they find that the institutional autonomy varies across committees. Civil servants act more as representatives from back home in the Council's working groups and the Comitology committees than when participating in the Commission's expert committees.[1] However, all committees produce multiple loyalties for the invited actors and are constitutive parts of the

[1] This finding contrasts (in part, at least) the earlier one by Jorges and Neyer, where participation in the Commission's Comitology committees were found to make national civil servants functional representatives of a Europeanized administration, where roles and perceptions transfer from the national to the supranational level (Joerges and Neyer 1997).

emerging multi-level administration, located in Brussels but where Europeanised views, problem-solving understanding and loyalities are brought back home on return (Egeberg et al. 2003, p. 30). Thus EU committees are indeed sites where individual civil servants are Europeanized.

Denmark's membership of the European Community in 1973 meant that the public administration was confronted with a demand to adapt of a scale not seen before (Grønnegård Christensen 2003, p. 63). Since then EU obligation has only grown – in scope and depth. However, contrary to the 'hollowing out of the state' thesis (Rhodes 1997), this development does not seem to have disempowered the Danish executive. Instead a new EU related bureaucratic order has come into place (Olsen 2007). Instead, it is found that over time membership of the European Community and increased integration has extended the role and power of the Danish government and the Danish central administration (Pedersen et. al. 2002). Part of the explanation is that EU policies often have a rather technical content which may prevent substantial intervention from a large set of political and societal actors. EU policies tend to appear complex, detailed and rather technical which invite for more expert participation and deliberation among experts (Martinsen and Beck Jørgensen 2010). Danish membership have produced more administrative tasks, and the Danish public administration have had more resources transferred to it as a result hereof (Grønnegard Christensen 2003, p. 58). Furthermore, Danish EU administration is found to be rather centralized and coordinated (Nedergaard 2005, pp. 380-382). This points to that the Danish central administration constitutes a powerful actor for Denmark's participation in the daily EU policy process – both in formal and informal channels. It, however, participates in a 'multiple institutional embeddedness' with

varying degrees of institutional autonomy (Egeberg et al. 2003), which makes compromised and shared policy-making the operating dynamic of the bureaucratic segmentation in Brussels. In this way, administrative autonomy is both considerable and compromised. Administrative *autonomy* constitutes a prerequisite for both influencing EU policies and the way this *influence* is carried out (Miles and Wivel 2011, Introduction to this volume).

Implementation of EU policies and compliance

According to Bardach (1977) implementation is 'the continuation of politics by other means' and the study of implementation thus addresses who controls the allocation of resources after a policy has been decided. EU implementation concerns the effectuation of EU decision and how such decisions are transcended into outputs and outcomes. The implementation of Community law and policies has been interpreted as a potential second stronghold of national control, where national actors may attempt to 'claw back' what they may have lost during the European decision-making process (From and Stava 1993; Mény et al. 1996: 7). According to article 4 (ex. art. 10) of the Lisbon Treaty, member states are responsible for the implementation of EU policies. The post-legislative phase of policy-making may thus be where member states regain, or retain, control over the impact of policy and where multiple institutional embeddedness is replaced by more unitary, hierarchical administrative structures. The first and eventually most decisive actors in the implementation phase of EU policies are the government and the national civil servants.

From classic implementation theory, we know that there are 'decision points' that are critical to the impact and control of policies in the implementation process. A

'decision point' arises when the consent of actors must be obtained in order to proceed with (further) implementation and may hinder efficient and/or successful implementation (Pressman and Wildavsky 1973: xxiv). In Europeanization theory, 'decision points' are conceived as 'veto points' or positions. Veto points arise at various stages in the policy-making process where agreement is required for policy change to take place (Haverland 2000: 85). Whereas the number and composition of veto-players in EU implementation vary from process to process, the public administration has the recurrent role as veto player, proposing to the minister how the EU act shall be formally transposed and practically applied (Bursens 2002).

Also regarding implementation, administrative *autonomy* varies and thus the independent *influence* that the administration may exert on implementation. First of all, the national bureaucracy is not a single united actor (Beck Jørgensen 2003), but likely to have heterogeneous preferences on correct and sufficient implementation. Secondly, the degree to which a policy area is politicized or remains rather technical affect administrative autonomy, as the politicized area is likely to be closer supervised by the government, the parliament and societal actors. Finally, Administrative autonomy is likely to be reduced when regulating policy areas with strong and vested societal interests. By and large, the degree of administrative autonomy will depend on checks and balances from other institutions and actors.

EU acts will specify the date when the supranational decisions have to be implemented. However, this is far from the end of sufficient compliance. Subsequently a second round of the post-legislative phase may set off, in which de facto compliance may be questioned and examined. During this process, the European

Commission and the European Court of Justice may play a key role in 'pushing' full implementation of policy through identifying and monitoring restrictive application or non-compliance by the national government (Börzel 2000; Tallberg 2003). National stakeholders, including citizens and interest groups, may be their allies, pointing out an implementation deficit and thus 'pulling' the impact of EU regulation. While in the short to medium run national governments and bureaucracies exert a dominant influence over implementation, the combination of supranational mechanisms of enforcement and decentralized management mechanisms are decisive to ensure compliance in the longer run (Tallberg 2002). The combination of supranational enforcement and decentral management mechanisms have been argued to ensure considerable efficient EU implementation:

"This twinning of cooperative and coercive instruments in a "management-enforcement ladder" makes the EU exceedingly effective in combating detected violations, thereby reducing non-compliance to a temporal phenomenon" (Tallberg 2002, p. 610).

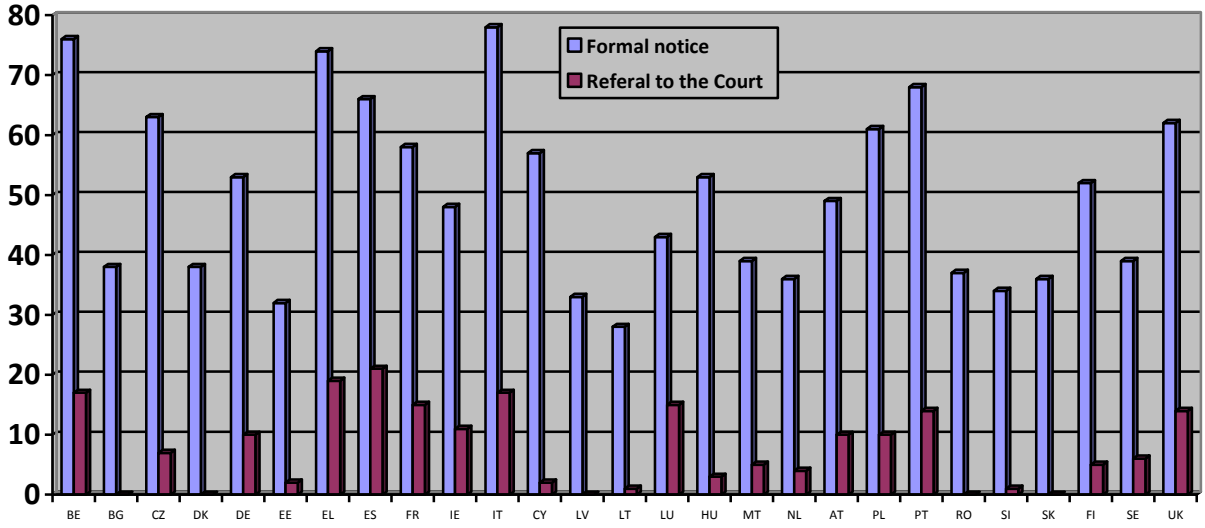
Although non-compliance may be temporal, its occurrence is a continuous challenge to the EU system and its output legitimacy. Börzel et al. find that powerful member states are the most likely non-compliers with European law whereas small member states with efficient bureaucracies are best compliers (Börzel et. al. 2010). The explanation is found to be that those smaller member states lack the political power to resist compliance pressure from the EU. They don't have sufficient political resources to confront the Commission with what contradict domestic institutional legacies or national interests. Instead they generally chose to obey. Member states' political power and government/administrative capacity are thus found to be decisive explanatory factors to compliance patterns (Börzel et al 2010). Political power is

constituted by economic size and EU voting power (Börzel et al. 2010, p. 13), whereas government and administrative capacity consist of resources *and* the bureaucracy's ability to mobilize and channel resources into compliance (Börzel et. al. 2010, p. 7 & p. 14). If resources are dispersed among many public agencies and over different levels of government, the bureaucracy is likely to have difficulties in mobilizing and channeling such resources into compliance.

Figure 1 below demonstrates that Denmark belongs to those member states which have least reported violations of EU law and equally least infringement procedures from the Commission. In 2008, it had 38 formal notices of eventual non-compliance referred to it by the Commission, but it had no referrals to the Court. By means of infringement procedures referred to the Court under article 258 of the Lisbon Treaty, Denmark stands out as a best complier which according to Börzel et al. is explained by relatively low political power, but high administrative capacity (Börzel et. al. 2010, p. 20).

Figure 13.1: Infringement procedures. Formal notice and referral to the court 2008.[2]

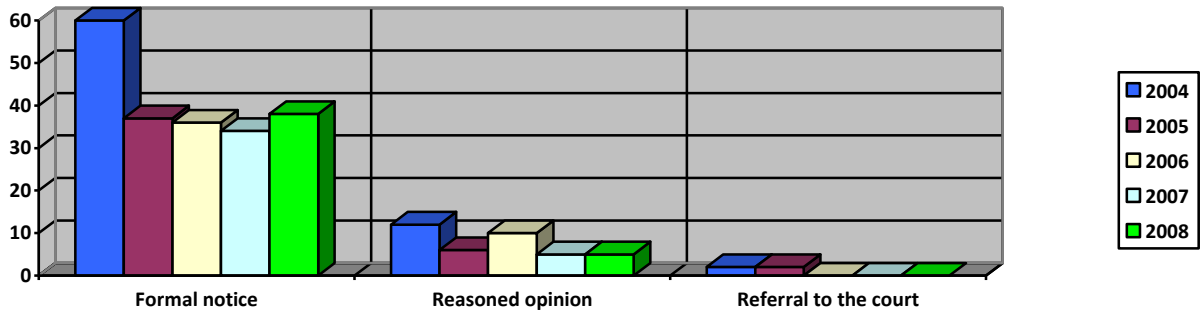
[2] Commission Staff Working Document. Accompanying document to the Report from the Commission 26th Annual Reprot on Monitoring the Application of Community Law (2008). See http://ec.europa.eu/community_law/docs/docs_infringements/annual_report_26/en_sec_statannex_vol1clean.pdf



Also when we look at Denmark in separate and examine formal notices, reasoned opinions and referrals to the Court, Denmark generally comply before an infringement procedure is taken to the Court. Whereas Denmark has a considerable number of formal notices and therefore infringement procedures initiated against it, it appears to comply before a matter ends up in Court as figure 2 demonstrates below.

Figure 13.2: Infringement procedures against Denmark 2004-2008. Formal notice, reasoned opinion and referral to the court[3]

[3] Commission Staff Working Document. Accompanying document to the Report from the Commission 26th Annual Reprot on Monitoring the Application of Community Law (2008). See http://ec.europa.eu/community_law/docs/docs_infringements/annual_report_26/en_sec_statannex_vol1clean.pdf



Infringement procedures are, however, unlikely to be a sufficient measure of member states compliance and only to mirror the tip of the iceberg (Falkner et. al. 2005). Underneath that tip we are likely to find many more violations of EU law that the Commission does not discover or is informed about.

Implementing EU decisions in Denmark

In general Denmark enjoys the reputation as a best complier. In the study of Falkner et. al. in which the authors have investigated implementation of a set of labour market directives in EU 15, Denmark is found to belong to a 'world of law observance' (Falkner et. al. 2005). Member states within this typology are guided by a compliance culture, according to which the goal to comply with EU obligation typically overrides domestic interests. Apart from Denmark also Sweden and Finland belong to this world of compliance. Two other worlds exist; a 'world of domestic politics' and a 'world of neglect'. Within the former, obeying EU rules are at best one objective among others and within the latter compliance is no goal in itself (Falkner et al. 2005, pp. 321-324).[4] The Falkner typology suggests that the Danish public administration has strongly internalized a norm or a culture, determining implementation behavior

[4] Germany, Austria, the UK, the Netherlands, Belgium and Spain belong to the 'world of domestic politics' whereas Ireland, Italy, Greece, Portugal, Luxembourg and France belong to the 'world of neglect' (Falkner et. al 2005, pp. 330-340).

and that – driven by this normative logic – Denmark generally implements irreproachably.

Also earlier findings suggest high compliance standards in Denmark. Denmark may be highly EU-skeptic (Börzel et. al. 2010), however still behaving as the teacher's pet when it comes to the implementation record.

"As a matter of policy, if a threatening in-court battle is unlikely to be won, the government seems to prefer to settle it by an out-of-court compromise. This will often be followed by pertinent new legislation being issued or other sorts of legal enactments which brings Denmark impeccably in line with its obligations" (Rasmussen 1988, p. 97).

However, we argue that it is important to distinguish between formal transposition and practical application (Bursens 2002). Existing studies as well as statistics comparing member states' implementation record tend to concentrate on the *formal* transposition stage. That is the stage between an EU act is adopted and until the implementation date set out in that act, where the national executive informs the Commission on its implementation measures. Formal transposition is thus a stage where the executive's means of implementation are least contested as they tend to be defined by and for the government and central administration. The sufficiency of formal transposition has not yet been tried out in practice.

Formal transposition; when administrative autonomy rules

It is important here to emphasize that formal transposition in Denmark is mainly a governmental and administrative act which tend not to involve any direct parliamentary control. First of all, this means that administrative transposition is not contested and secondly, it may in part explain why Danish implementation stands out

as highly efficient. As legal adviser to the Danish government Karsten Hagel-Sørensen wrote;

"When Denmark not without reason boast about its very high transposition rate of [EU] rules, an important causal mechanism is that transposition to a large extent can be carried out administratively, whereas you in other countries as for example Italy traditionally have far stronger constitutional limits on delegation from the legislative power to the administration" (Hagel-Sørensen (1994), p. 115, author's translation).

In general, EU directives continue to be transposed by means of executive order. This implies that the minister and his/her administration are responsible for the implementation but the Danish Parliament is not involved as legislative power. The parliament becomes involved when an act is transposed by means of a law, debated and processed in the parliament (Blom-Hansen and Grønnegård Christensen 2003, pp. 72-73). The means of transposition are demonstrated by the study of Blom-Hansen and Grønnegård Christensen within the long-time span 1973-2003 (2003).

Table 13.1: Transposition form of EU directives, the year adopted by Danish rule, in percent (Blom-Hansen and Grønnegård Christensen 2003, p. 71):

	Law	**Executive order**	**Circular**	**N=100 percent**
1973 and earlier	23	77	1	137
1974-1983	19	74	7	309
1984-1993	25	72	4	867
1994-2003	28	70	2	2244

When implementation takes place in a largely secluded administrative space without systematic checks and balances, the administration's discretionary power and the power to define are likely to become considerable. Thus Kallestrup finds that the maneuverable scope for the minister and the civil servant acting on his/her behalf has not diminished as a result of EU integration, but continues to be extensive (Kallestrup 2005; 2008). Until national implementation is eventually questioned by supranational or non-governmental national institutions and actors, such extensive maneuverable scope remains intact. In most matters, EU implementation thus remains within the exclusive portfolio of the Danish civil service.

Studies of implementation beyond formal transposition may, however, point out a different picture, questioning the Danish reputation as best complier.

Implementing EU healthcare rights

Between 1998 and 2010, the European Court of Justice laid down that health care is a service within the meaning of the Treaty, which shall in principle circulate freely (Martinsen 2005; 2009). In its ongoing case-law interpretations, the judiciary has laid down that the free movement principles apply to all health care services independent of how that health care service is financed or which health care system provides it. Jurisprudence has clarified that under certain conditions national restrictions to cross border health care are justified, but here the Court distinguishes between non-hospital care and hospital care. Free movement applies without restrictions to non-hospital care, essentially meaning any form of out-patient care/ambulatory care that can be taken care of without hospitalisation, i.e. without spending at least 24 hours in hospital. Regarding hospital care, member states may make access to treatment in

another member state subject to certain conditions. The Court finds it justifiable that member states make the right to treatment subject to first having that right authorised by the competent healthcare institution. But the Court also sets out that the national authority is obliged to issue the authorisation if the same treatment cannot be provided without undue delay back home and the decision whether to authorise or not has to be based on international medical science and not purely national considerations.

The judicial policymaking process between 1998-2010 is characterised by bits and pieces. Judicial interpretation departs from considering very specific healthcare goods and services with very specific conditions for its provision to gradually consider healthcare in more general terms. Concerning implementation, the Danish civil service has had a considerable scope to re-interpret, formulate and communicate how the wording of Court impacts on Danish healthcare policy (Martinsen and Vrangbæk 2008). Below, the scope of administrative autonomy will be analyzed. That is the scope to re-interpret and lay down a national understanding of what constitutes a service within the meaning of the Treaty.

The Danish government was one of the first governments to react to the early rulings of 1998. The government chose to set up an inter-ministerial working group of expert civil servants, commissioned to analyse the implications of the judgments for Danish health policy. The working group acknowledged that the cases had implications for healthcare systems other than that of Luxembourg and were not limited to glasses and dental treatment. The Danish report, however, contained a narrow definition of what constitutes a ‘service’, which remained the Danish re-definition of ‘service’ although later contradicted by new case law of the Court. To be a service according to the

meaning of Treaty Article 50, the Danish civil service argued that there needs to be an element of private pay and profit involved:

"It is the view of the working group that if, on the other hand, the treatment had been taken care of by the public hospital sector, the Treaty's Article 49 would not have applied. The reason is that Article 50 defines services as services normally carried out in return for remuneration [...]Characteristic for a service is thus that a service provider offers a service in return for remuneration" (Danish Report on the Decker/Kohll rulings 1999, p. 23. Emphasis added).

With the Danish way of narrowing down the definition of 'service', it could keep the large majority of Danish healthcare services outside the definition, since they are provided as benefits in kind, free of charge and thus with no direct remuneration. The early jurisprudence by the Court resulted in a smaller amendment of Danish healthcare policy, implemented by executive order[5], and according to which persons insured under Group 2 could have medical treatment from a general practioner as well as a specialist doctor in another member state, whereas persons insured under Group 1 could purchase dental assistance, physiotherapy, and chiropractic treatments with subsequent fixed-price reimbursement from the relevant Danish institutions.

When Denmark submitted its opinion in the 2001 Geraets-Smits and Peerbooms case before the European Court of Justice, it replicated its narrow definition of 'service', and argued that one precondition for a service to be a service within the meaning of the Treaty was that there must be an element of private pay and that the service must be provided with a view to making a profit (Report for the Hearing, pp. 76-78 in Case C-157/99 Geraets-Smits and Peerbooms, 2001). Although the Court overruled the

[5] The policy reform entered into force by executive order, BEK no. 536 of 15 June 2000

Danish definition in the sense that it overruled a 'service' requires an element of private pay and one of profit, Denmark did not change its point of view and did not extend the scope of outpatient treatment that could be provided in another member state.

However, an internal departmental note from 2004[6] clearly points out that the sufficiency of Danish implementation was disputed inside the Department of Health. Although the public administration externally agreed in consensus, it less acted as a unitary actor internally. The note sat out explicitly that the Danish understanding of a service within the meaning of the Treaty could no longer be sustained, and that in the light of the recent case-law[7] the Danish implementation of EU law was too narrow. The Minister, at that time Lars Løkke Rasmussen, had thus been informed by his bureaucracy, but nevertheless no change occurred externally. In later answers to parliamentary questions, the narrow definition of 'service' was restated (see answers to parliamentary questions no. 4965, 4967 and 4969, 17 May 2006).

Internal dispute and critique inside the civil service did not suffice as pressure to adapt. Instead practical application to EU law required external checks and balances outside the departmental corridors. In 2003, a case before the Danish National Social Appeals Board, Ankestyrelsen, commenced. One of the Danish municipalities had refused to reimburse a patient with group 1 healthcare insurance in Denmark his cost for provided outpatient/ambulatory care in Germany. In the first case before the

[6] Internal unofficial departemental note from the Ministry of Interior and Health, 22. March 2004.

[7] I.e. the cases C-157/99 Geraets-Smits and Peerbooms, 2001 and C-372/99 Müller-Fauré and van Riet, 2003.

Social Appeals Board[8], the Board supported the refusal, reasoning that the cost of care provided by a specialist doctor in Germany could not be reimbursed since a service within the meaning of the Treaty required an element of private pay and one of profit. The Board thus leaned onto the definition of the Ministry, without considering it any further. The patient, however, complained to the Danish ombudsmand. The Ombudsmand entered the case, and exchanged viewpoints with both the Ministry and the Social Appeals Board. Against this background, the Board decided to take the case up again. This resulted in a revised decision 3 years later[9], in which the Social Appeals Board found that specialist treatment for insured persons under group 1 constitutes a service within the meaning of the Treaty. It thus contradicted the maintained definition of the Ministry of Health, reasoning that the European Court of Justice had a broader view on what defines as a EU related service than what has been the Danish re-definition from 2000 an onwards.

The new statement by the Board did, however, not lead to the Ministry reconsidering its implementation practice. In May 2007, the Danish ombudsmand proceeded with his inquiries and questioned the Ministry why it had not changed its executive order of June 2000 to include a broader view on access to healthcare services in another EU member state. The ombudsmand also reminded the Ministry that the National Social Appeals Board ranked as the highest national administrative instance in interpreting and laying down the definition of service within the meaning of the Treaty. The Ministry finally responded and changed the executive order as of 1 December 2008[10] to also cover specialist treatment in another member state for group 1 insured in Denmark.

[8] Case before the National Social Appeals Board, 31 October 2003.
[9] Case before the National Social Appeals Board, 29 September 2006, SM S-2-06.
[10] The policy reform entered into force by executive order, BEK no. 1098 19 November 2008.

With a time lag of more than 8 years, Danish application in law and practice stands out as anything but best compliance. Instead it appears to be self-reliant, defensive and for a considerable time period rather immune to internal and external criticism. It takes institutionalised checks and balances with authorised mandates to inquire into administrative practices to rectify the implementation balance which lasted for almost a decade. In this case, the Danish ombudsmand became the turning point.

Implementation of EU environmental regulation

Analysing practical application, implementation deficit appears more common than general statistics on formal transposition would lead us to believe. When it comes to EU environmental regulation, Denmark has had the self-perception to be among the leading member states. The role as leader or best practice has often been stated by the Danish Ministry of the Environment;

"In many years, Denmark has had a high environmental profile in the EU (…) therefore Denmark has pressed for high environmental standards and been very active, when it comes to the environment in EU" (Miljøstyrelsen [The Environmental Protection Agency] "Fælles miljø, fælles ansvar – Danmark og EU" (2002), p. 20)

However, concerning implementation the Danish role is more disputable. In the following, practical application will be examined concerning the EU directive on the conservation of natural habitats and of wild fauna and flora, also known as the habitats directive.[11] According to the Directive, EU member states are to point out areas where wild flora and fauna can be conserved in order to preserve biodiversity.

[11] Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora.

In Denmark, the directive was implemented by executive order in 1998, where the Ministry pointed out 194 natural habitats.[12] This formal transposition resulted in various very critical evaluations. The Danish Nature Council, 'Naturrådet', found the implementation severely insufficient, not sufficiently setting out positive protection by means of conservation planning and not containing rules regarding general protection within appointed habitats. The implementation deficit implied that protection of nature even within the assigned habitats will not necessarily be favoured if other activities (as for example enterprises, construction or agriculture) threatens biodiversity or general conservation of the areas (Pagh 2001).

The Ministry of Environment initiated its own evaluation and requested the Legal Adviser to the Danish Government, Kammeradvokaten, to prepare a judicial report on the implementation. The report came out summer 2002 and was highly critical. It found Danish implementation to be insufficient, among other aspects in the light of the dynamic development of EU law.[13]

"But it has to be assumed that it [the Directive] not only concerns an obligation to establish areas, but also to ensure effective protection of those areas. In this regard the member states are obliged to ensure that considerable deteriorations of the areas or disturbances of the species, they are appointed to conserve, are avoided" (Kammeradvokaten [The legal adviser to the Danish government], 2002, p. 21. Author's translation).

Although considerable implementation deficits were pinpointed by the adviser, the Ministry decided not to inform the Danish Parliament on the critical report.

[12] Executive order, BEK 782 by 1 November 1998.

[13] Referring to the case-law of the European Court of Justice, see case C-103/00 Commission v. Greece, 30 January 2002 and case C-117/00 Commission v. Ireland, 13. June 2002.

Information on the report, however, leaked and in December 2002, a member of the socialist party questioned the Minister if he had not had a judicial assessment of the Danish implementation of EU environment rules (Berlingske Tidende 2002). Meanwhile, the Danish Forest and Nature Agency under the Ministry of Environment had requested the Consultancy firm, Rambøll, to analyse what the implementation of the habitats directive and the directive on the conservation of wild birds[14] would cost. The estimated amount was received by shock - and then silence. It was estimated that the implementation would cost between 1.7 and 2.6 billion Danish crones, i.e. 344-347 million Euros, between 2003 and 2012 (Parliamentary question to the Danish Minister of Environment, S. 5439, 4 April 2004). The Danish Forest and Nature Agency received the report by July 2002, but decided not to inform the Commission, nor the Danish Parliament on the estimated costs until December 2002. It was later held that the government had decided to keep silent until after the yearly negotiations on the national budget (Berlingske Tidende 2002).

Also the national NGOs intervened considerably in the practical application of the habitats directive. They came to constitute important national agencies that discovered and informed the European Commission on implementation deficits. In 2003, the Danish Ornithological Society, Dansk Ornitologisk Forening, complained to the Commission on what they found to be insufficient protection of the important bird area in Southern Jutland 'Tøndermarsken' (Andersen and Iversen 2006). Also the Danish Society for Nature Conversation, Danmarks Naturfredningsforening, sent complaints (Andersen and Iversen 2006, pp. 91-92). These complaints contributed to

[14] Council Directive 79/409 of 2 April 1979 on the conservation of wild birds.

the Commission sending a formal notice[15] to the Danish government in 2003 (The Foreign Ministry 2007; Andersen and Iversen 2006, p. 81). Against this background, the Danish Ministry of the Environment chose to appoint supplementing habitats as of 1. July 2003.[16] All in all supplementing habitats were pointed out 5 times, latest in 2009. The Commission is, however, still not satisfied with the implementation of the Directive and continues to examine the Danish case (Udenrigsministeriet [The Foreign Ministry] 2009; Ritzaus Bureau 2010; Flensborg Avis 2010).

In the case of environment, Danish implementation has not gone smoothly and Denmark has not proven to be a best complier when it comes to practical application. Instead the public administration has interpreted its EU obligations much too limited. In the medium run, between the formal transposition of the Directive in 1998 and till approximately 2002, implementation remained an uncontested governmental matter, administered by the civil service. In this period administrative autonomy was high. However, as a result of external evaluations implementation was brought under intensified scrutiny and the government gradually forced to adapt more in line with its EU obligations. This substantiates that compliance estimated by means of practical application is a much more inefficient and complicated process than formal transposition and best compliance scoreboards lead us to believe. To ensure practical application demands external checks and balances which recurrently question and control the de facto sufficiency of national implementation. In the case of

[15] The formal notice questioned the Danish implementation of art. 6. 2-4 of the habitats directive (The Foreign Ministry 2007, p. 32).

[16] See http://www.blst.dk/NATUREN/Natura2000plan/Natura2000omraader/Habitat/Udpegningsprocessen/

environmental regulation, the Danish parliament and NGOs played such key role, reducing the administrative autonomy of the Danish executive.

Concluding remarks

The national public administration stands out as omnipresent in the EU policy cycle, having a significant say from the initiation to the evaluation of supranational decisions. The bureaucracy proves to be key actor at all stages and there are good reason to 'rediscover bureaucracy' (Olsen 2005) in the EU institutional order.

Whereas the national civil servant may fly into Brussels as representative of national points of view, s/he adapts and socializes with his/her European counterparts. Identities and preferences in the bureaucratic segment in Brussels thus become overlapping and multiple. This has a significant impact on administrative autonomy and influence. On the one hand, administrative autonomy is considerable as civil servants are the continuous actors in EU policy-making. EU integration has not disempowered the bureaucracy, but quite on the contrary made it the irreplaceable actor in the EU related bureaucratic order. On the other hand, administrative autonomy is compromised as the national civil servant participates in a multiple institutional embeddedness, and the more Europeanized s/he becomes, the more obliged to think and act on behalf of Europe – and take that view with him/her back home.

Implementation is different and poses different demands on bureaucratic behaviour. Formal transposition is one thing. Here administrative autonomy seems to rule. Danish implementation is mainly made by means of executive orders. This implies

that the decision on how to comply is largely taken in a secluded administrative space. Compliance scoreboards continue to portray Denmark as best complier, and as long as Denmark continues to do so well there is no immediate reason for the Commission to question formal transposition. However, the reputation as best complier and obedient European may only picture Danish compliance half way through.

As the two case studies analysed in this chapter demonstrate, practical application is where implementation becomes more muddy business – also in Denmark. Practical application suggests that the public administration may far from always prioritise compliance over domestic interests. The efficient bureaucracies of small member states (Börzel et al. 2010) may not necessarily assure high compliance. Their bureaucratic ethos is far from neutral, but actually strive to preserve national autonomy, more loyal to the preferences of their ministers and the legacies of their national institutions than to EU obligations. The two case studies also substantiate that in practical application external checks and balances become essential. In this stage of EU policy-making, sufficient implementation comes to depend on the extent to which institutionalised checks and balances and societal actors are oriented towards the EU system as well as the extent to which they are capable and willing to evaluate national practices in the light of EU law and policies. Their part taking in a multiple institutional embeddedness becomes as essential when it comes to effectuating supranational decisions as it was to policy initiation and decision-making.

Analysing the role of the public administration and the implementation process provides insights on at least two of the dimensions raised in the introduction to this volume (Miles and Wivel 2011). Administrative autonomy varies across policy areas

and stages in the policy cycle. As a result hereof the independent influence that the civil servants may exert on how and to which degree Europe is effectuated varies too. When it comes to the two cases examined in this chapter, high administrative autonomy equals high influence to the Danish civil service on the reach of Europe into Danish society and concrete EU rights. Administrative autonomy and influence are, however, reduced the more other institutions and actors step in as mechanisms of checks and balances. The extent of policy change and the impact of Europe thus seem to depend not only on administrative power and capacity, but also on the engagement of the national legislature and societal actors. This proves that the EU political system and its impact has matured to such a degree that the same mechanisms are at play as when we consider domestic political systems and their policy cycles.

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