

INTERVENTION BY MR CARL CEDERSCHIÖLD FORMER MAYOR OF STOCKHOLM AND PRESIDENT OF NEELS (NETWORK OF EUROPEAN ELECTED REPRESENTATIVES FOR LOCAL SERVICES OF GENERAL INTEREST) AT THE IMCO HEARING ON “ REVIEW OF THE WORKINGS AND EFFECTIVENESS OF THE PUBLIC PROCUREMENT DIRECTIVES” IN BRUSSELS THE 20 OF APRIL 2006.

HONOURABLE MEMBERS OF THE COMMITTEE – LADIES AND GENTLEMEN,

THE HEADLINE FOR THIS SESSION – “IN-HOUSE” PUBLIC PROCUREMENT PROCEDURES AND THE REFINEMENT OF THE “TECKAL-CRITERIA – DESCRIBES EXACTLY WHAT IT IS ALL ABOUT. IN ORDER FOR PUBLIC AUTHORITIES TO BE ABLE TO ACT IN THE FIELD CLEAR CUT FORESEEABLE CRITERIA IS OF THE UTMOST IMPORTANCE.

A RELEVANT STARTING POINT FOR THIS DISCUSSION IS THAT THERE IS A CONFLICT OF INTEREST BETWEEN ON THE ONE HAND THE BASIC PRINCIPLES FOR THE INTERNAL MARKET – ONE OF THE FOUNDATIONS OF THIS UNION – CHARACTERISED BY :

TRANSPARENCY , NON-DISCRIMINATION, PROPORTIONALITY AND MUTUAL RECOGNITION - AND ON THE OTHER HAND

SUBSIDIARITY AS IT IS LAID DOWN IN THE MEMBER STATES IN VARYING FORMS OF LOCAL AND REGIONAL INDEPENDENCE.

THE SCOPE OF LOCAL AND REGIONAL INDEPENDENCE AS WELL AS THE DEGREE OF RESPONSABILITIES GIVEN TO SUB NATIONAL AUTHORITIES ARE DEFINED IN THE NATIONAL LEGISLATION OF RESPECTIVE COUNTRY – AND THEY MAY CERTAINLY DIFFER.

BUT TOGETHER THEY COVER A WIDE RANGE OF ACTIVITIES WITHIN THE UNION. PRIMARY AND SECONDARY EDUCATION, CARE OF THE ELDERLY, WATER AND WASTE WATER TREATMENT, WASTE MANAGEMENT , PUBLIC TRANSPORT ETC ETC. SERVICES OF GENERAL INTEREST AND SERVICES OF GENERAL ECONOMIC INTEREST.

IN ORDER TO MEET THESE LEGALLY DEFINED RESPONSIBILITIES THE LOCAL AND REGIONAL AUTHORITIES NEED A NUMBER OF TOOLS – AND THEY NEED TO CONTROL THESE TOOLS.

THIS ACCESS TO A VARIED TOOL BOX IS ALSO BECOMING MORE AN MORE IMPORTANT IN A WORLD WHERE THE PUBLIC SECTOR IN GENERAL AND THE PUBLIC AUTHORITIES IN PARTICULAR ARE FACING GROWING ECONOMIC CHALLENGES.

THE DEMAND FOR MORE EFFICIENCY AND ABILITY TO DEVELOP SERVICES IN LINE WITH MORE DEMANDING TAX-PAYING CITIZENS MAKES THIS VARIATION REGARDING THE AVAILABLE MEANS EVEN MORE CRUCIAL.

WE ARE TALKING VARIOUS COMBINATIONS OF :

TRADITIONAL ADMINISTRATIONS

IN-HOUSE TO COMPANIES OWNED AND CONTROLLED BY THE LOCAL AUTHORITY OR COOPERATING AUTHORITIES.

PPP:S OR IPPP:S

SERVICE CONCESSIONS

PUBLIC PROCUREMENT OF GOODS AND SERVICES

LOCAL INDEPENDENCE TO BE FOR REAL DEMANDS THE RIGHT AND POSSIBILITY TO HAVE A REAL CHOICE. IN ORDER FOR THE RELEVANT AUTHORITIES TO MEET THEIR RESPONSIBILITIES.

THE QUESTION WE FACE IS - WHERE EXACTLY SHOULD THE BALANCE POINT BE – THE LINE BE DRAWN - BETWEEN THE PREVAILING AND FUTURE INNER MARKET LEGISLATION AND THE FREEDOM OF CHOICE FOR LOCAL DEMOCRATICALLY ELECTED AUTHORITIES WITH A MANDATE FROM ITS CITIZENS.

AS THIS WHOLE HEARING GOES TO SHOW – THE IN-HOUSE ISSUE IS ONLY A PART OF THIS COMPLEX AREA. BUT IT IS A PART THAT IS CHARACTERISED BY A LARGE DEGREE OF UNCERTAINTY WHEN IT COMES TO WHAT IS ACTUALLY THE LEGAL FRAMEWORK ON EUROPEAN LEVEL.

THIS UNCERTAINTY HAMPERS LOCAL AND REGIONAL AUTHORITIES IN THEIR EFFORTS TO BECOME MORE EFFICIENT IN DOING THEIR JOB VIS A VIS THE CITIZENS.

IN ORDER TO COMPARE YOUR TOOLS AND CHOOSE THE RIGHT ONE YOU MUST KNOW EXACTLY WHAT EACH ONE IS GOOD FOR AND WHEN YOU CAN USE IT.

AS WE ALL KNOW SO FAR THE ONLY GUIDELINES WE HAVE IS THE JURIS PRUDENCE SO FAR PROVIDED BY THE COURT OF JUSTICE . THIS MEANS THAT THINGS HAVE BECOME SOMEWHAT CLEARER. – BUT IT IS BY FAR NOT ENOUGH FOR THE PEOPLE WORKING WITH THESE ISSUES IN THEIR EVERYDAY LIFE.

IT IS FAIR TO SAY THAT THE TECKAL DECISION IS THE BASIS OR AT LEAST THE STARTING POINT. IT REQUIRES THAT:

- THE PUBLIC AUTHORITY CONTROLS THE DISTINCT ENTITY IN QUESTION
- THE ESSENTIAL PART OF THE ACTIVITY OF THIS ENTITY MUST BE CARRIED OUT FOR OR ON BEHALF THE AUTHORITY.

THE FIRST REQUIREMENT HAS AS WE ALL KNOW BEEN SOMEWHAT REFINED BY SUCCESSIVE SENTENCES AS STADT HALLE , BRIKEN ETC.

NOW WHAT IS CONTROL IN THIS CONTEXT REALLY. FROM TECKAL IT CAN BE CONCLUDED THAT THE MUNICIPALITY FOR INSTANCE CONTROLS THE COMPANY IN THE SAME WAY AS IT CONTROLS A REGULAR OR TRADITIONAL MUNICIPAL ADMINISTRATION. IN OTHER WORDS THE POWER LIES SOLELY WITH THE MUNICIPALITY.

IT SEEMS TO ME THAT ONE ISSUE HERE – JUDGING FROM THE RULING ON BRIKEN - IS WHETHER COMPANY LAWS AS THEY ARE CONSTRUED IN OUR MEMBER STATES ARE CONSIDERED ENOUGH FOR THE PUBLIC AUTHORITY – THE OWNER - TO EXERCISE CONTROL OVER ITS COMPANY.

THIS IS A BIT ODD TO MY OPINION IF YOU OWN THE COMPANY YOU CAN CONTROL IT. AT THE SAME TIME THERE IS AN INTERESTING ARGUMENT ON HOW IN PRACTISE YOU CAN DO THIS BY SETTING UP OWNERS GUIDELINES, BY MONITORING OPERATING RESULTS AND THE STRATEGIC SUPERVISION BY THE MUNICIPALITY REGARDING FOR INSTANCE INVESTMENT,

I CAN TELL THE COMMITTEE THAT THIS IS EXACTLY THE WAY IT IS DONE IN MY CITY STOCKHOLM AND I CAN ASSURE YOU THAT THIS MEANS TOTAL CONTROL - THE CITY COUNCIL EVEN APPOINTS THE BOARD MEMBERS AS IT APPOINTS THE MEMBER ON THE DIFFERENT COMMITTEES WITHIN THE CITY ADMINISTRATION.

THE RULING ON STADT HALLE CAN BE SAID TO HAVE LED TO EXCLUSION OF IN-HOUSE COMPANIES WITH PRIVATE MINORITY PARTICIPATION. IN SPITE OF ITS MAJORITY CONTROL OF THE COMPANY – THE MUNICIPALITY COULD NOT BE SAID TO BE IN CONTROL AS WITH ITS OWN ENTITIES.

THE LOGIC FOLLOWING FROM STADT HALLE IS THAT THIS WAS NOT A CASE OF IN-HOUSE – IT WAS RATHER A CASE OF PPP AS THE CITY WANTED TO COOPERATE WITH A PRIVATE PARTNER TO PROVIDE THE SERVICE IN QUESTION.

FROM THE POINT OF VIEW OF LOCAL AND REGIONAL AUTHORITIES IT IS NOT A QUESTION OF DEMANDING TO BE EXEMPT FROM THE EU LEGISLATION AND HAVE TOTAL FREEDOM TO DO WHATEVER THEY LIKE .

ALL LEGAL RULES REGARDING IN-HOUSE CAN AND SHOULD ONLY APPLY WHEN A SERVICE OR ACTIVITY IN QUESTION STEMS OUT OF THE COMPETENCE AND RESPONSIBILITY GIVEN TO THE LOCAL AND REGIONAL AUTHORITIES BY THE LAWS OF THE MEMBER STATE.

IN THIS RESPECT WE SEE IN-HOUSE NOT AS AN EXCEPTION TO THE RULES FOR PUBLIC PROCUREMENT BUT AS A RIGHT FOR PUBLIC AUTHORITIES TO ORGANISE THEIR FIELDS OF LEGAL RESPONSIBILITIES AS THEY CONSIDER MOST EFFICIENT.

IT SHOULD ALSO BE POINTED OUT THAT IN REALITY IN-HOUSE AS A TOOL IS NOT USED IN ABUNDANCE BY LOCAL AUTHORITIES BUT FOR RATHER SPECIAL ACTIVITIES.

AT THE SAME TIME THERE IS A CLEAR UNDERSTANDING AND A COMMON INTEREST THAT THE LEGAL FRAMEWORK SHOULD BE CONSTRUED IN SUCH A WAY THAT IT CAN NOT BE CIRCUMVENTED BY THOSE WHO WOULD LIKE TO CREATE UNFAIR COMPETITION.

MY CONCLUSION IS THAT IN-HOUSE ACTIVITIES DO NOT CONSTITUTE A MAJOR PROBLEM FROM THE POINT OF VIEW OF THE INNER MARKET – BUT THAT THE PRESENT LEGAL UNCERTAINTIES CREATE OBVIOUS PROBLEMS FOR ESPECIALLY LOCAL AND REGIONAL AUTHORITIES AROUND THE UNION.

ALL PARTIES CONCERNED SHOULD HAVE AN INTEREST IN GETTING A PROPER AND LEGALLY CLEAR DISTINCTION OF WHERE THE RESERVED AREA ENDS AND THE AREA OF COMPETITION STARTS.

THE SOONER THIS LEGAL SOLUTION AND THEREBY THE BALANCE BETWEEN THE CONFLICTING INTERESTS CAN BE FOUND THE BETTER.. IT SHOULD REGULATE IN-HOUSE IN ESPECIALLY TWO REGARDS:

- WITHIN THE SCOPE THE PUBLIC PROCUREMENT DIRECTIVES
- FOR SERVICE CONCESSIONS WHERE IN-HOUSE AT THE MOMENT CAN NOT BE LEGALLY DEFINED.

END.