

Summary of the report

Services of General Interest – a Swedish Perspective

Tom Madell

Sweden has a long tradition of being a welfare state with local authorities both having the responsibility for the provision of public services and being the ones delivering the services. However, since the 1980's many countries, including Sweden, have been adjusting their models of welfare capitalism to a changed economic environment. One type of adjustments has been reforms of the public sector generally known as "New Public Management" (NPM). The reforms usually covered by this heading are, for instance, the introduction of explicit measures of performance, decentralisation, introduction of private-sector styles of management, contracting out, privatisation, and an increased focus on service and client orientation. Thus, since NPM was introduced, the scene has changed dramatically when it comes to service providers and today one can find both public and private actors in almost all areas of Services of General Interest (SGI). The purpose of this report is to map the developments in the area of SGI in Sweden and to show the relation between these developments and the purpose of EU free movement and competition law.

Today municipalities, county councils and regions to a large extent procure SGI from private companies. The activities carried out by private companies on behalf of municipalities, county councils or regions are financed using public funds. In some areas – such as dental care – it has for a long time been common for the public authorities to procure services externally. In the last ten years an increased number of private companies have also begun to run preschools, schools, hospitals and care facilities. Competition with private enterprise, and privatisation, has been a hallmark of the municipal area since the beginning of the 1990s and in this respect the influence of EU cannot be underestimated.

In spite of a strong public sector, the EU concepts in the fields of public services are not commonly used in Sweden.

In the legal and common language it is the national concepts of general interest, public services and social services that are used, not the concepts of SGI, SGEL, NESGI and SSGI (SSGEL or NESSGI) etc. However, there is no doubt that all the services that can be labelled as SSGI, e.g. statutory and complementary social security schemes, social assistance, reintegration into society and labour market, health and disability services, social housing, child care, teaching, education and training etc., in different ways are provided and financed within the Swedish welfare system. As stated above, the obligations to provide the services usually follow explicitly from legislation, but due to local or regional differences the local self-government concept of general interest may differ. Even if a service in an urban area isn't considered to be of general interest and therefore falls outside the municipality's competence to provide, it might well be a service that a rural area municipality can provide – since it in that case falls within the general interest in the municipality due to the principle of local self-government.

A part from the problem that can occur due to local and regional differences another important question is that it might be a democratic problem if the regulation concerning SSGIs if these services are developed without an open and strategic connection between on one hand the general interest that are desired and on the other hand the rules concerning transparency and competition that follows from the EU treaties. One of the biggest challenges today is to define the ability of local authorities to determine their own internal structures without getting in conflict with the EU rules. There are some areas that can be problematic in relation to Swedish SSGIs.

There is no doubt that municipalities and county councils are free to decide the forms in which municipal and county council services may be organised, in-house (sometimes

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including municipal companies) or ex-house by providers that have been procured under the Public Procurement Act (Sw.: *lagen (2007:1091) om offentlig upphandling, LOU*).

On the other hand, cases from the EU Court clearly show a more flexible approach towards decentralised governance and the obligation to follow the public procurement regime, e.g. the Teckal criteria's (based on the case C-107/98, Teckal) if an entity exercises a control over the person concerned which is similar to that which it exercises over its own departments and if that person carries out the essential part of its activities with the controlling local authority or authorities. Another example is the case C-480/06, Commission v. Germany, which appears to broaden the range of arrangements between local authorities, which would not be subject to the procurement rules.

The Swedish Public Procurement Act not only follow the directives, they also cover procurements under the thresholds and so-called "B-services", i.e. contracts which have as their object services listed in Annex II B and solely shall be subject to Art. 23 and 35(4) in the Directive 2004/18/EC. The only general exception from using the procurement regime is if the value of the contract is low, i.e. contract values less than 15 per cent of the thresholds (287 000 SEK). This strict regime leads to that SGI – if not provided in-house – usually are procured under the public procurement regime or, when possible, under the Act on Free Choice Systems (Sw.: *lagen (2008:962) om valfrihetssystem, LOV*). Therefore, it might be so that the EU Court has a more flexible approach on SGI than Swedish law. However, one has to keep in mind that it is not only the EU legislation that has lead to a change in the Swedish welfare model – it is more like a change into a new era and an ideology change. Thus, the Swedish model can be said to be eroding both from the inside and from the outside.

Another important issue is the relation between SGIs and state aid – either you follow the procurement regime or not it is very important to analyse the situation from a state aid perspective. The Swedish Public and social housing – the municipal housing companies – can be mentioned as one example that has been considered to be problematic from a state aid perspective. The municipal housing companies

in Sweden have by law been given a social obligation to provide good housing for all households. These companies also provide public utilities on the Swedish housing market. Rent control has also been a feature of the Swedish housing system. The Swedish Parliament ruled that the municipal owned housing companies together with tenant representatives where to negotiate rent level and the agreed rents set the ceiling for private and all other landlords' rents for similar dwellings.

Since January 1st 2011 municipal housing companies are to be run according to sound business principles. This means not only that the municipalities may not give direct subsidies to their municipal housing companies, but also that the companies must eventually generate the highest possible profit, taking into account the operational risks the municipality elects to accept. The Government decided not to classify any part of the activity in the municipal housing companies as a SGEI. The interpretation of Article 106(2) and the definition of "social housing" led to a view that such a classification would have forced the companies to limit the activity to housing for certain vulnerable groups. Such an interpretation is probably too narrow compared to the Commissions definition concerning model of subsidised housing in the Netherlands. The Commission considers social mix and social cohesion to be valid public policy objectives. The interpretation might also create state aid problems for municipal subsidising of the companies when it comes to the need of municipal subsidising of the companies in e.g. low-density regions. In the Netherlands case (COM(2009)9963, p. 67.) the Commission stated that the nature of the public service obligations is established in the Housing Act, which specifies that the purpose is to provide both social housing and public purpose buildings in the whole of the Netherlands.

The conclusion is that many questions concerning SGI remain to be answered. In this process Sweden can choose to act in two different ways, in a proactive or a more defensive way. However, the first step should be to analyse our welfare system versus the concept of SGI/SGEI. Is the concept something that can be useful for defending our system or doesn't it really matter, since most of the services already are performed by private actors.