VARIA 13 (E)

GEMEENTELIJKE OMBUDSMAN AMSTERDAM

RELEVANT ASPECTS OF THE COMPETENCE OF THE MUNICIPAL OMBUDSMAN OF AMSTERDAM

AND

Prof TEN BERGE

WHICH ARE THE EFFECTS OF THE ADMINISTRATIVE DEVELOPEMENTS IN PRIVATIZING AND REGIONALISING OF MUNICIPAL TASKS AND SERVICES FOR THE COMPETENCE OF THE MUNICIPAL OMBUDSMAN?

(Summary of the advisory exposition)

relevant aspects of the competence of the municipal ombudsman of Amsterdam

In the late 80's and the early 90's the Municipal ombudsman warned in her year reports for the consequences of the privatizing of municipal services and companies, for the competence of the ombudsman.
Following these signals, and the eventual loss of competence with the privatized housing service, a motion was filed by one of the council members: "motie van der Laan/Van der Stoel".
In this motion the college of Burgomaster and Aldermen was asked to make a proposition in order to establish a point of view on the competence of the ombudsman in cases of privatizing.

The ombudsman asked the law professor Ten Berge from the University of Utrecht for an advisory exposition (see summary).

In 1995 the City Council received a proposition on the subject, which included some substantial changes of the by-law on the Municipal ombudsman. The proposition was accepted.
The following is a summary of this proposition.

political proposition
The before mentioned motion "Van der Laan/Van der Stoel" was unanimously accepted by the City Council, in its meeting of 16 December 1993.
Following this motion the council commission on legal affairs discussed the matter during several sessions.

The first step in executing the motion "Van der Laan", was the decision of the Burgomaster and Aldermen dated 21 June 1994:
1 the members of the college of Burgomaster and Aldermen, awaiting the elaboration of the motion "Van der Laan", must report any intention to privatize municipal services within there portfolio, in order to make it possible to ask for the advice of the ombudsman thereon.
2 In the future political propositions concerning the privatizing of municipal services and companies need to have a paragraph on the role of the municipal ombudsman.

Answering the competence question, in cases of privatizing, the following criteria are considered relevant:
- the execution of tasks of privatized services occurs on the base of a statutory regulation;
- the privatized service is a monopolist within its market segment;
- the privatized service/company produces public conveniences (collectieve goederen);
- the production of the privatized service is, also after the privatizing, financed -mostly- by collective means.

If these criteria have not been met, the council could still decide that, when a civil body corporate is established, the competence of the ombudsman will be arranged properly. This could occur when the municipality has considerable influence on the functioning of this privatized company.

If the council feels that the competence of the ombudsman should be maintained, than it is necessary for the city council to arrange

this. Furthermore this should take place in due time, i.e. before the actual privatizing.

If the possibility to arrange the competence in due time is neglected, then the only possibility to restore this competence is that the board of the body corporate decides that the ombudsman is competent to investigate the actions of its organs and personnel, and in which way this should be arranged.
The city council is not competent to extend the competence of the ombudsman towards civil bodies corporate which are already functioning. (Other than the national legislator who extended the competence of the national ombudsman towards administrative organs, appointed by "Order in Council")

The deed of incorporation is a sort of contract between the founder and the to be established body corporate. Within this framework the competence to investigate complaints can be agreed upon. In the process of privatizing the energy company, this procedure was followed. Other aspects can also be arranged in the statutes or the deed of incorporation. The city council thus has considerable control in the amount and nature of its influence.

changes in the by-law concerning this subject
First of all, the concept of "organ" is changed into "administrative organ" following the general act on administrative law (see the text of professor Ten Berge).

Furthermore it was decided that there should be a list of administrative organs which are considered municipal administrative organs (the so called a-variety). Apart from the three organs that occur in every municipality, there are (according to the act on municipalities) only two other bodies to which authority can be attributed. These are commissions, to which the council or the Burgomaster and Aldermen can delegate powers (for instance the city boroughs), and the civil servants to whom the Burgomaster and Aldermen can delegate certain powers (this last option hardly ever occurs any more).

The b-variety of administrative organs, are those foundations or bodies corporate (etc) to whom a public task is attributed, on the condition that their actions can be considered to have public authority (the power to decide unilaterally on the legal status of citizens).
Criterion is the concept of "considerable influence" of the public authority.

When a service is privatized and the city council feels that the ombudsman should be competent, then there is no limitation in arranging this in the deed of incorporation. Therefore the following article has been added in the by-law on the municipal ombudsman:

article 21
1 This by-law is also applicable to actions of organs of a civil body corporate, that performs a formerly municipal task in Amsterdam and regarding to its actions the city council has decided that the competence of the ombudsman is extended.

2 The city council only decides to do so, if the deed of incorporation or the statutes create such possibility, or if the competent organ of the body corporate has declared in writing that it agrees to the applicability of the by-law to its actions; these bodies corporate are mentioned in the annex B of the by-law.
3 Within the meaning of the by-law, an organ of a body corporate is also considered an administrative organ. The action of an employee is imputed to the organ of the body corporate within which responsibility that person works.

As can be read, this article does not create automatic competence for the ombudsman; each time it requires a separate council decision. If the council takes such a decision, then the annex B has to be adapted. The annex is agreed upon to inform citizens on the competence of the ombudsman.

common regulations
The ombudsman thought it wise that there would also be an annex for administrative organs, established by common regulation, that accepted the competence of the ombudsman; the council agreed on that, on the condition that it is established that the organ in question requested this.

The following article has been added to the by-law:

article 22
In annex C the administrative organs, established by common regulation, are mentioned, which have decided that their actions can be investigated by the ombudsman. The same applies to common regulations for which the competent administrative body has decided that the ombuds-function is carried out by the Municipal ombudsman.

Next to the changing of the by-law the following was also formally decided:
When the following criteria have been met, the municipal ombudsman is competent.
- the execution of tasks of privatized services occurs on the base of a statutory regulation;
- the privatized service is a monopolist within its market segment;
- the privatized service/company produces common goods;
- the production of the privatized service is, also after the privatizing, financed -mostly- by collective means.

In all other cases, for example when there is considerable influence, the council has to elaborate whether within the discussion on the deed of incorporation the ombuds function should be carried out by the Municipal ombudsman.

At this moment the annexes hold

B
-the energy company
-the insurance company
-the credit bank
-the "NV Economisch herstel Zeedijk" (urban renewal/economic renewal)
-the foundation "Tot en Met" (service for the disabled)

C
The administrative organs of the public body taxitransport Amsterdam, Zaanstreek, Amstelland and Meerlanden.

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summary of the advisory exposition of Professor Ten Berge on

"Which are the effects of the administrative developments in privatizing and regionalising of municipal tasks and services, for the competence of the Municipal ombudsman"

1. introduction

In 1986 the Amsterdam City Council established a Municipal ombudsman institute. The ombudsman is competent to investigate complaints about the municipal "organs". Developments as the privatizing (or making more independent) of municipal services and -companies and the regionalising of municipal tasks are a threat to the competence of the ombudsman.
In this exposition the question of competence is investigated.

2. The competence of the Municipal ombudsman

The by-law on the Municipal ombudsman uses the term "municipal organ". What does this constitute? The by-law limits it to:
1 the city council, the board of Burgomaster and aldermen, or the Burgomaster;
2 the council of a city-borough and the daily board of that council;
3 a municipal commission to which administrative powers of the city council or the Burgomaster and aldermen are attributed.

Civil servants -and other employees- who work for one of these "organs" are also considered being within the competence of the ombudsman.

3. the relation between the by-law on the ombudsman and the general act on administrative law

The general act (in force since 1994) uses the concept of "administrative organ", which is further-reaching than the concept of "organ" in the by-law. According to the professor it is, however in contradiction with the general act, allowed to use the term "organ". The council has the right to decide independently which municipal organ is within the competence of the ombudsman.
The question, later to be answered, would be if it is wise to change the concept in the by-law towards the concept used in the general act.

4. criteria to "construct" the competence of the ombudsman

The by-law gives three possibilities to construct competence.
The ombudsman is competent if it concerns:
1 the action of an organ;
2 the action of a member of an organ (individuals);
3 the action of a civil servant, employed by the municipal authorities.

On the basis of these three possibilities can be judged if the ombudsman is competent when a service/task is privatized.
First however, one should elaborate what is meant by privatizing and regionalising.

5. **independence or the privatizing of municipal services and companies and the regionalising of municipal tasks**

In literature the concept of privatizing includes the "disposing of", the "contracting out", or the "making independent" of municipal services. According to this view, making independent is part of the privatizing. When a service is disposed of, it is either "given" to the free market, or to a non-commercial organization, not forming part of the municipal organization. "Making independent"; this is the case when a municipal service has a bigger independence, but it is still part of the municipal organization (certain municipal tasks are carried out in a more independent way). The process of making a service independent can be carried out in an administrative and a civil variety; for instance the establishment of a municipal commission, or the establishment of a civil body corporate.
Varieties are the foundation, the so called private company, and the so called limited liability company (anonymous company). As the most relevant form of privatizing in Amsterdam concerns not the administrative, but the civil variety, the discussion will concentrate on the establishment of the civil body corporate.

Furthermore some municipal tasks are regionalised. An example is the public body Taxi-transport Amsterdam, Zaanstreek, Amstelland and Meerlanden. This body has been established by a so called "common regulation". (several municipalities decide to place a certain task under the competence of such a common regulation)

Privatized services and companies are placed under the control of a civil body corporate, such as the foundation, the limited liability- and the private company. Regionalised tasks are placed under the control of a newly established organ, the daily board of a public body, established by common regulation. For the competence of the ombudsman, both developments need reflection.

6. **what are the consequences for the competence of the ombudsman in case of privatizing of municipal services and companies.**

A municipal company or service only has limited independence. The personnel usually exists of civil servants. There is no doubt whatsoever concerning the competence of the ombudsman.
However, is the ombudsman also competent to investigate the actions of the board or the personnel of a civil body corporate?
The answer should be found in the by-law on the municipal ombudsman (see paragraph 4).

The first criterion gives a negative result; the foundation and the limited liability or private company are not "organs" within the meaning of the by-law. The competence of the ombudsman can therefore not be established in this way.

The second criterion gives no solution either. When a member of an organ within the meaning of the by-law is also a member of the board of a foundation or a limited/private company, under which control a municipal service is placed, the ombudsman in principal is not competent to investigate the actions of that member. This is only otherwise if that person is a member of this board on behalf

of that public organ, or on behalf of another municipal organ. In that case this person is a representative of the municipality. As a member of the board, this representative has also the task to act in the interest of the company. There is in that case the risk of conflict of interest.

The competence of the ombudsman could be constructed when a member of an organ is a member of the board of a civil body corporate on behalf of that organ. This membership should however not occur by chance. It should be based on an explicit municipal policy-decision and it should be arranged as much as possible in the statutes of the civil body corporate involved.
If can be concluded that the ombudsman is competent, then this competence is limited to the actions of the member of the organ.

The third criterion concerns the legal status of the personnel. If it concerns civil servants, the ombudsman is competent. If the company has its own personnel, the competence of the ombudsman can not be constructed.

conclusion
Concluding from the text of the by-law on the municipal ombudsman, the ombudsman in principle loses its competence when a municipal service or enterprise is placed under the control of a civil body corporate. In the next chapters is examined how this competence problem can be solved. There are three alternatives to restore the competence. First of all to change the by-law. The second option is to declare the ombudsman competent in the statutes of the company. The last idea is to interpret the by-law in a different way, as to taking into account the changing municipal organization.

7. Changing the by-law on the municipal ombudsman

7.1 changing the concept of "organ"
The concept of organ determines the reach of the competence. As it is limited in reach (as explained) a change is logical. The concept of administrative organ, as used in the general act on administrative law, comes into view.
This act determines "administrative organ" as follows:
a an organ of a body corporate, established by administrative law, or
b another person or college/board, entrusted with public authority.

From the parliamentary history of this act can be concluded that in two cases an organ of a civil body corporate can be considered as a administrative organ:
First of all this occurs when the civil body corporate is part of the public authority. This is the case when an organ of an administrative corporation has considerable influence on the management of a civil body corporate. The whole of actions of this body is considered within the reach of the general act on administrative law.
Secondly this occurs when civil bodies corporate are entrusted with public authority.
Public authority is the authority to unilaterally decide on the legal position of other subjects (taking unilaterally binding decisions).

Civil bodies corporate that by means of attribution or delegation are entrusted with the authority to make those decisions, are only considered an administrative organ when their actions are actually based on that authority.
Thus the general act has a further reaching concept of organ than the by-law on the municipal ombudsman.

The second category is easy to point down, as public authority is usually defined in a special act, or law. More problems occur with the first category; Crucial is the concept of "considerable influence".

7.2 The concept of considerable influence
The criteria are derived from the jurisprudence/case law of the "Centrale Raad van Beroep in ambtenarenzaken" (central council of appeal in civil-servant cases). There are 4 criteria used in case of a foundation:

1 The public authorities should have considerable influence on the composition of the board, as well as on the appointment of the members of the board.
2 The public authorities should have important influence on the finances of the foundation.
3 The public authorities should be able to play its part in personnel policy.
4 A certain amount of decisions should be approved of by or on behalf of the public authorities.

The criteria are usually applied cumulatively.
Most jurisprudence/case law concerns foundations. If the criteria are met, it is possible to appoint civil-servants; they are a condition for a special legal status of the personnel. Questionable is if these criteria can be applied unconditionally to decide on the existence of considerable public influence.
As the criteria derived from the jurisprudence/case law on civil-servant-cases are probably not conclusive, one should also look into other fields of administrative law.

7.3 The National ombudsman act
Civil bodies corporate are only within reach of the national ombudsman act if a regulation explicitly attributes the authority of a minister to give instructions to the body corporate.

7.4 The act on disclosure of public action
(*see conclusion*)

7.5 The act Arob
(*see conclusion*)

7.6 literature
(*see conclusion*)

7.7 conclusion
The general act on administrative law knows the following categories of civil bodies corporate that are considered an administrative organ. The concept of considerable influence is determined by several criteria.

According to the literature on this subject, a civil body corporate is part of the public authority when an organ of the public authority is competent to appoint the majority of the board members. Furthermore the public authorities can exercise influence if the statutes of a civil body corporate attributes the competence of giving instructions or indications, approving of decisions or the budget etc.

The National ombudsman act and the act on disclosure of public action start from another criterion. A civil body corporate is within reach of these acts when that body corporate's actions are within the responsibility of a minister or public body. This occurs when the body corporate has to follow the assignments, indications and instructions of the public authority. These instructions/indications should be based on a legal regulation/act. But it is also possible that the statutes of the body corporate attribute this power.

The concept of considerable influence will be further defined by jurisprudence/case law and (scientific) legal development.

All in all it is considered wise to adapt the concept of "organ" in the by-law on the Municipal ombudsman. "Municipal administrative organ" should be the new term. Civil bodies corporate, being part of the municipality, will then be automatically within the ombudsman's competence. To be on the safe side, it would be sensible to state that the ombudsman is also competent if services, institutions, companies work within the responsibility of the municipal authorities/a municipal administrative organ. With that extension is made sure that civil bodies corporate, not being administrative organs, but receiving instructions/indications of a municipal organ, also are within reach of the ombudsman.

To restore the competence of the ombudsman it is thus necessary to change the by-law. This change, however, does not imply automatically the competence of the ombudsman. This depends on the legal form in which a municipal service or enterprise is privatized. If the foundation or body corporate does not form part of the municipal organization, the ombudsman will, even after changing the by-law, not be competent.

When there is no considerable influence of the public authority, the ombudsman is not competent. Would an annex with a list of civil bodies corporate that are within reach of competence give a solution? Probably not. This list would only include civil bodies corporate, not being an administrative organ. This would include the majority of civil bodies corporate. The municipal ombudsman would only want competence over some of them; the privatized municipal services/companies. A list would be rather arbitrary. Is there any general criterion to decide whether or not a body corporate should be placed on that list?
Furthermore it is incompatible with the system of book two of the civil code. A civil body corporate is an independent organization and legally not responsible for its actions to the municipality. A municipal by-law cannot infringe this independence. This would only be possible if stated in a national act. Declaring the ombudsman competent for certain foundations and corporate companies by naming them in the by-law is not the right solution.

8. to establish the competence of the ombudsman in the statutes of a civil body corporate

In the statutes of a privatized municipal service/enterprise one can include that the ombudsman is competent to investigate the actions of the board of the body corporate, and of its personnel. In the deed of incorporation the statutes have to be included. The city council that decides to establish a civil body corporate, has the right to decide on the contents of its statutes. It is recommended to include a declaration that the regulation on the competence of the ombudsman can only be changed after approval of the city council (in case of a foundation) or can not be changed at all (in case of a private or limited liability company).

9. changing the interpretation of the by-law

The National ombudsman has extended the interpretation towards the concept of working "within the responsibility of".
The Municipal ombudsman could do the same. For Amsterdam this solution brings too much uncertainty as the concept of administrative organ is standardized (in the general act) and its concept develops in a certain way. The "extending" instead of interpreting of this concept will not give the right solution.

10. elaboration towards the foundation and the limited/private company

In paragraph 7 was concluded that it is difficult to exactly point down when a civil body corporate is part of the municipal organization. A few criteria were discussed, but it stayed unclear which criterion is decisive. Two criteria are considered most relevant:
1 the right to appoint the majority of the board members of a civil body corporate;
2 working within the responsibility of a administrative organ. This occurs when the administrative organ has the right to give indications, instructions or assignments to the board of the body corporate.

How can one meet these criteria? Are there special requirements following the rules of corporate/company law?

10.1 The appointment of the board of a foundation
There are no specific demands following the law on foundations; the statutes can decide who has the right to appoint the board.
In casu this means that the city council is free to decide whether or not the ombudsman will be competent.

10.2 appointment of the board of a private or limited liability company
One should make the distinction between a normal- and a structure-company, because of the different procedures in appointing the board.
The board of a normal company is appointed by the general meeting of shareholders. The statutes cannot transfer this right to a third party. However it is possible for persons or bodies within or outside the company to have the right of binding nomination. The general meeting of shareholders can veto this right by two third majority vote, representing more than half of the subscribed capital.

The Managing Board of a "structured company" is not appointed by the General Meeting of shareholders, but rather by the Supervisory Board ("Raad van commissarissen"). A "structured company" is a large enterprise for which the subscribed capital, plus the capital reserves, amounts to at least 25 mil. Gulden, apart from other requirements. A "structured company" bears the responsibility to appoint a Supervisory Board. This body then exercises the preeminent applicable rights, including the appointment of a Managing Board of the company. It is not possible to limit these rights.

A structured company constitutes one part of the community organisation, if the right to appoint the majority of the Supervisory Board is assigned to a community organ. In accordance with the code of civil laws, the statutes may provide that one or several members of the Supervisory Board be appointed by the governing public body. The statutes may even provide that all members of the Supervisory Board be appointed by the governing public body, i.e. the community authorities.

In case the Town Council resolves to privatise a given community service sector, the particular legal form which is selected is what determines whether the authority of the ombudsman continues to lie in the purview of the city. If the community authorities possess the legal competence to appoint the majority of the members of the Managing Board or of the Supervisory Board, the authority of the ombudsman continues as before.

10.3 Directives

Substantial influence can also be achieved through the issuance of directives. Is it permissible to concede this right to persons or organs beyond the domain of the company/corporation?

The statutes of a company with limited liability or a publicly listed company are not permitted to grant this right to issue directives to persons outside the company. This right is reserved for the organs of the company itself. If public authorities are represented in this organ, this naturally constitutes a certain influence.

The legal form of a foundation and the legal form of an unincorporated association or club enable public authorities to exercise influence.

11. Housing cooperatives

(not relevant)

12. Regionalisation of communal responsibilities

A general edict may substantiate and justify the examination/inspection authority of the ombudsman. The City of Amsterdam in itself does not possess this legal competence.