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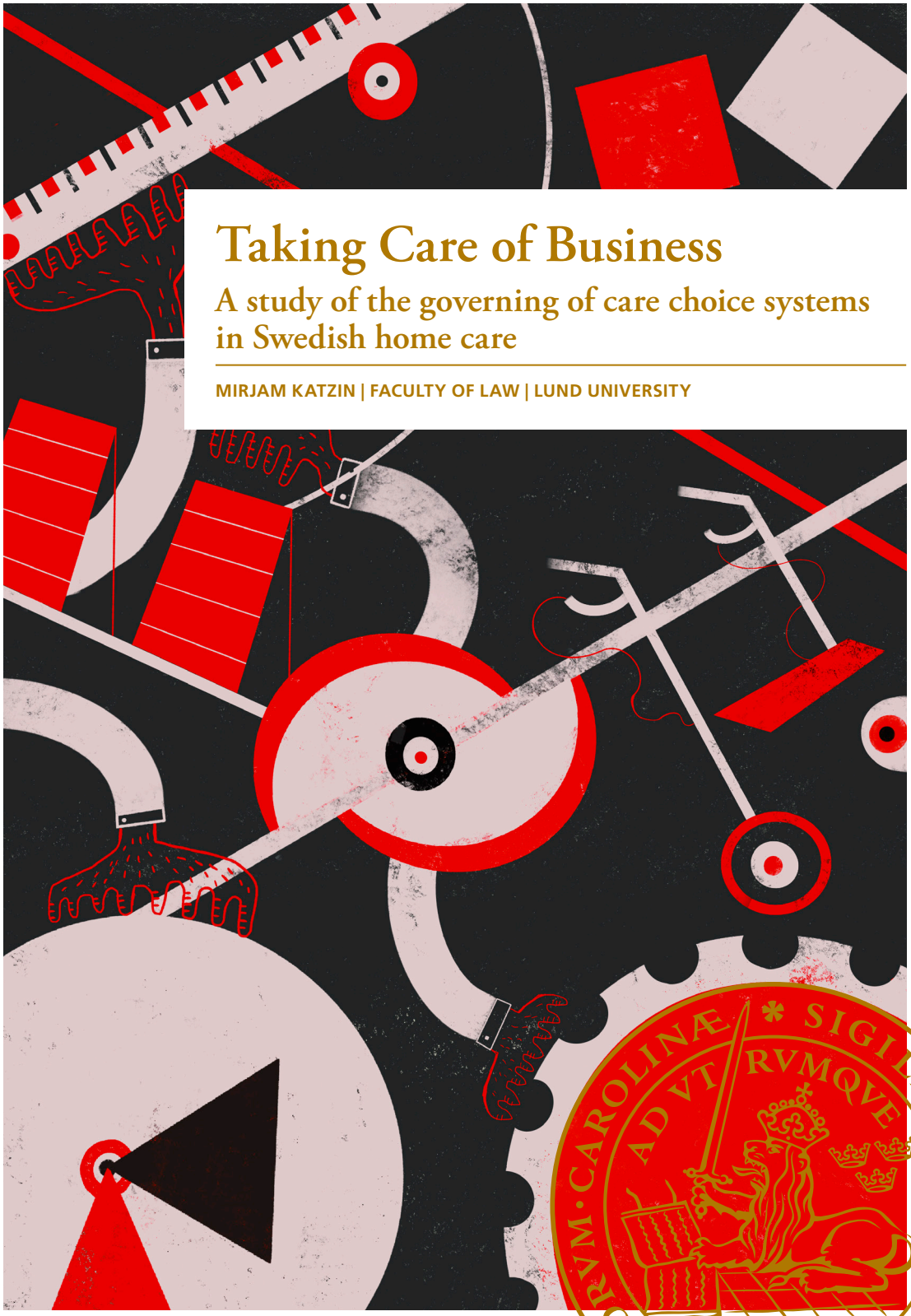

Taking Care of Business

A study of the governing of care choice systems in Swedish home care

MIRJAM KATZIN | FACULTY OF LAW | LUND UNIVERSITY

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Abstract

This study provides an account of the introduction of care choice systems into the provision of home care by Swedish municipalities. Care choice systems in elder care are at the centre of a conflict about the broader principles of the welfare state. Studying them is thus a way of revealing the outlines of this conflict. In this thesis, I show how the introduction of care choice systems changes the nature of public administration, the strategies officials deploy, and the tools they use. This helps to deepen the understanding of how quasi-market reforms transform public administration at the municipal level, while providing insight into the legal strategies used by public authorities in governing welfare. The thesis also provides new insights into how parts of the Swedish model have evolved during the last decade.

Methodologically, the study is based on an in-depth empirical investigation of the roles 'public law' and 'private law' play in realizing and shaping new forms of governing. I pursue a 'law in practice' approach grounded in a Foucauldian methodology, combined with a theoretical discussion of the outcomes of the study. One central finding of the study is that quasi-marketization leads not to a simple deregulation of public sector services, but rather to a reconfiguration of the relationship between state and capital. This entails new ways of governing, such as contractualization and standardization, as well as a new role for public administration and bureaucracy. The legal strategies adopted by the municipalities are complex and, in general, aim at regulating the private providers through the contract almost *as if* they were part of the municipality, while at the same time treating the municipal provider *as if* it was a private company.

The introduction of care choice systems has created new and specific conflicts and contradictions in the governing of home care for older persons. The municipal responsibility for the quality of elder care, the need to ensure the system has political legitimacy, and a political will to support small businesses combine to produce a situation in which public spending on welfare is channelled into the support and monitoring of businesses within the sector. To an increasing extent, public officials who's job it is to enforce regulations and monitor private actors end up 'taking care of business'. Crucially, this leads to a situation in which low-quality services and fraudulent behaviour cannot properly be dealt with. It is clear that, despite the great amount of work that the public authorities put into constructing, supporting, and monitoring the quasi-market, many apparent problems still remain.

Key words
User Choice; Home Care; Elder Care; Welfare Policy; Public Administration; Quasi-Market Reform; Swedish Neoliberalism; Marketization; Public and Private Law; Governmentality; Bureaucracy.

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To Jacob with all my love

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1 Introducing the study

1.1 Setting the scene

Up until the late 1980s, almost all elder care in Sweden was publicly provided. From the 1990s onwards, reforms of the welfare system guided by New Public Management (NPM) ideas introduced the combination of public financing and private delivery to the sector. The Swedish elder care sector increasingly came to involve a system of public procurement whereby private actors compete on price for a contract to deliver services. A 1993 amendment to the Social Services Act, which regulates elder care as well as social services more broadly, aimed to stimulate competition in the provision of care by the municipalities. The objective was to increase efficiency and drive down costs.[1] The focus on price competition was found to have negative effects on quality, and public authorities began to shift to quality competition. From the late 1980s onwards, some municipalities sought to introduce user choice, which competed with traditional public procurement (i.e. awarding the contract to the bidder offering the lowest price) as the way to privatize services. However, as late as 2005, 226 out of 290 municipalities still provided all home care publicly,[2] and in 2006 as few as 27 municipalities had choice systems for elder care.[3]

The 2008–2009 'freedom of choice' reforms to the Swedish health and social care sector gave further impetus to this development. These reforms were a key part of the agenda of the right-wing Reinfeldt government (2006–2014). A new piece of legislation – *lag* (2008:962) *om valfrihetssystem* (the Act on Care Choice Systems) – allowed municipalities to introduce care choice

[1] Prop. 1992/93:43 Ökad konkurrens i kommunal verksamhet.

[2] Marta Szebehely and Gun-Britt Trydegård, 'Generell Välfärd Och Lokalt Självstyre: Ett Dilemma i Den Svenska Äldreomsorgen?' in Håkan Jönson and Marta Szebehely (eds), *Äldreomsorger i Sverige : Lokala variationer och generella trender* (Gleerup 2018) 35.

[3] Marta Szebehely, 'Insatser För Äldre Och Funktionshindrade i Privat Regi' in Laura Hartman (ed), *Konkurrensens konsekvenser: vad händer med svensk välfärd?* (SNS förlag 2011) 221.

systems in certain service areas. The main aim of this reform was to encourage private companies to provide welfare services, to allow users to choose among different care providers, and more generally to encourage a move away from traditional public procurement (i.e. contracting with a single private company to provide a particular service) and towards care choice systems (i.e. giving users a choice of several different providers) as a means of privatizing services. The act applies to all areas of social services, most of the healthcare sector, and employment agencies. However, care choice systems are most commonly introduced in the area of home care for older persons in need of assistance. This is the topic of this dissertation.

This study takes as its point of departure the idea that the legal regulation of welfare services is a battleground where ongoing conflicts between different ways of organizing socially necessary reproductive functions are played out. Care choice systems in elder care are at the centre of a conflict about the broader principles of the welfare state, and studying them is therefore a way of revealing the outlines of this conflict. Another starting point is the claim that the welfare state has not been 'deregulated' but rather 'reconfigured' through new forms of public–private partnership and through the importation of the methods and instruments of the market into the public sphere. Trust is now placed in the market, rather than in the public sphere and public professionals, to solve problems within the system. At the same time, welfare has come to be seen less as a means of equalizing social conditions and more as a service that aims to satisfy citizens' needs.

The thesis is an empirical study focusing on how care choice systems function at the municipal level. I aim to show how the introduction of care choice systems in the area of home care for older people changes the nature of public administration, the strategies officials deploy, and the tools officials use. I provide an analysis of the practices connected to the contracting out of welfare services and of how these practices change public administration, welfare rationalities, and ways of governing. At the centre of the analysis will be questions about how the legal system provides a framework within which political interests can be pursued and how certain legal structures make possible certain kinds of activity. Inspired by governmentality studies and Michel Foucault, I aim to reveal the nuances and complexities of the development of neoliberal reforms in Sweden.

Elder care is a significant but often overlooked part of the Swedish welfare system and social infrastructure, and it is an area where the trend towards increasing privatization has had a major impact. Just like many other OECD countries, Sweden faces the significant demographic challenge of an ageing

population, which means that the provision of elder care under the auspices of the public welfare system will be an issue of increasing importance in the future.

1.1.1 The background to the study

Following the care choice systems reforms of 2008–2009, many municipalities decided to marketize their services. As part of the policy implementation process, the government offered an incentive, in the form of additional funding, to municipalities that wanted to investigate the introduction of a care choice system. Out of a total of 290 municipalities, 248 applied for and received this extra funding. Even though not all of the municipalities that received the payment ultimately decided to implement a care choice system, the incentive certainly had the desired effect. By May 2020, 151 out of the 290 Swedish municipalities had introduced care choice systems for certain home care services (such as cleaning, laundry, and shopping), and 127 had a care choice system for home care (i.e. the provision of care activities and healthcare in the user's home).[4] The introduction of the Act on Care Choice Systems in 2009 has thus radically increased the importance of choice systems as a model in Swedish elder care.

The introduction of care choice is part of an international trend towards market-oriented reforms in the welfare sector that started in the US and UK and has been promoted by international organizations such as the OECD.[5] In the Nordic countries, marketization has primarily been introduced 'within' publicly funded welfare systems rather than in parallel to or instead of such systems, and it has mostly taken the form of the privatization of service delivery rather than of funding.[6] The idea of choice has been central to the development of marketization in the Swedish welfare system. Different choice systems have also been introduced in the school and healthcare sectors. These

[4] 'The Care Choice Website', https://www.valfrihetswebben.se/statistik/, accessed 11 May 2020.

[5] Hildegard Theobald, 'Marketization and Managerialization of Long-Term Care Policies in a Comparative Perspective' in Tanja Klenk and Emmanuele Pavolini (eds), *Restructuring Welfare Governance : Marketization, Managerialism and Welfare State Professionalism* (Edward Elgar Publishing 2015) 32.

[6] Anneli Anttonen and Olli Karsio, 'How Marketisation Is Changing the Nordic Model of Care for Older People' in Flavia Martinelli, Anneli Anttonen and Margitta Mätzke (eds), *Social Services Disrupted: Changes, Challenges and Policy Implications for Europe in times of austerity* (Edward Elgar Publishing 2017) 222.

choice systems are based on *vouchers*, publicly funded benefits with which the care user can make choices on a market for care services. Voucher systems are based on an idea developed by Milton Friedman at the Chicago School of Economics in 1955. Friedman was looking for a way of increasing the role of the private sector in education while retaining public control over the system. Based on neo-classical economic ideas about competition as an efficient resource-allocating mechanism, the basic idea of voucher systems is to separate government financing and regulation from the delivery of services and to introduce consumer choice and quality competition.[7] Unlike traditional public procurement, voucher systems focus on quality competition and user choice.

A voucher-based market regulated and monitored by a municipality is referred to as a *quasi-market*. Quasi-markets may take different forms, but the use of the term implies that the market is at least partly regulated and is 'quasi' in that it differs from a conventional market in key ways.[8] Reforms in the late 1980s involved different experiments with quasi-markets which aimed to maintain the public financing of services but alter the means by which services were provided. Central to these reforms was a decentralization of decision-making and an introduction of competition in welfare provision, with the public sector becoming the purchaser, the providers independent units, and the users consumers.[9] In a voucher system, a recipient – that is, a service user – has the ability to 'exit': to stop using the services of one provider and instead use the services of another, rather than using their 'voice' to improve the quality of the services of the provider. The concepts of 'exit' and 'voice' are derived from Albert O Hirschman[10] and describe different ways in which a dissatisfied service user can seek to change an institution. The kind of quasi-market established through the care choice system is based on 'supply side' marketization; as prices are fixed, the market mechanism of competition applies only to the suppliers, and the consumer's purchasing power is not understood in monetary terms.[11] In the Swedish model, the difference between a municipality with a care choice system and one without a care choice system lies in the fact that the user may choose which provider should deliver the

[7] Milton Friedman, *The Role of Government in Education* (Rutgers University Press 1955).

[8] Julian Le Grand and Will Bartlett, *Quasi-Markets and Social Policy* (Macmillan 1993) 10.

[9] Le Grand and Bartlett (n 8) 3.

[10] Albert O Hirschman, *Exit, Voice, and Loyalty : Responses to Decline in Firms, Organizations, and States* (Harvard Univ Press 1970).

[11] Viola Burau and others, 'The Political Construction of Elder Care Markets: Comparing Denmark, Finland and Italy' (2017) 21 Social Policy & Administration 2.

services that the municipality has determined the user is eligible for. A user eligible to receive care can choose between the approved providers that have contracts with the municipality. If they are dissatisfied with the service, a care recipient also has the possibility to 'exit' a care provider and choose another.

In general, the reason for introducing a voucher system is often expressed in terms of a wish to increase diversity in a sector that has previously been more homogeneous. The systems are based on the conviction that giving care recipients an 'exit' option will stimulate innovation and improvement through competition.[12] In introducing the Act on Care Choice Systems, the Swedish government had a number of motives. In the preparatory works, there are three main lines of argument in favour of the reform. First of all, it is argued that freedom of choice has an intrinsic value; it empowers the care user, shifting power and influence away from politicians and administrators. The second line of argument is based on the explicit presumption that, through the operation of market forces, a choice system will increase the quality of elder care, stimulating competition, innovation, and diversity. The third line of argument is that the reforms will develop the market for services, creating jobs and giving care workers the opportunity to start their own businesses, and thus having positive effects for small businesses and women's entrepreneurship. Competition between employers is believed to lead to better conditions for employees.[13] The Act on Care Choice Systems is also thought to clarify the legal situation in the area of public procurement.[14] Finally, the government investigator claims that the municipalities' own services will also benefit from competition and highlights the importance of bench-marking, particularly in light of the need for increased efficiency in the sector as a result of the ageing population.[15]

To achieve the aims of the Act on Care Choice Systems, the municipalities have to create the preconditions for private providers to operate and for users to choose. At the same time, the municipalities are still responsible, under the Social Services Act, for securing high-quality services for users in need. The Act on Care Choice Systems is not meant to lower the ambitions of the elder care system as a whole, and it ultimately remains a public responsibility to ensure that the objectives of the act are achieved. What has changed, however,

[12] Jane R Gingrich, *Making Markets in the Welfare State : The Politics of Varying Market Reforms* (Cambridge University Press 2011) 15.

[13] Prop. 2008/09:29 Lag om valfrihetssystem 18.

[14] Prop. 2008/09:29 Lag om valfrihetssystem (n 13) 54–55.

[15] SOU 2014:2 Framtidens valfrihetssystem – i socialtjänsten 156.

are the tools of governing and of securing quality services. Through tender documents, the municipality determines the requirements that a private provider must live up to in order to be approved as a supplier. The Act on Care Choice Systems states that a municipality cannot refuse to sign a contract with a private provider if the provider meets the quality requirements in the act and in the tender. If a supplier meets these requirements, the application is approved, and the private provider is given the right to enter into a contract with the municipality. The contract creates an obligation to deliver services to users who choose the provider and a right to get paid according to a compensation scheme set out in the contract. The contracts also set out procedures for conflict resolution, sanctions, and amendment or termination of contract.

In seeking to govern private providers, the municipalities may make use of different mechanisms. They may alter the requirements in the tender document, monitor the providers, make use of the sanctions and grounds for termination provided in the contract, and engage in dialogue and more indirect approaches. The criteria set out in the tender documents, the clauses in the contracts, and the monitoring of the contracts become central to public administration at the municipal level. Formal – but also, as will be shown in this study, informal – aspects of the relationship with the private providers create a framework that determines what the municipality is able to achieve in seeking to realize the aims of the Act on Care Choice Systems on the one hand and the Social Services Act on the other.

The municipalities are not obliged to introduce care choice systems. In accordance with the principle of local self-governance, the municipalities have a great deal of leeway in organizing services, allowing them to take into account their own systems, budgets, and knowledge of local needs. The Act on Care Choice Systems thus provides a procedural framework but leaves it to the municipalities to determine the details of the regulation of the system. Many municipalities start by introducing care choice systems in the area of home care services for older people, as this sector has low barriers to entry: that is, it is relatively easy for new companies to establish themselves in the market.[16] The municipalities may have contracts with as many private providers as will apply and be granted entry into the system, but most care choice systems have very few established providers (or even no private providers at all, if no eligible provider applies). However, there are some larger care choice systems, such as

[16] Swedish Competition Authority, 'Kommunernas Valfrihetssystem - Med Fokus På Hemtjänst: Slutrapport' (Konkurrensverket 2013) 36.

the one in Stockholm, which for a time had over 100 providers for users to choose between. A provider may seek to distinguish itself from other providers by catering for those who speak certain languages or are from a particular cultural or religious background, by having special knowledge or expertise, or by being oriented towards particular conditions such as dementia, psychiatric diagnoses, or diabetes.[17] Each municipality develops its own tender dossier and contract. It therefore makes sense to focus a study of the organization and regulation of Swedish elder care services on what happens in the municipalities, for this is the level at which most elder care is provided in Sweden.

From a legal perspective, there is no relationship between the provider and the user in the Swedish care choice systems.[18] There is a rights-based, public-law relationship between the user and the municipality, and a private-law relationship – a contract – between the municipality and the provider. The agreement between the municipality and the provider and the actual relationship between the user and the provider reconfigures the relations between the citizen and the municipality, inserting the private provider as an intermediary between the two. The responsibility the municipality has towards the user is transferred, becoming the contractual responsibility of the private provider. However, because the municipality remains, legally, the principal with regard to all elder care services, including privately delivered services, the municipality is responsible for any errors or defects in the service provided by the private companies. The problem with the complicated relationships involved in the contracting out of welfare services is that public-law obligations end up having to be enforced by private legal subjects.

The type of privatization that results in private actors providing publicly funded services may be seen as involving the meeting of two legal metaphors. One legal paradigm, the rule of law and the relationship between the citizen and the public (vertical), is mixed with another legal paradigm, the contract (horizontal). Public-law relationships are traditionally seen as hierarchical power relations, whereas private-law relationships are seen as equal, voluntary relations between legal entities on the same level. This is a meeting between two legal paradigms: a traditional, hierarchical, and bureaucratic welfare

[17] Katarina Andersson, 'Valfrihet Och Mångfald: Ett Dilemma För Hemtjänsten' (2010) 17 Socialvetenskaplig tidskrift 308, 310.

[18] In the case Länsrätten i Stockholm, 2007-11-19, no. 105017-07 and 10527-07, the court ruled that it is not possible for a municipality to construct a care choice system in which users enter into contracts with suppliers to provide services for which the municipality later pays. Rather, the municipality has to establish a contract with the provider first.

system and a more libertarian contract-law system. The bureaucratic system tends to be rigid because it is based on general and abstract legal rules, which work to promote legal safeguards and security.[19] The classical Weberian-style bureaucracy, with hierarchical chains of command, distinct jurisdiction, concerns for impartiality, etc., has not vanished, but it has been challenged, and this challenge has informed a wide range of reform measures and techniques, which in turn have given rise to internal conflicts within the system.[20] Care choice systems have thus altered the regulatory powers of local governments.

1.1.2 Swedish exceptionalism, past and present

In recent months, because of the coronavirus pandemic, Swedish elder care has received a lot of international attention.[21] As Carl-Johan Karlsson points out in an analysis for *Foreign Policy* magazine, Sweden has traditionally been looked to as a model society, known for its robust welfare state and extensive and generous social services, including elder care. However, the coronavirus crisis has led to that image being questioned, not least because of the country's failure to protect the elderly within the elder care system.[22] An analysis of the longer-term changes to social services in Sweden, and to elder care in particular, complicates the image of Sweden as an exemplary advanced welfare state.

When looked at in an international context, the Swedish elder care system, with its combination of generous funding for welfare services and a large share of

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[19] See, e.g., Eberhard Eichenhofer and Mies Westerveld, 'Contractualism : A Legal Perspective' in Els Sol, Mies Westerweld and Maria Westerweld (eds), *Contractualism in employment services : a new form of welfare state governance* (Kluwer Law International 2005) 29.

[20] Peter Triantafillou, *New Forms of Governing : A Foucauldian Inspired Analysis* (Palgrave Macmillan 2012) 170.

[21] See e.g. Richard Orange, 'The Treatment of Sweden's Old and Vulnerable Is a "Catastrophe"' *The Telegraph* (7 May 2020) <https://www.telegraph.co.uk/news/2020/05/07/treatment-swedens-old-vulnerable-catastrophe/> accessed 7 July 2020; Maddy Savage, 'What's Going Wrong in Sweden's Care Homes?' *BBC News* (19 May 2020) <https://www.bbc.com/news/world-europe-52704836> accessed 7 July 2020; Carl-Johan Karlsson, 'Sweden's Coronavirus Failure Started Long Before the Pandemic' *Foreign Policy* (23 June 2020) <https://foreignpolicy.com/2020/06/23/sweden-Coronavirus-failure-anders-tegnell-started-long-before-the-pandemic/> accessed 7 July 2020.

[22] Karlsson (n 21).

for-profit private provision of public services, appears somewhat unique. Swedish elder care is based on the idea of the universal provision of high-quality care for everyone in need, financed by tax revenues. The system is one of the most generous structures of publicly provided care for older persons in the world.[23] From an international perspective, Sweden still has a well-developed elder care system, and the quality of home care in Sweden has been found to be among the highest in Europe.[24]

Developments in the organization of the Swedish welfare state, with the move towards market-based competition and the limited regulation of the amount of profit that can be made by companies providing welfare services, have thus been viewed from the outside with a certain astonishment.[25] However, as Stefan Svallfors and Anna Tyllström note, the latest privatization surge in the Swedish welfare system has received surprisingly little attention in the international welfare and social policy literature. The authors argue that the traditional image the world has of the Swedish welfare state needs to be updated in light of the developments towards privatization in recent decades.[26]

The way in which Swedish care choice systems are regulated is not particularly unusual in an international context; it is the combination of these systems with the universalist ambitions of the elder care system that makes the Swedish case remarkable. To highlight the specificities of the Swedish welfare and elder care systems, it is useful briefly to compare Sweden with the other Nordic countries, for these countries generally have very similar systems to Sweden. While a thorough analysis of all the similarities and differences between these systems is beyond the scope of this thesis, it is fruitful to highlight some differences which demonstrate why Sweden is a particularly interesting case. In international comparisons, the Nordic, or Scandinavian, welfare states are often lumped together, characterized as they are by a relevant shared feature:

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[23] Sara Erlandsson and others, 'Marketising Trends in Swedish Eldercare: Competition, Choice and Calls for Stricter Regulation' in Gabrielle Meagher and Marta Szebehely (eds), *Marketisation in Nordic eldercare: a research report on legislation, oversight, extent and consequences* (Department of Social Work, Stockholm University 2013) 24.

[24] Nadine Genet and others, 'Home Care in Europe : A Systematic Literature Review' (2011) 11 BMC Health Services Research 1, 9.

[25] Paula Blomqvist, 'NPM i välfärdsstaten: hotas universalismen?' (2016) 118 Statsvetenskaplig tidskrift 40.

[26] Stefan Svallfors and Anna Tyllström, 'Resilient Privatization: The Puzzling Case of for-Profit Welfare Providers in Sweden' (2019) 17 Socio-Economic Review 2.

generously funded public services.[27] However, the Nordic countries also regulate and organize public service provision in a variety of different ways – and these differences are growing.[28]

The development towards the private provision of social services began in all Nordic countries 15–20 years ago. In Sweden, policy-makers had an explicit aim of decreasing public sector dominance, and this led to the use of commercial incentives.[29] Sweden, like the other Scandinavian countries, implemented NPM reforms in the welfare system, bringing governing models from the private sector into the provision of services. As early as the 1990s, however, Sweden was going a step further than the other Nordic countries by encouraging competition between public and private welfare providers.[30] According to a 2013 study by the Swedish Competition Agency, less than 10 per cent of private welfare providers were non-profit associations, foundations, and cooperatives. Compared with other countries with similar welfare systems, Sweden has a large share of for-profit companies among private providers of welfare services.[31]

In Finland, a voucher system similar to Sweden's care choice system has been in place since 2004, but on a small scale, but there are ongoing, and extensively debated, plans to develop and expand this system.[32] Just as in Sweden, municipalities in Finland are not obliged to adopt the system, and they are free to organize their elder care services according to different models. Three out of four municipalities have some sort of voucher system, but it is still the case that only a small portion of the municipalities' budgets for elder care is spent via voucher systems.[33] In Norway, local authorities provide services in the

[27] In much social policy literature, the Nordic countries are discussed as a group. I will therefore adopt this practice when the authors to whom I am referring do the same.

[28] Signe Bock Segaard and Jo Saglie, 'Education and Elderly Care in Denmark, Norway and Sweden: National Policies and Legal Frameworks for Private Providers' in Karl Henrik Sivesind and Jo Saglie (eds), *Promoting Active Citizenship: Markets and Choice in Scandinavian Welfare* (Springer International Publishing 2017) 76.

[29] Karl Henrik Sivesind, 'The Changing Roles of For-Profit and Nonprofit Welfare Provision in Norway, Sweden, and Denmark' in Karl Henrik Sivesind and Jo Saglie (eds), *Promoting Active Citizenship: Markets and Choice in Scandinavian Welfare* (Springer International Publishing 2017) 59.

[30] Sivesind (n 29) 62.

[31] Swedish Competition Authority (n 16) 77–78.

[32] Mats Brandt, *Valfrihet inom social- och hälsovården : Myndigheters syn på valfrihetens inverkan i Finland och Sverige ur olika strategiska synvinklar* (Vaasan Yliopisto 2019) 3–4.

[33] Brandt (n 32) 39–40.

traditional manner, and there are no voucher systems in place. Outsourcing is also less common in Norway than in Sweden and Finland, and because of the special protections the Norwegian non-profit sector enjoys it is significantly larger than Sweden's comparatively small non-profit sector.[34] Denmark's home care system is more generous than Sweden's, and home care for older persons in need is provided free of charge.[35] Danish municipalities must provide their citizens with a care choice system, but there is national regulation of the private providers within the system.[36] The Danish non-profit sector is also larger than Sweden's, and has been from the start.[37]

According to a comparative study from 2017, public-sector employment has decreased more in Sweden than in other Scandinavian countries. In Denmark, there has also been a decline, but it has not proceeded at the same pace as the decline in Sweden. Norway has not seen the same declines in the extent of public sector employment that the other countries have seen. In Sweden, Denmark, and Norway, the for-profit share of the elder care market is increasing, while the non-profit sector is basically at a standstill. The gap is growing fastest in Sweden.[38] Despite common welfare ideals and similar recent changes in regulation, there are significant differences between the Scandinavian countries, and Sweden stands out from the pack when it comes to the downsizing of elder care, the degree of marketization, and the size of the for-profit sector.

From a broader European perspective, there has been a trend towards the increasing private delivery of elder care in several countries during the last decade, with private providers either replacing public provision or compensating for its absence.[39] Less stringently regulated 'cash for care' schemes are more common elsewhere in Europe than in the Nordic countries. In these systems, older persons in need for care are offered cash payments or vouchers instead of services, and they can then use these more or less freely on a private market for services. In these schemes, the contractual relationship

[34] Anttonen and Karsio (n 6) 223–224.

[35] Tine Rostgaard and Marta Szebehely, 'Changing Policies, Changing Patterns of Care: Danish and Swedish Home Care at the Crossroads' (2012) 9 European Journal of Ageing 103.

[36] Tine Rostgaard, 'Revisiting the Public Care Model : The Danish Case of Free Choice in Home Care' in Karen Christensen and Doria Pilling (eds), *The Routledge Handbook of Social Care Work Around the World* (Routledge 2017).

[37] Sivesind (n 29) 61.

[38] Sivesind (n 29) 41.

[39] Genet and others (n 24) 8.

is a direct one between the user and the provider, and the state is merely the funder of the care. It has been shown that the level of funding in many such schemes is significantly less than the cost of the required service.[40] These schemes have different roles in different countries. In some national welfare regimes, for instance the UK and the Netherlands, they are alternatives to services provided directly by the state. In others, for instance Ireland, the cash-for-care scheme is the only form of publicly financed elder care, and is the first step towards a public responsibility for the welfare of older persons.[41] In this way, the marketization reforms in Sweden are part of an international trend.

1.2 Frame of the study

1.2.1 Aim and research questions

This study provides an account of the introduction of care choice systems into the provision of home care by the Swedish municipalities. This account aims to deepen the understanding of how quasi-market reforms such as the introduction of care choice systems can transform public administration at the municipal level and the legal strategies used by public authorities in governing welfare. An additional aim is to analyse the outcomes of the care choice systems with regard to how they govern and secure quality services and how they deploy quality-assessment practices. The study provides an empirically based investigation of the roles 'public law' and 'private law' play in realizing and shaping new forms of governing.

As it is a study in law, this thesis aims to provide a detailed discussion of how the dichotomy between public law and private law relates to entities defined as 'public' and 'private', and to show how different instruments connected to each of these spheres are put to use within a privatized welfare sector. In this context, I will explain how the different rationalities and technologies connected with public and private law actually play out and highlight the

[40] Virpi Timonen, Janet Convery and Suzanne Cahill, 'Care Revolutions in the Making? A Comparison of Cash-for-Care Programmes in Four European Countries' (2006) 26 Ageing & Society 455–461.

[41] Timonen, Convery and Cahill (n 40) 470–471.

conflicts they create. This thesis will also provide a picture of the strategies actors use 'on the ground' in order to tackle these conflicts.

In seeking to understand the governing of care choice systems, this thesis will answer the following research questions:

- How, and according to which rationalities, do the municipalities govern care choice systems in the provision of home care for older people in Sweden? How do these rationalities conflict, and what are the roles of public administration within them?
- How does the introduction of care choice systems affect the definition of quality within home care, and how do the changes in the municipalities' governing structures and tools affect practices of quality assessment?
- How are public- and private-law tools and logics used in the governing of the public and private delivery of home care within care choice systems?

A central contribution of my study to the existing interdisciplinary work on Swedish care choice systems is that it provides a systematic analysis, from a legal perspective, of the role of public- and private-law instruments in general, and tenders and contracts specifically, in the governing of care choice systems. A study in law can bring something new to the table in our understanding of how care choice systems have been introduced in the municipalities. The role of law in structuring the organization and governing of welfare is generally undertheorized, and this thesis will demonstrate the importance of an understanding of this dimension to any account of the outcomes, risks, values, and problems of new ways of governing welfare. In making this contribution, I pursue a 'law in practice' approach alongside a theoretical discussion of the divide between public law and private law.

Furthermore, this thesis will contribute to an understanding of the development of the Swedish welfare system. Even though the system remains largely publicly financed, significant changes within the system mean that the provision of welfare has been reorganized. This merits study in its own right, but it may also be studied as a means of deepening our understanding of the different forms the relation between state and market can take. This thesis will, in this way, provide new insights into how parts of the Swedish model have evolved during the last decade.

This thesis foregrounds practices, and in doing so is informed by an approach inspired by the theories of French philosopher Michel Foucault. This approach,

which has been developed under the umbrella of what is called 'governmentality studies', emphasizes the importance of attending to the 'how' of governing. Making use of this perspective in legal studies means focusing on the practices, techniques, and institutions set up for governing. This implies a descriptive rather than a normative approach, but it is descriptive on a meta-level. In Foucault's words, it is a scientific approach that aims 'not to discover what is concealed, but rather to make visible what precisely is visible',[42] to reveal the contingency of what is taken for granted in the current order and to bring to light the structures of power which are at play in the processes being studied.[43] This approach is driven by a critical ethos: it involves an attempt to understand the limitations and conditions of the social order as it is, and thereby to enable us to examine these critically and to imagine other ways in which this order might be arranged.[44] On this basis, one may then also develop normative counter-strategies within and outside the law. This study will not, however, come up with suggestions for alternative ways of governing.

My analysis of the construction of quasi-markets in welfare is inspired by social theorist Karl Polanyi, who stated in his influential work *The Great Transformation* that a laissez-faire market economy can only function through societal, legal, and institutional structures. A market economy is not realized by simply allowing matters to take their own course; it has to be enforced by the state through laws that change regulation and at the same time expand the administrative functions of the state in order to protect the market.[45] To 'marketize' an aspect of the public sector thus does not mean to allow it to leave the sphere of regulation but rather to subject it to different legal and institutional structures.

1.2.2 Research design

In answering my research questions, I use a variety of materials and methods. One starting point is a study of legal texts: the legal regulations and the preparatory works (documents which count as important legal sources in the

[42] Michel Foucault, 'The Analytic Philosophy of Politics' (2018) 24 Foucault Studies 192.

[43] Michel Foucault, Mauro Bertani and Alessandro Fontana, *'Society Must Be Defended' : Lectures at the Collège de France, 1975-76* (Picador 2003) 25–30.

[44] Mitchell Dean, *Governmentality: Power and Rule in Modern Society* (SAGE Publications 2010) 14.

[45] Karl Polanyi, *The Great Transformation : The Political and Economic Origins of Our Time* (Beacon Press 2001) 145.

Swedish legal system), national policy documents, and municipal tender documents and contracts. But my main conclusions are drawn from the face-to-face interviews I have conducted with officials from three municipalities. I have also included a questionnaire I sent to all municipalities.

The thesis consists of a critical analysis of the governing rationalities of the care choice systems, with a focus on the function of public- and private-law logics and instruments, and it concludes with a discussion of possible ways of understanding these rationalities in a system of welfare capitalism. To achieve the aims of the study, I will describe how the care choice systems are constructed, regulated, supported, and monitored. My choices of methods and material will be discussed in chapter 2, but here I want to explain some central points of departure for my study.

The study of the legal sources aims to provide an overview of the regulations through an analysis of concepts, principles, and decision-making structures. However, many aspects of the way law functions in society are invisible in legal documents: how different instruments are used, how ambiguities are interpreted in practice, what gets prioritized by actors interpreting law in situations of conflict, which strategies are adopted in order to achieve the aims of the law, etc. An analysis of legal documents can therefore only go some way to answering my research questions. As Reza Banakar and Max Travers argue, the formal vocabulary of law almost by definition excludes extra-legal factors, which implies that a study concerned with the social function of law must complement the study of legal documents with data gathered through other methods of enquiry.[46] This study therefore combines a textual analysis of legal sources with an empirical case study of law in practice.

As I stated above, this thesis is inspired by the methods of Michel Foucault. These require that one adopt an 'intense scepticism' towards universal models and that one favour, instead, the close study of actual practices. A Foucauldian governmentality approach therefore starts from the assumption that practices and power must be studied with an open mind, without prior conceptualizations. However, Foucault's own diagnosis of the relationship between liberalism, the state, the economy, and the modern subject has generated its own tradition of thought about what is often termed 'neoliberalism'.[47] Scholars working in this tradition have developed a

[46] Reza Banakar and Max Travers, *Theory and Method in Socio-Legal Research* (Bloomsbury Publishing 2005) 135.

[47] See e.g. Wendy Brown, *Undoing the Demos : Neoliberalism's Stealth Revolution* (Zone Books 2015); Dean, *Governmentality: Power and Rule in Modern Society* (n 44); Suzan

methodological understanding of the connection between governing structures and rationalities, which I will make use of in my study. But they have also formed a description of current formations of governing rationalities under the headline 'the neoliberal state' (or 'advanced liberal state'[48]). One risk with these projects in governmentality studies is that they tend to conceptualize rationalities and technologies as operating within a coherent apparatus and fail to engage with difference, hybridity, contradiction, and politics. As Michelle Brady concludes in an article on the study of 'neoliberalism', this concept is so popular in social science that it appears in a third of all articles published within the fields of sociology and cultural anthropology, and with that kind of popularity the risk is that the use of the term 'obfuscates more than it enlightens' and leads to monolithic assessments of change.[49] Similarly, Loïc Wacquant argues that, for an empirical study of 'actually existing neoliberalism' to succeed, it would be necessary to study what actually happens in the state formation and how the project of creating markets takes place in practice.[50]

If we are to avoid the risk Brady identifies, and if we are to follow Wacquant's advice, it is important to design any study of a 'neoliberal' order in such a way that the study does not end up simply proving what is already implicit in the very use of the term itself. For this reason, I am inspired by Brady's approach to the study of neoliberalism. She states that the point of such research is

> to understand the *relative* importance of neoliberal rationalities within any particular context, and to uncover how neoliberal rationalities and practices *link up* and *combine* with other rationalities and practices … [thus] showing how distinct forms of power both recombine in different ways within different historical periods and *co-exist* (rather than simply replacing each other).[51] [Emphasis added]

Ilcan, 'Privatizing Responsibility: Public Sector Reform under Neoliberal Government' (2009) 46 Canadian Review of Sociology/Revue canadienne de sociologie.

[48] A term used first by Rose. Nicolas Rose, 'Governing 'Advanced' Liberal Democracies' in Aradhana Sharma and Akhil Gupta (eds), *The anthropology of the state: a reader* (Blackwell 2006).

[49] Michelle Brady, 'Ethnographies of Neoliberal Governmentalities: From the Neoliberal Apparatus to Neoliberalism and Governmental Assemblages' (2014) 18 Foucault Studies 11, 12.

[50] Loïc Wacquant, 'Three Steps to a Historical Anthropology of Actually Existing Neoliberalism' (2012) 20 Social Anthropology/Anthropologie Sociale 76.

[51] Brady (n 49) 32.

Being open to what the empirical material might show complicates a study because it allows the researcher to see more clearly how different rationalities meet and enter into dialogue, and allows for greater attention to be paid to processes and complexities. Whereas studies relying only on the legislation and policy documents relating to the reform would have highlighted the new and emerging rationality while bracketing other rationalities in play, this more open approach allows the researcher to showcase multiple and co-existing rationalities.[52] One point of departure for such an approach is the assumption that historical development is not deterministic but is a dynamic result of a political struggle between different interests which plays out in the legal arena and in the medium of law, as well as in other areas. These conflicts are not arbitrary; they are connected to power structures. It is for this reason that, in the concluding chapter, I relate the results of my open-ended empirical study to theoretical discussions of broader developments in capitalism. In this way it is also possible to bridge the divide between empirical work, which by itself can be mundane, and meta-theory, which, as Alan Hunt puts it, has a tendency to be arcane.[53] Through this dialectic between the micro and macro, it is possible to achieve an understanding of broader changes in society, with insights gained at the micro level enriching the account of structural developments at the macro level. On this model, instead of just viewing phenomena in terms of a predetermined theoretical framework, there is an interplay between the micro and macro levels.

My ambition is thus to combine an analysis of legal sources with observations of how the reforms under investigation play out on the ground, that is, in practice, before providing a theoretical discussion of how the results might be understood. In this way, I aim to link the study of governing rationalities, regulatory techniques, and actual practices. The ambition of adopting this dialectic approach to the relationship between critical questions and empirical material has led me to choose a variety of methods (described in more detail in chapter 2). This study is guided by a conviction that law is most usefully studied *in practice*, in the sites where it is *enacted*. This, in turn, is related to a belief that the implementation of any reform is most meaningfully studied close to where it actually plays out. After a particular set of rules and legislation is produced at the national level, it is handed down to local municipalities for implementation, at which point new possibilities open up. Seeing the world of law in terms of this topography of high-level law making and lower-level

[52] Brady (n 49) 28–29.

[53] Alan Hunt, 'The Problematisation of Law in Classical Social Theory' in Reza Banakar and Max Travers (eds), *An Introduction to Law and Social Theory* (Hart Publishing 2002) 29.

policy implementation has the effect of debunking the idea that there is a divide between 'law in the books' and 'law in practice'. Law is in part made, and completed, through the various ways in which it is implemented. No piece of paper or action is legal by nature; it becomes legal by being incorporated in a network of procedures. Legality is thus the quality of a network, not of an entity.[54] It is therefore not possible to draw a clear distinction between a reform and its implementation. What happens 'on the ground' is what the legal reform both does and is. A study that takes its cue from these assumptions requires a closer proximity to the practices than an analysis of texts alone can provide. This explains the way in which I have approached my material.

With regard to the time period under investigation in this study, I have chosen to begin with the introduction of the Act on Care Choice Systems (which started with a government inquiry in 2008, the act coming into force in 2009) and end in April 2019, when I collected the last of my empirical material. The interviews were conducted between May 2017 and January 2018. As I mentioned earlier, care choice systems existed in some municipalities before the introduction of the Act on Care Choice Systems, and therefore there are occasional references to the period before 2008–2009 in the study of the municipalities.

1.2.3 Contribution to existing research

Care choice systems in the provision of home care and in other areas of care services in Sweden have mostly been studied by researchers in the fields of social work, economics, and political science. Much of this research has been centred on users' experiences of the systems and users' ability to make active choices on the market;[55] on the functioning, effectiveness, and structure of the

[54] Mariana Valverde, *Chronotopes of Law: Jurisdiction, Scale and Governance* (Routledge 2015) 61, which in turn refers to Bruno Latour.

[55] See e.g. Per Gunnar Edebalk and Marianne Svensson, *Kundval För Äldre Och Funktionshindrade i Norden: Konsumentperspektivet* (Nordiska ministerrådet 2005); Linda Moberg, *Marketization in Swedish Eldercare : Implications for Users, Professionals, and the State* (Acta Universitatis Upsaliensis 2017); Erlandsson and others (n 23).

quasi-market;[56] and on questions of accountability within the market.[57] The reforms brought about by the Act on Care Choice Systems have also been the subject of several government agency reports, mostly focusing on the market, the users, and the effects of the care choice systems.[58] I will draw on several of these studies in order to add detail to my picture of practices within care choice systems.

I aim to contribute to this body of literature by focusing on the municipal administrations and the relationship between the administrations and the providers, an area which has not yet been the subject of much research. One exception is a recent dissertation by Mats Brandt. He studied care choice systems in healthcare and social services in Sweden and Finland, focusing on the strategies of municipal administrations. He created a questionnaire, which he gave to 178 municipal administrators in Swedish and Finnish municipalities with care choice systems.[59] There are important differences between our studies in terms of material, methodology, and perspective. His questions mainly regard the administrators' experiences and their opinions about competition and the degree to which users can make self-determined choices. With regard to methods, his digital questionnaire was mainly quantitative, while my face-to-face interviews are qualitative and have the aim of analysing municipal administrators' experiences of certain practices.

Another important body of literature in the field focuses on care choice systems as an example of marketization as governance and discourse, and on the overarching changes in governing logics involved in the implementation of

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[56] See e.g. Helene Brodin and Elin Peterson, 'Omsorgsföretag i Med- Eller Motvind? Genusperspektiv På Småföretagande i Hemtjänsten i Stockholm' in Håkan Jönson and Marta Szebehely (eds), *Äldreomsorger i Sverige : Lokala variationer och generella trender* (Gleerup 2018); Henrik Jordahl, *Välfärdstjänster i Privat Regi: Framväxt Och Drivkrafter* (SNS förlag 2013); Gabrielle Meagher and Marta Szebehely, 'The Politics of Profit in Swedish Welfare Services: Four Decades of Social Democratic Ambivalence' (2019) 39 Critical Social Policy; Gabrielle Meagher and Marta Szebehely, *Marketisation in Nordic Eldercare : A Research Report on Legislation, Oversight, Extent and Consequences* (Stockholm : Department of Social Work, Stockholm University, 2013 2013).

[57] See e.g. Anna H Glenngård, *Objectives, Actors and Accountability in Quasi-Markets : Studies of Swedish Primary Care* (Media-Tryck 2013).

[58] The most important being National Board on Health and Welfare, 'Valfrihetssystem Ur Ett Befolknings- Och Patientperspektiv: Slutredovisning' (Socialstyrelsen 2012) and; Swedish Competition Authority (n 16); The Swedish Agency for Public Management, 'Lagen Om Valfrihetssystem. Hur Påverkar Den Kostnader Och Effektivitet i Kommunerna?' (Statskontoret 2012) 15.

[59] Brandt (n 32) 53–54.

these systems.[60] Relatedly, there are theoretical studies of how welfare law operates.[61] These have informed my theoretical understanding of the field of study. What I aim to contribute to this field is a bottom-up investigation that stays close to the empirical material. Through my choice of material and my starting points in the methodology of governmentality studies, I seek to add nuance and concrete detail to the theoretical discussions of neoliberalism and rationalities of governing in the field of welfare.

Within Swedish legal studies, scholars have investigated the contracting out of welfare services and the possible conflict between public and private law this involves;[62] however, none of this research has focused specifically on care choice systems in the municipalities. This literature is mostly theoretical, and focuses on the analysis of legal sources. One exception from the Nordic literature is the work of Ole Hansen, who has studied the contracts used in the contracting out of welfare services in the Nordic countries through a combination of theory and empirical investigation. His work is relevant to the topic of this thesis, and will be referred to in what follows. However, his work does not employ quantitative methods or interviews, and, unlike this thesis, does not focus on how contracts are actually used, instead centring on the contracting strategies public authorities use when trying to regulate the private providers in their areas.[63]

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[60] See e.g. Katarina Andersson and Elin Kvist, 'The Neoliberal Turn and the Marketization of Care: The Transformation of Eldercare in Sweden' (2015) 22 European Journal of Women's Studies; Anneli Anttonen, Liisa Häikiö and Stefánsson Kolbeinn, *Welfare State, Universalism and Diversity* (Edward Elgar 2012); Paula Blomqvist, 'The Choice Revolution: Privatization of Swedish Welfare Services in the 1990s' (2004) 32 Social Policy and Administration; Blomqvist (n 25); Paula Blomqvist and Bo Rothstein, *Välfärdsstatens Nya Ansikte: Demokrati Och Marknadsreformer Inom Den Offentliga Sektorn* (Agora 2008).

[61] Gunther Teubner, *Dilemmas of Law in the Welfare State* (de Gruyter 1986).

[62] See e.g. Bertil Bengtsson, *Offentliga Tjänster i Civilrättsligt Perspektiv* (Norstedts juridik 2013); Anna Hollander, 'Privatisering Av Socialtjänstlagen: Rättsliga Villkor För Att Överlämna Utredningar Inom Individ- Och Familjeomsorgen På Entreprenad' (2005) 12 Socialvetenskaplig tidskrift; Ann-Charlotte Landelius, *Vård Och Omsorg i Offentlig Eller Privat Regi: En Rättsvetenskaplig Studie* (Jure 2006); Lena Marcusson, *Offentlig Förvaltning Utanför Myndighetsområdet* (Iustus 1989); Tom Madell, Tarjei Bekkedal and Ulla Neergaard, *Den Nordiska Välfärden Och Marknaden : Nordiska Erfarenheter Av Tjänster Av Allmänt Intresse i En EU-Rättslig Kontext* (Iustus 2011); Håkan Strömberg, *Om Rättsförhållandet Mellan Offentliga Anstalter Och Deras Nyttjare* (Gleerup 1949).

[63] Ole Hansen, 'Public Law by Contract: The Reluctant Creation of Private Markets for Welfare Service' (2017) 25 European Review of Private Law; Ole Hansen, 'Strategier for Længerevarende Kontrakter Om Udlicitering Af Kommunal Service' (2016) 2 Juristen.

1.2.4 Delimitations

Care choice systems raise a number of questions, not all of which can be addressed in this thesis. During the last decade, the concept of 'active citizenship' has been widely used in the welfare literature to discuss the *responsibilization* of members of society, meaning the institutional and policy changes introduced in order to make private individuals more responsible for their own welfare.[64] These issues are highly relevant to a study focusing on the topic of choice in welfare. However, my contribution focuses not on the users and their subjectivities, a topic others have examined thoroughly, but on the administrations and their practices. Consequently, I will not be discussing social rights or access to justice, for these would imply a focus on older persons' positions and actions, which are only of secondary importance in my study.

In the governing of elder care, tensions may arise between the national and municipal levels. These tensions are, however, outside of the scope of my study. The municipalities furthermore seem to have been influenced by the national agencies' definition of what counts as 'quality' within home care. It would therefore be interesting to know how these policies have been developed and which groups have influenced this process, but this is, again, outside of the scope of my own study. Although I will analyse some national policy documents, mostly to understand their relevance for the municipal administrations, the national authorities generally play a limited role in this thesis.

EU public procurement regulations are relevant to the construction of the Act on Care Choice Systems, and they also constrain the municipalities' actions in this area. However, in order to answer my research questions, it will not be necessary to give an in-depth account of EU regulations, and therefore I mention EU regulation when necessary but without going into detail. I will primarily account for the strategies deployed by the administrations in light of their knowledge of EU public procurement regulations.

At the beginning of 2019, as I was finishing the collection of my empirical material and had already conducted all the interviews, two amendments were made to the Social Services Act that are relevant to this thesis. The first makes it possible for municipalities to issue home care decisions without prior needs-

[64] Karl Henrik Sivesind and Jo Saglie (eds), *Promoting Active Citizenship - Markets and Choice in Scandinavian Welfare* (Palgrave Macmillan 2017) See e.g.; Bjørn Hvinden and Håkan Johansson, *Citizenship in Nordic Welfare States: Dynamics of Choice, Duties and Participation in a Changing Europe* (Routledge 2007).

testing, and the second requires providers of home care to be authorized by a national agency, the Health and Care inspectorate. How these amendments might affect the governing of home care in the municipalities is not discussed widely in the interviews, but they are mentioned when I deem them relevant to my research questions. Because of timing, developments in Swedish elder care that have taken place since the onset of the coronavirus pandemic will not be discussed.[65]

Lastly, I want to underline that, even though I am placing care choice systems in an historical context, this dissertation is not an historical study of the policy changes that have taken place. I am not examining municipalities before and after the introduction of care choice systems. In making comparisons, I can only refer to municipalities without care choice systems and to the accounts given by my respondents.

1.2.5 Outline

This dissertation consists of six chapters. In the remainder of chapter 1, I will paint a broad and concise picture of the historical, legal historical, and legal background to the study, providing a framework within which the empirical chapters that follow may be better understood. In chapter 2, I will provide an account of my methodological starting points, explaining how I intend to adopt the perspective of governmentality studies and describing the benefits and limitations this might imply. I will also present the material used and the methods with which I have collected and analysed the data.

Chapters 3–5 form the empirical part of my study and the heart of the thesis. Each chapter answers one of the three research questions. Chapter 3 discusses the governing of care choice systems and the role of the municipal administrations. Chapter 4 focuses on questions of quality. In chapter 5, I examine the question of public and private logics and instruments within care choice systems. These three chapters have the same form. At the beginning of each chapter, the main question is broken down into subquestions. The empirical investigation follows, and the chapter ends with a section that presents the results and answers the questions.

[65] It would have been interesting to study how private providers within care choice systems have been governed in the context of the crisis, but since time constraints made this impossible, the topic will have to be left to a future study.

In the concluding chapter, chapter 6, I discuss my results and relate them to theories of the organization of reproductive work under capitalism, theories of neoliberalism, and theories of law in the neoliberal era. In this section I also engage with feminist theories of the societal organization of social reproduction. The aim of this theoretical chapter is to discuss the implications of my empirical results and to try to understand why these results have been reached. The reason for introducing the theories in the final chapter is that I am seeking to study practices without – to the extent this is possible – adopting a predefined narrative which frames what is found. The role of the theories is to help me interpret the results and to see them within the broader context of the divisions of power and resources in contemporary society.

To this end, the concluding chapter discusses how reforms such as the introduction of care choice systems reconfigure public administration and introduce different rationalities and tools of governing. I will also discuss new modes of governing through public and private law. Lastly, I will analyse the care choice system reforms through the lens of different theories of neoliberalism and the commodification of care. While my aim is to use these theories in order to deepen the understanding of the results of the empirical part of the study, I also seek, by testing the theories against these results, to contribute to a development of certain parts of these theories. I argue that any study of neoliberalism, if it is to be non-reductionist, has to be placed in a particular space and time, and must point out specificities while leaving room for resistance to the neoliberal order. This study identifies the specific conflicts that this reform has created, and shows how the relationship between public authorities and private providers can be understood in the light of theories of neoliberalism. A close study of the governmentalities of a certain formation of neoliberalism can show how conflicts of interest can play out in different ways, and thereby also identify how resistance can be formed.

1.3 Care choice systems as part of the development of the Swedish welfare state

1.3.1 Swedish social democracy, welfare, and corporatism

In order to provide a backdrop to recent developments in the Swedish elder care system, this section will provide a brief summary of relevant periods in the history of the Swedish welfare state and its elder care system. The Swedish elder care system is a product of Swedish social democracy, with its ambitions towards universalism and high-quality care for all. However, transformations within the welfare state – NPM reforms and privatization – have fundamentally changed the delivery of elder care. The care choice systems signify a new *form* of cooperation between public and private partners in the Swedish welfare model, but connections between the public and private within Sweden's welfare state are not new.

The social democratic model of welfare has been thoroughly theorized and discussed in the literature. As John Lapidus shows, the Swedish social democratic welfare project has been described in many different, and ideologically tinted, ways. It has been described as the result of a successful class mobilization, and as the result of a successful class compromise.[66] The political hegemony of the Swedish Social Democratic Party from the 1930s to the late 1970s, and the elaborate welfare state constructed over those decades, produced something unique: what Peter Högfeldt calls 'the most successful and long-lived political vision ever in a democracy'.[67] An important aspect of this project was the extensive provision of social services based on principles of universalism and high-quality care. This meant a welfare system based on equal access to high-quality services for all rather than on means-testing. This model of welfare is described in Gøsta Esping-Andersen's well-known typology of welfare states, in which the Nordic countries are characterized as social democratic welfare states that are organized around an ideal of securing greater independence for their citizens, independence from employers as well as from families, through ambitious programmes of social security and social

[66] John Lapidus, *Social Democracy and the Swedish Welfare Model: Ideational Analyses of Attitudes towards Competition, Individualization, Privatization* (Unit for Economic history, Department of Economy and Society, School of Business, Economics and Law, University of Gothenburg 2015) 13.

[67] Peter Högfeldt, 'The History and Politics of Corporate Ownership in Sweden' (National Bureau of Economic Research 2004) Working Paper 10641 60.

services. Sweden's welfare state is characterized by the combination of universal access to tax-financed services and income-based social insurance.[68]

The earlier version of the Swedish welfare state is often called 'the people's home', after a phrase used by Sweden's Social Democratic prime minister Per Albin Hansson in 1928. The phrase suggests a society in which the home (the state) and the people are reconstructed and improved for the common good. This ideology was developed theoretically and ideologically by Alva and Gunnar Myrdal in the 1930s and by economists Gösta Rehn and Rudolf Meidner, within the Swedish Trade Union Confederation, in the late 1940s. The model combined social policy governed by an idea of advancing the common interest with economic policy aimed at securing full employment through low inflation and high growth rates. Together, these would produce a high degree of equality and a high standard of living for most.[69]

Sweden's corporatist model is connected to the basic pragmatism of reformist social democracy. This explains the close connection between the state and business interests, which is a thread that has run throughout the history of the Swedish welfare state. Fundamental to the social democratic ideology is the belief that a strategic path towards a socialist society leads through 'social engineering',[70] reform, compromise, and the formation of pragmatic alliances. The primary focus of the Swedish Social Democratic Party was, for a long time, securing full employment and creating a stable economy, goals that were to be reached through growth-enhancing public investment and an economic structure based on large industrial firms.[71] In Swedish social democracy, this strategy was expressed very explicitly in the 1938 compromise between the Swedish Trade Union Confederation and the Swedish Employer's Confederation, formalized in the Saltsjöbaden Agreement. The agreement laid the foundation for close cooperation between the unions, the Social Democratic Party, and employers.[72] Over time, the Swedish Social Democratic Party and the private corporate owners of Sweden's largest firms developed

[68] Gøsta Esping-Andersen, *The Three Worlds of Welfare Capitalism* (Polity 1990) 28.

[69] Bengt Larsson, Martin Letell and Håkan Thörn, 'Transformations of the Swedish Welfare State: Social Engineering,Governance and Governmentality', *Transformations of the Swedish Welfare State* (Palgrave Macmillan 2012) 14.

[70] Social engineering is based on the belief that science, natural as well as social, can be used to discover and describe problems, articulate solutions, and develop methods to implement solutions. Larsson, Letell and Thörn (n 69) 12.

[71] Högfeldt (n 67) 32.

[72] Larsson, Letell and Thörn (n 69) 16.

strong common interests, evidence of which may be seen in, among other things, the way companies, equities, and bonds are regulated.[73]

1.3.2 'The golden years' for Swedish elder care (1950s to 1980s)

Like many other Western countries, Sweden boomed after the Second World War. During the Swedish welfare state's 'strong decades', the 1950s to the 1970s, the system of care for older people evolved from one of poor relief to a relatively extensive system of public care organized according to the principle of universalism. At the same time, the family's legal responsibility for caring for older people was removed. The development of social services and welfare was explicitly motivated by the goal of reducing people's dependence on the traditional family and liberating women from their informal responsibility for care by collectivizing the provision of care. This struggle for equality between the sexes also went hand in hand with the expansion of the labour market. During the 1960s and 1970s, the collectivization of care tasks through universal public services made possible a gender-neutral ideal of paid work for everyone.[74]

Publicly financed and administered elder care was thus a central part of the strong state, which aimed to take responsibility for many aspects of the lives of its citizens. These shifting responsibilities led to a dramatic expansion of municipal care for older people during the 1960s and 1970s.[75] The ideal of universalism, along with other ideals, such as inclusiveness, social planning, and collectivism, sprang from the ideology of the 'people's home'.[76] Gabrielle Meagher and Marta Szebehely emphasize that the public provision of services was critical to the ideas of the social democratic reformers because it was seen as the way to guarantee access to high-quality social services. The public provision of services was thus a cornerstone of the universalist project.[77]

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[73] Högfeldt (n 67) 61.

[74] Åsa Lundqvist, *Family Policy Paradoxes : Gender Equality and Labour Market Regulation in Sweden, 1930-2010* (Policy 2011) 3.

[75] Helene Brodin, *Does Anybody Care? : Public and Private Responsibilities in Swedish Eldercare 1940-2000* (Univ 2005) 70–73.

[76] Anneli Anttonen and Jorma Sipilä, 'Universalism in the British and Scandinavian Social Policy Debates' in Anneli Anttonen, Liisa Häikiö and Stefánsson Kolbeinn (eds), *Welfare state, universalism and diversity* (Edward Elgar 2012) 29–30.

[77] Meagher and Szebehely, 'The Politics of Profit in Swedish Welfare Services' (n 56) 2.

Another central ideal for Swedish social democracy during this time was that of material and social equality. Paula Blomqvist and Bo Rothstein identify five established ideals of equality in Swedish social policy: equal access, equal treatment, equal and consistent high quality, the strategic preservation of solidarity (which ensures middle class support for the welfare system), and social integration.[78] Blomqvist points out that what is distinctive about the Nordic welfare state is not necessarily the level of welfare spending but the way in which the logics of universality and social equality were institutionalized and regulated through standardized and generous systems of public services.[79] Blomqvist and Rothstein call this the ideal of the 'high-quality standard solution', and argue that it was established as an ideal of the Swedish welfare state during the 1960s and 1970s.[80]

1.3.3 Elder care in welfare state reform (1990s to 2000s)

An important shift in the ambitious Swedish welfare project came during the 1980s, as part of the wave of welfare reform that was sweeping the Western world at that time. These developments were also reflected in the elder care sector. In the late 1980s, a period of downsizing began that would continue into the 2000s. The proportion of older people (aged 80 and over) with access to some form of care, whether assisted living or home care, fell from 53 per cent in 1990 to 37 per cent in 2011.[81] Every year since 1990, public spending on elder care has decreased in relation to the number of older people in the population.[82] This decreased level of service provision has in turn led to an increase in informal, family-based care for older people.[83] However, there were also changes in the organization of welfare and care provision.

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[78] Blomqvist and Rothstein (n 60) 64–65.

[79] Blomqvist (n 60) 140.

[80] Blomqvist and Rothstein (n 60) 64.

[81] Gun-Britt Trydegård, 'Från Fattigvård till Kundval: Den Svenska Äldreomsorgens Framväxt' in Hans Swärd, Per Gunnar Edebalk and Eskil Wadensjö (eds), *Vägar till välfärd: idéer, inspiratörer, kontroverser, perspektiv* (Liber 2013) 148.

[82] Szebehely and Trydegård (n 2) 25.

[83] See e.g. Gun-Britt Trydegård, *Tradition, Change and Variation : Past and Present Trends in Public Old-Age Care* (Univ Press 2000); Marta Szebehely, *Äldreomsorgsforskning i Norden : En Kunskapsöversikt* (Nordisk ministerråd 2005); Mirjam Katzin, 'Tillbaka till Familjen: Privat Och Offentligt Ansvar i Den Svenska Äldreomsorgen' (2014) 145 Retfærd; Petra Ulmanen, *Omsorgens pris i åtstramningstid : Anhörigomsorg för äldre ur ett könsperspektiv* (Diss Institutionen för socialt arbete 2015).

The first NPM reforms came at the end of the 1980s, as certain municipalities and regions introduced internal markets and decentralized spending. These reforms were embraced and advocated by Social Democratic Party politicians such as Kjell-Olof Feldt (minister of finance from 1983 to 1990), and gradually came to be adopted at a national level, with the Ministry of Finance directing municipalities and regions to implement NPM-style governing principles and tools.[84] Lapidus describes an internal battle within the Social Democratic Party between state-centred reformism and a more libertarian, although still socialist, view.[85] Unlike the views that prevailed in the party during the 1960s and 1970s, private enterprise, rather than the public sector, was now seen as the main driver of the economy.[86] Several authors explain the changes within the Swedish Social Democratic Party as a reflection of a more widespread ideological shift, which is taken to be the ultimate explanation of some of the changes in the organization of the welfare state in Sweden that have occurred since the 1980s.[87] In a study of parliamentary debates in Sweden, Kristina Boréus shows that there was an increase in the expression of 'right-wing' ideas at the beginning of the 1980s. The traditional right-wing party, the Moderate Party, moved away from conservatism and towards neoliberalism during that period, and started advocating privatization, a slimmed-down public sector, and deregulation.[88] She also shows that, from the 1980s onwards, private business strengthened its position in public debate, while the unions and other workers' organizations were weakened.[89] A broad change in the discourse, influenced by political developments in the rest of the Western world, was altering people's views of welfare even in the stronghold of social democracy.

Two significant government inquiries paved the way for welfare reform. The Power Investigation of 1990 framed the existing system of publicly delivered services as too large-scale and uniform, and thus as unable to live up to users' increasingly differentiated expectations.[90] The Inquiry on Competition, which presented its report in 1991, proposed a number of ways for the municipalities and regions to make their operations more effective, including through the

[84] Gingrich (n 12) 65–69.

[85] Lapidus (n 66) 15.

[86] Kristina Boréus, *Högervåg : Nyliberalismen Och Kampen Om Språket i Svensk Debatt 1969-1989* (Tiden 1994) 51.

[87] See e.g. Meagher and Szebehely, 'The Politics of Profit in Swedish Welfare Services' (n 56); Gingrich (n 12).

[88] Boréus (n 86) 172.

[89] Boréus (n 86) 320.

[90] SOU 1990:44 Maktutredningen.

procurement of services. This required a number of changes to the laws regulating these services.[91] The preparatory works for the Local Government Act of 1991, which gave the municipalities the responsibility for providing care services, emphasize the need to decentralize public bureaucracies, to focus governing more on targets, to report results more effectively, and to use resources more efficiently.[92] The new act entailed more freedom for the municipalities to regulate their care services according to local political decisions. Some municipalities used their new autonomy to downsize services, increase fees, and outsource the delivery of services.[93]

After almost a decade of internal debate, the 1991 budget proposal from the Social Democratic Party adopted a stance that promoted competition within the public sector and user choices in public services while remaining wedded to core principles of social solidarity and an extensive welfare state. Markets were thought necessary to address the economic and political challenges facing the welfare state while maintaining high-quality services.[94] The year 1991 continued to be an eventful year for welfare reform: there was a severe economic crisis in Sweden, and there was a new government, a coalition of right-wing parties, which took the reforms of the welfare system in a new direction. From being mostly focused on internal NPM reforms, privatization became a more salient part of the process.[95]

The period from the late 1980s onwards was thus characterized by the implementation of NPM reforms. These reorganized the public sphere: decentralized responsibilities, purchaser–provider models, performance-based compensation, new governing models, and increased quality control have been key aspects of these reforms.[96] They have had a significant impact on the organization of elder care. Before, the organization of elder care typically involved a close connection between decision-making and delivery. Organizing the delivery of services in an internal market, however, entails separating the planning and financing of services from the delivery of services, thereby creating self-governing units with responsibility to provide certain

[91] Ann-Charlotte Landelius, 'Statlig Styrning Och Privatisering: Vård, Skola Och Omsorg' in Bo Rothstein and Lotta Vahlne Westerhäll (eds), *Bortom den starka statens politik* (SNS förlag 2005) 89.

[92] Prop. 1990/91:14 Om ansvaret för service och vård till äldre och handikappade m.m. 26.

[93] Gingrich (n 12) 191–192.

[94] Gingrich (n 12) 69.

[95] Blomqvist (n 25) 49.

[96] Blomqvist (n 25) 52.

services according to a specified budget. Municipal authorities could then act as purchasers, financial and other targets could be more clearly specified, and the units could compete against each other.[97] This paved the way for the privatization of the delivery of services.[98]

In parallel with the NPM reforms of the Swedish welfare state, right-wing politicians at the local level also used activist strategies to push for the privatization of service delivery through local examples. They politicized the delivery of services, using the language of 'choice' to introduce marketization reforms.[99] The municipality of Nacka, close to Stockholm, was a pioneer in introducing care choice, and was soon followed by other municipalities, mainly in the Stockholm area, in the late 1980s and early 1990s.[100] A 1992 government bill on increased competition in the welfare sector advanced the idea of user participation as a central tool for change. User participation was supposed to create more agency, democracy, and service-mindedness in the care services. Relatedly, the Social Services Act, which, along with certain other laws, regulates welfare services, was changed to allow for competition, with the explicit aim of increasing efficiency and lowering costs.[101] The Act on Public Procurement was introduced in 1994, regulating more clearly how private actors could be involved in providing care. Under the act, public procurement must involve open competition and public authorities must choose the best bid, with price the most important criterion.[102]

Over time, questions of quality became more important in the debate about welfare state reform. Initially, the control over care providers was limited. A 1995 study found that most municipalities with contracted-out services had little or no monitoring mechanisms for the private providers, and there were few national regulations or instruments concerning monitoring.[103] Amendments to the Social Services Act made in 1996–1997 brought issues of monitoring, measuring, and evaluation to the fore. In the preparatory works, there is a clear focus on efficiency and the improved measurement of spending

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[97] Blomqvist (n 25) 49.

[98] Tobias Sjöqvist, 'NPM är död. Länge leve NPM!' (*Dagens Arena*, 30 September 2019) <https://www.dagensarena.se/essa/npm-ar-dod-lange-leve-npm/> accessed 28 May 2020.

[99] Gingrich (n 12) 65–66.

[100] Henrik Jordahl and Richard Öhrvall, 'Nationella Reformer Och Lokala Initiativ' in Henrik Jordahl (ed), *Välfärdstjänster i privat regi: framväxt och drivkrafter* (SNS förlag 2013) 69.

[101] Prop. 1992/93:43 Ökad konkurrens i kommunal verksamhet (n 1) 4–8.

[102] Blomqvist (n 25) 50–51.

[103] Gingrich (n 12) 192.

and results.[104] This legislation laid the groundwork for an institutionalization of the private delivery of welfare.

However, none of the new regulations allowing private providers to operate within the publicly funded welfare system set limits on the profits that could be made from these contracted-out services. Meagher and Szebehely underline the importance of this fact in understanding the way in which the market has developed within the Swedish welfare sector, which is internationally unique in this absence of a cap on potential profits.[105]

> [T]he LGA of 1991, which opened the way for private provision across all welfare services, was an important turning point. It unleashed a dynamic ratchet effect, unforeseen by the ambivalent Social Democratic government that introduced it, through which the growth of for-profit provision became self-reinforcing. … [O]nce private providers had a presence, they sought to defend and extend it, with intense, wide-ranging and well-resourced lobbying efforts. The early involvement of business interest organisations and large corporations was decisive.[106]

The development of the private care market happened in phases. At first, a number of small providers, often staffed by former employees of the publicly provided service, started care companies to enter the new markets. However, because municipalities were concerned above all to control costs, and because the Act on Public Procurement put price competition at the forefront, there was intense pressure on providers to cut costs. This was easiest for the larger care companies, which could use economies of scale. The result was consolidation in the care market: by the end of the 1990s, more than half of the contracted-out care in Sweden was provided by four major private firms.[107] In a study from 2011, Szebehely described the sector as characterized by a tendency towards oligopoly, with care provision dominated by four companies.[108]

How can these events be explained? Bengt Larsson, Martin Letell, and Håkan Thörn note that the welfare state has experienced recurring crises, both economic and ideological, throughout its entire history. Ideologically, the welfare project has repeatedly been attacked from the right for harming growth and being inefficient, and from the left for not being able actually to eradicate

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[104] Prop. 1996/97:124 Ändring i socialtjänstlagen 1996 51–53.

[105] Meagher and Szebehely, 'The Politics of Profit in Swedish Welfare Services' (n 56) 8.

[106] Meagher and Szebehely, 'The Politics of Profit in Swedish Welfare Services' (n 56) 17.

[107] Gingrich (n 12) 193.

[108] Szebehely (n 3) 231.

inequalities and instead producing a surveillance bureaucracy.[109] Henrik Jordahl and Richard Öhrvall instead emphasize the importance of economic developments. During the 1970s, economic growth slowed and politicians found it harder to meet the growing expectations placed on welfare systems. The significant expansion of these systems had also produced inefficiencies and ineffective bureaucracies.[110] The corporate ownership model of large firms was stable, but this sector was also prone to economic stagnation.[111] Blomqvist and Rothstein state that the developments from the 1980s onwards were a necessary reaction to a widespread critique of the welfare state focusing on the economic inefficiency of the public sector and the paternalism of state bureaucracy.[112] Particularly during the 1980s, terms such as 'decentralization' and 'user influence' were used by left-wing voices, critics of the strong state, who believed that the welfare state had brought with it not individual liberation, which must be the goal of any socialist movement, but instead rigid bureaucracy. From the right came arguments, supported by neo-classical economists, in favour of a slimmer and less interventionist state. Blomqvist and Rothstein emphasize, however, that it was the marked impact of market liberalism during the late 1980s which made it that the demands for user participation were formulated in terms of freedom of choice and the consumerization of welfare services.[113] Katharina Tollin argues that decreasing trust in the political and a belief in the primacy of the economic led to changed view of welfare, at the same time that a discourse built around key terms such as 'freedom of choice' and 'individual responsibility' became increasingly prevalent.[114] Lapidus emphasizes how industry and employers became less willing to compromise from the 1980s onwards, and how a political offensive by the Confederation of Swedish Enterprise alongside a strong international trend towards neoliberalism, started to turn opinion against central elements of the welfare model.[115]

[109] Larsson, Letell and Thörn (n 69) 7.

[110] Jordahl and Öhrvall (n 100) 35.

[111] Högfeldt (n 67) 60.

[112] Blomqvist and Rothstein (n 60) 35.

[113] Blomqvist and Rothstein (n 60) 47–49.

[114] Katharina Tollin, *Sida Vid Sida: En Studie Av Jämställdhetspolitikens Genealogi 1971-2006* (Atlas Akademi 2011) 104–106.

[115] Lapidus (n 66) 14.

1.3.4 A decade of welfare debate (2010–2020)

From the mid-1990s until the Act on Care Choice Systems reform of 2009, there were no significant legal reforms of the elder care sector, but during this period the proportion of services being delivered by private actors grew steadily and more and more municipalities introduced voucher systems. When a right-wing government, led by Fredrik Reinfeldt of the Moderate Party, took office in 2006, it promised to introduce reforms to increase choice in welfare. Issues relating to the organization of welfare have been on the agenda ever since, and this has been reflected both in the media and in government inquiries and proposals.

At the same time that the government was preparing to introduce care choice systems, the Swedish National Audit Office released a report that came to attract a great deal of attention. The 2008 report reviewed quality management in privatized elder care, and sharply criticized the government, relevant national authorities, and the municipalities for their lack of knowledge of and control over private delivery.[116] Just a few years later, in 2011, private elder care providers hit the headlines in a way that they never had before. The 'Carema scandal' involved one of the largest care companies, owned by overseas venture capitalists. Several cases of medical neglect were brought to light, as were the company's harsh cost-reduction programmes in some of their operations in the Stockholm area, prompting outrage across the country. More than 4,000 newspaper articles on privatized elder care were published in two months.[117] The other major event was the publication of an edited volume on the consequences of competition in welfare services.[118] The book was financed and published by an influential business think tank, the Centre for Business and Policy Studies. As it was, in parts, critical of the effects of privatization, several of the members of the think tank, who had connections with private companies in the welfare sector, protested the publication of the report. The editor of the volume, Laura Hartman, director of research at the centre, was severely criticized in the media by leading business figures and right-wing commentators. The affair prompted a debate about academic censorship, and Hartman left the organization.[119]

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[116] Swedish National Audit Office, 'Statens Styrning Av Kvalitet i Privat Äldreomsorg' (Riksrevisionen 2008) 34.

[117] Svallfors and Tyllström (n 26) 6.

[118] Laura Hartman, *Konkurrensens Konsekvenser: Vad Händer Med Svensk Välfärd?* (SNS förlag 2011).

[119] Svallfors and Tyllström (n 26) 6.

The issue remained on the agenda in the years that followed. The Reinfeldt government, which had introduced the Act on Care Choice Systems, set up a government inquiry into the question of whether care choice systems should be made obligatory for the municipalities. The inquiry concluded that there was no evidence that quality had increased in the municipalities with care choice systems. As this had been a main argument advanced in favour of the reforms, a new way of rationalizing the next step of the process was required, and it was found in the claim that the most important goal of the reforms was to introduce choice for users.[120] The inquiry's recommendation – that freedom of choice in social services be made obligatory for the municipalities – was presented in January 2014 but did not make it into a bill before the change of government later the same year.

Leading up to the election of 2014, there was an intense political debate over the regulation of the welfare sector and the profits being made by private providers in the sector. The election result put the Social Democratic Party back in power after eight years out of office, and in his declaration of government, the newly elected prime minister, Stefan Löfven, promised to consider changes to the regulations governing private providers in the welfare sector.[121] In 2015, a major government inquiry ('The Welfare Inquiry'), looking into the regulation of profits and financing in the welfare sector was launched. From the start, the Swedish business community, and especially the business group Almega, which represents private employers in the service sector, was sceptical about the inquiry. It took 18 months for its first report to be published, and during that time the debate continued to rage in the media. The first report, called 'Creating Order in the Welfare Sector', argued that welfare services were not like other services on the market and that the use of for-profit businesses to provide such services tended to lead to reductions in quality, cuts to staff numbers, and the prioritization of those with less complex needs. It thus proposed a cap on profits in the welfare sector.[122] The second report suggested improved monitoring[123] and more transparency regarding the use of public funds to purchase the services of private welfare businesses.[124] The business community came out against the recommendations of the reports,

[120] SOU 2014:2 Framtidens valfrihetssystem – i socialtjänsten (n 15) 155–158.

[121] Statement of Government, October 2014.

[122] SOU 2016:78 Ordning och reda i välfärden 27.

[123] SOU 2017:38 Kvalitet i välfärden – bättre upphandling och uppföljning 183–184.

[124] SOU 2017:38 Kvalitet i välfärden – bättre upphandling och uppföljning (n 123) 207.

as did the right-wing parties in the Riksdag, who defeated the minority Social Democratic government in a vote on the proposed bill.[125]

Several other government inquiries into the welfare sector more broadly were carried out in the years that followed, although they did not gain the same level of media attention. They suggested, among other things, increasing the monitoring of private providers and making private welfare businesses more transparent. One such inquiry was the extensive investigation of possible changes to the Local Government Act, which led to the creation of a new act.[126] The inquiry produced a report on private welfare providers, stating that the quality of monitoring in the municipalities was variable and that there was a need for a more strategic approach to control and transparency for privatized welfare.[127] As a result, there were new requirements for municipalities to provide information about and improve the transparency of private companies operating in the welfare sector.[128] Another inquiry looked into the assessment of the owners and managers of private businesses operating in the welfare sector. The inquiry concluded that Sweden had seen a rapid transfer of responsibility for providing welfare services to private companies and that, because the sector is characterized by stable demand and low barrier to market entry, private welfare companies are able to make large profits. The inquiry stated that 'deregulation has been characterized by a certain cluelessness' and concluded that more well-defined regulation was needed. The inquiry proposed, among other things, that businesses providing home care be required to seek further authorization from state authorities.[129] These measures were eventually introduced as amendments to the Social Services Act and came into force in 2019. Private providers of home care services now must be authorized by the Health and Care Inspectorate, a government agency.

Another important inquiry was the Trust Delegation, a large-scale government inquiry involving many welfare researchers and public administrations. The Trust Delegation was commissioned in an effort to address the alleged decline in the quality of welfare services, a problem which was often attributed to the adoption of NPM reforms in the public sector. The inquiry was tasked, specifically, with developing alternative governing procedures to strengthen

[125] Svallfors and Tyllström (n 26) 7.

[126] Local Government Act 2017:725.

[127] SOU 2013:53 Privata utförare - kontroll och insyn 122–123.

[128] SOU 2013:53 Privata utförare - kontroll och insyn (n 127) 237.

[129] SOU 2015:7 Krav på privata aktörer i välfärden 210.

'trust-based' management at all levels of governing.[130] According to its report, the introduction of targets and performance management has brought about an increased emphasis on evaluation and follow-up, but governing models inspired by NPM ideas have had a detrimental effect on values like 'cooperation, long-term sustainability, continuity, and professionalism'.[131] The situation of staff providing home care was used as an example: workers, 'instead of meeting a citizen who needs support in their home, are supposed to perform a number of services on a list within a given time-frame'.[132] The Trust Delegation's report suggested a new underpinning ideal for welfare activities: trust in the professions, grounded in professional ethics, knowledge, and integrity.[133]

At the time of writing, there is also an ongoing inquiry into possible amendments to the Social Services Act relating to elder care. The inquiry's main task is to look into the demographic trend towards an ageing population.[134] It is also investigating whether elder care should be regulated by its own piece of legislation rather than under the Social Services Act.[135] Besides those already mentioned, only a few concrete legislative proposals have resulted from these debates and inquiries. The question of welfare regulation has been, and still is, the subject of political tug of war in the current parliament. The issue of the quality of Swedish elder care has been further fuelled by the coronavirus pandemic, which has hit elder care (especially nursing homes) hard. The topic has been debated in the media and parliament,[136] and the government has announced major investment to raise the quality of elder care and improve the competence of staff.[137]

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[130] SOU 2018:47 Med tillit växer handlingsutrymmet: tillitsbaserad styrning och ledning av välfärdssektorn 60.

[131] SOU 2018:47 Med tillit växer handlingsutrymmet: tillitsbaserad styrning och ledning av välfärdssektorn (n 130) 84.

[132] SOU 2018:47 Med tillit växer handlingsutrymmet: tillitsbaserad styrning och ledning av välfärdssektorn (n 130) 107.

[133] SOU 2018:47 Med tillit växer handlingsutrymmet: tillitsbaserad styrning och ledning av välfärdssektorn (n 130) 131–134.

[134] Dir. 2017:39 Översyn av socialtjänstlagen.

[135] Dir. 2018:69 Tilläggsdirektiv till Utredningen Framtidens socialtjänst.

[136] '90 procent av alla döda i covid-19 var över 70 år' *Svenska Dagbladet* (28 May 2020) <https://www.svd.se/90-procent-av-alla-doda-i-covid-19-over-70-ar> accessed 8 July 2020.

[137] Government Offices, 'Nya åtgärder för att stärka äldreomsorgen och vården under coronakrisen' (*Regeringskansliet*, 12 May 2020)

1.3.5 Understanding how we got here

The period from the end of the 1980s to the beginning of the 1990s was one of significant reform in the Swedish welfare system. However, as Emmanuele Pavolini points out, although there were legal reforms during those years, larger structural changes did not occur until the 2000s, when ideas which had been introduced earlier were implemented in a more thoroughgoing way, particularly by the Reinfeldt government of 2006–2014.[138] The introduction of different kinds of public–private partnership, such as care choice systems, has been the most salient aspect of marketization in the Nordic countries.[139] Larsson, Letell, and Thörn argue that welfare reform in Sweden has played out not so much through 'free markets' as through forms of public–private partnership, with a strong state working together with capital.[140]

According to Blomqvist, the increasing privatization of the Swedish welfare system has taken place in three steps, each of which has been reflected in changes in the elder care system. During the 1980s and the beginning of the 1990s, decentralization and deregulation changed the organizational structures within the public sector, with the introduction of independent units with their own budgets, accountability for results, internal pricing systems, and an increasing focus on the user as a customer. During the 1990s, several important service sectors were opened up to external providers. This did not have any immediate effect, since there were still only a few private companies in the market. Under the third phase, towards the end of the 1990s and at the beginning of the 2000s, outsourcing and public procurement became important methods for public authorities seeking to implement austerity measures.[141] A fourth phase could be added to the story, one in which certain private providers, which have grown significantly through traditional public procurement, have also increased their presence in care choice systems and in the new private market for elder care services. In this fourth phase, private delivery is now a central element of the Swedish welfare system and private financing is

<https://www.regeringen.se/pressmeddelanden/2020/05/nya-atgarder-for-att-starka-aldreomsorgen-och-varden-under-coronakrisen/> accessed 8 July 2020.

[138] Emmanuele Pavolini, 'Marketization and Managerialization of Health Care Policies in Europe in a Comparative Perspective' in Tanja Klenk and Emmanuele Pavolini (eds), *Restructuring Welfare Governance : Marketization, Managerialism and Welfare State Professionalism* (Edward Elgar Publishing 2015) 11.

[139] Anttonen and Karsio (n 6) 230.

[140] Larsson, Letell and Thörn (n 69) 8.

[141] Blomqvist (n 60) 145.

increasingly common.[142] A study from 2016 found that, nationally, 23 per cent of the hours worked in the home care sector were worked by staff employed by private providers. In 16 municipalities, private companies provide, on a per-hour basis, more than half of the publicly funded care. Among the private providers, for-profit companies predominate. More than 90 per cent of privately employed staff were employed by for-profit businesses.[143]

Szebehely notes that publicly funded elder care in Sweden has become an attractive market for international investors. International venture capital companies have entered the field on a large scale since 2005. Profit margins are good and generally higher than in other sectors. Since care services are always needed, the care sector is, from an investment perspective, seen as a stable market, and the comparatively low level of regulation only makes care a more attractive investment opportunity.[144] Svallfors and Tyllström show that private care providers have pursued effective lobbying in Sweden.[145] The care companies are a heterogenous group, comprising companies with quite varied interests, with the larger having most influence over lobbying.[146] Svallfors and Tyllström note that the extensive Swedish welfare state constitutes a tempting business opportunity for many companies.[147] As Meagher and Szebehely emphasize, the private welfare business is highly profitable. It promises an average return on investment of 27.5 per cent, compared to 14.3 per cent in the private sector overall.[148]

As Katarina Andersson and Elin Kvist observe, the preparatory works to the Act on Care Choice Systems assume that the introduction of free establishment for businesses in the elder care sector will create opportunities for women to establish small businesses and lead to a competition between employers over working conditions, which will lead to improved conditions for women in the sector. However, studies have not borne this assumption out. On the contrary, smaller businesses, more often operated by women, have a hard time

[142] Anneli Anttonen and Gabrielle Meagher, 'Mapping Marketisation: Concepts and Goals' in Gabrielle Meagher and Marta Szebehely (eds), *Marketisation in Nordic eldercare : a research report on legislation, oversight, extent and consequences* (Department of Social Work, Stockholm University 2013).

[143] Szebehely and Trydegård (n 2) 27.

[144] Szebehely (n 3) 234–235.

[145] Svallfors and Tyllström (n 26) 9.

[146] Svallfors and Tyllström (n 26) 13.

[147] Svallfors and Tyllström (n 26) 17.

[148] Meagher and Szebehely, 'The Politics of Profit in Swedish Welfare Services' (n 56) 4.

competing with the large firms, more often owned and managed by men. Privatization has thus led to what Andersson and Kvist call the 'masculinization' of the elder care sector: managers in this sector are more likely to be men than in the public sector more generally, and the owners of the larger businesses in their study were all men.[149]

The significant impact of the NPM reforms on the Swedish welfare state explains why marketization has been easy to implement, for these reforms meant that there was already a distance between the political input side and the delivery of services. Along with the NPM reforms came an increased decentralization on the one hand and a focus on measurement and evaluation on the other. Ideas of accountability and the ways in which actors were held responsible changed. Prior to the implementation of the NPM agenda, trust between politicians, professionals, and users was central to the governing rationality. However, in the NPM era, mistrust of public actors and safeguards against abuses of power by politicians and authorities have become central to the way publicly funded services are organized. Trust is placed instead in the market, which authorities believe will solve all of the system's problems.[150]

At the same time, elder care has been increasingly professionalized, with more staff now holding an assistant nurse certificate.[151] The group of older persons being cared for within the elder care system in general, and the home care system in particular, has changed too, becoming older and sicker. Because there are fewer hospital beds, and because of changed practices in the healthcare system, patients are now sent home quicker and sicker. This has changed the nature of home care, which now has to focus more on medical and physical needs and less on social and other practical needs.[152] Staff working in the home care sector report that their working conditions have deteriorated during the last decade.[153] Staff experience higher levels of stress, and say that the limited amount of time they have to do their job means they are forced to adopt a standardized and routinized attitude towards care users. While there

[149] Andersson and Kvist (n 60) 9–10.

[150] Roland M Almqvist, *New Public Management : NPM : Om Konkurrensutsättning, Kontrakt Och Kontroll* (Liber 2006) 23–24.

[151] Blomqvist (n 25) 57.

[152] Trydegård (n 83); Kristina Larsson, *According to Need? : Predicting Use of Formal and Informal Care in a Swedish Urban Elderly Population* (Dept of Social Work [Institutionen för socialt arbete], Univ 2004).

[153] Rebecka Strandell, 'Lika Olika Hemtjänst: Omsorgspersonalens Arbetssituation i Stad Och Land' in Håkan Jönson and Marta Szebehely (eds), *Äldreomsorger i Sverige : Lokala variationer och generella trender* (Gleerup 2018) 137–140.

are ever-increasing political demands for higher quality, there are fewer resources to deliver it, which leads to feelings of inadequacy among staff.[154]

Blomqvist notes that, while one of the initial aims of publicly financed welfare was to protect the sector against market forces and thereby to increase social equality, current Swedish social policy instead values consumer sovereignty, economic efficiency, and private initiative.[155] Blomqvist has analysed a number of the changes that took place during the period from 1990 to 2015 from the perspective of universalism, concluding that the universalism of the Swedish welfare system has been weakened, especially when it comes to the uniform quality of services and the ability of services to meet the needs of all citizens. Other aspects of the system, such as the inclusiveness of services and the financing of services, have not changed as much. What have changed are the features that made the Swedish welfare system unique: the uniformity of high-quality, publicly delivered services and the centrality of the value of equality.[156]

To sum up, the implementation of a voucher system in the Swedish elder care system can be explained as the result of a combination of factors: changes in ideology, economic crises, and changes in the balance between relevant interests. I agree with Jane Gingrich, who states that the reform agenda that underpins privatization is a partisan one. Marketization cannot be seen merely as a functional response to the pressures on welfare states but must be seen as an instrument for reshaping the organization of services in particular ways. As she explains it, right-wing and centrist politicians have seen markets as a way to streamline the state, limit the role of the public, and create new bases of social support for further privatization of financing and service delivery, without needlessly antagonizing the electorate.[157] However, the privatizations and NPM reforms also led to the growth, particularly during the 2010s, of a counter-movement. This made itself felt both in the media and political debate and in a number of government inquiries that recommended ways of solving and mitigating the problems caused by the marketization reforms. At the same time, privatizations increase, and the elder care market is growing. The current situation can thus be described as one that expresses conflicting tendencies within the Swedish welfare state project.

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[154] Strandell (n 153) 147.

[155] Blomqvist (n 60) 151.

[156] Blomqvist (n 25) 41.

[157] Gingrich (n 12) 55.

1.4 The legal framework for care choice systems

1.4.1 General outline of the legal context

The legal regulation of care choice systems exists within the framework of the public administrative law regulation of social services and EU public procurement regulations. Swedish elder care, the rights of older people in need of care, and the obligation for the municipalities to provide services to those in need are regulated by the Social Services Act. However, the act allows the municipalities to contract out their service delivery, either through the Public Procurement Act or under the Act on Care Choice Systems.

As a framework law, the Social Services Act is built on statements of objectives, rules regarding the organization of social services, and procedural rules. The framework is supplemented by other legal sources: preliminary works, case law, provisions and guidelines from the National Board on Health and Welfare, reviews from the Parliamentary Ombudsman, and municipal norms and guidelines. Regulating social services through a framework law allows for the differing conditions of the municipalities to be taken into account in the enforcement of the law and for local political priorities to influence the way services are provided.[158] This gives municipalities a significant role in designing social policy. The municipalities have not been given the formal competence to issue binding norms (except for provisions on fees), but general instructions, guidelines, and norms issued by the city council or boards are common in the municipalities.[159]

There are a number of state agencies relevant to public procurement in elder care, the most important being the Health and Care Inspectorate and the National Board on Health and Welfare. The Health and Care Inspectorate has the important task of monitoring the municipalities' social services, as well as authorizing private providers and monitoring their compliance with the terms of their authorization. The National Board on Health and Welfare is a government agency under the Ministry of Health and Social Affairs. The National Board on Health and Welfare has the right to issue administrative provisions and general guidelines to help decision-makers with the application of legislation within these fields. The agency provides support to, but also

[158] Prop. 1979/80:1 Om socialtjänsten 2.

[159] Margareta Lindelöf and Eva Rönnbäck, *Biståndshandläggning Och Handlingsutrymme: Från Ansökan till Beslut i Äldreomsorgen* (Studentlitteratur 2007) 119.

exerts influence over, staff, managers, and decision-makers in the fields of social services, health and medical services, patient safety, and epidemiology by collecting and analysing information, developing standards, keeping registers, and collating official statistics. As well as sharing knowledge and information, the agency also has a regulatory function. The provisions and guidelines issued by the board are non-binding, but in practice they have a significant influence over social services. Pernilla Leviner points out that, from a judicial perspective, these provisions must be seen as explanatory 'quasi-legal' guidance rather than legally binding sources.[160] As I will show in this study, a variety of national instruments are of importance in the governing of care choice systems.

1.4.2 Regulation of social services and elder care

Since 1980, the Swedish system of elder care has been regulated by the Social Services Act, which regulates a broad range of social services, from welfare benefits to addiction treatment services. The 1980 act was introduced partly in order to amalgamate several older acts, but for the most part it was new, following from an ambitious inquiry, which took more than 10 years to complete, into social questions and possible solutions. Its framework character means that the law provides ample opportunities for administrators and social workers to adopt an individualized, holistic perspective.[161] This, in turn, has meant that a lot of the changes in the actual practices within social services in the years since the introduction of the law have been implemented without the need for any significant changes to the law itself. The fact that it is a framework law also means that the municipalities, where many of these changes were initiated, have a great deal of leeway in applying the law.

The starting point for the development of the act was the wish to achieve certain social policy goals and to pursue the ambitions of the social democratic welfare state. These overarching goals are expressed in the opening sections, which describe the objectives of social services in terms of the values of 'democracy', 'equality', 'solidarity', and 'social security'. Social services should promote the economic and social security of the people and work towards 'equality in living conditions' between citizens.[162] The goal is not merely formal equal treatment but also material equality in outcomes. Central

[160] Leviner, P., *Rättsliga dilemman i socialtjänstens barnskyddsarbete*. Stockholm, 2011, s. 41.

[161] Prop. 1979/80:1 Om socialtjänsten (n 158) 127.

[162] Ch. 1 § 1 Social Services Act.

to the act is the idea of a holistic approach to service provision. The individual in contact with social services should not need to navigate a complex bureaucracy but should be met with an organization which is flexible and ready to take care of different kinds of need. Instead of focusing on isolated aspects of an individual's life, the individual should be seen in their context, and different aspects of the relationship between society and the individual should be taken into account. The framework character of the act is meant to facilitate the achievement of this ambition.[163] Under the act, the municipality has the ultimate responsibility for ensuring that those residing within its borders receive the support and assistance that they need.[164] The municipality is ultimately responsible for providing a comprehensive safety net for the individual. Since the beginning of the 1990s, the municipalities have had the power to contract out the delivery of some municipal services.[165] The municipality, however, retains the ultimate responsibility for the delivery and quality of services.

The right to elder care is set out in the Social Services Act's section on assistance,[166] which states that those who cannot themselves meet their needs or have them met otherwise are entitled to assistance in order to achieve *a reasonable standard of living*. This is an individual right, the content of which follows from an individual needs assessment, which should be based on a holistic view of the individual's situation. A reasonable standard of living implies not only that a person must have access to the basic necessities of life but also that a person must enjoy a certain quality of life, even if this is not clearly defined in law, preparatory works, or case law. Under the Social Services Act, the municipalities are free to organize the delivery of this, although the municipality is responsible for determining whether the individual is eligible to receive a particular service. The right to social care does not depend on the individual's economic situation – an expression of the universalism of the system. The assessment of the individual's right to assistance is conducted by municipal social work administrators, a professional group with a bureaucratic task separated from the delivery of the service itself,

[163] Prop. 1979/80:1 Om socialtjänsten (n 158) 119–126.

[164] Ch. 2 § 1 Social Services Act.

[165] Ch. 2 § 5 Social Services Act.

[166] Ch. 4 § 1 Social Services Act.

which in most municipalities is organized according to a purchaser–provider model.[167]

In addition to its ultimate responsibility for the welfare of all of its residents, a municipality also has a particular responsibility for certain groups, as laid out in the Social Services Act. This is where the care of older persons is mentioned. The Social Services Act states that the care for older people should focus on their welfare and on providing them with a dignified life. Older people should have the opportunity to live independently and safely and to have an active and meaningful existence in community with others.[168] Old age should be regarded as a natural stage of life and not as an exception. Elder care should as far as possible be based on principles of self-determination and participation and should be tailored to individual needs. These objectives have led to a trend away from nursing homes and towards home services as the basis for the Swedish elder care system. Authorities focus on making it possible for older people to live in their own homes for as long as possible. This principle has been considered central to Swedish elder care ever since the introduction of the 1980 Social Services Act, and it marked a break from the tradition of institutionalized care. The goal is met through the provision of social and medical care at home, as well as through access to alarms, assistive technology, and help with adjusting the home environment to make it more accessible for older persons with functional impairments.

The importance of quality, quality development, monitoring, and self-monitoring in the social services sector has increased over time. The Social Services Act contains a section referred to as *Lex Sarah*,[169] named for a whistle-blowing nurse, which imposes a responsibility on individuals and organizations within social services to report, document, investigate, and remedy abuses or significant risks of abuse. Because of *Lex Sarah*, organizations are required to set up self-monitoring systems, which must also be transparent to the supervisory authorities. The obligation applies to public as well as to private service delivery. However, private organizations need only inform the responsible municipal board of the existence of reports produced by the self-monitoring system; they do not have to pass on the reports themselves. Any instances of abuse or risks of abuse should in the first instance be handled

[167] Katarina Andersson, 'Myndighetsutövning i Äldreomsorgen – Att Skapa Likhet i Äldres Behov?' in Stina Johansson (ed), *Social omsorg i socialt arbete* (Gleerups utbildning AB 2007) 154–155.

[168] Ch. 5 § 4 Social Services Act.

[169] Ch. 14 §§ 3-7 Social Services Act.

internally by the organization, but if there are serious abuses or risks the Health and Care Inspectorate must be notified, regardless of whether the provider is public or private.

Since 1 January 2019, the Social Services Act has stated that the Health and Care Inspectorate must authorize private providers of home care services.[170] This applies to private companies that have a contract with a municipality to provide services. The fact that a provider has been authorized does not absolve the municipality of their oversight responsibilities, which means that there are now two monitoring systems and systems of control – one the responsibility of the state and the other the municipality. Authorization is granted only if the services provided meet quality and safety criteria. Among the quality requirements are that the person in charge of the organization must have appropriate qualifications and previous experience and be personally suitable for the role. Authorization may be granted conditional on certain quality and safety requirements being met.

1.4.3 The regulation of care choice systems

According to the Act on Care Choice Systems, a care choice system is a procedure in which the individual has the right to choose a supplier to provide the service that the municipality has decided the individual is eligible to receive. The individual can choose between suppliers that the municipal authority has approved and entered into a contract with. The Act on Care Choice Systems does not regulate the relationship between the public authorities and the citizen; rather, it addresses the municipal administrations' public procurement processes with regard to care choice systems. The municipal authority must provide individuals in need of care with information on all suppliers that the municipality has contracted with within the framework of the care choice system. The information should be factual, relevant, easily understandable, and accessible, and it should allow individuals to make comparisons between providers. For the user who cannot or does not want to make an active choice, the municipality must provide a 'no-choice' alternative, which may be publicly delivered, privately delivered, or delivered through a combination of public and private providers.[171] The user's choice of supplier

[170] Ch. 7 §§ 1-2 Social Services Act.

[171] Prop. 2008/09:29 Lag om valfrihetssystem (n 13) 97.

does not imply a purchase of a service under the terms of the Consumer Services Act.[172]

The contract is defined as a public service contract for pecuniary interest concluded in writing between a service provider and a contracting authority, relating to EU directive 2014/24/EU on public procurement. The municipal authority must advertise the care choice system to potential providers, together with a specification of the requirements to be met by the applying companies, on the national website set up for this purpose.[173] Unlike tenders under the Public Procurement Act, there is no deadline for applications – they may be submitted at any time. The municipality must approve all applicants who meet the requirements stated in the tender, and these applicants must be offered a contract with the municipality. A supplier can be denied a contract on the basis of a number of grounds, some of which are specified in the legislation[174] and others of which may be specified in the tender documents. The grounds mentioned in the law mainly relate to financial issues or to crimes relating to the profession. For example, applicants must not be bankrupt or subject to a business ban; must not have been convicted of a crime in connection with their profession; and must not have been shown to have made serious mistakes in the profession. They must have paid taxes and other fees and have provided correct information on their application. The legislation does not explicitly define the requirements that may be set by the municipalities, but the preparatory works provide examples such as criteria regarding staff competence, quality assurance work, management of complaints, and collaboration with other care providers. The requirements may also be of a social or environmental nature.[175] If an application is rejected, an applicant can appeal the decision at the administrative court. If the court finds that the municipality has not applied the legislation correctly, the municipality has to rectify the decision and may be liable for damages.

The designated municipal board has to ensure that the privately supplied service is delivered in accordance with the goals and guidelines set out in the Social Services Act, the municipal documents, and other relevant regulations. For this to be possible, the contract must allow for the control and monitoring of the business. The Local Government Act requires municipalities to ensure,

[172] Prop. 2008/09:29 Lag om valfrihetssystem (n 13) 20.

[173] 'The Care Choice Website' https://www.valfrihetswebben.se/ accessed 11 May 2020.

[174] Ch. 7 § 1 The Act on Care Choice Systems.

[175] Prop. 2008/09:29 Lag om valfrihetssystem (n 15) 69–70. A further discussion of these criteria can be found in chapter 3.

when contracting out services, that they are able to monitor the businesses providing the services[176] and that municipal citizens are able to access information about these agreements and about the operations of the private providers, if providing such information does not risk distorting market competition.[177] The contract should also include clauses which give the municipality the opportunity to terminate the contract if the supplier violates the requirements. The grounds for termination must be proportional and related to the aim of ensuring the proper quality of care.[178]

The Act on Care Choice Systems determines the framework for municipal contracts with private providers and ensures the equal treatment of providers under competition rules. The municipalities are supposed to comply with EU public procurement regulations when designing tender documents and signing contracts with external suppliers. In a public procurement process, the contracting authority is supposed to take into account the principles laid down in the public procurement directives and developed in case law. In particular, attention must be paid to the principles of *non-discrimination*, that the tender should not be formulated so as to exclude non-Swedish applicants; *equal treatment*, that all suppliers should be subject to similar conditions; *transparency*, that suppliers must have a right to access information; and *proportionality*, that the contracting authority must not impose more requirements than are necessary and appropriate for the instance of public procurement in question.[179] Apart from the condition, laid down in the Act on Care Choice Systems,[180] that requirements set out in the tender documents must be proportionate and relevant to the objectives pursued, the preparatory works do not go into detail about the kinds of requirements that are allowed under the EU proportionality principle, and they do not discuss the possibility of conflicts with the quality standards set out in the Social Services Act.[181]

Because it seeks to standardize public procurement rules and strengthen the workings of the internal market, the EU public procurement directive might in theory be seen as limiting the latitude of public policy-makers. However, the directive also specifies several tendering procedures and types of contracts that fall outside of its scope, thus making possible divergences in national policy-

[176] Ch. 3 § 19, the Local Government Act.

[177] Ch. 3 § 19a, the Local Government Act.

[178] SOU 2008:15 LOV att välja - Lag Om Valfrihetssystem 181.

[179] Prop. 2008/09:29 Lag om valfrihetssystem (n 13) 44–50.

[180] Ch. 1 § 2 The Act on Care Choice Systems.

[181] Prop. 2008/09:29 Lag om valfrihetssystem (n 13) 62–66.

making and governing in certain areas, one of which is social services.[182] However, in a study of national policy documents relating to the public procurement of social services, Signe Bock Seegard and Jo Saglie show that, in spite of this, Sweden and Denmark not only adhere to the public procurement directive but, in the limits placed on public authorities when designing tenders for traditional or quasi-market public procurement, go beyond it.[183] Anneli Anttonen and Olli Karsio also state that, although marketization has been promoted by the OECD and the EU, regulations in the Nordic countries have often been more market friendly than is required by international agreements.[184]

The empirical chapters of this thesis will describe further the criteria set by municipalities through tender documents and will investigate the logics and strategies that are operative when municipalities determine the requirements that must be met by private providers of home care.

[182] Johan Höök, 'Valfrihet Från Rättsliga Utgångspunkter' (2017) 94 Nordisk Administrativt Tidsskrift 45.

[183] Segaard and Saglie (n 28) 100.

[184] Anttonen and Karsio (n 6) 233.

2 Methods and research material

2.1 Introduction

Answering my research questions has required me to draw on a variety of materials and to make use of various methods to process and analyse this material. Making use of a multitude of sources makes it possible to reveal the complexity of the topic being studied, to examine various aspects of the phenomena, and ultimately to produce a more comprehensive account of the issue.[185] The nature of the research questions has made necessary an interdisciplinary approach and an openness about the choice of methods, materials, and theories. However, these choices are also grounded in methodological considerations.

My study is based on a social constructivist view of law, according to which categories, representations, and materializations of law and jurisdiction are ultimately contingent (even if stable)[186], and according to which legal institutions cannot be understood without seeing them in their social contexts.[187] From this standpoint, a study in law should be broader than just an analysis of legal texts, and may analyse, in addition, the variety of apparatuses and institutions that use law. This starting point is guided by a pragmatist and non-formalist understanding of law. Deeper insights might be gained by studying law within its social environment, with help of a bottom-up approach, drawing on ground-level empirical research and social science methodologies.[188] Sabino Cassese makes a similar case with regard to the study of administrative law. He argues that, because the public–private divide has

[185] Sigmund Grønmo, *Social Research Methods : Qualitative, Quantitative and Mixed Methods Approaches* (Sage 2019) 404.

[186] Kevin Walby, 'Contributions to a Post-Sovereigntist Understanding of Law: Foucault, Law as Governance, and Legal Pluralism' (2007) 16 Social & Legal Studies 551, 557.

[187] Susan S Silbey and Austin Sarat, 'Critical Traditions in Law and Society Research' (1987) 21 Law & Society Review 165, 165.

[188] Margaret Davies, *Asking the Law Question* (Thomson Reuters (Professional) Australia Limited 2017) 172.

become blurred, and private law has invaded the space of public law, administrative law scholarship must change. While administrative law scholarship traditionally focused on statutes and judicial decisions, newer scholarship must focus on institutional practices instead. As Cassese points out, this can be achieved by combining legal analysis with fieldwork, with interviews and analyses of official documents and statistical data.[189]

I start from the assumption that law is thoroughly embedded in social relations of power and cannot be separated from these relations. Law is not external to 'society' or determined outside of existing power relations. That being said, law is not simply a tool of the dominant power. It can encompass and reproduce different, and potentially conflictual, logics. Law is an historical formation with no predefined features or functions, and it is deployed by different interest groups to achieve different ends.[190]

This position is akin to that inspired by the works of Michel Foucault, which centres on the study of practices on a micro level. The study of concrete practices allows for a description of the phenomena which does not take concepts or models for granted a priori. A main aim of Foucauldian studies in law is precisely to show that critical engagement with law cannot be premised upon assumptions about stable concepts or entities.[191] On a Foucauldian view, discourses which explain the nature of phenomena such as 'the state', 'politics', or 'law' are seen not as absolute but as parts of a specific governing rationality. The use of universal concepts (such as 'public' and 'private') tends to reify what has been historically constructed through practices. A conceptualization is a kind of legitimization or rationalization of the practices that seeks to render them coherent and understandable. The dividing line between, for instance, 'public' and 'private' is thus embedded in specific practices within a specific rationality, according to which politics and the market are seen as independent spheres. On this approach, the aim is to start with the practices in order to understand the power structures and the connection between constructions and reconstructions of concepts and specific

[189] Sabino Cassese, 'New Paths for Administrative Law: A Manifesto' (2012) 10 International Journal of Constitutional Law 610.

[190] This is a position often adopted by those in the 'critical legal studies' tradition. Jiří Přibáň, 'Sharing the Paradigms? Critical Legal Studies and the Sociology of Law' in Reza Banakar and Max Travers (eds), *An Introduction to Law and Social Theory* (Hart Publishing 2008) 120.

[191] Anne Orford, 'In Praise of Description' (2012) 25 Leiden Journal of International Law 620.

social orders.[192] This sort of Foucauldian approach has inspired a tradition of governmentality studies, further described below, and I will make use of theories in this field in this thesis. A governmentality approach urges the researcher to study the techniques, the *how*, of governing, and to investigate how different legal orders are accompanied by different rationalities and technologies that are the results of political choices.[193]

These starting points, which will be further explained below, form the basis for this study, which draws on a broad range of empirical material in order to describe the practices connected to the introduction of care choice systems in the provision of home care for older people in Sweden. The primary material consists of legal sources, such as legislation, preparatory works, and government policy, but the study focuses particularly on a qualitative analysis of material relating to the municipalities: all available tender documents and contracts used by the municipalities in administering care choice systems in home care for older people, and interviews with public officials in three municipalities that have care choice systems. In addition to these sources, there is a short questionnaire that was sent to all Swedish municipalities. All this empirical material will be described in more detail later in this chapter. Case law relating to my research questions is, however, relatively scarce, for reasons I will mention later. There are barely any precedents regarding care choice systems, or the privatization of social services more broadly, that are relevant to this study. Case law is usually helpful in understanding material facts, but because of this lack of relevant judgments I will only rarely refer to court cases in this study.

The case studies of the three municipalities provide this study with a proximity to the implementation and implications of the care choice reforms, thus making possible a more nuanced view of what is happening. Learning by placing oneself within the context that is being studied is a good way of understanding something complex and gaining a more comprehensive view of a topic. If one is too distanced from the studied object, as is the case when undertaking textual analyses, the risk is that one will end up in what Bent Flyvbjerg calls 'ritual academic blind alleys', where the research is too far removed from what is being studied and the researcher loses a sense of the point of the research. Attending more closely to the complexity of the studied object challenges the researcher's assumptions and adds nuance and depth to the image the

[192] Christopher Tomlins, 'The Presence and Absence of Legal Mind: A Comment on Duncan Kennedy's Three Globalizations' (2015) 78 Law and Contemporary Problems 1.

[193] Walby (n 186) 559.

researcher produces.[194] It was only once I engaged with the empirical material that my study really took shape. Previously, I was myself stuck in an 'academic blind alley', engaged in theoretical studies that simply proved what the theories already presupposed. Only by getting into the empirical material could I approach my questions in an open-minded way.

2.2 Methodological starting points

2.2.1 Governmentality studies

Governmentality studies is a research tradition in the social sciences inspired by Foucault's later work, especially by the lectures held at the Collège de France from 1975 to 1979.[195] Important for my understanding of this tradition are the influential works of Mitchell Dean, Nikolas Rose, and Béatrice Hibou, but I am also inspired by the work of Canadian criminologist Mariana Valverde and her development of governmentality studies within the field of law. Governmentality studies focuses on the rationalities, techniques, and internal logics of governing. The internal logics of governing may be more or less explicit, and may be revealed through an overall analysis of different elements within a governing structure. A governmentality analysis attempts to show that the way of organizing something that a society takes for granted is in fact neither obvious nor necessary.[196] The aim is therefore to map the studied area in order to describe the institutional, technological, and discursive conditions of different ways of governing.[197] What is fruitful about a governmentality approach is that, as Rose explains, it implies a perspective which is empirical but not realist, which aims to be diagnostic in its ways of describing the world, and which entails an open and critical relation to strategies of governing.[198]

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[194] Bent Flyvbjerg, 'Five Misunderstandings About Case-Study Research' (2006) 12 Qualitative Inquiry 223.

[195] Published in Foucault, Bertani and Fontana (n 43); Michel Foucault, Michel Senellart and Arnold Ira Davidson, *Security, Territory, Population : Lectures at the Collège de France, 1977-1978* (Palgrave Macmillan 2007) and; Michel Foucault and Michel Senellart, *The Birth of Biopolitics : Lectures at the Collége de France, 1978-1979* (Palgrave Macmillan 2008).

[196] Dean, *Governmentality: Power and Rule in Modern Society* (n 44) 32.

[197] Dean, *Governmentality: Power and Rule in Modern Society* (n 44) 39.

[198] Nikolas Rose, *Powers of Freedom : Reframing Political Thought* (Cambridge University Press 1999) 19.

The diagnostic function means looking at different kinds of phenomena as symptoms and drawing connections between them. Establishing a possible diagnosis, setting out a symptomatology, requires a certain creativity.[199] The broader definition of governing implied by the governmentality approach allows us to 'identify tools of government where we might not have searched before, allowing us to look beyond legislations, rules and policies to see how government is exercised through, for example, dialogue, benchmarking, opinion pools, maps, or architecture'.[200] In my case, this method of thinking has implied a need to be innovative in the choice of materials, going beyond legislation and making use of a number of different sources in seeking to produce a diagnosis of my object of study.

Governing is based on strategies, techniques that are regulated by and specified in administrative processes. Strategies link planning at the policy level to activity at the operator level. As Magnus Hörnqvist describes it, there are no secrets in this process. The aims of power are publicly formulated. Power is regulated in legal documents. Interventions are described in manuals. Organizational routines are documented and monitored. The strategies lack strategists, in the sense that they are almost never the product of a single person and are not masterminded by particular institutions. Instead, they are the result of conflicts and compromises.[201] All forms of governing must be broken down and transformed into aims, concrete objectives, and actual plans. This means that a study of forms of governing can begin from below, at the local level, investigating which governmentalities are at work in the studied institutionalized practices or regulations.[202] Governmentality studies thus offers a useful way of revealing the concrete aspects of a governing rationality. It also makes possible a study of how conflicts about governing appear and what perceptions and values they rest on and utilize. As I see it, the governmentality approach has much in common with other forms of socio-legal research that focus on the interaction between law, legal and non-legal institutions, and social factors.[203]

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[199] Rose (n 198) 57.

[200] Linda Nyberg, *Market Bureaucracy : Neoliberalism, Competition, and EU State Aid Policy* (Department of Political Science, Lund University 2017) 49.

[201] Magnus Hörnqvist, *En Annan Foucault: Maktens Problematik* (Carlsson 2012) 120–122.

[202] Dean, *Governmentality: Power and Rule in Modern Society* (n 44) 43.

[203] Frans L Leeuw and Hans Schmeets, *Empirical Legal Research: A Guidance Book for Lawyers, Legislators and Regulators* (Edward Elgar Publishing 2016) 25.

In Foucault's work, however, governmentality is not only an analytic tool that enables the researcher to understand the relationship between rationalities and techniques of governing. The term is also, confusingly, used to describe a particular *form* of governing, one centred on economics and statistics. In Valverde's reading, Foucault's concept of governmentality can 'be said to refer to ways of governing that are less intrusive and personal than discipline, and that rely more on managing risks, organizing spaces to minimize disorder and opportunities for crime, maximizing resources, and planning for the future'.[204] Instead of direct governing, where individual actors are disciplined to act according to what is considered the correct way to behave, governmentality acts on masses in such a way as to make them discipline themselves. For Foucault, a regime of governmentality is also an apparatus of security which 'seeks to govern risks and lower rates of offending by whatever means are empirically demonstrated to work'.[205] Guidelines, behavioural standards, benchmarking, and similar 'soft' measures of governing are supposed to offer security while enabling the 'freedom' of individual subjects.

2.2.2 A focus on practices

Foucault's key methodological innovation is the focus on practices or techniques of governing as the main object of research and analysis.[206] Social systems are defined as much by their everyday practices as by their ideologies or explicit systems of thought. For this reason, there is a need to focus on the 'how' of governing, and to make use of a broad variety of tools and perspectives in order to do so. In Valverde's words,

> [i]n order to avoid sociological reductionism and better understand the 'how' of legal mechanisms, analyses need to be simultaneously inside and outside law, simultaneously technical and theoretical, legal and socio-legal. Doctrinal 'technicalities' would be as important in such a study as sociological analyses of power effects.[207]

In order to study the 'how' of legal systems – the technicalities of the formal and informal aspects of governing – Annelise Riles recommends the use of

[204] Mariana Valverde, *Michel Foucault* (Routledge 2017) 24.

[205] Valverde, *Michel Foucault* (n 204) 26.

[206] Valverde, *Michel Foucault* (n 204) 17.

[207] Mariana Valverde, 'Jurisdiction and Scale: Legal Technicalities as Resources for Theory' (2009) 18 Social & Legal Studies 139, 153.

close observation. Close observation renders visible and accessible to study that which would otherwise be taken for granted.[208] She argues that the mundane technocratic dimensions of law, so often overlooked by critical or theoretical scholarship, are the most interesting artefacts of legal work. Thus, she argues, it is important to focus on the actual practice of 'doing' law: taking the technical forms of legal work seriously and studying them instead of ignoring them.[209] In light of these methodological considerations, it is already clear why the focus on public administration is appropriate. As Anne Orford describes it, the ambition of a Foucauldian project is to make our present situation, its governing logics and techniques, intelligible, and to do this not by studying theoretical accounts but by looking at the 'mundane' work of bureaucrats and administrations. The crucial aspect of state power is not its perceived core, that is, sovereignty, but the administration that realizes that sovereignty – the practices. Foucault's own works, which themselves drew on bureaucratic archives,

> suggest that there is much to be gained from the work of assembling new archives that might make visible the transformations articulated in the doctrines, practices, and rationalizations of the myriad administrators who now shape everyday life for many people on this planet.[210]

Examining the practices of public administration reveals aspects of governing that would otherwise be hard to detect. It demonstrates the importance of, in Valverde's words, the 'hybrid, in-between knowledges deployed in regulatory and administrative law'.[211] Governing institutions, when examined closely, turn out to be more hybrid and complex than theories about abstract rationalities (be they 'neoliberalism', 'bureaucracy', 'marketisation', or 'contractualisation') suggest. This study of the 'how' of governing also aims to demonstrate, as Rose puts it, 'a respect for the particularities of specific cases',[212] instead of trying to force a range of different examples to fit within the scope of broad concepts. A technical study of the governing practices at work can reveal the interlegal complexities and conflicts that make up the field

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[208] Annelise Riles, 'A New Agenda for the Cultural Study of Law: Taking on the Technicalities' (2005) 53 Buffalo Law Review 1018.

[209] Riles (n 208) 1030–1033.

[210] Orford (n 191) 621.

[211] Mariana Valverde, *Law's Dream of a Common Knowledge* (Princeton University Press 2003) 20.

[212] Rose (n 198) 13.

being studied. The law becomes, in this way, a much richer object of study than is suggested by black-letter law.[213]

It may be the case that there are conflicting governmentalities existing in parallel rather than there being a single, coherent rationality, and a governmentality analysis may examine these conflicts and inconsistencies and investigate how different governmentalities overlap, support, and challenge each other.[214] According to Valverde, an important Foucauldian principle is that we cannot infer the origins of an institution or practice from the function it currently performs and that, by the same token, these origins do not determine the future purposes an institution or practice might be made to serve. Social practices may fit with all manner of social and political aims. They have

> chequered careers, and have been reinvented to serve a variety of objectives. Techniques of governance are flexible; they can be separated from the larger institutional contexts in which they were born and recycled in quite different contexts for different goals.[215]

Methods of intervention travel easily from field to field, and it is helpful to study how a technique invented in one type of institution is borrowed by another. Thus, work in governmentality studies has shown how modern techniques of governing, such as audit, risk management, benchmarking, and different forms of marketization, have spread across institutions and how, through NPM reforms, they also came into the public sector.[216]

2.2.3 Critical empiricism

The same methodological principles that underpin governmentality studies are found in certain areas of legal studies, especially in the tradition of socio-legal studies. Margaret Davies argues that, by insisting on 'an empirically-informed understanding of the actualization of law in social settings', socio-legal research provides tools that enable us to understand law from a new perspective.[217] The perspective of governmentality studies invites me to approach my research questions from the standpoint of critical empiricism.

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[213] Valverde, 'Jurisdiction and Scale' (n 207) 142–143.

[214] Foucault and Senellart (n 195) 186.

[215] Valverde, *Michel Foucault* (n 204) 19.

[216] Valverde, *Michel Foucault* (n 204) 21.

[217] Davies (n 188) 450.

This approach to legal studies decentres: it studies not what the law is but what the law does.[218] What makes this approach 'critical' is that its starting point is a non-positivist idea about what the results of empirical study can tell us about the world. David M Trubek describes the critical empiricism project in legal studies in the following way:

> [F]actual inquiry in legal studies is necessary because law cannot be defined other than by the difference it makes in society, and empirical inquiry is necessary to determine what that is. This account of the reasons for empirical inquiry should be called 'pragmatism.' Pragmatists reject the notion that the goal of knowledge is to represent reality. Where positivists search for a method that will put us in touch with the way things 'really' are, pragmatists look for ways to talk about the world that are useful for specific purposes.[219]

Trubek expands the critical project, in which law is expected to mirror structural power relations and to serve functions of power. In his version, the critical empirical project does not take the functions of law for granted but allows law to play a more complex role. If the functions, productions, and effects of law cannot be assumed, they must be described empirically.[220] In the same way, legal and social institutions cannot be understood in terms of a simple functionalism; instead, they should be seen as spaces where conflicts temporarily converge.[221]

The upshot of this reasoning for the legal researcher is that empirical studies become an important tool with which the workings of power may be revealed, and this is one of the presuppositions underlying my research. This cannot be achieved through theory alone. In accordance with the ethos of governmentality studies, my focus in the empirical parts of this study is the 'how' rather than the 'why' or 'what' of the events that I am depicting. This means that I do not try to resolve uncertainties; rather, I see vagueness and the ways that actors attempt to deal with it as worth studying in themselves. Central to this study are technologies of governing: different tools or methods used in governing, such as legal instruments, institutions, routines, roles, and the prioritization of human and material resources. The technologies of

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[218] Silbey and Sarat (n 187) 165.

[219] David M Trubek, 'Where the Action Is: Critical Legal Studies and Empiricism' (1984) 36 Stanford Law Review 581.

[220] David M Trubek and John Esser, ''Critical Empiricism' in American Legal Studies: Paradox, Program, or Pandora's Box?' (1989) 14 Law & Social Inquiry 3, 139–140.

[221] Valverde, *Law's Dream of a Common Knowledge* (n 211) 28.

government are not just an effect of governing; they constitute the institutions under investigation here.

These methodological considerations led me to focus my investigation on municipal documents and on case studies with interviews and observations. Michelle Brady shows how participation and observation can inspire new ways of studying governing rationalities. An investigation of governmentality may thus combine the study of public documents with the use of interviews and the collection of documents on the ground, in this way displaying the connections between political rationalities, associated technologies, and actual practices of governing. This contributes more nuance to the analysis by militating against the researcher's tendency towards polemical generalization, and in doing so it makes it possible to acknowledge that multiple rationalities can be in play at once.[222] By focusing on the work of officials and administrators on the ground, and on mundane and micro-governmental techniques and tools, this approach allows the researcher to be more open to the unexpected, incoherent, and shifting.[223]

2.3 The material and the execution of the study

2.3.1 Legislation, preparatory works, and national policy documents

Some of the legal sources upon which this study draws have already been mentioned: the Act on Care Choice Systems, which is at the centre of the study, and the Social Services Act, which is the most important piece of legislation for the regulation of elder care in Sweden. In Swedish legal research and practice, preparatory works to legal acts (bills and government inquiries) traditionally play a crucial role. Government inquiries, investigations carried out by an external investigator or investigating committee, are often the first step towards legal change. The inquiry lays the groundwork for the government bill that is submitted to parliament, which is usually based largely on what the inquiry has recommended. Both the government bill and the government inquiry are important sources for courts and public authorities to draw on in interpreting the law. The preparatory works may also reveal how a

[222] Brady (n 49) 13–14.

[223] Brady (n 49) 21.

question has been approached politically and what the government thinks about the matter, and in my study it is this role, rather than the interpretive role, that preparatory works play. The same role is played in this study by doctrinal sources, which I draw on to show how the law has been interpreted and to describe the discourses around certain issues.

Where permitted by law, public authorities can issue provisions and guidelines. Provisions are binding regulations, and the role of guidelines is to help relevant actors apply the legislation. I refer to and analyse certain provisions and guidelines, especially those from the National Board on Health and Welfare and the Swedish Competition Authority. The National Board on Health and Welfare has, together with the Swedish Association of Local Authorities and Regions (the organization for municipalities and regions), developed a list of indicators for measuring quality in elder care. The quality indicators have in turn been used by the Swedish Competition Authority in their guidelines on how municipalities should develop tender documents. These indicators help in showing how quality is understood in tender documents, something which will be expanded upon in chapter 5.

In this study, legislation, preparatory works, and national policy documents primarily serve to facilitate descriptions and analyses of the structure and framework within which the municipal administrations work. They also reveal the discourses of the legislature, government, and policy authorities and show how national policy has developed.

I have quoted passages from the preparatory works and official policy documents in the empirical chapters in this study. These passages have all been translated by me, as have the transcriptions of the interviews, which originally were conducted in Swedish.

2.3.2 Tenders and contracts

Central to my study are the tender documents issued by the municipalities as part of the administration of care choice systems and the contracts entered into by the municipalities and the private providers. The tender documents contain a description of the service and a list of requirements, of a more or less general character, which the applicant needs to meet for the municipality to approve the application. Besides quality requirements, the list of requirements for approving an application usually also includes financial, credibility, administrative, and other types of requirements. While the precise contents of tender documents and contracts differ among municipalities, it is often the case

that tenders specify the quality criteria and contracts set out the commercial agreement (termination, sanction, regulation of damages, etc.) with reference to the tender. I have also complemented this material with six monitoring reports from one of the municipalities.

Municipalities design these documents in different ways, but there are also similarities and patterns among them. I have, as I mentioned above, studied the available tender documents and contracts looking at different aspects, recounted below. Ulrika Winblad et al. performed a large qualitative and quantitative study of tender dossiers, in 2014, for the Swedish Association of Local Authorities and Regions,[224] and this research complements and supports my own study. I have read in depth the tender documents provided by the three municipalities under investigation here. However, in order to discern broader patterns in tender documents across all the municipalities, I have complemented this content analysis with a quantitative analysis of a wider range of tender documents. This analysis looked for the frequency and presence of certain quality indicators, of specific clauses that benefit the providers, and of certain structures in the commercial agreements (such as duration, possibility to terminate the contract, regulation of fines, etc.). In this quantitative analysis, I made use of the 106 documents openly available on the municipalities' websites, which were accessed during August 2018. These parallel qualitative and quantitative approaches allow for general patterns to be clearly presented, while insights gained through the qualitative research in particular makes possible the interpretation and deeper understanding of these patterns.[225]

2.3.3 Questionnaire

I also sent a short questionnaire to all 290 Swedish municipalities. This questionnaire included a set of questions for municipalities with care choice systems and a different, but related, set of questions for those without. The first question asked whether the municipality had an in-house provider for the delivery of municipal services. The second question regarded the governing of the in-house production of services, and asked whether the governing model used contracts (or contract-like) agreements. The third question asked which

[224] Ulrika Winblad and others, 'Kvalitetskrav i valfrihetssystem : en analys av förfrågningsunderlagen' (Swedish Association of Local Authorities and Regions 2014).

[225] Grønmo (n 185) 407.

governing model was instead used if the answer to the second question was 'no'.

When it came time to compile the study, I had received responses from 178 (or 61 per cent) of the municipalities.

2.3.4 Municipal cases

Case selection

My ambition to study the technicalities and strategies used by municipalities more closely led me to the choice of three municipalities for my case studies. I have named the municipalities City L, City M, and City S, in reference to their relative size (large, medium-sized, and small, respectively). The choice to anonymize the case studies was primarily motivated by a desire to ensure that the reader views the cases as examples rather than as studies of specific municipalities.

Alexander L George and Andrew Bennett define a 'case' as an instance of a class of events (a phenomenon of scientific interest) which 'the investigator chooses to study with the aim of developing theory (or "generic knowledge") regarding the causes of similarities or differences among instances (cases) of that class of events'.[226] A case study could provide an in-depth analysis of a single case, a comparison between a few cases, or a combination of in-depth analysis and comparative analysis. The three cases chosen in this study tell three partly different stories, which I compare with one another but also analyse separately.

A case allows a researcher to tell a story, which may be rich in detail. Responding to the criticism that case studies yield ungeneralizable conclusions, Flyvbjerg argues that they bring other values to the table. He states that 'researchers who have conducted intensive, in-depth case studies typically report that their preconceived views, assumptions, concepts, and hypotheses were wrong and that the case material has compelled them to revise their hypotheses on essential points'.[227] This statement fits well with my own experience: my study changed and developed significantly as soon as I started investigating my cases. It also fits well with the ambition of studying phenomena from the bottom up, an ambition that has informed this study. This

[226] Alexander L George and Andrew Bennett, *Case Studies and Theory Development in the Social Sciences* (MIT 2005) 18.

[227] Flyvbjerg (n 194) 235.

approach does, however, present a difficulty, in that it is a challenge to reproduce all of these nuances in their diversity. By letting the material 'speak', through a generous use of quotes and references, I have tried to be as transparent as possible about the choices made in this representation.

In the selection of cases, the researcher should have in mind the kinds of variation required by the research problem. The researcher should determine whether the different cases belong to the same or to different subclasses and should ask to what extent fruitful comparisons between them may be made.[228] Critical cases can be found looking for 'most likely' or 'least likely' cases, cases that are at either extreme regarding central aspects, and which are therefore more likely to showcase or refute hypotheses. In order to increase the likelihood of conclusions being generalizable, the researcher can choose a *paradigmatic* case, a case which sets an example which others follow.[229] The municipalities in my study were chosen because they have all had care choice systems for a relatively long period of time. That means that any problems described by municipal officials will not be 'teething troubles' but of a more fundamental character. They are therefore what the case study literature refers to as 'most likely cases'. City L and City M, and in certain respects also City S, are moreover paradigmatic cases in that they are municipalities which other municipalities look to when constructing their own care choice systems. Studying them will therefore allow for broader conclusions about these systems.

There is a great deal of variation among the Swedish municipalities when it comes to care choice systems, with the size of the municipality seeming to be one decisive factor in whether a municipality implements such a system. There is a strong correlation between the size of the municipality and the presence of a care choice system: the larger the municipality, the higher the probability that it will have a care choice system.[230] Private providers also tend to have somewhat larger market shares in larger municipalities.[231] Smaller municipalities, especially those far away from larger cities, also find it more difficult to establish functioning quasi-markets. Several smaller municipalities have introduced care choice systems but have been unable to get any private

[228] George and Bennett (n 226) 83.

[229] Flyvbjerg (n 194) 231–232.

[230] Jordahl and Öhrvall (n 100) 64.

[231] Blomqvist (n 25) 55.

companies to provide services in the municipality.[232] In seeking to understand how the care choice system works in practice, it is therefore important to look at the differences between municipalities of different sizes. As the names I have given to the municipalities indicates, the selection of cases was made with a view to studying the differences between municipalities that arise because of their differing sizes, and therefore also their differing levels of resources, the differing dimensions of their administrations, and their differing internal competences. They are thus to some degree to be seen as separate cases, and this enables me to showcase different types of situations which can arise because of different preconditions.

Interviews

Talking to interviewees provides insights into routines, processes, roles, relations, and other aspects of the everyday work of administering care choice systems which cannot be inferred from policy documents. It also provides descriptions of how the system works in practice, accounts of interviewees' own experiences of being actors within the system, and arguments and ideas regarding the functioning of the system. My view of the role of the interviewee is inspired by David M Engel, who describes his informants as 'sociologists of everyday life' and 'observers of their own worlds'.[233] As this suggests, interview subjects should be seen not as docile and passive but rather as active participants in the scholarly project.

The officials' views of the care choice systems are of course not static or objective descriptions of how these systems function. Their views are produced in the context of their work in a process of meaning creation, informed by a discourse which is based on their professional background (most of them are qualified social workers) as well as on the political context in which they operate, in which context they have a professional responsibility to make the care choice system function according to plan. Their expressed standpoints are constantly under development, formed by the context in which they work. Yet their insights provide a much fuller picture of how care choice systems work than could have been obtained simply from textual sources, and the sum of their testimonies provides the study with more than merely a series of individual experiences. My interviews were designed with the aim of

[232] Mikael Elinder and Henrik Jordahl, 'Kontrakt, Kostnader Och Kvalitet' in Henrik Jordahl (ed), *Välfärdstjänster i privat regi: framväxt och drivkrafter* (SNS förlag 2013) 116.

[233] David M Engel, 'Making Connections: Law and Society Researchers and Their Subjects' (1999) 33 Law and Society Review 5.

extracting a detailed and in-depth description of the everyday practices of governing care choice systems.

The process of designing the interview study and extracting conclusions from it took place in several steps: planning the interviews, formulating the questions, and conducting the interviews; transcribing, coding, and analysing the interviews with the help of memo-writing and clustering; and finally arranging the findings into the arguments and stories presented in this book.

I first planned the interviews using Steinar Kvale and Svend Brinkmann's method. The interviewees were selected because they have special knowledge of, and therefore expertise in, the research topic. The interviews concentrate more on facts and description than on personal experiences and opinions, although these are also present.[234] Before the interviews, I developed an interview guide including themes which, from my study of the secondary literature, legislation, preparatory works, policy documents, and some tenders and contracts, seemed to be central to my project. The questions were designed to be open ended, explorative, and semi-structured, in order to allow for the interviews to take different paths and be conversational in style.[235] The first four interviews served as a pilot study (one of them was later excluded because the interviewee worked in a municipality which I later chose not to include in this study).[236] After the pilot study, I transcribed the interviews and carried out an initial coding (which I discuss in more detail below). This pilot helped me to develop the interview guide significantly, and it kept developing as I conducted more interviews.

The themes contained in the interview guide were the following:

1. General background: the interviewee's role in the care choice system and their general opinion of how it functions.
2. Relationship with central government: the interviewee's experiences of the state's governing of the municipality, including the interpretation of existing legislation.

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[234] Steinar Kvale and Svend Brinkmann, *InterViews : Learning the Craft of Qualitative Research Interviewing* (Sage Publications 2009) 150–151.

[235] Kvale and Brinkmann (n 234) 130.

[236] I conducted the pilot study in collaboration with a doctoral student from Linköping University, Lisa Donlau. Donlau was studying business law and had her own set of questions (concerning insurance and the economic regulation of damages), but in the end the interviews came to focus largely on my questions, since hers were difficult to answer for the non-lawyers we interviewed.

3. The municipality's development of its care choice system: how the system has developed, which actors are involved, what gets prioritized.
4. Quality criteria in the tender documents: how criteria are developed, whether criteria have become stricter or less strict, how practices of quality assessment in the municipality have developed.
5. Monitoring and control: how monitoring is carried out, how routines have developed over time, what is measured in monitoring, how sanctions are used.
6. The relationship with the private providers: how communication is organized, what role legal instruments play in any communication, how the issue of 'trust' is viewed.

In later interviews, I was able to elicit more elaborate and relevant answers because I had a much better understanding of the practices in which the interviewees were engaging. I also discarded some questions along the way when I came to realize that they were difficult to understand and did not prompt any interesting responses. Certain questions were also discarded as the knowledge I gained along the way led to changes in my own interests.

In planning an interview study, there are also ethical issues to consider, the degree of confidentiality provided to the interviewees being central among these. The interviews were all conducted on the basis of informed consent. I started each interview by providing a brief background to the research project and telling the interviewee how the interviews were going to be used, and I told the interviewee that their responses would be anonymized. As Kvale and Brinkmann recommend, I did not go into detail about the research project and my specific research interests because I also wanted interviewees to respond spontaneously, not steered in any way by a desire to give me what I was looking for.[237] The interviewees were also invited to ask me questions. Most of the questions I received had to do with the publication of the results, with interviewees expressing an interest in the study. I found the interviewees to respond confidently and speak freely. They were not particularly interested in who I was or in the details of my research project, but with few exceptions they were very committed to their profession and eager to talk about it, which made for rich conversations. They also responded positively to the fact that this topic was the subject of academic research, as in most cases they had reflected a lot

[237] Kvale and Brinkmann (n 234) 128.

on care choice systems and their pros and cons. Their insiders' perspective was crucial for the development of my own perspective.

All in all, I interviewed 17 people, six from City L, five from City M, and six from City S. A few of the interviews were conducted in pairs or groups, and all were between one and two hours long. The interviewees were all working in roles relating to the purchase and/or monitoring of the services of private providers. They were of varying levels of seniority and varying levels of specialization. These factors depend on the size of the municipality and the total number of officials working on the care choice system. In City S, for example, I was able to interview all of the officials working on the care choice system. Three of them were social workers; the others were one procurement adviser, one nurse, and one physiotherapist. In City M, I interviewed two administrators with a social work background, one in a team leader position in elder care administration, two administrators in the monitoring team – one with a medical degree and the other a political scientist – and one social worker from the social work administration. In City L, I interviewed four administrators in central elder care administration, two of them working on the procurement side and two on monitoring. All four, two of whom were originally social workers and two of whom had mixed educational and professional backgrounds, held leading positions in the administration. The other two interviewees from City L were both trained social workers and were working in a local district within the municipality. The anonymization of the municipalities also has the effect of increasing the level of confidentiality provided to the interviewees. I am aware that the anonymization of the municipalities is not absolute – an informed and determined reader could find out the actual names of the municipalities that are hiding behind the fictitious ones. However, there is still a point to the anonymization, as it leads us to focus on the interviewees not as individuals speaking in their own names but as people performing in certain roles.

The officials' opinions on care choice systems differ widely, from highly critical to very positive. Given their differing opinions, it is interesting to note that the stories they tell about how the care choice systems work in practice are quite similar. They describe the same kinds of problems and issues, but they differ in how concerned they are about these problems, or in how they see these problems as relating to what they see as the advantages of the system. There are some differences in the responses that seem to be related to the differences in the size of the municipality, a point that is acknowledged in the study, but otherwise the answers often resemble each other. Where interviewees report different experiences, I have tried to account for this.

The interviewees relate stories and experiences from 'on the ground'. Inevitably, the officials' personal beliefs and perspectives, as well as tones and expressions, affect their responses and colour the resulting text. I have chosen to quote liberally from the interviews because this produces a richer, less distilled, narrative, but also because I want to let the officials' voices be heard, since their stories underlie my arguments, rather than the other way around. It might have worthwhile spending some time understanding the everyday routines of the administrations' offices by being present, taking field notes, and so on, but I was not able to conduct such an investigation and the potential value of such research only occurred to me later.

Apart from the interview sessions, I also observed two branch meetings: meetings between the private providers, municipal officials, and relevant local politicians. These take place a few times a year in City M and City L, although there is no such meeting in City S. They were half-day meetings, and, although there was space for the providers to ask questions and discuss issues, they mostly centred on the administrations providing information to the providers. I made the decision to attend these meetings because it seemed important to understand more about the interactions between the administrations and the providers, although I would probably have learned more by sitting in on a closed meeting between municipal officials and a single provider, or by accompanying officials on an inspection. However, it was not possible to pursue these possibilities. They could be a worthwhile basis for a follow-up study.

The processing of interview data

After conducting the interviews, I began the task of extracting analysis, arguments, and theory from them. In this, I was inspired by Kathy Charmaz's[238] detailed account of how to construct grounded theory from interview material, and in particular her instructions on coding, clustering, and memo-writing. I used the programme NVivo 12 to code and sort the transcribed interviews.

Coding is the process of systematically labelling what is found in the data and then sorting the results. The process of finding codes is also an analytical process in which the researcher defines what is happening in the data and begins to sort through the meanings found in it.[239] The coding needs to happen

[238] Kathy Charmaz, *Constructing Grounded Theory : A Practical Guide through Qualitative Analysis* (SAGE 2006).

[239] Charmaz (n 238) 46.

in stages in order to distil out of the data the most analytically relevant and common codes. Thus, in the first stage, after first having read through the transcriptions, I made an initial and very open list of possible codes – a process Charmaz terms *initial coding*.[240] The initial codes were then clustered into main themes and subthemes and transferred to NVivo, where, using the programme's coding system, I read and labelled all the interviews, line by line. In this way I ultimately produced six main themes and a total of 73 codes, which were displayed as a tree with many branches. Many lines in the transcript contained more than one code, but there were also lines which seemed less relevant to my research questions and did not contain any codes. Some codes were also later never used. It would thus have been possible to draw other labels, themes, and stories out of the material. My choices of code were guided by what I found to be relevant to my research questions, by the material itself, and by the secondary literature and theory. This second phase is what Charmaz calls *focused coding*, and is the process of synthesizing larger amounts of data according to what is found to be adequate in the initial coding process.[241]

During the transcription and coding, as I worked through the material and got more and more accustomed to its content, I wrote short memos and notes. These were central to my analysis of the material. Memo-writing is a constant, open, and informal process of noting down ideas and sketches for later analyses. It is a way of capturing the thoughts, comparisons, and connections that arise spontaneously along the way, crystallizing questions that occur to one while reading.[242] Another method which I used a great deal to develop my analysis is what Charmaz calls *clustering* – 'mind mapping', as it is also known. This refers to the construction of a non-linear and flexible image of what is appearing in the data, a visual representation of how topics fit together and relate to other phenomena.[243] Clustering is a good way of getting to grips with large amounts of information, with all the threads, thoughts, and arguments which make up a research project. I also had colleagues read some of the transcriptions in order to see whether they could identify alternative perspectives and stories in the interviews.

When I had completed the process of describing and coding the interviews, I was already quite far along in the first stage of analysis. At this point, I could

[240] Charmaz (n 238) 48.

[241] Charmaz (n 238) 57.

[242] Charmaz (n 238) 72–82.

[243] Charmaz (n 238) 86–87.

identify the main themes, narratives, and arguments that I would focus on in the study. As I wrote each empirical chapter, I read through my codes, chose the relevant ones, and, with the help of NVivo, found the lines and passages labelled with that code. I then performed a second analysis and comparison of all the passages labelled with each specific code. Working so closely with the material, tossing and turning it this way and that, getting to know it so deeply by sorting and re-sorting it, is the type of concentrated, active, and rigorous involvement with the material that Charmaz calls *acting upon* the data, a process that allows one to construct grounded theory.[244] This process was a sometimes tiresome but very creative way of making sense of the data.

From my methodological perspective, the aim of processing data is to discern describable logics in the complexity of the empirical material. Through my analysis of the interviews, narratives have emerged, certain of which I have chosen to highlight. These are merely some among several other possible narratives I could have chosen to emphasize. My choice of which narratives to highlight was a pragmatic one. Still, by starting from the practices, I have been able to display complexities and nuances in the story, and the reader can also draw their own conclusions from these. The mixed-methods approach, combining quantitative and qualitative elements of different kinds, has contributed a richness to the answers to my research questions. Through the use of interviews, I have been able to demonstrate how law is enacted, and how different legal tools can perform a multitude of functions in the everyday practices of public administration.

The interviews are central to the presentation and analysis of the empirical material in the following three chapters, although I will also draw upon other empirical material and legal sources as necessary to answer the different questions each chapter considers.

[244] Charmaz (n 238) 59.

3 The role of municipal administrations in the governing of care choice systems

3.1 Introduction

The central political aim of the Act on Care Choice Systems was to empower care users by giving them the ability to choose between a number of different providers. The introduction of choice and diversity was also thought to be a way of increasing the quality of services and boosting innovation by allowing new actors on to the scene.[245] Municipal tender documents relating to the care choice systems often express the same ambitions. Municipalities that choose to introduce care choice systems in the home care sector have the task of creating an environment of enhanced choice, diversity, and innovation. In order to aid the municipalities in this task, central government also provided financial support. When the Act on Care Choice Systems was introduced, the government made available 280 million SEK (about 30 million euros) for municipalities that were considering introducing a care choice system. This financial incentive was intended to encourage municipalities to introduce such systems and to facilitate the transition from the traditional model of public procurement.[246] The Swedish Competition Authority was at the same time given the task of supporting the municipalities in the implementation of care choice systems through the issuance of guidelines and the dissemination of other information. Even as they implement quasi-markets and try to encourage competition within the home care sector, the municipalities are still responsible for ensuring that high-quality home care is provided on an equal basis for all older people in need.

[245] Prop. 2008/09:29 Lag om valfrihetssystem (n 13) 54–55.

[246] Prop. 2008/09:29 Lag om valfrihetssystem (n 13) 136.

The aim of this first empirical chapter is to answer the first research question: how, and according to which rationalities, do the municipalities govern care choice systems in the provision of home care for older people in Sweden? How do these rationalities conflict, and what are the roles of public administration within them? In what follows, I will discuss the role of the municipal administrations in relation to the creation of markets, and in doing so I will analyse the governing logics behind these processes. I have broken down the main research question into the following questions, to be answered in this chapter.

- What kinds of tools are used to support market actors, i.e. the users and the private providers?
- What role do monitoring systems play in governing care choice systems?
- Which rationalities are central to the municipalities' governing of the private providers?

To answer these questions, I will draw upon secondary literature and will analyse a variety of other sources: legislation, preparatory works, national policy documents, tender documents, monitoring reports, and the results of the interviews. I discuss the strategies used by national authorities and municipalities to support users in making active choices and analyse the regulations and strategies used on national and local levels to support the providers.

This chapter will proceed as follows. First, I describe the national framework that is in place to support the introduction of care choice systems in the municipalities and provide a general outline of the municipal tender processes. Then, I discuss the formal and informal procedures used by the municipalities to support market actors: i.e. the users and the private providers. Lastly, I describe the monitoring systems set up to control the private providers within care choice systems. The chapter ends with an analysis of the results.

3.2 Organizing the care choice system

3.2.1 The framework for the implementation of care choice systems in a municipality

A NPM reform that was key to the development of care choice systems was the purchaser–provider split at the municipal level, introduced in most municipalities at the beginning of the 1990s. The purchaser–provider model means that the administration and its decision-making are separated from the delivery of services. The administration purchases the services from the provider – in-house or private – which is responsible for planning and delivering the service within a given budget. The purchase and the provision of services take place within a legal framework and are informed by general advice from the National Board on Health and Welfare and municipal goals and guidelines. The local politicians responsible for elder care issues assesses the purchased services in order to determine whether the goals – which are often of an abstract kind, focusing on values – and the budget and efficiency requirements have been met. This assessment focuses on whether certain defined objectives have been met and on whether the overarching goals set by politicians, which are transformed by officials and professional staff into certain procedures and practices, are being achieved. It also looks at budgetary issues and the efficiency of the administration and provision of services.

The procedure for setting up a care choice system is as follows. The municipalities develop a tender document, which sets out the requirements to be met by those applying to provide services under the care choice system. The tender document determines a quality threshold that an applicant must meet to be allowed to enter the system as a provider, but the document also plays a role in the monitoring of the providers within the system. The tender is announced on the designated national website,[247] and applications can either be submitted on an ongoing basis or within a specified time period. The municipal administration assesses whether the applicant meets the requirements by examining the application and, often, meeting with the provider.[248]

If the application is approved, the provider has the right to enter into a contract with the municipality. The terms of the contract, which refer back to the requirements listed in the tender document, are the same for all providers

[247] 'The Care Choice Website' https://www.valfrihetswebben.se/ accessed 11 May 2020.

[248] This is the procedure followed in the municipalities in my case studies.

within a particular care choice system. The contract regulates various aspects of the parties' relationship, including providing for the possibility of sanctions and termination of the contract. Compliance with the terms of this contract (and attached tender) is thereafter monitored by the municipality. As I will explain below, there may also be other ways that the municipal administration and the providers come into contact with one another, such as through training sessions and regular meetings. In these ways, the municipality is able to steer the delivery of services within the care choice system.

3.2.2 The influence of national authorities on the municipal tender process

The municipal regulation of care providers by means of contracts is constrained by legislation. In particular, the Act on Care Choice Systems refers to the EU regulations on public procurement. The preparatory works state that the criteria in the tender documents must accord with the proportionality principle, that is, be proportionate in relation to the objective pursued.[249] The criteria also have to be able to be monitored, and actually be monitored, by the procuring authority, as criteria that are too vague or broad may put off applicants.[250] If an applicant is not approved by the municipality, the applicant may request that the municipality re-examine the application to see whether the requirements have been met. The municipality may also be liable for damages if the applicant can prove in court that the law has been breached and that the applicant has been made worse off as a result. The preparatory works state that it is reasonable for a disadvantaged supplier to be given the opportunity to claim damages for costs on the grounds of a loss of trade. They stress, further, that the possibility of damages claims will have a salutary effect on the contracting authorities, who will be less likely, whether knowingly or negligently, to set standards that are too high or to evaluate applications too strictly.[251] But the preparatory works also suggest the following extensive and detailed list of criteria for the municipalities' tenders:[252]

- competence and experience requirements relating to staff, including training

[249] Prop. 2008/09:29 Lag om valfrihetssystem (n 13) 62.

[250] Prop. 2008/09:29 Lag om valfrihetssystem (n 13) 77.

[251] Prop. 2008/09:29 Lag om valfrihetssystem (n 13) 108.

[252] Prop. 2008/09:29 Lag om valfrihetssystem (n 13) 72.

- quality assurance and security requirements, i.e. complaints procedures and procedures for addressing problems with the service
- monitoring requirements, e.g. that the provider should make data and documentation available
- transparency requirements
- equality requirements, i.e. the obligation to accept all users and to allow users to switch providers
- any requirements relating to geographical limitations
- requirements regarding the provision of information about changes to the provider
- emergency preparedness requirements
- IT requirements
- requirements regarding the economic stability of the business
- requirements regarding access for people with disabilities
- quality requirements
- requirements regarding cooperation with other care actors
- opening hours

Besides guidance in the preparatory works, there are also national policy documents relating to the municipal tender process. Several agencies support municipalities and companies in the public procurement process from a competition law perspective, including the Swedish Competition Authority, the National Agency for Public Procurement, and the Swedish Agency for Economic and Regional Growth. It is worth noting that the chief responsibility for supporting the municipalities in introducing care choice systems was given to the national body responsible for competition (i.e. the Swedish Competition Authority) and not to the National Board on Health and Welfare, which is generally responsible for working with the municipalities on questions of welfare.

The National Agency for Public Procurement has developed several support documents for municipalities that have chosen to introduce care choice systems for home care. Among these documents is a detailed guide for the municipalities on how to develop an effective monitoring system. There is also a guide for the external suppliers on how to prepare an application, which

explains the legal requirements they must fulfil. The agency also provides a step-by-step guide for the municipalities on how to develop a tender dossier, with a list of special requirements to be fulfilled. This guide also includes information on how to set up and publicize an application procedure, how to write a contract, how to help users choose a provider, and how to dismantle a care choice system, if local politicians decide to do so.[253] This guide was originally created in 2014 by the Swedish Competition Authority.[254]

The guide points out that, while the municipalities can set out special requirements in their tender documents, they must, in doing so, take into account public procurement principles (discussed in section 1.4.3), such as the equal treatment of potential applicants and proportionality. At the same time, the contract has to ensure, through the conditions it specifies, that the supplier provides the services in such a way that the municipality does not breach its responsibilities under applicable laws and regulations. The guide states that the municipality cannot be discharged from liability for defects in the service provided by the supplier and that the municipality retains the ultimate responsibility in all cases. However, if there is an effective binding private law agreement with the supplier, the municipality may impose different types of measures on the supplier where there have been defects in the service provided. Other than the requirements listed here, and a series of recommendations about quality requirements, the guidelines do not include any specific directions regarding the form the municipal tender documents or contracts must take.[255]

Winblad et al. have studied the requirements listed in tender documents from municipalities with care choice systems for elder care. They show that many of the municipal tender documents employ similar wording and that this can to some extent be traced back to the national authorities' guidelines. Moreover, municipalities within the same geographical area often have very similar tender documents, suggesting that support networks of neighbouring municipalities might play a role in shaping the documents.[256] This picture was

[253] National Agency for Public Procurement, 'Guide for Municipalities', https://www.upphandlingsmyndigheten.se/upphandla/valfrihetssystem/valfrihetssystem-steg-for-steg/, accessed 30 August 2020, Kammarkollegiet, 'Utformande av förfrågningsunderlag för upphandling enligt LOV'.

[254] The responsibility for supporting the municipalities has now been assumed by the National Agency for Public Procurement, but the guidelines from 2014 are still in effect.

[255] Swedish Competition Authority, 'Guide on Specification of Criteria in Procuring Home Care 2014' http://www.konkurrensverket.se/globalassets/publikationer/vagledningar/vagledning_2014-2_kravspecifikation_hemtjanst.pdf accessed 30 August 2020.

[256] Winblad and others (n 224) 25.

also confirmed by the officials interviewed for my case studies, who referred to the influence of regional networks on the development of their tender documents.[257] Networks of municipalities, under the auspices of the Swedish Association of Local Authorities and Regions, are an important source of information, support, and guidance.[258] However, officials from City L, which has the care choice system with the most users, most providers, and largest administration, explained that, in terms of the development of care choice systems, they were 'ahead'[259] of other municipalities, which suggests that other municipalities might be looking towards City L for guidance instead. Studying the tender documents makes clear that many of the smaller municipalities near to City L have very similar tender documents to the one used by City L, which is more detailed and comprehensive in its requirements than the average municipal tender document.

3.2.3 Patterns in the municipalities' tenders and contracts

The empirical element of this study includes a qualitative and quantitative investigation of municipal tender documents. The quality criteria set out in the tender documents will be discussed in section 4.2.3, but here I discuss the general outline of these documents and the similarities and differences between them.

An analysis of the tender documents reveals that the recommendations and requirements set out in the legislation, the preparatory works, and the national policy documents seem to have been influential. However, there are also other patterns that can be discerned. Although the tender documents vary in length, specificity, and content, there are a number of similarities between them. The documents often begin by stating the political aim of the care choice system: in the case of City S, 'to increase the freedom of choice for the user through the choice of provider and to increase the focus on quality'.[260] The documents specify, in more or less detail, the kinds of services that are being put out to tender and detail how the administrative approval process works. The report written by Winblad et al. reveals that the tender documents on which the contracts are based differ greatly in length, with the longest being between 10,000 and 13,000 words (40–45 pages), and the shortest around 2,000–3,500

[257] M1, S6.

[258] S6, M5, L1, L2, L3.

[259] L1.

[260] City S Tender Document point 2.

words (under 10 pages). The authors also state that there is a strong correlation between document length and the number of requirements included in the document.[261] One general observation, which is in line with Winblad et al.'s findings, is that, although the tender documents always detail the services being sought and the approval process, there is a great deal of variation in the level of detail provided about the requirements. Some include sweeping, general statements, while others include specific details about how and when different aspects of the service should be fulfilled. This difference in detail is what accounts for the varying length of the tender documents. Documents may also sometimes be accompanied by a short or long list of appendices, which provide details about the municipality's policies and procedures, giving further information about the standards expected of the private provider.

The contracts regulate levels of compensation, often in relation to different factors, such as travel time between users, administration, emergency situations, cases in which the user is not at home, etc. Some municipalities have more standardized models built on levels of care needs, but most require carers to log their worked hours, often through the use of a digitalized check-in system that registers the amount of time the carer is present in the user's home. The regulation of compensation varies between different municipalities and is often complex in structure.

Financial criteria are central to the tender documents. The Act on Care Choice requires the municipalities to exclude applicants who are bankrupt, whose affairs are being administered by a court, who have been convicted of a criminal offence affecting their professional standing, who have committed serious professional misconduct, or who have not paid social security contributions or taxes. The tender documents refer to these requirements and often supplement them. For instance, City L's tender document stipulates that if a representative of the provider has been convicted of a serious crime this may prevent the applicant from being approved even if the crime did not relate to the applicant's professional practice.[262] Further, the City L administration takes into account any procurement agreements between the provider and the city in the three years preceding the date of the application and rejects applicants who have provided services with 'documented defects that are not insignificant and that have not been corrected in a manner approved by the city'.[263] Municipal tender documents moreover include requirements, of

[261] Winblad and others (n 224) 12–14.

[262] City L Tender Document 1.3.3.

[263] City L Tender Document 1.3.6.

varying levels of detail, relating to the applicant's financial stability and strength, the credibility of the company description, and the business competence of the applicant. Some municipalities require a credit rating check.[264]

In sum, there are differences between the municipalities' tender documents and contracts, but there are also important similarities. There are no detailed regulations in the legislation or in documents from national agencies that determine how elder care should be organized or how private providers should be governed; the power to determine how welfare provision is governed therefore formally rests with the municipalities. The differences that exist between the municipalities in this regard illustrate the importance of local policy development within the framework set by national legislation, and care choice systems in particular reveal tendencies of decentralization in practices. Yet, in the ways the municipalities have constructed care choice systems, the similarities are still more apparent than the differences, and the expectations set out in the guidelines from the national authorities seem to have exerted a great deal of influence.

3.3 Promoting user choice

3.3.1 Providing information to users

Previous research has called into question the extent to which the ability to choose service providers truly equates to self-determination for the user. Research shows that older people in general are pleased to be able to have a choice and increased influence over their care but that they find it more important to be able to choose which services are to be provided, and to have them adapted to their individual needs, than to choose among providers.[265] Older care recipients welcome the ability to make a choice, but few people actually make an active choice. Only about five per cent of care users change providers, and of those about 20 per cent only change provider because the company that was providing their care has gone out of business.[266]

[264] E.g. City M Tender Document 4.1.

[265] Trydegård (n 81) 149; Andersson (n 17) 322.

[266] Erlandsson and others (n 23) 68.

The legal sources and national policy documents pay a great deal of attention to this low level of active choice by older users and suggest that it may be connected to a lack of information about the choices on offer. The problem of access to information was already discussed in the preparatory works to the Act on Care Choice Systems, and this issue was also followed up on in the official inquiry into the Act on Care Choice Systems in 2014. This discussion highlights the risk that limited access to information could lead to 'market failures',[267] and expresses an ambition to find a solution to this problem. The preparatory works state that one precondition of the kinds of quality improvements that care choice systems aim to bring about is a functioning demand side, where the user has a real ability to choose provider through a rational choice based on the individual's own needs and preferences. This idea is the basis of the public responsibility to provide easily accessible information that enables users to compare the different services on offer. The preparatory works further advocate the use of 'soft paternalism' to help individuals make decisions in complex choice situations while at the same time allowing for freedom of choice. This reasoning underlies the responsibility of both national and municipal authorities to inform individuals and to promote individual choice. According to the preparatory works, the provision of consumer information, usually taken care of through the regular marketing activities of market actors, also needs to be the responsibility of the public authorities operating markets for care services. The argument behind this requirement is that, because care is an essential service and the choice of care provider can have significant consequences for the individual, normal marketing will not suffice and must be complemented with more 'factual' information from a neutral source.[268]

The responsibility that the preparatory works place on the public authorities to complement providers' regular marketing with systems for the dissemination and provision of information might, the preparatory works state, come into conflict with the requirements for neutrality and proportionality set out in EU public procurement legislation. Accordingly, the preparatory works conclude that the municipality must not rank the services of the different providers

[267] Market failure is a concept derived from neo-classical economics. It is said to occur when the preconditions for a well-functioning market are missing, that is, when the allocation of resources achieved is not efficient. Matias Vernengo, Esteban P Caldentey and Barkley J Rosser (eds), *The New Palgrave Dictionary of Economics* (Palgrave Macmillan UK 2020) 8247.

[268] Prop. 2008/09:29 Lag om valfrihetssystem (n 13) 90–92.

within a care choice system.[269] Here there is a conflict between the ambition to give relevant information to 'care consumers' and the constraints that EU public procurement regulations place on the type and quality of information provided by public authorities.

A study by the Swedish Competition Authority on the implementation of care choice systems in 10 selected municipalities has identified that a lack of adequate information from municipalities makes it difficult for users to choose among providers. The users reported a lack of relevant, factual, and easily understandable information about the providers and the quality of the services on offer.[270] Several other studies have shown that it is difficult for older users and their relatives to understand the differences between providers, especially in municipalities where there are many suppliers to choose from. There is a lack of information about the results of quality monitoring, complaints, and staff competence.[271] Another noteworthy study, conducted by Anna Dunér, found that only 71 per cent of older care recipients in a municipality with a care choice system were aware of their ability to choose among providers. On the other hand, 28 per cent of care recipients in a municipality without a care choice system believed that they were able to choose among providers when in fact they were not.[272] In other words, care choice systems in elder care can be difficult for users to understand.

3.3.2 Open Comparisons and the Elder Guide

In order to improve access to information, the national authorities implemented a national benchmarking system based on a user survey and a few concrete measurements. The 'Open Comparisons' project was developed from 2007 to 2009 by the Swedish Ministry of Health and Social Affairs, together with the National Board on Health and Welfare and the Swedish Association of Local Authorities and Regions. The goal of the project was to develop means of comparison which could support monitoring and decision-making. The original ambition was to create a comparison tool that could be used by public authorities, but it has increasingly been made available through interactive web

[269] Prop. 2008/09:29 Lag om valfrihetssystem (n 13) 97–99.

[270] Swedish Competition Authority (n 16) 99.

[271] Erlandsson and others (n 23) 68; Moberg (n 55) 29.

[272] Anna Dunér, 'Självbestämmande Och Kontroll i Den Svenska Hemtjänsten: Retorik Eller Praktik?' in Håkan Jönson and Marta Szebehely (eds), *Äldreomsorger i Sverige : Lokala variationer och generella trender* (Gleerup 2018) 95.

applications targeted at users.[273] Open Comparisons thus aims to support citizens and users to make free and informed choices within care choice systems, stimulate developments in quality, and make the use of taxpayer money more transparent.[274]

The National Board on Health and Welfare's work on the 'Open Comparisons' project since 2007 has involved conducting surveys of users, providers, and municipal administrations. All of their surveys are based on the quality indicators which are used for benchmarking. Indicators are supposed to capture and reflect the quality and effectiveness of good care, and are based on a number of criteria. The agency also publishes these indicators in an 'indicator library', to which executives and providers may refer in their self-monitoring activities.[275] The agency has developed a tool to provide information to older people and their relatives on the quality of care offered by different service providers in order to enable them to make informed choices. This tool is the Elder Guide – a quality index based on national annual surveys of elder care users. The national user survey is sent out to care users, who are supposed to respond themselves. The results are published each year on the agency's 'Open Comparisons' website,[276] from which users and relatives can get comprehensive information about different providers. Besides the user survey, the guide is based on other information from municipalities and providers. The guide includes the following information about each service:

- overall user satisfaction
- user satisfaction with the service provided by the staff
- user satisfaction with the amount of time staff have to provide the service

[273] The Government Offices, 'Öppna jämförelser inom hälso- och sjukvården – handlingsplan för 2014-2015' available at https://www.regeringen.se/49bbd2/contentassets/86a015c3d8f3475e9aefb3770ab8e4e9/oppna-jamforelser-inom-halso--och-sjukvarden---handlingsplan-for-2014-2015-s2014.008 accessed 30 August 2020.

[274] Prop. 2008/09:29 Lag om valfrihetssystem (n 13) 35.

[275] National Board on Health and Welfare, 'Indicators' http://www.socialstyrelsen.se/indikatorer accessed 11 May 2020.

[276] National Board on Health and Welfare, 'Open Comparisons: The Elderguide' http://oppnajamforelser.socialstyrelsen.se/aldreguiden accessed 11 May 2020.

- how much influence users feel they have over when services are provided
- how much influence users feel they have over how services are provided
- the percentage of users with a responsible point of contact among staff
- the percentage of users with a care implementation plan
- languages spoken by provider staff.

Most of this data is based on the national user survey, an instrument which has been discussed in the literature. Several studies have pointed to a number of the survey's limitations. The report of the 2014 inquiry details some of these. First of all, there is a risk that the survey results will paint a misleadingly positive picture, since older users may feel uncomfortable about criticizing and potentially offending staff to whom they feel loyal. Second, the surveys are often answered not by the user but by staff or by relatives. Third, there is a low response rate, especially among older users with the most complex care needs. Vision and hearing impairments, as well as the level of competence in the Swedish language, also affect the response rate.[277] According to Marita Szebehely and Gun-Britt Trydegård, only about 30 per cent of home care users answer the survey themselves, and response rates have been decreasing over time.[278] Further, as Håkan Jönson and Annika Taghizadeh Larsson point out, the structure of the Elder Guide makes it hard for the users actually to understand the information about satisfaction rates and staff ratios, and they question whether differences in survey results can be attributed to actual differences in quality or whether they are, rather, a reflection of differences between user groups.[279] In their interviews with elder care users, they also detect an explicit loyalty between users and staff, which increases the probability that the users will evaluate their services positively, regardless of their actual level of satisfaction with the service.[280]

Another limitation of the user surveys was revealed in the interviews in this study. Small businesses, which are often perceived by municipal officials as

[277] SOU 2014:2 Framtidens valfrihetssystem – i socialtjänsten (n 15) 52.

[278] Szebehely and Trydegård (n 2) 33.

[279] Håkan Jönson and Annika Taghizadeh Larsson, 'Skilda Upplevelser Och Möjlighetshorisonter Bland Äldre Brukare Av Äldreomsorg Och LSS-Insatser' in Håkan Jönson and Marta Szebehely (eds), *Äldreomsorger i Sverige : Lokala variationer och generella trender* (Gleerup 2018) 77.

[280] Jönson and Taghizadeh Larsson (n 279) 83.

being less serious providers, often receive positive ratings in user surveys. Officials from two of the three municipalities stated that several of the providers that had had their contracts with the municipality terminated were in fact providers that received very high user satisfaction ratings in the surveys. This might be explained by the fact that these providers may have breached requirements and regulations in ways that ultimately benefited older users. For example, the provider may have employed a relative of an older user as a care worker despite this not being permitted, or the provider may have exaggerated the needs of the older user in order to secure more resources for them. In these cases, users may be very satisfied, or at least may have an incentive to tell the municipality that they are.[281] This seems to be another problem with the methods of data collection mentioned above.

Linda Moberg has shown that, despite these proven limitations, a significant weight is generally attached to user satisfaction in public assessments of the quality of services.[282] This finding is corroborated by my research. Municipalities are aware of the shortcomings of the Elder Guide, yet politicians and providers greatly value the results. In my fieldwork, I found that the national user survey was a frequent subject of discussion. It came up at both of the meetings between the municipalities and the providers that I attended. In City M, the results of the survey were presented and discussed, while at the same time the potential problems with the validity of the results were brought to people's attention. The administration stated that political leaders valued the results highly in spite of these problems. The providers were worried about the shortcomings, and found it hard to interpret the survey results.[283] A similar discussion took place in the City L branch meeting. Officials from City L said that the municipality was increasingly relying on its own user survey and on individual evaluations carried out by the municipal care managers in meetings with care users.[284]

3.3.3 Municipal structures for promoting users' choices and voices

The municipalities have an obligation under the Act on Care Choice Systems to provide information to individual users about all providers which have contracts with the municipality within the care choice system. According to

[281] M1, M3, L1.

[282] Moberg (n 55) 36.

[283] City M Branch Meeting.

[284] City L Branch Meeting.

the act, this information should be *factual*, *relevant*, *easily understandable*, and *easily accessible*, and should facilitate *comparisons* among services on offer.[285] This obligation is supposed to be discharged through the provision of information on websites, in leaflets, and through other such sources.[286]

An important figure in the communication between the municipality and the user is the care manager, the administrator who is in direct contact with the user. According to the preparatory works, the role that the care manager is supposed to have in providing information to the user implies 'encouraging and supporting' the individual to make an active choice in order to meet the individual need. At the same time, the preparatory works indicate that the care manager must be 'competition neutral' in relation to all providers, including the municipal provider.[287] The report of the public inquiry of 2014 states that here the balance seems to have leaned more in the direction of competition neutrality; out of fear of being seen to be biased, care managers have interpreted their responsibilities in a way that does not allow them to be very supportive of users making choices. On the other hand, the inquiry also found municipalities in which the care manager was expected to act as a consumer adviser, taking an active role in the choice of the individual.[288] The inquiry proposed that the National Board on Health and Welfare should be given the task of developing a guide to improve the dissemination of information within the care choice systems, as well as a guide for care managers about how to inform users about provider choices.[289] However, since the inquiry was never turned into a government bill, these guides were never produced.[290]

This issue was also brought up by my interviewees. Several of the officials said that their understanding was that they were not permitted to recommend any provider and could only inform users about the choices on offer.[291] One official, who was responsible for care managers, said the managers often found that they did not have the necessary means for providing information and that

[285] Ch. 9 § 1 The Act on Care Choice Systems.

[286] Prop. 2008/09:29 Lag om valfrihetssystem (n 13) 96.

[287] Prop. 2008/09:29 Lag om valfrihetssystem (n 13) 96.

[288] SOU 2014:2 Framtidens valfrihetssystem – i socialtjänsten (n 15) 136.

[289] SOU 2014:2 Framtidens valfrihetssystem – i socialtjänsten (n 15) 142.

[290] This was also confirmed in an email exchange with the National Board on Health and Welfare. Ann-Christin Granberg, 'Communication with National Board on Health and Welfare (2 May 2019).

[291] M2.

this led them to provide very little information, for fear of saying too much.[292] Another official described situations in which care managers knew that certain suppliers provided a low-quality service, such that there was a conflict between the task of providing impartial information and that of helping the users make choices.[293]

The municipalities also have other systems for providing information to users. City L has developed its own user surveys to complement the Elder Guide, mostly as a result of dissatisfaction with the national user survey. The results of City L's own surveys, together with monitoring results, are published on the municipal website, with the aim being to give users more information about the companies.[294] A brief overview of material from other municipalities shows that this is not a common procedure, but there are some other municipalities which provide this kind of information. City M created specific roles for individuals whose job is to guide older users in making their choices. These administrators are called 'elder pilots', and they are there to support older users who are hesitant about their choices. The 'elder pilots' are also responsible for improving and keeping up to date the information on the municipality's care choice webpage.[295]

One of the officials pointed out that changing providers was not the only means by which users let their opinions be known and that voice and dialogue were also important means in this regard. She said: 'the goal should not be that, as soon as you are a little dissatisfied or something, you should change provider, but it must be that one has a dialogue about what is not working out first'.[296] The providers are also required to have an internal procedure for receiving and handling complaints; this is stated in the regulations on quality management, and it is something the municipalities should monitor.[297] These procedures are a way of ensuring that user 'voice' exists, alongside 'exit', as an alternative way for users to help improve the service provided, in dialogue with the provider. The municipality can also support this dialogue between the user and the provider in certain ways.[298]

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[292] L4.

[293] L5.

[294] L1.

[295] M2.

[296] L6.

[297] L2.

[298] M2.

3.4 The conditions for private providers

3.4.1 Diversity of providers as a central goal

The government's motives for introducing care choice systems were several. My empirical research indicates that the municipalities consider the goal of increasing the diversity of service providers to be the most important reason for introducing a care choice system and that, in order to achieve this goal, municipalities believe they must foster an environment within which providers can flourish. Increased diversity means more providers for the users to choose from, and officials believe this will also lead to innovation and improvements in quality.[299] When asked to describe the positive aspects of care choice systems, officials also often mentioned the increase in users' levels of self-determination. A survey by Mats Brandt has indicated that a majority of municipal officials are of the impression that care choice systems have increased users' level of self-determination.[300]

The central political aim behind the introduction of a care choice system in City M was, according to one leading municipal official, to make it possible for small and medium-sized companies to establish in the sector and thereby to increase the diversity of providers. According to the officials, this has been successful, especially because of the entrance into the market of companies with staff that speak other languages and/or have other cultural understandings and therefore can match better with users.[301] Official L3, from City L, while discussing the different situations in the different districts in the city, vividly described the point of increasing the diversity of providers:

> After all, it is the district that knows which kinds of providers they need, what kind of added value they want. It really differs. [City L] is very – it really contains a lot. If you think about it, the residents in [poor suburb], for example, they need one kind of support from the municipal or private providers based there, often linked to culture, knowledge about culture, knowledge of food, of language, and all of that. If you go to [rich inner-city neighbourhood], you don't have that wish at all … You don't have that; you have other needs for providers to deal with. You might need to meet an older woman who lives in a large, high-

[299] S5, M5, L2, L3, L6.

[300] Brandt (n 32) 98.

[301] M5.

> end flat and perhaps is used to being addressed with titles.[302] … This diversity is needed. There are some companies that are perfect for [rich inner-city neighbourhood]. Another company's staff would hit the roof because of ideological – … Yeah, so you might think it's embarrassing, and why should that lady be allowed to say such things? But you must be able to handle this, in the management of the operations. So that's why it is difficult. I think that [rich inner-city neighbourhood] needs their home care companies and [poor suburb] must have others.[303]

The political ambition of supporting the creation of a market and fostering small businesses encourages the municipalities to create good conditions for private providers. However, they are not always successful in this endeavour. City S, for instance, have only one private provider, and, from the perspective of what is required to create a functioning market, this is seen as a problem. The administration is considering different ways in which the barriers to entry could be lowered or more providers could be attracted into the municipality's care choice system through marketing initiatives.[304] In general, the problem seems to have to do with the thresholds for getting into the market. Businesses that start from nothing have a hard time becoming profitable, and the companies which are already established, for example because they operate a residential home and provide services on the basis of normal public procurement, have a clear advantage.[305] I will return to these issues in section 4.5.2.

3.4.2 The structural and organizational conditions for private providers

Municipal tender documents set out the criteria and preconditions that the private providers in the care choice system must meet. The documents often provide for different ways in which the applying providers can choose to organize their activities in the municipality. These choices allow the private

[302] In the translation, I have removed the examples given (*fru*, *prästinna*, and *överstinna*) as there are no suitable English equivalents. These are titles for a woman based on her husband's title, and their use was once common among the upper classes. In Swedish: *Alltså du har inte det, då har du andra behov, kanske, som spelar med utförarna, där man kanske behöver bemöta en äldre kvinna som bor i en jättestor våning och där man är van att kanske bli tilltalad med fru, eller prästinnan, eller överstinnan eller… .*

[303] L3.

[304] S5.

[305] S2.

providers to design their operations with regards to capacity, geography, the provision of additional services, and, in some municipalities, the hiring of the relatives of care users as staff.

Table 1 Beneficial preconditions in the tender documents

PRECONDITION	N = 107	
	NR	%
Capacity limit	99	93
Geographical limitation	81	76
Additional services	100	93
Hiring relatives	76	71

If a provider has a capacity limit, it may refuse to take on new users if doing so would lead it to breach this limit. The amount of home care required within a municipality can be hard to forecast, since new users can enter the system at any time and the needs of users already in the system may unexpectedly become more serious or complex. Flexibility is thus important if home care services are to be able to meet the needs of older citizens, but this need for flexibility may also be seen as challenging and risky for businesses that need to be able to plan their activities in advance. The way care choice systems are organized takes into account this potential issue. As table 1 shows, more than 90 per cent of municipalities allow providers to set a capacity limit on their services. This means that they are allowed to limit the number of users they can take on – or, more commonly, the number of hours they can work. According to the contracts, capacity limits can usually be increased easily. The limit allows the providers to say 'no' to new users when the capacity limit has been met, but the ambition, often stated in the tender documents, is to allow the providers to grow at their own pace and to adjust their staffing levels and capacity levels in a sustainable way. The flexibility needed in the system is left to the municipal provider to supply.

Another aspect of many tender documents is the possibility for the providers to limit their activities geographically. Swedish municipalities differ greatly in size. Some municipalities are large, with fewer densely populated areas and citizens who live very remotely from the urban centre; others have large populations within a smaller geographical area. The provision of home care in more remote areas may be more costly because of travel expenses and the extra demand on staff time this implies. As table 1 shows, 75 per cent of municipalities allow providers to limit their activities to certain geographical areas within the municipality. Municipalities where geographical factors imply higher travel costs and where there are fewer users, and thus where it might be

harder for a care business to turn a profit, often allow for such geographical limitations. The private providers can, in this way, choose areas which are more profitable. Municipalities sometimes also combine the possibility of geographical limitations with schemes that provide extra compensation for providers that serve less densely populated areas or areas further from the urban centre of the municipality, although these schemes are also present in some of the municipalities which do not allow the providers to limit their scope geographically. These organizational structures have been created to ensure the profitability of the providers' businesses. The upshot is that there may be situations in which users in one part of a municipality have many providers to choose from and users elsewhere have far fewer or only one.[306]

Another regulation which benefits private providers is the right for private providers to offer 'additional services' to elder care users in addition to the service financed by the municipality. The individual right to home care is granted by a municipal decision based on a needs assessment, and the right is fairly strictly defined. It is usually restricted in terms of how long and how often care is to be provided and with regard to the kinds of tasks that the older person is to be helped with. But under the Act on Care Choice Systems, municipalities may allow the external providers that provide the services to offer additional services to their users. They may offer to extend the amount of time care is provided or offer extra services which are not included in the municipal decision. These services are paid for privately by the user.[307] The kinds of services usually offered are housework, such as more thorough cleaning, laundry services, window cleaning, and gardening. The preparatory works state that the point of allowing providers to offer additional services is to help them be profitable.[308] In my study, 100 of the 108 municipalities examined, 93 per cent, mention the possibility for private providers to offer additional services. In most cases, municipalities simply state that the providers are allowed to offer these services but that they are not allowed to charge privately for the services that the municipality has decided an individual is eligible to receive on the basis of their needs assessment. There are no

[306] Geographical restrictions may, however, also be imposed, as in City L, in order to increase efficiency. In City L, the long distances between different parts of the municipality make it irrational for providers to have only a few users in more remote parts of the city. The city therefore requires that at least one of the provider's facilities be located so that staff going to and from a user can reach the facility by public transportation (including walking) within 45 minutes. City L tender document 1.4.1.

[307] With respect to the additional services, the users are consumers under the terms of the Consumer Services Act, Prop. 2008/09:29 Lag om valfrihetssystem (n 15) 123.

[308] Prop. 2008/09:29 Lag om valfrihetssystem (n 13) 123.

statistics showing how many of the private companies offer additional services, but a study by Szebehely and Trydegård has found that most mention additional services on their websites.[309]

When the government bill for the Act on Care Choice Systems was sent out to the municipalities for consultation, a large number expressed discontent over the fact that the municipalities themselves were not going to be allowed to offer additional services. The municipality's own care organization does not have the option of providing additional services, except for some simple handyman services.[310] This means that the users who choose the municipal provider cannot top up their services with private money, and thus that municipal providers may become less attractive options for those who can afford and want to top up their services. However, the preparatory works state that these kinds of services should be seen as outside of the scope of public provision and that it is not in the general interest to allow municipalities to deliver such services. They furthermore state that allowing municipalities to provide additional services might have negative consequences for small businesses, which care choice systems are designed to encourage. Despite the municipalities' criticisms, the proposal was kept unchanged in the bill.[311] The ability of private providers to offer additional services adds a new layer to the Swedish home care system: a private market for services on top of the publicly funded system.

According to the quality regulations in the Social Services Act, home care should be performed by professional care workers. The act mentions, among other things, staff competence as a measure of quality. Although it was common in the 1970s for relatives to be employed as carers, this became less common in the years that followed.[312] However, the care choice systems reforms have partly reversed this trend.[313] Most, although not all, municipalities allow for private providers to hire relatives of care users as staff. This is an option which may seem to benefit the user, because they will already know and be comfortable with their carer, and especially if they have a relative in need of an income. If a provider offers this possibility this may therefore

[309] Szebehely and Trydegård (n 2) 38.

[310] According to the law (2006:492) on municipal authority to provide services to senior citizens, Prop. 2008/09:29 Lag om valfrihetssystem (n 15) 123.

[311] Prop. 2008/09:29 Lag om valfrihetssystem (n 13) 127.

[312] Ann-Britt M Sand, *Anhöriga som kombinerar förvärvsarbete och anhörigomsorg* (Nationellt kompetenscentrum Anhöriga 2010) 42–43.

[313] Helene Brodin, 'Hemmadöttrarnas Återkomst?' (2015) 50–51 Fronesis.

make it more likely that users will choose that provider. Cities M and L, which both have a great deal of experience of administering care choice systems, have decided to forbid private providers from hiring staff who are the family members of the user they are supposed to care for, as well as from hiring staff to care solely for a single user. According to these administrations, these forms of employment often result in unprofessional care and sometimes even involve fraud.[314] In the tender documents, however, only 31 out of 108 municipalities (29 per cent) do not allow providers to hire relatives or to hire staff to work solely with one user. Other municipalities allow the use of this form of employment only in certain cases, such as when the provider cannot otherwise find a staff member who speaks the user's language. A majority of municipalities, however, do not place any restrictions on this form of employment at all. All these factors mean that there are, in many municipalities, favourable conditions for private providers entering the care choice system. These reduce the risk the private providers have to bear.

3.4.3 Municipalities' informal support structures for private providers

The administrations have a general responsibility to create favourable conditions for care businesses. This was clear in the interviewees' general attitudes, whether critical or uncritical, to their professional roles, and in the different ways in which they described dealing with the providers in their areas. As one leading official in City S put it: 'the political ambition is to draw more providers into the market and we really pay attention to that'.[315] One of the officials from City M pointed out that the local regulation of the care choice system 'in some ways seems to have been designed less for the elder care users and more for the facilitation of starting businesses in the sector'. One example of this is the aforementioned ability of the providers to decide which parts of the city they want to operate in, thereby allowing providers not to serve less densely populated areas or areas with more complex social problems and leaving older persons in these areas with fewer options than those in other parts of the city. The official had the following view on the way the municipality's system was organized:

> The whole [creation of the system] has not been done for the sake of the users but for the providers. And our elder board also had as a goal to stimulate small

[314] M1, L6.

[315] S2.

> entrepreneurs, and doesn't that seem strange: that a board for elderly matters should aim at stimulating entrepreneurship![316]

In cities M and L, both users and private providers were involved and had influence over the process of reforming tender documents and qualification criteria.[317] The private providers, in other words, have the ability to affect the organization of care choice systems directly.

Besides the formal criteria in the tenders, there are also more informal ways in which the administrations create favourable conditions for the private providers. Because local politicians have instructed their administrations to promote the creation of new care companies, an important task for municipal officials is creating favourable conditions for small business owners. What form do these informal measures take? My interviewees pointed to the approval process as an important factor, not only in making sure that the providers meet the requirements from the start but also in establishing a good relationship, which is important if the municipality is to be able to govern through dialogue. In this process, the conflict between the municipality's different missions is clear: it is supposed both to support the providers and to control and monitor them. From the start, the aim is to create a climate of trust – but at the same time to let the providers know that they can be scrutinized.[318]

In City S, there are structures in place to ensure that new providers are, first of all, introduced to and educated about various municipal policies and procedures. The administration then helps the provider set up internal structures, such as a functioning quality development system. Even when the provider is up and running, the administration seek, to be available for services when needed.[319] One of the administrators commented on this structure by proudly stating: 'I'd say we are pretty generous [to the private providers]!'[320]

City M has developed an approval structure for new providers that involves a 'training package' for all approved suppliers. The training provides an introduction to what home care is, as defined by legislation, national policy, and local policy guidelines, in order to ensure the providers will act in accordance with the regulations. The package includes training for staff about

[316] M1.

[317] M1, M5, L1, L6.

[318] M5.

[319] S4, S6.

[320] S5.

the 'individual- centred care'[321] model. The providers are also given an introduction to how the municipality is structured and, in order to foster collaboration and ensure effective holistic support, an introduction to how to navigate other kinds of social care and healthcare services that might be relevant to the older persons for whom they will be caring. They are furthermore made aware of the digital and administrative management systems used by the municipality. There is also a team of municipal administrators that works together with different providers and that serves as the provider's point of contact in the municipality.[322]

Two of the officials from City M, generally seen by the interviewees as a 'business-friendly' municipality, used the concept of 'elder care school'[323] to describe the service provided by the municipality to the private businesses. Some of the officials said they sometimes found this form of governing too generous to business. One said that a balance had been sought between helping too much and helping the providers, especially smaller companies, function well. She said it sometimes seemed as though the municipality was 'creating the company together [with the entrepreneur]!'[324] These statements are remarkable in how far-reaching they show the municipalities' support for private providers to be. Providers are not kept at arm's length; they are offered a great deal of assistance and are supported from early on in the process.

In City L, approved providers are also given an information 'tool box' when entering the system, with details of different technical systems and a network of contacts within the administration. There are also regular information meetings and training sessions, as well as individual meetings between the administration and the provider's management.[325] The aim of establishing a good dialogue with the private providers is also the reason behind the arrangement of quarterly branch meetings. Besides these meetings, officials described 'an open line' between the providers and the administration: providers are welcome to call and ask questions or seek support.[326]

Central to the way City L supports the private providers are the specially appointed 'observers', who have the task of visiting all providers over a few

[321] A systematic way of working with social care services developed by the National Board on Health and Welfare.

[322] M5.

[323] M1, M5.

[324] M5.

[325] L6.

[326] L2.

weeks every other year and then providing constructive feedback on how the providers can improve their operations. This is in parallel with the system of inspections and monitoring, which will be described further below. After having agreed a suitable time with the provider, the observer spends around two weeks in the business, witnessing the day-to-day operations. The observer takes notes on situations and structures according to a protocol. Afterwards, there is a feedback session with the management where strengths and areas for development are discussed. The system of 'observers' is part of the monitoring structure, and the explicit aim is to use monitoring as a tool to educate and support providers in their work.[327] However, it is not the observer's role to ensure that the contract clauses are being met; instead, the dialogue is constructive, and the observer provides recommendations and advice. The observer is described as a kind of 'coach', and the observer system as 'a supportive function in the development of services'.[328] The municipality thus effectively provides the private providers with quality consultants. The observers do not issue any action plans or use hard measures, and the basis for their interventions is a 'soft' dialogue, where the provider and the observer together try to analyse why certain problems exist in the operation and what could be done about them. If an observer is alarmed by what they have seen, they can bring it to the attention of the inspectors, who can then undertake a more thorough monitoring process, but the purpose of the observation is to prompt internal learning processes to take place in the provider.[329] Observers also share recommendations and best practices among different providers. As one interviewee explained it: 'they act like little bees – they pollinate!'[330] She also explained that the providers' management teams have very little time to work on quality development and that the municipality thus sought to provide analysis and recommendations of quality development measures in order for everyone to improve.[331]

In all three municipalities, providing the private companies with education and training seems to be an important part of the practices of improving quality and providing favourable conditions for businesses to establish themselves in the municipality. The education and training initiatives thus have a double function: supporting the providers and ensuring the services are of a high-

[327] L3.

[328] L2.

[329] L2, L3.

[330] L2.

[331] L2.

enough quality. They are an expression of a broader attitude: the administration seeks to support the private providers, to be available, and to have a continuous dialogue with the businesses on matters of quality improvement. Assisting the providers with their quality development, giving advice, and providing education have thus come to be key parts of the municipal administrations' mission.

3.5 Monitoring care choice systems

3.5.1 The different aims of monitoring

Monitoring is a central governing technique in the municipalities' work with the private providers. Without a well-functioning monitoring system, the terms of the contracts might not be fulfilled. Questions of how monitoring works and how well it works are therefore central to understanding the governing of care choice systems.

What is meant, more broadly, by 'monitoring activities'? Ann-Charlotte Landelius suggests that in a Swedish legal context the term can refer to various activities, including counselling, licensing, information, evaluation, monitoring, and control of operations. The aim of the monitoring is often framed in terms of satisfying the citizens' interest in legal certainty and efficiency and ensuring that democratic decisions are implemented. Monitoring is thus linked to the concept of democratic accountability.[332] This is a traditional public-law perspective, but there is a parallel contractual principle: that whatever is set out in the contract must actually be realized before payment for the service is due. Given this, it is remarkable that the preparatory works to the Act on Care Choice Systems barely touch upon the subject. They state only that, in the municipalities that already had choice systems before the Act on Care Choice Systems, 'an increased activity has been noted when it comes to monitoring, evaluations, and the development and assurance of quality' and that

> this is a necessary development when a system built on a continuous competition between providers is implemented. For users to be able to choose, comparable information about the providers is needed – information that the

[332] Landelius (n 91) 99.

> municipalities are obliged to give them and which, therefore, must be collected through continuous monitoring and control of activities.[333]

These formulations give the impression that the main goal of monitoring is to facilitate the spread of information on the market. However, as we have already seen, municipal officials see it as a central tool for maintaining the quality of services and thus discharging the municipalities' responsibilities, since user choice is not sufficient by itself to ensure that standards are maintained. The officials' perspective is more evident in the 2014 inquiry report, which, while not discussing questions of monitoring at length, states that monitoring is an important method of ensuring that the individual user receives care in accordance with existing regulations.[334]

A central aim of municipal monitoring systems is thus to ensure that the quality standards set out in the Social Services Act are upheld. However, as I will show below, monitoring is also seen as having other functions. Monitoring is seen as a way of working alongside the providers to improve the quality of services, an understanding that fits well with the political ambition to promote small businesses. As one administrator explicitly stated: 'There is a political will to have – to support small businesses and so – At least I understand the mission as promoting that, rather than dismissing someone just because everything is not in place at once.'[335]

3.5.2 National monitoring and support for municipal monitoring

Monitoring is more a municipal undertaking than a national responsibility, but there are also national structures set up for this purpose. The Health and Care Inspectorate oversees both publicly and privately provided social services.[336] This supervision involves reviewing whether the services meet the requirements and objectives set out in policy guidelines and in law, including the principles stated in the opening sections of the Social Services Act. The reviews are based on legal requirements as well as on the provisions and guidelines issued by the National Board on Health and Welfare on quality indicators, registers, and statistics. The inspectorate can review entire organizations or individual cases. It may issue fines, issue injunctions, and

[333] Prop. 2008/09:29 Lag om valfrihetssystem (n 13) 117.

[334] SOU 2014:2 Framtidens valfrihetssystem – i socialtjänsten (n 15) 127.

[335] M3.

[336] Ch. 13 § Social Services Act.

revoke permits, but it also uses softer tools, providing advice and guidance as well as sharing knowledge and experience.

Many of the officials I spoke with brought up the issue of the presence, or rather lack of presence, of the Health and Care Inspectorate in the monitoring process. The agency was described as being 'very far away, at a critical distance',[337] 'hard to reach',[338] and 'just not present'.[339] The municipalities find that it is hard to get information about the reviews that the Health and Care Inspectorate has conducted – it can review a private supplier without notifying the relevant municipality. There is thus no close connection between the monitoring work carried out by the Health and Care Inspectorate and that carried out by the municipalities.[340] Officials repeatedly raised the problem of the long processing times at the agency.[341] Officials questioned whether, when home care come to be included in the authorization system, just as nursing homes are today, there will be sufficient time for the national agency to deal with the extra work. One claimed that the change would be good for the companies, which would 'rather have the Health and Care Inspectorate on their heels – since they don't have the time to check them out'.[342] The national control systems are perceived as underdeveloped and, unlike the municipalities' control systems, too remote from activities the ground.[343] From the branch meeting in City M, a clear picture emerged of the Health and Care Inspectorate as overloaded, and both the suppliers and the municipality expressed a great deal of frustration regarding how the agency worked.[344] The same discussion arose at the City L branch meeting.[345]

The Swedish Competition Authority also supports the municipalities in their monitoring, and it has developed a monitoring guide for administrations with care choice systems.[346] The agency approaches the issue from a competition

[337] S2.

[338] S5.

[339] M5.

[340] M2, M3.

[341] S6, M5, L1.

[342] L1.

[343] L6.

[344] City M Branch Meeting.

[345] City L Branch Meeting.

[346] The Swedish Competition Authority, 'Monitoring Guide' http://www.konkurrensverket.se/globalassets/upphandling/avtalsuppfoljning-av-vard-och-omsorg.pdf accessed 11 May 2020.

perspective, and it highlights EU competition regulations in setting out its overarching idea for how monitoring should be performed: it is important that monitoring relies only on the criteria listed in the tender documents, and it is important not to ask for unnecessary statistics or information from the providers.[347] The agency's guide recommends a particular structure and a number of tools for monitoring. It lists visits (announced and unannounced), site inspections, surveys, accounting records, verification of invoices, and other supporting documents as the main tools for monitoring. It also recommends the use of digital systems for time keeping and for the processing of other data. According to the guide, monitoring should be carried out regularly, but, when warranted, it may also focus on specific factors. A number of roles may be involved in monitoring, including procurement advidsers, controllers, experts in the procured services, and independent auditors. The guide states that successful monitoring requires the municipality to invest in skilled staff, good working routines, and digital information systems.[348] The monitoring should operate on several levels, the guide says. First of all, it should ensure that the contractual requirements regarding both the provider and the service itself are always being met. Second, the volume and price of the billed services must be checked in order to ensure that payments are accurate. Third, other contract clauses, such as those relating to working conditions and environmental standards, should also be monitored.[349]

However, a decisive role is also played by the providers' systems of self-monitoring. These are undergirded by *Lex Sarah* in the Social Services Act, i.e. the obligation to report, document, investigate, and remedy abuses or significant risks of abuse.[350] It is therefore crucial that the provider's quality management system, which is the basis of self-monitoring processes, is itself monitored. The quality management system should contain adequate quality assurance mechanisms (to detect, remedy, and learn from mistakes), quality development processes and procedures, and ways of measuring quality against goals and standards.[351]

[347] Swedish Competition Authority, 'Avtalsuppföljning av vård och omsorg' (2014) 16.

[348] Swedish Competition Authority (n 347) 52.

[349] Swedish Competition Authority (n 347) 20.

[350] See chapter 1.3.2.

[351] Swedish Competition Authority (n 347) 23.

3.5.3 How the municipalities monitor the providers

The guide issued by the National Authority on Public Procurement contains recommendations for how to organize monitoring on a municipal level, but the way monitoring is carried out is primarily a matter of municipal procedure. Here, I will analyse these procedures, drawing on the descriptions provided in the tender documents, the interviews, and, in case of City M, monitoring reports. Most of the tender documents regulate, or rather list, the ways in which monitoring will be carried out, but the lists are most often open ended or quite unspecific. City S's tender document, for example, mentions:

- consultation meetings
- planned and unplanned visits and observations
- reviews of how comments, complaints, and mistakes are addressed
- monitoring of documentation and care implementation plans
- user surveys
- monitoring of the internal quality management system
- follow-up on the internal operational plan
- auditing by municipal or external accountants
- contacts with other relevant actors.[352]

City M's document lists most of these, and also mentions:

- a requirement to provide a yearly account of the quality improvements made by the provider
- monitoring of staff working conditions
- administrative audits
- sample checks
- screening
- more in-depth monitoring, if needed.

City L's document contains similar descriptions of monitoring requirements to those listed above. As these requirements make clear, the monitoring process is an advanced apparatus of meetings, visits, reviews of documents, user

[352] City S Tender Document 3.10.5.

surveys, financial check-ups, and technical systems. In the interviews, it became clear that the levels of monitoring and the instruments and technologies used differ markedly among the municipalities, a variation which can be attributed to the different levels of resources available in smaller and larger municipalities. To paint a picture of these differences, each municipality's monitoring system will be described in turn below.

City S

In City S, there is one controller who is responsible for the contract on the municipal side and four specialists (healthcare or social workers) responsible for monitoring the municipal provider and private providers. They all work within the same department and have the same manager. They are responsible not just for home care but also for other social services, such as residential care.[353] They monitor the municipal provider and the private providers through (unannounced and announced) site visits, either regularly (quarterly) or as required, as well as through regular meetings. They talk to the management as well as to care workers. Self-monitoring is seen as an important part of the monitoring structure: the monitors send the providers sets of questions relating to the contract terms, read the responses, and follow up in conversation with the providers. The digital system through which the municipality places service orders and the provider reports the number of hours worked also serves as a control mechanism.[354] Furthermore, care managers conduct individual evaluations when meeting users. If there is a problem, they will, with the consent of the user, tell the provider about the issue. If the problem is found to be particularly serious, they will write a report on the discrepancies. However, if the user concerned is being cared for by a private provider, this report is confidential, and thus is not seen by the municipal administration. In such cases, the system relies on the provider's self-monitoring procedures.[355] The reports on discrepacies do not, in other words, play a role in guiding users' choices in the care choice system.

In the interviews, the monitors claimed that they conducted overall assessments of the providers' operations but also that there were certain aspects to which they paid particular attention. These included staffing levels and competence, procedures, reports on discrepancies, documentation, ID cards,

[353] S2.

[354] S2, S4, S5, S6.

[355] S4, S6.

and implementation plans.[356] In general, central to the monitoring process are the internal processes the provider has in place to meet formal requirements, as well as factors such as user participation, good treatment, and continuity.[357] As one administrator put it: 'We are asking the question: "how do you achieve this?"'[358] At the time of the interviews, there had been a recent reorganization on the monitoring side, and the four monitors had all been hired quite recently. The department had decided to reorganize the monitoring structures with the aim of refocusing the mission away from mere control and towards being more supportive. The plan was that the providers would be monitored for half of every year in accordance with the procedures described above, and that the monitors would then spend the other half of the year supporting the providers, helping them to improve whatever was found to be suboptimal during the evaluation.[359]

City M

In City M, three different departments are responsible for the monitoring of home care: the Social Work Department, the Care Service Department, and the Elder Department. The Social Work Department is home to the care managers, who are responsible for individual user evaluations. The Care Service Department and the Elder Department have a common Quality and Evaluation Office, which is responsible for the systematic monitoring of all social services, including home care. All three departments interact regularly and sometime do joint monitoring. Besides these activities, contract managers within the Elder Department have regular meetings with the providers.[360] The individual evaluations conducted by the care managers within the Social Work Department are based on care implementation plans and on interviews with the users. They are compiled into anonymized reports, which are sent to the provider and the Care Service Office.[361] The Quality and Evaluation Office conducts thorough monitoring processes to monitor compliance with contract terms, as well as thematic monitoring relating to specific aspects of operations.[362] Their monitoring work is based on visits, documents, and interviews. The same procedures apply to both the municipal provider and the

[356] S2, S5, S6.

[357] S4, S5, S6.

[358] S5.

[359] S2, S5.

[360] M1, M2, M3, M4.

[361] M2.

[362] M3.

private providers. The municipality publishes the results of monitoring activities on its website, and the provider is also obliged to be transparent and to allow municipal monitors to access relevant information.[363]

The municipality sets yearly targets for the monitoring team, and currently aims to monitor all contracts at least once in every period of office (four years), but this means providers might not be monitored for several years. One third of the monitoring processes should be based on strategic choices (e.g. new providers), while one third should take place when warranted and one third should be randomly chosen. Since the Quality and Evaluation Office is responsible for providers in all areas of social services, most of which have choice systems, it has many providers to monitor – with 15 in home care alone.[364] Interviewees reported that monitoring was resource intensive.

> Yes, it takes a lot of time, because, yes, of course we want to do this as seriously as possible, and it should be formally communicated, and – yes, it takes a lot of time. Maybe it can be simplified over time, but it has taken a lot of time, really.[365]

The Quality and Evaluation Office has been up and running since 2013, when it was decided that, in order to make monitoring a priority, it would be best to have a number of administrators working solely on monitoring in a separate department.[366] Over time, the whole process, from application stage to monitoring, has been developed and streamlined into a structure with defined internal roles: care managers, contract managers, digital system managers, controllers, and inspectors. There are now defined procedures for handling applications, meeting applicants, reviewing the strength of their application through interviews, and processing applications for approval. After approval, there are procedures for training, regular meetings, self-monitoring, and monitoring (as described above). There is also a dedicated team of officials at the administration that stays in contact with providers in order to detect any potential cases of fraud.[367] Another aspect of the development of the monitoring system is the ongoing process of streamlining the technical systems that support care work, for instance the digitalization and standardization of individual care implementation plans and the supervision of these plans to

[363] City M Tender Document Special Requirements 7.0.

[364] M1, M3.

[365] M1.

[366] M3.

[367] M1, M5.

ensure that the right amount of time is spent in the user's home, among other things.[368]

The officials from City M who work on monitoring also regard supporting the providers as part of their role. The monitoring of the companies functions as a kind of learning process for the providers. When the monitors visit the providers, they also provide recommendations for how to improve procedures, and their reports may be seen as learning tools for the providers.[369] This is especially true of the municipality's relationships with the small providers. One official from City M stated: 'we do put lower demands on the small and new companies', adding that this meant that the services of different providers were of different levels of quality. The official said that the monitoring of small companies in particular took the form of education and support, since they

> do not have the same knowledge or organization behind them as with the more established providers. If a large provider opens a new home care service in a new city or on a new market, they will have – They have in their organization that knowledge and quality management system and everything. The small providers that can show up in care choice systems, they normally don't have that.[370]

As this makes clear, the levels of monitoring and control to which companies are subject vary depending on the size of the business, and monitoring not only serves to ensure the quality of the services for the users but also to support the private providers.

Monitoring reports are published on the municipality's website. I read six sample reports from the period 2015–2017 in order to get a fuller picture of how monitoring is conducted, the typical results of monitoring exercises, and the typical remedial actions proposed. Monitoring processes are either routine or one-off – for example if there have been complaints from users. The reports are based on visits (announced and unannounced), interviews, written documentation, and data from the municipality's digital management system. The reports are structured so as to correspond to different contract clauses – i.e. the requirements set out in the tender document – and examine whether the service meets the required standard. If any shortcomings are identified, the report will list, at the end of the document, measures that the provider has to implement, with a deadline by which the changes have to be made. Two out of

[368] M2.

[369] M4.

[370] M3.

the six sample reports conclude that the providers meet all of the requirements, recommending a few areas for improvement but not requiring any actions of the providers. The other four (samples A–D) are described in detail below.

Report A identifies several defects in the service. The planning of daily operations had not been functioning for some time. High staff turnover and a general lack of staff meant that not all planned care activities had been carried out, which meant that users had not received services they were entitled to according to municipal decisions. Adequate quality management procedures were in place, but they had not been implemented and followed appropriately. Mistakes had not been registered in the municipality's digital management system. Individual care implementation plans were not up to date, and users were not being visited by their assigned carers. Furthermore, the provider had received low ratings in the user survey carried out by the National Board on Health and Welfare earlier in the year. The actions taken by the municipality were to call the provider's regional office to make them aware of the defects and to require several measures to be implemented, with the provider to report back within four weeks.[371]

Monitoring report B lists several areas in which the provider had to make structural improvements in order to achieve professional levels of operation and meet contractual obligations. The defects identified were that the quality management system was not sufficiently developed or implemented, that only about 25 per cent of the staff had had adequate training, and that staff were sometimes scheduled to work 12-hour shifts but were only paid for the time they were in the users' homes. Care implementation plans were not used to guide daily operations, and staff were not equipped with phones to ensure their availability. The municipality required the provider to produce an action plan within 10 weeks, threatening to terminate the agreement if the defects were not addressed. The action plan had to show that the quality management system would be updated and implemented; that there would be procedures put in place regarding care work in the users' homes; that the provider would ensure staff availability, give staff time to document and transmit information, and improve staff working conditions; that a training plan for staff would be drawn up; that the care implementation plans would be updated and staff trained in how to use them; and that procedures would be established for cooperation with other relevant actors in the care of individuals.[372]

[371] City M Monitoring Report Dnr ÄN 2017-599.

[372] City M Monitoring Report Dnr ÄN 2016-15.

Report C similarly finds a series of actions that had to be taken to improve procedures and internal structures. The most remarkable aspect of this report is that it states that the provider had been wrongly approved: the requirements in the tender document were not fulfilled at the time of approval, and this was known prior to the approval decision being taken. The problem, specifically, was the competence and experience of the operations manager, which was still an issue at the time the report was compiled. Furthermore, the quality management system was found to be inadequate and to have been not sufficiently implemented. There were inadequate procedures for sharing information about the users among staff, problems with documentation, and issues with staff availability. The staff did not regularly visit the provider's premises but travelled between users' homes and their own homes, without seeing management or colleagues. Care implementation plans were deficient; they were not based on user participation and were not used by staff. Keys were not stored and handled in a secure way. Documentation was not handled digitally but completed on paper once a week. The municipality gave the provider 10 weeks to implement changes, and stated that the contract might be terminated if defects were not remedied.[373]

Report D states that there were severe problems with the provider's service and that the provider had to make extensive improvements if it was to keep the contract. The report mentions working conditions that violated the Work Environment Act, an inadequate quality management system, almost no staff with qualifications, no access to staff over the phone, no care implementation plans or user participation, and problems in the recording of time worked and invoicing. The provider was given 10 weeks to implement certain measures but 14 weeks for others.[374]

Apart from report A, which refers to the results of the national user survey, these reports do not rely on measurable outcomes. It is also remarkable that providers were given several months to remedy defects, even in cases where these were deemed severe. I do not have access to the follow-ups or know whether these providers are still in business.

City L

City L has a comprehensive regime for monitoring providers, of which there are around 100. The municipality is divided into 14 districts, each of which has its own monitoring organization, with care managers, contract controllers, and

[373] City M Monitoring Report Dnr ÄN 2016-612.

[374] City M Monitoring Report Dnr ÄN 2015-432.

quality inspectors. There is also a central administration with its own contract managers, inspectors, and observers.[375] I conducted interviews with administrators from the central Elder Department and administrators from one district.

The districts are responsible for individual evaluations. These are carried out yearly by care managers through care implementation plan follow-up investigations and interviews with users that ask pre-defined questions about perceptions of trust, social contact, and continuity.[376] The point of the interview is to complement the national survey, as there are seen to be problems with the validity of the results of this survey, as I mentioned in section 3.3.2. However, similar criticisms have also been levelled at the municipal user survey; in particular, it has been claimed that users are unwilling to criticize their carers, to whom they feel loyal.[377] The districts are also in charge of payments; they deal with invoicing and track billed hours with the help of a digital system through which the providers register the amount of time they have spent caring for each user. This digital system also allows the municipality to ensure that users actually receive the hours of care to which they are entitled,[378] although one official from the central department alleged that local districts were more interested in ensuring that they were not overbilled than in ensuring that users received the services to which they were entitled.[379] This highlights the conflict between the different aims of monitoring.

Further, each district is responsible for overseeing its providers through a yearly quality control process. In order to increase efficiency, if yearly inspections of a particular provider are not deemed necessary, the process takes place only every other year.[380] In this process, local inspectors use a monitoring system developed and managed centrally. Their tools are visits, reports and documents, and data and statistics drawn from the digital systems. They also monitor the providers' quality management systems, staffing levels and competence, security procedures, and other issues central to the contract.[381] Where there are problems, they meet with the providers and may refer the

[375] L1.

[376] L4, L5, L6.

[377] L1.

[378] L4, L5.

[379] L2.

[380] L2, L3.

[381] L1, L2, L4.

matter to the central administration, which will then carry out a more thorough investigation and may impose sanctions, if necessary.[382]

The central administration is responsible for the contracts with the providers. Six months after a provider is approved, contract managers assess compliance with contract clauses. They look at issues such as facilities, the share of staff with assistant nursing diplomas, salaries and working conditions, procedures for handling users' keys, work clothes, statutory documentation procedures, and confidentiality. They will also be in touch with providers concerning any complaints and reported discrepancies and will carry out some site visits.[383] The inspectors' primary responsibility is quality assurance, so they mostly respond to reports, complaints, or other signals of problems within an organization. This function was created in 2011, in the wake of a care scandal. The contract managers, inspectors, observers, and care workers responsible for quality assurance meet weekly, going through complaints and other reports to decide how to act and to divide up responsibilities. They may decide to call the provider, have a meeting with the provider, conduct an unannounced site inspection, initiate sanctions procedures, or even, in the most serious cases, move towards the termination of the contract.[384] The role of the observers, discussed above, centres on supporting the providers and helping them to improve their operations. Interview evidence from contract managers in City L indicates that, unless they are monitoring compliance with contract clauses, they approach their visits to providers in a similar way. They advise the providers on strategic issues, share experiences, and discuss weaknesses, with the aim of helping providers find better solutions.[385]

3.5.4 Monitoring: a demanding task for municipalities

Many of the officials that were interviewed agreed that monitoring was a demanding undertaking for the municipal administrations, implying significant time, personnel, and resource commitments. Officials who were otherwise positive about the care choice system all mentioned this as the most problematic aspect of the system.[386] L3 said that monitoring the 'soft sector' was very difficult and that ensuring that holistic, qualitative monitoring was

[382] L1, L4, L5.

[383] L1, L6.

[384] L2, L3.

[385] L6.

[386] L1, L2, L3, L5, L6.

actually achieved required an ambitious and careful programme of monitoring work, including individual follow-ups and thorough analyses. If the administration requires a provider to improve its procedures, which is a common action taken following an inspection, the provider will often submit a description of the steps taken to improve procedures. Assessing whether improvements have actually been implemented requires administrations to put more resources into monitoring and inspecting on site.[387]

> The challenges are that it is so incredibly large. There are so many providers who are eligible, so it is difficult to have contact with everyone and monitor everyone as you might want, because it is, after all, our users who have these providers – One would want to have a little more monitoring and control, and it is in principle impossible to have that with everyone.[388]

The extent of the monitoring seems also to be steadily growing, a trend the officials explained with reference to the growing number of providers, a growing political awareness of quality issues, and a general tendency in the care sector towards increased measurement and evaluation.[389]

> In elder care, it has become just more and more monitoring, more and more control, and more and more indicators and – so it is just, 'Look at the newspapers! Here is Sweden's best residential home!' That news then comes from the National Board on Health and Welfare's surveys that have just been published and it has shown all kinds of results. So, if I am a provider, then I can get, first, an inspection and next month comes a controller to do the annual monitoring of the contract. Then next an observation – [390]

L3, who was, again, very positive about the care choice system generally, stating that it was a good thing for the development of elder care, also said that monitoring and securing services for individual users required a lot of resources. The system required purchasers to take on a lot of responsibility, she said, for ensuring that unserious or unqualified providers were not allowed to operate, a task she said was highly demanding. She emphasized that, especially in recent years, monitoring work had increased, both centrally and

[387] L3.

[388] L5.

[389] L2, L3, L5, L6.

[390] L2.

in the districts, as had the resources committed to monitoring.[391] This was a view shared by the district-level officials[392] and by L1, a contract manager.

> Interviewer: Has the monitoring developed, from the introduction of the act?
>
> L1: Yes, it has, it has. You come to realize that you need to monitor more. You have to do that. The monitoring is, after all, the most important of all.
>
> Interviewer: So, in the beginning the organization was a bit more unclear and then it has developed to be more systematic?
>
> L1: Yes, in the beginning it was only [L6] who was here, and then she could not do anything, except approving contracts for applicants.
>
> Interviewer: But that also means that the resources for monitoring have increased over time?
>
> L1: Yes, yes. When I came in four and a half years ago, we started to develop the monitoring, because then we had more time to do it.
>
> Interviewer: Quite recently, in other words, really?
>
> L1: Mm-hmm.

Over the years, more resources have also gone into monitoring, and many administrators have been employed for this purpose.[393] As the interviewees described it, in the early years of their care choice systems, the focus was on the application process, but now their focus is increasingly on monitoring, on what happens after the approval of a provider. As can be seen from the descriptions above, in all three municipalities monitoring is increasingly central to the work of the administration. After a care choice system has been introduced, the felt need to subject providers to continuing assessment seems to intensify. The methods, tools, and professionals involved also seem to become more specialized over time.

[391] L3.

[392] L5.

[393] L1.

3.6 Results

The answer to this chapter's central question is that, in creating quasi-markets in the provision of home care, Swedish municipal administrations commit a lot of resources to both supporting and monitoring private providers. The role of municipal administrations in relation to elder care changes, for public authorities are now responsible for creating and protecting favourable conditions for market competition as well as for monitoring the outcomes of this competition – sanctioning providers and compensating for market failures. As we have seen from the material presented in this chapter, municipalities have implemented measures to support users' choices and, through support and training, and through regulations that are often beneficial to private providers, to create an environment within which businesses can thrive. In what follows, I discuss the questions set out in the introduction in turn.

What kinds of tools are used to support the users as market actors?

One of the basic premises of care choice systems is that home care should function like a market. The role of the public authorities administering care choice systems becomes that of creating and protecting the market so that independent market actors can operate effectively. Discussion in legal sources and national policy documents seeks to explain one of the shortcomings of the care choice systems, the low levels of active choices made by users, in large part in terms of a lack of information among the users, and so proposes that the solution is to improve systems for collecting and disseminating information. Both the central government and the municipalities have adopted techniques to provide better information to users. However, there is a fundamental conflict between the municipal administrators' role of providing guidance and their obligation to act impartially with respect to competing market actors, and according to my research it is the latter that seems to have the upper hand. When providing information to users, municipal administrators put a lot of effort into providing 'neutral' information, paying close attention to the 'rules of the market' on competition neutrality. It is this logic, rather than the older person's need, that seems to govern the way municipalities provide information. This is in accordance with the EU's rules on public procurement and state aid, which place certain limits on the actions of public administrations and politicians: for instance, these rules mean that care managers are not permitted to recommend providers they believe provide a good service over businesses they think just barely live up to the requirements.

What kinds of tools are used to support the private providers?

The main responsibility for creating and maintaining home care markets falls on the municipal administration. The logic seems to be that, because competition is the way to increase quality, the appropriate role for public administration is to stimulate and create competition. The municipalities seem to be committed to supporting private providers: providers are allowed to effectively outsource certain functions to the municipality and thus to save money and resources. This also changes the relationship between private actors and the municipality – in this case, the municipality must exercise monitoring and regulatory functions while at the same time supporting and promoting the companies.

All three municipalities in my case study have education and training programmes for approved private providers. After the approval process, there are meetings and training sessions to get the providers started. There is also ongoing work to help the private providers improve their services. Through the appointment of municipal administrators as points of contact for the providers and the regular meetings, training sessions, and feedback procedures that they organize, responsibility for certain aspects of quality development comes to be assumed by the municipality.

In addition, since providing conditions for businesses, especially small businesses, to flourish is central to the creation of care choice systems, municipalities ensure that there are favourable market conditions in place to increase the likelihood that providers will be successful. The system is geared towards the private providers, which enjoy better conditions than the municipal providers. Private providers have options for organizing their services that the municipalities do not have: the private providers can limit the geographical scope of their operations or the number of users for whom they are responsible, which are things the municipality cannot do. *Cream skimming* is a concept used to describe a practice whereby producers (in this case private care providers) opt to provide a service only or mainly to relatively low-cost (i.e. more profitable) users.[394] If providers are able to cream off the more profitable users in this way, there is a risk that welfare services will be provided in a way that discriminates against more costly or risky groups within the population, who might get stuck with lower-quality care, and that the system will thus become more unequal.[395] Even though discrimination against the users of elder care is

[394] Gingrich (n 12) 10.

[395] Le Grand and Bartlett (n 8) 32.

prohibited,[396] if providers target certain less-costly groups or areas, there is still a risk of cream skimming occurring in practice.[397] The possibilities that exist in many municipalities for providers to choose certain areas and to place capacity limits on their services allow for a form of cream skimming which benefits the providers on account of the level of equality between the users.

The fact that providers are allowed to deliver additional services is another condition favourable to these companies. The ability of private providers to offer their users additional services should be seen as part of a governing logic which steers the system towards the establishment of conditions that enable private providers to make profits, whether within or outside of the publicly funded welfare system. This is in line with the reasoning of Sara Erlandsson et al., who argue that the ability to 'top up' care with additional services creates incentives for more affluent groups of seniors to choose private providers. This may also make it more likely that private providers will offer their services in geographical areas where they think they can attract users who will purchase the additional services. Those with fewer resources and more complex needs cluster in the no-choice alternative, which risks becoming relatively worse.[398] There is a notion that competition should promote better quality. At the same time, there is a tendency among market players to prioritize more profitable areas and groups. There is a clear contradiction here – if companies cluster in some parts of the municipality rather than others, the result is not only uneven provision but also uneven competition (more in some areas, less in others). Poorer areas attract fewer suppliers and thus have less competition, which according to the prevailing logic should lead to (even) poorer services.

What role do monitoring systems play in governing care choice systems?

The monitoring of operations, municipal as well as private, has undoubtedly become a large and growing part of municipal administration. This is not something really reflected in the preparatory works or national policy documents, but it is clear from the empirical evidence from the municipalities. This evidence shows that municipalities have implemented a broad range of monitoring measures in order to assess the providers' operations. The monitoring work focuses on the requirements in the tender documents and contracts, particularly on the existence and implementation of procedures,

[396] The Discrimination Act Ch. 2 § 13 prohibits discrimination in the activities of the social services. According to the preliminary works, private providers are subject to this prohibition on discrimination. Prop. 2002/03:65 Ett utvidgat skydd mot diskriminering 142.

[397] National Board on Health and Welfare (n 58) 37.

[398] Erlandsson and others (n 23) 69.

plans, and systems and on the competence and working conditions of staff. Extensive monitoring is seen as necessary to ensure quality.

In a meta-study from 2011, Szebehely states that several studies showed that municipal monitoring activities in care choice systems for elder care were generally limited and that many municipalities seemed to rely largely on complaints from users or on users opting out of providers that they were not satisfied with.[399] There are no studies which directly follow up on these results, but, given the general tendency towards increased monitoring, the high-profile scandals in the sector, and the development of national guidelines on how to monitor private providers, there is reason to believe that there has been a significant increase in monitoring activities in the municipalities since 2011.[400] There is also reason to believe that the extent to which authorities are able to conduct effective monitoring differs markedly among municipalities depending on their size and that monitoring has developed in different ways in different municipalities depending on how long the care choice system has been in place. These findings are in line with those of Moberg, who shows in her dissertation that public authorities have enhanced their monitoring systems in order to ensure that the providers of publicly funded elder care fulfil regulatory requirements. However, it also seems as though this monitoring is unsystematic and that, especially on the local level, there is a lack of continuity in how quality control is conducted.[401]

Even though the municipal administrations spend a great deal of time and a lot of resources monitoring the providers, they still have to rely on the providers' self-monitoring systems, and thus also to prioritize efforts to support the development of these systems. Monitoring focuses primarily on processes and on the implementation of self-monitoring through quality management systems. This is described by Toomas Kotkas as a response to a new challenge: how to monitor the operations of private service providers effectively while at the same time not increasing the costs of monitoring. The resources for monitoring need to be allocated more efficiently, and this is achieved through the introduction of self-monitoring systems.[402] Instead of direct monitoring by

[399] Szebehely (n 3) 248.

[400] See e.g. The Swedish Competition Authority, 'Monitoring Guide' http://www.konkurrensverket.se/globalassets/upphandling/avtalsuppfoljning-av-vard-och-omsorg.pdf accessed 11 May 2020.

[401] Moberg (n 55) 23–25.

[402] Toomas Kotkas, 'From Official Supervision to Self-Monitoring: Privatizing Supervision of Private Social Care Services in Finland' (2016) 50 Social Policy & Administration 602.

public authorities, the focus is on pre-emptive supervision, in which the controlling agency issues regulations and instructions that guide private social welfare service providers in drawing up self-monitoring plans.[403]

Studying the municipalities' monitoring systems reveals that they seem to have several different aims at once: ensuring that the service meets the requirements set out in the Social Services Act, ensuring that the provider is complying with the clauses in the contract, and helping (especially small) businesses to prosper. The last aim marks a step away from a more traditional view of monitoring activities. If, as my research indicates, the effectiveness of quality control is not uniform across larger and smaller care companies, this may imply that legal requirements on equal treatment are not being fulfilled.

The extent of monitoring activities in the municipalities with care choice systems, and the importance attached to them, also suggests that the nature of public administration is changing. Municipal monitoring systems are large and complicated, especially in the larger municipalities. Many actors are involved, on many levels, and they produce large amounts of data and many reports. This suggests that public officials are increasingly adapting to the care choice reforms. The development towards increasing levels of measurement and evaluation was already present prior to the implementation of the reforms, but the Act on Care Choice Systems seems to have catalysed this development.

Which rationalities are central to the municipalities' governing of the private providers?

The political aims behind the introduction of care choice systems were to move towards the use of a market-like model to coordinate the provision of elder care, to improve the quality of services, and to empower users. To fulfil these objectives, public authorities take active measures to deal with perceived 'market failures'. Because the municipalities are at the same time responsible for the quality of home care, there is a conflict between rationalities here. To resolve this conflict, the interviews suggested, there is a need to use alternative methods of governing: a combination of rigorous systems of evaluation and monitoring with systems of support, coaching, and education for the providers. This changes the relationship between the municipal administration and private providers – public administrators are enrolled in the task of aiding and assisting private providers, even in tasks that relate more to business administration than to the provision of care. The development of care choice systems also exhibits

[403] Kotkas (n 402) 605.

tendencies of decentralization – towards the municipalities from the national level, and towards the providers from the municipal administrations.

These results fit well with those of Gingrich, who argues that markets in welfare services have in this way significantly changed the conditions of care. They have brought about distributional and political changes within the public sector and the state itself. The introduction of markets has implications beyond the way citizens' care is provided; it also affects the relative power of professionals, users, and the state, both socially and materially.[404] Anna H Glenngård describes the move towards markets and choice as 'a shift from the sphere of political authority towards the sphere of voluntary exchange as the mode for social coordination'.[405] This development entails a change in the role of public authorities – from setting objectives, defining rules, and exercising control to creating and protecting the market.

A fundamental belief of those in favour of the 'free market' is that when agents act freely and in accordance with their own interests the result, eventually, is beneficial for everyone. It is therefore paradoxical that the municipalities are supposed to, and do, take responsibility for the market, encouraging users, in various ways, to make active choices and supporting private providers – to such an extent, in some instances, that municipal officials feel that they are actually helping to set up businesses. The municipalities' involvement in the quasi-markets of the care choice systems is in this way very far from the ideal of the laissez-faire market. The administrations have the responsibility both to support private businesses and to guarantee the provision of high-quality elder care. The role of municipalities administering care choice systems might, in this way, be contradictory, a question to which the following chapters will return.

[404] Gingrich (n 12) 213–214.

[405] Glenngård (n 57) 25.

4 Governing quality and practices of quality improvement

4.1 Introduction

A central goal of care choice systems is to increase the quality of elder care. According to the Social Services Act, the municipality is responsible for ensuring that the care provided to older people is of high quality, regardless of whether the care is provided publicly or privately. Through a contract with a private provider, part of the responsibility for fulfilling political objectives regarding the quality of services is in practice transferred to the private company. On the other hand, a central task for municipal administrations seeking to introduce a care choice system is, as chapter 3 demonstrated, creating market conditions favourable to private providers. The conflict between the objectives of the Social Services Act and the motivations behind the introduction of the Act on Care Choice Systems was identified by the public inquiry that preceded the introduction of the latter act.

> One purpose of introducing a care choice system is to increase the diversity of service provision. How significant the increase will be depends on the requirements that will be placed on the suppliers in the specifications which form the basis for the municipal contract with the external suppliers. If the requirements are numerous and strict, external suppliers will be less interested in providing services and less able to meet the requirements. With standards that are too numerous and too high, there is a risk that services will be more uniform and less diverse. However, it is essential that the activities should be carried out according to current regulations, and that means, among other things, that they must comply with the Social Services Act's demands for good quality.[406]

[406] SOU 2008:15 LOV att välja - Lag Om Valfrihetssystem (n 178) 174 my translation.

This passage highlights a possible conflict between setting tough quality criteria for the private providers and fostering innovation within the sector. The aim of this chapter is to answer the second research question: how does the introduction of care choice systems affect the definition of quality within home care for older people, and how do the changes in the municipalities' governing structures and tools affect practices of quality assessment? I have broken down this question into the following subquestions:

- How is quality defined within the care choice systems?
- Which strategies and tools are used by the public authorities to govern practices of quality improvement and assessment?
- What conflicts might arise in the governing of quality through a care choice system?

I will first discuss how, and by whom, quality and practices of quality assessment are defined, with a focus on the quality criteria found in the tender documents. I then provide a description of the strategies and tools used in the three municipalities I have studied. The chapter will conclude with a discussion of how the municipalities deal with the conflicts which arise when they seek to govern quality within a care choice system.

4.2 How are quality and practices of quality assessment defined?

4.2.1 Quality definitions in legislation and preparatory works

One starting point for understanding the definition of quality relevant to Swedish elder care is the legislation. Requirements relating to the quality of social services are set out in the Social Services Act.[407] They are, however, not fully defined in the law, preparatory works, or case law. The section of the legislation dealing explicitly with quality requirements was introduced in the Social Services Act following the changes made through government bill 1996/97:124. The preparatory works to this amendment state that 'quality is an elaborate concept' and that 'what is good quality cannot be determined in an unambiguous and objective way'. That said, the preparatory works also state

[407] Ch. 3 § 3 Social Services Act.

that the concept should be taken to include the employment of knowledgeable staff, expertise, and adequate resources and, in addition, factors such as legal certainty, individual participation, good treatment, and the availability of services. Services should be characterized by a respect for individual self-determination and flexibility.

The amendment of 1996/1997 came in response to calls for better quality control in the sector. The preparatory works state that

> [l]imited financial resources in the municipalities in combination with new principles for the governing and management of the activities have in recent years brought to the forefront issues of quality and quality development. The importance of evaluating the effects and results of the social services' activities and gaining an overall view of the content and development of the social services has increased.[408]

As this passage highlights, measuring and evaluation are central parts of the practices of quality improvement in the municipalities. The preparatory works also state that quality development needs to focus not only on the results achieved but also on organizational structures and working practices, and that quality development implies a need for systematic documentation.[409] The Trust Delegation claims that the effect of the 1996/1997 reforms was to steer the focus towards measurable quality indicators, and argues that there is a problem with this:

> [S]ocio-economic, legal, or ethical goals are difficult to formulate in terms of well-defined numerical goals. They are therefore often left out of formulations of targets (at least the type of targets which lay the groundwork for follow-up and evaluation of the activities) and therefore risk being given a lower priority in daily activities. This affects, among other things, collaboration and a holistic perspective, as these things can be difficult to properly measure and evaluate.[410]

The changes that took place in the 1990s laid the groundwork for an organizational culture of measurement and self-evaluation within the municipal administrations. This is also acknowledged in the preparatory works to the Act on Care Choice Systems, which state that practices of quality assessment – the formulation of requirements, goals, measurements,

[408] Prop. 1996/97:124 Ändring i socialtjänstlagen (n 104) 51.

[409] Prop. 1996/97:124 Ändring i socialtjänstlagen (n 104) 53.

[410] SOU 2018:47 Med tillit växer handlingsutrymmet: tillitsbaserad styrning och ledning av välfärdssektorn (n 130) 85.

comparisons, and results – have become integral to social services. The preparatory works underline the importance of this development, arguing for more and higher-quality statistics and assessments and further work on quality indicators and benchmarking, which the preparatory works state could also play a role in improving the information provided to customers within care choice systems.[411] The preparatory works conclude that it is more difficult in the elder care sector than in the healthcare sector to define what counts as 'quality' care. The existing knowledge of these standards is thought to consist of information which is difficult to collect, quantify, and present in an aggregated format, which limits the usefulness of any potential definition.[412] This complicates the task of governing quality within a care choice system.

4.2.2 Quality in national policy documents

National agencies have developed instruments to govern and support the municipalities' practices of quality assessment. The National Board on Health and Welfare has published a number of important provisions and guidelines[413] relating to the definition of quality in home care for older people. The most important of these documents are presented here. They are all dated after the introduction of the Act on Care Choice Systems.

- SOSFS 2012:3 is general guidance on how to interpret the set of values expressed in the Social Services Act regarding social services for older people: the right to dignity and well-being and the promotion of security and a meaningful existence in community with others. The guidance includes some further discussion of these values, but it does not go into detail.[414]
- The general guidance document SOSFS 2011:12 lists the basic knowledge and competence which is expected of staff working in elder care.[415] These guidelines are not binding, however, and as will be seen below there are large numbers of untrained staff working in elder care.

[411] Prop. 2008/09:29 Lag om valfrihetssystem (n 13) 35.

[412] Prop. 2008/09:29 Lag om valfrihetssystem (n 13) 34.

[413] As discussed in previous chapters, provisions are binding regulations, and guidelines are intended to help in the application of the law.

[414] SOSFS 2012:3 Värdegrunden i socialtjänstens omsorg om äldre.

[415] SOSFS 2011:12 Grundläggande kunskaper hos personal som arbetar i socialtjänstens omsorg om äldre.

- SOSFS 2011:5 (amended through SOSFS 2013:16) is an administrative provision detailing the application of *Lex Sarah*, the system for the self-reporting of problems by providers.[416]
- SOSFS 2015:10 is a provision setting out standards for hygiene, infection control measures, and clothes for staff working in elder care (and in other health and social services).[417]
- An administrative provision from 2014, updated in 2018 (HSLF-FS 2018:24), clarifies the need for the documentation of all social services activities, something which has become increasingly important over time.[418]

Of particular importance for this study is administrative provision SOSFS 2011:9, which relates to systematic quality management. The first version of the provision was published in 1998 in response to the 1996/1997 amendment mentioned above, which had called for systematic quality development work, and the 2011 version develops and adds further detail to the provision. The provision calls for the systematic and continuous development of methods of ensuring the quality of services, and for care organizations this means having to implement self-monitoring systems to plan, monitor, evaluate, and improve their operations. This requires analysing the risks of any defects in the service arising and identifying, developing, and implementing the necessary quality management procedures within the organization. The system should be self-monitored and should build on internal quality improvement structures. The system should also involve cooperation with other actors and take into account complaints and feedback from users. All quality management work should be documented.[419] To complement this provision, the National Board on Health and Welfare has published a guide to help organizations create quality management systems.[420] What is noteworthy here is the focus on *processes* of

[416] SOSFS 2013:16 Senaste versionen av Socialstyrelsens föreskrifter och allmänna råd (SOSFS 2011:5) om lex Sarah.

[417] SOSFS 2015:10 Basal hygien i vård och omsorg.

[418] HSLF-FS 2018:24 Senaste version av Socialstyrelsens föreskrifter och allmänna råd (SOSFS 2014:5) om dokumentation i verksamhet som bedrivs med stöd av SoL, LVU, LVM och LSS.

[419] SOSFS 2011:9 Socialstyrelsen föreskrifter och allmänna råd om ledningssystem för systematiskt kvalitetsarbete.

[420] National Board on Health and Welfare, 'Guide to Quality Management Systems' https://www.socialstyrelsen.se/Lists/Artikelkatalog/Attachments/18777/2012-6-53.pdf accessed 25 November 2019.

quality development rather than on organizational structures or outcomes and results.

My interviewees frequently mentioned quality management systems as central to the way the administrations work to ensure quality within care choice systems. They look to SOSFS 2011:9 both for guidance in developing their own municipal control systems and as a benchmark for the service providers.[421] Interviewees stated that it was also central to the monitoring of the private providers. An official in the central office of City L indicated that monitoring had shifted from examining the providers' activities and procedures to studying how their systems of quality management and self-evaluation were designed.[422] Another stated that the provision was a central tool for municipalities in seeking to govern the 'soft values' of care provision, as it provided a way of examining the processes and internal structure of the care providers.[423] One official whose work was crucial to the implementation of monitoring systems in a district in City L stated that the focus tended to be on the existence and design of the providers' quality management systems, not on whether or how these systems were actually being used.[424] As this evidence shows, explicit and systematic quality development work has become increasingly central to the provision of elder care. This is connected to and reflected in the way the private providers are governed. The requirement that providers have a quality management system in place is included in 94 per cent of all tender documents in my quantitative study, despite the fact that providers are already subject to this requirement directly through the National Board on Health and Welfare provision.

4.2.3 Quality criteria in tender documents and contract clauses

In order to complement the national authorities' guidelines, the National Board on Health and Welfare and the Swedish Association of Local Authorities and Regions have developed a list (first published in 2007) of definitions and indicators of six quality areas. These indicators are intended as a structure for the quality criteria that municipalities apply to home care – they are, in other words, one of the ways in which the state has attempted to support the municipalities in defining and improving quality. The quality indicators have

[421] S5, S6.

[422] L2.

[423] L6.

[424] L4.

in turn been operationalized by the Swedish Competition Authority in their guide to municipalities on how to develop tender documents.[425]

The quality areas are self-determination and integrity, overall approach and coordination, safety and security, knowledge-based activities, accessibility, and efficiency.[426] The quality indicators play an important role in governing: they are listed in most of the tender documents, albeit in different forms. They thus serve as a good starting point for understanding the quality requirements listed in the tender documents. Tender documents break down the quality indicators into specific requirements. The Swedish Competition Authority's guide seems to have been followed by most municipalities at least to some extent: many of the criteria suggested in the guide are found in the municipalities' documents. However, there are also significant differences between different municipalities' documents. The guide lists 16 distinct criteria. Table 2 shows that less than 10 per cent of municipalities include all 16 requirements in their tender documents, while about 10 per cent have include 10 or fewer of the listed requirements. However, the table shows that there is, in general, a high level of adherence to the criteria suggested in the guide, which indicates that the guide is a useful tool for studying the regulation of quality in municipal tender documents.

Table 2 Regulation of indicators

NUMBER OF REQUIREMENTS	NUMBER OF MUNICIPALITITES	%
		N=107
16	9	8
15	17	16
14	20	19
13	18	17
12	18	17
11	15	14
10	4	3
9	1	1
8	3	3
7	2	2

[425] Swedish Competition Authority, 'Guide on Specification of Criteria in Procuring Home Care 2014' http://www.konkurrensverket.se/globalassets/publikationer/vagledningar/vagledning_2014-2_kravspecifikation_hemtjanst.pdf accessed 30 August 2020.

[426] National Board on Health and Welfare, 'Indicators' http://www.socialstyrelsen.se/indikatorer accessed 11 May 2020.

The section below will discuss the criteria that are included more and less frequently and how they are presented. This indicates where and how the municipalities focus on the quality requirements they impose on the private providers in care choice systems. The quality indicators, and especially the specific criteria in the Swedish Competition Authority's guide, are an attempt to standardize quality measurements nationally, and it is important to understand how they have been taken up and implemented by the municipalities in their tender documents.[427]

Criteria regarding self-determination and integrity

The first quality indicator is self-determination and integrity, defined as the ability of the individual to be involved in and have an influence over their care and the opportunity for the individual to make their own choices. The guide operationalizes this overarching goal as three specific criteria: the establishment of an individual implementation plan; a system for feedback and complaints; and written procedures for the good treatment of users. The findings are presented in table 3.

Table 3 Regulation of indicators concerning self-determination and integrity

INDICATOR	NUMBER OF MUNICIPALITITES	%
		N=107
Individual implementation plans	105	98
System for comments/complaints	97	91
Written procedures for good treatment	7	7

Almost all municipalities have requirements on individual implementation plans – plans created together with the user or a relative that define when and how different care activities should be carried out. It is more unusual, however, for municipalities to require written procedures for good treatment. In the interviews, officials mentioned competence and professionalism in caring for older users as some of the most central aspects of what they took to be high-quality care. They also said these were some of the things most often complained about by users.[428] Many tender documents emphasize the importance of the good treatment of users, but few translate this into monitorable requirements. Reference is often made to values and principles, with more or less clear criteria given for how these must be put into practice.

[427] It is important to say here that I am not concerned with whether these are the right or the best criteria for measuring the quality of elder care. I am simply interested in the way in which quality and practices of quality assessment are defined in these instruments.

[428] S4, M4, M5.

The criterion of good treatment may include requirements relating to non-discrimination and the Discrimination Act and the principle of equal treatment in public administrative law. Even if procedures for good treatment and the involvement of users do not take the form of explicit requirements, tender documents often include references to this quality indicator. In City S, for example, providers are required to 'take into account and respect the user's integrity and self-determination; take note of the user's wishes about where, when, how, and by whom activities should be implemented; at each occasion meet the user with respect, consideration, and responsiveness'.[429] The way municipalities ensure that procedures of this kind are employed by a provider is often by requesting that the company provide evidence of relevant policies in the course of the application process.

Criteria regarding collaboration and a holistic approach

The second quality indicator relates to collaboration and a holistic approach. These are operationalized as cooperation with relevant actors, such as relatives, trustees, healthcare providers, and other persons and organizations relevant to the user. Eighty-seven per cent of the studied municipal tender documents require this explicitly.

Criteria regarding safety and security

According to the Swedish Competition Authority's guide, the safety and security indicator implies that services must be provided in accordance with applicable regulations. The services should be transparent and predictable, and preventive work should be undertaken to reduce the risk of abuse, neglect, and physical and mental harm.[430] More specifically, there must be procedures in place regarding users' keys and cash, the documentation of completed actions, and the reporting of irregularities in accordance with *Lex Sarah*.[431] As table 4 shows, these criteria are all very frequently mentioned in the municipalities' tenders.

[429] City S Tender Document 3.10.1.3.

[430] Swedish Competition Authority, 'Guide on Specification of Criteria in Procuring Home Care 2014' http://www.konkurrensverket.se/globalassets/publikationer/vagledningar/vagledning_2014-2_kravspecifikation_hemtjanst.pdf accessed 30 August 2020.

[431] *Lex Sarah* sets out a system not only for reporting problems but also for self-evaluating and learning from mistakes internally in the organization. See section 1.4.2.

Table 4 Regulation of indicators concerning safety and security

INDICATOR	NUMBER OF MUNICIPALITITES	%
		N=107
Documentation	106	99
Lex Sarah	101	94
Procedures for keys	99	93
Procedures for cash	90	84

Tender documents also often include general remarks about the safety and security of the user, as in the case of City S, whose tender document states that the provider should 'act in a professional and lawful manner; prioritize staff and care continuity; have staff with relevant knowledge and skills; document, investigate, and remedy deviations, complaints, and abuses; notify the municipality if the user can be in need of a custodian'.[432] Similar phrases can be found in many of the tender documents.

Criteria regarding the skills and competence of management and staff

The fourth quality indicator has to do with skills and competence. It includes requirements for the level of competence and experience required of management and staff and the company's internal skills development strategies. Infection control procedures[433] and food hygiene and nutrition policies are also included under this heading.

Table 5 Regulation of indicators concerning skills and competence

INDICATOR	NUMBER OF MUNICIPALITITES	%
		N=107
Competence of head of operation	93	87
Infection control procedures	67	63
Skills development strategies	65	61
Competence of staff	60	56
Food hygiene and nutrition	34	32

In the interviews, officials mentioned the knowledge and experience of the operations' manager of the provider as a key factor in whether a care company could be said to provide good-quality care.[434] As can be seen in table 5, almost 90 per cent of the tender documents contain a specific requirement relating to the qualifications of the operations' manager, most often that they must possess

[432] City S Tender Document 3.10.1.1.

[433] Since 2015 there has been an administrative provision from the National Board on Health and Welfare, SOSFS 2015:10, regulating infection control procedures for both municipally provided and privately provided home care.

[434] See e.g. M1, L1, L2.

a relevant university degree, such as in social work or nursing, and appropriate professional experience. Sometimes having an assistant nurse diploma – a non-university qualification – combined with a certain number of years of professional experience is sufficient.[435]

Requirements relating to the skills of staff on the ground, however, differ greatly across the municipalities. As table 5 shows, only 56 per cent of municipal tender documents include competence requirements for the private providers' staff. Almost half of the municipalities either have no requirements at all or simply include a general statement to the effect that the private providers should strive to employ trained and experienced staff. Some municipalities' requirements are broad and general, such as in City M, whose tender document stipulates that 'applicants must ensure that the business has sufficient staff with such skills as are necessary to ensure the user receives good-quality care based on the user's individual needs'.[436] While some municipalities require that all permanent staff have an assistant nurse diploma, it is more common for a municipality to require that at least 60–80 per cent have one. In some municipalities, the required proportion drops as low as 30–40 per cent. Very occasionally, documents include requirements relating to the proportion of permanent staff in the company.

Short-term employment and hourly paid work is quite common in the sector, with 27 per cent of municipal workers and 37 per cent of workers in private companies in these forms of employment (in 2017).[437] The working conditions in the sector have become a topic of public debate during the coronavirus pandemic,[438] as it has become clear that poor working conditions contributed to the fact that care workers were still going to work despite being ill.[439] Some

[435] Since 2019 the Health and Care Inspectorate has also examined the competence of the CEO and senior management as part of the authorization process for home care providers.

[436] City M tender document 5.3.

[437] Kommunal, 'Så mycket bättre? En jämförelse av anställningsvillkor och löner i privat och kommunalt driven äldreomsorg' (2018) <https://www.kommunal.se/sites/default/files/sa_mycket_battre_2018_webb.pdf> accessed 30 August 2020.

[438] 'Coronakrisen blottar brister i äldreomsorgen' *forskning.se* (12 May 2020) <https://www.forskning.se/2020/05/12/coronakrisen-blottar-brister-i-aldreomsorgen/> accessed 8 July 2020.

[439] Sanna Arbman Hansing, '23 av 57 anställda på äldreboende gick till jobbet sjuka' *gp.se* (21 April 2020) <http://www.gp.se/1.27040356> accessed 8 July 2020.

have suggested that the low proportion of skilled workers in the sector has contributed to the high levels of infection within elder care.[440]

Criteria regarding the accessibility of services

According to the Swedish Competition Authority's guide, the accessibility quality indicator has to do with information and communication. The most important requirement is that each user should have a contact person, someone who is primarily responsible for all communication with that user. The tender documents state that this is important in order to ensure continuity of care. The other requirements are that the provider should be contactable during office hours and that staff should wear visible ID cards.

Table 6 Regulation of indicators concerning information and communication

INDICATOR	NUMBER OF MUNICIPALITITES	%
		N=107
ID cards	97	91
Contact person	94	88
Phone hours	36	34

As table 6 shows, requirements on contact persons and ID cards are common. The requirement that the provider should be reachable by phone during office hours is, however, only included in a third of municipal tender documents.

Criteria regarding efficiency

The last quality indicator, efficiency, is operationalized through certain measurable efficiency targets, which are found in only seven per cent of municipal tender documents. I will return to this issue in section 4.3.

Other relevant criteria

The tender documents vary in length and in the numbers of requirements they include, and some of the longer and more detailed documents contain requirements other than those listed above. There are certain words frequently used to describe the general attitude towards care that the documents expect providers to adopt: for instance *salutogenic*, *rehabilitating*, and *active*. They thus seek to promote a progressive view of care and a view of the older user as an active participant in their own care and in society. The provider may be

[440] However, there has not been any evidence of different COVID-19 mortality rates in private and public elder care providers. Janne Sundling, 'Höga dödstal på äldreboenden – ett globalt problem' *Fokus* (7 May 2020) <https://www.fokus.se/2020/05/hoga-dodstal-pa-aldreboenden-ett-globalt-problem/> accessed 8 July 2020.

asked to facilitate the user's ability to live an active life and to maintain contact with relatives, organizations, or other actors.[441] How these goals are to be met and how this attitude is to be monitored are usually not specified; they are not operationalized into concrete requirements for the providers.

Continuity of care is another frequently mentioned concept. It is defined in relation to staff, meaning that the user should usually meet the same care workers; in relation to time, meaning that care should normally be provided at the same times each day; and in relation to care activities, meaning that the same tasks should be carried out in the same way. When older persons themselves are asked to define good-quality care, continuity is frequently cited as a central factor,[442] although individual users' perceptions and definitions of continuity vary. As I will explain in section 4.3, despite the fact that continuity of care is measurable, only a few municipalities have set specific targets for it.

4.2.4 The user's role in defining quality

Besides creating more diversity in care provision, improving the quality of care through increased competition in the social services sector was, as I stated above, a central aim behind the introduction of care choice systems. The preparatory works to the Act on Care Choice Systems argue that the operation of market forces, via users' choices, should lead to increased quality. As I mentioned in chapter 1, the idea of using a voucher system to introduce competition and improve quality comes from neo-classical economic theory.[443] According to these theories, certain conditions must be met in order to ensure that the market works as intended, which in our case means that the market produces higher-quality care.[444] The connection between quality and competition, as the preparatory works explain it, is that 'consumers' have the ability to choose and switch providers, which then have a need to retain their customers and thereby protect their revenues.[445] Because 'poor customer satisfaction will lead to the user or citizen choosing another provider, which

[441] E.g. City S Tender Document 3.10.1.2.

[442] This topic has also been raised in the context of the coronavirus crisis in elder care. Some have asked whether high staff turnover may have contributed to the spread of the virus. Felicia Nordlund, 'En sargad äldreomsorg står inför stora utmaningar' *SVT Nyheter* (14 June 2020) <https://www.svt.se/nyheter/inrikes/forskaren-har-ar-aldreomsorgens-utmaningar> accessed 8 July 2020.

[443] See section 1.1.1.

[444] Le Grand and Bartlett (n 8) 19; Glenngård (n 57) 14–15.

[445] Prop. 2008/09:29 Lag om valfrihetssystem (n 13) 94.

stimulates the providers to develop their activities', freedom of choice drives quality improvements.[446] Quality control and quality evaluation are thus supposed to result from individual choice, through the operation of the invisible hand of the market. The self-interest that is assumed to guide providers' (i.e. businesses') conduct, the profit motive, is supposed to function as a force that, in the aggregate, drives quality and efficiency improvements.[447] This explains one of the findings of chapter 3, that the state and the municipalities have focused on promoting users' choices through systems of information and benchmarking. What explains this focus is not only that individual choice is seen as good in itself but also that an individual choice is seen as one of a multiplicity of choices which functions to increase the quality of services. In this model, the user is central to defining and improving quality.

This issue also came up in the interviews. The officials, almost without exception, stated that it was not possible to maintain high-quality services simply through the choices of the users and the invisible hand of the market. They were of the impression that older persons in general did not act as customers and that the market was difficult for them to understand. Two officials described the dilemma in similar ways.

> S2: And the idea is, though, that it should be self-regulating, in fact. Of course, we will have some control mechanisms in place, but it's 'voting with your feet' [that should be the effective mechanism]. But these customers or users are not the ones that can run 100 metres in 10 seconds, if you like. They are not easily mobilized … But, of course, the idea is to 'vote with your feet' and that those companies that do not measure up, they disappear. Whether it actually works on this quasi-market, I cannot say that, but – but if it did, we would not be needing such hard control mechanisms, because then it would be self-regulated![448]

> L3: The thing is – it should not be like you sometimes hear people say in this debate, which I can get a little annoyed at: 'yes, but if you don't like it you can move somewhere else, or if you don't enjoy the home care service you can choose someone else'. Sure, that sounds good, because I mean, if I have been badly treated in a shop, I'll be damned if I go there again! Then I go to another store and shop. That is, if I can choose – but these poor people cannot choose! And then we have to make sure that they do not end up in a bad situation. So it should not really at all actually – it should not be an option for those people

[446] SOU 2008:15 LOV att välja - Lag Om Valfrihetssystem (n 178) 261–262.

[447] Glenngård (n 57) 26.

[448] S2.

> who are very vulnerable, that they should have to vote with their feet, as you say.[449]

As was shown in chapter 3, national policy documents primarily ascribe the low levels of active choice to problems with accessing information, but the interviews provided a few more hints as to the barriers to user choice. One interviewee said that the reason why choice is not that important to users is the quality of care is seen as down not to the company but to the particular worker providing the care. The interviewee put it as follows:

> If you talk to the older people receiving home care, they don't really care about the company but about the individual people [in the company]. If it is somebody you don't like, you have them do what's necessary and then you send them on their way. Here it seems like too much is made of freedom of choice. It is, at the end of the day, the relationship between these people which is important, not which [provider logo] is on the clothes.[450]

Another aspect of the users' role in this context is to ensure that sufficient weight is attached to the 'subjective' dimension of the definition of quality. The subjective side of the definition of good quality is indirectly laid down in the law: the Social Services Act mentions individualization, flexibility, and self-determination as important aspects of care. As I mentioned earlier, a central idea behind care choice systems, as both the preparatory works[451] and many municipal documents state, is that the users' definition of quality should be valued more highly than any professionally or politically defined idea of good-quality care. This is supposed to come about both through choice and through voice, both of which are meant to help foster a user-oriented perspective in the delivery of services. As one administrator described it: 'the provider and the staff, together with the user receiving the help, should agree on the "how". That is how they should decide how the activities should be carried out, and at what time, and so on.'[452]

As the inquiry prior to the Act on Care Choice Systems pointed out, the user's basis for assessing services might differ from what is valued by professionals, and the individual user's preferences will not necessarily take the collective good into account. Therefore, quality must also be measured against

[449] L3.

[450] M1.

[451] Prop. 2008/09:29 Lag om valfrihetssystem (n 13) 54.

[452] M1.

requirements insisted upon by the municipality.[453] This tension was recognized by the interviewees. When users switch from a provider, this may signal to the municipality that it should review the quality of that provider. According to the municipal officials, however, the fact that users were switching from a particular provider would not be enough to lead them to review the quality of the service it provides, since the professionals' definition of quality, which involves the question of whether laws, regulations, and procedures are being followed, may be very different from the users' definitions.[454] One administrator pinpointed the tension created by the care choice system:

> So we could have our opinion, one idea of quality, and then the user can have a different opinion and be happy anyway. It may be that they arrive on time and that it is always Linda who sees them. But that might not be – we might have higher standards.[455]

The tension also arises from the fact that, when administrators evaluate the providers, they examine aspects other than simply how the service in the user's home is provided. Whether they are good employers and how they handle documentation, confidentiality, and other such procedures might not directly affect the user, but from the more legalistic perspective of the administrations these issues are very important. The following excerpt from an interview further demonstrates the interviewees' doubts about the effectiveness of choice in the system.

> Interviewer: So, the quality is ensured partly through the switching of providers?
>
> L1: No, but I don't think it actually is. I find that point about quality very hard. I mean, the customer could be very satisfied with this person, but then the company can be – lousy, as an employer and all the rest of it. But they are happy with this one person …
>
> Interviewer: So the customers' experiences of quality do not have a lot to do with how you – which providers you kick out of the system?
>
> L1: No, they actually don't. It could even be that the customers get hugely upset because we close down the company.

[453] SOU 2008:15 LOV att välja - Lag Om Valfrihetssystem (n 178) 160.

[454] S1, M5, L1.

[455] S2.

After this exchange, she described another situation she had experienced, a case involving fraud from which both the provider and the user were benefiting. A similar case was the subject of a significant scandal in another municipality. In a situation in which the customers are benefiting financially or are dependent on the relationship with the provider, such as when the company is paying the user's municipal fees for them – an example brought up in the interview – the quality of the services is not the user's main concern.[456] A related type of situation was also brought up by an official from another municipality, who claimed that the reason most users switched providers was that the municipality's contract with the user's provider had been terminated and that such users often seemed to move to similar providers, smaller companies who were 'not really following the municipality's rules'. Some users have in this way been forced to change providers several times, because the contracts with their providers keep being terminated. According to the interviewee, this is the main reason that users change providers within the care choice system: 'otherwise [there is] no particular swapping, really'.[457]

From the above, we can conclude that, despite the aims of the legislation, the users' role in defining quality is limited, both because of the low levels of active user choice and because the administrators' broader perspectives on what counts as a good-quality service take precedence over the individuals'.

4.3 The monitorability and measurability of quality criteria

The extent to which requirements set out in contractual clauses are monitorable affects the extent to which the municipality is able to respond to defective services with sanctions, and this is particularly important when it comes to a municipality's ability to govern quality. As will be seen in chapter 5, the officials view the contract as of crucial importance: essential to providing the framework within which services are provided and the basis for governing quality. However, as the preparatory works to the Act on Care Choice Systems point out, under EU public procurement regulations, requirements imposed on private providers must also be monitorable.[458] This section discusses the extent

[456] L1.

[457] M1.

[458] Prop. 2008/09:29 Lag om valfrihetssystem (n 13) 77.

to which the criteria in the tender documents are in fact monitorable and in what way they may be monitored. Connected to this issue is the question of the degree to which the criteria may be measured, and in what way they may be measured (whether quantitatively or by some other means), as well as the matter of the difficulties and possible effects of focusing governing on monitorable and measurable criteria.

To understand the results of my study, it is valuable to look first at those of Winblad et al., who found that 44 per cent of the requirements in the tender documents were not monitorable at all, while 49 per cent were monitorable but not measurable.[459] Only seven per cent were both measurable and monitorable. There were also substantial differences between different types of quality measures. Requirements relating to organizational structures were the most likely to be measurable, while requirements regarding outcomes were the least likely. Winblad et al.'s study also found that 88 per cent of the listed requirements were connected to the quality of processes (the 'how'), 12 per cent to organizational structures, and only one per cent to the quality of outcomes. The focus of the municipalities' requirements is generally how the providers function rather than the results the providers are expected to achieve.[460]

My quantitative study of the tender documents complements and adds further detail to Winblad et al.'s results. What is particularly notable in my quantitative study is the way the criteria in the tenders are structured so as to prioritize certain kinds of quality measurements. As mentioned in 4.2.3, less than 10 per cent of municipalities have a measurable requirement, a specific target to be met by the provider, relating to results. The targets in the municipal documents that I have studied are of two kinds: they refer either to a measurement of continuity of care or to the results of the national user survey. The targets for continuity of care refer to the number of different people visiting the older person within a certain time period, for instance a maximum of 10 in 14 days.[461] Targets relating to the results of the user survey refer to levels of consumer satisfaction, either overall or in relation to specific aspects of the service. For example, the tender documents may state that 'at least 95 per cent of the users and relatives should be satisfied with the treatment'[462] or that 'if less than 80

[459] Winblad and others (n 224) 16–18.

[460] Winblad and others (n 224) 16–18.

[461] Ronneby 2.4.1.

[462] Göteborg 4.1.2.

per cent of the provider's survey responses are positive, an action plan needs to be presented'.[463]

The results of my interviews, parts of which focused on how the requirements in the tender documents were chosen, go some way to explaining these findings. Some interviewees highlighted the potential difficulties created by the focus on monitorability in the governing of quality. Officials said the question of monitorability was central to the way the tender documents were formulated and that the tender documents and contracts played a crucial role in the monitoring process.[464] L6 discussed the relationship between the contract and the monitoring of the quality of the services provided.

> You could have, no matter how good a contract – if you don't follow up or control it, the contract is not worth anything, so it is very important to monitor, and what you write in the contract is something that you actually must be able to monitor and so forth, so that it is not just there for show and then you don't know how to control it. When you look at these terms, you have to know that they are possible to follow up on and that you actually have the ability to do so too.[465]

At the same time, the list of requirements in the contract is seen as having clear limitations as a monitoring tool. According to officials, the central problem is that it is difficult to standardize and define the 'soft values' of care in a way which can be fit into the form of a contract. In the interviews, the difficulty of formulating, monitoring, and enforcing 'soft values' was a central topic. The 'fuzziness' of the concept of good-quality care, as one official put it, is hard to capture in a contract clause.[466] The issue seems to be that, in the home care sector, where good relationships are central, it is particularly difficult to formulate monitorable quality requirements.

Unlike in healthcare, in elder care there are few agreed standards of quality, and this makes it much harder to find precise wordings or definitions of quality for use in the tender documents, leaving the municipalities to develop them without the benefit of nationally agreed standards.[467] One official said that, compared to other social services, he found the home care service for older

[463] Norrtälje 2.2.1.

[464] S4, M5, L1, L2.

[465] L6.

[466] M4.

[467] Winblad and others (n 224) 31.

people to be 'more like a piece of soap. It slips away. It is very hard to get a grip on.'[468] As such, he said, it was hard to regulate and monitor.

One official argued that the contract could be a more effective tool but that the municipalities were too cautious about setting clear quality criteria or were unaware of methods for doing so. She also compared this situation with that in healthcare, where standards are much more clearly defined and regulated. According to her, elder care could function according to similar standards.

> We should be able to say that these theories, these working methods, should be pursued, to reach the goal of self-determination, for example. If we then meet a provider and they don't work according to these theories, then we should be able to dismiss them if we want to! … If we see that, here, they don't work according to the salutogenic model – yes, but isn't that grounds for being questioned?[469]

The attempt to define this slippery concept of quality in terms of measurable criteria creates problems for the monitoring system. Social services staff are used to adopting a holistic view of services, and they will, through their collective experience, form an overall impression of the quality of a certain provider's service, but they then need to relate this impression to the aspects that are covered by the contract.

> You form a lot of impressions. You are out and meet staff and managers and you review documentation and that kind of information, and you get an impression of the operations, of the whole picture, in some way, whether it is functioning well or not, and so forth. It is an art to go from that impression and everything to a report that must relate to the contract.[470]

It is important to note that the need for requirements to be monitorable also shapes how quality is defined in the tender documents. One administrator captured this well:

> We've included requirements that we know for certain can be monitored. So 'person-centred care' comes to equal the existence of care implementation plans. And then we've gone out and said that everyone should have approved implementation plans but that that is perhaps not what actually should be

[468] S2.

[469] L3.

[470] M3.

> followed up on. Rather it should be what the user actually thinks about the quality, and so on.[471]

As this implies, definitions of quality in terms of broader values, such as 'person-centred care', must be broken down and operationalized in ways that can be captured in the tender documents and contracts, and hence are possible to monitor. On the other hand, as the descriptions above – and Winblad et al.'s findings – show, there is a lack of monitorable requirements in these documents. There thus seems to be a conflict between the aim of governing the 'soft' aspects of quality and the mechanisms of governing made possible by contracts and contract monitoring.

4.4 Changes in practices of quality assessment within the municipalities

Even though the preparatory works to the original act do not discuss the aim of enhancing the quality and efficiency of the municipal service providers, several of the officials suggested that the reforms had had this effect. This issue was discussed, however, in the government inquiry into care choice systems in 2014. The report states that most municipal administrators surveyed were of the opinion that the implementation of the care choice system had led to quality improvements in the municipal delivery of services. The report states that there seemed to be an increased 'awareness' of quality issues within the municipalities.[472]

This fits well with the findings of Brandt's study of care choice systems in Sweden and Finland. A majority of the municipal administrators responding to his survey said that the working methods within the municipal operations had changed as a result of the introduction of care choice systems within elder care: 72 per cent of the Swedish municipal administrators working within social services agreed with the statement 'we are learning to develop our own operations by comparing ourselves to private providers', and 58 per cent agreed that 'we are changing our own service structure to adjust to the competition from outside'.[473]

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[471] L2.

[472] SOU 2014:2 Framtidens valfrihetssystem – i socialtjänsten (n 15) 128.

[473] Brandt (n 32) 124. The translations of the questions are my own.

The results of my interviews deepen our understanding of the kinds of changes brought about by the introduction of care choice systems. One official said that the process of introducing the care choice system meant that the municipal organization had had to make a list of quality criteria as a reference point for the development of the contract. This provided a new perspective on the municipality's own operations that had not been appreciated before, and it changed their ways of thinking about how to specify and define quality in measurable ways.[474]

> Interviewer: So you agree with one another that the care choice system has influenced the municipal delivery of care?
>
> S3: Positively, yes.
>
> Interviewer: Would you like to develop that? In which way?
>
> S4: Yes, but it is kind of like my colleague says, that you have to stop and think: what do we offer and what are the requirements that we place on our private providers? And then, what should we ask of ourselves? What is our minimum level? Because we must bear in mind that we – that the demands we put on others, we must of course also ask of ourselves.

The contract was described as a good benchmark or measuring tool for assessing the municipal delivery of services.[475] The need to detail the various tasks involved in a service also brings with it a more comprehensive understanding of costs, which makes it possible to streamline the delivery of services in the same way as the private providers do.[476]

> Interviewer: Maybe this question is hard to answer, but – what is the difference in the internal relationship to the municipal provider before and after the introduction of the care choice system? We have touched upon it, but would you like to elaborate?
>
> S4: Well, I just remember, because then I was working on the ground as a physiotherapist, and I remember that when we were to introduce care choice, then all of a sudden you started to make specifications of requirements, that is, on what you were doing in your own activities. And that had not been done before, and that was quite interesting. Then you started to think along these

[474] S4.

[475] M5.

[476] S6.

> lines: for us to be able to set requirements for the [private providers], we need to figure out first – what demands do we place on ourselves?
>
> S6: What do we actually do?
>
> S4: What are we doing? Exactly! What do we do? What are we offering?
>
> Interviewer: But how did the governing work before, when that was not happening? Was it more about simply trusting the professionals? An unspoken confidence? How would you express it?
>
> S4: Yes, exactly. That is how it was, yes.

The need to specify requirements led to a kind of standardization: increasingly, everyone started to work in the same way. Before the introduction of care choice, municipal staff were mostly governed through an implicit trust, which also meant

> that not everyone does the same. That one home care group could have a routine on one thing and someone else another. What help you got could look very different depending on where you lived within the city. But now that it all has been become clearer – I think it has been tightened up as well.[477]

This official went on to describe the influence the provision on systematic quality management had exerted on the municipalities' work, leading it to standardize its quality development procedures.

> I think that the SOSFS, when it came in in 2011, the one about quality management systems, it contributed to the fact that all municipalities, regardless of whether you have many or a few care choice providers, have been forced to think of and have a process around different things. It has contributed to more quality thinking and so – before, there was maybe more confidence in the profession than there is now.[478]

This statement accords with a more general development described by a long-serving official from another municipality. She said that the provision of care nowadays is governed by far stricter requirements in general – on documentation, technical systems, and security. The focus on monitoring and evaluation had also increased over time, she said, a development which she

[477] S5.

[478] S5.

believed had been driven by the increasing use of contracts as a tool within the system.[479]

Interviewees also described the competition brought about by the introduction of care choice systems as having 'put pressure'[480] on the municipalities themselves by providing incentives and ideas for change. They spoke about developing 'a concept'[481] of the municipality's operations, as though the municipal provider were a private company presenting its business proposition. Within this discourse, the user is more often referred to as a 'customer'. Officials said that thinking of the recipient as a customer changed the municipalities' approach and attitude towards the care user. The municipalities increasingly have to start thinking about the service they provide in the language of business. This shift goes hand in hand with the introduction of competition in the system. Through the 'consumerization' of care users, another view of flexibility becomes apparent. If the rule is that 'the customer decides', subjective views of quality and the individualization of services become increasingly important. As one official pointed out, there is a tension between this way of seeing service provision and the more legalistic and formal administrative processes normally carried out by municipal administrations, with their needs-testing and formal decision-making. That said, she thought the development of the care choice system, and the attendant consumerization of care users, was a positive step.[482]

4.5 Balancing conflicting missions

4.5.1 Blocking loopholes and handling fraud

One obvious internal conflict in the role of the municipalities is that between the aim of ensuring that services provided are of high quality and that of promoting diversity in service delivery. A recurring issue in the interviews was how municipalities handled providers who did not meet the quality requirements, or were even fraudulent. One issue with more business-friendly regulations, as the officials saw it, is that these provide incentives for

[479] M1.

[480] S1.

[481] S6.

[482] S6.

companies to 'nudge down the level of quality if it means that you can earn more'.[483] As one official pointed out, it was relatively easy for rogue companies to make money in rather unregulated sectors or in sectors where monitoring was not efficient enough. She expressed her view of the situation bluntly:

> It is like that, unfortunately, when you have – what to say – when you have a private market, then that's the case. And the welfare system in Sweden is unique, and there's definitely a lot of cheating and fraud in it, unfortunately! … So we try to keep up, but it's not that easy. I am completely convinced that we are being cheated, in several places. However, we are trying to do something about it.[484]

When the officials were asked to explain why they found it hard to keep out the more unscrupulous private providers, they pointed to the problems raised by the need to govern through tenders and contracts. One such problem is that it is difficult to define quality in a monitorable way. This, in turn, creates a structure within which more unscrupulous companies can flourish. Several administrators highlighted the fact that it can be hard to use contractual requirements to deny entry to the system to unsuitable companies, as a company may have all the formalities in place but have flaws or display incompetence in areas that are not directly captured by the specified requirements. The Act on Care Choice Systems states that municipalities have to accept providers who meet the requirements in the act and tender documents.[485] There might thus be a conflict between the aim of upholding standards of quality and this legal demand to accept all companies that formally meet the requirements. One official said that she had met aspiring providers who fulfilled all the formal requirements but seemed not to be knowledgeable about basic regulations or did 'not seem to know what they [were] talking about'. In those situations, she said, 'it is hard for us to do anything about it'.[486] As another put it:

> As long as they meet the requirements in the regulation, we cannot say that they are not entitled to establish their business here. We here [at the administration] can think 'hmm, that is not going to work', or 'that is not okay', or 'you don't

[483] M3.

[484] L1.

[485] See section 1.4.3.

[486] M5.

> know what you are talking about', but they still have fulfilled what is required of them, even if they do not understand the implications of it.[487]

A third interviewee, a leading official in City L, described the dilemma the administration faced when trying to use the quality requirements to keep rogue companies out:

> The problem is that there are companies that can describe very well that they can – that they will manage it. So it looks good on paper, but then when they get started, we notice during the monitoring that it just doesn't work, and then it becomes difficult. And that is why you have to raise the bar to get in, in some way. And I personally think that a main thing should be the driving motivation, the idea of why you want to be in the sector. Why are you starting an elder care company in the first place? And that is a very relevant question, because many of those who have been interested [in getting in] and still are or are already in – they have taxi companies; they can have beauty – what's the name? – parlours. I also had one who had a vehicle service station and – it really can be – and if you have three, four of these business areas, then it is pretty relevant to ask, 'why should you be in elder care?'[488]

However, it is difficult to get at these motivations simply on the basis of the contract. Another problem officials mentioned was that certain shortcomings in service provision, things which are clearly inappropriate, are hard to tackle if not regulated in the contract beforehand. Similarly, it is difficult to foresee all possible situations and regulate them *ex ante* through a service contract. It is, in other words, difficult to close all the possible 'loopholes' that a provider might find in a contract, and these loopholes might thus be exploited by unscrupulous providers:

> It is also one – how should I put it? – an area in which you can pretty quickly make big money. The turnover is quite large, and if you are a serious provider, there is no excessive compensation, but if you find loopholes, this may be quite a large number. So I guess it is – well, it is not directly connected to care choice as a system, but it is linked to – yes, you open yourself up to it, you might say.[489]

[487] S5.

[488] L3.

[489] M5.

This highlights a central tension: to get rid of the loopholes, the regulation would need to be so detailed that it would be difficult for providers to enter the system at all. This dilemma will be discussed in the next section.

4.5.2 Regulation versus innovation

As the above makes clear, the priorities of the Social Services Act and the Act on Care Choice Systems can be seen to produce a regulatory conflict, where the responsibility to uphold quality standards comes into conflict with the responsibility to foster 'innovation' in the care choice system and to provide 'flexibility' for the private care companies. The tension between the objectives set out in the Act on Care Choice Systems and those in the Social Services Act relates particularly to the quality requirements that may be stated in the contracts. Even as municipalities aim to encourage diversity and innovation, to create markets and support (especially small) businesses, there is a public regulation which must be adhered to, through the use of tenders and contracts. Yet, if these contractual requirements are too onerous, the growth of the market will be constrained. One official summed up the dilemma in the following way: 'you cannot raise the quality there and make it that fewer are able to get in, because then – that's not within the meaning of the Act on Care Choice Systems'.[490]

This conflict becomes central to the municipal administration of elder care, particularly because of the existence of unscrupulous and fraudulent providers in the system, and it affects the form and outcomes of care choice systems. Officials described the conflict as one between regulation and innovation. The positive aspect of care choice systems is that they allow new ideas and providers into the field. This was described by one of the officials in the following way:

> You get creative, innovative ideas into the sector. That is the good thing, and that is the thought behind the care choice system: that the procurement should not be so detailed, but it should allow space for the entrepreneur or provider to bring their innovative ideas and find solutions. There should be clear objectives but not a specified way there.[491]

Compared to traditional public procurement, a care choice system is also, depending on how the contracts are constructed, relatively easy to adapt. The

[490] L1.

[491] L2.

ability to easily change the requirements is seen as an advantage that the Act on Care Choice Systems has over traditional procurement under the Public Procurement Act. However, officials find that this is difficult in practice. Contracts within care choice systems do not in fact include many fewer requirements than those used in traditional public procurement. The report by Winblad et al. for the Swedish Association of Local Authorities and Regions, mentioned above, shows that the requirements in tender documents in care choice systems are often as many and as extensive as in traditional public procurement.[492] One official said she had been surprised when she started working on the care choice system in City S. She had previously worked with traditional public procurement and thought that the Act on Care Choice Systems would provide much more freedom. Instead, she found the list of specifications very detailed. 'Personally, I think that we can ease up on certain things, partly because it should be easier to apply and not – because if you are presented with this as a small company you could be – it can scare you away.'[493]

One explanation for the stringency of the requirements is that officials consider the provision of elder care to be governed by quite strict public regulations to which the requirements in the tender must adhere. The regulations, especially the provisions and guidelines from the National Board on Health and Welfare, also to some degree specify how services should be provided – from rules on giving out medicine, to serving food, to how staff should dress.[494] These aspects of service provision are regulated in detail in the provisions from the National Board on Health and Welfare, and also often through local guidelines. The stringency of the requirements may also be explained in terms of the fact that the municipality has a responsibility to ensure that privately delivered services are of a certain level of quality. Official M5 pointed out that securing quality required distinct and effective standards to be set out in the contract, as well as an effective monitoring process.[495]

But private providers find these regulations difficult to understand. Officials confront the conflict between regulation and innovation in some of their dealings with providers. According to several officials, some of the private providers struggle to understand the fact that they have to work within a regulated framework when providing home care, for instance that they must

[492] Winblad and others (n 224) 32.

[493] S1.

[494] M5, L1.

[495] M5.

adhere to certain formalities when they give out medicine or perform other healthcare tasks.[496] Many of the interviewees said that certain companies, especially the smaller ones, were simply unprepared for dealing with the vast numbers of regulations pertaining to the elder care sector. While the large care companies often have administrators and even lawyers, and more experience of complying with regulations, smaller companies find it difficult to keep up with laws and regulations around issues such as documentation, delegation of healthcare tasks, confidentiality, treatment issues, etc.[497] According to the interviewees, the companies sometimes expressed a lack of understanding about why they had to comply with the requirements of a public-law framework. One official even went as far as to state that many of the companies showed 'no respect' for the legal regulations that govern elder care.[498] Sometimes the providers want to provide more services than the municipal decision has determined the older user has a right to receive.[499] 'And what is difficult then is that the provider does not understand the issue, but rather finds us bureaucratic, complicated, and an obstacle to their entrepreneurship. They don't see these differences; they haven't thought that way.'[500] This problem seems to come up most often with the smaller companies, whereas the larger companies, which the officials see as more 'serious', may welcome stricter regulation because they want compete with other serious actors, as one administrator put it.[501]

In City M, stricter regulation and stringent monitoring led to some contracts being terminated, with the number of private providers declining from about 20 when they started monitor more strictly a few years back to about 15 today. A leading official from City M said there were companies that had complained about the extent of the requirements, especially those relating to digital systems, documentation, and technology, which were seen as creating a barrier to new market entrants. City M has gone from 'leaving very, very much to the providers, towards managing more, while still, as I've said, trying to retain the differences, because there is no point in a care choice system if everything is exactly the same'.[502]

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[496] M1, L6.

[497] M5, L3, L6.

[498] L3.

[499] S5, M5.

[500] M1.

[501] L6.

[502] M5.

However, the official said, because of the rules and regulations governing the sector, the scope for developing and changing services 'is not extremely large'. This leads to a lot of discussion with certain companies, for example regarding how generous they can be in providing social activities for older persons. 'There should be room for some type of variation and some type of freedom to build your own competence and your own approach, and so on. But, as I said, it is limited on account of the specific conditions and what you need to adhere to.'[503]

There also seems to be a widely shared wish across the municipalities to keep control over the services provided in order to ensure quality and limit fraud. Some of the more detailed tender documents even specify how different care tasks are to be carried out in order to deliver quality care. City S's tender document is one such example. The document lists and defines different care tasks in detail: for instance hygiene, oral hygiene, dressing, shower and body care, diet and meal support, physical activation, and assistance for self-care.[504] Such specific requirements, however, limit the extent to which services can actually be changed and developed. One administrator stated that the ability of private providers to actually develop their services is clearly limited by the fact that they are providing services within a very regulated sphere. 'They have a high level of trust from us, but it is still supposed to be the case that home care should be provided based on the Social Services Act and the guidelines in [City M]. So there are definitely limits to what you can offer.'[505]

The need to strictly regulate the elder care sector thus conflicts with the aim of supporting businesses (see section 3.4.3). One official described experiencing this conflict when dealing with small companies which she believed, despite the administration's goal of supporting small businesses, might not really be able to deliver the level of quality that was required. It is hard to get at the problem, as long as the company meet the demands set up in law and the municipality's list of requirements.[506] That creates a situation in which the municipality itself cannot live up to its responsibility regarding the quality of services. The end result of the strict regulation and detailed governing of the

[503] M5.

[504] For example, diet and meal support is defined in the following way: 'The provider must be able to provide the user with help and support for main meal, breakfast, snacks, and supper. For example, with heating food, setting the table and washing the dishes. In addition, the provider must be able to assist the user in eating and be available during the meal to motivate and support the user.' (City S Tender Document 3.5).

[505] M5.

[506] S5.

home care sector, from the national level as well as the municipal level, is less diversity in the sector and higher barriers to new entrants. Disappointment over this difficult dilemma from the political side was captured in a remark from a municipal councillor for elder care at the City L branch meeting:

> CL: I think it would be great if we had greater diversity among the private providers. Really, there are a lot of very similar profiles, if you look at the big picture. Really, it is not like we have a lot of linguistic diversity or special – I mean if you compare it to kindergartens, which often have pedagogical profiling and such things, here everyone is very similar, which is really unfortunate in a way.[507]

The conflict discussed in this section was a recurring theme in the interviews. One administrator described it as a catch-22: either you lock small and newly established businesses out of the market and risk creating an oligopoly, or you have a more open policy and risk getting stuck with poor providers.

> It is a balancing act. I mean, you could raise the demands on the companies, but if you do so suddenly you have tied up the market. Several of the providers that we have that are – they would never have existed if it wasn't done more openly from the start, so it is a bit of a catch-22, how to do this.

The same administrator vividly described this balancing act through a metaphor of different games.

> Another alternative is to play 'beggar-my-neighbour', and be left with seven big dragons in the whole care market in [City L], or you keep it pretty free, and if you're open, you are at risk at being left with the 'Black Peter', the bad card.[508]

The ultimate source of this catch-22 is the conflict created by the need to ensure quality by insisting on certain requirements in policies, tenders, and contracts, which leads public authorities to find more streamlined, standardized, and detailed ways of defining and governing quality.

[507] City L Branch Meeting.

[508] L4.

4.6 Results

The development of care choice systems takes place within a particular context. This is often described as a context in which the ideas of New Public Management have become increasingly central, where practices of quality assessment have become more explicit and more focused on measurement. But this context also includes the voices of those critical of these tendencies – in Sweden, for example, the Trust Delegation. This chapter asked how the implementation of care choice systems affects the municipal authorities' governing of quality issues and whether any such effects might be part of a longer-term trend towards particular ways of governing quality. My empirical research shows that the attempts to define and monitor quality are central to the work carried out by the administrations. Defining and operationalizing quality are seen as difficult, but these processes are also viewed in a positive light, since they lead to a focus on quality improvement in municipal elder care. The need to define quality in measurable and quantifiable ways within care choice systems has knock-on effects for the care provided by the municipalities. Through the ways of operationalizing quality indicators provided by national policy instruments and tender documents, services become more specified, detailed, and standardized.

My study of the tender documents and contracts reveals that they contain a great level of detail. According to the Trust Delegation's inquiry, there has been an increasing focus on detailed regulation in the welfare sector as a whole, and the main reason for this is the contracting out of services. The results of my empirical investigations also reveal a connection between levels of regulation and instances of fraud, where providers abuse loopholes in the contracts to lower quality. As the Trust Delegation states, a common response of municipal administrations in such cases is to advocate even more precise specifications and more detailed control in public procurement.[509]

When studying the question of the governing of quality in care choice systems, the logic that becomes visible is one which centres around standardization, streamlining, measurement, and evaluation. Even in the preparatory works to the Social Services Act in the 1990s, which introduced practices of quality assessment into social services, there was already an increased focus on

[509] SOU 2018:47 Med tillit växer handlingsutrymmet: tillitsbaserad styrning och ledning av välfärdssektorn (n 130) 105–106.

measurement and evaluation in social services. Care choice systems strengthen this logic.

What this chapter has also shown is that from the detailed specification of tasks required by the use of contracts a detailed form of technical monitoring has followed. The focus on monitoring promoted by care choice systems leads to increasing standardization and increased measurement. This is an aspect of the reform the importance of which must be underscored. All of these tendencies produced by the introduction of care choice systems have the effect of increasing bureaucracy. Another implication of these systems is that, even though the purpose of creating these markets and supporting (especially small) providers is to promote diversity, the logics of standardization and streamlining work in the opposite direction.

How is quality defined within the care choice systems?

A first question here regards *where* the definitions of quality relevant to care choice systems are to be found. They are not explicitly provided in the legislation but are left to national authorities and municipalities. Unlike related public services such as healthcare, which often makes use of highly specific quality standards, the definition of what constitutes quality in elder care is left relatively open by national policy documents: it mostly consists of values and rules governing certain processes, whether more concrete ones, such as basic hygiene, or more overarching ones, such as quality development and internal learning.

The National Board on Health and Welfare has issued several relevant regulatory documents, and other state agencies, such as the National Agency for Public Procurement, also issue guidelines and provide support for municipalities with care choice systems. The introduction of a new national agency, the Health and Care Inspectorate, in 2013 was also motivated by a desire to increase the level of monitoring of the sector from central government. The introduction, in 2019, of the authorization requirements for providers of elder care further underlined that tendency. Relatedly, there has been an increased use of national guidelines and provisions by the National Board on Health and Welfare for the area of elder care, many of which were written after the Act on Care Choice Systems came into force. One important national policy document which governs the municipalities' practices of quality assessment is the list of quality indicators developed by the National Board on Health and Welfare and the Swedish Association of Local Authorities and Regions. The quality indicators have in turn been operationalized for use by those administering care choice systems in a policy

document issued by the Swedish Competition Authority. These quality indicators are intended as a way of streamlining definitions of quality nationally, especially the definitions employed by municipalities with care choice systems. Hence, although the legislation leaves much leeway for municipalities to produce their own interpretations of quality, the national policy documents limit this freedom somewhat. It appears as though this is the result of the growing importance of private interests in the sector and the high-profile scandals of the last decade, which have led to political pressure to govern the sector more stringently, but an investigation of this is beyond the scope of this study.

A second question regards *who* should be given the role of determining definitions of quality. A central purpose of the introduction of care choice systems was to increase the influence of users over services, the idea being that care users, as customers, would favour companies that provide good-quality care and that this would drive quality competition between different service providers. My empirical research shows that there is evidence to suggest that public providers too have come to adopt a similar market-oriented understanding of quality, using many of the same tools and discourses as private providers. However, as this[510] and other studies have shown, choice is not an effective tool for increasing the quality of services. The preparatory works suggest an image of the user, and of the sorts of choices that are important to users, that is not confirmed by the experiences of the municipal officials. Because municipalities are still responsible for the quality of the services provided, the recognition that choices are few and limited has led municipal administrations to more actively monitor and control the private delivery of services.

Through care choice systems, with their focus on benchmarking through the user survey, the Elder Guide, and Open Comparison, the definition of quality has also become a matter of user satisfaction. The definition of quality created through this quasi-market differs from the definition employed by municipal administrations, which focuses rather on whether regulations and standards are being adhered to and is based on professional judgements of what constitutes quality in elder care. Because the criteria that are measured become ever more central to the service provided, the logic of benchmarking steers the governing rationality in a certain direction. When thinking about Open Comparison's role in the care choice system, it is important to note that the data collected is based largely on subjective factors rather than on the formal aspects of a service. The

[510] See section 4.2.4.

measurements do not relate to organizational factors such as staff ratios or staff competence. The fact that so much weight is given to subjective experiences marks a step away from the professional definition of quality. The significant impact of the user survey results and the comparison mechanism, despite the criticisms these tools have come in for from several organizations and researchers, is an expression of this trend. The importance accorded to subjective experiences might be seen as empowering the users, but it also facilitates the marketization of services and the consumerization of users. Instead of being able to trust that the care given complies with professional standards, is high quality, and is equal, as one might expect of public services run on universalist lines, each user is supposed to look to other users' experiences of and levels of satisfaction with particular service providers. At the same time, service providers are expected to compete on the basis of user satisfaction rates rather than other standards of quality.

This account of developments accords with that provided by Susan Ilcan, who states that benchmarking sets up a learning and feedback system that is based on precisely the aspects measured by the benchmarks. Her study shows that 'rendering something "benchmarkable" shapes the practices that are to be benchmarked', which marginalizes established knowledge and expertise.[511] Wendy Brown makes a similar point, arguing that benchmarking tends to lead to a 'mission drift', a reorientation or recalibration of the goals of an activity or an organization.[512] Such a reorientation may be seen in the importance accorded to the user surveys and Elder Guide by the municipalities, which has the effect that both private and municipal provision come to be increasingly directed towards the measurements contained in the guide. Benchmarking systems which are digitalized, such as throught the Elder Guide, also bring technical systems into play, as Peter Triantafillou points out, as they allow the performance of the providers to be scrutinized not only by their superiors (in this case municipal officials and politicians) but also by citizens. The citizens are in turn supposed to act as informed and critical customers who make active use of digital and other information systems and take responsibility for their own situations.[513] In a similar vein, Moberg, whose dissertation studies some of the implications of the introduction of care choice systems for governing, concludes that

[511] Ilcan (n 47) 218.

[512] Brown (n 47) 139.

[513] Triantafillou (n 20) 53.

> it can be argued that the organizational logic behind the Swedish eldercare sector was, up until 1990, based on the assumption that public regulation and provision, in combination with trust in the discretion of eldercare workers, were the best means to ensure that eldercare services of high quality were available to all citizens in need of them. In this light, the introduction of marketization reforms marks a turning point in the organization and governance structures of Swedish eldercare. … [T]he sector has come to rely more on the market logic in the sense that the wishes and demands of the service users should have more impact when steering the supply and quality of publicly funded eldercare.[514]

Hence, even though users exert only a limited influence on services through their choices, there has still been a move away from trusting the professionals and towards benchmarking based on user satisfaction as the definition of quality. At the same time, the municipalities still have the responsibility to ensure the services provided are of high quality, and they try to achieve this through the use of tender documents as governing instruments.

What are the *effects* of these new ways of defining quality? My analysis of the tender documents suggests that concrete, formal criteria – such as the requirement to produce individual care implementation plans, to provide assigned contact persons, to have procedures in place for handling users' keys, to display staff ID cards, and to have procedures for documentation and reporting errors and risks (according to *Lex Sarah*[515]) – are all frequently included. These criteria are easy to fulfil, and it is easy to provide evidence that they have been fulfilled. More demanding requirements, such as having a skilled workforce and implementing knowledge-based written procedures, are seldom included in the tender documents. Skilled management is valued more highly and regulated more strictly than a skilled workforce 'on the ground'. Staff continuity, which care users often state is a value of central importance for them, is only regulated in a handful of municipalities.

The provision issued by the National Board on Health and Welfare regarding systematic quality management seems to have influenced the governing of care choice systems, bringing processes of quality assurance into providers' operations. These quality management systems are focused on implementing procedures to plan, monitor, and evaluate services, thereby also contributing to the focus on measurement and evaluation. In the context of care choice systems, the significance of quality management systems is that they ensure that providers have self-management systems in place, and these are in turn

[514] Moberg (n 55) 25–27.

[515] See section 1.4.2.

governed by public officials. Furthermore, many tender documents include key words that are intended to denote the kind of quality that providers should strive to achieve, words such as 'salutogenic' and 'rehabilitating'. These are, however, seldom operationalized into concrete, monitorable criteria. It is also worth noting that simply requiring providers to have in place procedures for ensuring 'good treatment' does not necessarily lead to the good treatment of users in practice. This highlights the difficulty of regulating the central aspects of good care in formal terms.

Criteria related to security occur frequently in the tender documents. Quality assurance seems to be central to the definition of quality. This relates to the risk of rogue and fraudulent providers operating within the market, an issue that came up in the conversations with the municipal officials. My research corroborates a point made by the Trust Delegation: that the risk of companies using loopholes to lower quality leads to ever stricter regulation. As the municipalities can only keep out or get rid of providers who clearly breach requirements and/or contractual clauses, quality must be able to be transformed into formal and measurable criteria. The struggle to formulate such monitorable criteria is the result of the shift of focus from content to process in the understanding of quality.

The quality requirements in the tenders hence focus more on processes than on outputs. Criteria relating to organizational structures sometimes appear, but more costly requirements, such as those relating to staff density or staff competence, are more unusual. It seems to be easier – it is at least more common – to use contracts to regulate processes rather than outcomes. Details of the processes, the 'how' of operations, become central, and the definition of quality seems to become narrower. Overall there has been a shift from profession-centric systems of quality assurance to complex qualitative and quantitative measures. This has in some cases increased the administrative workload for private and public providers. From a market perspective, it does not make sense to limit the support given to older persons to the strict and often detailed framework which results from the administrative need-testing process. This produces a conflict with the way the municipal officials believe home care services should be provided, a view informed by public regulations and the needs-testing defined by the Social Services Act.

Which strategies and tools are used by the public authorities to govern practices of quality improvement and assessment?

The development of good tender dossiers and contracts has become an increasingly important, and difficult, task for municipal administrations. The

centrality of this task changes the role of the municipal authority. Using the purchaser–provider model was already a step towards using market models in public services, but care choice systems take this model further by increasing the distance between purchaser and provider. This distance means that the service and the requirements must be more clearly defined and that formal regulations must be explicit and enforced. Through the use of contracts, quality comes to be defined by processes, formalized, and standardized.

Monitoring is a central tool in governing practices of quality assessment, and my empirical research shows that one risk with this is that whichever formal aspects of service provision can be established concretely will become central to the monitoring, further accelerating the trend towards the standardization of services. As Rose explains, in this way monitoring changes what is supposed to be monitored. The 'logics and technical requirements of audit displace the internal logics of expertise', and norms of accountability and trust in professional competence and the decisions of specialists and politicians are replaced by other norms, such as observability and legal enforceability.[516]

At the same time, the tenders often contain unmonitorable clauses. As we have seen, the 'soft values' in the contracts seem to be hard to define in a way that avoids detailed standardized criteria. The quality requirements are designed to constitute contractual terms, such that a failure to meet them will entail a clear breach of contract. However, many of the quality requirements are unclear, and without clarity it is difficult to make a legal claim of breach of contract if the provider fails to meet them. Winblad et al. emphasize that the lack of monitorable and measurable quality requirements creates incentives for profit-making companies to offer lower-quality services. Their point is that monitorable lists of requirements are therefore an important tool for ensuring and improving quality in elder care.[517] Without monitorable requirements, the municipality cannot determine whether specific goals have been achieved. The lack of monitorable clauses may be explained by the nature of the service purchased. The municipalities struggle to govern quality through contracts because contracts provide 'hard tools' and elder care is a sector characterized by 'soft values' of quality, which are difficult to define as contract clauses, monitor properly, and enforce.

Alongside the trend towards using and monitoring compliance with criteria in tenders and contracts there has been an increasing use of partnerships as tools

[516] Rose (n 196) 154.

[517] Winblad and others (n 224) 30.

for governing quality. If municipalities and providers are partners, then supporting the providers' quality development initiatives – in the ways described earlier in this study – is seen to be in everyone's best interests. My research shows that the municipalities assume part of the responsibility for carrying out the private providers' quality development work. Local administrators generally claim that they feel they are able to improve quality in the private businesses, but this requires a team of administrators to offer training, dialogue, and guidance on quality development. This kind of soft governing fits well with the political ambition to promote small businesses. The existence of unscrupulous providers within the system was a problem repeatedly raised by the interviewees, and we might ask whether relying too heavily on self-regulating mechanisms to ensure quality is dangerous in a system where fraud is a constant threat. As Roger King points out, organizations confronting this problem will need to institutionalize ways of ensuring that certain processes are in place, through the appointment of personnel and groups focused on documenting and evaluating 'to ensure the development of a "learning organization"'.[518] In the municipalities I studied, these personnel seem to be located primarily in the municipal administrations themselves, providing training to private companies in matters of quality improvement.

What conflicts might arise in the governing of quality through a care choice system?

A central problem for municipalities is that they cannot exert the same level of control over private providers as they do over the in-house providers – hence the risk of fraud and exploitation. Just as it is hard for the municipalities to hold the private providers fully accountable for below-par services, so it is also hard for them to get rid of rogue companies. In analysing the problems confronted by municipal officials in this context, it becomes clear that the basic issue is that private providers have priorities other than delivering high-quality elder care: at least some of them are in the business to make a profit, and if high quality is not required, or quality requirements are not effectively enforced, it cannot be assumed that the aim of delivering high-quality services will always trump the profit motive. According to the interviewees' testimonies, it is very difficult to use contracts to govern the more unspecifiable aspects of elder care. This means that the use of contracts tends to increase formalization and standardization, while failing to address the risks of fraud and poor quality.

[518] Roger King, *The Regulatory State in an Age of Governance : Soft Words and Big Sticks* (Palgrave Macmillan 2007) 75.

This might in turn mean that individuals in need of care end up with poor-quality services, that private providers still make profits through providing substandard care, and that all the while public resources are spent on ambitious monitoring and training programmes for private companies.

The hybridized structure of care choice systems seems to create a variety of possibilities and loopholes for rogue companies. To avoid the possibility of such companies abusing the system, the municipalities will have to put a lot of effort into monitoring and collecting information from the private providers. The need to monitor also creates a need for standardized procedures and operations, as these are easier to control. The use of certain technical and digital systems, such as time measuring and documentation systems, which play an important role in day-to-day care work, is an example of this development.

One reason for introducing care choice systems is to foster diversity and innovation. According to the evidence from the municipalities, however, there is not much space for diversity. One early study suggested that municipal care choice systems had not resulted in any significant developments of services or in the provision of new types of care services.[519] The report of the government inquiry of 2014 similarly finds that the scope for innovation within care choice systems is limited because the regulation and monitoring of the sector is, and has to be, so extensive.[520] And any further regulation might produce further obstacles to competition and innovation. As Julian Le Grand and Will Bartlett point out, 'in the absence of good outcome measures, regulation of quality tends to concentrate on inputs or production technology, both of which discourage flexibility and innovation'.[521]

Because of the amount of administrative work required and the degree of risk involved, care choice systems seem to benefit large companies more than small ones. Ole Hansen remarks that the uncertainty involved in the provision of home care services might create unusually large risks for private care companies. In combination with the significant demands on administrative capacity, legal capacity, and so on, this creates a situation which is less beneficial for small and medium-sized companies, which may only have a single municipal customer, and easier to navigate for larger companies

[519] Edebalk and Svensson (n 55) 73.

[520] SOU 2014:2 Framtidens valfrihetssystem – i socialtjänsten (n 15) 87.

[521] Le Grand and Bartlett (n 8) 209.

established in several municipalities.[522] There is a conflict here between two very different kinds of market: one occupied by larger, more 'professional' care companies and one that is also home to smaller companies.

The municipalities are saddled with a contradictory mission, and this fundamentally changes the nature of their role. The conflict is present at the level of the legislation and at the level of the stated goals of central government and the municipal administrations. It is also felt within the municipalities themselves. Home care activities cannot be regulated in detail, and this means that providers must be allowed room for manoeuvre. This is, of course, one reason for introducing care choice systems in the first place, but it can lead to profit-driven interests exploiting this space in unforeseen ways. But the regulation and control needed to counteract unscrupulous behaviour might create obstacles to the sorts of innovation that were supposed to have been created through the operation of private incentive. The administrations are thus constantly engaged in a balancing act. The aim of increasing diversity and specialization in order to better cater for the needs of users can be hard to combine with the need to regulate the sector properly, and with the kind of standardization that the increasingly detailed regulation and monitoring described earlier in this chapter produces. There is a tension between the political ambition of supporting smaller care companies and the need to ensure that the care provided is of an adequate standard. In some cases, the political ambition has the upper hand, and requirements are watered down, or providers who do not meet the requirements are accepted, and the message sent to the administration is that it should not allow excessive bureaucracy or overly stringent standards to get in the way of the operation of the market.

In terms of related governing rationalities and techniques, care choice systems play into general tendencies associated with NPM ideas. When it comes to governing quality in particular, there has been a general trend away from trusting professional expertise and towards measurement and standardization, and the Act on Care Choice Systems is part of this development. Improving the quality of services becomes a matter of evaluating and measuring. As delivery moves from public to private, further increasing the distance between purchaser and provider, the need for control, evaluation, and measurement grows.

[522] Hansen, 'Public Law by Contract' (n 63) 645.

5 The use and function of legal tools and strategies

5.1 Introduction

The preparatory works to the Act on Care Choice Systems state that municipalities that contract out services to external providers retain their primary responsibility towards citizens under the Social Services Act.[523] Since the public authority, in this case the municipality, is still accountable to users and citizens, it must be able to ensure that it can in turn hold the private providers accountable. This may be achieved using a variety of strategies and tools, for instance tenders and contracts, monitoring, sanctions, and more informal methods.

The aim of this chapter is to answer the following question: how are public- and private-law tools and logics used in the governing of the public and private delivery of home care within care choice systems? This chapter intends to show how these different logics and instruments are used and to understand the implications of these usages. I have broken down this main question into the following subquestions, to be discussed in this chapter:

- How is the relationship between public-law obligations and contracted-out welfare services expressed in national legal sources, policy documents, and doctrine?
- What strategies do municipalities with care choice systems adopt in order to fulfil their public-law obligations?
- What issues and conflicts might arise when these strategies are used?
- How does the introduction of care choice systems affect the municipal delivery of elder care?

[523] Prop. 2008/09:29 Lag om valfrihetssystem (n 13) 115.

The chapter consists of cross-analyses of legal regulation, preparatory works, national policy documents, tenders, contracts, interviews, and the results of a questionnaire sent to the municipalities. The chapter begins with a description of how legislative works, government inquiries, and doctrinal sources have treated the question of the relationship between the public and the private in the contracting out of welfare services. I then describe the ways in which public-law obligations are expressed in contracts, before discussing sanctions and their use. I consider some of the issues experienced by the municipalities in trying to comply with their legal responsibilities and the strategies adopted in order to tackle these issues. Lastly, I analyse the question of how the use of private legal tools affects the governing of the public delivery of services.

5.2 Public obligations for private services in policy discussion and in contracts

5.2.1 A legal and policy perspective on public obligations in privatized welfare services

The administration of social services, as a public function, is regulated by general public administrative law. This legal framework includes constitutional laws as well as statutes such as the Administrative Procedure Act, which contains provisions relating to values such as legality, objectivity, and proportionality. The Auditor General's report of 2008 (preceding the Act on Care Choice Systems), which examined contracts between the municipalities and private providers of elder care services, pointed out a series of problems with the way public administrative law principles were expressed in tender dossiers and contracts. The report stated, for instance, that the contracts rarely required the private providers to provide information, guidance, and advice to individuals and that requirements for transparency and protection for whistle-blowing staff were lacking. These requirements are seen as central principles of Swedish public administrative law. The Auditor General stated that quality and transparency requirements had to be set out more explicitly by the municipalities in the governing documents. The report also discussed the ways in which discrepancies between public- and private-

law functions could be handled by the municipalities so as to ensure accountability.[524]

The report of the government inquiry preceding the Act on Care Choice Systems emphasizes that the private delivery of services has to be conducted in a way that respects the overarching goals and fundamental values expressed in the Social Services Act and that services have to meet requirements relating to quality and quality-ensuring processes.[525] The preparatory works to the Act on Care Choice Systems furthermore state that 'providers have to comply with conditions set in Swedish legislation, e.g. the Health and Medical Services Act (HMSA), the Social Services Act, tax law and labour law'.[526] These statements do not explain whether these statutes are directly binding on private providers or whether they are only binding if transformed into contractual clauses by the municipalities. They do not state, either, whether private providers' compliance with these statutes could be enforced by courts. Since the municipality maintains the principal responsibility, the situation is not comparable to, for example, the school sector, where the School Act states that private schools are themselves primarily responsible in relation to the law.

There are two things worth noting before proceeding. First, there exist no specific regulations in Swedish law that govern public contracts. Contracts between public and private entities are, in principle, considered as transactions governed by private law.[527] This differs from the situation in, for instance, French and German law.[528] The situation in Sweden also contrasts with that in Denmark, where the Consolidation Act on Legal Protection and Administration in Social Matters (*Retssikkerhetsloven*) stipulates that, in some outsourced public services, such as social services, public and administrative law apply directly to the private entities.[529] Second, there are no clear definitions of the concepts of public law, public administration, public administrative duties, etc., in Swedish legislation or doctrine. Public

[524] Riksrevisionen (n 6) 30–34.

[525] SOU 2008:15 LOV att välja - Lag Om Valfrihetssystem (n 178) 152.

[526] Prop. 2008/09:29 Lag om valfrihetssystem (n 13) 71.

[527] For further discussion, see Jakob Heidbrink, 'Ett Avtal i Gränslandet Mellan Offentlig Och Privat Rätt' (2018) 2018–19 Juridisk Tidskrift 134.

[528] Hansen, 'Public Law by Contract' (n 63) 627.

[529] Karsten Naundrup Olesen, *Offentlig Opgave På Kontrakt* (Jurist- og Økonomforbundet 2011) 123-124. The Finnish Constitution contains a provision relating to the transfer of administrative duties to private-law subjects in Article 124, which states that the transfer must not compromise fundamental rights, legal certainty, or other requirements on good governance.

administration in Sweden is generally thought to consist of a) public authority decisions and b) the actual administration and services which follow from those decisions. According to Swedish constitutional law, while the actual administration and provision of public services may be contracted out, the public decision-making process can only be transferred to private subjects if this is provided for in legislation, and this is explicitly not the case with the Social Services Act.[530] In the case of home care for older people, it is only the actual service provision, not the public decision-making process, that is transferred to private subjects – and this only in the municipalities which have chosen to implement a care choice system under the Act on Care Choice Systems or to procure through the Public Procurement Act.

Several recent government inquiries and policy documents have discussed the position of public law in relation to contracted-out services, although there is little consensus regarding the issue. The preparatory works for the 1996/1997 changes to the Social Services Act state that the quality requirements contained in the act should apply to both the public and private delivery of services.[531] This is also repeated in the preparatory works to the Act on Care Choice Systems.[532] The report of the official inquiry preceding the Act on Care Choice Systems states, as noted at the outset of this chapter, that the municipality retains the primary legal responsibility towards the users of the services.[533] The inquiry report also states that the transition to market-oriented service provision implies that private law will have more of a role in the regulation of the sector, but it does not clarify the nature of this role. According to the report, the Administrative Procedure Act's rules on services and cooperation requirements should apply not to the external supplier but only to public authorities, and the private supplier should be bound only by the terms of the contract.[534] However, the report also states that the municipality should include in the contract a requirement that the supplier must act in accordance with current regulations.[535]

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[530] However, it should be noted that the distinction between public decision-making processes and the provision of services is not clear cut. There are also exceptions to this rule – that is, instances in which activities connected to decision-making may be contracted out. See e.g. Titti Mattsson, 'Socialtjänstens Barnavårdsutredningar i Privat Regi', *Festskrift till Wiweka Warnling Conradson* (Jure 2019).

[531] Prop. 1996/97:124 Ändring i socialtjänstlagen (n 104) 51–55.

[532] Prop. 2008/09:29 Lag om valfrihetssystem (n 13) 73.

[533] SOU 2008:15 LOV att välja - Lag Om Valfrihetssystem (n 178) 67.

[534] SOU 2008:15 LOV att välja - Lag Om Valfrihetssystem (n 178) 81-82.

[535] SOU 2008:15 LOV att välja - Lag Om Valfrihetssystem (n 178) 152.

Three more recent government inquiries have also touched upon this question, expressing somewhat different views on how (and whether) responsibility should be formally transferred to private providers delivering public services. The report of the inquiry into changes to the Local Government Act argues that all providers who conduct social services operations regulated by the Social Services Act have to comply with the quality requirements set out in the act,[536] which would mean that this public-law responsibility would apply directly to private providers, regardless of the terms of their contract. The report of the inquiry into ownership assessment, on the other hand, argues that, because the starting point is that the municipality bears the primary responsibility, the municipality must ensure that the private producers are able to comply, and actually do comply, with the applicable rules, and this should be achieved by the municipalities through the use of tenders, specified requirements, and contracts.[537] The third report, on quality in the welfare sector, states that the ability of citizens to hold private actors accountable for substandard services is only indirect – through the municipalities' contracts with the businesses – and that these companies may be governed only on the basis of what is agreed in the contract.[538] In other words, this report argues that public provisions are not applicable directly to private providers. Thus, despite the fact that these three inquiries were carried out around the same time, during the period from 2013 to 2017, they came to very different conclusions. This underlines the confusion regarding how public obligations apply to private providers within care choice systems. Municipalities seeking to govern the private delivery of services are operating in a legal grey zone.

In a similar vein, Ann-Charlotte Landelius identifies a lack of research, political direction, and public debate in the Nordic countries on the legal consequences of contracting out.[539] To the extent that there has been a doctrinal discussion, it has been clearly divided over the question of whether public law directly binds private actors that are carrying out tasks on behalf of a public administration. I do not intend to enter into this debate in any more detail; I introduce it here merely to highlight the different views of the matter and to make clear the lack of consensus in this area.[540]

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[536] SOU 2013:53 Privata utförare - kontroll och insyn (n 127) 152.

[537] SOU 2015:7 Krav på privata aktörer i välfärden (n 129) 119.

[538] SOU 2017:38 Kvalitet i välfärden – bättre upphandling och uppföljning (n 123) 161.

[539] Landelius (n 62) 13.

[540] For further discussion, see e.g. Hollander (n 62); Anders Thunved, *Privatisering Av Socialtjänsten: Om Rättssäkerheten För Den Enskilde* (Publica 1993); Gunnar Bramstång,

The interest in defining the differences between public and private law in Swedish doctrine seems to be sparked precisely by those situations in which practices that are defined as public administration are carried out by subjects defined as private entities. An important source for much of the Swedish debate on this question is the influential legal scholar Håkan Strömberg, who argued in his 1949 dissertation that a public administrative task is defined as such in terms of whether it is in the public interest: guided by the public good rather than by private profit.[541] Tom Madell points out that private-law instruments have long existed within the public sphere and that public regulation affects many areas of private law. However, he concludes that there still are important distinctions between the two. Public authorities are subject to a number of obligations and restrictions that follow from public law; they must attend to and be governed by norms which do not apply to the private sector. That this distinction exists is, according to Madell, especially apparent in fields where public operations are very similar to private actors' operations (such as in welfare services).[542] Similarly, Lena Marcusson claims that whether an activity is private or public depends on the nature of the activity. According to this type of functional analysis, certain activities are by their nature public or private, irrespective of who is entrusted with carrying out the activity; therefore there is a legitimate demand from citizens for the type of control and transparency usually associated with public-law regulations.[543]

The debate in Swedish legal studies on the question of the efficacy of public law in contracted-out welfare services has produced a similar lack of consensus. Håkan Strömberg and Bengt Lundell argue that it is a general rule of law that public regulation only binds public bodies. If a task is handed over to a private entity, this entity's activities will not be bound by the public law applicable to the corresponding public activities unless otherwise stipulated.[544] Marcusson, by contrast, believes that constitutional values and the general principles of public administration should apply to all activities that are of a 'public nature', regardless of whether the body carrying them out is public or

Förvaltningsrättens Begreppsbildning Och Grundläggande Principer i Konkret Belysning (Juristförlaget 1993).

[541] Strömberg (n 62) 12–13.

[542] Tom Madell, *Avtal Mellan Kommuner Och Enskilda : Avtalsslut Och Rättsverkningar* (Norstedts juridik 2000) 17.

[543] Marcusson (n 62) 61.

[544] Håkan Strömberg and Bengt Lundell, *Allmän Förvaltningsrätt* (23rd edn, Liber 2006) 30–31.

private.[545] Landelius offers additional support for Marcusson's view. She argues that there are several reasons to believe that the rights protection and public-law regulation of constitutional law should follow the public task when it is transferred to the private sector. Since publicly regulated care work is an example of an exercise of public power, private subjects contracted to carry out this work should be subject to such requirements.[546] Landelius points out that the dependent and vulnerable position of the individual in need of social services does not depend on whether these services are provided privately or publicly. It is therefore not reasonable, she argues, for the protection offered by public-law regulation to be dependent on whether the care is provided by a public- or private-law subject – especially not when the activities are publicly funded.[547] The ambiguity of the legal principles makes them hard to apply properly, which in itself spells problems for legal certainty and transparency, she states; given the large-scale transfer of service delivery to private bodies in recent years, the legislature therefore has a responsibility to clarify the legal situation.[548] Landelius states that the current uncertainty, for both the citizens and the private entities involved in welfare services, raises questions of liability and accountability within the system.[549]

This question has also been approached from a private-law perspective. Madell's assessment is that, where contracts are used by public actors in fields which are otherwise publicly regulated, the ground rule is that private law should apply to the interpretation of contracts, although public law may be drawn upon to fill in gaps in the agreement.[550] On this issue, Hansen states that it is assumed in Nordic legal theory that a private party to a contract with a public authority must accept, to a greater extent than would be the case with other commercial contracts, requests for variations of contract terms during the contract period. However, he states, this is a position which is disputed in the literature and has only been established with reference to a few cases. There must also be limits on the extent to which the public contracting party can demand such adjustments, even on the basis of changes in regulations, if the rights and duties of the parties are not to be unbalanced.[551] Another question in

[545] Marcusson (n 62) 401.

[546] Landelius (n 20) 40–43.

[547] Landelius (n 62) 139.

[548] Landelius (n 62) 68.

[549] Landelius (n 62) 13.

[550] Madell (n 542) 13.

[551] Hansen, 'Public Law by Contract' (n 63) 628.

this area is what happens to liability issues when public activities are carried out by private subjects. Vibe Ulfbeck and Marta Andrecka note that there have been different answers put forward to this question, even within the Nordic countries. Since there is no legal relationship between user and provider, liability can, for instance, be organized through general tort-law rules rather than through contract. However, they also suggest that this is an unsatisfactory solution, as it may be difficult in practice for the individual to hold the private party liable.[552] When it comes to outsourcing, there still remains a basic concern about whether it diminishes the degree to which the users or citizens can hold authorities accountable. Ulfbeck and Andrecka argue that contracting out welfare services may bring about a 'liability gap' in which the citizen ends up in a less favourable position than would have been the case had these services not been outsourced.[553] There seems to be a similar liability and accountability 'gap' within the policy field, which leaves the municipalities without clear guidance on their legal obligations or on which legal strategies they should adopt. This is an interesting area for further study.

5.2.2 Contracting out the municipalities' political aims and legal obligations

With respect to the delivery of social services in general and the delivery of home care specifically, municipalities have a range of public-law obligations with which they must comply. Besides national obligations, there are also municipal goals and policies that an administration must take into account. When contracting out, the municipality has to use different legal strategies in order to discharge these responsibilities.

Almost all of the tender documents mention that the private provider must keep up to date with and follow 'all applicable regulations', referring to a number of laws and provisions applicable to the home care service sector. These are sometimes detailed in a list, but sometimes they are referred to with a more general phrase. The influential guidelines from the National Board on Health and Welfare are also often directly referred to or cited in the contracts. City L, for example, stipulates that

[552] Vibe Ulfbeck and Marta Andrecka, 'Contracting Out of the Provision of Welfare Services to Private Actors and Liability Issues' (2017) 8 Journal of European Tort Law 88–90.

[553] Ulfbeck and Andrecka (n 552) 98.

> the performer is responsible for ensuring that the activities are carried out in accordance with the goals and guidelines that follow from the Social Services Act, the Public Access to Information and Secrecy Act, the Work Environment Act and all other laws and regulations applicable at any particular time. Furthermore, the business must be conducted in accordance with the general advice and provisions from the National Board on Health and Welfare.[554]

City M's document states that 'the performer should have knowledge of and comply with all applicable laws, ordinances, regulations and general guidelines applicable to the service that the service provider applies for'.[555] Similar phrases are found in most tender documents and in the contracts connected to them. The municipalities' strategy seems to be to ensure adherence to public-law norms by referring to them in the contracts, although different municipalities provide different levels of detail about the regulations the private provider is actually expected to comply with.

The criteria mentioned above follow the legislation and the preparatory works closely. But there are also other requirements that are commonly mentioned but are less closely connected to the operation and organization of the businesses. These requirements may relate, for instance, to the company's independence from party politics or religious organizations. Social and environmental considerations may also be mentioned, as may requirements that the company comply with certain international conventions, such as the UN Convention on Human Rights or the International Labour Organization's core conventions.[556] Documents also often refer to the municipality's own policies, such as political goals set by the elder board. A municipal goal is a statement of something the municipality, as a public actor, wants to achieve rather than of how it intends to achieve it. Some of these may be more clearly applicable to the activities of a private home care provider than others, but they tend to be vaguely formulated requirements about, for example, 'security', 'good quality, 'good treatment', etc., which largely depend on interpretation and are rarely defined in the documents.

Tender documents usually specify what types of marketing the providers may engage in and set out rules on public transparency and staff whistle-blowing, although these provisions are not present in all documents. When transparency and whistle-blowing are regulated, the document also qualifies these

[554] City L Tender Document 1.3.14.

[555] City M Model Contract, 1.12 and 8.

[556] E.g. City M Tender Document 4.5.

provisions with reference to the right to business confidentiality.[557] Regulation of terms of employment for the providers' staff is common, and often makes reference to the terms of the applicable collective agreement (although EU public procurement regulations place limits on the application of collective agreements to tenders).[558] Other frequently mentioned requirements are those relating to facilities and technical standards, such as access to IT systems and phones. It is quite common for municipalities to require that private providers use the municipality's own IT system for documentation, deviation reports, timekeeping, etc.[559] The private providers are furthermore required to cooperate with the municipality and other relevant actors in various ways, such as attending meetings and training sessions and participating in statistical inquiries. The documents sometimes mention the requirement to participate in national quality registers. Some municipalities, such as City M, have regular 'branch meetings', which representatives of the private providers are supposed to attend.[560] The close cooperation and interaction with the municipal administration is thus also regulated through contract.

It is worth noting that the regulations that the private provider must comply with are not arranged in any hierarchy. The reference to the regulations is often broad and unspecific, as in the examples cited above. The expectations placed upon the private providers are far-reaching, approaching the level of rigour with which the municipalities' own operations are governed. In some cases, the contracts or lists of requirements state which laws and regulations must be complied with, and, in many cases, certain provisions of laws or regulations also appear as separate contractual terms. Because compliance with applicable laws is included as a contractual requirement, any non-compliance with these laws becomes a breach of contract.

[557] E.g. City M Tender Document 7.0 and Model Contract 1.2.3.

[558] For further discussion of this topic, see Albert Sanchez-Graells, 'Regulatory Substitution between Labour and Public Procurement Law: The EU's Shifting Approach to Enforcing Labour Standards in Public Contracts' (2018) 24 European Public Law 229.

[559] E.g. City S Tender Document 2.14.

[560] E.g. City M Tender Document 4.0.

5.3 The use and function of sanctions in contracts

5.3.1 The regulation of sanctions

An important technique used by municipalities seeking to ensure compliance with the requirements laid down in tenders and contracts is the use of sanctions and termination clauses. Sanctions regimes are included in contracts for a variety of reasons. First, sanctions are the only way a municipality can get rid of providers which are not meeting the requirements and are thereby placing the municipality in breach of its own legal responsibilities. Second, the existence of sanctions has a deterrent effect, making the companies more likely to adhere to the terms of the contract and thus reinforcing the standards set out in the tender documents. Third, the imposition of sanctions may compensate the municipality for the costs it may incur as a result of the breach of contract.

The contracts used in the care choice system are supposed to be more flexible than those used in traditional procurement. My examination of clauses regarding amendment and termination of contract shows that, in general, contracts are designed to apply until further notice, although there are also examples of fixed-term contracts, often stipulating a renegotiation after two or three years. The municipalities often reserve the right to make amendments to the agreed terms unilaterally. In such a situation, the private provider can either accept the new terms or terminate the contract. Contracts can be terminated by either party, most commonly after serving a notice period of three or six months. Most contracts provide for a longer notice period, usually a year or longer, in the case of a municipal decision to abolish the care choice system. These clauses may have significant implications in situations in which circumstances and needs change rapidly. The municipalities can only change the criteria for the private delivery of services in the ways provided for in the contract. Only a few municipalities have emergency clauses in their contracts with the private providers.[561]

[561] An obvious example of a case in which circumstances change rapidly is the ongoing coronavirus pandemic, during which much stricter hygiene control in elder care has become necessary. Contract amendments take time to be implemented, and in the case of a pandemic an amendment clause which gives the private provider three months to accept may be of limited usefulness. I have pointed out these difficulties in relation to care choice systems in elder care in the following article: Mirjam Katzin, 'Valfrihetssystemet skapar betydande kvalitetsskillnader' *Dagens Samhälle* (4 May 2020) <https://www.dagenssamhalle.se/debatt/valfrihetssystemet-skapar-betydande-kvalitetsskillnader-32446> accessed 7 July 2020.

For the municipalities to be able to hold providers accountable, the tools for sanctioning them must be regulated in the contract. The sanctions in the municipal contracts vary greatly, although there are some general patterns in the documents. The most common types of sanction are warnings, freezes on new customers, suspensions or reductions of payment, fines, and termination of contract. The Swedish Competition Authority's guide on monitoring recommends that contracts provide for an eight-step ladder of possible sanctions. These steps may be used either sequentially, in response to a continued failure to address a problem, or individually, where a defect of a certain level of seriousness merits a particular sanction. The steps are:

1. dialogue
2. demand for rectification
3. suspension of pay-for-performance
4. fee reduction
5. fines
6. decision not to renew the contract
7. cancellation of contract with notice
8. immediate termination of contract.[562]

The list above seems to indicate that ending the contractual relationship altogether should be a last resort for municipalities unsatisfied with the services of the private providers. It also seems that the providers should be given many chances to rectify their mistakes before being asked or forced to leave the care choice system. It is not uncommon to find such ladders of sanctions in the contracts. These are often similar to the one recommended by the Swedish Competition Authority but with fewer steps: dialogue, the drawing up of an action plan, financial penalties, the termination of the contract. The choice of sanction is also related to the seriousness of the defect in a particular case. Interestingly, a third of the contracts contain no direct sanctions other than the possibility of terminating the contract.

[562] Swedish Competition Authority (n 347) 19.

Table 7 Regulation of different sanctions

TYPE OF SANCTION	NUMBER OF MUNICIPALITITES	%
		N=106
Termination	102	96
Warning	37	35
Suspension/reduction of payment	35	33
Fine	26	25
Freeze on new users	13	12

Table 7 presents the different types of sanctions in the municipal contracts. The possibility of financial penalties such as fines or payment reductions is provided for in approximately half of the contracts. The size of the fines varies a great deal. The most common sum is one *price basic amount*[563] per week. Another common fine is the withholding of 5 or 10 per cent of the provider's weekly payment until the defect is remedied. However, the fines range from 1,500 SEK per identified deficiency up to 100,000 SEK per serious deficit, the latter being found in only two municipal contracts. It is interesting to note that only 12 per cent of the municipalities provide for the possibility of a freeze on new users while the provider is under investigation for defects or while termination of the contract is being considered. There are also only a few examples of the contract providing for the possibility of the business being suspended and activities taken over by the municipality during such times. And there are also many examples of municipalities that have only a few sanctions in their 'toolbox'. City S is one such example. Its contract does not provide for any direct financial sanctions. Instead, providers must respond to complaints or reports of defects within 10 days.[564] But if these responses are unsatisfactory, the only measure available to the municipality is dialogue through the monthly meetings with the company.[565]

What counts as a defect in the service provided differs from contract to contract, although there are some patterns in the wordings used. There is often a list of formal requirements which can be breached, accompanied by a general description of services that do not meet quality requirements. The contracts

[563] The price basic amount is calculated based on changes in the general price level, in accordance with the National Insurance Act (2010:110). Calculations are based on the change in the Consumer Price Index and are fixed for the entire calendar year. For 2019, the price basic amount was 46,500 SEK. Statistics Sweden https://www.scb.se/en/finding-statistics/statistics-by-subject-area/prices-and-consumption/consumer-price-index/consumer-price-index-cpi/pong/tables-and-graphs/price-basic-amount/price-basic-amount accessed 25 November 2019.

[564] S5.

[565] S2.

normally state that for the municipality to be able to terminate the contract the defects or breaches of contract have to be either numerous and unrectified or of a serious nature. As the following examples show, these provisions may be more or less detailed and precise. In City M's contract, the agreement can be terminated immediately

- in case of bankruptcy, insolvency, or composition
- if the provider is disqualified from business activities by a court
- if the provider is found to have submitted incorrect information of importance in the application
- in case of serious defects, such as repeated breaches of contract, abusive treatment, or criminal acts directed against users or their property.[566]

City S's contract, by contrast, contains a longer list of situations in which an immediate termination may be appropriate. The municipality can terminate the contract

- if the formal requirements in the Act on Care Choice Systems, Ch. 7 § 1 are unfulfilled
- if the provider refuses to take on a user, or refuses to execute the ordered activities, within its given capacity and geographic area
- if the provider charges the user for services that are to be paid by the municipality
- if obligatory documentation is lacking
- if the provider does not provide approved personnel
- if the provider implements healthcare services without necessary delegation from the municipality's licensed healthcare professionals
- if the provider appoints a new manager who does not meet the relevant competence and experience requirements
- if the provider lacks adequate procedures or systems for quality assurance
- if the provider violates provisions on confidentiality

[566] City M model contract, clauses 1.1.3.

- if the provider does not take action after being instructed to do so by the appropriate authorities
- if the provider is bankrupt or found to be insolvent such that they cannot be expected to fulfil their obligations
- if the provider does not make obligatory payments for taxes, social security fees, or other payments which are required by law or collective agreements
- if the contract is transferred to another entity without the consent of the municipality
- if the provider assigns subcontractors without the consent of the city.[567]

As these lists show, the grounds for termination are left quite open and vary significantly from municipality to municipality, but the focus still seems generally to be on formal defects and financial problems.

The contracts also regulate financial liabilities for damages. Eight out of 10 of the contracts studied explicitly state that the provider is responsible for paying damages to the municipality or a third party for losses that result from defects in the provision of services, although, again, these provisions vary in their level of detail across different municipal contracts. Almost all municipalities require the contractors to have valid liability insurance. The aim of this division of responsibility in the contracts is to ensure that the entity that controls the daily operations of service delivery is responsibility for paying any damages. One interviewee referred to the damages that would have to be paid if, for example, a care worker broke an expensive China vase in the user's home, or even 'dropped a customer on the ground' and accidentally killed them. In these cases, however, the liability insurance that the service provider has to have as a condition of its contract would cover the damages, and no liability process would be needed.[568]

5.3.2 How municipalities make use of sanctions

The evidence presented above shows that contracts generally allow for the use of sanctions in response to defects in service provision. But how are the contracts' ladders of sanctions actually used? What kinds of failings most often lead to sanctions? When are contracts terminated? The interviews with the

[567] City S Tender Document point 6.18.

[568] L1.

municipal officials provide insights into how these legal tools are used in practice in care choice systems.

The administrations find it difficult to make claims of defects related to the quality of services. This difficulty relates to the problem of defining and measuring quality in ways that can be translated into contract clauses, and to the fact that municipal officials are aware that they need to have a decent case if the issue ends up in court. As one official put it: 'There could be flaws which one, on a purely personal level, feels are very serious but that it is hard to tie to anything really concrete in the contract.'[569]

As a consequence, in cases where officials believe that the quality of the service is substandard, they try to find formal flaws in order to justify the sanction or termination.[570] One official said that 'it could be that there are a lot of quality defects, but it is easier to point to formal flaws – accounting mistakes, for example'.[571] As long as poorly performing companies are not in severe breach of any of the formal requirements in the contract, therefore, it is hard to get rid of them. The officials indicated that, by the same token, generally well-functioning providers might be sanctioned for some formal defect, even though this failing would not have presented any serious risk for users or had serious consequences for the quality of the services. In this way, the use of monitoring reports and sanctions may not actually reflect the true quality of a service.[572]

For these reasons, it is often the case that sanctions are based on concrete, formal grounds that can be objectively demonstrated. As examples of the sorts of failings that have been used as grounds for direct termination, officials mentioned serious invoicing errors, tax evasion, mistakes in documentation, issues with working conditions, and other formal and financial requirements.[573] The formal grounds most often used when municipalities want to terminate a contract seem to be failings relating to formal or financial requirements rather than requirements relating to the quality or content of the service. Officials consciously try to find formal failings of this type when they are seeking to terminate a contract.

[569] M3.

[570] M3, L1, L5.

[571] M3.

[572] M3, L2.

[573] M1, M3, L1, L6.

The interviews also made clear that both sanctions and termination are often used as measures of last resort. A central point that came across in many of the interviews was that, in most cases of termination, it happens only after a long process in which the municipality first enters into a dialogue with the provider and the provider gets the chance to set out an action plan to rectify its mistakes. There are then typically more follow-ups and dialogue before, if the requested improvements have not been made, the political board or a senior official makes the final decision on termination.[574] One official said that providers should get the chance to rectify mistakes unless the problems are of a very serious nature: 'you can never terminate [directly] unless it's crisis and disaster'.[575] One reason this process is so drawn out is that the municipal officials are aware that their decisions may be appealed and so want to ensure that any possible action they may take has a sound legal basis.[576] The following exchange explains this dynamic:

> Interviewer: But sometimes you terminate the contracts quite directly?
>
> L6: Terminate without an action plan – we have done that a few times, but it is – there should always be the possibility of rectification, because otherwise the municipality could risk having to pay a lot of damages and so on for a wrongful termination. So they should be given the opportunity to rectify, but sometimes things are such that this just does not work.
>
> Interviewer: What kind of things do you mean?
>
> L6: If there are very, very many flaws then you cannot meet – cannot at all meet the individual's needs, for example.
>
> Interviewer: Do you want to develop what that can – what have you found in that case?
>
> L6: We have terminated – so, we have terminated if you do not, for example – if you cannot ensure the individual's needs are met, for example because the time registration shows that the wrong person was there, you do not know who was there or if anyone was there at all. There are many – there is no ongoing social documentation, the staff is not trained, that is, there is – so, all these things that you follow up, they are really very serious. They have only made

[574] S4, S6, M1, L6.

[575] L2.

[576] L6.

> manual registrations, they have not paid taxes and fees as they should have, so, very –
>
> Interviewer: Things that are very – which can be linked to a clear contractual clause?
>
> L6: Yes, exactly.[577]

This exchange also shows that the actions of the administrations are framed by the legal situation in which they are operating, and specifically that they are concerned about the risk of having to pay damages and the difficulty of proving breaches of contract. The following passage sums up the difficulties that officials face in trying to regulate providers' operations through contracts:

> It is so legally difficult, so everything is delayed. It takes a long time before you can remedy mistakes. What is easy is if they commit any financial crime, or make accounting errors, or do not pay taxes, and so on. Then we can just – *whoop* – kick them out. But problems with the quality for the individual, then it becomes much more difficult. … However, here we have been, I think, legally speaking, a little too cautious. We, kind of, do not dare to – and it may have to do with the courts: that it is thought that we wouldn't win something like that, because it is difficult to put your foot down when it comes to the 'soft', subjective experience.[578]

In City M, a thorough assessment of all providers led to the termination of six contracts with private home care providers. A leading official explained that in these cases 'there were really serious shortcomings when it came to things such as work environment, documentation, the hiring of [relatives as] employees against regulations, and serious breaches of policy'. In one case, the city reported the provider to the police for fraud relating to 7 million SEK of payments, but at the time of the interview this had as yet not led to any charges.[579] A majority of these terminations were justified on the basis of financial irregularities.[580]

What happens to care users when the municipality is investigating a provider or demanding that it take action to rectify the failings in its operations? As was shown in section 5.3.1 (table 7), only a few municipalities allow for the intake

[577] L6.

[578] L3.

[579] M1.

[580] M3.

of new users to be frozen, and all municipalities allow the providers to carry on serving their current users. One official commented that, ultimately, it is seen as the duty of the individual care user and the responsible care manager to ensure that the care given to the individual under these circumstances is of an adequate standard, even if, as this official accepted, this is an undesirable situation for both users and administrations.[581] Another interviewee described the challenging situation that administrations find themselves in when a provider that is the subject of a drawn-out sanctions process still has users to care for.

> Interviewer: What happens to the quality of the service for the older user during that process?
>
> L1: No, that is what we are thinking – if we do not think that this company is up to the mark, they should not really have customers. It is irresponsible of us to let it be that way, but it is a bit difficult. It is legally difficult.[582]

In summary, the risk of 'legal difficulties' arising seems to be the primary reason why sanctions, the contracts' 'hard tools', are seldom used. Two officials responsible for monitoring the contracts told me that sanctions could and should be used more often in order to ensure that providers abide by the terms of the contracts. They claimed that both less important and highly important contractual requirements were often not met, without the providers facing any consequences. According to the officials, as economic incentives are effective tools for governing the private providers, the use of financial penalties or threats of termination would make the providers 'get their act together'.[583]

[581] S2.

[582] L1.

[583] L4, L5.

5.4 Municipalities' strategies for complying with their legal responsibilities

5.4.1 Municipal administrations' views of different legal tools

The municipal officials expressed some confusion about whether the laws and provisions governing elder care are automatically binding on the care companies. One administrator claimed, for instance, that there is 'no difference' between the municipality and the private provider in this regard and that a private provider bears the 'ultimate responsibility' for older persons.[584] The phrase comes from the Social Services Act, which, however, states that the municipalities have the ultimate responsibility for ensuring that the needs of individuals are met. Another official said, by contrast, that 'ultimately, it is still the municipality that is responsible'.[585] A third claimed that the companies have to understand that, when providing care, they are actually representing the municipality, meaning that, for example, they have a responsibility to provide information to older persons about individual rights and the different services provided by the municipality,[586] which seems to describe, rather, the demands placed on the *municipality* under the Administrative Procedure Act. One leading official argued that it is misguided to regulate through contract what is already in the law and so already binding on the companies. If they want to be part of the sector, '[t]he company should know the law by heart', she stated, adding that it should not be left to the municipality to teach them, as is the case now. This official also thought it important for monitoring to pay closer attention to companies' adherence to legislation.[587] To other officials, however, it was less clear how monitoring should take legal regulations into account. Some monitors claimed to make reference to the regulations in monitoring the companies,[588] whilst others said that the contract was the focus of monitoring and the legislation only an indirect tool.[589] The same confusion regarding the applicability of public law to private welfare providers that was found in the policy documents and

[584] M1.

[585] L1.

[586] M5.

[587] L3.

[588] S5, L2.

[589] M1.

doctrinal debate is reflected here in these differing views from the municipalities.

Many officials explicitly stated that they wanted the criteria and requirements placed on the private providers through tenders and contracts to be stricter. They often referred in this connection to the struggle to meet the objectives of the Social Services Act, especially those on good quality, something that they said was made more difficult by the fact that contractual requirements were not strict enough.[590] As this demonstrates, they see the tenders and contracts as preconditions for their quality assurance work. This remark from an official in the City S administration shows how central the contract is in their everyday work: 'If the contract is well written, which we think it is, pretty well written on our part, then there are quite concrete things to follow up on. So it is sort of our bible.'[591]

How do officials account for the fact that the requirements are not stricter? One significant barrier to tightening up the requirements seems to be the municipal lawyers, who insist, with reference to EU regulations on public procurement and the proportionality principle, that there are limits on the kinds of requirements that can be included within the contracts. In City L, which has its own legal department within the administration, this discussion about the permissibility and impermissibility of certain contractual criteria is much more developed than in the other municipalities. Several of the officials mentioned these legal constraints as a problem,[592] as did the municipal councillor at one of the regular meetings that the municipality has with sector representatives. She said there was a political ambition to reduce the number of providers but that the ability of politicians and administrators to impose stricter tender requirements was limited by legal considerations.[593]

One leading official from City L (L6) stated that the legislators who passed the Act on Care Choice Systems had been naïve in not imposing higher standards on businesses. The lack of tough criteria, she claimed, allowed for less serious and incompetent applicants to be accepted into the system. She claimed that legislators seem not to have understood the implications of the legislation and said the municipalities were not given enough support and guidance on how to avoid companies exploiting and finding loopholes in the system.[594] A colleague

[590] S2, S5, M1, M5, L2, L3, L4, L6.

[591] S5.

[592] L1, L3, L6.

[593] Field note City L Branch Meeting.

[594] L6.

(L3) said she had hoped that the politicians would have learned from the earlier mistakes made in introducing public procurement without sufficient regulation. Instead, she said, the attitude was 'let a thousand flowers bloom' – an attitude which, she stressed, might be good for small companies but was neither careful nor responsible behaviour on the part of the public purchaser.[595] L6 stated that, while the system had become better over time, when the Act on Care Choice Systems was introduced, many had applied for contracts, without really knowing what was required, in the hope of earning big money. As she put it, 'they applied to be in a tax-financed sector', explaining that such companies were often be active in several other sectors where public financing was the common denominator. She stated that the problem of under-regulation in her municipality (City L) was not as acute as it had been initially, but she said it still existed.[596] The administration still experienced problems when seeking to make use of the tools at their disposal to get rid of poor providers. Another colleague complained that

> with the care choice system it is supposed to be that it should be easy to get in [to the system as a provider], but it should also be easy to get kicked out. But it has not really been that way. If they get in, they are stuck there.[597]

As this official saw it, this generosity towards providers has led to the creation of companies that provide severely flawed services.

L3 offered some detailed reflections on how the purchaser's perspective had developed over time. She claimed that public purchasers used to be overly focused on using public procurement and privatization with the aim of cutting costs and that a more serious approach was to analyse what resources were actually needed in order to ensure that quality services were delivered. The move from price competition to quality competition in public procurement – that is, the move from traditional public procurement to care choice systems – she saw as a missed opportunity for developing this more serious approach. She was still of the view that, in order to be better purchasers, municipalities have to be more knowledgeable about how businesses function, as in this way they will be better at governing them and at avoiding certain pitfalls. She thought that, for the system to work, the purchasing authorities overall have to shape up:

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[595] L3.

[596] L6.

[597] L1.

> What is a bit unfortunate, I find, having been through the whole process, is that so few lessons have been learned from this experience. Instead there is a lot of political jousting and blame games and 'it is all those venture capitalists'. But it is not their fault! They are operating on a market that allows for this. Yes, so why are we allowing for this, then? And if we can't put an end to the abuse, then we shouldn't have this whole thing. But that would be very devastating and sad for elder care, because then it would fall back to what it was again.[598]

From these different reflections from the interviewees one gets an image of the legal situation surrounding care choice systems as unclear and somewhat frustrating for municipal officials, who seem to believe that the contract is central to, but not sufficient for, the governing of private providers and avoiding the problem of fraud.

5.4.2 The use of informal techniques in governing providers

As I have stressed, the contract is seen as providing the essential framework within which the private providers are governed. However, when officials were asked whether the contract was more important than dialogue and the relationship between municipalities and providers, the answer was 'no'. The same City S official who described the contract as the officials' 'bible' (see above) went on to state that they had never experienced any tension between the formal and informal aspects of governing because their provider was always willing to cooperate and do as the administration wished. 'So it is difficult to say whether the one is more important than the other.'[599] Another City S official described the basis for the municipality's relationship with the provider in the following way: 'Sure, the contract must be followed, but it is, after all – it is just the starting point. We should be able to have a good relationship: that is the most important.'[600] Her colleague agreed that a soft relationship and good dialogue are central to how the administration governs the private providers, but also emphasized that this would be much harder to achieve if they had more than one private provider.[601] The other interviewees from City S unanimously agreed that the relationship is 'absolutely' based on

[598] L3.

[599] S5.

[600] S1.

[601] S2.

trust and cooperation.[602] These remarks underline the need to see the contract in the context in which it is used.

This point is also connected to the use of sanctions, as discussed in section 5.3.2. A leading official from City M said that, in seeking to handle defects, the starting point is a good and trusting relationship between the municipality and the provider:

> and when that is not present anymore, or what to say, then you have been aware of that in advance, as a provider. You know why it is a serious situation. And these follow-ups, they have always – that is, there will have been long processes. Many attempts will have been made to debug. There will have been much dialogue. It will have been very much like, yes, trying to remedy – it is not as if we just strike![603]

However, while trust is a central component of the relationship between all the municipalities and their providers, it has its limits. This was more clearly expressed by the officials from City M and City L, both of which have had cases involving fraudulent providers. When it comes to monitoring, it is a balancing act between trust in the providers' intentions and self-monitoring systems and public control over the providers by means of the instruments in the contract. The monitors believe that there has to be an effective control function in order to keep the providers alert to the risk of being scrutinized.[604]

> Interviewer: Would you say that the relationship is more characterized by trust than by control? How do you balance them?
>
> L6: I wish that we could govern more by trust. I feel like home care is – some are, of course – home care you cannot really govern by trust alone. If you compare with nursing homes, there has been a longer period of private provision, and you can govern more through trust. But in home care, a level of control is needed, absolutely.[605]

In City S, which has only one private provider, trust seems unproblematic. If the provider did something which violated the terms of the contract, the starting point would be to address this in cooperation with the provider, rather than

[602] S3, S4, S5, S6.

[603] M5.

[604] M3, L4.

[605] L6.

seeking to 'throw the book' at them, as one official put it.[606] To officials in City S, using the hard tools provided in the contract seems, as one said, 'far from our reality today, absolutely'.[607]

That having a good relationship with the private providers is so important to the officials may seem surprising given the parallel distrust in the motives of some of these companies and the ever-present concern about fraud in the system. The most explicit description of this was provided by one of the officials who had worked the longest within a care choice system:

> It has to do with how you view having different private providers. My position and we - it is that if you decide to have such a system – like we in [City M] have chosen to have a purchaser–provider model – or something like that, then you at the same time enter into a kind of partnership between equal partners. Then you cannot – at the same time, we want our providers to have quality management systems; we want them to report discrepancies and deficiencies. We don't want to establish a culture where things are obfuscated; we want it out in the open! So we work to create a good dialogue with the providers, to meet them in good times and in bad.[608]

Another leading official put it this way:

> We often discuss this: what is our responsibility? But, really, our common interest is everyone's interest, really: I mean, that the operations should improve. I should say that this is the goal we are working towards, so to speak, so I don't want to – we are really very, very supportive when they call and ask or when we follow up on things, in these communications and so on. I think that the spirit is that we are working towards the development of all the services, because this is beneficial for everyone. It benefits us. It benefits the individual. It benefits society at large. It benefits everyone. Then again, of course, we cannot – it's a fine line. We cannot do everything. We cannot recommend exactly what they should – [609]

Another official, seeking to explain the importance of the relationship, said that the end goal is not to have to terminate the contract. As she saw it, the aim is

[606] S1.

[607] S5.

[608] M1.

[609] L6.

to help the provider improve their operations, and this is more effectively achieved through dialogue and support.[610]

5.4.3 Developments over time

Administrations are constantly changing and developing the ways that they govern through contracts. A statement frequently heard in the interviews was that it takes time to develop a well-functioning care choice system. The requirements in the tender documents and the system of monitoring are important pieces of the puzzle that must be fitted together. This may explain one of the findings of the Winblad et al. study: that the tender documents vary depending on the amount of time a municipality has had a care choice system. Municipalities with more experience of having a care choice system tend to have contracts with requirements that are more monitorable and with more effective sanctions structures.[611]

My interviewees highlighted time and the balance between different interests as important aspects in the development of care choice systems. One official described her experience of developing the care choice system in the following way:

> It takes time for a care choice system to be put in place. It takes several years; it might take 10 years! Before it is in balance and we know what we need to look at – I think we have come pretty far down that road. But then there are demands that you would like to set that you're not allowed to – [612]

Several officials agreed with the suggestion that the reason care choice systems take so long to put in place is that the right balance must be struck between different aspects of the system. One interviewee indicated that she thought it was possible to handle the conflict between meeting the legal requirements of the Social Services Act and creating good market conditions (a conflict discussed in section 4.5), but she said that striking such a balance took time.

> That has been difficult, and it has taken a very long period of development to get there: like, to understand how detailed can you be, how much confidence can you have, and to actually make sure that we can follow up on the right

[610] S5, M5, L6.

[611] Winblad and others (n 224) 31.

[612] L6.

> things and that we are sure that they deliver good quality, without micromanaging. That is a long journey.[613]

In City M, the process of changing the balance of interests – the requirements are now more stringent than they used to be – led to an increase in the number of rejected applications. This is reported to have upset certain providers who had been accepted in other municipalities with lower or different requirements in their tenders but now found themselves being rejected. Requirements relating to management, professional knowledge, and business structure were strengthened in response to the administration's experiences with poor-quality providers.[614] City L has also made its requirements stricter in recent years, and the officials welcomed this development. The requirements that were strengthened in City L relate to the qualifications of the head of operations and the staff, the conditions of employment, the geographical connection, and the location of the business premises.[615] The number of active private providers fell from 128 to 98 after the new list of requirements was brought in.[616] Those that left the system tended to be the smaller providers. This was seen positively by one official, who thought the task of monitoring very small providers an unnecessary administrative burden.[617] When the municipality changed its tender, all providers had to reapply. A lot of providers said that, because of the higher standards, they were not going to. '[A]nd that was exactly the point. That's what the politicians wanted. So we do not feel sorry about that!'[618] But one official, pointing to one very successful and well-regarded company, which had started out as a small business, claimed that that company would have had a hard time meeting the new requirements.[619]

Why does it take such a long time to develop a care choice system? Several long-serving officials described the implementation of the system as a long learning experience for the administration as a whole: it must determine which requirements to impose, learn how to train the private providers, and learn how to supervise and monitor effectively. As these officials saw it, a care choice system has to develop over a long time if the administration is to avoid the

[613] L2.

[614] M1.

[615] L1, L6.

[616] City L Branch Meeting.

[617] L1.

[618] L1.

[619] L4.

pitfalls associated with the system.[620] Officials from City S said that, in the earlier stages of the care choice system, the contract had been less central to governing and less well understood by the administration than it was now. Officials had consciously tried to make the contract into more of a living document, something more relevant to the relationship with the private provider. The lack of legal expertise, not only within the elder care unit but within the municipality as a whole, was cited as an explanation of why the contract had had a limited role in governing.[621] In City M, too, there are no lawyers working in the unit responsible for elder care, although the most senior official stated that there was still a good deal of public procurement expertise within the municipality thanks to its years of experience with contracting out elder care services.[622]

It also becomes clear, when studying the evidence from the three municipalities, that different political priorities lead to different strategies for handling the sorts of conflicts described earlier in this chapter. In City S, the requirements for entering the sector have over the years been strengthened, weakened, and strengthened again, depending on the directions from, and the political affiliations of, the politicians in charge. The municipality used to have more companies in the sector but now has only one private provider (alongside the municipal one). According to S2, the stricter requirements and changes to the compensation system explain the reduction in the number of providers.[623] In City M, too, there is a political angle to the changes in strategies.[624]

> It is also connected to the fact that we now have, for the last two years, a coalition with the Social Democrats and the Green Party and the Liberals, where entrepreneurship is very toned down [laughter], so there is also a political dimension to it. In an office like this we're working very closely with the politicians, and there is, for example, no interest now in measuring the number of small businesses that we have, which we used to measure quarterly: then, we always measured how many companies with less than 15 employees we had. That is just not on with these people, so there are differences. But, yes, the bar is higher now.[625]

[620] M1, M5, L1, L2, L6.

[621] S1, S2.

[622] M1.

[623] S2.

[624] M1.

[625] M1.

In City L, changes in the tender came after a shift in the political leadership of the municipality from a liberal–conservative alliance to a green–left coalition, with the Left Party given responsibility for elder care issues. The responsible councillor for elder care is also from the Left Party, and she did not mince her words when talking to the providers at the branch meeting about the stricter requirements. In remarks that sum up many of the broader conflicts faced by municipalities in governing care choice systems, she said:

> CL: If we find that this does not have the intended effect, then we will sharpen even more. I will have no hesitation when it comes to that. I am after the desired outcome, and we need to get rid of the rogue companies. Look, my goal is a trust-based system. We should have a home care service in which we can cooperate, but it is partly – well, you cannot have too many companies if you're going to cooperate. It does not work for the care managers, nor for the rest of the chain. So I want us to achieve a functioning collaboration and build trust so that we can govern more on the basis of trust than we do today. And we are not there yet. We cannot be naïve and abolish the time registration systems and the like before we have reached that trust and that cooperation. … I don't think we will get to the point of cancelling all the contracts again, but we will see! Everything is, after all, driven by the desired outcome, which is collaboration, trust, good quality for the elderly, and fair working conditions for the staff.[626]

It is interesting to note that she was not completely opposed to the care choice system, nor to the idea of governing the private providers on the basis of trust. The conflict between strict requirements and room for innovation, or, in other words, public control versus private profit-making, in the welfare sector is in the end a political question that must be contested within the loosely defined framework of the Social Services Act.

The way the care choice systems have developed over time is the outcome of officials and politicians seeking to strike the right balance between the different aims and aspects of the system and to find workable legal and political strategies for solving the problems within the system. Care choice systems change and develop over time because their implementation implies a significant learning phase for the administration, because there may be a lack of legal expertise within the administration, at least at the beginning, and because shifts in political leadership bring about different political priorities.

[626] City L Branch Meeting.

5.5 Governing with and without a care choice system

This dissertation focuses on governing *with* care choice systems rather than on comparing this form of governing with other ways of governing. However, because an analysis of the differences between the governing structures of municipalities with and without care choice systems can throw light on the different ways in which public and private bodies are governed, a questionnaire I produced was also sent to municipalities without care choice systems. The purpose of the questionnaire was to understand how the use of the tender documents and contracts, with their lists of specific requirements regulating the relationships between municipalities and providers, has affected the internal governing models of municipalities with care choice systems.[627] The questionnaire focused on the overarching governing structures relating to elder care within the municipalities, with a particular focus on whether and how contracts or contract-like arrangements were being used. The municipalities were asked whether they governed their municipal provider through a contract-like agreement with a specific list of requirements (as private providers are governed in municipalities with care choice systems). If the answer was 'no', they were asked to provide a description of the model that was used instead. The municipalities with care choice systems were asked whether the list of requirements that governs the municipal provider, if they used such a list, was the same as that used in the case of the private providers. They were also asked whether the monitoring process was the same for the municipal and the private providers. Table 8 sums up the responses provided by the municipalities.

Table 8 Governing municipal provider through contract-like agreements[628]

ANSWER	GROUP OF MUNICIPALITY							
	Group 1		Group 2		Group 3		Total	
	N	%	N	%	N	%	N	%
Yes	53	66	2	18	2	3	**57**	**33**
Connected	16	20	1	6	-	0	**17**	**10**
No	11	14	14	82	74	97	**99**	**57**
Sum	**80**	**100**	**17**	**100**	**76**	**100**	**173**	**100**

[627] Described in chapter 2.3.3.

[628] Excluded from the table are those municipalities which do not have any municipal provision at all, and instead have only private providers, contracted either through the Act on Care Choice Systems or through the Public Procurement Act. Among the respondents, there were five such municipalities.

Group 1 in table 8 includes those municipalities that have care choice systems both for services (such as washing, cleaning, shopping) and for personal care (support with hygiene, dressing, food, and basic medical care). In this group, two out of three govern their municipal provider with the same tools used to govern the private provider(s). The 'connected' row refers to responses that suggest that the governing and monitoring of the municipal provider resembles and is influenced by, but is not exactly the same as, the governing of the private providers. Among the municipalities with care choice systems for both services and personal care, one out of five govern their municipal provider in this way. Only 14 per cent of this group do not govern the municipal provider through a contract-like agreement. There is thus a strong tendency within municipalities with care choice systems for services and personal care to govern their municipal provider as they govern their private providers. Group 2 consists of municipalities that have a care choice system for services but not for personal care. This group is smaller, but here the effect of the care choice system on the relationship with the municipal provider is not at all as significant, with 82 per cent of these municipalities responding that they do not have a contract-like agreement with their municipal provider. Group 3 consists of municipalities that do not use a care choice system to provide elder care home services. In this group, almost all municipalities responded that they do not govern their municipal provider through a contract or contract-like agreement. Further, the two municipalities in this group that answered 'yes' to this question explained that they used to have a care choice system and that, when they got rid of the system, they had chosen to continue governing their internal provider through a contract-like agreement. There are, however, several municipalities in this group which have abolished their care choice system but have not chosen to continue governing their municipal provider in this way. It is clear, from the results of the questionnaire, that the introduction of a care choice system affects the governing of the internal delivery of services in the home care sector.

Among those municipalities which answered 'no' to the question in table 3, a large majority said that their alternative governing structure was a purchaser–provider model. In this model, the decision-making unit sends a basis for decision to the execution unit, which reports performed time back to the decision-making unit and is compensated accordingly. A general trend made clear by the results of the questionnaire is that the models used to govern home care in the smaller municipalities tend to be less developed.

All three municipalities in my interview study have contract-like agreements with the internal organization that are the same as or closely resemble the contract used for the private provider(s). Of the three, City M has the most

level playing field for the municipal provider and the private providers: they are supposed to 'compete on the same terms', and in some parts of the city (the care choice system is geographically divided in the city), the municipal provider has even been squeezed out by private providers.[629] It has also on occasion been fined for providing poor-quality services, demonstrating the fact that the municipality is expected to follow the same rules as the private providers.[630] In City L, the administration's agreements with the municipal and with the private providers look the same, but the central office does not monitor the municipal providers in the different districts of the city, as they do with the private providers, and instead the districts are responsible for monitoring the public providers (as well as private providers).[631] There are also a few districts which have not yet entered into the central agreement for their public provider.[632] Municipal providers are not subject to sanctions, and accountability is based on the traditional model, where the municipality is directly responsible to its citizens for the service provision.[633] From the descriptions offered by City S officials, it seems that there are more differences between the governing of the municipal provider and that of the private in that municipality than in City M and City L, although these officials also claimed that they were actively working to harmonize the governing and monitoring of the municipal and private provider.[634] City S is also distinguished by the fact that the relationship between the administration and the management of the municipal provider is much closer, and the contact more frequent, than in the other cities, as all the officials work in the same building. Communication regarding issues of quality development runs up and down the hierarchy between the administration, the management, and workers on the ground. By contrast, the meetings with the private provider are on a monthly basis and more formal, and officials have decided to introduce these monthly meetings for the municipal provider too.[635] The administration also currently provides training sessions for municipal staff to which the staff of the private provider are not invited, but this too is planned to change in the future.[636]

[629] M1.

[630] M3.

[631] L1.

[632] L2.

[633] L3.

[634] S2, S6.

[635] S5.

[636] S2.

5.6 Results

The most important finding of this chapter is that care choice systems change the tools that are used in governing, bringing about a growth in the importance of the contract: the *contractualization* of governing. However, alongside the use of tenders and contracts in governing is also an extensive informal governing process, which takes place through monitoring and dialogue. Further, this contractualization process also affects the municipalities' own operations. From the purchasers' perspective, the differences between public and private providers of services do not seem significant. The move away from a public-law framework and the public delivery of services should therefore be seen not as deregulation but rather as a new form of regulation. The introduction of the care choice system does not mean that the municipalities govern or regulate less, but it does mean that they govern and regulate with different tools. That said, this shift does leave less room for political intervention and more room for the operation of private, profit-driven interests.

How is the relationship between public-law obligations and contracted-out welfare services expressed in national legal sources, policy documents, and doctrine?

There seems to be no clear legal guidance on the extent to which public-law regulations are transferred to private-law subjects carrying out public activities or on the role of the contract in regulating public-law obligations in contracted-out services. Even though the legal sources that deal with this issue do not explicitly contradict one another, there is no clarity about the legal responsibilities of private providers operating in the welfare sector. Legislators seem to have been unwilling or unable to make explicit what is expected of private providers in the welfare sector from a public-law perspective.

It is also unclear just to what extent the municipalities look to the debates in national policy documents and doctrinal sources when trying to understand how to regulate the private providers. The municipalities seem to have handled this lack of clarity primarily by including broad references to public law in their contracts. The overall impression one gets from the statements from the interviewees is that there is a certain amount of confusion and disagreement about how the principles expressed through public law, regulation, and policy relate to private providers offering welfare services. The interviews suggest that some officials see the private providers, or believe the private providers should be seen, as an extension of the public services. This lack of clarity creates a grey zone in which lines of accountability might become obscured.

This could, however, also be seen as connected to the trend towards the more indirect regulation of public services, as in, for instance, the support given to private providers, described in the preceding chapter.

What strategies do municipalities with care choice systems adopt in order to fulfil their public-law obligations?

My empirical investigation reveals that the municipalities use a mixture of strategies to try to ensure that the private providers comply with the obligations surrounding the provision of home care in Sweden. To deepen the understanding of these strategies and their implications, it is helpful to turn to the international debate in the legal studies literature on the question of contracted-out welfare services. On one side of this debate, there are those who argue for increasing the use of private-law instruments within the public field.[637] The other side is represented by those who believe that private companies cannot provide the accountability and compliance with fundamental public-law rules and principles that public authorities can, and therefore that core public services cannot, or rather should not, be transferred to private entities and governed through private law.[638] Within the broader debate about how to understand and regulate this phenomenon, there are proposals for different legal strategies by which public authorities should handle the governing of contracted-out services. These may be grouped under the following four headings: strategies of *securing public values*, through regulation and/or contracts; strategies of *publicization*; strategies of strengthening the use of private law instruments, and strategies of *relational contracting*. It is worth mentioning at the outset that I have not found any explicit references to these strategies, or to the literature in which they are presented, in any of the legal, policy, or doctrinal sources I have studied, nor were they explicitly mentioned in the interviews. I thus cannot claim that any of these strategies are being consciously followed by public authorities.

[637] See e.g. Jody Freeman, 'Extending Public Law Norms Through Privatization' (2003) 116 Harvard Law Review 1285; Laura A Dickinson, 'Public Values/Private Contract' in Jody Freeman and Martha Minow (eds), *Government by contract: outsourcing and American democracy* (Harvard Univ Press 2009).

[638] See e.g. Martha Minow, *Partners, Not Rivals : Privatization and the Public Good* (Beacon Press 2002); Jon Pierre and Martin Painter, 'Why Legality Cannot Be Contracted Out: Exploring the Limits of New Public Management' in M Ramesh, Eduardo Araral and Wu Xun (eds), *Reasserting the public in public services : new public management reforms* (Routledge 2010); Alfred C Aman, jr., 'Privatization and Democracy: Resources in Administrative Law' in Jody Freeman and Martha Minow (eds), *Government by contract: outsourcing and American democracy* (Harvard Univ Press 2009).

Nevertheless, examining the different positions taken up in the legal studies debate can illuminate the strategies used by the municipalities in practice.

Proponents of the *public values* theory, such as Martha Minow, argue that the values that have emerged from legal and political traditions and sources should guide public–private partnerships. On this view, the responsibility should rest with the public authority, regardless of how a service is delivered.[639] A central problem, however, is that providers enjoy considerable discretion when implementing policy through the delivery of services. Through this discretion, policies might be redefined or interpreted in a way unanticipated by the policy-makers, thereby undermining democratic decision-making. This problem may arise in the case of public as well as private providers, but proponents of the 'public values' school see public employees and organizations as imbued with a certain ethos that prevents them from infringing fundamental public norms. Minow adopts a traditional administrative-law view of accountability as the holding of authority to account through incentives and sanctions connected to obligations that are ultimately created through democratic decision-making. The ultimate authority in such a system is the people, that is, the voters. If public services are contracted out, government must continue to evaluate the service provision and must explain to the public how the public-law requirements are being met, and this process must be transparent.[640]

In an article from 2003, Jody Freeman, responding in part to Martha Minow, introduced the term *publicization*.[641] The goal of the publicization project is to extend public goals to the private providers of contracted-out services. On this view, rather than necessarily compromising public values, as critics such as Minow fear, privatization may thus be consistent with the goals and values of public authorities. Tools such as the accreditation of providers, budgeting requirements, regulations, contracts, and monitoring may all be used as means in the publicization process,[642] but it also requires an inventive attitude towards legal solutions.[643] Publicization is seen as a pragmatic position, combining the will to deliver high-quality and publicly regulated services with the need to do

[639] Minow (n 638) 142.

[640] Martha Minow, 'Public and Private Partnerships: Accounting for the New Religion' (2003) 116 Harvard Law Review 1229, 1260.

[641] Jody Freeman (n 637) 1327.

[642] Jody Freeman (n 637) 1315–1317.

[643] Jody Freeman (n 637) 1340.

so in cost-effective ways (which, on this view, means privately rather than publicly).[644]

Some authors have argued that the changes that have taken place within the welfare state – the increasing private delivery of services, the implementation of austerity measures, and the increased emphasis on the private responsibility of the individual – should lead to an expansion of the role of *private-law instruments* within the welfare state. Thomas Wilhelmsson argues for the use of private law to carry out regulatory and supervisory functions within the welfare system, functions that were previously exercised by the state and that are important in preventing systematic abuses of power.[645] The vacuum created in the governing of welfare services when the public hands over the delivery of services to private interests creates space for such private-law regulation, with the responsibility for failings in the services monitored and enforced through tort and contract.[646] Emily Dickinson similarly argued for the development of public–private partnership contracts that would enhance accountability by including requirements relating to specific performance standards, benchmarks, graduated penalties, and reporting. These contracts could explicitly require that the contractors obey public-law regulations, and contractual terms could provide that private contractors must abide by relevant legal rules applicable to public actors. Contracts could also provide for 'back-end enforcement', sanctions that would enhance accountability through, for example, the right of third parties to the contract to sue.[647] The aim of this sort of project is to use private-law techniques to strengthen both incentives and penalties: rewarding good performance through standards or benchmarking and discouraging bad performance through the threat of penalties, terminations, and government takeover of contracts.[648] In order for this strategy to function effectively, increased levels of monitoring would be necessary, and this would require clear benchmarks to be included in the contracts.[649]

Nestor M Davidson seeks to add some nuance to the image of how contracts and contractual relationships in the private delivery of public services should look. He describes privatization as a *relational* phenomenon. For many public

[644] Jody Freeman (n 637) 1295.

[645] Thomas Wilhelmsson, *Senmodern Ansvarsrätt : Privaträtt Som Redskap För Mikropolitik* (Iustus 2001) 19.

[646] Wilhelmsson (n 645) 61.

[647] Dickinson (n 637) 338.

[648] Dickinson (n 637) 352.

[649] Dickinson (n 637) 347.

authorities, he claims, the solution to the problems created by the use of contracts, for instance the principal–agent problem,[650] is sought in increasingly detailed contracts, more specificity in contract design, and increased attention to contract monitoring by public officials. This solution is sought because policy-makers want to retain the advantages of privatization, which they believe come from increases in efficiency, while at the same time keeping enough control over the process to ensure that public goals are met. Davidson, however, spots a problem with this logic: it assumes that public service terms of engagement can be reduced to clear contractual clauses which capture the essence of the desired output. Given the nature of welfare services, however, many aspects of the services provided are difficult to specify in terms of clear outputs and will 'elude detailed specification, no matter how prescient or creative the drafter of the contract'.[651] In response, the traditional 'discrete' contracting approach calls for more contractual specificity and vigilant monitoring. Davidson's relational approach, by contrast, recognizes that public-law norms are inherently difficult to capture in contractual terms. This approach seeks to inculcate public values in private providers, not only through contractual specificities but also through 'informally encouraging reciprocity and private-party solidarity to public values'.[652] In the process of selecting providers, in the contracts, and in subsequent interactions, public administrators should make fidelity to public values central to their approach. The private provider should not be kept at arm's length; instead, public authorities should make a long-term investment in the relationship. A relational strategy plays out over a number of exchanges, which bring the parties into repeated contact, creating a superstructure of formal and informal interactions through which any gaps in the initial contracts can be filled and any potential conflicts avoided.[653] Although the possibility of termination and other hard sanctions can still exist, and may be used if cooperation has broken down, this

[650] An agency relationship is a contract under which one or more persons (the principal[s]) engage another person (the agent) to perform some service on their behalf which involves delegating some decision-making authority to the agent. The 'problem' arises since both parties to the relationship are utility maximizers, which means that there are good reasons to believe that the agent will not always act in the best interests of the principal. Michael C Jensen and William H Meckling, 'Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure' (1976) 3 Journal of Financial Economics 310.

[651] Nestor M Davidson, 'Relational Contracts in the Privatization of Social Welfare: The Case of Housing' (2006) 24 Yale Law & Policy Review 278.

[652] Davidson (n 651) 306.

[653] Davidson (n 651) 299.

approach affords public authorities discretion in the significant grey areas that often surround welfare services.[654]

Looking at the results of the study through the lens of these strategies, a variety of tendencies can be discerned in the municipalities' practices, but some patterns also become clear. I discuss the different strategies in turn below in relation to the evidence from the municipalities.

Regulation to secure public values

The debate about the importance of securing public values is prominent in Swedish doctrinal sources through the work of authors such as Landelius and Marcusson. However, as I mentioned above, this has not translated into a similar prominence in policy documents and inquiries by the government and governmental agencies. In the municipalities' tender documents, however, this strategy is more noticeable, in particular in the use of references to values and overarching principles. Interviewees also discussed the challenge of ensuring that providers comply with public values and live up to the high standards of care quality contained in national legislation. Public procurement law, however, sets limits on how far public authorities can go in trying to regulate the private providers. Here there is a conflict between two aims: the municipalities' wish to guarantee quality and the public procurement regulations' aim to limit state intervention. One sign of an increasing desire to exert public control over contracted-out services is the growth of detailed regulation in the form of non-binding national policy documents and the increasing involvement of government agencies, as this study has documented. As the last chapter showed, the provision of elder care has become more regulated in recent years, especially through the standards and provisions issued by the National Board on Health and Welfare. These are generally applicable to the private providers, either directly or through their inclusion in contracts. It cannot be conclusively proven that the increase in standards is a direct effect of the introduction of care choice systems, but, as I discussed in section 4.6, there seems to be a connection between marketization and standardization. If that is right, then it seems that the entrance of private providers into markets for public services brings with it an increase in public-law regulation.

[654] Davidson (n 651) 312.

Publicization

The list of requirements set through tenders and contracts achieves a highly detailed form of governing, covering organizations, processes, procedures, and systems. Even though there are limits to this kind of regulation set by EU public procurement rules and the way these are interpreted, there is still a great deal of detail in contractual criteria. For instance, requirements relating to involvement in the municipality's emergency preparedness system, references to international conventions on human rights, and sweeping statements on broad values regarding environmental and social responsibility indicate a level of governing which seems to suggest that private providers are seen as extensions of the public authority. The same goes for the widespread requirement that the private providers use the same technical systems (for complaints, time measuring, etc.) as the municipality. A tension arises from the fact that elder care is a sector that is subject to a lot of regulation, especially through the provisions issued by the National Board on Health and Welfare, and that elder care is a service defined not in relation to a 'customer' but by the municipal administration's decision concerning the needs of the individual. This is found to be problematic by at least some of the private providers. This tension is dealt with in part through the training and education the administrations offer to the private providers. As we have seen, because the matter of whether public law applies directly to private providers is unclear, the municipality must ensure compliance with these rules through other techniques.

Using private-law tools

It is clear that the municipalities view the tender documents and contracts as tools that are essential if they are to be able to govern the quality of services and thereby comply with their legal responsibilities. The municipalities have a responsibility to interpret and follow the law, but their tools for actually realizing this obligation to the citizen lie in the contracts and sanctions and how these are actually used. If the contractual clauses are not sufficient to capture central requirements, the municipality's ability to have influence over and govern the outcome may be weakened. However, my empirical investigations reveal that the municipalities actually make limited use of sanctions. The possible explanations for this are several: the difficulty in defining quality in monitorable terms, the ambition to create good relationships and a trusting environment, and the risk of legal and financial repercussions for the municipalities themselves. In practice, then, the legal structure protects not only, or even primarily, individual users but individual providers. The structure of a sanctions regime also affects the effectiveness of the sanctions in

structuring behaviour. If, for instance, the fines are too small, providers may see it as cost effective to simply pay the fine rather than to remedy the defect.

The construction and use of the tender documents and contracts define the administrative process of dealing with the private providers, from formulating requirements and processing applications to monitoring, tackling problems, and getting rid of companies providing substandard services. How this process is carried out differs across the municipalities, with lists of requirements of varying length and detail in the tender documents and differing sanctions regimes in the contracts. These differences seem to be explained in part by the degree of legal expertise available within the municipality, which mostly relates, in turn, to the size of the municipality, and by the length of time the municipality has had a care choice system in place. As officials pointed out, the contract creates the framework for the relationship, although, as they also claimed, the contract is not sufficient to guarantee the level of quality required by law. The contract is also a difficult tool to work with, especially when it comes to defining and controlling quality. However, without a workable contract the municipality might end up in a situation in which it has the responsibility for a service over which it has limited influence.

Relational strategies

The function of the contract must be seen in context. Since public-law regulations, including the Social Services Act, are built on values, principles, and frameworks of norms, rather than detailed lists of requirements, they are often hard to regulate and monitor through contracts. In all three municipalities studied, the informal relationship with the provider has therefore come to be an important complement to the contractual one. The limitations of governing through contracts entail that other ways of governing the providers, through dialogue, coaching, etc., have to be used in parallel, as part of a wider relational context. This context is shaped by the logic of the instruments, of course, but also by the political aim of establishing a functioning market while at the same time ensuring that the services provided are high quality. The municipal administrations have developed complex contractual relationship strategies for dealing with the private providers. The providers are not simply seen as exchange partners, but instead they come to be intertwined with the municipal administration. The relationship is built on dialogue rather than on the hard tools of the contract. Still, there are some differences between the municipalities in this regard, and these seem to have been the product of the different experiences municipalities have had with different providers. In the municipal administrations I studied, the idea of ‘partnership’ is central, and

trust is an important aspect of these partnerships. However, in City M and City L, the recurring problems of fraud in the systems have made the administrations increasingly wary, concerned about loopholes, trust, and discretionary power, and strategies have been set up to keep a watchful eye on the private providers. These concerns also explain why the administrations have sought to impose tougher requirements for providers trying to get into the system. Another important factor in this context is the political ambition of supporting the creation of a care market within which small businesses can flourish. The municipalities' use of relational strategies, alongside their general unwillingness to use the tougher sanctions in the contracts, may be connected to this wish to support private providers. The partnership model is thus complicated by the need and wish to be heavily involved with the private providers in different ways, both through monitoring and through support.

To sum up: as the municipalities see it, the way that they govern the private providers, their governing model, seems to a large extent to rest on collaboration and self-regulation, but with limited discretionary powers for the private providers – a somewhat ambiguous and complex system. There seems to be a tension within the system between the desire to create partnerships and the need to exert control over the quality of the services. In order to navigate this tension, they adopt a number of strategies, as this study has shown: relationships and dialogue, coaching and monitoring, and regulating private providers 'as if' they were the municipality. From my case studies, it is clear that municipalities frequently adopt a relational strategy, becoming closely involved with the operations of the private providers. However, there are also elements of publicization here: public-law regulations are a significant element in the relationships between the municipalities and the providers.

These observations corroborate findings from some other studies in the field. In their study of the legal framework governing the contracting out of education and elder care in the Nordic countries, Signe Bock Segaard and Jo Saglie find that even though municipalities are urged to find 'freedom within the form', national policy documents seem overall to encourage a partnership and collaboration model rather than a hierarchical purchaser–provider relationship.[655] They also conclude that national governing tends to focus more on processes than on content and results, a conclusion also borne out by my own study, particularly in the discussion above about the construction of contractual requirements.[656] Hansen has studied the design of the tenders and

[655] Segaard and Saglie (n 28) 96–97.

[656] Segaard and Saglie (n 28) 98.

contracts used in privatized welfare services in the Nordic countries. He finds that they are generally of a long-term type, designed to promote reliability and commitment.[657] He also identifies a variety of strategies used, often in combination, by the municipalities, remarking that there is 'a remarkable inconsistency in the strategies chosen'.[658]

Just as in my study, the outsourcing contracts Hansen studied typically contained very detailed descriptions of the services required of the private providers, as well as extensive legal specifications and requirements. Hansen observes that references to legal requirements are often placed in the first section of the contracts, underlining the importance of services being delivered in accordance with public-law rules. This effect is also sometimes achieved by the public authority defining the service in the contract with explicit reference to the public-law regulations by which the public authority itself is bound.[659] Echoing the way several of my interviewees described their view of the private providers' responsibilities, Hansen notes that the idea seems to be that the contractor should act towards the citizen as though it were the municipality itself, in accordance with the legal requirements placed on the municipalities, almost as if the contract were more like a licence.[660]

In another article, Hansen states that the outsourcing contracts for social services can often be described as *concessions*. In this strategy, the private provider is in many ways seen as taking the place of the public authority, providing a service that is seen as a public resource which should benefit the public, and the contract requires the provider to follow the same rules and regulations to which the municipality is subject through public law. One such regulation is a general requirement of legal security and conformity, something to which private parties would not otherwise be subject. In fact, Hansen states, it may be hard to tell the difference between the terms of such concession contracts and administrative provisions.[661] In other words, the strong tendencies towards publicization strategies seen in my evidence from the municipalities was also identified by Hansen. Moreover, Hansen also found evidence of the same sort of relational strategies as I described above. He finds that relational strategies are often used when contracting out services which

[657] Hansen, 'Public Law by Contract' (n 63) 631.

[658] Hansen, 'Public Law by Contract' (n 63) 635.

[659] Hansen, 'Public Law by Contract' (n 63) 635–636.

[660] Hansen, 'Public Law by Contract' (n 63) 637.

[661] Hansen, 'Strategier for Længerevarende Kontrakter Om Udlicitering Af Kommunal Service' (n 63) 62.

are seen as more complex and as involving care. These services are more difficult to describe in contractual terms and are seen as involving public interests of a type which are foreign to private market actors. The private providers thus have to comply with a detailed body of rules and legal standards, such as standards for staff competence, hygiene, etc.[662]

What issues and conflicts might arise when these strategies are used?

The effect of the translation of public-law provisions into contractual clauses is uncertain, but my empirical investigations, analysed with the help of relevant literature in this area, provides some clues as to its implications. From a private-law perspective, it creates a complexity in the relationship between the parties, which underlines the fact that the delivery of social services is not a straightforward action which can easily be regulated via contract. Interpretive difficulties may arise when public-law regulations are included as vague contractual terms of a more or less general character. Principles of equality, objectivity, and transparency are often included in the contracts even in relation to situations in which the provider is only completing practical tasks and has no decision-making responsibility.[663] The very use of a ladder of sanctions might be seen as being in conflict with a public-law perspective, in which the individual right to receive good-quality services is non-negotiable. One issue here is that, when services are substandard, the person who suffers the loss is not party to the contract. That person's rights are constructed in accordance with another, non-economic logic.

The contract is a technology of a certain rationality. The rationality legitimizes as well as uses the technology, but the technology also limits and structures the rationality. Tender documents and contracts have a certain significance as governing mechanisms, at least insofar as they provide a framework for the relationship between the public authorities and the private providers. This has several implications for the governing of quality: for instance, it constrains how quality can be governed and monitored, and it leads to a focus on measurable and monitorable features of quality, as this study has shown. It is much easier to respond to formal deficiencies, like tax avoidance or structural defects, than it is to respond to deficiencies in the 'softer' aspects of quality, a fact that seems to follow from the form of the contract. It is also not possible

[662] Hansen, 'Public Law by Contract' (n 63) 633–634.

[663] Lisa Donlau, 'Studie Av Avtal Mellan Kommuner Och Privata Utförare Av Hemtjänst' (Working Paper, Linköping University 2017).

for the municipalities to ask the private providers to do more than they are required to do under the terms of the contract.[664]

This chapter provides further insight into why the contracting out of services leads to a weakening of accountability. The chief reason is that it seems to be difficult both to terminate contracts and to use quality requirements to sanction companies that are providing substandard services. Many of the requirements in the tender documents are unclear, vague, and therefore difficult to monitor. It is hard to hold private providers accountable for breaches of clauses that refer to more abstract standards of quality. Contractual tools, such as the threat or actual use of warnings, fines, and other financial penalties, are used to regulate quality and other aspects of services in care choice systems. From one perspective, it might seem as though, when contracts are used to enforce public standards relating to certain aspects of quality, quality and accountability could be enhanced. In theory, if horizontal accountability is more effective than vertical accountability, private parties should comply with public regulations even more scrupulously than the public provider itself, at least in cases where the standards are well defined, monitoring is effective, and remedies are used (at least as a deterrent).[665] In order for there to be effective accountability between the municipality and the private provider, however, there have first to be monitorable clauses in the contracts, and, second, these must be connected to sanctions which are actually used. Even though monitoring has become an increasingly large part of the municipal administration of elder care, it is very difficult actually to monitor the providers to the extent that is necessary to exclude the more unscrupulous providers from the system. The municipality also confronts legal difficulties if it wants to terminate a contract with a company providing substandard services. In order to be able to terminate a provider, the municipality must be able to specify the precise way in which the provider has violated the quality requirements stated in the contract. This means that the extent to which municipalities can hold private providers accountable is limited and that, as a consequence, the quality of services may

[664] One implication of this can be seen in the context of the coronavirus pandemic, which has hit the elder care sector hard and has meant that new measures have had to be implemented. If the contract does not allow for rapid amendment in emergency situations, then it is not possible for the municipality to require changes to working conditions (e.g. to ensure that staff with symptoms do not have to go to work) or changes in the organization of care (e.g. procedures for isolation and cohort care for infected patients). Mirjam Katzin, 'Skärp kraven på den privata hemtjänsten, kommuner' *Dagens Samhälle* (21 April 2020) <https://www.dagenssamhalle.se/debatt/skarp-kraven-pa-den-privata-hemtjansten-kommuner-32282> accessed 7 July 2020. See further footnote 561.

[665] King (n 518) 85.

be compromised by unscrupulous providers coming on to the market. As my interviewees made clear, the process of rectifying inadequacies or terminating contracts is often long, and in the meantime the quality of the services provided to individual users might be compromised. Monitoring work is also used in part as a way of supporting the providers, and when the providers fail in their mission they are given opportunities and time to rectify their mistakes, even when they have not met basic requirements.

The public-law regulation seems to act as an argument in the relationships with the private providers when trying to regulate them by other means, such as through contract, monitoring, and dialogue. Because of the hybridization of public and private interests that comes about through care choice systems, the companies are at the same time representatives of the public authorities and are – directly or indirectly – expected to comply with public-law regulations. On the other hand, these public-law regulations seem to be viewed rather differently by municipal administrations and care companies, according to my interviewees, underlining the fact that these actors operate according to different logics. Municipal officials therefore feel a responsibility to explain the rules to the private companies, so as to ensure that quality standards in the sector are upheld. The conflict between these different logics arises especially in relation to small businesses.

The international debate on the contracting out of welfare services provides some points of orientation that can deepen our understanding of my empirical results. The *publicization* project is a conscious strategy of hybridization in which the public authority becomes heavily involved in the operations of the private actors through detailed regulation and extensive monitoring. One reason for pursuing this project is that the responsibility for the user's situation stays with the municipality, both in a public-law sense and in the view of the public. Segaard and Saglie go as far as to say that a very detailed list of requirements, combined with extensive supervision by the public authorities, could actually be described as an extended form of in-house service delivery.[666] Hansen's main finding, which my study echoes, is that municipalities 'seem to want competitive and efficient markets for social services, but at the same time stay in complete control with the quantity and content of private contractors' performance in the full length of the contract period'.[667] Hansen states that the public's desire for far-reaching control over providers and service provision may at times seem to contradict the very rationale for creating a quasi-market

[666] Segaard and Saglie (n 28) 99.

[667] Hansen, 'Public Law by Contract' (n 63) 621.

for social services in the first place: to allow the operation of private incentive to improve service provision.[668] Jon Pierre and Martin Painter recognize the importance of the publicization narrative, while, like Hansen, criticizing some of its basic claims:

> To become agents of 'publicization' private contractors would have to make significant investments in staff training and be willing to, as Freeman suggests, become quasi-agents of the state. … At the end of the day, Freeman's analysis of 'publicization' begs the question of the rationale of contracting out in the first place. The costs for the public sector associated with 'publicization' – designing and managing by contracts, careful evaluation of potential contractors, evaluation of the performance of the final contractor, and so on – raise the issue of how much money is actually saved by contracting out services where adhering to public norms is paramount. The market logic is not in favour of 'publicization'; a related question is whether the public sector logic would support such an arrangement.[669]

The same criticism could apply to the relational strategy: if private interests are governed by a logic of profit-making rather than public values, close cooperation might not necessarily be worthwile for the public, but more so for the private interests. This is also recognized by Davidson, who admits that the underlying goal of parties in a commercial context is 'relatively clear and translatable (in some form) into financial terms', and that the need to be sensitive to public values in welfare services might make the goals of the parties 'incommensurate'.[670] To get the private parties to commit to solidarity and the achievement of public values, economic incentive structures are needed. Another impediment to public–private partnerships is the potential for the capture and abuse of the public commitment to collaboration. The absence of standards often present in welfare services might undermine the ability to detect and defer fraud.[671]

The relational strategy raises issues of trust between the administrations and the providers. To cast some light on these issues, it is worth considering the results of two Swedish studies of contracted-out elder care, one by Malin Tillmar, the other by Helene Brodin and Elin Peterson, which both deal with this issue. In Tillmar's study, she found a high level of mutual distrust between

[668] Hansen, 'Public Law by Contract' (n 63) 642.

[669] Pierre and Painter (n 638) 59.

[670] Davidson (n 651) 313.

[671] Davidson (n 651) 310–311.

care providers and municipal employees. She connects this lack of trust with the system's lack of legitimacy in the eyes of citizens. The legitimacy of the system could be strengthened through more effective contracting and public procurement, but this might then have negative effects on the relationship between public authority and provider.[672] Brodin and Peterson reach similar conclusions in their study of the relationship between private providers and municipal authorities in the care choice system for home care in Stockholm. They say that the large number of providers makes close cooperation impossible, a situation which creates a vicious circle of distrust in which municipal officials suspect the private providers of malpractice and the private providers suspect the administration of not being competition neutral.[673] The representatives from the providers interviewed expressed distrust towards other providers, which they suspected of being unscrupulous, and believed the market was full of 'dirty dealing'.[674] The providers accepted that there was detailed regulation in place, partly to prevent such market abuse, but this regulation was seen as a significant problem for small businesses, where care staff had to spend a lot of their working time doing administrative work in order to comply with the municipality's demands for documentation.[675] The authors conclude that the distrust in the system affects practices around remuneration, monitoring, and follow-up. This image corresponds with the findings of my own study and may be especially true of those municipalities with many care providers within the quasi-market and/or with many cases of fraud in the system. This passage captures the picture well:

> To combat the cheating companies, the City of Stockholm has developed a complicated control system. But when the control system regulates the operations and thus also the care work in detail, it becomes rigid. The control system thus makes it impossible for providers and their staff to be flexible and responsive to variations in the needs of older persons. The distrust also makes the essential cooperation on particular issues and the exchange of information about changes in users' needs difficult.[676]

The evidence from my interviews reveals a more sincere ambition to create partnerships and build trust than these studies have found. That said, officials

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[672] Malin Tillmar, 'No Longer So Strange? (Dis)Trust in Municipality—Small Business Relationships' (2009) 30 Economic and Industrial Democracy 418–419.

[673] Brodin and Peterson (n 56) 121.

[674] Brodin and Peterson (n 56) 127.

[675] Brodin and Peterson (n 56) 130.

[676] Brodin and Peterson (n 56) 133. The translation is my own.

from all three municipalities emphasized the constant conflict between combatting cheating in the system and building partnerships. Taken together, the studies also suggest that relational, trust-based contracting strategies become much more difficult in systems with many providers.

The municipal administrations spend a great deal of time handling the risks and loopholes that seem to arise frequently within care choice systems. All the municipalities in my study have had care choice systems for a long time, and officials from each city described a gradual development in which, in response to experiences of fraud and substandard services, the balance between trust and control had shifted towards the latter. What this suggests is that the development of well-functioning structures takes time and requires legal knowledge; in the early years after the introduction of a care choice system, there may be more loopholes and defects within the system that are gradually closed and ironed out over time. Smaller municipalities with more limited legal expertise within the administration may also face bigger obstacles in seeking to develop better ways of governing this new mode of service provision. This also means that the actual outcomes of care choice systems can differ significantly from municipality to municipality.

How does the introduction of care choice systems affect the municipal delivery of elder care?

The introduction of the Act on Care Choice Systems has changed the way home care is governed by the municipalities. This may be seen not only in the entrance of private providers into the sector but also, in many cases, in changes in the municipalities' relationships towards their own in-house providers. In a majority of the municipalities with care choice systems, the municipal provider is still the largest provider. Yet municipal providers increasingly tend to be governed as though they were private providers. There is a clear connection between the implementation of the care choice system and changes to the way the municipal administration governs the municipal provider. On the other hand, the introduction of the Act on Care Choice Systems does not seem to have affected internal governing structures in municipalities without care choice systems.

The municipalities with care choice systems tend to govern their municipal providers with the same private-law tools as they use to govern the private providers Thus, the contractualization of service provision brings about certain changes in municipal organization, increasing the distance between policy input and output. With the introduction of care choice systems, the division already created under the purchaser–provider model is taken one step further,

with the distance between those responsible for governing and the units being governed increasing. This means that the differences between the municipal and private providers are lessened. In this way, it can start to seem as though the municipalities' own services are being governed as though they were private entities, partly outside of the structures of the municipalities themselves. On the other hand, the support given to the private providers suggests that they are not seen as being fully external to the municipality either, an attitude which, as we have seen, is also reflected in the highly detailed requirements included in the tenders and in the remarks of the municipal officials.

The general tendency this chapter has revealed is that, within care choice systems, the contract comes to be an increasingly important tool for governing the provision of elder care. The shift from governing on the basis of public law and policies to governing on the basis of tenders, contracts, and sanctions amounts not to deregulation but to a new form of regulation. This shift has various implications. As this chapter has shown, the municipalities find that they have to complement the contract with a significant degree of informal governing, which is used alongside the contract in order to ensure that the municipalities comply with their legal responsibilities. These strategies reduce the distance between the public authority and the private providers of services. In this way, one outcome of governing through care choice systems is a blurring of the boundaries between public and private bodies and public and private legal tools.

6 Why are municipal administrations taking care of business?

6.1 Introduction

A central purpose of this thesis is to understand how the private providers in care choice systems are actually governed – to identify the logics, rationalities, and technologies through which they are governed – and to understand what role public and private law play in this governing. To describe the shifts in governing structures that have occurred as *deregulation* seems, however, to be misleading. This is rather a situation of *reregulation*: the use of different techniques of governing. Where the line between different forms of governing should be drawn is a matter of political dispute, but behind the goal of 'rolling back the state' is actually a wish to govern not less, but differently. By drawing on the work of various theorists, this chapter will elaborate these claims and, in doing so, explain the results of the empirical chapters. I will also use the chapter to summarize my findings and to discuss the lessons that can be learned from the example of home care for older persons in Sweden for broader discussions about contracted-out welfare services.

As I have stressed throughout this dissertation, quasi-marketization leads not to deregulation but rather to a reconfiguration of the relationship between state and capital. This entails new ways of governing, such as contractualization and standardization, and a new role for public administration and bureaucracy. This chapter will discuss how the state creates and secures markets and how neoliberalization extends markets and commodification into new spheres. In these discussions, Polanyi's theories about the construction of markets in *The Great Transformation*, and the literature these theories have inspired, are an

important starting point.[677] Central to the mythology of capitalism is the idea of the self-regulating market, but in reality capitalism requires a state in order to create and regulate markets. Polanyi points out that there is nothing 'natural' about laissez-faire capitalism. The growth of public administration is therefore a necessary consequence of the expansion of markets and commodification, as a significant apparatus is needed to support the market and to meet the constantly increasing need for control, regulation, and intervention in the market.[678] Polanyi historically reconstructs how the market economy built on previously introduced price and competition mechanisms, as well as how it commodified things that are were commodities in themselves. By being converted into tradable goods, factors such as land and labour became commodities, albeit 'fictitious' ones. Commodification, however, is a fiction with real consequences.[679] At the same time, Polanyi says, there is a 'double movement' in society, as the tendency towards market liberalization creates a reaction against the exploitation and vulnerability that this liberalization entails. From this point of view, the state plays an ambivalent role in the relationship between economy and politics, creating and expanding markets as well as creating legislation to protect workers and citizens.[680]

As I will show in this chapter, the changes that have been depicted in this study are part of a legal-historical development towards new modes of governing and new uses of public and private law. The results of this study can be interpreted in the light of theorizations of the contemporary legal paradigm. Especially useful for understanding the tendencies analysed in this study are the concepts of 'neofunctionalism' and 'neoformalism', originally derived from Duncan Kennedy's article 'Three Globalizations'.[681] Neoformalism leads to the strengthening of rights and formal law, neofunctionalism to law being used to construct markets. These concepts relate to the question of the use and function

[677] In recent decades, Polanyi's thought has inspired a neo-Polanyian literature. These authors have focused on the financialization of the economy and economic crisis, as well as on the commodification of care. Nancy Fraser, 'Feminism, Capitalism, and the Cunning of History', *Fortunes of feminism: from state-managed capitalism to neoliberal crisis* (Verso 2013); David Harvey, *A Brief History of Neoliberalism* (Oxford University Press 2005); Brigitte Aulenbacher, Fabienne Décieux and Birgit Riegraf, 'Capitalism Goes Care: Elder and Child Care between Market, State, Profession, and Family and Questions of Justice and Inequality' (2018) 37 Equality, Diversity and Inclusion: An International Journal.

[678] Polanyi (n 45) 146–147.

[679] Polanyi (n 45) 76.

[680] Polanyi (n 45) 185.

[681] Duncan Kennedy, 'Three Globalizations of Law and Legal Thought: 1850–2000' (2006) 19 The New Law and Economic Development: A Critical Appraisal.

of public- and private-law logics and tools, and they may help us deepen our understanding of the changes in the relationship between these two logics and the implications of these changes. I would like to argue that the new governing rationality, which has replaced the command-and-control model of the welfare state, is connected to a new mode of capitalism and a new form of state, the neoliberal state.[682] I will also argue that the results of this study imply a need to rethink the divide between public law and private law.

This chapter will also seek to illuminate the empirical results of this study with the help of theories of neoliberalism and feminist critiques of the commodification of care. Fifteen years ago, David Harvey described Sweden as a case of 'circumscribed neoliberalism',[683] characterized by a combination of neoliberal reform and high-quality public services. This chapter will consider this description in the light of developments in the governing logic of neoliberalism and changes in the Swedish welfare state. Central to this discussion is an understanding of the increasing commodification of care.

However, I will also argue that the results of this study are complex and reveal, in a manner that fits well with my Foucauldian-inspired critical empiricism, how different conflicting or contradictory rationalities can operate at the same time. These results might in turn inform and nuance the theories that purport to explain the results. The results of this study may deepen our understanding of the *how* of neoliberal reforms, and thereby of the implications of these reforms. I have also aimed to portray and analyse the conflicts inherent in a system of outsourced public services and how these conflicts play out in the legal system. As I mentioned in chapter 1, one idea underlying this thesis is that the legal regulation of welfare activities is a battleground where conflicts between different modes of governing and ways of organizing social reproduction are played out. Care choice systems are in the middle of such a conflict.

Lastly, I discuss why Sweden is such an interesting case in this debate. The Swedish example can enrich our understanding of a global phenomenon, but it also has specific aspects which must be understood as part of a specific historical trajectory. Privatizations are configurations that are both

[682] For similar arguments see Fenner L Stewart, 'The Corporation, New Governance, and the Power of the Publicization Narrative' (2014) 21 Indiana Journal of Global Legal Studies; Béatrice Hibou, *The Bureaucratization of the World in the Neoliberal Era : An International and Comparative Perspective* (Palgrave Macmillan 2015); Hila Shamir, 'The Public/Private Distinction Now: The Challenges of Privatization and of the Regulatory State' (2014) 15 Theoretical Inquiries in Law, amongst others.

[683] Harvey (n 677) 115.

'commonplace in principle and specific in their arrangements – in the dispositions of relations between public and private, economic and political'.[684] Understanding these specificities makes it possible to see how they help to shape various concrete modes of governing, which are as much parts of a global trend as they are the results of a specific historical context in a local setting.

It is worth mentioning that, despite being of different sizes, the three municipalities in my case study produced generally similar findings. Some differences between them were more obviously directly related to the size of the municipality, such as differences in the number of providers or the size of the administration (and thereby the available resources and expertise). The larger municipalities, which have had many more providers pass through their systems, have also had much more experience of fraud than the small municipality, but these different experiences are not necessarily related to the sizes of the municipalities. Apart from these differences, the municipalities have had generally similar experiences. Any remaining differences have mostly to do with the closer personal relationships between the administrations and the providers in City S and City M, relationships made possible by their limited numbers of providers, and with the larger and more complex monitoring systems implemented in City M and especially in City L. From the available tender documents, it is clear that there is a tendency for smaller municipalities, at least in parts of the country not geographically close to other larger cities with a long history of care choice systems, to have tender documents and contracts that are less well developed.

[684] Béatrice Hibou, 'From Privatising the Economy to Privatising the State: An Analysis of the Continual Formation of the State' in Béatrice Hibou (ed), *Privatising the state* (Hurst & Company 2004) 25.

6.2 A reconfiguration of public administration

6.2.1 The enterprisation of the state, the governmentalization of the enterprise

This thesis has shown that the implementation of care choice systems changes the role of the municipal administrations. The need to administer a quasi-market such as the care choice system creates a new and different role for public bureaucracy. Where the Social Services Act and its preparatory works focus on issues of equality, social security, and a holistic perspective on the individual, the municipal administrations now need to devote themselves to administering public procurement processes, monitoring contracts, and supporting private providers. Welfare services are now delivered by atomized agents which are governed indirectly, but strictly, through contracts, targets, performance measures, auditing, and the use of technical time and activity reporting systems. What is thus created is a bureaucracy focused on *management*, *measurement*, and *monitoring.*

The municipal administrations govern the private providers very actively through a number of different tools – ranging from detailed regulations set out in a contract to the physical presence of municipal representatives in the providers' operations. This study has shown that the municipal administration effectively functions as a kind of quality consultancy for the private providers and that private providers are sometimes in effect created by the entrepreneur *together with* the municipal administration. In a similar way, the monitoring of the quality of services comes to be intertwined with the municipalities' support for private providers and their internal learning processes. The contract is supplemented with a high level of informal contact between the public authorities and the private providers, and governing through these relationships, through systems of trust, must be understood as an important part of the governing of the sector. The private providers are, in other words, not governed at arm's length, nor is the sector left to govern itself, in a laissez-faire fashion. Rather, the providers are treated as though they were an extension of the public services. At the same time, in those municipalities with care choice systems, the governing of the municipal delivery of services also changes, with the use of contract-like arrangements supplanting traditional public-sector governing methods.

The care choice system creates a new, more complex, intertwined relationship between public and private, in which municipal administrations govern private

providers almost as though they were part of the public sector, and municipal services begin to be governed with the instruments of private law. This double-sided development may be understood with reference to Mitchell Dean's analysis of the two competing imperatives of neoliberal programmes of public management. The first he calls 'the enterprisation of the state': that is, the shift towards governing public services as though they were private enterprises. The second is 'the governmentalization of enterprise': the detailed regulation of autonomous bodies by public authorities.[685] As my study has shown, the subjectivity of the civil servants – the administrator and the bureaucrat – is transformed in the course of these developments. Civil servants come to adopt a new way of seeing their responsibility and the aims of public services. The very way in which public authorities are organized is transformed. As Rose puts it, their ethos moves 'from one of bureaucracy to one of business, from one of planning to one of competition, from one dictated by the logics of the system to one dictated by the logics of the market'.[686] The upshot of this transformation is that we have a situation in which private providers are making profits from public money while being supported in developing their operations by public administrators.

In care choice systems, governing takes place through systems of self-monitoring, benchmarks, and standards, which are ways of governing that are premised upon the 'freedom' of the individual providers. However, they are combined with more classical disciplining measures such as regulation, monitoring, and sanctions – tools of governing more associated with the command-and-control logic of the traditional welfare state. The use of each logic's associated tools seems to have increased, with standards proliferating and monitoring operations expanding. One reason there is a need for active governing is that service provision has become fragmented and decentralized. While responsibility and accountability remain central, direct control is limited. The municipalities remain legally responsible, and national politicians are also expected to be politically accountable, as is clear from the national debate regarding this municipally regulated area. In response to cases of fraud, and with the aim of avoiding future scandals, national and local authorities seek to intensify their governing and monitoring of the sector. At the same

[685] Mitchell Dean, 'Risk, Calculable and Incalculable' in Deborah Lupton (ed), *Risk and sociocultural theory: new directions and perspectives* (Cambridge University Press 2000) 149.

[686] Rose (n 198) 150.

time, because of the lack of direct control, there is a need to find alternative tools. A new logic of governing prevails.

6.2.2 An increase in public bureaucracy

The study has shown that practices of quality assessment have become increasingly important in home care services. These practices have become more explicit, more central, and increasingly focused on measurement. As we have seen, the Act on Care Choice Systems requires municipalities to sign contracts with any provider that meets the criteria in the act and in the tender documents. In this way, the criteria in the tender documents become the focus of the municipalities' attempts to ensure that services provided are of high quality. Trying to define quality becomes central, and in that process quality becomes more specified, detailed, and standardized. The contractualization and specification of tasks have also given rise to a form of detailed technical monitoring. A broad range of monitoring measures is seen as necessary to ensure quality, and in turn this monitoring activity creates an increase in bureaucracy and in the use of data. This study has shown how information-gathering systems are employed with a view to gauging and improving the performance of the services. These systems include monitoring, benchmarking, and different forms of mapping and judging, which enable comparison and competition, spurring constant organizational change. The introduction and expansion of care choice systems has thus entailed the creation of increasingly complex systems of quality assessment and management at different levels, both in the public procurement process and in the monitoring of services.

This increased use of quality assessment and standards and the increasing standardization of service provision are, however, parts of a larger trend, which has been described in both the theoretical and empirical literature.[687] This development in the neoliberal governing of the public sector has been

[687] For theoretical accounts, see e.g. Dean, 'Risk, Calculable and Incalculable' (n 9); Roger King, *The Regulatory State in an Age of Governance : Soft Words and Big Sticks* (Palgrave Macmillan 2007); Peter Triantafillou, *New Forms of Governing : A Foucauldian Inspired Analysis* (Basingstoke : Palgrave Macmillan, 2012 2012). Two recent empirical studies focusing on the increase in measurement and standardization in the Swedish welfare bureaucracy are Majsa Allelin, *Skola För Lönsamhet : Om Elevers Marknadsanpassade Villkor Och Vardag* (Arkiv förlag 2019) and Teres Hjärpe, *Mätning Och Motstånd : Sifferstyrning i Socialtjänstens Vardag* (Samhällsvetenskapliga institutionen, Socialhögskolan, Lunds universitet 2020).

described by Dean using the concept of *performance technologies*[688] and by Triantafillou using that of *performance-measuring regimes*.[689] These authors suggest that performance targets and monitoring are intrinsic components of, and preconditions for, the contracting out of public services. Even though there is existing knowledge and information about how public services have been traditionally delivered, these performance measurements produce a particular kind of knowledge in which quality is quantified and measured. This means practices must be measurable, and thus the result is that performance measurement changes what is being measured. Performance technologies are presented as a way to restore confidence in public services and other institutions, but they are based on an assumption of mistrust of these very institutions, and as a result they produce even more mistrust. The introduction of performance technologies can be seen as an attempt to unite two competing imperatives of neoliberal governing: the aim of transferring public tasks to private subjects on the one hand, and the aim of increasing public control over how these tasks are completed on the other.

Alongside this development is a proliferation of rules and regulations issued by non-legislative bodies. These rules do not have the same status as law, but they are developed and enforced by dedicated agencies, such as, in this case, the National Board on Health and Welfare and the Health and Care Inspectorate. Detailed governing and strict control through standards and other regulations become salient parts of the governing model in this field. King points out that in what he calls 'the regulatory state' a new system of rules is often introduced to marry private sector ownership with the protection of public interests.[690] The guidelines and provisions from the National Board on Health and Welfare may be understood as, in King's term, 'meta-regulation', since these guidelines often focus on the monitoring of the organizations' own regulatory procedures. Soft regulation, self-regulation, and the involvement of clients/users in regulation are forms of regulation that are more selective and less burdensome than the more legalistic forms.[691] In terms of the specific ways in which quality is regulated, there also seems to be a significant focus on the regulation of processes and routines and less of a focus on outputs or factors that would imply significant costs for businesses (such as the hiring of a skilled workforce).

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[688] Dean, 'Risk, Calculable and Incalculable' (n 685) 148–149.

[689] Triantafillou (n 20) 60.

[690] King (n 518) 18.

[691] King (n 518) 74.

The municipal authorities' governing is indirect, through contracts, monitoring, and partnerships: a form of 'meta-regulation'. It moves away from direct command-and-control towards the regulation of organizations' internal control systems. However, the systems municipalities set up to monitor the providers' self-monitoring systems are still extensive, as we have seen. The need to control the private providers, ensure quality, and close contractual loopholes seems to have led to a marked expansion of public bureaucracy, particularly in the number of actors involved in monitoring, evaluating, and maintaining a constant dialogue with private providers.

This significant expansion of public administration underlines the point, made above, that the state is essential to the construction and administration of the (quasi-)market. The way in which neoliberal rationality leads to an expansion of public bureaucracy has been discussed in the literature. David Graeber, in his persuasive 2015 work *The Utopia of Rules*, traces what he calls 'the age of total bureaucratization' to the intertwining of public and private:

> This apparent paradox – that government policies intending to reduce government interference in the economy actually end up producing more regulations, more bureaucrats, and more police – can be observed so regularly that I think we are justified in treating it as a general sociological law … [which] states that any market reform, any government initiative intended to reduce red tape and promote market forces will have the ultimate effect of increasing the total number of regulations, the total amount of paperwork, and the total number of bureaucrats the government employs.[692]

This 'law' of increased bureaucratization seems to be relevant to the results of this study. Bureaucratization takes the form of complicated procedures involving many actors, standardization, monitoring, evaluation, and data collection, and as this study has shown this sort of bureaucratization follows from the use of tenders, contracts, and private-law instruments in the governing of the elder care sector. Also relevant in this context is the conflict between the increasing distance between political input and service delivery and the need to retain control over services. Public bureaucracy and legal regulation are thus not set aside but instrumentalized for the purpose of constructing and supporting the market. Paradoxically, this all takes place under the discursive flag of 'less bureaucracy' and 'more laissez-faire'. But the state still occupies a central role. As Béatrice Hibou puts it: 'In this sense privatisation can be

[692] David Graeber, *The Utopia of Rules : On Technology, Stupidity, and the Secret Joys of Bureaucracy* (Melville House 2015) 9.

considered as a new form of state interventionism.'[693] This accords with the Polanyian analysis of how liberalism triggers a growth in legislation and administration.

6.2.3 Conflicting rationalities for public administration

This thesis has focused on how the role of public authorities changes with the introduction of care choice systems. Governing through a quasi-market also entails different governing goals. Most importantly, governing comes to include the public responsibility to create and maintain markets. The public authority is not merely an impartial umpire maintaining the rules of the game. It plays an active role in supporting and coaching market actors, as well as itself participating in the market through its own delivery organization. My study makes clear that these changes in governing models do not diminish the role of the state; rather, they create a different role for the state, one that focuses on enabling the market and private providers to operate. The objectives of public administration are thus reconfigured. The market comes to be seen as the driving force, and while the state remains a decisive actor, its work is focused on supporting market actors. This sort of analysis challenges the traditional conception of the public as something inherently opposed to the private,[694] a conception which is not borne out by the reality depicted in this study.

However, this study has also revealed that public administration contains a mixture of rationalities which combine and conflict with each other. This mode of indirect government seems to be characterized by an ongoing negotiation between aims and actors and a constant redrawing of the boundaries and balances between delegation and control.[695] Governing that focuses both on creating markets and on upholding standards of quality in service provision has to deploy 'an increasingly complex apparatus of governing institutions and techniques'.[696] What we witness here is a confrontation between bureaucratic practices that have developed over decades, through the institutionalization of the Social Services Act, and the practices made necessary by the introduction of quasi-markets. The complex apparatus thus created implies somewhat

[693] Hibou (n 684) 17.

[694] Hibou (n 684) 46.

[695] Hibou (n 684) 15.

[696] Triantafillou (n 20) 85.

contradictory and sometimes even obscure networks of administrative rules, roles, and processes.

As we saw in the empirical chapters of this study, there is an inherent conflict between the aim of supporting private providers and the aim of securing high-quality services. This could be described as an unresolved tension between the aim of increasing the diversity of service providers and that of ensuring that loopholes are closed through stricter regulation, where the pursuit of the latter aim leads to overly formalized requirements, standardization, and ultimately a lack of diversity. As the regulation of quality primarily focuses on processes and production technology, flexibility and innovation are systematically discouraged. Thus while the ambition is to create diversity, the logics of standardization and streamlining prevail. One reason for this is that an important rationality at play in the governing of care choice systems is that of risk management, and the operation of this logic entails an expansion of bureaucracy and active monitoring, measuring, and quality regulation through whatever methods are available. Performance technologies, such as the measurements, user surveys, and monitoring reports presented on municipal and national websites, are supposed to serve as ways of restoring confidence in public services. These developments have taken place alongside and within care choice systems, as responses to the risks of fraud and scandal that the openness and profit-driven nature of these systems create.

According to the governing rationality behind the Act on Care Choice Systems, quality is also supposed to be maintained through the operation of market forces. Through the effects of the aggregated choices of individuals, bad providers should be forced to leave the system. However, as this and other studies have shown, in care choice systems, market mechanisms are not in play, since users rarely make active choices or change providers. The two other ways that private providers may be forced to leave care choice systems are a decision by the Health and Care Inspectorate to withdrawing their authorization or prohibit them from operating, or a decision by a municipality to terminate their contract. However, as we have seen in this study, the monitoring work undertaken by the Health and Care Inspectorate is limited,[697] and terminations of contracts by the municipalities are rare. The rarity of terminations may be explained, as I have suggested, in terms of the fact that

[697] As the legislation that makes the Health and Care Inspectorate responsible for authorizing private providers has been in force for less than two years (at the time of writing), it is difficult to evaluate the effects of this reform. However, it is worth mentioning in this context the fact that municipal officials report that the Health and Care Inspectorate is generally absent in their work.

municipalities generally adopt relational rather than discrete contractual strategies in their dealings with private providers. Further, municipalities find it difficult to prove that the quality of a service is substandard.

The result is that the municipalities implement increasingly sophisticated monitoring systems and try to improve the private providers' operations through support systems. These systems are demanding and difficult to maintain for the municipal authorities, especially for those with many providers. This is a possible explanation of the many cases of fraud and the high-profile scandals in care choice systems. The determining logic of the system involves a combination of public responsibility and private interest. The for-profit businesses are interested in making profits, and, if it is necessary to cut corners and exploit loopholes in order to do so, then they may well do just that. As a result, public authorities need to keep checking for mistakes and defects in service provision in order to uphold the public values for which they are responsible, even though this monitoring work is of questionable effectiveness. Even if the monitoring tools can be sharpened, there is a fundamental and unavoidable conflict at the bottom of the care choice system.

Hence, despite all the descriptions of relationships of 'partnership' and 'trust' and the support given to the private providers, there is a conflict between the interests of the actors – the municipal interest in control and the private interest in making profit – and this conflict also plays out in the relationships within the care choice system. Hibou captures this paradox neatly:

> [T]he use of intermediaries and collusion between public and private interests are not synonymous with harmonious and symbiotic relations: they do not prevent tense and conflictual relations among the parties. … [S]uch conflictual relations and uncertainties are at the very heart of these arrangements. Everywhere there are slip-ups and spaces where freedom can slip in, and if there are none of these, for astute actors it is always possible to invent ways of circumventing.[698]

This passage describes the different motives and driving forces behind the different interests at play. This can be seen, for instance, in the municipalities' attempts to close loopholes and find more efficient ways of monitoring the private providers.

[698] Hibou (n 684) 17.

6.3 New modes of governing through public and private law

6.3.1 A new matrix of public and private

The different logics we find in the governing of contracted-out welfare services can be ambivalent. As we have seen in this study, political forces may grant private service providers considerable leeway while at the same time intervening in them in significant ways. Public authorities may implement rigorous structures to manage and measure outcomes while at the same time trying to create environments of innovation and freedom. This conflict could be described in many different ways, but one way to deepen the understanding of it is to view it as an unresolved tension between different legal paradigms: a more traditional public-law rationality, focused on bureaucratic procedures and professional expertise, and a market-oriented rationality, focused on establishing and maintaining a market with conditions favourable to private providers.

The public–private dichotomy plays a significant role in legal discourse. The division between public and private in legal terms derives from the Savignian system, which drew a line between the family and the market and between family law and patrimonial law.[699] Hila Shamir argues that this doctrine sought to separate law from politics by establishing an (imaginary) apolitical legal system for the private sphere. On this view, within a certain sphere, individuals and companies should be allowed to operate freely in accordance with their desires and, for the most part, should be shielded from political intervention.[700] The public–private distinction is thus a product of the rise of capitalism in the nineteenth century. On the other side of this separation is the public sphere, defined as the sphere of issues connected to 'a public interest'. At its centre is a professional administrative apparatus and public-law regulations bound by principles of fairness, transparency, and accountability.[701]

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[699] Duncan Kennedy, 'Savigny's Family/Patrimony Distinction and Its Place in the Global Genealogy of Classical Legal Thought' (2010) 58 The American Journal of Comparative Law 813.

[700] Shamir (n 682) 5.

[701] Paul R Verkuil, *Outsourcing Sovereignty : Why Privatization of Government Functions Threatens Democracy and What We Can Do about It* (Cambridge University Press 2007) 85.

However, the state and the market cannot be separated in this way, and the concepts of 'public' and 'private', and the dichotomy between them, are contingent constructions. The state affects social power relations in the 'private' sphere, and in some sense all law is 'public'.[702] The dichotomy between the two logics is, however, not arbitrary or meaningless. The choice between these logics is a political choice. Some of the conflicts between different rationalities that have emerged in the course of this study may be explained in terms of a confrontation between different legal rationalities and paradigms. This study has revealed structures that operate on the micro level, and here the intersection of the two rationalities becomes more complex. This may entail a better understanding of how differences in legal techniques produce certain outcomes. However, the major overarching tension arises from the different logics that govern the Social Services Act and the Act on Care Choice Systems.

The Social Services Act is a typical product of twentieth-century social regulation and engineering. Kennedy characterizes the dominant paradigm during this period as 'the Social School'.[703] Within this paradigm, law is viewed as an instrument for achieving political aims and objectives, including distributive outcomes.[704] In this paradigm, a central area of law is administrative law; central actors are the legislature, government officials, and public administrators; and the central principle is the 'public interest'. Central to this paradigm are social rights, which, despite their vague legal status, played an important role in legal argument in the period during which this legal paradigm was dominant. Social rights are simultaneously legal and not legally enforceable; above all, they serve as goals for the welfare bureaucracy. The newly created profession of 'social work' used them to frame the goals of the

[702] For further discussion, see e.g. Morton J Horwitz, 'The History of the Public/Private Distinction' (1982) 130 University of Pennsylvania Law Review 1423; Jeff A Weintraub, 'The Theory and Politics of the Public/Private Distinction', *Public and private in thought and practice: perspectives on a grand dichotomy* (University of Chicago Press 1997); Martha Minow, 'Public and Private Partnerships: Accounting for the New Religion' (2003) 116 Harvard Law Review 1229; Shamir (n 6); Deanna Malatesta and Julia L Carboni, 'The Public-Private Distinction: Insights for Public Administration from the State Action Doctrine' (2015) 75 Public Administration Review 63; Berry Tholen, 'Drawing the Line: On the Public/Private Distinction in Debates on New Modes of Governance' (2016) 18 Public Integrity 237; and Ronit Donyets-Kedar, 'Rethinking Responsibility in Private Law' in Fineman, Martha Albertson, Ulrika Andersson and Titti Mattsson (eds), *Privatization, Vulnerability, and Social Responsibility : a comparative perspective* (Routledge 2017).

[703] Kennedy (n 681) 38–40.

[704] Shamir (n 682) 7–11.

welfare state.[705] The Social Services Act is very much a product of this rationality: it expresses social policy goals and (weak) social rights within a framework law which is intended to govern officials within the welfare bureaucracy. It is as such marked by instrumentalism rather than by formalism.

The Act on Care Choice Systems, however, is essentially a public procurement regulation, founded on a different set of premises and making use of a different set of tools. I want to argue that the act and the regulations surrounding it are best understood as products of a neoliberal legal paradigm. As such, they are characterized by a dissolution of public and private and may be described with reference to the concepts of neoformalism and neofunctionalism, concepts which will be discussed below.

The neoliberal legal paradigm is distinct from the liberal paradigm, which has a governing structure in which there is a relative autonomy between 'the state' and 'the market' and a presumed tension between 'political' and 'economic' systems.[706] As Hibou explains, at the core of neoliberal bureaucratization there is a mixing of public and private, as well as an expansion of private instruments of governing and public–private partnership models.[707] All of these aspects of neoliberal bureaucratization are present within the care choice systems. It is the homothetic relationship between public and private that constitutes what is new and specific about neoliberalism. Instead of a fundamental distinction between public and private, traceable to a belief in the opposition between the general interest and private interests, neoliberal governmentality is founded on the postulate of the priority of economic and financial logic, which is seen as the appropriate governing logic for both the private sphere and the public sphere.[708]

According to Kennedy, our current legal paradigm is characterized by this dissolution of the division between private and public law. But he also highlights how the extension of the scope for legal intervention means that public authorities are able to govern actively and extensively in favour of the free market in a 'neofunctionalist' manner. This paradigm is also characterized by its 'neoformalism': the development of proportionality assessments, the centrality of courts and legal proceedings, and the new role for human rights.[709]

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[705] Kennedy (n 681) 52–54.

[706] Wendy Brown, 'Neoliberalism and the End of Liberal Democracy', *Edgework: Critical Essays on Knowledge and Politics* (Princeton University Press 2005) 45.

[707] Hibou (n 682) 16.

[708] Hibou (n 682) 66.

[709] Kennedy (n 681) 63.

While the efforts to strengthen private interests in and through law can be described as neofunctionalist, the creation of frameworks that constrain political intervention in the market can be characterized as neoformalist. The neofunctionalist legal ideology emphasizes the value of market freedom and competition, while neoformalist ideas emphasize the importance, on the grounds of 'efficiency' or 'market expectations', of limiting the right of government to intervene. As Peer Zumbansen points out, there is a paradoxical alliance here between a notion of the market and the state as two separate fields and a policy that advocates governing through the privatization of the public sector. Active governing by public authorities through contractual relationships can thus be viewed as a new instrumentalization of the public function.[710]

As this study has documented, the municipal administrations are very active in using legal and other tools to construct their quasi-markets and support market actors. This is an example of neofunctionalism: tools belonging to both public and private law become instruments with which administrations create markets, which in turn are expected to deliver quality services. The governing rationality of care choice systems puts the interests of the private providers highly, with the public authorities playing a supporting role. In the creation of a care choice system, these interests are the starting point, and the municipal authorities later have to struggle to regulate the system to ensure that standards of quality are upheld for the users. The ways in which political influence over private actors is constrained may be understood with reference to the concept of neoformalism. For example, when municipal officials seek to impose stricter requirements on providers, they find that they are blocked by municipal lawyers citing public procurement legislation. Because the Act on Care Choice Systems refers to EU public procurement regulations, officials must ensure their interventions are proportional: social and political goals must not be disproportionate in light of the business interests of the companies participating in the public procurement process. Because the municipalities have to act within this legal framework when developing their tender documents, and must take the legal principle of proportionality into account, they have to seek to balance public and private interests. Other constraints on public authorities have been imposed by politicians seeking to create legal conditions favourable to small companies. This is, again, an example of the neofunctionalism of the law and the state: the harnessing of the power of public authorities and its use in constructing and maintaining markets and supporting

[710] Peer Zumbansen, 'Law After the Welfare State: Formalism, Functionalism, and the Ironic Turn of Reflexive Law' (2008) 56 The American Journal of Comparative Law 775–780.

market actors. The goals of care choice systems are set in relation to market and economic interests.

Zumbansen describes the contemporary combination of neoformalism and neofunctionalism as an aggressive backlash against the welfare state. At the same time, this combination conceals the fact that privatization is a political project. 'This combination is ideological because both of these fields of expertise are considered a-political, when in fact in all these references to "law", the "market", and "experts", the choice takes place within political, economic and other normative frameworks.'[711] In this legal paradigm, legal thinking is a supplement to economic policy-making, and law and administration are used instrumentally to enhance market competition. The public is not simply subordinated but rather integrated in an economic rationality. This explains the fact that law comes to be reorganized around the market and market behaviour, that reforms take the market economy as a given, and that the premise of legal thinking is the preservation of the capitalist market economy.[712] As a consequence, law in the neoliberal era becomes both a medium of government intervention and a language in which the constraints on such interventions are inscribed. It is deployed to promote efficiency and to defend institutions such as property and freedom of contract.[713]

However, as the empirical chapters of this study have also shown, there still remain transformed elements of the welfare rationality within the mixture of rationalities that govern care choice systems. The belief in the virtues of privatization and the market logic in public spheres is, in this case as in many others, coupled with the demand that this privatization be governed by social values through the application of public regulations to private entities providing outsourced services. Tendencies towards privatization and the use of private-law instruments in regulation may be seen as ways in which the public has been colonized by private interests, diminishing the power of the state in relation to the market. However, the picture is complex, ever-changing, and dynamic.[714] Techniques of governing may be put to new and different uses, such as when a contract is used to govern the provision of public services or when personal and informal contacts are used to supplement the contractual

[711] Zumbansen (n 710) 796.

[712] Tomlins (n 192) 9–11.

[713] Leila Brännström, 'Law, Objectives of Government and Regimes of Truth: Foucault's Understanding of Law and the Transformation of the Law of the EU Internal Market' (2014) 18 Foucault studies 182–184.

[714] Shamir (n 682) 7–11.

relationships between public authorities and private providers. In a similar way, this study has shown how monitoring can be used not only to secure adherence to laws and contract terms but also as a tool for learning, and how the contractual regulation of liability can be put to use in governing complex issues of quality in care. Through these processes, the rationalities and tools of both public and private law change.

6.3.2 Challenging the understanding of the public–private divide

The governing structures of care choice systems could be described as a hybridized form of welfare in which traditional public-law relationships are intertwined with private-law contract relations. This is a complex, layered system in which various governing logics operate at the same time and in which governing principles associated with the public sector and the market are mixed together and combined. As the preceding chapter concluded, municipalities adopt a mixture of publicization and relational contracting strategies in order to uphold public values in care choice systems. And, as that chapter also showed, it is not clear from regulations and preparatory works just to what extent public-law regulations and values are applicable to and binding on the private companies operating in the sector.[715] In a situation where private entities provide services which are publicly funded, highly regulated, and closely monitored by public authorities, and where, at the same time, public authorities work to construct and support the market and the language and concepts of business are injected into the discourse of welfare delivery, the conceptual line between public and private bodies has become blurred. This has implications for the relationship between public and private interests, and it creates new lines of accountability. Understanding this new legal landscape is important for legal scholars attempting to understand both public law and private law in the hybridized welfare state.

Within a neoliberal ideological framework, and within a neoliberal state, law is deployed in new ways, creating new formations of 'public law' and 'private law'. Within this framework, the contract plays a new role, bridging public and private law in complex, conflictual ways. The empirical data presented in this study suggest that the changes in the ways welfare services are delivered require us to rethink the distinction between public- and private-law tools and logics. Formerly distinct categories have become muddled. This 'muddle' in the contemporary relationship between public and private is sometimes

[715] See section 5.6.

described as 'governance' in the literature. 'Governance' refers to ways of governing that involve a 'blurring' of public and private functions within areas of regulation.[716] There is no settled definition of the concept, and scholars differ significantly in the ways in which they understand and use it. However, the idea that governance signifies a transformation from hierarchical command-and-control governing to governing through networks, cooperation, partnership, and self-monitoring seems to be agreed upon by most scholars.[717] Another frequently mentioned aspect of governance is the transposition of the language and instruments of the business world into public administration, for instance through the concepts of 'benchmarks' and 'best practices'.[718]

The concept of governance seems relevant to the results of this study, but the concept itself does not explain why this 'blurring' of the lines between public and private came about or what its implications might be. Could the problems described above be solved by clarifying the relationship between public and private, pursuing the 'publicization' of contractual relationships, or finding better ways of monitoring private providers? Or are they of a more fundamental nature? The empirical results show that the ambitious work of public authorities in supporting the quasi-market and the private providers – what I described above as a form of neofunctionalism – must be understood as implying more than just a 'blurring' of the boundary between public and private. It is an active management whose aim is to support the private providers. The market logic prevails over the logic of public administration, and the interests of private market actors are given priority over the public, as they are believed to deliver the sought-after qualities within the welfare sector. This reasoning carries over to the question of law's relationship to the construction of markets. The dichotomy between state and market, which lies at the bottom of the public–private distinction, has always been problematic, for it implies that government is 'exogenous' to the market; in truth, states create markets by formulating the 'rules of the game' which structure and define markets and market actors from within.[719] Markets are always

[716] Stewart (n 682) 515.

[717] Brown (n 47) 122–123; See also Mitchell Dean, *Governing Societies: Political Perspectives on Domestic and International Rule* (Open University Press 2007) 48–49; King (n 518); Pavolini (n 138); Mirko Noordegraaf, 'New Governance and Professionalism' in Tanja Klenk and Emmanuele Pavolini (eds), *Restructuring Welfare Governance: Marketization, Managerialism and Welfare State Professionalism* (Edward Elgar Publishing 2015).

[718] Brown (n 47) 71.

[719] Robert C Hockett and Saule T Omarova, 'Private' Means to 'Public' Ends: Governments as Market Actors' (2014) 15 Theoretical Inquiries in Law 54–55.

constructed by law, as Alain Supiot, among many others, has pointed out. A market requires the existence of contracting entities, actors who have decision-making power and may be held liable – competences given to them through law. Both public law and private law are thus prerequisites for the operation of the market.[720] Neoliberalism brings about a growth in the power of market actors and an expansion of the laws of the market into what were previously purely public areas.[721]

To the user, the private provider might seem to be an extension of the public, and it is understandable that the distinction between public- and private-law subjects is unclear in a situation in which the operations of the private entities are so extensively financed, regulated, monitored, and supported by public authorities with which the private companies have close working relationships. However, I will argue that there are fundamental differences between public and private providers. These can be demonstrated both with reference to the results of the empirical part of this study and with the help of theory. Drawing on the empirical results, I want to provide three arguments to show that there are qualitative differences between the public and private delivery of services and that the establishment of quasi-markets in the welfare sector might have unwanted side effects for citizens.

The first argument has to do with the problem of translating public-law principles, or principles central to the provision of welfare services, into contract clauses, a difficulty that came up frequently in my investigation. A related problem is that, from a classic public-law perspective, individual rights to receive high-quality care are supposed to be non-negotiable, but this conflicts with the some of the ways in which private law is used in the welfare sector. One example of this from the municipalities is the way in which monitoring is used to support the private providers' internal learning procedures rather than to secure the rights of older persons. Similarly, the use of ladders of sanctions and the many opportunities that providers are given to rectify their mistakes – all the while continuing to provide services to users – may be at odds with the user's right to receive high-quality care on equal terms with other users. Another important issue in this context is the fact that the monitoring work undertaken by the municipalities, although ambitious and resource intensive, cannot keep track of all of the activities of the private

[720] Alain Supiot, 'The Dogmatic Foundations of the Market (Comments Illustrated by Some Examples from Labour Law and Social Security Law)' (2000) 29 Industrial Law Journal 323.

[721] Shamir (n 682) 25.

providers, and thus it cannot hope to exclude from the system all fraudulent providers and companies providing poor-quality services. This means that it is difficult for the municipalities to ensure that important quality standards, such as those relating to working conditions and the competence of staff, continuity of care, and infection control – all essential aspects of home care, as the coronavirus pandemic has demonstrated – are actually upheld in the operations of the private providers.

A second fundamental difference between publicly and privately delivered services has to do with accountability. In a care choice system, although the legal responsibility remains with the municipality, contracting out means that the distance between democratically made decisions (the input side of the political system) and the provision of services (the output side of the political system) increases, which makes the lines of political accountability for the quality of the services more obscure. The use of relational contracting strategies obfuscates the connection between input and output further. As Wendy Brown argues, a system of network governing, such as this, changes power's visibility for those who are governed.[722] Rendering more obscure the ways in which citizens can hold responsible actors accountable for substandard tax-financed services might create problems of legitimacy for the welfare system. This is potentially a problem with governing through standards, benchmarking, networks, and non-transparent partnerships. As Triantafillou puts it: 'a wide array of technical and calculative standards has supplemented, if not supplanted, the laws and regulations making up the normative framework informing acts of accountability'.[723] The connections between democratic input and output – via tenders, monitoring, and dialogue between the public and the private providers – become quite complex and obscure. There is thus a risk that this model creates a 'liability gap': a situation in which it is not clear which actor is responsible for problems with the service. In terms of the strategies adopted by the municipalities, their detailed regulation of the private delivery of services may be viewed as an attempt to transfer their public obligations to the private contractor. As Hansen points out, this can scarcely succeed, since public responsibility is tied to the fundamental rule of legality while contractual liability is fixed through the contract.[724] This lack of accountability is likely to be even more acute in a quasi-market such as a care

[722] Brown (n 47) 129.

[723] Triantafillou (n 20) 66.

[724] Hansen, 'Public Law by Contract' (n 63) 648.

choice system than it is in situations involving traditional public procurement, since the range of actors involved is broader in a quasi-market.

A third, and particularly important, distinction between publicly and privately delivered services has to do with incentives. The problem with strategies such as publicization and relational contracting is that they do not sufficiently take into account the underlying logic driving private, for-profit companies: namely that they are profit-driven and will not adhere to public values and regulations unless they are given economic incentives to do so. For-profit providers, which provide a vast majority of the private elder care sector in Sweden, are of course driven by the profit motive, and this constitutes a distinctive difference from public providers of welfare. As King says: 'Private companies can never discharge public interest accountability against their inevitable pursuit of commercial gain.'[725] Their actions are motivated in a different way, and this influences the way in which governing can shape the overall outcome.

The evidence from the municipalities, complemented by theoretical tools, thus shows that a quasi-market reform such as the care choice system entails more than a 'blurring' of the line between public and private. It is an active choice to govern in a way that supports private interests. At the same time, we have seen that this is not the only rationality in play. The reforms also emphasize the values of diversity and freedom of choice for the individual, and these claims must be taken at face value. Further, the rationality that governs the Social Services Act aims at securing high-quality services for all older users on an equal basis. The meeting of these different rationalities and different, sometimes opposed, driving forces and logics can create tension. They are kept in balance through the different strategies employed by the municipal administrations, although this balance is constantly shifting as a result of political choices. This situation could also be described as an ongoing conflict, in a political-legal setting, about the nature of welfare.

Even if the distinction between private and public law is, as I said above, a contingent construction, there are still relevant differences between the legal techniques and rationalities that belong to each sphere. As we have seen, when one of these legal governing rationalities increases its influence over a certain sphere at the expense of the other, there are consequences. Public law is based on a normative project of protecting individual citizens from public power and structuring the institutions of parliamentary democracy, the political decision-making process, and the relationship between the popular will (as expressed through parliament) and the rule of law. The public-law logic has, in the

[725] King (n 518) 88.

context of the welfare state, instrumentalized democratic gains as means to protect individuals and limit the influence of economic interests within certain spheres. The primary normative logic underlying private law, on the other hand, aims at structuring relationships of trade and ownership and protecting the interests of contracting parties. It thus has a different normative ground from that underlying public law.

The question is whether Jody Freeman's claim, now almost two decades old, that many public-law scholars are 'badly out of synch' with the reality of the public–private dichotomy, which has been fundamentally changed through the widespread use of public–private partnerships,[726] still holds true for parts of the discipline. There is an idea among public-law scholars – for some, it might even be a hope – that public-law governing instruments, with their principles of transparency, political accountability, equality, etc., are robust enough to withstand neoliberal reform. Public law has not, however, gone unaffected by the far-reaching privatization programmes that have affected public services in so many countries. The hybridization brought about by these reforms of the welfare state has transformed the post-war model of public law. This study has shown how this hybridization plays out in practice, on the ground, and how it relates to the neoliberal project and its fundamental restructuring of public law. This means that those wishing to uphold public-law principles may have to reformulate their political demands in light of the changes which the system has already undergone. For those who want to see increased democratic influence and a public sphere that does not work for, but as a counterpart to, business interests, a new formulation of political programme is needed. This new formulation must take into account how different privatization reforms in the welfare sector have fundamentally changed not just the ways services are delivered but also models of governing and regulation.

[726] Jody Freeman (n 637) 1288.

6.4 Care choice systems in the context of neoliberalism and the commodification of care

6.4.1 A new organization of social reproduction

The shifts in the responsibilities and forms of organization of reproductive work may also be understood with reference to feminist theories about social reproduction. Feminist theorists have long been interested in care and the organization of reproductive work, which were traditionally seen as existing in a separate sphere, such that analyses of labour and capitalism excluded from their scope reproductive work taking place within the household. Experiences of care work have been regarded, within feminist standpoint theory, as a 'potential source of alternative epistemologies and ontologies'.[727] According to Tithi Bhattacharya, an advocate of social reproduction theory, care and reproductive work must be understood within the framework of capitalism, and any understanding of capitalism must include an account of the organization of reproductive work. Social reproduction theory takes as its point of departure the idea that the reproduction of society – all the care work that needs to get done in order for society to exist and function – is an integral, but often overlooked, part of any economic system.[728] Thus, changes in the way welfare services are organized may be fruitfully analysed through the combined lenses of a feminist understanding of the importance of reproductive work and an analysis of the evolution of capitalism.

Writing within a Marxist tradition, Silvia Federici points out that the question of older people and elder care has traditionally been left out of analyses of labour, including analyses of reproductive labour.[729] Federici observes that, at a certain stage of capitalist development, *all* social relations become relations of production, subsumed under capital.[730] Salar Mohandesi and Emma Teitelman develop this point, arguing that capitalism has expanded by gradually commodifying objects and services which were previously produced within the

[727] Kathi Weeks, 'Life within and against Work: Affective Labor, Feminist Critique, and Post-Fordist Politics' (2007) 7 Ephemera: Theory and Politics in Organization 236–237.

[728] Tithi Bhattacharya (ed), *Social Reproduction Theory : Remapping Class, Recentering Oppression* (Pluto Press 2017) 3.

[729] Silvia Federici, *Revolution at Point Zero : Housework, Reproduction, and Feminist Struggle* (PM Press 2012) 120.

[730] Federici (n 729) 7.

home.[731] Social reproduction thus changes, with more of its technologies and activities becoming commodified and integrated within capitalist relations of production.[732] Contemporary financialized capitalism is well placed to exploit the sources of social reproduction, as it is now possible to invest and speculate in services such as publicly funded welfare. Investing in welfare and social services seems to produce good returns.[733] In this way, care work, or reproductive work, which at one point would have been seen as existing in a separate sphere, is now more fully integrated into the capitalist logic.[734]

Brigitte Aulenbacher, Fabienne Décieux, and Birgit Riegraf describe a new stage of capitalist societalization which extends to care. These authors claim that the commodification of care is the result of three factors: 1) an ideological market fundamentalism, 2) an erosion of other forms of care, and 3) the need for capitalism to expand.[735] Capital approaches social reproduction as a source of valorization and profit, which means that care and care work become commodified, become factors of production like other commodities, or 'fictitious commodities' (to use Polanyi's term). The new stage of the capitalist societalization of social reproduction builds on the subordination of the political to the economic seen in the marketization and quasi-marketization reforms that extended the economic logic to new societal spheres. However, Aulenbacher, Décieux, and Riegraf argue that commodification is not the only tendency in play in the organization of care and care work.

> Such forms of marketisation and quasi-marketisation of social reproduction cannot be understood sufficiently if they are only interpreted in the frame of the ongoing capitalist commodification of nature and labour and the relations of class. They also refer to the relations of gender and ethnicity underlying the societal separation of spheres.[736]

Capitalism always needs to expand, and this is made possible through processes that transform activities into work and various assets into commodities. The marketization of elder care, in other words, is the transformation of the activity

[731] Salar Mohandesi and Emma Teitelman, 'Without Reserves' in Tithi Bhattacharya (ed), *Social Reproduction Theory : Remapping Class, Recentering Oppression* (Pluto Press 2017) 43.

[732] Mohandesi and Teitelman (n 731) 60–62.

[733] Mohandesi and Teitelman (n 731) 66.

[734] Weeks (n 727) 238.

[735] Aulenbacher, Décieux and Riegraf (n 677) 349.

[736] Aulenbacher, Décieux and Riegraf (n 677) 348.

of care into care work, which can in turn be turned into a source of profit. However, Federici argues that technological innovation and professionalization will never completely replace the 'care' in elder care. According to her, there is a limit to the commodification of reproductive labour. Care work inherently involves the complete engagement of the worker; it is work of a holistic character. If it were totally commodified, this would lead to the radical alienation of the social relations of care.[737] One question in this context is whether it is possible to draw a line between care activities and other activities. Whether care work is something qualitatively different from other services is in part a normative debate, but an answer to this question might enable an explanation of some of the difficulties that arise in regulating care through the market. However, this is beyond the scope of this study.

The changes in the definition of care described in this study, from relational and professional to standardized and marketized, may also be seen as a change in the status of care from an activity within a separate, gendered sphere to a commodity on the market. One of the main motivations behind the introduction of a generous system of social services, including elder care, in Sweden was the aim of emancipating women from the care burdens of the family through a collectivization of caring responsibilities.[738] While this rationality is still present, it is clear from this study that elder care is still a gendered sector, as the majority of employees, care managers, and users are women. This implies that any transformation of the elder care system will affect women more than men.[739] The introduction of care choice systems implies the increased commodification of home care services and the creation of new spheres of capital accumulation. The feminist theories presented above can help to explain some of the difficulties that arise in this process. The standardization of elder care that this study has revealed may be understood as a product of the commodification of care work, for commodities must be defined and measurable to be able to be bought and sold. This commodification is in turn a way for capital to expand and find new markets and ways to secure profits. Moreover, the difficulties municipalities experience in attempting to find ways of measuring care work arise because of the specific relational features of reproductive work and the limits these place on the extent to which these activities can be commodified. Here there is clearly the potential for further research.

[737] Federici (n 729) 122–123.

[738] See section 1.3.2.

[739] Andersson and Kvist (n 60) 3.

6.4.2 The state activated on behalf of the economy

A main finding of this study is that care choice systems produce a situation in which public authorities actively support private providers yet at the same time find themselves constrained in the extent to which they are able to politically intervene in or exert control over these providers. While the topic of study here has been home care services for older people in Sweden, a similar dynamic is present in other domains. These changes should be understood in the context of a global development, as part of a neoliberal reconfiguration of public administration and its relationship with private interests.

The concept of neoliberalism provides a deeper understanding of the ways in which the relationship between state and capital has been reorganized in recent decades. Academics have argued about whether to understand the concept as denoting 'an order of normative reason'[740] which is present in many spheres – not only in the economic and political spheres but also in the workplace, education, and culture – or rather as referring to a political project aimed at re-establishing the preconditions for capital accumulation and the dominance of the capital-owning class.[741] Even though both of these positions have explanatory value, I find the 'thick' sociological conception of neoliberalism presented by Wacquant, which incorporates parts of both of the aforementioned perspectives, to be most useful in discussing the findings of this study. This conception is 'thick' because it does not reduce neoliberalism to a merely economic phenomenon, but it is also not all-encompassing in the

[740] This position could be represented by Wendy Brown, whose work is influenced by Foucault. Brown (n 40) 30. Similarly, governmentality scholars like Mitchell Dean (*Governmentality: Power and Rule in Modern Society* (SAGE Publications 2010)) and Rose (n 10) could be seen as subscribing to the 'broad' concept of neoliberalism. One problem with the governmentality view of neoliberalism is that it comes to encompass everything. Although it acknowledges that neoliberalism takes many different forms, these all come under the heading of the logic of neoliberal governmentality, which is not explained with reference to any economic interests. As such, this concept of neoliberalism does not allow space for conflict. It is almost as though the neoliberal governing logic is a metaphysical phenomenon, existing somewhere above our material world of resources and interests, with an agency of its own.

[741] This position, which places economic interests and class struggle at the forefront of an analysis of ideology, could be represented by Marxist scholar David Harvey (n 1) 19. What I find important in Harvey's account is that it explains why power operates as it does and purports to reveal the origins of domination. This is somewhat lacking in theories that are overly influenced by Foucauldian analyses of power, which, with all their nuance and anti-reductionism, instead become all-encompassing and monolithic, in part because of the vagueness of their concept of power. However, Marxist theories also risk failing to appreciate the complexities and logics inherent in the legal system.

way that governmentality conceptions of neoliberalism can tend to be. According to Wacquant, neither governmentality studies nor Marxism fully captures what is new in neoliberalism, namely 'the remaking and redeployment of the state as the core agency that actively fabricates the subjectivities, social relations and collective representations suited to making the fiction of markets real and consequential'.[742] In other words, Wacquant wants to suggest a definition of neoliberalism centred around the state and the institutional machinery involved in the establishment of market dominance.[743] There are three aspects of this analysis of the neoliberal state formation that I especially want to highlight in relation to my study.

The first is a commonly held view of neoliberalism as an ideological project that aims to turn ever more spheres into markets and increasing numbers of interactions into market-like activities. The very idea of introducing a quasi-market into social services, the view of users and providers as market actors, and the commodification of care are all suggestive of such a project. Neoliberal rationality, as Brown claims, 'disseminates the *model of the market* to all domains and activities – even where money is not an issue – and configures human beings exhaustively as market actors, always, only, and everywhere as *homo oeconomicus*'.[744] The operative political rationality here functions to commodify activities and aspects of society which were not hitherto viewed as commodities. Marketization and voucher systems may be understood as technologies which facilitate commodification and, at the same time, allow private enterprises into public spheres. By allowing such actors to exist within the welfare service sector, this sector is opened up for profit-making interests.

Second, neoliberalism must be seen as a constructivist and political project. Even if it plays out in complex ways and exhibits a complicated relationship between structure and agency (the strategies lack strategists), it is undeniably a project which is fuelled by and serves certain interests. Harvey argues along these lines that the theories and ideology of neoliberalism serve mainly to legitimize and justify this political project. This produces a 'creative tension' between the power of the ideas advanced under the flag of neoliberalism and the actual practices of global capitalist interests.[745] An important fact about this legitimizing ideology is that it has captured ideas of individual freedom and turned them against the practices of the state, which it depicts as bureaucratic

[742] Wacquant (n 50) 68.

[743] Wacquant (n 50) 71.

[744] Brown (n 47) 31.

[745] Harvey (n 677) 19.

and unnecessarily interventionist. The idea of consumer choice, including in relation to public services, has been a central tool in this ideological struggle.[746] The trend towards increased marketization and private influence over public spheres and the welfare state is an expression of a shift in the global balance of power towards a global financial capitalism constantly in search of new markets,[747] and this development has come about thanks to the gradual delegitimization of direct public intervention and lobbying by private actors seeking to shape governing to their own advantage. This is a process fueled by the ideology of the market and enterprise.[748]

Third, and most important for the analysis of the findings of this thesis, an essential aspect of this political project is the reconfiguration of the state, the activation of the state on behalf of the market. As Wacquant puts it in the passage quoted above, in the neoliberal state the public authorities' role becomes that of making 'the fiction of markets real and consequential'.[749] This is precisely what has happened with the municipal administrations in Sweden: they have been remade such that they now function to produce market subjectivities, social relations, and institutional preconditions for the operation of businesses. In the neoliberal hegemony, entrepreneurship and private enterprise are seen as the keys to innovation and growth. This means that the traditional role of the state as the protector of social values is transformed. Since markets do not naturally appear, intervention is needed to create them.[750] Brown writes:

> Neoliberalism is not about the state leaving the economy alone. Rather, neoliberalism *activates the state on behalf of the economy*, not to undertake economic functions or to intervene in economic effects, but rather to facilitate economic competition and growth and to economize the social, or, as Foucault puts it, to 'regulate society by the market'.[751] [Emphasis added]

This reasoning recalls the Polanyian point of departure for this chapter, and potentially goes some way to answering the question of why the municipal administrations go to such lengths to support private providers – to take care of business. A rationality in which the market is thought to be the superior way

[746] Harvey (n 677) 42.

[747] Harvey (n 677) 160.

[748] Hibou (n 682) 75.

[749] Wacquant (n 50) 68.

[750] Harvey (n 677) 64–65.

[751] Brown (n 47) 62.

of organizing human interaction, an ideology which supports and is driven by certain interests, reconfigures the municipal administrations into apparatuses whose purpose is to help the private providers, in the belief that, in doing so, the best for all concerned will be achieved. One of my interviewees summed this point up neatly when discussing the support offered to the private providers: 'It benefits us. It benefits the individual. It benefits society at large. It benefits everyone.'[752]

A strength of Wacquant's 'thick' conceptualization of neoliberalism is that it leaves room for an analysis of the internal tensions that arise within public administration, tensions this study has documented. Lines of conflict emerge between policy-makers driven by neoliberal ideals and administrators attempting to advance the traditional missions of public bureaucracy, and between business-friendly politicians and bureaucrats seeking to control public spending and more socially minded politicians and bureaucrats seeking to protect and support welfare recipients. The fact that there has been what Wacquant identifies as a 'rightward skewing of the structure and policies of the state' should not be understood as the product of a systemic imperative or functional necessity. Rather, it is – and this is an important point – a 'structurally conditioned but historically contingent outcome of material and symbolic struggles, waged inside as well [as] from outside the bureaucratic field, over the responsibilities and modalities of [the] operation of public authority'.[753] This sort of analysis makes visible the antagonisms between different interests which, according to Chantal Mouffe, are the basis of the political. The political is in this way an arena of constant renegotiations of balances and solutions in which any consensus reached can only ever be temporary and unstable. This furthermore means that what are perceived as political problems cannot ever be fully pinned down; they are always in motion and constantly being renegotiated.[754] What is fruitful about Wacquant's and Mouffe's approaches is the way in which this 'thicker', sociological, non-reductive understanding of historical developments makes it possible to comprehend the basis of these conflicts. It is important not to conceive of neoliberalism in a teleological or determinist way, as this closes the door to other political ways forward. This reasoning fits well with Polanyi's view of the market economy as a contingent creation. Polanyi claims that the transition to a market economy was not a result of any inherent tendency in markets or

[752] L6. The quotation comes from a passage in section 5.4.2.

[753] Wacquant (n 50) 74.

[754] Chantal Mouffe, 'Democratic Citizenship and the Political Community [1992]' in James Martin (ed), *Hegemony, radical democracy, and the political* (Routledge 2013) 111.

human interaction but was the product of active political decision-making. Thus, the market and state intervention are not at all opposed phenomena: state intervention is constantly required in order to establish new markets and maintain the market system.[755]

6.4.3 Is Sweden an example of 'circumscribed' neoliberalism?

The contemporary Swedish social services system may be described as the product of a combination of neoliberalism and welfarism, a specific form of neoliberalization which makes Sweden an interesting case. Larsson, Letell, and Thörn use the term 'social-democratic neoliberalism'[756] and Johan Pries 'social neoliberalism'[757] to capture the sense in which the Swedish welfare regime and its underlying logics and driving forces have been reconfigured rather than replaced. The findings of my study corroborate this point. There is not a simple dichotomy between state and market, nor between social democracy and neoliberalism. The social democratic project was built on a consensus, a compromise between the state and important market actors. Accordingly, the shift in governing models that has taken place is not a shift from state to market as the organizing model, but a transformation from one compromise between interests to another.[758] The neoliberalization of the Swedish welfare state should thus be understood as the striking of a new balance between the different logics inherent in the social democratic project.

It has always been the case that this project has involved a balance between a vision of welfare for the working class and a regulated capitalism, between the political and the economic, where the former has served to mitigate the social problems created by the latter. However, the story of the Swedish welfare state has entered a new chapter in recent decades. What is left of the old rationality? What happens when it confronts the new governing logic? I agree with Wacquant's important claim that there exist internal tensions between different parts of the state. Appreciating this point allows for a more nuanced understanding of the findings of this study. This study has shown that multiple rationalities exist side by side within the same governing structure – in this

[755] Polanyi (n 45) 155.

[756] Larsson, Letell and Thörn (n 69) 8.

[757] Johan Pries, *Social Neoliberalism through Urban Planning : Bureaucratic Formations and Contradictions in Malmö since 1985* (Faculty of Humanities and Theology, History Department 2017) 213.

[758] Larsson, Letell and Thörn (n 69) 17.

case, the aim of securing high-quality services for all and the ambition of supporting profit-making businesses (especially small ones). This combination of rationalities leads, in turn, to a reconfiguration of the role of public administration and a tendency towards standardization within the care sector, as, without detailed regulation and monitoring, the risk is that public money would go straight into the pockets of business owners. Thus, while care choice systems are an expression of a broader development in the relationship between state and capital, they are also shaped by the rather more mundane practices of municipal bureaucrats dealing with conflicting priorities.

As I have mentioned, earlier versions of the Swedish welfare state can also be understood as products of a balance between conflicting interests. The social democratic model was always a compromise with capital. Neoliberalism, however, marks a new era, a new balance between conflicting interests and rationalities. One aspect of this new balance is that there is now less distance between what is seen as the market and what is seen as the public sphere. Following Harvey, we can say that this is a sign that capital has strengthened its power and established markets in new places. The development of quasi-markets, under the banner of 'freedom of choice' and 'efficiency', proves to be favourable to large, well-established companies owned by venture capitalists. Even if the introduction of care choice systems in the Swedish elder care sector advances the economic interests of large care companies, this shift must also be understood as a political one. The emerging welfare market model, characterized by public governing and funding and private delivery, is not the product of a natural evolution. It is politically created, maintained, and reproduced. This study has shown that the establishment and the maintenance of this system of welfare services require considerable public intervention, public spending, and public regulation. This also tends to create more bureaucracy. I would dispute Harvey's characterization of Sweden as a case of 'circumscribed' neoliberalism. Instead, the Swedish system is a specific formulation of the conflict between state and capital in which public authorities provide far-reaching support for private businesses, one instance of which has been described in this study.

6.4.4 A reorganization of welfare and welfare law

As the Swedish example shows, alongside its core function of protecting citizens against the economic and social risks of capitalism, the welfare state has always also indirectly supported capitalism by ensuring the reproduction of a well-functioning workforce and stabilizing consumer demand. However, neoliberalism also seems to involve welfare and social policy in a more direct supporting role through the processes of neofunctionalism and neoformalism in the legal paradigm.[759] Kenneth Veitch refers to Bob Jessop as well as to Polanyi to suggest that social policy and welfare institutions have been redesigned in order to support capital. Because, as I have said, state intervention is needed to establish and maintain markets, state intervention also creates the conditions for capital accumulation. Veitch argues, with reference to Wacquant, that this should be seen as a *political* project, not something which is a logical consequence of an economic order.[760] Legal structures and specific acts created in order to introduce market logics and profit opportunities into the publicly financed sector, such as the Act on Care Choice Systems, are examples of precisely these kinds of political decisions.

Another aspect of the privatization of welfare services is that the public contracts with the private sector increasingly make the well-being of care recipients, and to some extent the economic fate of the taxpayer, dependent on the operations of private businesses and market mechanisms. Public and private interests thus become interwoven. Competition law and contract law become crucial tools for realizing the political project of privatization. Basic principles of social welfare law are often kept intact alongside newly introduced elements of formal law. These new systems, competition law and contracts, introduce principles of formal equality and formal processes into a legal system that has traditionally been an instrument for the achievement of certain ends, in particular equality of outcomes. What Veitch calls 'formal rational law' is an institutional mechanism that functions to introduce markets and private interests into the welfare sector. It is therefore constitutive of how these markets operate. In this way, law and legal structures have an integral role to play in these market constructions.[761] Here I want to cite the municipalities' compliance with the perceived limits imposed on them by EU regulations and the proportionality principle. According to the rationality of

[759] Kenneth Veitch, 'Law, Social Policy, and the Constitution of Markets and Profit Making' (2013) 40 Journal of Law and Society 137, 138.

[760] Veitch (n 759) 144.

[761] Veitch (n 759) 152.

EU competition law, the role of government should be to uphold the rules of the game, to support and complement the market,[762] and the competition thereby facilitated will create a spontaneous order.[763] Other examples of this neoformalist rationality are the use of sanctions to regulate behaviour and the rules that limit the kind of information municipal administrators can provide to users in relation to their choice of provider.

However, the changes in legal paradigms is not enough to explain this development. For formal rational law to function effectively in its creation of opportunities for capital accumulation and profit-making in the welfare sphere, a certain political and social environment is required. Most importantly, there must have been a political choice made to use public funds to create markets and to allow private profits to be made out of these public funds. When public funds are used to support private interests, the principle of solidarity is turned upside down. Instead of simply using publicly funded welfare as a support system to mitigate the inequalities of capitalism, it is also used to support private companies. In systems such as the Swedish one, where it would be politically impossible to dismantle the welfare system, capital instead exploits the generously funded services by seeking the commodification of this sphere. Veitch explains this eloquently:

> Given that, politically, it would be unfeasible simply to dismantle welfare institutions and move to a system of private insurance, the desire to use these institutions as sources of economic growth for the private sector requires the careful construction of a legal, political, and social system geared towards this end.[764]

Care choice systems must be seen in the context of the discussion about profit-making in the welfare sector. Otherwise, the fraudulence and substandard care within these systems are attributed to the moral motivations of those running the businesses, and one could be led to believe that the people who are in the system 'for the wrong reasons' could easily be removed with the right level of regulation. However, as long as it is possible to make a profit by providing welfare services, the profit motive will by definition override other motives, and there will be a never-ending search for the right level of regulation to prevent the misuse of public money. Here we should remind ourselves of the

[762] Nyberg (n 200) 198.

[763] Nyberg (n 200) 76.

[764] Veitch (n 759) 153.

unique extent to which Swedish welfare regulations allow private profit to be made from public funding.

From the results of this study, it is clear that the Swedish tradition of instrumentalism in the regulation of welfare, and the large and active bureaucracy associated with welfare provision, have in a way been repurposed. As such, economic aims, rather than political ones, have come to function as a dominant rationality. Private companies are driven by the pursuit of profit and, following the care choice system reform, public authorities have come to be increasingly supportive of this pursuit. This is because, according to the dominant governing logic, the care companies are treated as trusted partners and thus afforded a great deal of discretion. The neoliberal transformation of public law is connected to a change in the social democratic project, which was formerly based on the idea of the public sphere as a counterbalance to the market. The weakening of this logic therefore might have implications. In the neoliberal era, the interests of capital have more political influence, and they work to institutionalize their victories through law, which, while it has its own inherent logic, can also be an instrument for external interests. Exactly how these interests have affected the development of the care choice systems, and the tools and strategies used within these systems, is an empirical question which has not been answered in this thesis but could be fruitfully studied elsewhere.

To sum up: markets require law and bureaucracy to function, and neoliberalism means more markets and thus more regulation and bureaucracy. Crucially, law is used to construct and control markets, and law's role is particularly important in the context of neoliberalism. Veitch's claim that law is used as an institutional mechanism to allow private interests into the welfare sector gains some support from the findings of this study. The quasi-market is a legal construction and needs an advanced public apparatus to be sustained. This relates to Graeber's law: that any marketization reform inevitably increases regulation and bureaucracy – an observation that is particularly relevant to this study. However, this is not a simple and straightforward development, but one filled with internal conflicts and contradictions, as my study of the municipalities has shown.

6.5 Conclusions

Although this study has specifically focused on home care for older persons in Sweden, the tendencies it has identified are present in other areas of the privatized welfare services. Here, I want to underline the points made above about how quasi-marketization drives a growth in bureaucracy, monitoring, and standardization and how neoliberalism reconfigures public administration, turning it into a servant of business. These findings have a broad relevance. Changes in the use of public- and private-law tools and logics mean a redefinition of aspects of the public sector as a whole.

Many of the developments traced in this study were already under way before the introduction of care choice systems. The fact that the Social Service Act is a framework law had allowed for a gradual transformation of the organizational structures of welfare services over time. Prior to the Act on Care Choice Systems, the use of traditional public procurement in the sector had also already introduced elements of contractualization and privatization, although not on as large a scale. The introduction of care choice systems catalysed this development, both on a state and a municipal level. The act shows how the enterprisation of the state and the privatization of public services go hand in hand. The implementation of New Public Management ideas brought about a focus on measurement, standardization, and market-based tools in the governing of the public service sector. The purchaser–provider model in use in many municipalities had already introduced the split between purchaser and provider and market competition among providers. These reforms, which separate the delivery unit from the governing body and create systems of measuring, are a precondition for the construction of quasi-markets and competition between public and private. If New Public Management reforms had not been implemented, privatization, in the form of the care choice systems, would have been more difficult to pursue.

The introduction of care choice systems has also created new and specific conflicts in the organization of home care for older people. The municipal responsibility for the quality of elder care, the need to ensure the system has political legitimacy, and a political will to support small businesses combine to produce a situation in which public spending on welfare is channelled into the support and monitoring of businesses within the sector. Because of the internal conflicts between different orders and interests, municipal administrations find themselves with a contradictory mission, and municipalities handle this by supporting the private providers. This also leads to a situation in which low-quality services and fraudulent behaviour cannot

properly be dealt with. It is clear that, despite the great amount of work that the public authorities put into constructing, supporting, and monitoring the quasi-market, many apparent problems still remain. These problems have become topics of public debate in Sweden over the last decade. Many of the changes within the Swedish welfare system described in this thesis, however, take place on the level of administrative procedures, governing techniques, etc. – that is, on levels which are generally hidden from the public and therefore not matters of public debate.

Another key point that I have emphasized in this thesis is that the market is not 'free'; marketization leads not to less bureaucracy but to more bureaucracy, a fact which is clearly borne out by the whole apparatus of control which seems to be required by a care choice system. The Trust Delegation, which was set up to find ways of solving the problems associated with the New Public Management reforms, has had a difficult time trying to find ways to foster trust alongside the existence of private interests in the welfare sector. The problem arises because public authorities have to trust not the profession, which is what is usually meant by the expression 'governing through trust', but the private providers, which at the same time have to be closely scrutinized so that they do not exploit loopholes in regulation in order to secure more profits for themselves. The operation of profit incentives must be controlled by means of the contract, but since, as we have seen, criteria regarding public values and quality standards are hard to formulate, two implications follow: 1) loopholes cannot be avoided and fraud becomes systemic, and 2) public values and quality standards become standardized, formalized, and reduced to measurable details. Even if the municipal officials believe that the tenders and contracts gradually improve over time as better balances between conflicting priorities are found, my study does not suggest that there is any way out of this quandary.

The empirical chapters of this study have shown that government is, in this case, exercised beyond legislation, rules, and policies. Central to public power are the administrations which realize this power. The way administrations seek to handle the care choice reforms reveals that conflicting rationalities are in play. Administrations adopt strategies to solve the conflicts they confront, thereby creating new logics that were not necessarily intended by any actor. This study shows that the legal strategies adopted by the municipalities are complex and, in general, that they aim at regulating the private providers through the contract almost *as if* they were part of the municipality, while at the same time treating the municipal provider *as if* it were a private company. At the same time, the formal contractual relationships are supplemented by relational contracting strategies, that is, by informal contact, training, and

support. However, my findings do not allow us to say with any confidence which of these strategies is most effective in preventing the negative implications of the outsourcing of welfare services.

In the law surrounding welfare services, different rationalities are in play alongside one another. As I have suggested, we should see law as a complex instrument that plays different and sometimes conflicting roles, an instrument which may be used to institutionalize the political achievements of different sides of political conflicts. Legal regulation is also not automatically put into play. This study has revealed that law is being used as an instrument with a function different from that of the functionalism of the twentieth-century legal paradigm. That functionalism was targeted at protecting society against the adverse effects of market forces, but the neofunctionalism of today's legal paradigm works to support the market and market actors. Another aspect of this new paradigm is that it uses law to limit the scope of potential political influence over the regulation of the market and market actors, which is an expression of a broader neoliberal rationality that casts the economy as primary. This legal restrictiveness may be described as a kind of neoformalism. Further work in the area of administrative or public law could fruitfully continue this investigation into how a new legal paradigm and new forms of organizing public–private relations play out in law and in the legal strategies deployed by legislators and administrators.

There is a final point that must be made here regarding the exceptionality of the Swedish case. The unique status of the Swedish welfare state as a whole is evident in its elder care system, which is characterized, on the one hand, by generous public funding and, on the other, by the presence of for-profit companies operating on a large scale with limited regulation of their ability to make profits. This study has shown that the traditional universalist (and feminist) aims of the Swedish welfare state are still present in this new configuration, but they now have to be achieved through large-scale interventions in private businesses by municipal administrations. The Swedish social democratic model has always been premised upon a compromise between state and capital, but the marketization of welfare systems entails a new version of this compromise. This version is not simple: it is complex and contradictory, as this study has shown. However, it deserves also to be regarded as a specific iteration of the neoliberal relationship between state and capital, one which, rather than being a lighter, 'circumscribed' version of neoliberalism, has increased the power of capital at the expense of the state. As we have seen, municipalities and municipal administrations are sites where this compromise between capital and state is realized. In this process, there is

space for difference, conflict, and resistance, and this means that the struggle over the regulation of welfare can never be over. To see neoliberalism as a political project gives us a choice: which way do we want to go?

List of references

Books, book chapters, and articles

Allelin M, Skola För Lönsamhet : Om Elevers Marknadsanpassade Villkor Och Vardag (Arkiv förlag 2019)

Almqvist RM, New Public Management : NPM : Om Konkurrensutsättning, Kontrakt Och Kontroll (Liber 2006)

Aman, Alfred C, 'Privatization and Democracy: Resources in Administrative Law' in Jody Freeman and Martha Minow (eds), Government by contract: outsourcing and American democracy (Harvard Univ Press 2009)

Andersson K, 'Myndighetsutövning i Äldreomsorgen – Att Skapa Likhet i Äldres Behov?' in Stina Johansson (ed), Social omsorg i socialt arbete (Gleerups utbildning AB 2007)

——, 'Valfrihet Och Mångfald: Ett Dilemma För Hemtjänsten' (2010) 17 Socialvetenskaplig tidskrift 308

Andersson K and Kvist E, 'The Neoliberal Turn and the Marketization of Care: The Transformation of Eldercare in Sweden' (2015) 22 European Journal of Women's Studies

Anttonen A, Häikiö L and Kolbeinn S, Welfare State, Universalism and Diversity (Edward Elgar 2012)

Anttonen A and Karsio O, 'How Marketisation Is Changing the Nordic Model of Care for Older People' in Flavia Martinelli, Anneli Anttonen and Margitta Mätzke (eds), Social Services Disrupted: Changes, Challenges and Policy Implications for Europe in times of austerity (Edward Elgar Publishing 2017)

Anttonen A and Meagher G, 'Mapping Marketisation: Concepts and Goals' in Gabrielle Meagher and Marta Szebehely (eds), Marketisation in Nordic eldercare : a research report on legislation, oversight, extent and consequences (Department of Social Work, Stockholm University 2013)

Anttonen A and Sipilä J, 'Universalism in the British and Scandinavian Social Policy Debates' in Anneli Anttonen, Liisa Häikiö and Stefánsson Kolbeinn (eds), Welfare state, universalism and diversity (Edward Elgar 2012)

Aulenbacher B, Décieux F and Riegraf B, 'Capitalism Goes Care: Elder and Child Care between Market, State, Profession, and Family and Questions of Justice

and Inequality' (2018) 37 Equality, Diversity and Inclusion: An International Journal

Banakar R and Travers M, Theory and Method in Socio-Legal Research (Bloomsbury Publishing 2005)

Bengtsson B, Offentliga Tjänster i Civilrättsligt Perspektiv (Norstedts juridik 2013)

Bhattacharya T (ed), Social Reproduction Theory : Remapping Class, Recentering Oppression (Pluto Press 2017)

Blomqvist P, 'The Choice Revolution: Privatization of Swedish Welfare Services in the 1990s' (2004) 32 Social Policy and Administration

——, 'NPM i välfärdsstaten: hotas universalismen?' (2016) 118 Statsvetenskaplig tidskrift

Blomqvist P and Rothstein B, Välfärdsstatens Nya Ansikte: Demokrati Och Marknadsreformer Inom Den Offentliga Sektorn (Agora 2008)

Boréus K, Högervåg : Nyliberalismen Och Kampen Om Språket i Svensk Debatt 1969-1989 (Tiden 1994)

Brady M, 'Ethnographies of Neoliberal Governmentalities: From the Neoliberal Apparatus to Neoliberalism and Governmental Assemblages' (2014) 18 Foucault Studies 11

Bramstång G, Förvaltningsrättens Begreppsbildning Och Grundläggande Principer i Konkret Belysning (Juristförlaget 1993)

Brandt M, Valfrihet inom social- och hälsovården : Myndigheters syn på valfrihetens inverkan i Finland och Sverige ur olika strategiska synvinklar (Vaasan Yliopisto 2019)

Brännström L, 'Law, Objectives of Government and Regimes of Truth: Foucault's Understanding of Law and the Transformation of the Law of the EU Internal Market' (2014) 18 Foucault studies

Brodin H, Does Anybody Care? : Public and Private Responsibilities in Swedish Eldercare 1940-2000 (Univ 2005)

——, 'Hemmadöttrarnas Återkomst?' (2015) 50–51 Fronesis

Brodin H and Peterson E, 'Omsorgsföretag i Med- Eller Motvind? Genusperspektiv På Småföretagande i Hemtjänsten i Stockholm' in Håkan Jönson and Marta Szebehely (eds), Äldreomsorger i Sverige : Lokala variationer och generella trender (Gleerup 2018)

Brown W, 'Neoliberalism and the End of Liberal Democracy', Edgework: Critical Essays on Knowledge and Politics (Princeton University Press 2005)

——, Undoing the Demos : Neoliberalism's Stealth Revolution (Zone Books 2015)

Burau V and others, 'The Political Construction of Elder Care Markets: Comparing Denmark, Finland and Italy' (2017) 21 Social Policy & Administration

Cassese S, ‘New Paths for Administrative Law: A Manifesto’ (2012) 10 International Journal of Constitutional Law

Charmaz K, Constructing Grounded Theory : A Practical Guide through Qualitative Analysis (SAGE 2006)

Davidson NM, ‘Relational Contracts in the Privatization of Social Welfare: The Case of Housing’ (2006) 24 Yale Law & Policy Review

Davies M, Asking the Law Question (Thomson Reuters (Professional) Australia Limited 2017)

Dean M, ‘Risk, Calculable and Incalculable’ in Deborah Lupton (ed), Risk and sociocultural theory: new directions and perspectives (Cambridge University Press 2000)

——, Governing Societies: Political Perspectives on Domestic and International Rule (Open University Press 2007)

——, Governmentality: Power and Rule in Modern Society (SAGE Publications 2010)

Dickinson LA, ‘Public Values/Private Contract’ in Jody Freeman and Martha Minow (eds), Government by contract: outsourcing and American democracy (Harvard Univ Press 2009)

Donlau L, ‘Studie Av Avtal Mellan Kommuner Och Privata Utförare Av Hemtjänst’ (Working Paper, Linköping University 2017)

Donyets-Kedar R, ‘Rethinking Responsibility in Private Law’ in Fineman, Martha Albertson, Ulrika Andersson and Titti Mattsson (eds), Privatization, Vulnerability, and Social Responsibility : a comparative perspective (Routledge 2017)

Dunér A, ‘Självbestämmande Och Kontroll i Den Svenska Hemtjänsten: Retorik Eller Praktik?’ in Håkan Jönson and Marta Szebehely (eds), Äldreomsorger i Sverige : Lokala variationer och generella trender (Gleerup 2018)

Edebalk PG and Svensson M, Kundval För Äldre Och Funktionshindrade i Norden: Konsumentperspektivet (Nordiska ministerrådet 2005)

Eichenhofer E and Westerveld M, ‘Contractualism : A Legal Perspective’ in Els Sol, Mies Westerweld and Maria Westerweld (eds), Contractualism in employment services : a new form of welfare state governance (Kluwer Law International 2005)

Elinder M and Jordahl H, ‘Kontrakt, Kostnader Och Kvalitet’ in Henrik Jordahl (ed), Välfärdstjänster i privat regi: framväxt och drivkrafter (SNS förlag 2013)

Engel D M, ‘Making Connections: Law and Society Researchers and Their Subjects’ (1999) 33 Law and Society Review

Erlandsson S and others, ‘Marketising Trends in Swedish Eldercare: Competition, Choice and Calls for Stricter Regulation’ in Gabrielle Meagher and Marta Szebehely (eds), Marketisation in Nordic eldercare: a research report on

legislation, oversight, extent and consequences (Department of Social Work, Stockholm University 2013)

Esping-Andersen G, The Three Worlds of Welfare Capitalism (Polity 1990)

Federici S, Revolution at Point Zero : Housework, Reproduction, and Feminist Struggle (PM Press 2012)

Flyvbjerg B, 'Five Misunderstandings About Case-Study Research' (2006) 12 Qualitative Inquiry

Foucault M, 'Society Must Be Defended' : Lectures at the Collège de France, 1975-76 (Picador 2003)

——, Security, Territory, Population : Lectures at the Collège de France, 1977-1978 (Palgrave Macmillan 2007)

——, The Birth of Biopolitics : Lectures at the Collége de France, 1978-1979 (Palgrave Macmillan 2008)

——, 'The Analytic Philosophy of Politics' (2018) 24 Foucault Studies

Fraser N, 'Feminism, Capitalism, and the Cunning of History', Fortunes of feminism: from state-managed capitalism to neoliberal crisis (Verso 2013)

Friedman M, The Role of Government in Education (Rutgers University Press 1955)

Genet N and others, 'Home Care in Europe : A Systematic Literature Review' (2011) 11 BMC Health Services Research 1

George A L and Bennett A, Case Studies and Theory Development in the Social Sciences (MIT 2005)

Gingrich J R, Making Markets in the Welfare State : The Politics of Varying Market Reforms (Cambridge University Press 2011)

Glenngård A H, Objectives, Actors and Accountability in Quasi-Markets : Studies of Swedish Primary Care (Media-Tryck 2013)

Graeber D, The Utopia of Rules : On Technology, Stupidity, and the Secret Joys of Bureaucracy (Melville House 2015)

Grønmo S, Social Research Methods : Qualitative, Quantitative and Mixed Methods Approaches (Sage 2019)

Hansen O, 'Strategier for Længerevarende Kontrakter Om Udlicitering Af Kommunal Service' (2016) 2 Juristen

——, 'Public Law by Contract: The Reluctant Creation of Private Markets for Welfare Service' (2017) 25 European Review of Private Law

Hartman L, Konkurrensens Konsekvenser: Vad Händer Med Svensk Välfärd? (SNS förlag 2011)

Harvey D, A Brief History of Neoliberalism (Oxford University Press 2005)

Heidbrink J, 'Ett Avtal i Gränslandet Mellan Offentlig Och Privat Rätt' (2018) 2018–19 Juridisk Tidskrift 134

Hibou B, ‘From Privatising the Economy to Privatising the State: An Analysis of the Continual Formation of the State’ in Béatrice Hibou (ed), Privatising the state (Hurst & Company 2004)

——, The Bureaucratization of the World in the Neoliberal Era : An International and Comparative Perspective (Palgrave Macmillan 2015)

Hirschman A O, Exit, Voice, and Loyalty : Responses to Decline in Firms, Organizations, and States (Harvard Univ Press 1970)

Hjärpe T, Mätning Och Motstånd : Sifferstyrning i Socialtjänstens Vardag (Samhällsvetenskapliga institutionen, Socialhögskolan, Lunds universitet 2020)

Hockett R C and Omarova S T, ‘“Private” Means to “Public” Ends: Governments as Market Actors’ (2014) 15 Theoretical Inquiries in Law

Högfeldt P, ‘The History and Politics of Corporate Ownership in Sweden’ (National Bureau of Economic Research 2004) Working Paper 10641

Hollander A, ‘Privatisering Av Socialtjänstlagen: Rättsliga Villkor För Att Överlämna Utredningar Inom Individ- Och Familjeomsorgen På Entreprenad’ (2005) 12 Socialvetenskaplig tidskrift

Höök J, ‘Valfrihet Från Rättsliga Utgångspunkter’ (2017) 94 Nordisk Administrativt Tidsskrift

Hörnqvist M, En Annan Foucault: Maktens Problematik (Carlsson 2012)

Horwitz M J, ‘The History of the Public/Private Distinction’ (1982) 130 University of Pennsylvania Law Review 1423

Hunt A, ‘The Problematisation of Law in Classical Social Theory’ in Reza Banakar and Max Travers (eds), An Introduction to Law and Social Theory (Hart Publishing 2002)

Hvinden B and Johansson H, Citizenship in Nordic Welfare States: Dynamics of Choice, Duties and Participation in a Changing Europe (Routledge 2007)

Ilcan S, ‘Privatizing Responsibility: Public Sector Reform under Neoliberal Government’ (2009) 46 Canadian Review of Sociology/Revue canadienne de sociologie

Jensen MC and Meckling WH, ‘Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure’ (1976) 3 Journal of Financial Economics

Jody Freeman, ‘Extending Public Law Norms Through Privatization’ (2003) 116 Harvard Law Review 1285

Jönson H and Taghizadeh Larsson A, ‘Skilda Upplevelser Och Möjlighetshorisonter Bland Äldre Brukare Av Äldreomsorg Och LSS-Insatser’ in Håkan Jönson and Marta Szebehely (eds), Äldreomsorger i Sverige : Lokala variationer och generella trender (Gleerup 2018)

Jordahl H, Välfärdstjänster i Privat Regi: Framväxt Och Drivkrafter (SNS förlag 2013)

Jordahl H and Öhrvall R, 'Nationella Reformer Och Lokala Initiativ' in Henrik Jordahl (ed), Välfärdstjänster i privat regi: framväxt och drivkrafter (SNS förlag 2013)

Katzin M, 'Tillbaka till Familjen: Privat Och Offentligt Ansvar i Den Svenska Äldreomsorgen' (2014) 145 Retfærd

Kennedy D, 'Three Globalizations of Law and Legal Thought: 1850–2000' (2006) 19 The New Law and Economic Development: A Critical Appraisal

——, 'Savigny's Family/Patrimony Distinction and Its Place in the Global Genealogy of Classical Legal Thought' (2010) 58 The American Journal of Comparative Law

King R, The Regulatory State in an Age of Governance : Soft Words and Big Sticks (Palgrave Macmillan 2007)

Kotkas T, 'From Official Supervision to Self-Monitoring: Privatizing Supervision of Private Social Care Services in Finland' (2016) 50 Social Policy & Administration

Kvale S and Brinkmann S, InterViews : Learning the Craft of Qualitative Research Interviewing (Sage Publications 2009)

Landelius A-C, 'Statlig Styrning Och Privatisering: Vård, Skola Och Omsorg' in Bo Rothstein and Lotta Vahlne Westerhäll (eds), Bortom den starka statens politik (SNS förlag 2005)

——, Vård Och Omsorg i Offentlig Eller Privat Regi: En Rättsvetenskaplig Studie (Jure 2006)

Lapidus J, Social Democracy and the Swedish Welfare Model: Ideational Analyses of Attitudes towards Competition, Individualization, Privatization (Unit for Economic history, Department of Economy and Society, School of Business, Economics and Law, University of Gothenburg 2015)

Larsson B, Letell M and Thörn H, 'Transformations of the Swedish Welfare State: Social Engineering,Governance and Governmentality', Transformations of the Swedish Welfare State (Palgrave Macmillan 2012)

Larsson K, According to Need? : Predicting Use of Formal and Informal Care in a Swedish Urban Elderly Population (Dept of Social Work [Institutionen för socialt arbete], Univ 2004)

Le Grand J and Bartlett W, Quasi-Markets and Social Policy (Macmillan 1993)

Leeuw FL and Schmeets H, Empirical Legal Research: A Guidance Book for Lawyers, Legislators and Regulators (Edward Elgar Publishing 2016)

Lindelöf M and Rönnbäck E, Biståndshandläggning Och Handlingsutrymme: Från Ansökan till Beslut i Äldreomsorgen (Studentlitteratur 2007)

Lundqvist Å, Family Policy Paradoxes : Gender Equality and Labour Market Regulation in Sweden, 1930-2010 (Policy 2011)

Madell T, Avtal Mellan Kommuner Och Enskilda : Avtalsslut Och Rättsverkningar (Norstedts juridik 2000)

Madell T, Bekkedal T and Neergaard U, Den Nordiska Välfärden Och Marknaden : Nordiska Erfarenheter Av Tjänster Av Allmänt Intresse i En EU-Rättslig Kontext (Iustus 2011)

Malatesta D and Carboni JL, 'The Public-Private Distinction: Insights for Public Administration from the State Action Doctrine' (2015) 75 Public Administration Review

Marcusson L, Offentlig Förvaltning Utanför Myndighetsområdet (Iustus 1989)

Mattsson T, 'Socialtjänstens Barnavårdsutredningar i Privat Regi', Festskrift till Wiweka Warnling Conradson (Jure 2019)

Meagher G and Szebehely M, Marketisation in Nordic Eldercare : A Research Report on Legislation, Oversight, Extent and Consequences (Stockholm : Department of Social Work, Stockholm University, 2013 2013)

——, 'The Politics of Profit in Swedish Welfare Services: Four Decades of Social Democratic Ambivalence' (2019) 39 Critical Social Policy

Minow M, Partners, Not Rivals : Privatization and the Public Good (Beacon Press 2002)

——, 'Public and Private Partnerships: Accounting for the New Religion' (2003) 116 Harvard Law Review 1229

Moberg L, Marketization in Swedish Eldercare : Implications for Users, Professionals, and the State (Acta Universitatis Upsaliensis 2017)

Mohandesi S and Teitelman E, 'Without Reserves' in Tithi Bhattacharya (ed), Social Reproduction Theory : Remapping Class, Recentering Oppression (Pluto Press 2017)

Mouffe C, 'Democratic Citizenship and the Political Community [1992]' in James Martin (ed), Hegemony, radical democracy, and the political (Routledge 2013)

Naundrup Olesen K, Offentlig Opgave På Kontrakt (Jurist- og Økonomforbundet 2011)

Noordegraaf M, 'New Governance and Professionalism' in Tanja Klenk and Emmanuele Pavolini (eds), Restructuring Welfare Governance: Marketization, Managerialism and Welfare State Professionalism (Edward Elgar Publishing 2015)

Nyberg L, Market Bureaucracy : Neoliberalism, Competition, and EU State Aid Policy (Department of Political Science, Lund University 2017)

Orford A, 'In Praise of Description' (2012) 25 Leiden Journal of International Law

Pavolini E, 'Marketization and Managerialization of Health Care Policies in Europe in a Comparative Perspective' in Tanja Klenk and Emmanuele Pavolini (eds), Restructuring Welfare Governance : Marketization, Managerialism and Welfare State Professionalism (Edward Elgar Publishing 2015)

Pierre J and Painter M, 'Why Legality Cannot Be Contracted Out: Exploring the Limits of New Public Management' in M Ramesh, Eduardo Araral and Wu Xun (eds), Reasserting the public in public services : new public management reforms (Routledge 2010)

Polanyi K, The Great Transformation : The Political and Economic Origins of Our Time (Beacon Press 2001)

Přibáň J, 'Sharing the Paradigms? Critical Legal Studies and the Sociology of Law' in Reza Banakar and Max Travers (eds), An Introduction to Law and Social Theory (Hart Publishing 2008)

Pries J, Social Neoliberalism through Urban Planning : Bureaucratic Formations and Contradictions in Malmö since 1985 (Faculty of Humanities and Theology, History Department 2017)

Riles A, 'A New Agenda for the Cultural Study of Law: Taking on the Technicalities' (2005) 53 Buffalo Law Review

Rose N, Powers of Freedom : Reframing Political Thought (Cambridge University Press 1999)

——, 'Governing "Advanced" Liberal Democracies' in Aradhana Sharma and Akhil Gupta (eds), The anthropology of the state: a reader (Blackwell 2006)

Rostgaard T, 'Revisiting the Public Care Model : The Danish Case of Free Choice in Home Care' in Karen Christensen and Doria Pilling (eds), The Routledge Handbook of Social Care Work Around the World (Routledge 2017)

Rostgaard T and Szebehely M, 'Changing Policies, Changing Patterns of Care: Danish and Swedish Home Care at the Crossroads' (2012) 9 European Journal of Ageing

Sanchez-Graells A, 'Regulatory Substitution between Labour and Public Procurement Law: The EU's Shifting Approach to Enforcing Labour Standards in Public Contracts' (2018) 24 European Public Law

Sand A-B M, Anhöriga som kombinerar förvärvsarbete och anhörigomsorg (Nationellt kompetenscentrum Anhöriga 2010)

Segaard S B and Saglie J, 'Education and Elderly Care in Denmark, Norway and Sweden: National Policies and Legal Frameworks for Private Providers' in Karl Henrik Sivesind and Jo Saglie (eds), Promoting Active Citizenship: Markets and Choice in Scandinavian Welfare (Springer International Publishing 2017)

Shamir H, 'The Public/Private Distinction Now: The Challenges of Privatization and of the Regulatory State' (2014) 15 Theoretical Inquiries in Law

Silbey S S and Sarat A, 'Critical Traditions in Law and Society Research' (1987) 21 Law & Society Review 165

Sivesind K H, 'The Changing Roles of For-Profit and Nonprofit Welfare Provision in Norway, Sweden, and Denmark' in Karl Henrik Sivesind and Jo Saglie (eds),

Promoting Active Citizenship: Markets and Choice in Scandinavian Welfare (Springer International Publishing 2017)

Sivesind K H and Saglie J (eds), Promoting Active Citizenship - Markets and Choice in Scandinavian Welfare (Palgrave Macmillan 2017)

Stewart F L, 'The Corporation, New Governance, and the Power of the Publicization Narrative' (2014) 21 Indiana Journal of Global Legal Studies

Strandell R, 'Lika Olika Hemtjänst: Omsorgspersonalens Arbetssituation i Stad Och Land' in Håkan Jönson and Marta Szebehely (eds), Äldreomsorger i Sverige : Lokala variationer och generella trender (Gleerup 2018)

Strömberg H, Om Rättsförhållandet Mellan Offentliga Anstalter Och Deras Nyttjare (Gleerup 1949)

Strömberg H and Lundell B, Allmän Förvaltningsrätt (23rd edn, Liber 2006)

Supiot A, 'The Dogmatic Foundations of the Market (Comments Illustrated by Some Examples from Labour Law and Social Security Law)' (2000) 29 Industrial Law Journal

Svallfors S and Tyllström A, 'Resilient Privatization: The Puzzling Case of for-Profit Welfare Providers in Sweden' (2019) 17 Socio-Economic Review

Szebehely M, Äldreomsorgsforskning i Norden : En Kunskapsöversikt (Nordisk ministerråd 2005)

——, 'Insatser För Äldre Och Funktionshindrade i Privat Regi' in Laura Hartman (ed), Konkurrensens konsekvenser: vad händer med svensk välfärd? (SNS förlag 2011)

Szebehely M and Trydegård G-B, 'Generell Välfärd Och Lokalt Självstyre: Ett Dilemma i Den Svenska Äldreomsorgen?' in Håkan Jönson and Marta Szebehely (eds), Äldreomsorger i Sverige : Lokala variationer och generella trender (Gleerup 2018)

Teubner G, Dilemmas of Law in the Welfare State (de Gruyter 1986)

Theobald H, 'Marketization and Managerialization of Long-Term Care Policies in a Comparative Perspective' in Tanja Klenk and Emmanuele Pavolini (eds), Restructuring Welfare Governance : Marketization, Managerialism and Welfare State Professionalism (Edward Elgar Publishing 2015)

Tholen B, 'Drawing the Line: On the Public/Private Distinction in Debates on New Modes of Governance' (2016) 18 Public Integrity 237

Thunved A, Privatisering Av Socialtjänsten: Om Rättssäkerheten För Den Enskilde (Publica 1993)

Tillmar M, 'No Longer So Strange? (Dis)Trust in Municipality—Small Business Relationships' (2009) 30 Economic and Industrial Democracy

Timonen V, Convery J and Cahill S, 'Care Revolutions in the Making? A Comparison of Cash-for-Care Programmes in Four European Countries' (2006) 26 Ageing & Society

Tollin K, Sida Vid Sida: En Studie Av Jämställdhetspolitikens Genealogi 1971-2006 (Atlas Akademi 2011)

Tomlins C, 'The Presence and Absence of Legal Mind: A Comment on Duncan Kennedy's Three Globalizations' (2015) 78 Law and Contemporary Problems

Triantafillou P, New Forms of Governing : A Foucauldian Inspired Analysis (Palgrave Macmillan 2012)

Trubek D M, 'Where the Action Is: Critical Legal Studies and Empiricism' (1984) 36 Stanford Law Review

Trubek D M and Esser J, '"Critical Empiricism" in American Legal Studies: Paradox, Program, or Pandora's Box?' (1989) 14 Law & Social Inquiry

Trydegård G-B, Tradition, Change and Variation : Past and Present Trends in Public Old-Age Care (Univ Press 2000)

——, 'Från Fattigvård till Kundval: Den Svenska Äldreomsorgens Framväxt' in Hans Swärd, Per Gunnar Edebalk and Eskil Wadensjö (eds), Vägar till välfärd: idéer, inspiratörer, kontroverser, perspektiv (Liber 2013)

Ulfbeck V and Andrecka M, 'Contracting Out of the Provision of Welfare Services to Private Actors and Liability Issues' (2017) 8 Journal of European Tort Law

Ulmanen P, Omsorgens pris i åtstramningstid : Anhörigomsorg för äldre ur ett könsperspektiv (Diss Institutionen för socialt arbete 2015)

Valverde M, Law's Dream of a Common Knowledge (Princeton University Press 2003)

——, 'Jurisdiction and Scale: Legal Technicalities as Resources for Theory' (2009) 18 Social & Legal Studies 139

——, Chronotopes of Law: Jurisdiction, Scale and Governance (Routledge 2015)

——, Michel Foucault (Routledge 2017)

Veitch K, 'Law, Social Policy, and the Constitution of Markets and Profit Making' (2013) 40 Journal of Law and Society 137

Verkuil P R, Outsourcing Sovereignty : Why Privatization of Government Functions Threatens Democracy and What We Can Do about It (Cambridge University Press 2007)

Vernengo M, Caldentey E P and Rosser B J (eds), The New Palgrave Dictionary of Economics (Palgrave Macmillan UK 2020)

Wacquant L, 'Three Steps to a Historical Anthropology of Actually Existing Neoliberalism' (2012) 20 Social Anthropology/Anthropologie Sociale

Walby K, 'Contributions to a Post-Sovereigntist Understanding of Law: Foucault, Law as Governance, and Legal Pluralism' (2007) 16 Social & Legal Studies 551

Weeks K, 'Life within and against Work: Affective Labor, Feminist Critique, and Post-Fordist Politics' (2007) 7 Ephemera: Theory and Politics in Organization

Weintraub J A, 'The Theory and Politics of the Public/Private Distinction', Public and private in thought and practice: perspectives on a grand dichotomy (University of Chicago Press 1997)

Wilhelmsson T, Senmodern Ansvarsrätt : Privaträtt Som Redskap För Mikropolitik (Iustus 2001)

Winblad U and others, 'Kvalitetskrav i valfrihetssystem : en analys av förfrågningsunderlagen' (Swedish Association of Local Authorities and Regions 2014)

Zumbansen P, 'Law After the Welfare State: Formalism, Functionalism, and the Ironic Turn of Reflexive Law' (2008) 56 The American Journal of Comparative Law

Newspaper articles and opinion pieces

'90 procent av alla döda i covid-19 var över 70 år' *Svenska Dagbladet* (28 May 2020) https://www.svd.se/90-procent-av-alla-doda-i-covid-19-over-70-ar

'Coronakrisen blottar brister i äldreomsorgen' *forskning.se* (12 May 2020) https://www.forskning.se/2020/05/12/coronakrisen-blottar-brister-i-aldreomsorgen/

Government Offices, 'Nya åtgärder för att stärka äldreomsorgen och vården under coronakrisen' (*Regeringskansliet*, 12 May 2020) https://www.regeringen.se/pressmeddelanden/2020/05/nya-atgarder-for-att-starka-aldreomsorgen-och-varden-under-coronakrisen/

Hansing S A, '23 av 57 anställda på äldreboende gick till jobbet sjuka' *gp.se* (21 April 2020) http://www.gp.se/1.27040356

Karlsson C-J, 'Sweden's Coronavirus Failure Started Long Before the Pandemic' *Foreign Policy* (23 June 2020) https://foreignpolicy.com/2020/06/23/sweden-coronavirus-failure-anders-tegnell-started-long-before-the-pandemic/

Katzin M, 'Skärp kraven på den privata hemtjänsten, kommuner' *Dagens Samhälle* (21 April 2020) https://www.dagenssamhalle.se/debatt/skarp-kraven-pa-den-privata-hemtjansten-kommuner-32282

——, 'Valfrihetssystemet skapar betydande kvalitetsskillnader' *Dagens Samhälle* (4 May 2020) https://www.dagenssamhalle.se/debatt/valfrihetssystemet-skapar-betydande-kvalitetsskillnader-32446

Nordlund F, 'En sargad äldreomsorg står inför stora utmaningar' *SVT Nyheter* (14 June 2020) https://www.svt.se/nyheter/inrikes/forskaren-har-ar-aldreomsorgens-utmaningar

Orange R, 'The Treatment of Sweden's Old and Vulnerable Is a "Catastrophe"' *The Telegraph* (7 May 2020)

https://www.telegraph.co.uk/news/2020/05/07/treatment-swedens-old-vulnerable-catastrophe/

Savage M, 'What's Going Wrong in Sweden's Care Homes?' *BBC News* (19 May 2020) https://www.bbc.com/news/world-europe-52704836

Sjöqvist T, 'NPM är död. Länge leve NPM!' (*Dagens Arena*, 30 September 2019) https://www.dagensarena.se/essa/npm-ar-dod-lange-leve-npm/

Sundling J, 'Höga dödstal på äldreboenden – ett globalt problem' *Fokus* (7 May 2020) https://www.fokus.se/2020/05/hoga-dodstal-pa-aldreboenden-ett-globalt-problem

Preparatory works, policy documents, and reports

Dir. 2017:39 Översyn av socialtjänstlagen

Dir. 2018:69 Tilläggsdirektiv till Utredningen Framtidens socialtjänst

HSLF-FS 2018:24 Senaste version av Socialstyrelsens föreskrifter och allmänna råd (SOSFS 2014:5) om dokumentation i verksamhet som bedrivs med stöd av SoL, LVU, LVM och LSS.

Kammarkollegiet, 'Utformande av förfrågningsunderlag för upphandling enligt LOV'

National Board on Health and Welfare, 'Valfrihetssystem Ur Ett Befolknings- Och Patientperspektiv: Slutredovisning' (Socialstyrelsen 2012)

Prop. 1979/80:1 Om socialtjänsten

Prop. 1990/91:14 Om ansvaret för service och vård till äldre och handikappade m.m.

Prop. 1992/93:43 Ökad konkurrens i kommunal verksamhet

Prop. 1996/97:124 Ändring i socialtjänstlagen 1996

Prop. 2002/03:65 Ett utvidgat skydd mot diskriminering

Prop. 2008/09:29 Lag om valfrihetssystem

SOSFS 2011:12 Grundläggande kunskaper hos personal som arbetar i socialtjänstens omsorg om äldre

SOSFS 2011:9 Socialstyrelsen föreskrifter och allmänna råd om ledningssystem för systematiskt kvalitetsarbete.

SOSFS 2012:3 Värdegrunden i socialtjänstens omsorg om äldre

SOSFS 2013:16 Senaste versionen av Socialstyrelsens föreskrifter och allmänna råd (SOSFS 2011:5) om lex Sarah.

SOSFS 2015:10 Basal hygien i vård och omsorg

SOU 1990:44 Maktutredningen

SOU 2008:15 LOV att välja - Lag Om Valfrihetssystem

SOU 2013:53 Privata utförare - kontroll och insyn

SOU 2014:2 Framtidens valfrihetssystem – i socialtjänsten

SOU 2015:7 Krav på privata aktörer i välfärden

SOU 2016:78 Ordning och reda i välfärden

SOU 2017:38 Kvalitet i välfärden – bättre upphandling och uppföljning

SOU 2018:47 Med tillit växer handlingsutrymmet: tillitsbaserad styrning och ledning av välfärdssektorn

Statement of Government, October 2014.

Swedish Agency for Public Management, 'Lagen Om Valfrihetssystem. Hur Påverkar Den Kostnader Och Effektivitet i Kommunerna?' (Statskontoret 2012) 15

Swedish Competition Authority, 'Kommunernas Valfrihetssystem - Med Fokus På Hemtjänst: Slutrapport' (Konkurrensverket 2013)

——, 'Avtalsuppföljning av vård och omsorg' (2014)

Swedish National Audit Office, 'Statens Styrning Av Kvalitet i Privat Äldreomsorg' (Riksrevisionen 2008)

Internet resources

'The Care Choice Website' https://www.valfrihetswebben.se/ accessed 11 May 2020

Kommunal, 'Så mycket bättre? En jämförelse av anställningsvillkor och löner i privat och kommunalt driven äldreomsorg' (2018) https://www.kommunal.se/sites/default/files/sa_mycket_battre_2018_webb.pdf, accessed 11 May 2020

National Agency for Public Procurement, 'Guide for Municipalities' https://www.upphandlingsmyndigheten.se/upphandla/valfrihetssystem/valfrihetssystem-steg-for-steg/, accessed 11 May 2020

National Board on Health and Welfare, 'Guide to Quality Management Systems' https://www.socialstyrelsen.se/Lists/Artikelkatalog/Attachments/18777/2012-6-53.pdf, accessed 25 November 2019

——, 'Indicators' http://www.socialstyrelsen.se/indikatorer, 25 November 2019

——, 'Open Comparisons: The Elderguide' http://oppnajamforelser.socialstyrelsen.se/aldreguiden, 25 November 2019

Statistics Sweden, Price Basic Amount https://www.scb.se/en/finding-statistics/statistics-by-subject-area/prices-and-consumption/consumer-price-index/consumer-price-index-cpi/pong/tables-and-graphs/price-basic-amount/price-basic-amount, accessed 25 November 2019

Swedish Competition Authority, ‘Guide on Specification of Criteria in Procuring Home Care 2014’ http://www.konkurrensverket.se/globalassets/publikationer/vagledningar/vagledning_2014-2_kravspecifikation_hemtjanst.pdf, accessed 25 November 2019

——, ‘Monitoring Guide’ http://www.konkurrensverket.se/globalassets/upphandling/avtalsuppfoljning-av-vard-och-omsorg.pdf, accessed 11 May 2020

The Government Offices, ‘Open Comparisons in healthcare and social care – action plan for 2014-2015’ https://www.regeringen.se/49bbd2/contentassets/86a015c3d8f3475e9aefb3770ab8e4e9/oppna-jamforelser-inom-halso--och-sjukvarden---handlingsplan-for-2014-2015-s2014.008, accessed 11 May 2020

Quoted municipal material

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Policy documents
City L Tender Document
City M Monitoring Report Dnr ÄN 2015-432
City M Monitoring Report Dnr ÄN 2016-15
City M Monitoring Report Dnr ÄN 2016-612
City M Monitoring Report Dnr ÄN 2017-599
City M Tender Document
City M Tender Document Model Contract
City M Tender Document Special Requirements
City S Tender Document
Göteborg Tender Document
Norrtälje Tender Document
Ronneby Tender Document

List of cases

Länsrätten i Stockholm, 2007-11-19, no. 105017-07 and 10527-07

Other sources

Granberg A-C, 'E-mail Communication with NBHW' (2 May 2019)

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Taking Care of Business

In this doctoral thesis in social welfare law, Mirjam Katzin provides an account of the introduction of care choice systems into the provision of home care by Swedish municipalities. The thesis explores the reconfiguration of the relationship between state and capital in relation to quasi-marketization of central welfare services. The issue is analysed on the basis of an empirical investigation focused on three case municipalities and combines interviews, legal analysis, quantitative and qualitative readings of tender documents and contracts, with a theoretical discussion on the commodification of care in a Swedish neoliberal context. The thesis shows how multiple factors – including the municipalities' responsibility for maintaining the quality of elder care, the political will to support small businesses, and the need to ensure that the system has political legitimacy – combine to produce a situation in which public spending on welfare is channelled into aiding and supporting private actors within the sector. Put simply, municipal officials end up 'taking care of business'.

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