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# Alternatives to Public Procurement:

## Free Choice in Marketised Social Services – Legal Challenges Illustrated via Long-Term Care[*1]

**Abstract.** In light of Europe's ageing population, the article explores the legal dimensions to freedom of choice within marketised social services, especially in the context of long-term care. It offers critical analysis of the implementation of the free-choice model in Estonia within the framework of European Union public-procurement law and Estonian law on administrative co-operation. The landscape has been a legal 'no man's land' somewhat: this demand-based model with an unlimited number of providers falls outside the traditional public-procurement framework, and how the general principles for transfer of public tasks to the private sector might apply to a free-choice model, which does not entail explicit 'transfer', has remained unclear. Although the Estonian care reform of 2023 established a funding model, it did not resolve the legal uncertainties surrounding public–private co-operation and user rights. As care homes in Estonia are largely run by the private sector, vague legal regulation and weak state supervision pose a threat to access, the care services' quality, and their economic efficiency. Drawing on international comparisons with the Nordic countries, the article warns against uncritical adoption of market-based models, stressing the need to balance the roles of public authorities and private providers. The paper underscores the crucial role of legal professionals in ensuring that public–private co-operation for social services upholds both individuals' fundamental rights and public interests.

**Keywords:** marketisation, privatisation, social services, free choice, consumer choice, long-term care

[1] The paper is an English-language updated and revised version of a piece recently published in Estonian: M-L Viirsalu, 'Alternatiiv riigihangetele: turupõhine, isiku valikuõigusel põhinev sotsiaalteenuste korraldus. Õiguslikud väljakutsed pikaajalise hoolduse näitel' [2024](2) *Juridica* 148.

# 1. Introduction

In a rapidly ageing Europe, researchers are seeking solutions to the growing need for long-term care. Care services get delivered largely within welfare markets,[*2] characterised by competing providers and – increasingly – choice for the service-users.

The aim behind this article is to contribute to international discussion focusing on the legal aspects of free choice in the realm of marketised social services. While the topic has attracted interest for many years in academia within the Nordic region, this paper marks the first attempt to conceptualise the free-choice model (sometimes described as an 'open house', or a 'consumer-choice' model[*3]) and analyse its implementation in an Estonian setting, with the valuable comparative view in the background.

In July 2023, a long-awaited care reform came into force in Estonia.[*4] This was considered one of the most significant innovations in the social sector in recent decades, assumed to bring relief to the excessive care burden on families. Just like before the reform, local authorities, who bear the responsibility for organising care services in Estonia, continue to be free to arrange those services in any way they choose. Private providers handle more than 50% of the volume of residential-care services, yet awards of public service contracts cover an insignificant proportion of this figure and the legal relationships with many of the rest remain vague. Both the supervisory visits undertaken by the Office of the Chancellor of Justice and decisions of the Supreme Court have repeatedly indicated that the local authorities struggle to guarantee access to social services[*5], so there were hopes that the care reform would bring legal clarity, especially with regard to those public–private co-operation mechanisms involving personal choice but also for untangling the complex legal relationships that form the basis for protection of the fundamental rights of the service users. Upon closer examination, however, one can notice that the reform was amounted to little more than creating a funding model.[*6]

The article examines the free-choice model in the context of both the European Union's public procurement law and current Estonian law, with special focus on administrative co-operation law. With growing concerns over the dominance of profit-oriented private providers, the article also addresses the potential conflict between social goals and business interests.[*7] The task of this article is not however to evaluate the justification of the marketisation, but to contribute to legal clarity for the cases wherein public authorities have decided to implement a market model. The necessarily limited scope of the article dictates that the closely related topic of bringing balance to the positions in these triadic legal relationships (possibly a need for a special consumer law) must remain a subject for subsequent articles.

2 KPMG for the European Commission, 'Study on the Long-Term Care Supply and Market in EU Member States, Final Report' (Publications Office of the European Union 2022) <https://ec.europa.eu/social/main.jsp?catId=738&langId=en&pubId=8448&furtherPubs=yes> accessed on 3 July 2024. For a critical take on welfare markets, see M Maucher, 'Social Services of General Interest at the Crossroad of Competition on Social Markets across Europe and the Guarantee and Realisation of the Common Good' in TP Boje and M Pot Potůček (eds), *Social Rights, Active Citizenship and Governance in the European Union* (Nomos Verlagsgesellschaft 2011) 61. – DOI: https://doi.org/10.5771/9783845230290-61F Martinelli, 'Social Services Disrupted: Changing Supply Landscapes, Impacts and Policy Options' in F Martinelli, A Anttonen, and M Mätzke (eds), *Social Services Disrupted: Changes, Challenges and Policy Implications for Europe in Times of Austerity* (Edward Elgar 2017) 393. – DOI: https://doi.org/10.4337/9781786432117.00031.

3 Known predominantly under the *Zulassungssystem* notion in German-speaking environments.

4 Since 1 July 2023, the local authority has financed the staff costs and other expenses of care workers, whereas the recipient of the service pays the accommodation and catering costs and the other costs related to the provision of the service, per Section 221 of the Social Welfare Act, available in English translation: <https://www.riigiteataja.ee/en/eli/ee/519012024004/consolide/current> accessed on 3 July 2024.

5 For instance, see RKPJKo 5-18-7, 9.12.2019 (dealing with the duty to guarantee social services); RKPJKo 5-22-10, 6.2.2023 (addressing the duty to guarantee child-care service).

6 Unlike most other European countries, Estonia has not created a long-term care insurance system. Long-term care is financed from taxes.

7 KPMG for the European Commission (n 2).

# 2. Handling of public duties in the social-services market

## 2.1. Historical and socio-political context

The development of public services in Estonia after regaining of independence was strongly influenced by the Nordic tradition; except for the financing model of the social protection system, that was based on the German model.[*8] Manifesting this mixed approach, the country's first Social Welfare Act (SWA), adopted in 1995, was considered a 'combination of Scandinavian and Finnish laws suitable for the Estonian context'.

With the widespread proliferation of the New Public Management ideology in the 1980s, transfer of public services to the private sector picked up pace in nearly all of the developed countries. Most visibly in the UK[*9] but also in the Nordic countries[*10], legislators and policymakers wove key elements of the market economy into social policy, thereby offering the recipients, or 'consumers', of the services greater freedom of choice and an avenue for demanding higher quality from the providers, who now operated in a climate of competition.

For Estonia, the shift toward liberal social policy occurred in connection with the launch of European Union projects. Influenced by experts from the UK, known for its neoliberal economic policy, Estonia's social-security system took on more of the characteristics of private-law relations.[*11] As for international tendencies, the development of social-service organisation within the last couple of decades has shown great variety; however, a few overarching trends can be observed[*12]:

(a) vertical reallocation of responsibility from the central government to the local level;
(b) horizontal reallocation of responsibility – i.e., reducing the state's direct involvement while increasing the role of for-profit and not-for-profit service providers;
(c) supporting the latter by public authorities' actions and with a regulatory framework.

These patterns create reason to believe that the manner of arranging social services is going to become even more complex and fragmented as the future unfolds.[*13]

## 2.2. The private sector's involvement in the performance of public duties: A right *versus* an obligation of the state

Traditionally, the involvement of private entities in the performance of public duties was considered an anomaly requiring justification or at least was regarded as an exception to a rule. In contrast, the neoliberal school worked from the opposite starting point, questioning the right of a public authority to perform a public duty if the market was ready to handle it.

The principle of subsidiarity[*14], supported by Georg Jellinek, the quintessential representative of the liberal school, holds that the state may intervene in public duties – and indeed must do so – if and only if its objectives cannot be reached through societal means, and only to the extent that the state can protect the affected interest better.[*15] For those holding this viewpoint, the performance of public tasks falls within the scope of the civil rights and liberties of private actors, without requiring any special justification.[*16] From

8 M Mikkola, 'Eesti sotsiaalse õiguse areng ja koostöö Soomega [The development of the social law in Estonia and cooperation with Finland]' [2004] Riigikogu Toimetised 12 <https://rito.riigikogu.ee/wordpress/wp-content/uploads/2004/12/Eesti-sotsiaalse-%C3%B5iguse-areng-ja-koost%C3%B6%C3%B6-Soomega.pdf> accessed on 3 July 2024.

9 C Schmitt and H Obinger, 'Verfassungsschranken und die Privatisierung öffentlicher Dienstleistungen im internationalen Vergleich' (2010) 51 Politische Vierteljahresschrift 643, 643, 648.

10 For Sweden, Denmark, Finland, and Norway, see G Meagher and M Szebehely (eds), 'Marketisation in Nordic Eldercare: A Research Report on Legislation, Oversight, Extent and Consequences' (Department of Social Work at Stockholm University 2013).

11 Mikkola (n 8).

12 H Wollmann and G Marcou (eds), *The Provision of Public Services in Europe: Between State, Local Government and Market* (Edward Elgar 2010) 240.

13 M Vabø and others, 'Is Nordic Elder Care Facing a (New) Collaborative Turn?' (2022) 56 Social Policy & Administration 549, 549. – DOI: https://doi.org/10.1111/spol.12805.

14 J Isensee, 'Gemeinwohl im Verfassungsstaat' in *Handbuch des Staatsrechts der Bundesrepublik Deutschland*, vol 4 ('Aufgaben des Staates') (CF Müller 2006) s 71, marginal 111.

15 Ibid s 73, marginal 63.

16 Ibid s 73, marginal 67, alongside H Butzer's marginal notes 64–67 in s 74.

this perspective, rights are less infringed if the state only ensures the performance of the task while leaving direct execution within the private sector's sphere of responsibility. In addition to this, the rationalising argument emphasises efficiency and economic viability, suggesting that the state should direct its limited resources only to tasks that cannot be managed on private initiative and to situations wherein the market fails to provide a satisfactory solution that serves the general interest.[*17]

In academic discussions, these understandings form the basis for the concept of the 'ensuring state' (*Gewährleistungsstaat*)[*18], or as the 'regulatory welfare state' among English-speaking scholars. Although the precise legal content of the 'ensuring state' concept remains debatable, the latter notion can be considered a constitutional reflection of the European social market economy model, designed to align the public interest with the idea of market competition.

## 2.3. Competition as a foundation for choice

Competition in so-called welfare markets varies in its form. In **competition for the market** (*Wettbewerb um den Markt*[*19]), a monopolistic situation exists in the setting of providing the public service in question. For instance, a public-tender process might precipitate dividing the market among providers in such a way that non-contract-winning providers cannot compete in certain arenas for certain spans of time. This situation has been referred to also as 'limited competition'.[*20] In contrast, **competition in the market** (*Wettbewerb im Markt*) refers to the scenario wherein multiple service providers compete for the custom of end users in the relevant market. Legally, creating competition for a market entails designing rules for access to that market while appropriate competition in a market requires the legislator to regulate the competition and its functioning.

Where a public-procurement process has resulted in several service providers sharing the market, a **supply-based system** is in place. In this case, selection of a service provider is executed by the purchasing authority. A market of this sort has been denoted also as 'exclusive' or 'selective'.[*21] This can be distinguished from a **demand-based system**[*22], also referred to as a 'non-selective' or 'inclusive' one[*23]. This contrasting set of conditions displays a considerable amount of choice on the part of the service users; meanwhile, providers have no guarantee of service volume, since the money moves with the consumers.

The latter can be seen as a logical development for service systems influenced by neoliberal ideology, which have transformed a relatively passive 'beneficiary' into a 'customer' with agency. In the new image, of so-called *Homo economicus*[*24], a motivated, autonomously acting individual strives to make rational choices from a position of solid knowledge.

In practice, the expansion evident in the right of choice has not been an end in itself but primarily a means to promote the market economy, to boost competition among service providers. If there are competing providers, a broader scope for choice represents potential for growth through competition to offer higher quality and, when prices are not fixed, friendlier pricing.

17 Ibid s 73, marginals 67–68.

18 C Franzius, 'Die europäische Dimension des Gewährleistungsstaates' (2006) 45 Der Staat 547; B Friedländer, M Röber, and C Schaefer, 'Institutional Differentiation of Public Service Provision in Germany: Corporatisation, Privatisation and Re-municipalisation' in S Kuhlmann and others (eds), *Public Administration in Germany* (Palgrave Macmillan 2021) 291–92. – DOI: https://doi.org/10.1007/978-3-030-53697-8_17.

19 M Fehling and M Ruffert (eds), *Regulierungsrecht* (Mohr Siebeck 2010) s 21, comment 14.

20 Ibid.

21 M Burgi, M Dreher, and M Opitz, *Gesetz gegen Wettbewerbsbeschränkungen – GWB – 4. Teil* (4th edn, CH Beck 2022) s 130, comments 19–20.

22 KH Sivesind, HS Trætteberg, and J Saglie, 'The Future of the Scandinavian Welfare Model: User Choice, Parallel Governance Systems, and Active Citizenship' in KH Sivesind and J Saglie (eds), *Promoting Active Citizenship: Markets and Choice in Scandinavian Welfare* (Springer 2017) 297. – DOI: https://doi.org/10.1007/978-3-319-55381-8_8.

23 Burgi, Dreher, and Opitz (n 21) s 130, comment 20.

24 CC Walker, A Druckman, and T Jackson, 'A Critique of the Marketisation of Long-Term Residential and Nursing Home Care' (2022) 3 The Lancet Healthy Longevity e298, 301. – DOI: https://doi.org/10.1016/s2666-7568(22)00040-x.

## 2.4. A revolution of choice and neutrality of competition

The concept of free choice has no specific definition. Choice presents itself in multiple institutional frameworks[*25], including publicly provided or procured service systems that do not necessarily involve real competition. However, choice can be enhanced when competition is incorporated.

The emphasis in this article is on exploring demand-based systems wherein service-users have a right to choose from among several providers (public, for-profit, or not-for-profit) who compete with each other while providing services without quota-related or other limits. In the social services sector, the rise of the liberal notion of competition and freedom of choice is a rather new phenomenon on the international stage, one that burst into the spotlight especially in the last two decades. Probably among the main reasons for this is that, in contrast against many other fields of general public interest – such as electricity, telecommunications, and transport – public–private co-operation in the field of personal social services is rather complicated to manage, on account of complex issues of ensuring reliability, defining quality standards, conducting monitoring, and measuring service outcomes.[*26]

The term 'choice revolution' originated in Sweden, where, as in other Nordic countries, a system affording choice in social services' organisation was tested as early as the 1990s.[*27] In 2007 in Denmark[*28] and in 2009 in Sweden[*29] and Finland[*30], laws were enacted to regulate the right of individuals to choose between distinct sets of service providers (public, for-profit, and not-for-profit) in particular sectors; likewise, the roles and responsibilities of the providers were regulated. This move was rooted in assumptions (bound up with economic theory) that the needs of the population are met most fully when all providers are given equal opportunities in the market.[*31] A broad-based selection of service providers was presumed to support quality, efficiency, and innovation.[*32]

In Estonia, (an implicit) 'choice revolution' has taken place in the organisation of technical aids and social rehabilitation: a person needing the service can freely choose a service provider from among all providers who meet the requirements set for it and who hold a corresponding activity licence. Said freedom and requirements extend also to public-law providers and to state and local government institutions (per the SWA, Subsection $1^1$ (2)).

In international experience, **competitive neutrality** has not proved to manifest balanced development.[*33] The field of long-term care services has witnessed especially serious concerns about service provision growing more and more consolidated in private hands. This trend of increasing concentration with profit-oriented (incl. international) business enterprises is highly evident in Finland and Sweden, for instance.[*34] While competition is typically expected to improve performance, the opposite has been observed

25 F Blank, 'When "Choice" and "Choice" Are Not the Same: Institutional Frameworks of Choice in the German Welfare System' (2009) 43 Social Policy & Administration 585. – DOI: https://doi.org/10.1111/j.1467-9515.2009.00682.x.

26 T Klenk and R Reiter, 'Post-New Public Management: Reform Ideas and Their Application in the Field of Social Services' (2019) 85 International Review of Administrative Sciences 3, 3, 6. – DOI: https://doi.org/10.1177/0020852318810883; H Blöchliger, 'Market Mechanisms in Public Service Provision' (2008) OECD Economics Department Working Papers 626; Friedländer, Röber, and Schaefer (n 18) 298.

27 P Blomqvist, 'The Choice Revolution: Privatization of Swedish Welfare Services in the 1990s' (2004) 38 Social Policy & Administration 139, 139, 141.

28 In Denmark, a choice system was created initially in the field of home-care residential care services – see the Retsinformation page 'Lov om friplejeboliger' for 2007 <https://www.retsinformation.dk/eli/lta/2007/90> accessed on 3 July 2024.

29 The system of choice in Sweden is regulated by the act of law on the system of choice: 'Lag (2008:962) om valfrihetssystem' (2008) <https://www.riksdagen.se/sv/dokument-lagar/dokument/svensk-forfattningssamling/lag-2008962-om-valfrihets-system_sfs-2008-962> accessed on 3 July 2024.

30 In Finland, the choice system is regulated by the Act on Health and Social Service Vouchers (*Laki sosiaali- ja terveydenhuollon palvelusetelistä*), 24.7.2009/569 <http://www.finlex.fi/fi/laki/ajantasa/2009/20090569> accessed on 3 July 2024.

31 Sivesind, Trætteberg, and Saglie (n 22) 300.

32 See the reasoning behind the law proposals 2008/09:29 (for Sweden's *Lag om valfrihetssystem*) 18 and Finland's SOTE proposal (s 1.2) – available via, respectively, <https://www.regeringen.se/rattsliga-dokument/proposition/2008/10/prop.-20080929> and <https://www.eduskunta.fi/FI/vaski/HallituksenEsitys/Sivut/HE_47+2017.aspx> both accessed on 3 July 2024.

33 Sivesind, Trætteberg, and Saglie (n 22) 302.

34 A Anttonen and O Karsio, 'How Marketisation Is Changing the Nordic Model of Care for Older People' in F Martinelli, A Anttonen, and M Mätzke (eds), *Social Services Disrupted: Changes, Challenges and Policy Implications for Europe in Times of Austerity* (Edward Elgar 2017) 219. – DOI: https://doi.org/10.4337/9781786432117.00020; C Wehlander, 'När medför en offentlig finansiering en skyldighet att följa LOU?: Studie med särskilt fokus på EU-begreppen SGEI och NSGI [When does public funding entail an obligation to comply with the LOU?: Study with special focus on the EU concepts of SGEI and

in the field of care services. Greater competition reduces profits, thereby pushing quality downward[*35] since, with the salaries of the personnel already being low, ways of becoming more cost-effective or innovative are limited.[*36] Studies have shown, furthermore, that service providers intent on earning profits for the business (such as those owned by private-equity firms and publicly traded companies) perform worse.[*37] This most likely holds for aspects of quality that are difficult to measure and monitor, such as the service users' inclusion in meaningful activities for purposes of enhancing their personal ability to participate.

After decades of neoliberal-agenda-impelled shifting of social-service provision toward marketisation, increased worries about 'supplier opportunism' and about losing control over the provision of the services have started to trigger reverse developments. Critics of the so-called open-house service approach have argued that having a large number of providers makes it hard to maintain a sufficient regulatory overview of the service landscape and for individuals to choose a suitable, high-quality provider; that the lack of a turnover guarantee for providers could, by contributing to their financial uncertainty, possibly hinder investment efforts and flexible deployment of personnel; and that concluding contracts with every single care provider that meets the threshold requirements is likely to exacerbate administrative burdens.

Perhaps the most noteworthy example from recent times of back-pedalling on marketisation of social services comes from Finland: when a full-choice model was proposed under which the private sector would have been authorised for exclusive provision of social and health services, it was declared unconstitutional.[*38] As for Norway and especially Denmark, scholars have argued that the strong societal role of the countries' third sector, including participation in policymaking[*39], alongside exemptions to general competition[*40], has enabled them to resist market pressures. The strength of non-governmental organisations (NGOs) lies in their proactive work to develop personalised services. Also, their activities are driven more by public interests and the society's values than profit-oriented companies' are.[*41] Denmark's national strategy for strengthening the capacity of civic organisations has been cited as a positive example and even copied elsewhere.[*42] In several choice systems for social services, not-for-profit providers have been accorded a clear legal advantage in recent years.

Another downside associated with the free choice system is increased inequality.[*43] Ability and capacity to make informed choices are not equally distributed across society, and developers of choice models who wish to safeguard against this additional source of potential for inequality should include a 'non-choice option' – that is, if an individual cannot or does not wish to make a choice, the administrative authority ought to direct that person to a service that meets the relevant personal needs.[*44] In light of the Swedish example, it can be suggested that the implementation of the choice model should be left to the discretion of local authorities, as this model seems inherently better-functioning in some conditions than others (e.g., in densely populated areas, as opposed to rural areas, where the public authority often must compensate for a lack of competition).

NSGI]' (Konkurrensverket 2018) 65 <https://www.konkurrensverket.se/globalassets/dokument/informationsmaterial/rapporter-och-broschyrer/uppdragsforskning/forsk-rapport_2018-5_nar-medfor-en-offentlig-finansiering-en-skyldighet-att-folja-lou.pdf> accessed on 3 July 2024.

35 J Forder and S Allan, 'The Impact of Competition on Quality and Prices in the English Care Homes Market' (2014) 34 Journal of Health Economics 73, 82. – DOI: https://doi.org/10.1016/j.jhealeco.2013.11.010.

36 Walker, Druckman, and Jackson (n 24) 299–300.

37 R Broms, C Dahlström, and M Nistotskaya, 'Provider Ownership and Indicators of Service Quality: Evidence from Swedish Residential Care Homes' (2024) 34(1) Journal of Public Administration Research and Theory 150. – DOI: https://doi.org/10.1093/jopart/muad002.

38 The reasoning of the constitutional committee of Eduskunta is available via <https://www.eduskunta.fi/FI/vaski/Lausunto/Sivut/PeVL_26+2017.aspx> accessed on 3 July 2024. See s 3.3 in particular.

39 SB Segaard, N Brookes, and JB Pahl, 'What Shapes National Responses to EU Public Procurement Policy? The Case of Health and Social Services in Norway, Germany and England' (2020) 24 Scandinavian Journal of Public Administration 43.- DOI: https://doi.org/10.58235/sjpa.v24i1.8623.

40 M Szebehely and G Meagher, 'Nordic Eldercare – Weak Universalism Becoming Weaker?' (2018) 28 Journal of European Social Policy 294, 301. – DOI: https://doi.org/10.1177/0958928717735062.

41 Anttonen and Karsio (n 34) 229.

42 Vabø and others (n 13).

43 Szebehely and Meagher (n 40) 294.

44 For Finland, see the Act on Health and Social Service Vouchers (n 25) s 6. For Sweden, see Act 2008:962 (n 24) ch 9, s 2.

# 3. Arrangement of social services within the context of European Union public-procurement law

The political, economic, and cultural diversity across EU member states has shaped an extremely varied landscape of arranging social services.[*45] Both the Procurement Directive (2014/24/EU) and the Union's concession-contracts directive (2014/23/EU) respect 'welfare autonomy'[*46], i.e the extensive powers that Member States have, organising the selection of service providers in the manner they deem most appropriate while respecting cultural differences, embracing sensitivity of social services, and honouring their limited cross-border impact (under recitals 114 and 54, respectively). The recitals to these instruments underscore that the directives should not be construed as encompassing or promoting liberalisation to services of general economic interest and that Member States remain free to organise the provision of compulsory social services either as services of general economic interest or as non-economic services of general interest, with a mixture of the two being possible also (see the comments accompanying Annex IV of Directive 2014/23/EU and Recital 6 of Directive 2014/24/EU).[*47]

Assessing whether a particular service is of economic interest is not subject to clear guidance from the EU treaties or procurement directives, but one can conclude from European Court of Justice (ECJ) practice that the crucial factor is **the specific organisational model, not the service's intrinsic nature**.[*48] Importantly, if the Member State itself defines the service in question as a non-economic one of general interest, its organisation falls entirely outside the scope of internal-market and competition rules (per Recital 6 of Directive 2014/24/EU).

However, even when choosing to arrange its social services as, alternatively, economic services of general interest, a Member State still is granted considerable discretion, in line with Article 14 of the Treaty on the Functioning of the European Union (TFEU) and its Protocol 26, on services of general interest. Though flexible options exist within the lines of the public-procurement system (e.g., a framework agreement[*49]), it is important to note that, under the terms set forth in Directive 2014/24/EU's Recital 114, Member States may completely waive application of the public procurement procedure and 'organise social services in a way that does not entail the conclusion of public contracts' – for example, merely through 'financing of such services or by granting licences or authorisations to all economic operators meeting the conditions established beforehand by the contracting authority, without any limits or quotas, provided that such a system ensures sufficient advertising and complies with the principles of transparency and non-discrimination' (this idea is reiterated in Recital 54 of Directive 2014/23/EU with regard to concessions).

It used to be that the open-house model, characterised by granting authorisations to all partners meeting the requirements, was considered a special form of public procurement.[*50] The matter was clarified, however, by the ECJ ruling in the *Falk Pharma* case[*51], wherein the Court confirmed that 'selectivity' is a constitutive element of public procurement. For sectors such as social services, where service quality and meeting specific user needs take precedence over solely economic considerations, there is reason to believe that a conscious choice has been made to leave space for the development of innovative and locally adapted service systems (e.g., utilising customer-choice and service-voucher models). In cases of selecting particular partners under a contract, the authorities may employ a simplified procedure expressly for social and other specific services (following the so-called light regime) set up within the system for public procurement[*52].

45 KPMG for the European Commission (n 2).

46 L Zhu, 'SGI: An EU Expression of State Functions' in *Services of General Economic Interest in EU Competition Law* (Springer 2020) 56. – DOI: https://doi.org/10.1007/978-94-6265-387-0_2; D Schiek, 'Social Services of General Interest: The EU Competence Regime and a Constitution of Social Governance' in UB Neergaard and others (eds), *Social Services of General Interest in the European Union* (TMC Asser Press 2013), along with the latter volume more generally. – DOI: https://doi.org/10.1007/978-90-6704-876-7_4.

47 For Estonia, see Viirsalu (n 1).

48 L Hancher, Y de Vries, and FM Salerno, *EU State Aids* (5th edn, Sweet & Maxwell 2018) ch 10, s 1.

49 Directive 2014/24/EU, specifically art 33; Public Procurement Act of Estonia (PPA) (2017) ss 29ff.

50 M Burgi, *Vergaberecht: systematische Darstellung für Praxis und Ausbildung* (CH Beck 2016) 170–71.

51 Case C-410/14 *Falk Pharma*, 2.6.2016, para 38.

52 Directive 2014/24/EU, arts 74–77; PPA, s 126.

In some cases, it may be difficult to distinguish predefinition of the applicable quality standards from criteria for selection of providers.[*53] The directive at issue makes reference to the European Quality Framework for Social Services, a voluntary mechanism developed by the Social Protection Committee[*54]. In the *Tirkkonen* ruling[*55], the ECJ clarified that simply **predefining quality standards does not constitute a public contract**, provided that the contracting authority has not cited any award criteria for the purpose of comparing and classifying admissible tenders. The Court stated that even the matter of whether interested operators are given a deadline after which candidate providers shall no longer be considered is irrelevant to ascertaining whether the scheme in question constitutes a public procurement. Regarding the award of contracts for social services, the ECJ addressed obliging the operator to have a location ready to serve the place where the services are to be provided, from the time of submission of the tender onward. Namely, the Court found that, although imposing this condition could help guarantee the proximity and accessibility of social services, it is clearly disproportionate to the objective (in that the situation might be different at the time of fulfilling the public contract). The ruling notes that the associated difference in treatment is compatible with the principle of equal treatment only in so far as it may be justified by a legitimate objective.[*56] This factor should be kept in mind with regard to all aspects of organising a service under a free-choice model and setting conditions for the operators.

Additionally, while Directive 2014/24/EU allows reserved contracts for social services (see Sec. 77 and also Section 127 of the Public Procurement Act of Estonia, PPA), the ECJ has recently dealt with the question of whether it is permissible to deviate from competitive neutrality by reserving the right to participate in procedures for awarding public contracts for social-services provision exclusively to private not-for-profit organisations. In the *ASADE* case, the Court stated that excluding private profit-making entities from the procedure for granting of public contracts for supplying such social services is not contrary to the principle of equality, as long as the exclusion genuinely contributes to pursuit of the social purpose articulated and to reaching the objectives, of pursuing the greater good of the community and budgetary efficiency, on which the relevant system is based.[*57] Furthermore, NGOs that are not strictly volunteering-based and that make profits from the provision of services must reinvest the profits from the associated operations with a view to reaching the social objective of general interest pursued thereby.[*58] Accordingly, treating NGOs differently from for-profit providers can be deemed objectively justified.

However, it is not entirely clear whether permissibility of favouring the not-for-profit sector should be extended to consumer-choice and voucher models that lie beyond the scope of public-procurement rules. According to the last sentence of Recital 114 of Directive 2014/24/EU, a system based on personal choice must adhere to the principles of transparency and non-discrimination. Interpretation in light of the TFEU and its protocol on services of general interest (which lays down additional shared values from the service-user's point of view: service-related diversity, high quality, safety, acceptable pricing, equal treatment, universal access, and promotion of users' rights) allows us to argue that differential treatment of for-profit and non-profit-making providers could indeed be justified when the organisation of the service is based on free choice, on the condition that this model is necessary for safeguarding the rights of the service-users and public interests. Everything that is considered acceptable under the 'light regime' should be acceptable in the even more lightweight frame of simple authorisation schemes.

53 With regard to concessions, see J Wolswinkel, 'Concession Meets Authorisation: New Demarcation Lines under the Concessions Directive?' (2017) 12 European Procurement & Public Private Partnership Law Review 396, 401. – DOI: https://doi.org/10.21552/epppl/2017/4/6.

54 'A Voluntary European Quality Framework for Social Services' (adopted on 16 November 2010) <https://ec.europa.eu/social/BlobServlet?docId=6140&langId=en> accessed on 3 July 2024.

55 Case C-9/17 *Tirkkonen*, 1.3.2018, paras 32–35.

56 Case C-436/20, *ASADE*, 14.7.2022, paras 103–110.

57 Ibid para 91.

58 Ibid para 95.

# 4. The free-choice model in the context of Estonia's Administrative Cooperation Act

Internationally, the need for long-term care is gaining status as a recognized social risk*[59], and most likely falls within the material scope of Subsection 28 (2) of the Estonian Constitution, which regulates the protection of individuals against social risks. The Constitution does not forbid involving private entities in protection of social rights (see its Subsection 28 (3)), and the state is widely acknowledged as possessing broad discretionary power to decide on how public tasks should be performed. However, there are constitutional boundaries restricting the transfer of public duties, derived from constitutional principles and social basic rights.*[60] To specify those boundaries, mandatory requirements for the involvement of the private sector in the performance of public duties have been set out in the Administrative Cooperation Act (ACA).*[61]

From a comparative perspective, it is interesting to note that the rules for delegation of administrative tasks have been accorded constitutional rank in Finland. The Finnish Constitution*[62] states the following in its Section 124: 'A public administrative task may be delegated to others than public authorities only by an Act or by virtue of an Act, if this is necessary for the appropriate performance of the task and if basic rights and liberties, legal remedies and other requirements of good governance are not endangered. However, a task involving significant exercise of public powers can only be delegated to public authorities.' With the principles explicitly set forth in its fundamental law thus, the Finnish system can be considered stricter than the Estonian one in this regard. That also explains the recent rejection of the fundamental social-services reform that had proposed a full-choice model.*[63]

As for the corresponding Estonian regulation, according to the ACA's Section 5, an administrative duty may be delegated to a private person only if:

(1) the performance of the administrative duty by the legal or natural person is financially justified, taking into consideration, *inter alia*, the transaction costs (incl. expenses associated with administrative supervision);
(2) granting authority to perform the administrative duty is not going to impair the **quality** of the performance thereof; and
(3) the grant of authority to perform the administrative duty will not harm **public interests or the rights of persons** in respect of whom that administrative duty is to be performed.

Additionally, Subsection 126 (7) of the PPA contains terms that overlap somewhat with the regulations presented above: 'When awarding the contract, the authority or entity may have regard to considerations of service quality, continuity, accessibility, affordability, availability and comprehensiveness, the specific needs of different categories of users, including specific needs of disadvantaged persons, the involvement of users and innovation."

Although the legislator has not explicated the relations between these two norms, the ACA, with its Section 5, clearly offers better protection of public interests and the fundamental rights of the service-users (also because PPA considerations are subject to the discretion of the authority) so therefore should be applied in the delegation of social services.

Exercise of the free-choice model in the domain of residential-care services has led to administrative malpractice that jeopardises the rights of the services' users. Namely, municipalities let the individual choose a private service provider from the market but do not contribute sufficiently to making sure there are enough service places. The 'care poverty' or 'care deserts' problem linked to this issue tends to run rife in

59 European Commission, 'Long-Term Care Report: Trends, Challenges and Opportunities in an Ageing Society, Volume I' (Publications Office of the European Union 2021) <https://op.europa.eu/en/publication-detail/-/publication/484b0ceb-cd83-11eb-ac72-01aa75ed71a1/language-en/format-PDF/source-search> accessed on 3 July 2024.

60 N Parrest, 'Constitutional Boundaries of Transfer of Public Functions to [the] Private Sector in Estonia' (2009) 15 Juridica International 44; *Suomen perustuslaki*, 11.6.1999/731 <https://www.finlex.fi/fi/laki/ajantasa/1999/19990731> accessed on 3 July 2024.

61 RT I 2003, 20, 117; RT I, 17.11.2021, 7, available also in an English-language version <https://www.riigiteataja.ee/en/eli/ee/502012024007/consolide/current> accessed on 3 July 2024.

62 *Suomen perustuslaki* (n 60).

63 See n 32.

free-choice systems such as that in place in the UK, where the authorities have failed to 'shape' the market so as to guarantee service-users access to services of good quality.[*64]

In Estonia's case, there are municipalities that have refrained from admitting any legal (contractual) relationship with a service provider other than partial financing – i.e., paying the bills. A question naturally arises: how is it possible to ignore the legal obligation to guarantee existence of the service, access to it, and quality in its provision?

A large amount of the confusion lies in the fact that the ACA, adopted more than 20 years ago, does not, at least not *expressis verbis*, encompass regulation of a free-choice model. The ACA presumes that authorisation to fulfil a public duty exists. In the case of employing the free-choice system, it is unclear what constitutes the act of authorisation if this cannot be derived from the legislation or in the absence of a contractual relationship. One thing is clear, though: it is not the activity licence that constitutes authorisation to fulfil a public task.[*65] As of today, doubt remains as to whether the mandatory considerations specified by the ACA should apply also to the delivery of public services in the free-choice system.

It is crucial to note that social-policy literature discusses 'choice model' and 'outsourcing' as two alternative, mutually distinct concepts. One being demand-driven and the other supply-driven, the differentiation makes sense. At the same time, a choice-based model can be interpreted as one form of outsourcing (in a broad sense). This allows an interpretation under which the ACA applies directly to the current, demand-driven organisation of residential-care services.

Without going too deeply into the details[*66], one can state in summary that, as residential care is continuously regulated as an administrative duty, escaping the obligation to justify the delegation would be unconstitutional.[*67] Residential care could logically fall outside the scope of the ACA only if an individual chooses to live in a care home without there being an objectively assessed need for the service. In this hypothetical case, the service provider would be meeting a market need, not performing an administrative duty.

The regulation of the ACA must be revised in such a way that the fundamental principles for delegation apply irrespective of the scheme selected. From the comparative perspective, a German legislative proposal for regulating **co-operation agreements** for contract-based public–private partnerships (*Kooperationsvertrag*)[*68] deserves attention. This was designed to regulate the requirements of the so-called functional privatisation. According to the proposal, cooperation agreements with the private providers must only be allowed if the authority can guarantee retaining **sufficient influence on the proper performance of the public duty**.[*69] Underpinning this reasoning is a fundamental awareness that the state must not rely on private markets so heavily that it could lose control.

## 5. Free choice or no choice?

In Estonia, a sector-specific 'choice revolution' took place with the marketisation of the field of technical aids and social rehabilitation services in 2016.[*70] Legally, the subjective right to the service/aid was replaced with a right to take on an obligation to pay a fee in exchange for the service/aids . It remains unclear whether the associated revision was purely shimmering wordplay or, on the other hand, fruit of a genuine intention

64 C Needham and others, 'How Do You Shape a Market? Explaining Local State Practices in Adult Social Care' (2023) 52(3) Journal of Social Policy 640. – DOI: https://doi.org/10.1017/s0047279421000805.

65 If there is no clear co-operation agreement between the municipality and the private provider, then the administrative decision of the municipality granting the service (per the SWA's s 21(1)) could be implied as the act of (missing) authorisation.

66 Discussed further in the preceding publication: Viirsalu (n 1) s 4.

67 Another way to escape the considerations pertaining to delegation is to employ such means as establishing a civil-law contract instead of a public contract between the authority and the private provider, because this explicitly falls outside the scope of the ACA (s 1 (3)).

68 Legislators have proposed that a new norm be added to the Administrative Procedure Act (*Verwaltungsverfahrensgesetz*), for s 56a.

69 H-J Knack (ed), *Verwaltungsverfahrensgesetz (VwVfG): Kommentar* (11th edn, Carl Heymanns 2020) before its s 54, comment 86.

70 See M-L Viirsalu, 'Eraõiguslik sotsiaalõigus: vastutuse muutumine sotsiaalse rehabilitatsiooni õigussuhete kolmnurgas [Privatising social law: changing responsibility in the social rehabilitation legal triad]' [2017](2) Juridica 82.

of the legislator to limit the public duty to solely monetary obligations and step back from a responsibility to ensure access and quality connected with the services.

Whatever the financial compensation might be, it has no meaning if the service needed is neither on the market nor supplied by any public providers. A free-choice system makes sense only where there is true choice available. It should be stressed that the objective of social rights is not to improve the economic well-being of the individuals alone but also to offset or compensate for market deficiencies – i.e., to offer assistance that would not be sufficiently available via market mechanisms at acceptable pricing or quality. However, if a municipality chooses to fulfil its public duties (often through a blend of models), its responsibility cannot not, by any means, be limited to providing financial support for the care service. Yet the state, lacking the resources necessary for exercising effective state- and administrative-level supervision, does not push the municipalities enough to honour their constitutional obligations.

According to Sections 14 and 28 of the Constitution of Estonia, the legislator is obliged to create a clear legal framework under which local governments can organise care services on the basis of public interests and fulfil the obligation to guarantee fundamental rights. If choice, competition, and private interests enter the picture, that regulatory framework must establish clarity as to the rights, duties, and responsibilities of all parties involved in the service triad. A free-choice system implemented via mere financial compensation (i.e., a monetary benefit instead of a right to the service) could hypothetically be considered constitutional in a situation 1) wherein said service's quality and availability are sufficiently regulated either by law or through co-operation agreements and 2) in which the absence of administrative procedure is compensated for by a 'consumer law' – that is, a functionally equivalent private-law-based procedure. Currently, in stark contrast against the Nordic legal systems considered above, the Estonian case falls short of meeting these prerequisites .

# 6. Conclusions

Under a free-choice model as described in the article, a beneficiary is permitted to select a personally preferred service provider from among all providers in the relevant market who meet the legal requirements and hold a corresponding activity licence. The key element of this market-based model for arranging social services is that it is based on the demand of the consumer. With this 'open house', the foundations do not rest on supply as they do in traditional public procurement.

In Estonia, the implementation of residential-care service is sometimes mistaken for a 'free market', although in actuality it continues to be a public duty. A loosely defined regulatory framework, non-existent user rights, and an overburdened – and hence rarely applied state supervision have fuelled administrative malpractice and questionable interpretations of the law. Some municipalities see their legal relationship with the private providers engaged as being limited to just paying the bills. Thereby, the duty to ensure quality, continuity, and cost-effectiveness of the service and the obligation to protect the service-users' procedural rights has remained unclear.

The extensive freedom left to the municipalities in the manner of organising the services can demonstrate its worth only when supported by legal clarity. One would expect greater legal clarity to also save on resources and contribute to equal treatment of the service users.

The Administrative Cooperation Act requires an analysis to be carried out prior to the transfer of public tasks to a private provider. This shall ensure that the transfer of public tasks does not end up violating neither individual-level fundamental rights nor collective-level public interests. With this paper I contend that the requirement of reasoning must be extended to any application of the market-based choice model that entails executing public tasks. Though the ACA, by assuming that the public authority is the one to select the private service provider, does not explicitly cover a free-choice model that falls outside the sphere of public-procurement procedure, interpreting the law as applying also to a free-choice model is justified. It is crucial to agree upon the regulative leeway afforded with regard to the private actors to avoid the 'escape' of the public authorities into the private law. The principles of the rule of law and the social state, alongside constitutional social rights, require functional equality in the protection of the service users' rights, regardless of whether the service is provided by a private legal entity or by a public one. The 'enabling state' does not just enable the private provision of public services; it also bears a constitutional responsibility to

guarantee (*Gewährleistungspflicht*), which requires retaining sufficient ability (competence and resources) to influence the proper fulfilment of the public task.

International comparisons attest that balanced development in long-term care demands more than giving the public, business, and third sector equal opportunities to provide the care services. If the public sector decides to rely on private initiative, the political and regulatory environment must actively engage and empower the not-for-profit sector that is driven more by public interests and social values. There is empirical evidence that in the realm of personal (human) services, this contributes to achieving high service quality, reaching aspects of quality that typically prove difficult to measure and supervise.

Although empirical studies increasingly highlight negative consequences of delegating public services to the private sector,[*71] the academic literature warns also against overly generalised conclusions about its effects. After all, success depends on numerous non-legal factors (such as market conditions, the institutional framework, and service-transaction costs) in addition to the legal setting.[*72] Nevertheless, the current situation in Estonia's residential-care market is an example of a true **market failure** since the demand for the service exceeds the supply and the lack of service placements leaves the municipalities dependent on private providers and their conditions, including rapid rise in care home prices.

Looking at the international experience, one can derive the conclusion that market-based choice models tend to thrive in areas with denser competition and are suitable predominantly for empowering informed clients who are willing and able to compare between service providers and to 'vote with their feet' (which, in turn, relies on sufficient, healthy competition). Therefore, while the free-choice model may prove viable for some services, it is not a panacea – it might not be an optimal solution for the residential-care service users.

Whether to provide choice and to what extent is, consequently, a matter primarily for social policy, not for the law. That said, considering that the organisation of social services is bound to grow even more complex in the coming years, with public and private law increasingly intertwined, lawyers must be prepared. Legal professionals need to take responsibility for ensuring that all forms of public–private co-operation, especially the innovative solutions, are adequately linked with the rest of the legal system, without forgetting the underlying aim: safeguarding the individual service-users' fundamental rights and, simultaneously, public interests.

71 S Overman, 'Great Expectations of Public Service Delegation: A Systematic Review' (2016) 18 Public Management Review 1238. – DOI: https://doi.org/10.1080/14719037.2015.1103891.

72 OH Petersen, U Hjelmar, and K Vrangbæk, 'Is Contracting Out of Public Services Still the Great Panacea? A Systematic Review of Studies on Economic and Quality Effects from 2000 to 2014' (2018) 52 Social Policy & Administration 130, 130. – DOI: https://doi.org/10.1111/spol.12297.