The organization of nursing homes as local policymaking

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1. BACKGROUND

Local governments are the closest to citizens and the community. Therefore, they are the main actors when it comes to delivering welfare or social services, fulfilling the binding requirement laid down in Art. 50 of the Spanish Constitution (CE). Under this constitutional provision, public authorities must protect and provide for the elderly.[338] To do so, local authorities are duly empowered and have many available instruments and resources. The long list of welfare services and benefits shows that welfare has a broad scope, also evidenced by the wide array of services and benefits provided by local bodies. These aspects have been discussed in this book.

Welfare's broad scope and diversity also affects public policies specifically targeting the elderly, including residential care. Although authorities tend to prioritize active ageing or "ageing in place" policies,[339] nursing homes and other forms of residential care still play a *prominent role* in local welfare provision.[340] This is why we focus on them as one of the cornerstones of local policymaking and, in particular, of elderly-related policies.

Indeed, the importance of this political dimension is often downplayed (and rightly so), or even disregarded altogether, in many legal studies on the arrangement and organization of welfare. Note that this contrasts with political science works. This is obviously not a problem for legal studies, since they actually focus on legal aspects. The analysis thereof could be distorted or tainted by political matters. However, keep in mind that law and politics often run parallel, *influence each other* and overlap, as is the case with other fields such as economics or technology. This is also true for local government, where the political and administrative or decision-making spheres are closely and distinctly intertwined.

[338] Rodríguez de Santiago, J.M. (2007), La Administración del Estado social, Marcial Pons, Madrid, p. 44.
[339] Díez Sastre, S. (2020b), "Los servicios municipales para mayores en el entorno rural y urbano," Istituzioni del Federalismo, 2/2020 (pending publication), p. 441-460 (p. 449).
[340] Egea, A. and Navarro, C. (2019), Mayores. Análisis comparado de políticas locales de mayores en municipios de la Comunidad de Madrid, Instituto de Derecho Local-UAM, Madrid, p. 59.

Consequently, decision-making (including the arrangement and organization of welfare services) relies on a legal and political perspective, particularly considering the democratic legitimacy of local bodies and, particularly, municipalities. For many decisions, this twofold perspective is implemented by *entirely separating* both domains. Accordingly, when public authorities want to implement a local policy, they first carry out a legal assessment to gain an understanding of what is legally feasible or allowed. And, finally, within those legal boundaries, public authorities make a political decision. Let us imagine, for instance, a municipality in need of IT support. It may rely on a private provider or hire new staff. Both organizational decisions are available to the local government, and making one or the other only has an internal dimension, i.e., it has no impact vis-à-vis third parties.

This decision-making outline applies to many local government decisions, where the legal implications of one decision or another do not vary significantly. Nevertheless, there are certain political decisions with a major legal impact. If so, law and politics are no longer entirely separate domains, since political decision-making affects the local policy's legal framework. The legal framework's prominent role is displayed in *two stages*: (i) prior to making the decision, in order to learn the available ways and resources; and also (ii) after the decision has been made, since the legal framework affects many aspects regarding the implementation and enforcement of the decision.

Therefore, at early stages of public policymaking it is often necessary to combine legal and political aspects, particularly considering that the legal effects of many decisions do not only have internal implications, but also effects vis-à-vis third parties. In other words, citizens can be affected by a political decision that *has significant legal implications*, e.g., water supply management decisions. If water supply is directly managed by local authorities, citizens will only be required to pay a public fee, whereas if local governments rely on indirect management approaches citizens will be charged a private price. These decisions are present in the welfare sector, which is characterized by its focus on citizens' living conditions.

The purpose of this chapter is to examine the potential impact of applicable legal frameworks on the organization and arrangement of nursing homes, particularly at a local level. We intend to come up with an *outline* including the various options available verifying their potential implications. This approach to decision-making allows to fine-tune public policy decision-making to find the alternative that best suits the political objective, in order to ensure that such political objective be fulfilled.

2. TYPES OF FACILITIES

As is well-known, the map of residential homes for the elderly is defined by its diversity, particularly regarding ownership and management. Although residential facilities are mostly

a public service,[341] there are *privately owned* and *publicly owned* facilities, as well as nursing homes held by non-profit organizations. On top of that, there is a third type of facilities, i.e., *public-private* facilities.

2.1. Public facilities

Public facilities are established by public entities that exercise their powers to create them, with no involvement of private parties in management. However, there can be *more than one public entity* involved in public facilities, including local governments.

First, local bodies are entitled to open a nursing home and *manage it directly*, whether setting up publicly-held companies or enterprises under Art. 85(2)(a) of the Spanish Local Government Act (*Ley de Bases del Régimen Local*, LBRL) or not. Such a nursing home will be (i) included in the relevant regional welfare system; and (ii) subject to the applicable regional provisions.

Nevertheless, a public body may open a nursing home and *commission* or *outsource* its management to other entities. This would not qualify as direct management. In these facilities, public authorities would be responsible, i.e., held liable, for the residential services (*Trägerschaft*), whereas the actual provision of the services (*Leistungserbringung*) is commissioned or delegated to a different entity. There are various instruments for this twofold involvement (e.g., commissioning arrangements or *encomiendas de gestión*; transfers or delegations; and agreements), the most remarkable being the so-called *concierto* or public-private arrangement.

2.2. Private facilities

These facilities are operated by private entities and public authorities are not accountable for the services provided therein. We refer to private nursing homes, resulting from free enterprise (i.e., the freedom to establish and conduct a business) and subject to public oversight. Private facilities thus play a minor role in the study of nursing homes at a local level, since *there is no public action or public authorities involved* in the establishment or operation thereof. However, it is relevant that there be more or fewer private nursing homes when assessing the various political options, e.g., not opening a public facility because there are already enough private residential homes.

[341] Ortega Bernardo, J. (2017), "Servicios públicos e iniciativa económica local," in Velasco Caballero, F. (Dir.), Tratado de Derecho económico local, Marcial Pons, Madrid, p. 73-104, § 6.

2.3. Public-private facilities

These are also called "mixed facilities." Let us recall the aforesaid distinction between accountability for the service and the actual provision thereof. Having that in mind, in public-private facilities, public authorities are still responsible (i.e., held liable) for the service, but the *factual provision* thereof rests on private entities or actors. There are two instruments used to get private entities involved in the provision of nursing home services: concession agreements and the so-called *conciertos* or public-private arrangements.

2.3.1. Facilities subject to public-private arrangements or **centros concertados**

Public-private arrangements are one of the most widespread instruments in the organization of welfare services. Typically, they qualify as non-contractual instruments used for organizational purposes (see Art. 3 of Aragón Regional Act 11/2016). However, they can also qualify as a specific type of the formerly applicable contract for the management of public services under Art. 277 of the Spanish Public Procurement Act (TRLCSP). Another defining feature of welfare public-private arrangements is that they allow for the provision of welfare services through entities funded, authorized and overseen by public authorities (Art. 101(1) of the Andalusia Regional Act on Welfare Services). Thus, there are *non-contractual public-private arrangements* and *contractual arrangements*, depending on the applicable regional welfare legislation. In both cases, the subject-matter of the arrangement is usually (i) to reserve public places for the relevant welfare service; or (ii) fully managing the service at a private facility (see Art. 62(1)(a) of the Basque Country Act on Welfare Services or Additional Provision 3(3) of Catalonia Regional Decree 3/2016).

In any case, these public-private arrangements for welfare provision seem to be considered as *organizational instruments or approaches*, which are therefore beyond the classic distinction between direct and indirect management. It remains unclear whether this organizational approach arises from a traditional understanding of direct and indirect management or, rather, from an interpretation of such distinction which is overly based on public procurement law. Indeed, public-private management approaches (also referred to as joint management) often fall outside the scope of the direct-indirect management framework.[342] In any event, there are no grounds to consider public-private arrangements as a *tertium genus* on top of direct and indirect management approaches.[343]

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[342] López de Castro García-Morato, L. (2017), "Formas de gestión de los servicios públicos locales," in Velasco Caballero, F. (Dir.), Tratado de Derecho económico local, Marcial Pons, Madrid, p. 105-152, § 28.

[343] Domínguez Martín, M. and Chinchilla Peinado, J.A. (2019), "La acción concertada en la gestión de servicios sanitarios en la Ley 9/2017 de contratos del sector público," Derecho y Salud, no. 29, p. 186-193 (p. 191); Díez Sastre, S. (2020a), "La acción concertada como nueva forma de gestión de los servicios sanitarios," in Agulló

Contractual public-private arrangements or *conciertos* have been traditionally based on the long-standing "contract for the management of public services." However, the 2017 Spanish Public Procurement Act (*Ley de Contratos del Sector Público*, LCSP) removed this type of contract, so now we must determine in which category do these *conciertos* fall. A good starting point could be the 34th Additional Provision of the LCSP, which generically refers to the new service concession contract if there are any references to the contract for the management of public services. Nonetheless, there is only room for this referral as long as this regulation "fit," or "be in line with," the previous one. Self-evidently, such a generic or undetermined referral will not work for all types of public service management contracts, but *only for service concession contracts*, since only these public contracts allow for transferring the operating risk to the contractor. This "risk transfer" is one of the defining features of service concessions (Art. 15(2) LCSP).

Consequently, the successor of the former public-private arrangement in public service management contracts is the *service contract*.[344] Therefore, it would be wrong to consider that contractual arrangements for welfare provision entail transferring the risk (even if only because the demand for public services is guaranteed).

Nevertheless, defining public-private arrangements for welfare provision as a non-contractual instrument raises major concerns from the perspective of public procurement law. There are two public procurement levels, i.e., the EU level and the domestic or national sphere. First, note that the *European notion of public contract* is a functional concept, where neither the *nomen iuris* nor the domestic categorization matter, i.e., it is irrelevant whether national provisions categorize the relevant instrument as a "contract," an "agreement" or otherwise (see CJEU Judgment in Case C-382/05, par. 30). We must begin by verifying if public-private arrangements for welfare provision (*conciertos*) fall under the European concept of public contract. If so, we will check whether EU public procurement directives fully apply thereto. The LCSP transposed the public procurement directives almost word by word, so we will only refer to the LCSP in case there are any significant differences or remarkable aspects.

Under Directive 2014/24/EU of the European Parliament and of the Council, of 26 February 2014, on public procurement and repealing Directive 2004/18/EC (Directive 2014/24), the European notion of public contract has four *distinct features*: parties, subject-matter, remuneration and award requirements or what Directive 2014/24 calls "selectivity." Under EU law, the parties to the contract must be contracting authorities and economic operators.

Agüero, A. (Dir.) and Marco Peñas, E. (Ed.), Financiación de la sanidad. Tributación, gestión, control del gasto y reparto constitucional del poder financiero, Tirant lo Blanch, Valencia, p. 232-261 (p. 252).

[344] Villar Rojas, F.J. (2018), "El impacto de la nueva Ley de Contratos del Sector Público en la gestión de los servicios públicos locales," Anuario de Derecho Municipal 2017, no. 11, p. 75-101 (p. 86-87).

This poses no issues regarding nursing home arrangements, since a party to the *concierto* is always a public body. The subject-matter raises no concerns either, having regard to the thorough definitions of welfare services in the *Common Procurement Vocabulary*.

Remuneration could create problems, since compensation is not always clear. Some pieces of regional legislation on *conciertos* for welfare provision state that the price or compensation payable to the provider must not exceed the costs incurred thereby to deliver the services, thus not including any profit (see Articles 4(g) of Aragón Regional Act 11/2016 and 87(2)(g) of the Valencia Regional Act on Welfare Services). Many regional provisions prefer non-profits to be parties to these *conciertos*[345] (see Art. 88(1) of the Valencia Regional Act on Welfare Services). That is why they set that cap on remuneration. Note, however, that according to the CJEU, an arrangement or *concierto* cannot fall outside the concept of public contract merely because the remuneration paid to the relevant non-profit organization remains limited to reimbursement of the expenditure incurred to provide the agreed service (see CJEU Judgment in Case C-113/13, par. 37).

It is also worth discussing the award requirements in public-private arrangements or *conciertos*, whether or not they involve non-profit organizations. Article 11(6) LCSP states that welfare provision by private entities falls outside the scope of the LCSP if the contracting authority simply covers the cost of the services or grants unlimited or uncapped permits or authorizations–as long as this whole procedure ensure sufficient advertising and comply with the principles of transparency and non-discrimination. Article 11(6) LCSP is worded just like Recital 114 of Directive 2014/24. From this perspective, only if these *conciertos* were concluded with all the private entities that requested it, there being no actual "selectivity," could they benefit from not being subject to public procurement law, as long as the entities met the pre-established requirements. However, an overview of regional welfare legislation shows that there are *many and extremely detailed criteria* used to select the relevant entity, including quality of the service, territorial presence or experience. In sum, there are indeed award requirements, i.e., an actual selection or "selectivity," and thus public-private arrangements for welfare provision or *conciertos* are subject to EU public procurement directives and to the LCSP.

Articles 74 *et seq.* of Directive 2014/24 allow these *conciertos* for welfare provision to rely on a *simplified framework* for the award requirements applicable thereto (thus falling under the scope of the Directive). The rationale underlying EU legislation is that social or welfare service contracts have a limited cross-border dimension, so that they should only be subject to Directive 2014/24 if they exceed the EUR 750,000 threshold under Art. 4(d) or if they actually have a cross-border dimension. And, if they ended up falling within the scope of the Directive, they would be subject to the applicable specific regime allowing to award the

[345] Díez Sastre (2020a: 244, 257).

contracts directly to eligible entities (see Art. 75 of Directive 2014/24). If the welfare or social service does not exceed that threshold, the LCSP applies. Note that the LCSP provisions resemble those of the Directive for any contracts not exceeding the threshold and thus not subject to the Directive.[346]

In sum, public-private arrangements for welfare provision *must qualify as public contracts*. It is unimportant whether regional legislation defines these *conciertos* as non-contractual organizational instruments if, following a thorough analysis, it is safe to conclude that they have the defining features of a public contract. This has major implications regarding (i) access to the arrangement; and (ii) the selection of the private providers involved therein. On top of that, qualifying these *conciertos* as public contracts has additional legal implications that will be discussed below.

2.3.2. Commissioned nursing homes

Commissioned nursing homes are another type of mixed or public-private facilities. In contrast with facilities subject to public-private arrangements or *centros concertados*, commissioned facilities do not reserve places at public authorities' request. Rather, public authorities commission a private entity to *fully manage* a publicly owned nursing home. Therefore, commissioned facilities supplement *centros concertados*, since the main difference between them is the facility's ultimate owner. Commissioned nursing homes are not as common as the *centros concertados*.

Note that public authorities are entitled to award a service concession to a private entity managing a publicly owned facility provided that the private provider be transferred the operating risk. Furthermore, as pointed out before, it is unlikely that in such a contract (i.e., involving that kind of welfare services) demand not be guaranteed. In any case, we would have to carefully examine the (i) *transfer* or *allocation of risks* in the contract; and (ii) specific circumstances, in order to determine if it qualifies as a service concession or a service contract.

It is worth noting that some Autonomous Regions have passed legislation allowing public authorities to commission the full management and provision of welfare benefits to private entities relying on a "non-contractual organizational instrument" other than the aforesaid public-private arrangement for welfare provision or *concierto*. See, for instance, the so-called "commissioned management" or *gestión delegada* governed by the Third Additional Provision of Catalonia Decree 3/2016. Commissioned management resembles *conciertos*, although there is a significant difference: the relevant welfare or social service is provided in publicly owned facilities. To verify if they are non-contractual instruments, we must rely on

[346] Díez Sastre (2020a: 242).

the criteria provided for the *conciertos sociales*, although it seems unlikely that they qualify as something other than contracts.

2.4. Significant relationships and interactions between actors involved

It is worth examining the significant relationships and interactions at each facility. First, in public nursing homes there can be *twofold* relationships: the public authority-resident binomial. If two different public bodies were involved (one of them being held liable and another public entity providing the service), there would be a *threefold* relationship: the accountable public body-public provider-resident trinomial. Public-private facilities, whether commissioned facilities or subject to *conciertos*, also have trinomials with accountable public bodies, public providers and residents. Finally, we only found twofold relationships in private nursing homes, although with no administrative or public roles: the private entity-resident binomial.

In public-private facilities there are threefold interactions and we also found *three distinct legal relationships*. The public body-resident binomial will be referred to as the "basic relationship," where the public body is responsible for guaranteeing that the service be provided. Additionally, public bodies and service providers have a cooperation relationship, whether contractual or non-contractual, depending on the circumstances. Finally, providers and residents have a relationship based on the actual provision of the relevant benefit or service.[347]

3. STANDARDS TO COMPARE THE DIFFERENT FACILITIES' LEGAL FRAMEWORKS

The previously discussed framework is sufficiently comprehensive so as to examine nursing homes' legal regimes and their impact on elderly policymaking by local governments. To do so, we relied on a set of *standards* or *benchmarks* that allow to (i) go over major aspects of residential homes' legal framework; and (ii) compare the effects of providing the service one way or another. We relied on the following standards or benchmarks: (i) activities comprised by the service provision; (ii) public oversight of providers; (iii) public authorities' accountability and liability regime; (iv) economic or financial framework; and (v) organizational and staff requirements applicable to providers.[348] These are not the only possible standards, but they most certainly seem the most significant.

[347] Rodríguez de Santiago (2007: 81, 116).

[348] Castillo Abella, J. (2020), "Tipología y régimen jurídico de los sujetos gestores de residencias de mayores," InDret, no. 2/2020, p. 457-507.

3.1. Activities comprised by the service provision

First, it is worth determining those factors actually defining the welfare service received by residents. We focus on which elements shape the actual welfare provision and to what extent, relying on the classic duality *legal activity* and *factual (non-formal) activity*. This distinction further clarifies that there are two backbones defining the final service or benefit received by nursing home residents: (i) the previous requirements specifying how to provide the service; and (ii) how the service is actually delivered.

The distinction between legal and factual activity revolves around the activity's actual impact on legal situations and legal status rather than any formal aspects. Therefore, legal activity qualifies as any legal action creating, modifying or terminating legal situations, which contrasts with factual (non-formal) activities.[349] Consequently, administrative acts, administrative rulemaking and administrative contracts or arrangements would qualify as legal activity.

Contrasting legal and factual activity could lead to a misconception, i.e., that factual activity falls outside the scope of the applicable law. This would be a wrong assumption, since both are fully subject to the law, which regulates them and renders them *law*ful or *unlaw*ful.[350] The difference between both forms of activity is that factual action is *not able to modify legal status*. Put differently, factual activity is not binding.[351]

From this perspective, we obviously need the law or legal activity to *define, on an* ex ante *basis*, the relevant welfare service (including residential homes). However, legal regulation is not equally intense or stringent in all facilities. Nursing homes where public authorities are held liable (public and public-private facilities) are more densely regulated than private residential homes.

Interestingly enough, factual activity truly shapes residential home services.[352] Legal provisions cannot get into the actual delivery of the service or benefit, since regulation can only provide how to deliver the service, but it cannot perform it *de facto*. Such *de facto* delivery is entirely left for factual activity.

Factual or *de facto* activity greatly differs depending on whether public authorities are held liable for the service. If so, the service qualifies as a public benefit, and therefore it is mostly

[349] Stober, R. and González-Varas Ibáñez, S. (1995), "Las actuaciones materiales o técnicas," Revista de Estudios de la Administración Local y Autonómica, no. 267, p. 573-590 (p. 574); García de Enterría, E. and Fernández, T.R. (2017), Curso de Derecho Administrativo, Volume I, 18th ed., Thomson Reuters-Civitas, Cizur Menor, p. 867.

[350] García de Enterría and Fernández (2017: 867-868).

[351] Stober and González-Varas Ibáñez (1995: 573-574).

[352] Rodríguez de Santiago (2007: 110).

governed by public law provisions, either directly or indirectly. Performance or delivery rests with public authorities (in public facilities) or private entities commissioned to that end (public-private facilities). Private nursing homes also include strictly private services that cannot qualify as public. Therefore, these services are subject to private law provisions. Yet again, we can see the *varying scopes* of provisions governing residential homes: in public and public-private facilities they seek to regulate as much as possible the delivery of the service or benefit and the quality thereof, whereas the purpose of regulating private nursing homes is solely to ensure a minimum standard.

These preliminary insights already show the impact of this first legal benchmark for residential homes. Having regard to (i) the legal activity's varying scope and intensity; and (ii) the existing differences in the factual activity, it is worth concluding that the *scope of action* is different in each type of facility. There is very little room for action in public nursing homes, but private facilities enjoy the broadest scope of action. As a result of these varying scopes, providers and residents are more or less free to define or shape the services or benefits. In private residential facilities, a resident could agree with the providers that he be placed in a single room or be served specific food. However, this would be very unlikely in nursing homes where public authorities are held liable, since these tend to be highly standardized and strict.

Nevertheless, these varying scopes for action allow for a different interpretation, based on the *public authority's ability to influence* the welfare provision altogether, including both legal and factual activities. Local governments have limited rulemaking power in this field, but we can assess their influence on each facility's residential service as long as they have some connection to it. They have the highest influence on public facilities. Local bodies will control and perform any aspects related to the welfare service to be provided at nursing homes owned thereby. As for residential facilities managed by local bodies (although owned by separate public entities), the managing public authority will mostly influence the *de facto* delivery of the service. Public bodies will have significant power over public-private nursing homes promoted by them, but not as much as in public facilities, because they would not be factually delivering the service. Within the context of public-private residential homes, both the public body's legal activity and oversight of private providers play a major role. Finally, public authorities barely have any influence on private nursing homes. Indeed, public bodies have little leverage on the provision of residential home services other than the oversight and inspections performed before the facility started to operate. And keep in mind that these inspections often relate to other fields of local action, such as urban development or health-related matters.

Accordingly, when it comes to nursing home policymaking, it is worth comparing (i) the scope of action left to residents and providers; and (ii) the relevant public body's loss of influence or leverage over the welfare benefit or service. Thus, we could seek a fair balance

between granting more freedom to private actors and the need to ensure high-quality nursing homes.

3.2. Public oversight of providers

The oversight of nursing homes is another significant standard to understand the legal framework applicable thereto. Administrative oversight of nursing homes can be either *ex ante* or *ex post*. Also, as discussed above, oversight does not always have the same purpose: sometimes oversight provides for minimum requirements, whereas other forms of control may be aimed at ensuring compliance with stringent quality standards. In any case, this study only focuses on the requirements specifically applicable to residential homes, regardless of any other requirements (e.g., related to urban development or health).

See below an outline of the oversight conducted on nursing homes.[353] This outline evidences the importance of *ex ante* controls of welfare services, including local nursing homes. Keep in mind that local authorities can be *either the owners of the facility or the providers*. Therefore, they should not only be concerned with obtaining the relevant permits and certificates, but also with making sure that any private entities commissioned to manage public-private nursing homes have them.

3.2.1. **Ex ante** *controls*

3.2.1.1. Permits

The difference between *ex ante* and *ex post* oversight is based on the *start of the activity*. Administrative permits are a paramount example of *ex ante* controls. Permits seek to prevent potential damage arising from the activity to be authorized or mitigate the impact or scope of such activity.[354] Permits will allow to make sure that nursing homes comply with the relevant building, operational, staff and training requirements as well as with any quality standards. Note that such standards must remain in place for as long as the service is being provided (see Art. 85(2) of the Andalusia Regional Act on Welfare Services). There are other oversight instruments (e.g., prior communications).

An in-depth analysis of regional legislation on nursing home permits shows right away that *not all of them* require administrative permits to operate. Generally, the competent regional authority or department must grant a permit for private facilities (See Articles 71(1) of the Catalonia Regional Act on Welfare Services, 55(2) of the Madrid Regional Act on Welfare

[353] Due to their specificity and short duration, this study does not examine the specific provisions on nursing homes passed during the 2020 state of emergency resulting from the COVID-19 health crisis.
[354] Laguna de Paz, J.C. (2006), La autorización administrativa, Thomson-Civitas, Cizur Menor, p. 37.

Services and 59(1) of the Basque Country Regional Act on Welfare Services). Now, do publicly owned facilities require an administrative permit to operate? Some Autonomous Regions, like Valencia, require that all nursing homes (including those owned by local or regional bodies) obtain a permit (see Art. 58(3) of the Valencia Regional Act on Welfare Services, providing that the requirements are the same as the certification requirements imposed on private nursing homes). Other regional governments, like that of the Basque Country, solely require private facilities to apply for a permit (see Art. 59(1) of the Basque Country Regional Act on Welfare Services). In other regions, only those nursing homes owned by regional (not local) bodies are exempt from obtaining a permit (see Art. 4(3) of Castilla y León Decree 2/2016).

Not being required to obtain a permit does not mean that public residential homes need not fulfill the same requirements as private facilities. Most likely, public nursing homes are not required to apply for a permit because it is deemed unnecessary that public authorities grant a permit to themselves, as long as the applicable standards are met. Even if no permits are required, all Autonomous Regions do require a *certification* that the facility meet any applicable requirements. Such certification can be a report, a decision or resolution issued by the head of a regional department or something else.

Interestingly enough, the Basque Country Regional Government requires more than one permit. More specifically, it requires two permits for *different purposes*, i.e., with a different subject-matters: (i) a permit prior to building the facility; and (ii) another permit or authorization before it starts to operate. However, regional authorities (e.g., Madrid, Valencia or Catalonia) usually require just one permit, prior to the start of activity.

3.2.1.2. Certification

Whereas permits seek to lay down minimum requirements applicable to all residential homes, certificates ensure that such residential homes comply with *stringent quality standards* on top of the aforesaid minimum requirements. Certificates are often required from privately owned facilities where public authorities remain accountable (public-private nursing homes). Accordingly, certification seeks quality assurance, whether the service be provided by public bodies or private entities cooperating therewith.[355] Certification procedures often resemble permit applications, but sometimes they work like some sort of contractual verifications.

Therefore, any facilities that want to participate in competitive procedures or tenders to be awarded public contracts or *conciertos* must previously obtain (and keep) their certification

[355] Fernández Ramos, S. (2008), "Los centros residenciales para personas mayores en el marco del sistema de servicios sociales," in Zurita Martín, I. (Coord.), Responsabilidad derivada del internamiento de personas mayores dependientes en centros residenciales, Bosch, Barcelona, p. 93-156 (p. 119).

(see Articles 84(1) of the Andalusia Act on Welfare Services, 63(1) of the Valencia Act on Welfare Services and 75(2) of the Catalonia Act on Welfare Services). Certificates are thus useful to know about the minimum quality standard provided by each type of facility. Public nursing homes are rarely required to obtain a certificate (i.e., to meet certification requirements) for the same reason they are exempt from applying for permits. In Andalusia, Catalonia or the Basque Country, public facilities are not required to obtain a formal certificate. In Valencia, all residential homes that are not owned by regional authorities must be duly certified. Under Art. 12 of Madrid Regional Act 11/2002, nursing homes based in Madrid will only be subject to certification requirements if they exceed a certain number of residents. Regardless if public nursing homes must obtain a certificate, they are required to meet the same quality standards as facilities subject to certification requirements. This is a way of guaranteeing the *quality of the public nursing home network*. However, this does not mean that a non-certified private facility does not meet the same (or even higher) quality standards, it is just that such private facility is not forced or required to maintain such high standard.

3.2.2.* Ex post *controls

As noted before, there are also controls performed after the residential homes have begun providing their services. Such *ex post* control is conducted by public authorities exercising their *powers of inspection* under the applicable regional welfare legislation. Inspections largely have preventive purposes, although they can also find and correct breaches or certain legal violations.[356]

Under the applicable sector-specific legislation, these powers of inspection are often granted to regional authorities. In fact, regional governments are responsible for (i) the welfare system (including residential homes); and (ii) authorizing the provision of nursing home services. These powers of inspection cover all types of facilities, whether public, public-private or private. Inspections may be conducted on any kind of residential home, but not all inspections will be equally stringent or, better said, subject to the same standards. This will depend on the requirements to be complied with by each facility. Therefore, the reference or standard for inspections may be either the permit requirements or the certification requirements. These are referred to as *general powers of inspection*, governed by generic provisions in the applicable legislation.

Additionally, inspection powers over nursing homes can be based on the specific contract or arrangement for publicly owned facilities with third party providers. Public procurement law

[356] Rivero Ortega, R. (2000), El Estado vigilante, Tecnos, Madrid, p. 79-82; Fernández Ramos, S. (2002), La actividad administrativa de inspección. El régimen jurídico general de la función inspectora, Comares, Granada, p. 21-25.

grants powers of inspection to public authorities so as to oversee and control the appropriate provision of the service by the commissioned provider. Note that these inspection powers have been strengthened by the so-called "monitoring authority" under Art. 62 of the Spanish Public Procurement Act (LCSP). Art. 190(II) LCSP provides that contracting authorities will have general powers of inspection over contractors. Moreover, Art. 287(2) LCSP specifically provides for such inspection powers regarding service concessions, and Art. 312(e) for service contracts when they qualify as public contracts or entail the direct provision of benefits. Considering that these inspection powers are only granted to public authorities depending on how they manage their services, they will be designated as *special powers of inspection*. As for public-private arrangements or *conciertos*, special powers of inspection will be granted as long as (i) the rules specifically governing the *concierto* so provide (see Art. 15 of Extremadura Regional Act 13/2018); or (ii) they be set out in the arrangement itself. Indeed, inspection powers could very well qualify as mandatory content within the *concierto* (Art. 9(e) of Madrid Regional Decree 2/1990).

The general and special powers of inspection are similar but not identical (hence the distinction). General inspection powers are held by regional authorities, whereas special powers of inspection are often granted to the contracting public body, which may not be a regional authority. Also, general powers of inspection cover all facilities, whereas special inspection powers only apply in publicly owned facilities with an outsourced provision of services (i.e., if the owner of the facility and the service provider are different entities). This has a twofold implication for local bodies. On the one hand, they will only be entitled to inspect public-private facilities *established thereby*. On the other, facilities *managed by local authorities* under an arrangement with regional governments may also be subject to inspections.

Accordingly, private nursing homes will only be subject to regional inspections. Public nursing homes as well, unless they be owned by regional authorities and the services be provided by a different public entity, e.g., a local body. Public-private residential homes may be inspected by one or two inspection authorities, depending on whether the contract or arrangement was concluded with a regional body or with a different public authority. This benchmark allows local authorities to verify (i) if they have inspection powers over other facilities; and (ii) the scope of the powers of inspection over their own nursing homes.

3.3. Liability

A central aspect of nursing homes' legal frameworks is their liability regime. It is worth clarifying if public authorities will be liable for any damage to residents or third parties arising from the provision of residential home services. First, we could rely on the *summa divisio* (or long-standing separation between public and private law) and argue that public

facilities will be subject to the state liability framework−i.e., liability of public authorities or public tort law−whereas private residential homes will be subject to private tort law. Public-private facilities will have a combined regime. However, this is overly simplistic. See a more thorough analysis below.

First, let us differentiate between two *separate activities* that can give rise to liability: (i) the factual (non-formal) provision of the service or benefit; and (ii) oversight or control of the facilities. This section focuses on these two activities. Although there are more situations that could give rise to liability regarding nursing homes, (i) and (ii) above allow to clarify, for the sake of explanation, the difference between public, public-private and private facilities.

3.3.1. Liability arising from the factual provision of the service

3.3.1.1. Public facilities

Liability in public nursing homes is governed by the General Act on Public Authorities (LRJSP) and the General Act on Administrative Procedure (LPAC). There is no doubt that public nursing homes provide "public services" within the meaning of Art. 106(2) of the Constitution (CE). It does not really matter whether there is a twofold or a threefold relationship (a binomial or a trinomial) at the public facility, since all actors involved will be public authorities except the residents. The only difference between binomials and trinomials in this case would be that, in threefold relationships, damage could be *attributed to* both public authorities, thus being *both* liable vis-à-vis the injured party, who would claim liability from *both* of them.

As is well-known, Spain's liability framework for public authorities has been for decades a *strict liability* regime. This was confirmed by Constitutional Court Judgment (STC) no. 112/2018. The Court clarified that Art. 106(2) CE provides for a *strict* state liability regime that must remain a *strict* liability framework no matter what, regardless of how the regime be implemented in statutory provisions (legal basis 5). In spite of the Court's bold statements and arguments, whether there is a strict liability standard raises some concerns. In fact, there are many scholarly works expressing these concerns, as well as a bold dissenting opinion issued against STC no. 112/2018 by Justice Andrés Ollero.[357] For now, we will rely on Justice Ollero's dissenting opinion and state the following: public authorities are subject to a strict liability regime, but negligence can also apply as a liability standard within this framework.

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[357] See a more comprehensive analysis in Castillo Abella (2020: 478 *et seq.*).

Otherwise, negligence ends up playing a part in liability cases, distorting them and giving rise to elusive lines of reasoning.[358]

3.3.1.2. Private facilities

At the other end of the spectrum we can find private facilities. The wrongful or harmful provision of services in private nursing homes is only attributable to the managing private entity. Thus, only the private entity managing the facility will be held liable. Private tort law applies to these cases. The major difference between private tort law and the abovementioned strict liability regime is that, under non-strict or negligent-based liability frameworks (private tort law) the defendant will only be held liable if it is *negligent or otherwise at fault* (Articles 1191 and 1902 of the Spanish Civil Code or CC), whereas the strict liability standard requires that the defendant be held liable regardless of its intent or mental state when committing the action.

Liability in private residential homes will be mostly *contractual* (see Articles 1101 *et seq.* CC), since the contract governing the service provision will include additional services such as accommodation, food or medical care. Liability arising from ancillary obligations that have not been expressly provided in the contract will also qualify as *contractual*, since such ancillary obligations are directly related to the contractual obligations.[359] Keep in mind that there are some significant, and applicable, consumer protection provisions (see, for instance, Art. 148 of Decree 1/2007 on the liability for harm to consumers arising from the misuse of health services).

3.3.1.3. Public-private facilities

Finally, public-private facilities pose two liability-related issues: the applicable *liability standard* and *jurisdiction*. Both are complex and challenging matters that do not allow for indisputable or clear-cut solutions. Rather, we should find reasonable approaches consistent with the legal system as a whole.

Prior to dealing with these two issues, it is worth discussing allocation of liability in different cases. In public procurement, the default rule is that *contractors be held directly liable*, unless the damage arises from a public authority's instruction (see Articles 196, 288(c) and 312(b)

[358] Mir Puigpelat, O. (2000), La responsabilidad patrimonial de la Administración sanitaria. Organización, imputación y causalidad, Civitas, Madrid, p. 68-75; Doménech Pascual, G. (2019), "Sobre el poder explicativo del análisis económico del Derecho. En especial, del Derecho de daños," InDret, no. 2/2019, p. 22-24.
[359] Asúa González, C.I. (2014), "Responsabilidad civil médica," in Reglero Campos, L.F. and Busto Lago, J.M. (coords.), Tratado de responsabilidad civil, 5th ed., Pamplona, Thomson Reuters-Aranzadi, Pamplona, p. 697-815 (p. 729-730).

LCSP). This is in line with the rule that contracts be performed at the risk and expense of the contractor, and it is due to the fact that, generally, there is no causal link between the harm caused to third parties and public action. In the absence of an instruction issued by the relevant public authority, public bodies may only be held liable for oversight-related activities, not for the factual provision of the service.

Therefore, the applicable liability standard in claims for damages at public-private facilities remains unclear. Some argue that private tort law should apply on the grounds that the contractor is a private entity or because the strict liability regime (i.e., for public authorities) should be considered exceptional.[360] However, there are arguments in favor of applying the strict state liability regime governed by the General Act on Public Authorities (LRJSP), remarkably that the service provider's liability standard should be established *objectively*, so that the state liability regime be applicable as long as a public authority remain accountable for the service.

When dealing with public services, the applicable liability standard should not be based solely on a public authority's *organizational decision*.[361] If it did, the service recipients' safeguards would vary depending on the management approach taken by the relevant public authority.[362] This is not a matter of having a more stringent or guarantee-oriented standard. Rather, it is about having the same standard all along for both public authorities and third party providers.

Applying the same standard to public authorities and their service providers avoids certain issues that may arise when *both are liable* vis-á-vis the injured party. A wide variety of liability standards will most likely distort potential subrogation claims or claims for repayment, either because liability is not clearly allocated or because if the other standard had been applicable the counterparty would not be liable for repayment.

A service provider in a public-private nursing home being a private entity does not necessarily entail that it be entirely subject to private law provisions. The liability standard

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[360] Galán Galán, A. (2010), "La responsabilidad por los daños causados por la actuación de las entidades privadas colaboradoras de la Administración," in Galán Galán, A. and Prieto Romero, C. (Dirs.), El ejercicio de funciones públicas por entidades privadas colaboradoras de la Administración, Huygens, Barcelona, p. 85-123 (p. 112-115).

[361] Gamero Casado, E. (2018), "Responsabilidad extracontractual de la Administración y del contratista por daños a terceros en la ejecución del contrato," in Gamero Casado, E. and Gallego Córcoles, I. (Dirs.), Tratado de contratos del sector público, Tirant lo Blanch, Valencia, p. 2151-2208 (p. 2174).

[362] Pérez Monguió, J.M. (2008), "La responsabilidad patrimonial de la Administración por los daños causados a personas mayores ingresadas en centros residenciales," in Zurita Martín, I. (Coord.), Responsabilidad derivada del internamiento de personas mayores dependientes en centros residenciales, Bosch, Barcelona, p. 157-179 (p. 174).

in state liability frameworks can be detached from its original target (i.e., public authorities) and be applied to private service providers.[363]

Due to its complexity and broad scope, we will only provide a brief overview of the second liability-related issue, i.e., jurisdiction. There have been several turning points and milestones in public procurement law with regards to jurisdiction. There is extensive case law of the Supreme Court Chamber for Conflicts of Jurisdiction. In its rulings, this Special Chamber argues that judicial administrative courts shall have jurisdiction over claims for damages against private entities involved in public services *only if the public authority accountable for such service* is a co-defendant in the case, i.e., if the claimant brings its claim against both the provider and the relevant public authority (see the Supreme Court Special Chamber Orders no. 5/1998, 30/1998, 19/2000 and 10/2018). Otherwise, if the claim is only brought against the private entity, civil courts will have jurisdiction to hear the case (see Court Orders no. 8/2003 and 9/2019). Both the Civil and Judicial-Administrative Chambers of the Supreme Court have adhered to this line of case law (see Supreme Court Judgment no. 598/2012). Interestingly enough, in Judgment no. 4/2003, the Supreme Court's Special Chamber for Conflicts of Jurisdiction argued that, since the central element of damage had been the public health system's malfunctioning, the case could only be heard by judicial administrative courts. However, this line of reasoning has not been embraced in subsequent rulings.

The previous considerations cannot be applied *tout court* to liability cases in public-private arrangements or *conciertos*. In my opinion, the same rules can apply to both contractual or non-contractual arrangements, since they are *equivalent*. As for non-contractual arrangements, the contractual rules could apply by analogy.[364] In these *conciertos*, public authorities commission a service provision to a third party although remaining accountable for such service (*Trägerschaft*), subject to the same conditions that would apply if the parties were subject to a contract. Consequently, the commissioned provider subject to the arrangement would be held liable for any damages arising from the factual provision of the service, excluding any harm caused as a result of a public authority's instruction. Note, however, that public authorities can be automatically held liable for the harmful outcome (i.e., the resulting damage) at a public-private facility if so stated in the *concierto* (Supreme Court Judgment of 15 June 2011).

3.3.2. Liability arising from public oversight

[363] See Velasco Caballero, F. (2014), Derecho público *más* Derecho privado, Marcial Pons, Madrid, § II.9.

[364] Cano Campos, T. (2002), "La analogía en el Derecho administrativo sancionador," Revista Española de Derecho Administrativo, no. 133, p. 51-88 (p. 56-57).

Public oversight or control over nursing homes can also give rise to liability. Since local authorities do not conduct *ex ante* controls, we will focus on *liability arising from* ex post *oversight*.

As discussed before, *ex post* controls are to be performed by public authorities with powers of inspection. These inspection powers require that the empowered authority exercise them, in order to make sure that the entities subject to oversight comply with any applicable requirements. Since it is an obligation incumbent upon public authorities, non-fulfillment would be *a breach of proper conduct*,[365] i.e., failure to supervise properly or to exercise due diligence (*in vigilando* liability or fault in supervising). There are two essential requirements to find this breach:

(i) That if the relevant public authority had acted properly, hypothetically it would have avoided the damage,[366] where proper conduct should be defined based on the average service standards;[367] and

(ii) That such proper conduct would have modified the course of action leading to the damage.[368]

In order to find this fault in supervising, the relevant public authority need not be a guarantor. Under the state liability regime, public authorities may be held liable even if they are not specifically placed in the position of ensuring compliance.[369] However, the fact that public authorities be granted certain powers of inspection does not entail that they be required to avoid any potential damage, i.e., public authorities do not provide "universal insurance." Finally, keep in mind that any liability arising from the public authority's fault in supervising will apply together with the liability of the party *actually causing the damage*. They will be jointly and severally liable.[370]

So, local bodies are required to carry out inspections *wherever they have established public-private facilities*, but they only have special powers of inspection (see section 3.2.2 above). The liability standard to find this fault in supervising (i.e., *in vigilando* liability) is very stringent and therefore most claims are dismissed. However, it most certainly opens a new front for public authorities, although only in public-private nursing homes.

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[365] Beladíez Rojo, M. (1997), Responsabilidad e imputación de daños por el funcionamiento de los servicios públicos, Tecnos, Madrid, p. 197; Gallego Córcoles, I. (2008), "Daños derivados de la ejecución de contratos administrativos. La culpa in vigilando como título de imputación," Revista de Administración Pública, no. 177, p. 265-291 (p. 266).
[366] Mir Puigpelat (2000: 243).
[367] Gallego Córcoles (2008: 269).
[368] Beladíez Rojo (1997: 197); Mir Puigpelat (2000: 243-244); Gallego Córcoles (2008: 290).
[369] Gallego Córcoles (2008: 289-290). The counterargument can be found in Mir Puigpelat (2000: 241-244).
[370] Beladíez Rojo (1997: 207).

3.4. Economic regime

It is also worth examining the residential homes' economic regime and, more specifically, the regulation of the amounts paid by residents in exchange for the service. Let us recall the long-lasting scholarly debate (also found in the case law) about public fees and private prices (*tasas* and *tarifas* in Spanish) regarding payment for public services. Constitutional Court Judgment (STC) no. 63/2019 has been the last milestone in this debate. In this judgment, the Court ruled on the constitutionality of various LCSP provisions. Note that STC no. 63/2019 found that Art. 289(2) LCSP was constitutional. Article 289(2) provides that any payments received by commissioned providers or concessionaires in exchange for their services (i) must be designated as *tarifas*; and (ii) should be defined as *public payments not qualifying as taxes*. The unconstitutionality appeal brought before the Court argued that there had been a violation of (i) the Constitutional Court's doctrine on Art. 31 CE (since the LCSP amended the legal framework of public fees or *tasas*); and (ii) the *reserva de ley principle*[371] under Art. 31(3) CE, since the principle would not be fulfilled by the loose regulation of Art. 289 LCSP.[372]

The Constitutional Court allows for the cost of public services managed through direct forms of management to be covered by public fees or *tasas*, and for the cost of indirectly managed services to be covered by *tarifas*. The Court assumes that both *tasas* and *tarifas* would be public payments, although only *tasas* would qualify as taxes. Keep in mind that public payments are mandatory contributions (STC no. 185/1995) levied or collected in the public interest (STC no. 182/1997). On top of that, in order to qualify as taxes, they must be aimed at financing public expenditure (see Art. 31(1) CE). Despite this general allocation of *tasas* to direct management and vice versa, we should examine, on a case-by-case basis, whether these public fees and prices meet the applicable requirements according to the Constitutional Court's interpretation of Article 31 CE.

Consequently, public facilities will charge public fees or *tasas* unless payment is voluntary. If so, i.e., if payment is not mandatory, residents would be paying the so-called "public prices." Commissioned facilities will be subject to Art. 289(2), and therefore payments will

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[371] "*Reserva de ley*" has often been translated as "statute reservation," "statutory requirement," "requirement for a statute" or "to be defined by an act of parliament." This notion refers to a principle under which a matter must be regulated by a statutory provision or act of parliament. See http://legalspaintrans.com/legal-translation/how-to-translate-reserva-de-ley-into-english-using-a-descriptive-strategy/ or http://transblawg.eu/2014/12/18/gesetzesvorbehalt/ for further details.

[372] See Castillo Abella (2020: 490 *et seq.*) for a more detailed analysis of Judgment no. 63/2019. See a critical review of the ruling in Martínez Sánchez, C. (2019), "La constitucionalidad de las nuevas prestaciones patrimoniales de carácter público no tributario. Análisis de la STC 63/2019, de 9 de mayo, appeal no. 739/2018," Revista de Contabilidad y Tributación (CEF), no. 441, p. 113-123.

take the form of private prices or *tarifas*. Nonetheless, if payment is not collected compulsorily, residents' payments would still be called *tarifas* although they would not qualify as public payments.[373] There is no provision equivalent to Art. 289 LCSP for facilities subject to service contracts, but payments can also be designated as "public payments not qualifying as taxes," since there is no exhaustive list or a specific category[374] and their defining features tend to be the same as those of *tarifas* paid in concessions. The same applies to residential homes subject to non-contractual arrangements, since defining the payments as public payments and/or taxes is based on Art. 31 CE, not on the rules governing the public-private arrangement (*concierto*).[375] Finally, note that private nursing homes charge private prices, which nonetheless must sometimes be reported in writing to the relevant regional government (see Art. 123 of the Andalusia Regional Act on Welfare Services).

Determining the nature of payments, i.e., qualifying them, is far from unimportant. There are three aspects where the definition of these payments is decisive. First, when determining whether the *reserva de ley* principle applies or not, considering that the regulation of public payments, in general, is subject to such principle (Art. 31(3) CE), as well as the regulation of taxes in particular (see Art. 133(1) CE). Second, when it comes to determining the amounts due or payable by recipients, since *tasas* are subject to the *principle of equivalence in public revenue and expenditure* (applicable to local governments under Art. 24 of the Local Tax and Treasury Act). Finally, there is another aspect: the management and administration of the collected revenue. Collection of payments in private facilities will be subject to private law, whereas *tasas* and public prices can be compulsorily collected through enforcement proceedings. Collection of *tarifas* remains unclear.

Nevertheless, there are some specificities affecting the local government level. First, the *reserva de ley* principle is beginning to be *more loosely applied* regarding local tax regulations, since (i) these are passed by elected bodies (the local council); and (ii) under the Constitution, local bodies are entitled to the so-called local autonomy (see STC no. 233/1999). Thus, we expect local governments to have a broader scope to shape the relevant *tasas* and *tarifas*. Second, the *principle of equivalence in public revenue and expenditure* does not have the exact same implications for local governments as it does for regional or

[373] Tornos Mas, J. (2017), "La tarifa como contraprestación que pagan los usuarios en el contrato de concesión de servicios de la Ley 9/2017 de contratos del Sector Público," La Administración al día (INAP), 12 December 2017 (last accessed on 3 December 2018), p. 11. Available at: http://laadministracionaldia.inap.es/noticia.asp?id=1508103

[374] Villar Rojas (2018: 98).

[375] Art. 112(1) of the Valencia Regional Act on Welfare Services has defined as "*tasas*" or "public fees" any payments made by residents of public and public-private facilities in Valencia provided that the place therein has been assigned through an administrative decision. The purpose of this is to standardize or homogenize the various regimes applicable in both types of facilities, precisely because they are managed differently. However, despite this provision, it is still necessary to define the payment on a case-by-case basis.

national authorities. Article 7 of Act 8/1989 on Public Fees [*tasas*] and Public Prices (applicable to national authorities) provides that *tasas* should be as close as possible to covering the cost of service. However, Art. 24(2) of the Local Tax and Treasury Act sets out that the cost of service should be the *upper limit* or *cap* for local public fees. Hopefully, this slight difference in wording will have no practical implications. The remaining payments (*tarifas*, and public prices) will exceed the overall cost of service. The third specificity for local authorities relates to the *collection* of *tarifas* paid in concessions. Indeed, local bodies are entitled to collect these *tarifas* through enforcement proceedings (see the Decree of 17 June 1955, Articles 128(4)(2), 130 and 155(1)). This provision is probably applicable to *tarifas* charged in nursing homes other than commissioned facilities.

This economic benchmark clearly evidences the implications of management approaches on such significant aspects as residents' payments or the applicability of the *reserva de ley* principle. This is why local bodies should take these factors into account to better align their policy objectives and their results regarding nursing homes.

3.5. Organizational and staff requirements

Our last standard or benchmark relates to organizational and staff requirements. Indeed, certain provisions governing nursing homes clearly seek to influence the facility's *organization and staff policy*. This has to do with the abovementioned limits on the legal ability to shape residential home services. It is impossible to pre-determine and solve in advance all the needs and circumstances that may arise during the service provision. Since these situations cannot be anticipated or scheduled, it becomes necessary to implement organizational procedures and techniques allowing for nursing homes' proper functioning.[376]

Accordingly, the applicable rules and regulations provide for similar *organizational requirements*−although they may be more or less stringent−for the various facilities. These provisions refer to (i) creating joint or mixed participation bodies within the nursing home (Articles 57 of the Catalonia Regional Act on Welfare Services, 101 of the Valencia Regional Act on Welfare Services and 41 of the Madrid Regional Act on Welfare Services); and (ii) implementing complaint mechanisms and suggestion boxes for residents (either as an organizational requirement or as rights for residents). See, in this regard, Articles 9(1)(j) of the Basque Country Regional Act on Welfare Services, 4(j) of the Madrid Regional Act on Welfare Services, 10(e) of the Catalonia Regional Act on Welfare Services and 9(e) of the Andalusia Regional Act on Welfare Services.

There is another significant aspect: the major role played by the *person actually providing the service or benefit*, as stated in many pieces of regional legislation (see Articles 43(2) of

[376] Rodríguez de Santiago (2007: 110, 151-154).

the Catalonia Regional Act on Welfare Services and 52 of the Castilla y León Regional Act on Welfare Services). It is key that residents trust the nursing home's staff or that such staff be trained and aware of residents' needs. Otherwise, these residential facilities will not provide a high-quality service tailored to the needs of older adults. This is why sector-specific legislation contains rules particularly governing staff requirements. Certain provisions (i) impose training requirements and mandatory resident-staff ratios (Articles 43(1) of the Catalonia Regional Act on Welfare Services and 59(2) of the Andalusia Regional Act on Welfare Services); (ii) require that training programs be implemented (e.g., Articles 121 of the Valencia Regional Act on Welfare Services, 53 of the Castilla y León Regional Act on Welfare Services or 45(1) of the Catalonia Regional Act on Welfare Services); and (iii) enhancing or regulating working conditions, particularly regarding job stability and social acknowledgment (Art. 43(1) of the Catalonia Regional Act on Welfare Services), work-life balance and the implementation of gender-based perspectives (Art. 64(4) of the Basque Country Regional Act on Welfare Services), or the listing of employees' rights and duties (Articles 63 of the Andalusia Regional Act on Welfare Services, 56 of the Castilla y León Regional Act on Welfare Services and 12 and 13 of the Valencia Regional Act on Welfare Services). These aspects clearly show that even the worker's attitude has a decisive impact on job performance and thus on the service provided to residents.

Not all of these requirements are imposed on every facility. The way of enforcing and ensuring compliance with these requirements are that they be prerequisites to obtain permits or certificates before they begin to operate. The requirements to obtain permits and certificates could be similar or even identical, but certification requirements tend to be more stringent−as could be expected having regard to the ultimate purpose of permits and certificates.

When it comes to assessing nursing home services, local bodies (as any other public authorities) should also consider these aspects. These rules on organization, procedure and staff cannot ensure, by themselves, the best possible service. However, they are suitable proxies for each facility's quality. It is not only a matter of information or figures ensuring a high-quality service. It is also about introducing a human element at the core of the service provision.

4. CONCLUDING REMARKS

Throughout the study we provided an analysis of nursing homes focusing on the most salient aspects of their legal framework. We were trying to show that any decisions on the arrangement and management of these residential homes have major implications that go way beyond purely organizational aspects. These implications are clearly noticeable in

significant areas such as liability for damages caused at nursing homes or residents' payments.

Local authorities play a prominent role in the provision of residential home services. They are granted powers in the field and they have a distinct position allowing them to shape the whole nursing home network through local policymaking. These local policies will not only be based on political preferences, but also on legal matters that significantly affect the residential home services enjoyed by residents. Sound decision-making in this area should most certainly take into account the implications of all the available options when it comes to shaping the service. The benchmarks and standards examined herein evidence that, in the abstract or on an *a priori* basis, there are no right or wrong answers. We did find certain trends stemming from the various applicable regulations. Since there is some degree of uncertainty, all the assessments and analyses should be performed on a case-by-case basis in order to make the best possible decisions. These standards and benchmarks should be useful for this.

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