Carina Risvig Hamer

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1. Introduction

The public sector can be organized in many different ways when it comes to performing public tasks, and contracting authorities are free to organize themselves in the way they want. They can either choose to carry out an economic activity themselves or entrust it to a third party. By involving a private party to perform a public task, the Public Procurement Directive1 applies to a range of specific public contracts, but only as long as the contract constitutes a public contract.2

Defining a public contract in the light of the definition found in the Public Procurement Directive can often be difficult. This is especially due to the many different forms of cooperation, which a contracting authority can engage with private undertakings, including the many different ways to get a public task carried out. Thus, it can be difficult to establish whether the Public Procurement Directive applies, as concepts similar to a public contract such as for example

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2 The Public Procurement Directive also applies to certain contracts subsidised by contracting authorities, see Article 13.
authorisations (licenses), exclusive or special rights, concessions or various free choice systems are not covered. It is therefore not surprising that case law on the subject of what is public contract has taken place at EU level. That the issue becomes relevant at EU level is due to the fact that the concept of a public contract is an EU concept, and should be interpreted in the light of EU law.

However, case law from Member States on the matter has also taken place such as in Denmark where recent case law from the Complaints Board for Public Procurement has shown that defining a public contract is important in the field of free choice systems. The case law from Denmark is a great example as to how a Member State’s court (Complaints Body) has tried to interpret the Public Procurement Directive in national legislation, where the state of law at EU level has not been clear. Since a similar free choice arrangement has recently been the
subject of a judgment from the CJEU, in *Dr. Falk Pharma* it is possible that this case in the future will impact the way free-choice systems are organized.

Even though there are many similarities between the different types of cooperation a contracting authority can have with private undertakings, it is important to classify the type of arrangement correctly, as only public contracts are covered by the EU procurement rules. Thus, it is important to establish when a public contract exists in order to know, which rules to follow. This article aims to analyse the concept of a public contract within the meaning of the Public Procurement Directive. Section 2 will analyse the definition of a public contract in the Public Procurement Directive by exploring the case law from the CJEU on the matter. Section 3 will look upon the new definition of Public Procurement in the Directive and the impact the new definition has regarding defining a public contract. Section 4 will look at free choice systems from a Danish Perspective. Finally, Section 5 states the conclusions.

2. The definition of a public contract in the Public Procurement Directive

A simple example of a public contract is the case where a municipality wants to build a school or acquire office furniture. In such cases the municipality pays a certain amount of money to the supplier for the exchange of the office furniture or for building the school. However, it is not always as easy to classify an acquisition as a public contract, for what about the situation where it is not the municipality that will use the service, but the citizens of the municipality? And what if it is the citizens who pay for the service? Are these cases also public contracts? It is not easy to make a complete clear distinction. The legal classification of a contract depends on the specific conditions in the individual case. To answer these and more questions it is relevant to look closer on the definition of a contract in the Public Procurement Directive.

The Public Procurement Directive Article 2 (1)(5), defines public contracts as “… contracts for pecuniary interest concluded in writing between one or more economic operators and one or more contracting authorities and having as their object the execution of works, the supply of products or the provision of services.” From the definition it can be seen that a public contract is a contract for pecuniary interest. A contract for pecuniary interest in public procurement law is first of all an EU law concept and does not depend on the classification in national law. The use

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9 C-410/14, Dr. Falk Pharma GmbH v. DAK-Gesundheit, EU:C:2016:399.
10 See e.g. C-264/03, Commission v. France, EU:C:2005:620, paragraph 36, C-220/05, Jean Auroux and Others v Commune de Roanne, EU:C:2007:31, paragraph 40, regarding the definition of a works contract.
of the term “contracts for pecuniary interest” aims to separate contracts from the scope of the Public Procurement Directive. In this context, the case law from the CJEU on in-house has developed specifically with reference to when a contract can be said to be for pecuniary interest.\textsuperscript{11} The fact that a contract must be for pecuniary interest also means that unilateral actions such as specific gifts or donations to the contracting authority are generally not covered by the concept of a public contract.\textsuperscript{12} In these situations there is no need for undertakings to compete for the contract and the contracting authority does not risk discriminating among undertakings and one could therefore argue that the aim of the procurement rules, which is “…to ensure the free movement of services and the opening-up to undistorted competition in all the Member States”\textsuperscript{13} does not as such need to be ensured in these cases.\textsuperscript{14}

As mentioned above, the CJEU has a sufficient number of case law on the concept of a public contract, and from the definition in the procurement Directive and the case law from the CJEU, the following conditions must be fulfilled in order for a public contract to be present:


\textsuperscript{12} The same applies if a donation is earmarked for the purchase of equipment of a particular make. However, if there are several suppliers who can deliver the product, the contract offered, if the value of the contract means that the thresholds values are exceeded. The same is true when the entity receives a donation for the purchase of equipment of a particular species, but without requiring a particular product. If, for example, a hospital receives a special scanner from a company, the contracting authority can receive the scanner without a procurement procedure, provided that the hospital does not undertake to conclude an agreement with the donor, for example maintenance, service and so on. However, on the contrary, if the hospital receives a larger amount of money to purchase a scanner, the procurement rules are observed.

\textsuperscript{13} C-454/06, Pressetext Nachrichtenagentur GmbH v Republik Österreich (Bund), APA-OTS Originaltext-Service GmbH and APA Austria Presse Agentur registrierte Genossenschaft mit beschränkter Haftung, EU:C:2008:351 paragraph 31.

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1) A contract
2) In writing
3) Acquisition (by a contracting authority)
4) Consideration

These conditions will be examined below in Section 2.1–2.4.

2.1. Contract

A public contract must, as mentioned above, first and foremost be a contract. This means for example that services on other bases than a contract, for example laws or regulations, etc., are not covered by the procurement rules. It should in that regard be borne in mind that the definition of a public contract is a matter of EU law, with the result that a Member States’ classification of a given matter is irrelevant for the purposes of determining whether a given arrangement falls within the scope of Directive. This means that even though an agreement by the contracting authority is not called contract, the circumstances of the agreements may lead to the conclusion that it is considered as a public contract within the meaning of the definition in the Public Procurement Directive.

It seems obvious that a contract is build upon an agreement entered into by more than one party – and the procurement rules are first applicable if there is another party involved than the contracting authority. This would also lead to the assumption that both parties will have influence on aspects in the contract. Thus, one could argue that in case the supplier has no influence on whether it is required by national law to supply as well as on the conditions in the contract, a public contract is not present. Recital 34 of the Procurement Directive states on this matter that “Certain cases exist where a legal entity acts, under the relevant provisions of national law, as an instrument or technical service to determined contracting authorities, is obliged to carry out orders given to it by those contracting authorities and has no influence on the remuneration for its performance. In view of its non-contractual nature, such a purely administrative relationship should not fall

15 See, however, C-399/98, Ordine degli Architetti delle province di Milano e Lodi, Piero De Amicis, Consiglio Nazionale degli Architetti and Leopoldo Freyrie v Comune di Milano, and Pirelli SpA, Milano Centrale Servizi SpA and Fondazione Teatro alla Scala, EU:C:2001:401, which modifies this as the CJEU in the case found that the fact that a national rule on the how the work should be carried out existed, did not exclude the use of the procurement rules if the conditions for a public contract was present.
16 See also C-220/06, Asociación Profesional de Empresas de Reparto y Manipulado de Correspondencia v Administración General del Estado, EU:C:2007:815, paragraph 50.
17 If no other party is involved this would constitute an in-house arrangement, see Article 12 of the Procurement Directive. For reference to literature on in-house, see footnote 11.
18 A draft of the contract will typically be a part of the procurement documents, and the tenderer will not always have the possibility to influence the conditions in the contract.
within the scope of public procurement procedures." The recital is a consequence of case law from the CJEU, where the CJEU has found that in case of a unilateral administrative measure, which solely creates obligations for an undertaking to deliver the service, such a situation will under certain conditions not constitute a public contract.

In *Asemfo/Tragsa*, the CJEU found that a procurement procedure could be left out in case the undertaking did not have any freedom to place an order or influence on tariffs for its services. The CJEU stated that, if Tragsa “...has no choice, either as to the acceptance of a demand made by the competent authorities in question, or as to the tariff for its services, the requirement for the application of the directives concerned relating to the existence of a contract is not met.” However, the CJEU’s statement in *Tragsa* should be viewed in the specific context of the case, and more elements will also be part of the assessment of whether there is a unilateral administrative measure. The CJEU concluded in the case, that the situation was an in-house situation and emphasised that Tragsa’s relations with the public bodies, were “...not contractual, but in every respect internal, dependent and subordinate.”

If taking a closer look at the conditions, which must be present in order for the situation to be outside the procurement rules, it is relevant that the conditions which establish the agreement, or transfer of a task, departs significantly from the normal conditions of a commercial offer made by that undertaking. In the assessment whether this is the case, it is relevant whether the company is able to negotiate with the contracting authority the actual content of the services it has to provide and the tariffs to be applied to those services and whether. If

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19 The Recital was suggested by the Council, see Proposal for a Directive of the European Parliament and of the Council on public procurement (First reading). Approval of the final compromise text, Council document number 12167/13, see recital 14aaa.
20 C-295/05, Asociación Nacional de Empresas Forestales (Asemfo) v Transformación Agraria SA (Tragsa) and Administración del Estado, EU:C:2007:227.
21 C-295/05, Asociación Nacional de Empresas Forestales (Asemfo) v Transformación Agraria SA (Tragsa) and Administración del Estado, EU:C:2007:227, paragraphs 53–55.
22 C-295/05, Asociación Nacional de Empresas Forestales (Asemfo) v Transformación Agraria SA (Tragsa) and Administración del Estado, EU:C:2007:227, paragraph 54.
23 See also C-220/06, Asociación Profesional de Empresas de Reparto y Manipulado de Correspondencia v Administración General del Estado, EU:C:2007:815, paragraph 52.
24 C-295/05, Asociación Nacional de Empresas Forestales (Asemfo) v Transformación Agraria SA (Tragsa) and Administración del Estado, EU:C:2007:227, paragraph 51.
the contracting authority has determined the amount a company must be paid for the services it performs for the contracting authority, could be an element to take into consideration. In such a case there is no reciprocity, and hence no pecuniary interest. However, the fact that the undertaking does not have any influence on its payment is not sufficient alone to conclude that an agreement is outside the procurement rules. If the company has a choice as to whether it will do the job for contracting authority, including that the company has the option to terminate the agreement with the authority, this would point in direction that a public contract is present. It may also be relevant to look at whether the company also provides services to private. In such a situation, it is relevant that the ‘public’ conditions differ significantly from the commercial conditions, including in relation to that there is no opportunity for the company to terminate the agreement.27

In theory, it should not be that difficult to determine whether there is a contract or an administrative act, but in several Member States this has shown to be difficult, which also can be seen from the case law from the CJEU.28 In Denmark tasks from the public to private undertakings will take place in the light of a contract, hence not creating difficulties in Denmark regarding the requirement for a contract.29 Finally, it should be noted that the fact that a task is entrusted by law and therefore outside the Procurement Directive, does not mean that there are no other rules to be observed, including state aid rules.30

2.2. In writing

From the definition of a public contract in the Public Procurement Directive, it can be seen that the contract must be “in writing”. A strict interpretation of the wording would lead to the conclusion that the Public Procurement Direc-

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28 Regarding case law in the individual Member States, see e.g. Caranta, Roberto, General Report, in Neergaard, Ulla, Jacqueson, Catherine & Ølykke, Grith Skovgaard (eds.), Public Procurement Law: Limitations, Opportunities and Paradoxes, Djoj Forlag 2014, pp. 86–96, who at p. 86 e.g. states “in some Member States the grey area between contracts and unilateral measures has many nuances.”

29 Another reason why this has not caused practical problems in Denmark could also be that the Danish State considers itself as one single unit, which is able to award tasks to it self divided between the individual ministries. See Nielsen, Rasmus Horskjær in Hamer, Carina Risvig, Grundlæggende Udbudsret, Djoj Forlag, 2016.

30 For a recent view on the interaction between public procurement law and state aid, see Ølykke, Grith Skovgaard, Commission Notice on the notion of state aid as referred to in article 107(1) TFEU – is the conduct of a public procurement procedure sufficient to eliminate the risk of granting state aid?, P.P.L.R. 2016, 5, 197–212.
The requirement for a contract to be in writing should be read as a condition, which the contracting authority should ensure take place when following the procurement rules. Thus, the requirement is more a formalistic requirement to ensure transparency in the procurement procedure for tenderers as well as to verify later on that the procurement rules were followed and no breaches took place. This also means that in case an agreement does not take place in writing the contracting authority will be in breach of the principle of transparency.

Article 2 (18) of the Public Procurement Directive defines ‘written’ or ‘in writing’ as “any expression consisting of words or figures which can be read, reproduced and subsequently communicated, including information transmitted and stored by electronic means.” When something takes place in writing is hard to imagine would be the subject of many disputes. The Directive contains several places where there is requirement for something to take place in writing such as for example most communication in the procurement procedure is required to take place in writing by using electronic means of communication, see Article 22 for further on communication.

2.3. Acquisition (by the contracting authority)

The element of a contract for pecuniary interest requires that the contracting authority acquire works, goods or services (for a consideration, see Section 2.4). Thus, the acquisition consists of the works or service performed or the goods

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31 See also the case C-532/03, Commission v. Ireland, EU:C:2007:801. In the case an agreement was not in writing and the Commission was of the opinion that the principles of the Treaty should have been observed. The case was dismissed, as the Commission could not lift the burden of proof. The case is commented by Brown, Adrian, The Commission Loses another Action against Ireland Owing to Lack of Evidence: A Note on Case C-532/03 Commission v Ireland, Public Procurement Law review, 2008, NA92.


33 However, in C-197/11, Eric Libert and Others v Gouvernement flamand (C-197/11) and All Projects & Developments NV and Others v Vlaamse Regering (C-203/11), EU:C:2013:288, the CJEU emphasis that the Belgium court, which had referred the preliminary question before the CJEU seemed to be in doubt as to whether the requirement for in writing is fulfilled. In the case the social obligation entailing the development of social housing units is imposed in the absence of an agreement concluded between the housing authorities and the economic operator concerned. The Flemish Decree imposed the social obligation directly on subdividers and developers and applicable to them merely because they own the land in relation to which they have applied for the grant of a building or land subdivision authorization, see paragraph 111.
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delivered. In that regard it is irrelevant whether the acquisition takes place as a purchase, leasing or similar. Recital 4 states on this matter: “It should be clarified that such acquisitions of works, supplies or services should be subject to this Directive whether they are implemented through purchase, leasing or other contractual forms.” It is also irrelevant why the contracting authority wants to acquire something as well as whether the purchase serves the purpose of meeting needs in the general interest or not. The determine factor alone is whether an acquisition takes place by the contracting authority. The Commission wanted the definition of a public contract to be clear on this matter and in its proposal regarding the definition of public procurement (see below Section 3, regarding the new definition of public procurement) they suggested the wording: “whether or not the works, supplies or services are intended for a public purpose”, be added to the definition. This did not become a part of the final version of the Directive.8

When taking a closer look, at the requirement for acquisition, it is clear that an acquisition does not need to be meant for the contracting authority itself, but it can be a service for citizens such as for example renovation. In that regard the CJEU has stated that the contracting authority must get a direct economic benefit from the performance of the service, which can take place by ownership

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35 See also e.g. C-536/07, Commission v Germany, EU:C:2009:664, regarding the construction and lease of some buildings, which was considered as a public contract.

36 See e.g. C-126/03, Commission v Germany, EU:C:2004:728, paragraph 18 and C-44/96, Mannesmann Anlagenbau Austria AG and Others v Strohal Rotationsdruck GesmbH, EU:C:1998:4, paragraph 31–32. See also the explanatory note from the Commission, Cluster 10 “Scope”, Council document number 9315/12 from April 27, 2012, p. 3.


38 In Denmark the condition is only found on the preparatory works to the Public Procurement Act and not in the act itself.
but also other types of economic interest can be sufficient to establish that a public contract is present.39

In Helmut Müller40 the question was (in simple terms) whether the 2004 Directive was applicable in case of a sale of land, in which it was the plan that in the nearest future the land would be built (the purchaser was to develop it in conformity with the urban-planning objectives of the competent local authority). At a starting point the CJEU found that a sale of land does not fall within the Public Procurement Directive.41 In order for a public contract to exist it is necessary that the contracting authority receives a service and that “Such a service, by its nature and in view of the scheme and objectives of Directive 2004/18, must be of direct economic benefit to the contracting authority.”42 Such an economic benefit is clearly established where the contracting authority is to become owner of the subject of the contract, but ownership does not determine a public contract alone. The CJEU stated: “That economic benefit is clearly established where it is provided that the public authority is to become owner of the works or work which is the subject of the contract.” And that “Such an economic benefit may also be held to exist where it is provided that the contracting authority is to hold a legal right over the use of the works which are the subject of the contract, in order that they can be made available to the public.”43 The economic benefit may also “lie in the economic advantages which the contracting authority may derive from the future use or transfer of the work, in the fact that it contributed financially to the realisation of the work, or in the assumption of the risks were the work to be an economic failure.”44 Hereafter, the CJEU concluded that in the present case a public contract was not present as “it is not the purpose of the mere exercise of urban-planning powers, intended to give effect to the public interest, to obtain a contractual service or immediate

39 C-451/08, Helmut Müller GmbH v. Bundesanstalt für Immobilienaufgaben, EU:C:2010:168. Earlier case law such as C-399/98, Ordine degli Architetti delle province di Milano e Lodi, Piero De Amicis, Consiglio Nazionale degli Architetti and Leopoldo Freyrie v Comune di Milano, and Pirelli SpA, Milano Centrale Servizi SpA and Fondazione Teatro alla Scala, EU:C:2001:401, and C-220/05, Jean Auroux and Others v Commune de Roanne, EU:C:2007:31 was decided without reference to a requirement for the contracting authority to have a direct economic benefit. The cases lead to insecurity particular planning agreements and there link to the procurement rules. For further on planning agreements see Eleftheriadis, Pavlos, Planning agreements as public contracts under the EU procurement rules, P.P.L.R. 2011, 2, 43–55.
41 C-451/08, Helmut Müller, paragraph 41.
42 C-451/08, Helmut Müller, paragraph 49
43 C-451/08, Helmut Müller, paragraphs 50–51.
44 C-451/08, Helmut Müller, paragraph 52.
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economic benefit for the contracting authority, as is required under Article 1(2)(a) of Directive 2004/18.” 45

Only 3 months after Helmut Müller, another case Commission v. Germany 46 concerned the interpretation of the concept of a contract for pecuniary interest. In the case, the CJEU repeated the requirement that it was necessary for a public contract to exist that there would be a direct economic benefit involved. The CJEU stated “…the condition requiring the contracts at issue to be for pecuniary interest entails determining whether those contracts are of direct economic benefit to the local authority employers which conclude them.” [Emphasis added]. 47 The case concerned some local German municipalities who, according to German legislation, were required to ensure that employees at the municipalities received occupational old-age pensions, which the municipalities could entrust a private pension provider to administrate. It was the local municipalities’ responsibility to ensure the provision of the benefits as well as it would negotiate the terms of a group insurance contract with a professional insurer. The services supplied would enable the employer to take on its obligation of being responsible for the proper execution of this form of deferred earnings resulting from the salary conversion measure. The services also relieved the employer of management of that measure and therefore the CJEU found that the agreement in the case constituted a public contract. The CJEU stated “In these cases the local authority employer pays to the body or undertaking at issue premiums deducted from the earnings to which the persons concerned are entitled from it, in return for receiving services that are inherent in its obligation, (…), of being responsible for ensuring the provision of the retirement benefits in favour of the workers who have opted, with its guarantee, for the salary conversion measure.”. The CJEU added that “The fact that the ultimate recipients of the retirement benefits are the workers who have participated in that measure cannot call into question the fact that such a contract is for pecuniary interest.” 48 The case shows that even in the situation where the contracting authority does not pay for a service, the economic interest would be present as long as the contracting authority gains an economic benefit, which in the case was the release of an administrative task, which it was required by law to ensure took place.

Based on the cases above, the CJEU has a broad interpretation of when something can be said to constitute an acquisition with reference to the fact that an acquisition must be of direct economic interest to the contracting authority.

45 C-451/08, Helmut Müller, paragraph 57. See also paragraph 68 and 70 ff. The CJEU also concluded that the contract was not a concession contract.
46 C-271/08, Commission v. Germany. EU:C:2010:426.
47 C-271/08, Commission v. Germany. EU:C:2010:426, paragraph 75. See also C-451/08, Helmut Müller, paragraph 49.
Such an economic interest does not alone exist when the contracting authority itself receive the acquisition, but can take place by e.g. the release of an administrative obligation, but exercise of urban-planning powers, does not in itself create an economic benefit for the contracting authority.

Recital 4 of the Public Procurement Directive now states “The notion of acquisition should be understood broadly in the sense of obtaining the benefits of the works, supplies or services in question, not necessarily requiring a transfer of ownership to the contracting authorities.” Roberto Caranta states with reference to Recital 4 that “Direct economic benefit to the contracting authority is therefore not a requirement for a procurement contract and Muller is no more good law under this respect (if it ever was, which I doubt).” According to Caranta, Recital 4 should be read as the legislator has chosen another road than the case law from the CJEU. However, this is most likely not the case, and Recital 4 also states that: “The increasingly diverse forms of public action have made it necessary to define more clearly the notion of procurement itself; that clarification should not however broaden the scope of this Directive compared to that of Directive 2004/18/EC.” Thus, it has not been the legislator’s intention to change the definition of a public contract (and hence to broaden the scope of the Directive). It is in that regard also important to bear in mind that the EU legislator cannot change the current state of law in a recital. Recitals are not legal acts and the state of law cannot be stated in recitals. The CJEU has for example stated regarding recitals, “Whilst a recital in the preamble to a regulation may cast light on the interpretation to be given to a legal rule, it cannot in itself constitute such a rule.”

Recitals are often an expression of a political compromise, and regarding many of the definitions in the Public Procurement Directive; Member States in Council were of the opinion that no clarifications resulting from clarifications of definitions in the case law from the CJEU, should be added to the definition. Instead many of the clarifications, which the Commission had suggested in its proposal, were instead removed to the recitals. One should therefore be careful when reading something new into the definition of a public contract in the 2014 Public Procurement Directive. The requirement

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for an acquisition to be of direct economic interest is still part of the definition of a public contract.53

2.4. Consideration

The last condition to be fulfilled in order for a public contract to exist is that a payment (consideration) for the acquisition takes place. Consideration ensures that the agreement is not unilateral. In case the contracting authority does not acquire something the arrangement will not be a public contract, but instead the case will concern support or similar. It is not a contract in the case the service provider pays for a permission or similar and in case the payment consists in the right to exploit a given works or service, the contract involved will instead constitute a concession.54

Like the requirement for acquisition, also the requirement for consideration has been interpreted broad by the CJEU. The CJEU has found that “The pecuniary interest in a contract refers to the consideration paid to the contractor on account of the execution of works intended for the contracting authority (...).”55 Thus, the determine factor is that the contracting authority while acquiring the service also pays the undertaking a consideration.56 It lies in the very essence of a public contract that these create some sort of payment or economic benefit. The Advocate General in La Scala found that “Economic operators are motivated by the prospect of obtaining some economic benefit from contracts. Discrimination in awarding contracts is unacceptable because awards of contracts entail payment to the contractors who are selected. It would be difficult, where no finance was provided for a contract by the contracting authority, to imagine any kind of favouritism which could benefit the operator chosen. If anything done free of charge or financed by the party carrying out the work offends against the principle of competition, that

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53 This is also the interpretation by the Danish legislator, where the preparatory works to the recent Procurement Act, states that an economic interest must be present in the case of a public contract, see act. Nr. 1564 of December 15, 2015, “Udbudsloven”.
54 See footnote 5 above for references to literature regarding concessions.
56 See e.g. C-458/03, Parking Brixen GmbH v Gemeinde Brixen and Stadtwerke Brixen AG, EU:C:2005:605, paragraph 39, which states “It follows from that definition that a public service contract within the meaning of that directive involves consideration which is paid directly by the contracting authority to the service provider.” See also C-382/05, Commission v. Italy, paragraph 33, and C-206/08, Eurowasser (Gotha), paragraph 51.
is because it is damaging to that party’s interests and not because it gives him any advantage over his competitors (…).” 57

It is not a requirement that the contracting authority itself bears the final expenses or if the contracting authority places the expense on the citizens through taxes or tariffs. 58 The latter case will also be a contract for pecuniary interest as long as the payment to the service provider comes directly from the contracting authority and there is a direct economic interest in the performance of the contract. Also cases where, the contracting authority reimburses expenses constitute a consideration, which was the case in e.g. Spezzino. 59 In most cases, the contracting authority will pay a certain amount for the works, goods or service, and the payment will depend on the winning tender in the procurement procedure.

It can sometimes be difficult to determine whether a given amount constitutes a payment for the performance of services (and hence a public contract) or whether the payment is simply a grant. In the latter case, it can be particular difficult to classify an arrangement if the grant contains various conditions. 60 Inspiration can be found in the case law regarding body governed by public law and the requirement for “public financing”. In Cambridge 61 the CJEU found that only payments, which go to finance or support the activities of the body concerned without any specific consideration may be described as public financing. This meant in the case that payments “…in the form of awards or grants for the support of research work, (…), may be regarded as financing” while sums paid “…by one or more contracting authorities constitute in that case consideration for contractual services provided by the university, such as the execution of particular research work

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59 C-113/13, Spezzino and Others v San Lorenzo Soc. coop. sociale and Croce Verde Cooperaativa sociale Onlus, EU:C:2014:2440, paragraph 37: “...A contract cannot fall outside the concept of public contract merely because the remuneration remains limited to reimbursement of the expenditure incurred to provide the agreed service.”. See also C-159/11, Lecce, paragraph 29. See also C-399/98, Ordine degli Architetti delle province di Milano e Lodi, Piero De Amicis, Consiglio Nazionale degli Architetti and Leopoldo Freyrie v Comune di Milano, and Pirelli SpA, Milano Centrale Servizi SpA and Fondazione Teatro alla Scala, EU:C:2001:401, where settlement of debts, also was regarded as consideration.

60 See the Danish Competition Authority statement regarding this topic from April 2011 (Erhvervsråd).

or the organisation of seminars and conferences." Thus, the requirement for consideration requires that the contracting authority receive something in return.

3. A new definition of public procurement

As something new in the 2014 Public Procurement Directive, the term procurement now has its own definition in Article 1(2), which states "Procurement within the meaning of this Directive is the acquisition by means of a public contract of works, supplies or services by one or more contracting authorities from economic operators chosen by those contracting authorities, whether or not the works, supplies or services are intended for a public purpose." [Emphasis added]. In the Commission's proposal another wording was found "Procurement within the meaning of this Directive is the purchase or other forms of acquisition of works, supplies or services by one or more contracting authorities from economic operators chosen by those contracting authorities, whether or not the works, supplies or services are intended for a public purpose." [Emphasis added]. The wording purchase was deleted in the final version (wish from the Parliament) and it was clarified that the acquisition should take place by means of a public contract (wish from the Council).

The aim of including a definition on procurement was to better “… circumscribe the notion of procurement itself. Directive 2004/18/EC only provides for a definition of “public contract” without providing a proper definition of the underlying concept of “procurement”, i.e. the act of public purchasing, which is however the first determining factor for the application or not of the Directive." One should be careful when reading too much into the fact that a definition for procurement now exists, and this should not broaden the scope of the Directive, and the decisive element will still be whether a public contract is present. As Caranta suggests "The two provisions might easily have been merged, and the distinction between “procurement” and “public contract” is simply lost in most of the other language versions." Caranta also argues that ““What is, however, important is that the definition of procurement brings an additional requirement – “acquisition” – on top of the definition of public

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64 See the explanatory note from the Commission, Cluster 10 “Scope”, Council document number 9315/12 from April 27, 2012, p. 3. See also Recital 4, which states "The increasingly diverse forms of public action have made it necessary to define more clearly the notion of procurement itself; that clarification should not however broaden the scope of this Directive compared to that of Directive 2004/18/EC."
65 Caranta, Roberto, The changes to the public contract directives and the story they tell about how EU law works, CML Rev. 2015, 52, 391–460 at p. 435.
contract.” In my opinion the element of acquisition can already be found in the case law from the CJEU on the matter, with the additional option that acquisition can also be an economic interest.

In Denmark the definition of procurement is not to be found in the recent Procurement Act, which implement the Directive. It has probably been the intention that the interpretation of what procurement is, was not found to be necessary to define the scope of the procurement rules. Thus, the definition of procurement can be seen as unnecessary. However, in a recent case, Dr. Falk Pharma, the CJEU has referred to the definition. The CJEU found with reference to the definition of procurement that the choice of a successful tenderer, is intrinsically linked to the regulation of public contracts, and that this “... principle is expressly set out in the definition of the concept of ‘procurement’, now set out in Article 1(2) of Directive 2014/24, in respect of which one aspect is the choice by the contracting authority of the economic operator from whom it will acquire by means of a public contract the works, supplies or services which are the subject matter of that contract.” The CJEU refers here to the definition in Article 1(2) that an acquisition takes place “… from economic operators chosen by those contracting authorities.” [Emphasis added]. Thus, the CJEU seems to have taking a new road by sort of inventing a new factor of procurement: the choice element. However, normally a choice of supplier in procurement procedures would take place after a competition and the “choice elements” must be based on objective criteria. Thus, it seems dangerous to conclude that just because there was a lack of choice in the arrangement that it fell outside the Directive.

The conclusion in the case, that a so called free-choice system regarding the

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67 C-410/14, Dr. Falk Pharma GmbH v. DAK-Gesundheit, EU:C:2016:399, p. 40

68 In the Commission’s explanatory note, Cluster 10, Scope, p. 3, the choice element is also found to be a distinctive feature of public procurement. It is stated “Finally, it also seemed important to clarify that public procurement necessarily presupposes an element of selectivity, which distinguishes procurement from simple authorization schemes: Only such contracts can be considered as procurement where one or several economic operators are chosen to fulfil the task in question against remuneration. Situations where all operators fulfilling certain conditions are entitled to perform a given task, without any selectivity, are normally not procurement but simple authorization schemes (e.g. licenses for medicines or medical services).”

69 The Procurement Directive Article 32 contains situations where the choice element will also be lacking simply because only one supplier exists.
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supply of a medical product did not constitute a public contract, could probably also have been reached with reference to the fact that the contracting authority in the case most likely did not have a direct economic interest in the case (see above Section 2.3), depending on the structure of obligations in German law. This is the conclusion from similar Danish decisions regarding free choice systems, which will be elaborated on below in Section 4.

The Pharma case involved the supply of medicinal products refundable under a general social security scheme. Thus, it would ultimately be the individual citizen who would purchase a given product among the suppliers. The contracting authority in the case had issued an “authorisation procedure” for the conclusion of rebate contracts. The procedure provided for the authorisation of all interested undertakings meeting the authorisation criteria and for the conclusion with each of those undertakings of identical contracts whose terms were fixed and non-negotiable. Furthermore, any other undertaking fulfilling those criteria also had the opportunity of acceding on the same terms to the rebate contract scheme during the contract period. Only one undertaking expressed interest in the contract and contract was concluded with that one undertaking. The essence in the case was a so-called “free choice” system in which a contract scheme, in which a public entity intends to acquire goods by contracting throughout the period of validity of that scheme with any economic operator who undertakes to provide the goods concerned on fixed terms, without choosing between the interested operators, and allows those operators to accede to that scheme throughout its period of validity, must be classified as a public contract within the meaning Public Procurement Directive. The CJEU found, with reference to the aim of the procurement rules, that such a free-choice system was not to be regarded as a public contract. It stated “Consequently, where a public entity seeks to conclude supply contracts with all the economic operators wishing to supply the goods concerned in accordance with the conditions specified by that entity, the fact that the contracting authority does not designate an economic operator to whom contractual exclusivity is to be awarded means that there is no need to control, through the detailed rules of Directive 2004/18, the action of that contracting authority so as to prevent it from awarding a contract in favour of national operators.” [Emphasis added].

70 The fact that such an authorisation scheme (free choice system) did not fall under the Procurement Directive, does not mean that the principles of the Treaty does not apply in case the contract is of cross-border interest. The CJEU stated that, paragraph 44 “…It should be noted that such a procedure, in so far as its subject matter is of certain cross-border interest, is subject to the fundamental rules of the FEU Treaty, in particular the principles of equal treatment and of non-discrimination between economic operators and the consequent obligation of transparency, that obligation requiring that there be adequate publicity. In that regard, Member States have some latitude in a situation such as that at issue in the main proceedings for the purpose of adopting measures intended to ensure observance of the principles of equal treatment and the obligation of transparency.”

71 C-410/14, Dr. Falk Pharma GmbH v. DAK-Gesundheit, EU:C:2016:399, paragraph 37.
Section 4, the conclusion in the case is identical to the case law from Denmark regarding similar free-choice systems, but seems to be with different reasoning. It is noteworthy that the case was cited without an Advocate General’s opinion and the case has already in literature been criticised substantially, indicating that we have probably not seen the last judgment on this matter.

4. Free choice systems from a Danish Perspective

Free choice system is a broad term for various opportunities that citizens are given to choose between different providers of public benefits. In Denmark these free-choice systems exist in areas of health care (free choice of hospital), children (day-care, school, youth education) and elderly (personal or practical home care and aids). Characteristic of a free choice system is that most often will be private suppliers, which the individual citizen can choose freely between. As a company, it would therefore be appropriate to have knowledge of how to be accepted or chosen supplier in a given area. Free choice systems are often introduced because of a wish from the contracting authority to promote competition and facilitate the private suppliers to offer their services on the same terms as the local municipality. Characteristic by a free choice system is that it is the citizens who choose the supplier to perform the service involved, but it is the municipality who will pay for the service (or depending on the type of contract involved grant an aid to the citizen, often by a voucher). A free choice system is typically established in one of the following ways:

1) The municipality enters into a contract with two or more suppliers.
2) The municipality offers the recipients of the service a free choice voucher
3) A person who is entitled to help or support, can choose to designate a person to perform the tasks. The appointee must be approved by the municipality, which then must enter into an agreement with the relevant person about the scope and content of the tasks

It is mainly the first situation, which has been the subject of disputes due to its resembling as a public contract, which will be elaborated on below.

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72 For critical comments to the conclusion in the judgment, see Albert Sanchez Graells http://www.howtocrackanut.com/blog/2016/6/3/6dmoauv4vg7cuvwdsxj9zdclyk19h , who finds that the judgment is an “...undesirable development of EU public procurement law.” Also David McGovern takes a very critical approach in his comments to the judgment, McGovern, David, The concept of a public contract: Dr. Falk Pharma Gmbh v DAK-Gesundheit (Case C-410/14), Public Procurement law Review, P.P.L.R. 2016, 5, NA156-NA15.

73 Also called open-house contracts, see http://www.twobirds.com/en/news/articles/2016/germany/june/eugh-entscheidet-ueber-openhousevertraege , or customer choice and service voucher system as in Recital 5 of the Public Procurement Directive.
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In a statement from the Danish Competition and Consumer Authority from 2012, the authority concluded that the purchase of arm and leg prostheses, did not involve an economic benefit for the contracting authority. The agreement in the case took place between the individual citizen and the supplier and the municipality was not according to Danish legislation required to ensure citizens had access to arm and leg prostheses, but was alone required to pay for it. The Competition Authority concluded that the aim of entering into the agreements in the case was not to exempt the municipalities for a duty according to legislation, hence the contracting authority did not have an economic interest in the arrangements, and hence these agreements were not concluded for a pecuniary interest (and thus not covered by the Procurement Directive).

The Danish Complaints Board for Public Procurement took the same approach in a decision of August 2013, Bandagist-Centret A/S v. Haderslev Kommune. The Complaints Board further added that it was not the municipality who became owner of the arm and leg prostheses, and there was nothing in the agreement, which gave the municipality a direct economic interest in the arm and leg prostheses, which should only be used by the individual citizens. The municipality was not obliged to make these benefits available to citizens, (contrary to the contracting authority in Commission v. Germany, mentioned above). Thus, the municipality was not released from a duty by the agreement, and the Board concluded that the agreement in question was not a contract for pecuniary interest and hence the situation was not covered by the Procurement Directive.

In another statement from the Competition Authority regarding a similar situation, the conclusion was different. In this case it was the municipality who would be responsible for the purchase of the relevant help equipment, and hereafter they would borrow the equipment to the citizens who ultimately would need to give them back to the municipalities. Thus, the contracting authority would become owner of the product and this situation should, according to the Competition Authority be regarded as a public contract, covered by the Public

74 See decision, Indkøb af arm- og benproteser uden forudgående udbud, Jr. nr. 4/0420-0100-0297, 2012.
75 C-271/08, Commission v. Germany. EU:C:2010:426.
76 The Board concluded that since the contracting authority did not receive a service, which they had a direct economic interest in, the payment from the municipalities could not be regarded as a consideration. "Da de indklagede således ikke modtager en ydelse, som de har en direkte økonomisk interesse i, kan den betaling, som kommunerne foretager, heller ikke anset for en modydelse for en sådan ydelse. “ Hence, the payment coming from the authority was to be considered as aid "Aftalens parter er dermed dels borgeren på den ene side og leverandøren på den anden side, dels mellem kommunen og den leverandør, som borgeren har valgt. Efter klagenævnets opfattelse har kommunernes betaling til leverandørerne alene karakter af udbetaling af den offentlige støtte, som kommunen på forhånd har bevilget borgeren i henhold til den sociale lovgivning."
77 Act number 150 of February 16, 2015 regarding social services.
Procurement Directive.\textsuperscript{78} The difference in this situation compared to the previous case, was that the municipality would become owner of the given products indicating that it had a (limited) economic interest in the case.

In the Complaints Board for Public Procurement, decision of December 16, 2014, \textit{Handicare Auto A/S v. Ringkøbing-Skjern Kommune}, the municipality had entered into a framework agreement regarding the purchase of cars to be used for handicapped. It followed from Danish legislation (servicelovens § 114) that a municipality should provide a grant in the form of a loan without interest to purchase of cars to persons with permanent physical or mental impairment. According to the procurement conditions, the citizen could choose any supplier they wished, provided that they themselves would pay any potential increase another provider should have. The municipality would not become owner of the car. The Complaints Board found that the municipality with the purchase would not be released from any duties and hence there was no economic interest in the case, and the contract was not a public contract. The purpose of the procurement was to create competition regarding the amount the aid the municipality would grant a citizen.

A similar situation was involved in a decision from March 30, 2016, \textit{OneMed A/S v. Københavns Kommune}. In the case the Complaints Board found that the contract involved was not a contract for pecuniary interest, but alone a sort of “a price retrieval”, with the purpose that prices in the future would form the basis for the municipality’s allocation of grants for the equipment concerned. This because the undertaking that had submitted the lowest price, was not guaranteed any minimum purchase, since it would be the individual citizens who would purchase the equipment (and became owner of it). Thus, a contract for pecuniary interest was not present in the case, as the municipality did not have a direct economic interest in the agreement.

To sum up regarding free choice systems in Denmark, it can be concluded that only in case the municipalities are released from an administrative duty, or when the municipalities become owners of the products involved, can it be said that the municipalities have an economic interest in the case (and hence a public contract is involved). However, in situations where the municipality only supports a service or similar by grants or aid, such as loans without interest, the contracting authority will not have an economic interest in that case, and those situations does not constitute a public contract. Furthermore, in those cases where it is the citizen who becomes owner of a given product the contract involved will not be a contract for pecuniary interest.

The fact that the Public Procurement Directive does not cover these so called free-choice systems is now explicitly mentioned in the new Procurement Direc-

\textsuperscript{78} Decision from September 4, 2012.
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tive. Recital 4 states “Similarly, situations where all operators fulfilling certain conditions are entitled to perform a given task, without any selectivity, such as customer choice and service voucher systems, should not be understood as being procurement but simple authorisation schemes (for instance licences for medicines or medical services).”79 Thus, it has been the intention of the EU legislator to emphasize that free-choice systems fall outside the Public Procurement Directive.

5. Conclusions

As seen above it can often be difficult to determine whether a public contract is involved in a given situation. Case law from the CJEU has a broad definition of the concept of a public contract. The 2014 Public Procurement Directive does not change the concept of a public contract; hence the earlier case law from the CJEU will still be relevant to look upon when defining a public contract. The condition that the contracting authority must have a direct economic interest creates in itself a broad definition of a public contract compared to for example a requirement for ownership or that the service involved should be intended for the contracting authority itself. Such a broad definition is in line with the aim of the procurement rules.80

It is possible, that the Falk Pharma case indicate that the CJEU will look at the concept of a public contract differently. The case might be seen as an example on limiting the scope of the Directive. The new definition of public procurement does not seem to add anything new to scope of the Procurement Directive, as also stated in the recitals to the Directive. It has also clearly been the intention of the EU legislator that free choice systems should not be covered by the procurement rules. However, one should be careful by only placing emphasis on the element of choice, but should also look upon whether a concrete arrangement creates an economic benefit for the contracting authority. It should also be borne in mind that other rules such as state aid and competition rules could be relevant for a given arrangement.

One could have thought that such an important factor as defining a public contract 79 This reference and the fact that free-choice systems are not covered by the procurement rules was an important element for Scandinavian countries. Also in relation to the negotiations under the concessions directive, particular Scandinavian countries found it important to ensure that a free choice system was not to be regarded as a concession contract. Recital 13 of the Concession Directive now states "Furthermore, arrangements where all operators fulfilling certain conditions are entitled to perform a given task, without any selectivity, such as customer choice and service voucher systems, should not qualify as concessions, including those based on legal agreements between the public authority and the economic operators. Such systems are typically based on a decision by a public authority defining the transparent and non-discriminatory conditions on the continuous access of economic operators to the provision of specific services, such as social services, allowing customers to choose between such operators."
80 See footnote 14 above.
contract should long have been resolved, but it still raises important questions and by referring to the definition of procurement in the *Falk Pharma* case, and placing emphasis on the contracting authority’s choice this might have open up a whole new debate as to when something can be said to fall under the Directive. We will presumably see more cases on the topic in the future at EU level as well as national level.