The Complaints Board for Public Procurement

# Annual Report 2022

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# INTRODUCTION

The Complaints Board for Public Procurement hereby publishes its tenth annual report outlining the Complaints Board's decisions in its leading cases in accordance with the Danish Executive Order on the Complaints Board (*klagenævnsbekendtgørelsen*).

Chapter 1 provides an account of the Complaints Board's legal basis, establishment and composition, including the presidency, the Board's experts and secretariat.

Chapter 2 contains summaries of a number of the Board's decisions from 2022 that are considered leading cases or are of particular interest otherwise. Part of the decisions concern the understanding of key provisions in the Danish Public Procurement Act (*udbudsloven*). The description aims to focus on the aspects which the Complaints Board found of particular interest. The Complaints Board's decisions are published on an ongoing basis on the Complaints Board's website at www.klfu.naevneneshus.dk. This applies to decisions concerning violation of the public procurement rules, decisions awarding compensation and a selection of the Complaint's Boards final decisions regarding suspensive effect and access to documents.

Chapter 3 gives an account of Danish judgments in cases that were previously heard by the Complaints Board.

Chapter 4 contains statistics on the Complaints Board's activities with comments. In 2022, the Complaints Board received 100 complaints which is nearly on a level with the number received in 2016-2018 and a little more than the number received in 2021. The Board's decisions in 2022 fully or partly found in favour of the complainants in approx. 36% of the cases, which is a higher percentage than in 2020 but nearly on the same level as 2021. Moreover, in approx. 24% of the Complaints Board's decisions regarding suspensive effect where the Board applied the prima facie case test (examined whether the complaint seemed to be well-founded on a preliminary assessment), it considered the case to be a prima facia case. This typically led the parties to find a solution, and the complaint was withdrawn.

Chapter 5 describes the Complaints Board's other activities in the course of the year.

In 2022, the Complaints Board's average length of proceedings increased to 7 months compared to 6 months in 2021.

Jakob O. Ebbensgaard, President

Viborg, July 2023

# 1. THE COMPLAINTS BOARD FOR PUBLIC PROCUREMENT

## 1.1 Legal basis and establishment

The Complaints Board for Public Procurement is a quasi-judicial complaints board. The Complaints Board was established in 1992 for the purpose of meeting Denmark's obligations under the Control Directives (Directive 89/665/EEC and Directive 92/13/EEC). The Board's activities are currently governed by the Danish Act on the Complaints Board for Public Procurement (the Complaints Board Act) *(lov om Klagenævnet for Udbud* (*klagenævnsloven*)), see Consolidated Act no. 593 of 2 June 2016, amended by Act no. 884 of 21 June 2022, which contains the rules on the Complaints Board's jurisdiction and activities. The Act is supplemented by Executive Order no. 887 of 11 August 2011 on the Complaints Board for Public Procurement (the Executive Order on the Complaints Board), most recently amended by Executive Order no. 178 of 11 February 2016. The Complaints Board Order regulates, *i.a.*, the submission of complaints and the Complaints Board's procedure. The history of the legal basis governing the Board's activities was described in detail in chapter 1 of the Board's 2016 Annual Report, to which reference is made.

## 1.2 The Complaints Board's composition

The Complaints Board's organisation is laid down in Section 9 of the Complaints Board Act and Section 1 of the Executive Order on the Complaints Board.

The Complaints Board consists of a President and a number of Vice-Presidents (the presidency) as well as a number of expert members. The presidency and the expert members are appointed by the Minister for Industry, Business and Financial Affairs for a period of up to four years. They are eligible for re-appointment.

The presidency consists of six High Court judges and four District Court judges.

The President organises the work of the Complaints Board and its secretariat and appoints a president of the individual case from among the members of the presidency. The president of the case then appoints the expert to assist in the procedure. In special cases, the Complaints Board's President may decide to let more members from the presidency and experts participate in the adjudication of a case. See section 1.5 below.

The Complaints Board's experts are appointed among people with knowledge within fields such as building and construction, public procurement, transport, utilities and law. The Complaints Board's 20 experts are appointed on the recommendation of the ministries and organisations that have been given a right of nomination under the Executive Order on the Complaints Board. The experts are independent in their duties as experts of the Complaints Board and are thus not subject to powers of direction or supervision of the authority or organisation where they have their principal occupation or the authority or organisation that has the right of nomination.

In 2022, the Complaints Board's presidency was composed of the following judges:

President of the Complaints Board for Public Procurement:

Nikolaj Aarø-Hansen, High Court Judge (until 14 August 2022)

Jakob O. Ebbensgaard, High Court Judge (appointed President on 15 August 2022)

Other members of the Complaints Board's presidency:

- Kirsten Thorup, Former High Court Judge
- Michael Ellehauge High Court Judge, PhD
- Niels Feilberg Jørgensen, Former Judge
- Erik P. Bentzen, High Court Judge
- Jesper Stage Thusholt, Judge
- Charlotte Hove Lasthein, Judge (until 21 February 2022)
- Jesper Jarnit, High Court Judge
- Mette Langborg, Judge
- Morten Juul Nielsen, Judge (from 22 February 2022)

The Board's experts in 2022 were:

- Pernille Hollerup, Senior Director
- Jan Eske Schmidt, Knowledge Partner
- Lene Ravnholt, Legal Advisor
- Preben Dahl, General Counsel
- Stephan Falsner, Lawyer
- Jeanet Vandling, CPO
- Ole Helby Petersen, Professor with Special Responsibilities, PhD
- Christina Kønig Mejl, Chief Advisor
- Claus Pedersen, General Counsel, LL.M.
- Birgitte Nellemann, Office Head
- Kurt Helles Bardeleben, Lawyer
- Maria Haugaard, Office Head
- Carina Risvig Hamer, Professor
- Trine Kronbøl, Head of Service
- Mikael Kenno Fogde, Lawyer
- Rikke Fog Bach, Sales Manager
- Louise Kirkegaard Folling, Chief Advisor
- Torkil Schrøder-Hansen, Lawyer, Chief Advisor
- Michael Steinicke, Professor
- Christian Lund Hansen, Chief Advisor

## 1.3 The Complaints Board's secretariat

The Complaints Board's secretariat is located in the offices of the Danish Appeals Boards Authority, which is an agency under the Ministry of Industry, Business and Financial Affairs.

The Complaints Board's President is the head of the secretariat, which had three lawyers and two secretaries for the major part of 2022.

The Complaints Board's lawyers prepare the cases and help the relevant president in selected cases prepare a draft decision. In addition, the lawyers assist the Complaints Board's president with various management tasks. The Complaints Board's secretaries participate in case preparation, answer questions on whether a complaint of a completed procurement procedure has been filed within the standstill period, perform a number of administrative tasks and provide telephone support. In addition, they perform joint duties for the Danish Appeals Boards Authority.

In 2022, the secretariat consisted of:

- Maiken Nielsen, Legal Special Advisor, MSc in Business Administration and Commercial Law
- Tanja Bøtker Lindgren, Legal Special Advisor, LLM (leave from 8 April 2022)
- Mona Rosenlund, Legal Special Advisor, LLM (until 13 March 2022)
- Julie Dybdahl Barrett, Legal Administrative Officer, LLM (from May to September 2022)
- Louise Dissing Jensen, Legal Administrative Officer, MSc in Business Administration and Commercial Law (from 15 November 2022)
- Stine Loftager Rasmussen, Legal Administrative Officer, MSc in Business Administration and Commercial Law (from 1 December 2022)
- Heidi Thorsen, Administrative Officer
- Katrine Kirkegaard Gade, Senior Clerk (from 16 March 2022)
- Nadia Reichenbach Bodentien, Junior Clerk (from 1 July 2022)

## 1.4 The Complaints Board's tasks, including possible actions and sanctions

In accordance with the first sentence of Section 10(1) of the Complaints Board Act, the Complaints Board considers whether a contracting authority has violated the rules referred to in Section 1(2) and (3) of the Act.

The Complaints Board thus primarily deals with complaints of public contracting authorities' violations of:

- The Public Procurement Act and rules adopted under it, except for violations of Sections 1 and 193 of the Public Procurement Act
- EU law on the conclusion of public contracts and supply contracts (the EU public procurement rules)
- The Danish Act on Invitations to Tender in the Construction Sector (the Act on Invitations to Tender) (*Lov om indhentning af tilbud i bygge- og anlægssektoren* (*tilbudsloven*))

Pursuant to Section 37 of the Danish Access to Public Administration Files Act (*offentlighedsloven*), the Complaints Board is the appeals body for the consideration of complaints of other authorities' decisions on access to documents in public procurement cases. Reference is made to chapter 3 of the 2016 Annual Report for a detailed description of this part of the Complaints Board's work. The Complaints Board is the final appeals body for local and regional governments' violations of the Danish Executive Order on Reference Bids (Executive Order no. 607 of 24 June 2008) (*kontrolbudsbekendtgørelsen*) as well as in particular areas where the Complaints Board has status as an appeals body by law or in accordance with law.

The majority of the cases heard by the Complaints Board concern the Public Procurement Act, which mainly implements the Public Procurement Directive (Directive 2014/24/EU) and the other EU public procurement rules, while only a very limited number of cases concern the Act on Invitations to Tender.

The Complaints Board's primary task is to make specific decisions in specific complaints cases. When the Complaints Board makes decisions in leading cases, it often makes general statements on the rule of law, and care should be taken not to over-interpret the Complaints Board's decisions and not to attach too much significance where it is not warranted by the relevant decision. Please see the article in the Danish weekly law reports 2013 B, pages 241 et seq. (U.2013B.241, Michael Ellehauge: Erfaringer med håndhævelsen af EU's udbudsregler (*Experience with the application of the EU public procurement rules*), section 1).

As a source of law, the Complaints Board's decisions are subordinate to judgments from Danish courts of law and the Court of Justice of the European Union. However, only a small share of the Board's decisions is brought before the courts of law; in 2022, only 3 out of 42 decisions. The Complaints Board's case law, and perhaps particularly decisions made within the past ten years, must be regarded as an important source of law in the application of the public procurement rules in Denmark. The Complaints Board also has the advantage of being able to act faster than the courts of law. In 2022, the average length of proceedings for public procurement cases was seven months, and to this should be added that a very large portion – approx. 59% – of the cases are brought to a conclusion within the first three months of receipt of the complaint (this figure includes both settled and rejected cases). See chapter 4 of the Annual Report.

*The Complaints Board's actions and sanctions*

Sections 12-14 a, Sections 16-19 and Section 24(2) of the Complaints Board Act set out the Complaints Board's possible sanctions to ensure effective enforcement of the procurement rules.

*Suspensive effect*

In standstill cases (Section 12(2) and (3) of the Complaints Board Act) and in other cases (Section 12(1) of the Complaints Board Act), the Complaints Board may, on request, grant suspensive effect to a complaint if justified by special reasons.

According to the Complaints Board's established case law, the conditions for granting suspensive effect to a complaint are:

1. The initial examination of the complaint suggests that it is well-founded ("prima facie case test"). If the complaint seems futile, this condition is not met.

2. There must be urgency. This means that it is necessary to grant suspensive effect to avoid serious and irreparable damage to the complainant.

3. Granting suspensive effect must be justified by a balancing of interests: The complainant's interest in being granted suspensive effect must outweigh the respondent's interest in the opposite.

Reference is made to the articles on this subject in the Danish weekly law report 2010 B, pages 303 et seq., and 2016 B, pages 403 et seq. (U.2010B.303, Mette Frimodt Hansen and Kirsten Thorup: Standstill og opsættende virkning i udbudsretten (*Standstill and suspensive effect in public procurement law*) and

U.2016B.403, Katja Høegh and Kirsten Thorup: Standstill og opsættende virkning inden for udbudsretten – endnu engang (*Standstill and suspensive effect in public procurement law – revisited*)) and the same in the chapter Standstill og opsættende virkning i udbudsretten (*Standstill and suspensive effect in public procurement law*) in Treumer (ed.) Udbudsretten 2019 (*Procurement Law 2019*).

The Complaints Board's assessment of whether to grant suspensive effect to a complaint is a preliminary assessment of the fulfilment of the three conditions based on the written material received. The conditions are cumulative, meaning that suspensive effect will not be granted if one of the conditions is not fulfilled. The decision to grant suspensive effect does not prejudice the final decision in the case.

The Complaints Board's case law shows that it is common practice to provide a detailed explanation in relation to the first "prima facie case test". The objective is to explain to the complainant and the respondent that, on the existing basis, 1) no serious violation of the public procurement rules has been committed, and the complainant cannot expect to succeed in the complaint unless important new information is produced, or 2) that infringements have been committed which, in the circumstances, should cause the respondent to consider cancelling the procurement procedure or reversing its award decision, if possible.

Although a decision to grant suspensive effect is not a final assessment and thus a substantive decision in the case, the Complaints Board's "prima facie decision" will in practice often serve to inform the party adversely affected that it must bring new evidence in the case to have a chance of the Complaints Board finding in its favour in the subsequent substantive decision in the case. The Complaints Board granted suspensive effect to three complaints in 2022: In its decision of 25 May 2022, HCS A/S Transport & Spedition v the Regional Municipality of Bornholm and Bornholms Affaldssortering (BOFA), in its decision of 1 June 2022, Fayard A/S v the Danish Ministry of Defence's Acquisition and Logistics Organisation, and in its decision of 6 October 2022, Tunstall A/S v Frederikssund Municipality.

Sometimes, suspensive effect is requested even after the contract has been concluded. In these cases, the procurement procedure is already completed, which means that suspensive effect will be pointless unless the complainant's purpose is to declare the contract ineffective.

If the Complaints Board assesses that a case may be adjudicated on the written record, the Complaints Board may instead decide to settle the case so that the Complaints Board will not decide on whether to grant suspensive effect. The parties will then be allowed to submit supplemental pleadings. Three such decisions were made in 2022: The decision of 22 March 2022, Indra Sistemas, S.A. v the Danish Ministry of Defence's Acquisition and Logistics Organisation, see the decision of 17 June 2022, Grandt Defense ApS v the Danish National Police, and the decision of 16 September 2022, Electrolux Professional A/S v Alabu Bolig. The decision of 16 September 2022 is discussed in chapter 2 of the Annual Report.

*Other sanctions*

When the Complaints Board has ascertained that the public procurement rules have been violated, its sanctions include the following depending on the complainant's claim (Sections 13-14 a and Sections 16-19 of the Complaints Board Act):

- to suspend the contracting authority's procurement procedure or decisions made in connection with a procurement procedure;
- to annul the contracting authority's unlawful decisions or cancel a procurement procedure;
- to declare a contract ineffective and/or
- to impose an alternative sanction on the contracting authority;
- to file a police report for the purpose of a fine;
- to order the contracting authority to pay compensation.

"Ineffective contract" in combination with the rules on alternative sanctions/filing of a police report are the most far-reaching sanctions. "Ineffective contract" is only used for the most serious violations of the public procurement rules and in particular in connection with direct award of contracts and conclusion of contracts during a standstill period or during the period in which the complaint has been granted suspensive effect by the Complaints Board.

Section 185(2) of the Public Procurement Act dictates that if an award decision is annulled by a final decision or judgment, the contracting authority must terminate a contract or framework agreement concluded based on this decision giving a reasonable notice unless there are special circumstances justifying continuation of the contract. This provision does not apply where the "ineffective contract" sanction applies, see the first and second sentences of Section 185(2) of the Public Procurement Act. According to the explanatory notes to the Act, final decision or judgment means a final decision from the Complaints Board or a judgment from the ordinary courts which may no longer be appealed.

The "ineffective contract" sanction may be used against the contracting authority even though it believes in "good faith" that no complaint has been made to the Complaints Board within the standstill period because the complainant has neglected to inform the contracting authority of the complaint to the Complaints Board contrary to Section 6(4) of the Complaints Board Act. Reference is made to the above-mentioned article by Katja Høegh and Kirsten Thorup in U.2016B.403, referring to the Complaint Board's decision of 7 May 2015, Rengoering.com A/S v the Municipality of Ringsted. However, the contracting authority may write to the Complaints Board's secretariat to ask whether a complaint has been filed against a procurement procedure, stating the contract notice number, before concluding a contract with the successful tenderer. Wherever possible, the Complaints Board's secretariat will reply to such written enquiries after 1 pm (weekdays) on the day that they are received.

If the contracting authority is not part of the public administration and therefore is not covered by Section 19(1) of the Complaints Board Act, the Complaints Board may not impose a financial sanction on the contracting authority. The Complaints Board will instead report the case to the police if an alternative sanction in the form of a penalty is to be imposed on the contracting authority, see Section 18(3) of the Act. Reference is made to the Complaints Board's decision of 16 September 2022, Electrolux Professional A/S v Alabu Bolig (discussed in chapter 2 of the Annual Report), where the Complaints Board filed a police report.

The case law overview shown at the Complaints Board's website in relation to the annual report contains a number of examples of the Complaints Board's application of the sanctions provided in the Complaints Board Act.

## 1.5 Decisions by the Board and by the President

The rules on the composition of the Complaints Board in individual cases are set out in Section 10(4) and (6) of the Complaints Board Act.

*Decisions by the Board*

When the Complaints Board hears a case, the Complaints Board is generally composed of one member of the presidency and one expert. The President of the Complaints Board appoints the president of each case.

In special cases, as mentioned above in section 1.2, the President of the Complaints Board may decide to let more members from the presidency, thus also more experts, participate in the adjudication of a case. These cases include leading cases, particularly large or complex cases, where two members of the presidency and two experts will participate.

In 2022, this happened in five cases: the decision of 7 March 2022, (three co-adjudicated cases) Albertslund Tømrer og Snedker A/S, VVS & Varmeteknik A/S and HRH EL A/S v Albertslund Municipality, the decision of 28 November 2022, Grandt Defense ApS v the Danish Ministry of Defence's Acquisition and Logistics Organisation, and the decision of 29 November 2022, Fayard A/S v the Danish Ministry of Defence's Acquisition and Logistics Organisation. The decisions are discussed in chapter 2 of the Annual Report.

*Decisions by the president*

The president of the case may decide to adjudicate cases without the involvement of an expert if they may be assessed based on the written record and are not leading cases. This option is hardly ever used as the experts' assistance is essential to cases. An expert member always assists in those decisions where a contract is considered ineffective or where alternative sanctions are applied.

The president of the case may also decide to settle procedural issues without the involvement of an expert such as decisions on suspensive effect and access to documents as well as rejection of ineligible complaints.

## 1.6 Eligibility conditions for complaints and complaint guidelines

The eligibility conditions for complaints are set out in Sections 6-7 and Section 10 of the Complaints Board Act and in Sections 4-5 of the Executive Order on the Complaints Board.

In cooperation with the president of the case, the secretariat is responsible for checking whether the complainant fulfils the formal requirements for filing a complaint. Complaint guidelines in Danish and English setting out the requirements for a complaint mainly directed at complainants who are not represented by a lawyer or other professional advisor are available on the Complaints Board's website at www.klfu.naevneneshus.dk. In addition, the secretariat offers telephone support on the procedure for the filing of complaints.

A complaint to the Complaints Board must be filed in writing. When filing the complaint, the complainant must also notify the contracting authority in writing of the complaint, stating whether the complaint has been filed in the standstill period. If the complaint has not been filed in the standstill period, the complainant must state whether it has requested that suspensive effect be granted pursuant to Section

12(1) of the Complaints Board Act. The complainant must enclose a copy of this notification with the complaint. In addition, the complainant must state whether there is information in the statement of claim that must, in the complainant's view, be excluded from access.

Complaints of violations of Titles I-III of the Public Procurement Act, the Utilities Directive, the Concession Directive or the Directive on Security and Defence Procurement are subject to a fee of DKK 20,000 while other complaints, including of violations of the Act on Invitations to Tender, are subject to a fee of DKK 10,000. If the fee is not paid on the filing of the complaint or before the expiry of the time for payment fixed by the Complaints Board, the complaint will be rejected.

The complaint must describe the claims of violations that the Complaints Board is requested to consider. The Complaints Board is bound by the parties' claims and allegations (arguments), which means that it is not allowed to award more than the party has claimed or take into account arguments that were not included in the parties' submissions (Section 10(1) of the Complaints Board Act). This means that the Complaints Board will not help the complainant with the formulation of appropriate claims, but it may offer guidance to the complainant. If, after such guidance, the claims still cannot be used as basis for consideration of the case, the Complaints Board will reject the claims or the entire complaint, see the decision of 21 March 2018, Scientia Ltd. v Aarhus University and the decision of 22 June 2021, Pro Medical Covid-19 Test ApS v the Central Denmark Region, the North Denmark Region, the Region of Southern Denmark, Region Zealand and the Capital Region of Denmark.

It is also a condition that the complainant has a legal interest. Companies that had an interest in winning a certain contract are eligible to complain. Typically, complainants will be companies that have applied for preselection or submitted a tender, but companies that would have had access to apply for preselection or to submit a tender (potential candidates/tenderers) may also have a legal interest. If the complainant is not able to prove that it has a legal interest in the case, the complaint will be rejected. To mention an example, this was the case in the Complaints Board's decision of 24 October 2022, KN Rengøring v/Henrik Krogstrup Nielsen v Herlev Municipality where a potential tenderer was not found to have a legal interest as the company was subject to the ground for exclusion in item 5 (now item 4) of Section 137(1) of the Public Procurement Act. The decision is described in more detail in chapter 2 of the Annual Report. The Complaints Board has made a number of decisions that illustrate the legal interest requirement. Some of these decisions are shown in the case law overview at the Complaints Board's website in relation to annual reports.

The Danish Competition and Consumer Authority and certain organisations and public authorities mentioned in the annex to the Executive Order on the Complaints Board have been granted a special cause of action.

The complainant must also observe the time limits for filing complaints set out in Section 7 of the Complaints Board Act to which reference is made.

**In general**, the time limits for filing complaints are:

No preselection: 20 calendar days.

Contracts based on a framework agreement with reopening of the contract to competition or a dynamic procurement system: 30 calendar days (only applies to complaints about EU procedures).

"Ordinary contracts": 45 calendar days.

Framework agreements: 6 months.

Contracts directly awarded where the Section 4 procedure has been followed (notice for voluntary ex ante transparency): 30 calendar days

A special time limit of two years from the day after the publication of a notice of contract applies to the Danish Competition and Consumer Authority.

The time limits set out in the Complaints Board Act are calculated in accordance with the Regulation on Time Limits (Regulation No. 1182/71 of the Council of 3 June 1971 determining the rules applicable to periods, dates and time limits).

## 1.7 Preparation and adjudication of cases, including costs

The rules on the preparation and adjudication of cases are set out in Sections 6 and 10-11 of the Complaints Board Act and in Sections 6-9 of the Executive Order on the Complaints Board.

The Complaints Board's secretariat prepares the cases in cooperation with the president of the individual case. During the case preparations, the parties exchange pleadings, and the Complaints Board may request clarification of specific aspects of the case.

After the initial review of whether the complaint/statement of claim meets the necessary conditions (see section 1.6), the Complaints Board will ask the respondent to submit an account of the factual and legal circumstances of the case and the exhibits in the case within a prescribed time limit (defence). After this time, additional pleadings (reply and rejoinder etc.) will generally be exchanged between the parties. The length of this part of the proceedings depends on the nature of the case. During the hearing of the case, the Complaints Board will decide on any disputes between the parties as to the complainant's right of access to documents as a party. Such decisions are made in accordance with the relevant rules in the Danish Public Administration Act (*forvaltningsloven*), see chapter 3 of the 2016 Annual Report. The complainant will normally be given the opportunity to make additional submissions when the Complaints Board has settled the issue of access and before the Complaints Board makes the substantive decision in the case. In any case, thus regardless of the complainant's restricted access, the Complaints Board will have access to all documents and may use them in its assessment of whether any violations have been committed.

The Complaints Board may allow a third party to intervene in the case for the complainant or the contracting authority (Section 6(3) of the Complaints Board Act). This is most commonly the case when a claim for annulment of the award decision has been made and where annulment under Section 185(2) of

the Public Procurement Act would generally oblige the contracting authority to terminate the contract giving a reasonable notice. If the issue is concerning the "ineffective contract" sanction, the party with whom the contract was concluded has an unconditional right to intervene and to be informed hereof, see Section 6(5) of the Complaints Board Act. Pursuant to Section 6(3) of the Act, it is a condition for intervention that the case is of significant importance to the party wishing to intervene. Intervention under the Complaints Board Act corresponds to non-party intervention under the Danish Administration of Justice Act (*retsplejeloven*). This means that the intervener is not allowed to make separate claims or present its own arguments and can therefore not be ordered to pay costs.

The Complaints Board is responsible for ensuring that there is sufficient evidence in the case. The Complaints Board may request that the complainant, the respondent or a third party acting as intervener provide information deemed to be important to the case (Section 6(2) of the Executive Order on the Complaints Board). By contrast, the Complaints Board is not entitled to raise any issues of errors for consideration in the case as the parties' claims and arguments provide the framework for the Complaints Board's hearing (Section 10(1) of the Complaints Board Act). Here, the Complaints Board operates under the adversarial system, which, for example, was evident in the decision of 31 May 2021, Familieplejen Bornholm v the Regional Municipality of Bornholm (discussed in chapter 2 of the 2021 Annual Report).

When the exchange of pleadings is completed, the case will generally be adjudicated on the written record unless the president of the case decides to conduct a hearing, which, however, only occurs in very few cases.

Whether a case requires a hearing is assessed on a case-by-case basis considering, *i.a.*, whether the case is a leading case or complex and whether statements are necessary or desirable, including if the parties agree that the case should be considered in a hearing.

Hearings are held in the offices of the Danish Appeals Boards Authority in Viborg and will generally start with a review of the parties' claims and the key documents. It is possible to supplement the information in the case with statements given at the hearing, but written statements submitted in advance to the Complaints Board and the opposing party will normally be preferred. In some cases, the Complaints Board deems the initial presentation of the documents in the case to be unnecessary. In that case, the Complaints Board will announce that it is acquainted with the documents in the case and the parties' positions in the pleadings. The Complaints Board may have questions that need clarification or ask for a demonstration of the issue in dispute, see for example the decision of 15 March 2019, Leo Nielsen Trading ApS and Glock Ges.m.b.H. v the Danish Ministry of Defence's Acquisition and Logistics Organisation. The hearing ends with the parties' or their counsel's closing statements after which the case is set down for decision. Deliberations normally start immediately thereafter. Hearings will normally take 4-5 hours, but in major cases, they may take up to 1-2 days. No oral proceedings were conducted in 2022.

The Complaints Board makes its decisions on a majority of votes. In case of an equality of votes, the President has the casting vote.

When the president of the case and the expert have deliberated, their draft decision will be discussed by the presidency before the decision is delivered. This applies in particular if the case is a leading case.

In connection with substantive decisions and decisions on compensations, the Complaints Board will consider the issue of costs. The Complaints Board may order that the unsuccessful party fully or partly cover the other party's costs for the complaints procedure based on a specific assessment of, among other things, the nature and extent of the case and the proceedings.

Situations may arise where a complainant is still considered the unsuccessful party although a decision was made partly in favour of the complainant, for example in the decision of 25 February 2021, SUEZ Water A/S v Danish Oil Pipe A/S (discussed in chapter 2 of the 2021 Annual Report).

As a general rule, costs are limited to a maximum of DKK 75,000, but the Complaints Board may order the respondent to pay a higher amount if justified by the amount of the contract or special circumstances. In the Complaints Board's decision of 9 February 2018, Dansk Cater A/S v Staten og Kommunernes Indkøbsservice A/S, costs were set at DKK 100,000 for the successful party.

The award of compensation in a complaint case requires that a claim has been made, see Section 14 of the Complaints Board Act. Once a complaint has been withdrawn, the case has been closed and cannot be reopened by claiming compensation during the exchange of pleadings in connection with a decision on costs, see for example the decision on costs of 22 November 2021, Rally Point Tactical Scandinavia ApS v the Danish Ministry of Defence's Acquisition and Logistics Organisation (discussed in chapter 2 of the 2021 Annual Report).

As set out in section 1.4, the Complaints Board's case law shows that it is common practice to provide a detailed explanation in relation to the first "prima facie case test" when considering when to grant a complaint suspensive effect. If the interim decision is the final decision in the case and the pleadings in the case were as substantial as they would have been if the Complaints Board had made a final decision in the case, the Complaints Board will issue a separate decision awarding costs to the successful party as if the case had been closed with a substantive decision.

The Complaints Board's decisions may be brought before the courts within eight weeks of notification of the decision to the parties. Cases where compensation is awarded will generally be divided into two parts: the substantive assessment and the award of compensation. The time limit for bringing the substantive decision before the courts starts to run when the decision on the award of compensation has been notified to the parties. The Complaints Board's decision is binding on the parties if not brought before the courts within the statutory time limit.

## 1.8 Cases on access pursuant to the Access to the Public Administration Files Act

The Complaints Board's access cases pursuant to the Danish Access to Public Administration Files Act comprise:

- Complaints of contracting authorities' refusal to grant access to documents in a procurement procedure where the Complaints Board is the appeals body according to Section 37 of the Access to Public Administration Files Act. However, the Complaints Board is not the appeals body in complaints of refusal to grant access to cases on the performance of agreements concluded as a result of a procurement procedure.

- Cases where a third party, e.g., a journalist, applies for access pursuant to the Access to Public Administration Files Act to documents executed or received in a complaints case that is or has been pending before the Complaints Board. In these cases, the decision whether to grant access generally lies with the Complaints Board and not the respondent contracting authority. As the respondent contracting authority naturally also has the documents in its possession, it will normally also be possible to apply for access directly to this authority.

Cases on access pursuant to the Access to Public Administration Files Act differ significantly from the cases concerning violations of the public procurement rules that are heard by the Complaints Board in accordance with the Complaints Board Act. Reference is made to chapter 3 of the 2016, 2017, 2018, 2019 and 2020 Annual Reports for a detailed description of this part of the Complaints Board's case law in access cases.

In the middle of 2020, the Complaints Board decided to publish decisions on access to documents to a greater extent for which reason and in the light of descriptions of the Board's practice from previous years the Board decided that there is no need for the 2022 Annual Report to include a separate chapter on decisions on access to documents.

# 2. DECISIONS IN SELECTED AREAS

## 2.1 Introduction

All substantive decisions and decisions on compensation are published on the Complaints Board's website at www.klfu.dk. Interim decisions granting suspensive effect and decisions on access to documents are also published if they are of general interest. Below follows a description of a number of decisions from 2022 that have all been published at the Complaints Board's website. Some of the cases were leading cases. Others deal with issues that, regardless of their specific nature, are likely to be of interest to a wider audience.

The decisions are categorised as follows:

- Competitive tendering obligation, direct award and modification of contracts
- Requirements for specifications, including minimum requirements, and organisation of procurement procedures
- Evaluation, including choice of evaluation model
- Framework agreements
- The Complaints Board Act, including suspensive effect and the Complaints Board's sanctions
- Grounds for exclusion
- Competitive procedure with negotiation

The decisions are categorised by the issues specifically considered in the decision as several aspects can be highlighted in each case.

## 2.1 Selected interim decisions and decisions

### 2.1.1 Competitive tendering obligation, direct award and modification of contracts

*Decision of 8 February 2022 and decision of 20 June 2022, Atea A/S v the Ministry of Foreign Affairs of Denmark*

*The Ministry of Foreign Affairs of Denmark's erroneous interpretation of minimum requirements at the award and following the commencement of the contract not considered an amendment of the contract. After the Complaints Board had made its decision on the correct understanding of the minimum requirement, the Ministry of Foreign Affairs of Denmark had enforced the contract accordingly, and the supplier had complied within reasonable time. Not ineffective. Claim for annulment rejected as brought after the expiry of the time limit for filing complaints.*

The case concerned a restricted procurement procedure under the Public Procurement Act for a framework agreement on wiring and entrance protection. Four companies were preselected while only two companies, TPA and Atea, submitted bids. TPA was awarded the contract after which Atea filed a complaint.

According to the complaint, the Ministry had acted contrary to the principles of equal treatment and transparency in Section 2(1) of the Public Procurement Act (Article 18(1) of Directive 2014/24/EU) and section 178(1), see 178(2) of the Public Procurement Act (Article 72(4) and (5) of Directive 2014/24/EU) in that it waived a minimum requirement and a fundamental element setting out that for the entire term of the framework agreement, the supplier must be a certified electrical contractor, a certified TVO (TV monitoring) installation contractor registered with F&P and a certified AIA (automatic burglar alarm) installation contractor registered with F&P. There was a dispute concerning the minimum requirement understanding as well.

Atea also made a claim for ineffective contract. The view was that the Ministry had waived the minimum requirement in that it had not enforced it, and the rules on amendments therefore applied.

The Complaints Board therefore stated that it has been clearly and explicitly stipulated as a minimum requirement that throughout the term of the framework agreement, the supplier itself (thus not merely a sub-supplier) had to be certified as mentioned. The circumstance that the Ministry of Foreign Affairs of Denmark had had a different understanding and found the requirement inexpedient did that not change that, see also the judgment of the Court of Justice of the European Union of 10 October 203 in C-336/12 Manova according to which "it falls to the contracting authority to comply strictly with the criteria which it has itself laid down" Thus, the minimum requirement could not be fulfilled by the sub-supplier(s) alone meeting the certification requirements.

In relation to the issue of ineffective contract, the Complaints Board stated,

*'Not all disputes concerning the understanding of a minimum requirement which does not favour the contracting authority mean that the minimum requirement can be considered changed or waived.*

*In the case in hand, the Ministry of Foreign Affairs of Denmark applied the tender specifications incorrectly in a situation where there had been a real dispute between Atea A/S and the Ministry concerning the understanding and application of the minimum requirement, also in the light of the context of which the minimum requirement forms part.*

*However, it cannot be applied that the Ministry of Foreign Affairs of Denmark has currently waived the minimum requirement, thus has changed the tender specifications. …"*

It is a general statement from the Complaints Board that contributes to limiting the scope of application for the rules on amendments, thus also the rules on ineffective contract.

On that basis, the Complaints Board did not declare the contract ineffective and did not impose an alternative sanction. No claim had been made for annulment of the award decision. Thus, the Complaints Board could not make a decision on annulment, see the second sentence of Section 10(1) of the Complaints Board Act, with the effect that the contract was to be terminated, see section 185(2) of the Public Procurement Act.

The Complaints Board subsequently stated,

*"However, the Complaints Board has now established how the minimum requirement for certification of the supplier is to be understood.*

*If the Ministry of Foreign Affairs of Denmark then does not enforce the minimum requirement in accordance with the way it should rightly be understood, it could, in the given circumstances, mean that the Ministry is considered to have waived the requirement, thus made a change subject to Section 178 of the Public Procurement Act (Article 72(4) and (5) of Directive 2014/24/EU).*

Atea subsequently filed a complaint about the Ministry of Foreign Affairs of Denmark once more. Atea essentially stated that the Ministry had acted contrary to the principles of equal treatment and transparency in Section 2(1) of the Public Procurement Act (Article 18(1) of Directive 2014/24/EU) and Section 178(1), see Section 178(2), of the Public Procurement Act (Article 72(4) and (5) of Directive 2014/24/EU) in that it did not enforce the relevant minimum requirement, and the Complaints Board therefore had to declare the contract ineffective and impose an alternative sanction, in the alternative annul the award decision.

The Complaints Board stated that it is not implied in the first decision that the Ministry had an obligation to terminate the framework agreement as the Complaints Board did not make a decision on ineffective contract or annulment. The Complaints Board therefore had to determine whether the Ministry of Foreign Affairs of Denmark had acted contrary to the Public Procurement Act after the Complaints Board's first decision in that it had not enforced the minimum requirement, thus had not changed/waived it.

The Complaints Board did not find grounds to assume that the Ministry of Foreign Affairs of Denmark had changed or waived the minimum requirement on certification. However, it had to be considered that the Ministry of Foreign Affairs of Denmark had maintained the minimum requirement as the Ministry enforced the requirement in relation to the supplier TPA immediately following the Complaints Board's decision. Following an overall assessment, including of the nature and extent of the necessary certifications and the need for an external audit, the Complaints Board found that the minimum requirement had been met by the supplier within a reasonable time.

In connection with the first complaint, Atea chose to not claim annulment. As complaint no. 2 claiming annulment of the award decision had not been filed until more than 6 months after the award notice, the claim was rejected, see item 3 of Section 7(2) of the Complaints Board Act.

*Decision of 21 June 2022, Inlead ApS v Det Digitale Folkebibliotek (digital public library)*

*A direct award was not declared ineffective as (1) Det Digitale Folkebibliotek had published a notice for voluntary ex ante transparency before the contract formation, 2) no objections had been raised by the deadline and 3) Det Digitale Folkebibliotek had acted diligently in their assessment of whether the conditions for a direct award had been met. The assessment as to whether Det Digitale Folkebibliotek had acted diligently had to be based on an assessment of the overall circumstances of the case in which the subject-matter of the contract was also included, including the complexity of the service about which a contract is concluded and the minor value of the contract. The Complaints Board subsequently annulled the award decision as the conditions for a direct award were not present. The circumstance that the conditions for a direct award had not been met meant in itself that Det Digitale Folkebibliotek had not acted diligently when assessing whether the conditions for a direct award had been met.*

The case concerned a directly concluded contract on the development of a basic platform as part of a major upgrade of the website solution for all public libraries in Denmark and Greenland as well as the Faroe Islands.

Before the contract was concluded, Det Digitale Folkebibliotek had issued a notice for voluntary ex ante transparency in which Det Digitale Folkebibliotek in more detail stated its reasons as to why there could only be one specific supplier for the intended solution due to lack of competition of technical reasons. Det Digitale Folkebibliotek did not intend to conclude a contract with that supplier. As Det Digitale Folkebibliotek did not receive objections within the deadline in the notice for voluntary ex ante transparency, Det Digitale Folkebibliotek then concluded a contract.

On 15 October 2021, the Complaints Board made an interim decision in the case. In the interim decision, the Complaints Board stated that, *inter alia*, it is for the contracting authority to prove that the conditions in item 2 of Section 80(3) of the Public Procurement Act (Article 32(2) of Directive 2014/24/EU) to use competitive procedures with negotiation with no prior publication have been met. If the contracting authority cannot prove that the conditions to use negotiated procedures without prior publication have been met, the contract must generally be declared ineffective. However, pursuant to Section 4(1) of the Act on the Complaints Board for Public Procurement, the contracting authority has the possibility to ensure that a contract is not declared ineffective if 1) prior to the contract formation, the contracting authority has published a notice in the Official Journal of the European Union stating that the contracting authority intends to conclude the contract, 2) the contract has not been concluded by the expiry of 10 calendar days counting from the day after the date on which the notice was published, and 3) the contracting authority finds that the conclusion of the contract without prior publication of a contract notice in the Official Journal of the European Union is permitted under the Act on Public Procurement or the EU public procurement rules.

Conditions no. 1) and no. 2) were met. About condition no. 3), the Complaints Board stated that, referring to the judgment of the Court of Justice of the European Union in C-19/13, Fastweb, it is a condition that the contracting authority acted diligently in its assessment of whether the conclusion of the contract without prior publication of a contract notice in the Official Journal of the European Union is permitted.

The Complaints Board then stated that the determination as to whether a contracting authority acted diligently in the specific case had to be based on an assessment of the overall circumstances of the case in which the subject-matter of the contract is also included, including the complexity of the service about which a contract is concluded and the minor value of the contract.

In the specific case, the Complaints Board found that Det Digitale Folkebibliotek had acted diligently, and as Det Digitale Folkebibliotek's assessment was stated in the notice for voluntary ex ante transparency, potential contracting authorities had sufficient information to assess whether there were grounds to file a complaint.

On that background, it was not likely that in its final decision, the Complaints Board would declare the contract ineffective. As a contract had been concluded, the complaint was not granted suspensive effect.

However, Inlead maintained the complaint, including the claim that the contract was ineffective.

In the final decision, the Complaints Board found that Det Digitale Folkebibliotek had not met the burden of proof establishing that the conditions in item 2 of Section 80(3) of the Public Procurement Act (Article 32(2) of Directive 2014/24/EU) to use negotiated procedures without prior publication had been met. Det Digitale Folkebibliotek had therefore acted contrary to the equal treatment and transparency principle in Section 2 of the Public Procurement Act (Article 18(1) of Directive 2014/24/EU) and Section 6 of the Public Procurement Act (Article 4(1)(a)-(c)) and Article 13 of Directive 2014/24/EU), see Section 128(1) (Article 49 of Directive 2014/42/EU) in that it had made a direct award of the contract, and the conditions to annul the award decision had therefore been met.

However, the Complaints Board still found that Det Digitale Folkebibliotek – in spite of Det Digitale Folkebibliotek's assessment being incorrect and the conditions for making a direct award not having been met – had acted diligently in the preparation and publication of the notice for voluntary ex ante transparency. There were therefore no grounds to declare the contract ineffective. The circumstance that it had now been established that Det Digitale Folkebibliotek's assessment was incorrect and that the conditions for making a direct award had, accordingly, not been met meant in itself that Det Digitale Folkebibliotek could not be considered as having acted diligently.

*Decision of 16 September 2022, Electrolux Professional A/S v Alabu Bolig*

*Complaint about a social housing organisation's award with no procurement procedure on laundry operations at a total value above the threshold for 18 departments in the housing organisation. Because of the housing organisation's distinctive construction, each department was considered a decentralised unit, see Section 131(2) of the Public Procurement Act (Article 5(2) of Directive 2014/24/EU). The acquisitions by 15 departments did not exceed the threshold while the acquisitions of three departments did. Ineffective and police report for the purpose of alternative sanction.*

Alabu Bolig is a social housing organisation with a tendering obligation, see item 28 of Section 24 of the Public Procurement Act (item 1 of Article 2 of Directive 2014/24/EU) and with 70 departments in Northern Jutland.

Alabu had previously initiated a public procurement-like process concerning the acquisition of all laundries of the housing organisation, but that process had been annulled. The acquisitions which the complaint was about concerned 18 departments which had concluded a number of contracts on laundry operations with no procurement procedure, signed by Alabu's manager on three different dates. Combined, the contracts exceeded the threshold, and the contracts of three departments on their own exceeded the threshold. These three contracts were terminated because of the complaint.

Electrolux, which was aware of the acquisitions through the previous public procurement-like process, claimed that the direct award of the 18 contracts, in the alternative the three contracts, was contrary to Section 2 of the Public Procurement Act (Article 18(1) of Directive 2014/24/EU) and item 3 of Section 6(1) of the Public Procurement Act (Article 4(1)(c) of Directive 2014/24/EU) and claimed annulment of the 18, in the alternative the three, award decisions. Furthermore, Electrolux claimed ineffective contract and alternative sanction.

Alabu claimed dismissal and acknowledged violation in terms of the three departments.

The Complaints Board did not allow the claim for dismissal as Electrolux' claims concerned possible violations of Title II of the Public Procurement Act which the Complaints Board has the jurisdiction to consider.

The Complaints Board referred to the Complaints Board's decision of 25 November 2002, Skousen Husholdningsmaskiner A/S v Arbejdernes Andels Boligforening, where the form of the housing organisation is described as "a distinctive, legal construction" as each unit, not the housing organisation, is considered a contracting authority according to procurement law. The departments were considered to meet the conditions for being decentralised units subject to Section 31(2) of the Public Procurement Act (item 2 of Article 5 of Directive 2014/24/EU) so that the value of the acquisitions was to be estimated separately for each department. The claims which concerned the three departments whose acquisitions were above the threshold were therefore allowed, and those contracts were declared ineffective. Pursuant to Section 18(3) of the Complaints Board Act, the Complaints Board filed a police report.

*Decision of 26 September 2022, Borch Teknik A/S v DR*

*Direct award of contract with DR was legal as the conditions in Section 19 of the Public Procurement Act had been met.*

In the notice for voluntary ex ante transparency of 1 February 2022, DR (the Danish Broadcasting Corporation) announced that DR intended to enter into a contract on "Administration Agreement on DTT, FM, AM and DAB" which had been awarded to Cibicom through a direct award. The contract replaced the prior administration agreement with Cibicom (previously Teracom) concluded in 2013.

Borch Teknik complained of the direct award and claimed that the conditions in Section 19 of the Public Procurement Act (Article 8 of Directive 2014/14/EU) to avoid putting the contract out to tender had not been met.

About the *legal basis*, the Complaints stated that under the Act, Section 19 (Article 8 of Directive 2014/24/EU) did not apply to public contracts for "… the principal purpose of permitting the contracting authorities to [1] provide public communications networks, [2] exploit such networks or [3] provide to the public one or more electronic communications services".

Furthermore, the Complaints Board stated that according to the wording and the legislative history behind the provision, it is sufficient that it is a matter of a public contract that has one of the principal purposes mentioned in the provision. Thus, they are not cumulative conditions. The same is clear in Article 8 of the Public Procurement Directive ("… for the principal purpose of permitting the contracting authorities to provide or exploit public communications networks or to provide to the public one or more electronic communications services.").

*About the third limb of Section 19 of the Public Procurement Act*

The Complaints Board stated that according to the third limb of Section 19, it is decisive that the principal purpose to is permit the contracting authority to provide to the public electronic communications services. According to the travaux preparatoires, the term *"Electronic communications services"* must be attributed the same significance as in the framework directive (Directive 2002/21/EC).

The framework directive has been replaced by Directive 2018/1972/EU. The 2018 Directive is a reworking of the framework directive and other legislative acts within the area and contains a definition of "electronic communications services" in item 4 of Article 2. The definition contains, *i.a.*, services consisting wholly or mainly in the conveyance of signals such as transmission services used for the provision of machine-to-machine services and for *broadcasting*.

The definition also mentions that it is a service normally – but not only – provided for remuneration via electronic communications networks. Such electronic communication networks are broadly defined in item 1 of Article 2 of the Directive and in item 4 of Section of the Danish Act on Electronic Communications Networks and Services (*teleloven*). Both definitions contain, *i.a.*, networks that are used for broadcasting as well as cable television networks regardless of the type of information being conveyed.

"Electronic communications service" is also broadly defined in item 9 of Section 2 of the Act on Electronic Communications Networks and Services as follows:

"Service consisting wholly or partly in the conveyance of communication in the form of *sound, images, text or combinations thereof through radio or telecommunications technology* between network termination points, including two-way communication as well as *one-way communication*.

*The Complaints Board's assessment of the direct award*

Following an overall assessment of the existing information, the Complaints Board found that the directly awarded contract was subject to the exclusion in the *third limb of Section 19 of the Public Procurement Act* on contracts for the principal purpose of permitting the contracting authorities to provide to the public electronic communications services. Thus, the relevant network must, undoubtedly, be considered an electronic communications network in accordance with the definition in item 1 of Article 2 of Directive 2018/1972/EU and in item 4 of Section 2 of the Act on Electronic Communications Networks and Services.

Furthermore, the Complaints Board took into account that the administration agreement concerned networks for DTT, FM, AM and DAB. It had to be considered that the services in the contract were to enable DR to provide to the public radio and TV.

The fact that there was not general access for other actors providing radio and TV etc. to provide services on the relevant network (the input side), a key point in the case, did not cause any changes.

The fat that DR launched a restricted procedure in 2012 for the current, similar contract did not lead to a different outcome.

As the conditions in the third limb of Section 19 of the Public Procurement Act had been met, DR was entitled to award the contract through a direct award. However, the Complaints Board added that the first and second limbs of Section 19 include public contracts for "the principal purpose of permitting the contracting authorities to provide to the public electronic communications services [or] exploit such services".

In the Complaints Board's opinion, the explanatory notes to item 10 of Section 2 of the Act on Electronic Communications Networks and Services (the definition of public electronic communications services) clearly substantiated that the conditions in Section 19 of the Public Procurement Act had been met.

According to the explanatory notes (bill 2020/21 L42), "... the decisive element determining whether an electronic communications network is considered a public electronic communications network will be whether the network or the services conveyed on the network are provided to a group of end users or providers of electronic communications networks not limited beforehand".

*Decision of 28 November 2022, Grandt Defense ApS v the Danish Ministry of Defence's Acquisition and Logistics Organisation ("FMI")*

*In a notice for voluntary ex ante transparency, FMI had stated that it wanted to conclude framework agreements with the existing supplier on subsequent deliveries of military equipment (ballistic vest systems) with spare parts and service and that the framework agreements would be concluded with no procurement procedure pursuant to Article 28(1)(e) of the Defence and Security Directive. The conditions to use negotiated procedures without prior publication of a contract notice had been met.*

In 2012, FMI concluded an agreement with no procurement procedure on delivery of a system for ballistic vests (bulletproof vests with a complicated and advanced construction). The system was subjected to various changes and adaptations, and in 2018, FMI had the agreement replaced with a seven-year framework agreement with the supplier. However, as a need arose for new adaptations and for supplementation of various accessories, FMI announced in a notice for voluntary ex ante transparency that it intended to use a negotiated procedure without contract notice to conclude a 10-year framework agreement on delivery of systems for ballistic vests and a 10-year framework agreement with an option to extend for seven years on the delivery of spare parts and services with the supplier. The value of the two framework agreements was estimated at between DKK 850m and approx. DKK 1.2b.

The dispute between Grandt Defense, a company delivering military equipment itself, and FMI concerned whether the conditions to conclude framework agreements without a procurement procedure had been met.

The Complaints Board stated that, *i.a.*, FMI had not phased out the existing vest system at the time of the concluded framework agreements and that the framework agreements were therefore an expression of supplementary procurement. Nor were there grounds to disregard FMI's information that it was decisive that soldiers only had one vest system to relate to and that FMI in its procurement of new and different vest systems would have conversion costs and a loss of value corresponding to DKK 500m. Even if there were other suppliers that would be able to deliver compatible parts for the current supplier's patented parts, it would mean that FMI would not be able to hold one supplier accountable for the total ballistic vest system. The Complaints Board found that considering the nature of personal safety in the procurement, that was a fair requirement.

FMI had therefore met the burden of proof establishing that the special circumstances in the exemption provision in Article 28(1)(e) of the Defence and Security Directive existed and that the conditions to use negotiated procedures without prior publication of a contract notice had been met.

Grandt Defense's claims that the Complaints Board had to establish that the conditions stated had not been met and the claims on annulment were therefore not allowed.

The decision has been referred to the courts.

*Decision of 29 November 2022, Fayard A/S v the Danish Ministry of Defence's Acquisition and Logistics Organisation*

The Danish Ministry of Defence's Acquisition and Logistics Organisation (FMI) also published a notice for voluntary ex ante transparency in the Official Journal of the European Union that FMI would initiate negotiations with a Danish consortium on the delivery and maintenance of some ships to the Royal Danish Navy without a procurement procedure pursuant to Article 346(1)(b) of TFEU. A Danish shipyard then complained to the Complaints Board that contrary to the fundamental principles of equal treatment and transparency in EU law, the tender had not been put out to a sufficient degree of competition. *The Complaints Board did not allow the complaint.*

The complaint concerned whether the procurement and maintenance of patrol vessels for the Royal Danish Navy could be with no procurement procedure pursuant to the exemption provision in Article 346(1)(b) of the TFEU on the protection of essential security interests.

Due to its nature and the value of the procurement procedure, the case was considered by two members of the Complaints Board's presidency and two experts, see Section 10(4) of the Complaints Board Act.

After having conducted various market surveys, FMI published a notice for voluntary ex ante transparency on 29 April 2022 stating that FMI wanted to procure a number of patrol vessels and would, in those regards, initiate negotiations with a consortium, Danske Patruljeskibe K/S, to take the role as national supplier. FMI also announced that the outcome of the assessment was that there was no reasonable alternative to Danske Patruljeskibe K/S and that the direct award was pursuant to Article 346 of the TFEU. FMI mentioned that the purpose was to ensure maintenance of Danish skills for tasks of particular strategic importance to Denmark.

Among others, the company Tema A/S, the only, undisputed Danish integrator of weapons and other systems, was part of the consortium. No yard was part of the consortium.

It was uncontested that the patrol vessels were in the nature of war material, that the common market for goods that are not specifically intended for military purposes would not be affected by the procurement and that essential security interests necessitated discrimination based on nationality.

Fayard A/S, which complained about FMI's decision, had a chief point of view that (claim 1) the purpose of excluding the contract from a procurement procedure would not be fulfilled when concluding a contract with a supplier which did not include yard capacity and that the contract could therefore not be concluded without a procurement procedure. Fayard A/S had a secondary point of view that (claims 2 and 3) it was not necessary to conclude a total supplier contract on the delivery and that FMI – by maintaining that rather than dividing the contract into lots – artificially limited competition and went beyond what was necessary to protect essential security interests.

Conversely, FMI claimed that the exemption provision in the treaty had been rightfully used.

The Complaints Board held in favour of FMI that the exemption provision in the treaty had been rightfully used.

The Complaints Board stated that there were no grounds to challenge FMI's assessment that there was in fact only one Danish supplier and that the purpose of protecting national security interests could be fulfilled, even if parts of the contract were to be performed by sup-suppliers as observance of national security interests could be ensured in the requirements for sub-suppliers in the contractual basis.

Furthermore, the Complaints Board stated that it could not be considered artificial narrowing of competition that FMI had fairly assessed that the contract had to be concluded as a total supplier contract notwithstanding the fact that it meant that there was in fact only one possible supplier.

The Complaints Board made the final statement that the fact that the tender had not been out to a sufficient degree of competition was not contrary to the fundamental EU principles on transparency and equal treatment as a procurement that was not subject to a procurement procedure referring to Article 346 of the TFEU falls outside the scope of the treaty.

In its decision of 13 June 2022, the Complaints Board had decided not to grant the complaint suspensive effect as the prima facie condition had not been met.

The Complaints Board has previously heard complaints about the application of Article 346 of the TFEU, see the decision of 16 February 2009, SAAB Danmark A/S v the Acquisition and Logistics Organisation of the Danish Defence, and the decision of 20 December 2013, Augusta Westland Limited v the Acquisition and Logistics Organisation of the Danish Defence.

Thus, no part of Fayard A/S' complaint was allowed.

### 2.1.2 Requirements for tender specifications, including minimum requirements, and organisation of procurement procedures

*Decision of 4 May 2022, Koss ApS v Indkøbsfællesskabet IFIRS*

*The case concerned the procurement procedure for a 2-year agreement on delivery of teaching materials to the hairdresser training programme.*

Koss ApS, an unsuccessful tenderer, claimed that, *i.a.*, the tender specifications did not state whether the price of courses formed part of the evaluation. The Complaints Board noted that it was clear from the qualitative sub-subcriterion of the tender specifications that the price of "courses and services" formed part of the evaluation.

Koss also claimed that IFIRS needed a question answered from Koss which had been asked before the expiry of the deadline for the submission of tenders and which concerned the way to understand the expression "tender sum" in the tender specifications. On 29 April 2021, Koss found an error in the tender specifications as "average tender sum", "tender sum" and "weighted tender sum" were listed with no further description of the concepts and how they were calculated. The deadline for giving supplementary information expired on 28 April 2021.

The Complaints Board noted that the question had been asked later than 6 days before the expiry of the deadline for the submission of tenders. The Complaints Board established that according to the guidelines concerning the evaluation, this would be according to a method described in more detail according to which

"the tenderer's overall evaluation price" would be calculated for each tenderer. The Complaints Board found that "the meaning of the concept "tender sum" in 7.3.2 of the tender specifications [must] have been clear for a reasonably informed and normally attentive tenderer", and following a review of the travaux preparatoires to Section 134 of the Public Procurement Act (first sentence of Article 53(2) of Directive 2014/24/EU), the Complaints Board found no basis for IFIRS being obliged in the specific situation to give Koss supplementary information with the consequence that IFIRS had to extend either the deadline for submitting applications or the deadline for submitting tenders.

*Interim decision of 25 May 2022, Aktieselskabet Carl Christensen v the Danish National Police*

*The case concerned the Danish National Police's procurement procedure for 32 framework agreements on workshop services. The lots had been divided according to geography and vehicle make. The case particularly concerned whether some of the minimum requirements for technical and professional capability had been met by Aktieselskabet Carl Christensen and whether some of the minimum requirements for the service put out to tender were fair and proportionate.*

Aktieselskabet Carl Christensen claimed that, *i.a.*, the minimum requirements for the service put out to tender were contrary to Section 40(4) of the Public Procurement Act (Article 42(2) of Directive 2014/24/EU) according to which the technical specifications which the contracting authority establishes must give economic operators access to the procurement procedure and may not have the effect of creating unjustified obstacles to prevent the opening up of a public procurement to competition.

The provision in Section 40(4) of the Public Procurement Act (Article 42(2) of Directive 2014/24/EU) does not prevent a contracting authority from establishing the technical specifications so that there are only certain economic actors that can submit tenders during the procurement procedure. It merely requires these requirements and specifications to be fair, proportionate and reasoned in the contracting authority's needs.

The decision of 25 May 2022 is a prima facie decision that for three of the six minimum requirements for the service, the Danish National Police had not met the burden of proof that the requirements were legal and that it was therefore likely that the procurement procedure would be cancelled. However, because of the lack of urgency, the complaint was not granted suspensive effect.

The minimum requirements for the service all related to relations between car repair workshops authorised by a vehicle manufacturer and car repair workshops that are not. To a great extent, this is regulated by the EU. The objective of the regulation is to make the non-authorised workshops competitors equal to the authorised workshops.

The procurement procedure concerned general workshop services on common car makes. Three of the minimum requirements required the use of "the vehicle manufacturer's tools" etc. and requirements for the use of original spare parts. The requirements concerned all testing, calibration and diagnostic tools and all spare parts with no further delimitation and with no possibility of using something similar. Because of a question during the procurement procedure, it was stated that tools from other vehicle manufacturers or unoriginal spare parts could not be used even if it would not mean that the Danish National Police was placed in a worse position in terms of quality or warranties.

For the three minimum requirements, the Complaints Board found – based on a preliminary assessment – that the Danish National Police had not met the burden of proof that there had been fair and proportionate reasons to establish the minimum requirements the way it had happened.

Among other things, the fact that similar minimum requirements had not been set out in a previous, similar procurement procedure and that a number of compliant bids had been received in the previous procurement procedure while there were significantly fewer compliant bids in the specific procurement procedure and in some lots no compliant bids at all formed part of the Complaints Board's assessment of whether the burden of proof had been met. Furthermore, the assessment also included the fact that the – fair – needs to which the Danish National Police had referred as a reason for the requirements did not establish that it was necessary to make the requirements the way it had happened.

The complaint about the three other minimum requirements was not allowed as the Complaints Board referred to, *i.a.*, the EU regulation of unauthorised workshops and specifically found that the minimum requirements were fair and proportionate.

*Decision of 27 July 2022, Edora A/S v the Municipality of Copenhagen and Aalborg Municipality*

*The municipalities had taken sufficient measures for the purpose of evening out the advantages that a different tenderer had as a previous supplier of the IT system to which there was to be an integration. A declaration obtained by one party did not have such clarity and significance in terms of evidence that it could lead to a different outcome. No grounds for rounding off scores in the evaluation when awarded according to the subcriteria. Such rounding off could also lead to a distortion of the evaluation, thus an incorrect outcome.*

The case concerned a procurement procedure for a contract on delivery of a citizen booking solution. Citizen booking is a self-service solution for citizens receiving benefits from the municipalities. Edora and Systematic submitted bids, and on 23 April 2021, the municipalities awarded the contract to Systematic.

Edora filed a complaint claiming that the municipalities had acted contrary to the principles of equal treatment and transparency in Section 2 of the Public Procurement Act (Article 18(1) of Directive 2014/24/EU) in that they had not treated the tenderers on equal terms (claim 1) and in that they had not followed the established procedure for the evaluation (claim 2).

In more detail, *claim 1* concerned the municipalities not having made sufficient efforts to even out the advantages which Systematic had as a supplier to the municipalities of the IT system Cura with which the citizen booking solution was to be integrated.

The Complaints Board referred to the interim decision in the case and stated that the tender specifications contained a description of the interface for integration to Cura which was to be taken for basis by the tenderers whether or not Cura was upgraded in the bidding process.

In connection with the bidding, Edora had issues with a so-called sandbox environment concerning Cura which Systematic had made available. However, the Complaints Board found that it was not due to the municipalities' circumstances that Edora had not had access to Cura for a period of time. Edora had not requested access to the sandbox environment using the procedure in the procurement documents

although that was an obvious thing to do. The company had to bear the risk of any negative consequences. That was the case whether or not access was considered necessary or merely expedient when preparing bids.

The Complaints Board's overall assessment was that the municipalities had taken sufficient measures for the purpose of evening out the advantages which Systematic had as a supplier of Cura by which the Complaints Board referred to the judgment of the General Court of 28 June 2018 in T-211/17, Amplexor Luxembourg Sarl v the Commission, paragraphs 37 and 38, and the judgment of the Court of First Instance of 12 March 2008 in T-345/03, Evropaïki Dynamiki v the Commission, paragraph 76.

Edora had produced a declaration of 4 October 2021 from Force Technology. The declaration had been obtained by one party. The Complaints Board found that the declaration did not have such clarity and significance in terms of evidence that it could lead to a different outcome. The decision illustrates that technical declarations can be produced to the Complaints Board but also shows that the evidential weight depends on how the declaration came into existence, including whether both parties or one party only participated in obtaining the declaration. Furthermore, the evidential weight depends on a specific assessment, including on the content and degree of accuracy of the declaration.

Claim 2 concerned the issue of whether it had been established in the tender specifications that only integers were to be used in the evaluation and whether scores with decimal places were to be rounded off to the nearest integer. Edora stated that the weighted score for Quality should be rounded down to 7 points for both companies. The weighted score for Price should have been rounded down to 7 points for Systematic's part. Edora would then have obtained a higher, total, weighted score than Systematic, and Edora would have been awarded the contract.

The Complaints Board stated that there were no grounds in the procurement documents for rounding off scores in the evaluation when awarded according to the subcriteria. Such rounding off did not harmonise with the provision in the tender specifications stating that at the end, all subcriteria had to be added up according to their weighting to the total number of points of the bid so that the bid with the highest total number of points was the most favourable bid in economic terms. A rounding off could also lead to a distortion of the evaluation, thus an incorrect outcome.

Thus, the complaint was not allowed.

### 2.1.3 Evaluation, including choice of evaluation model

*Interim decision of 12 January 2022, Norsk Luftambulanse AS v the North Denmark Region, the Central Denmark Region, the Region of Southern Denmark, Region Zealand and the Capital Region of Denmark*

*The regions had violated the rules on parallel procedures in that they had not stated in the procurement documents how the regions would choose between the parallel solutions.*

The case concerned a competitive procedure with negotiation according to Title II of the Public Procurement Act of the national emergency doctor helicopter plan run by the five regions together as a cross-regional emergency response. The procurement procedure was a parallel procedure as the tenderers were to submit bids for four different kinds of performance of the service put out to tender: 1) four small

helicopters with no time limit, 2) two large and two small helicopters with no time limit, 3) four small helicopters for 10 years and 4) two large and two small helicopters for 10 years. The procurement documents stated that because of the consideration for the best patient care, the regions preferred a contract with no time limit and a contract with two large and two small helicopters but that the regions would also take into account the general financial situation of the regions in relation to the solution preferred.

Norsk Luftambulanse, which was not awarded the contract, claimed particularly that the fact that it was not stated in the procurement documents how the regions would choose between the four solutions was contrary to the Public Procurement Act

The Complaints Board established that Section 53(3) of the Public Procurement Act contains an obligation to ensure that the contracting authority cannot freely combine the various solutions with the outcome that the contracting authority has a free choice between the bids and that when choosing between the bids received, the contracting authority must use the evaluation method published in the procurement documents, see Section 160 of the Public Procurement Act. That applies to all bids received, including the parallel bids and not only the bids within the chosen parallel solution. The contracting authority is therefore obliged to describe an evaluation method in the procurement documents in advance describing how the comparison between the various bids with various methods of execution etc. is done.

The regions had described that they preferred partly an open-ended contract rather than one for a limited period of time, partly a combination of two large and two small helicopters rather than four small ones. However, it had not been established how the regions would prioritise or do the evaluation between the four parallel bids if an open-ended contract with two small and two big helicopters was not possible within the financial framework of the regions. Thus, it was not possible to do an evaluation in accordance with Section 160 – and one had not been done. It was therefore likely that Norsk Luftambulanse's claim 1 would be allowed.

Thus, the prima facie decision had been met concerning part of the claim, however, as the urgency condition was not fulfilled, the complaint was not granted suspensive effect.

The regions subsequently cancelled the procurement procedure, and Norsk Luftambulanse then withdrew the complaint. The interim decision was therefore the Complaints Board's final decision.

*Interim decision of 23 February 2022, Capio A/S v the Central Denmark Region*

*Open procedure under Title III (the light regime) of the Public Procurement Act for a framework agreement with two lots for the performance of orthopaedic surgery with the award criterion best price-quality ratio. The complaint had been filed by an unsuccessful contracting authority claiming that, i.a., the region had violated Section 160 of the Public Procurement Act in that it had not informed of an evaluation model applied in the procurement documents and in that it had fixed the maximum consumption for the lots at an unrealistic, high level. Prima facie decision that it was not likely that the complaint would be allowed.*

The Central Denmark Region launched an open procurement procedure under Title III (the light regime) of the Public Procurement Act for a framework agreement with two lots for orthopaedic surgery – lot 1 Upper extremity surgery and lot 2 Lower extremity surgery. In the procurement documents, consumption on the

two lots were estimated at 3,600 and 2,400 diagnostic investigations/treatments, respectively, while the maximum consumption was set out to be 6,000 and 4,000 diagnostic investigations/treatments, respectively. The award criterion was best price-quality ratio based on the subcriteria Price and Quality, each with a weight of 50%. For the purpose of the bid assessment in relation to the subcriterion Price, the tenderers had to state prices of various services in a list of tenders, stated as a percentage of a special rate for the patients' free choice of hospital. In the procurement documents, a number of sub-subcriteria were also set out which the contracting authority would take into account for the bid assessment according to the subcriterion Quality.

Bids were received from two tenderers after which the region decided to conclude a contract with one of them. The other tenderer, Capio, filed a complaint with the Complaints Board and claimed that, *i.a.*, the region had violated Section 160 and Section 2 of the Public Procurement Act (Article 18(1) of Directive 2014/24/EU) in that it had not sufficiently described the evaluation model applied in the procurement documents. The evaluation model had not been stated in the procurement documents but was listed in an evaluation report enclosed with the region's reason for the award decision.

The Complaints Board stated that it was not likely that the complaint would be allowed. The reason was that the procurement procedure had been conducted pursuant to Title III of the Public Procurement Act, and the region had therefore only been required to arrange a procedure in accordance with Section 2 of the Public Procurement Act (Article 18(1) of Directive 2014/24/EU), including establishing award criteria and making the award decision in accordance with the established procedure, see Section 186 of the Act (Article 74 of Directive 2014/24/EU) and Section 188 of the Act (Article 76 of Directive 2014/24/EU). The requirement according to Section 160 of the Public Procurement Act that the evaluation model intended to be applied must be described in the procurement documents did not apply to procurement procedures under Title III of the Public Procurement Act. The procurement documents contained no information about the scale which the region intended to apply in the qualitative bid assessment or how the tendered prices would be calculated. However, the evaluation report which was sent together with the notice of the award decision contained a detailed description of the evaluation model applied, and the Complaints Board found no grounds to conclude that the region had not observed the established award criteria, subcriteria and sub-subcriteria in the evaluation. The evaluation of the bids in relation to the subcriterion Quality had been according to a normal, absolute method, and the evaluation of the tendered prices had been according to a normal, relative price assessment.

Capio also claimed that the maximum consumptions for the two lots had been fixed at an unrealistic, high level and that the procurement procedure could therefore not form the basis for legal contract awards as the real, maximum amount could not be identified.

The Complaints Board stated that it was not likely that the complaint would be allowed. The Complaints Board stated that the contracting authority has significant discretion when fixing the maximum amount/value of a framework agreement, but the discretion has to be fair. The contracting authority may not artificially increase the total amount/value of the framework agreement in relation to its needs. When assessing whether a contracting authority has fixed the maximum amount/value artificially high, it is within the contracting authority's discretion to attach a safety margin to the anticipated need.

The Central Denmark Region had prepared a note beforehand showing that there were a number of significant uncertainties when estimating the need. The region had referred to the healthcare sector being dynamic and having limited predictability and that the public hospital services generally face a number of challenges described in more detail. The Complaints Board then found no grounds to establish that the maximum number of diagnostic investigations/treatments had been fixed unfairly or exceeded the safety margin which the region was entitled to include.

The complaint was subsequently withdrawn, and the interim decision was thus the Complaints Board's final decision.

*Interim decision of 20 April 2022, Umove Vest A/S v Nordjyllands Trafikselskab*

*The evaluation model for a qualitative sub-subcriterion was contrary to the principle of equal treatment as the model excluded some tenderers beforehand from obtaining more than a certain score. However, as the urgency condition was not fulfilled, the complaint was not granted suspensive effect.*

Nordjyllands Trafikselskab (NT) launched a restricted procedure under the Utilities Directive for a 10-year contract concerning regular traffic with an option for a 6-year extension. The award criterion was best price-quality ratio with a number of subcriteria. The case concerns the sub-subcriterion working environment. The bids would be evaluated according to the degree to which the tenderer's bus facilities were classified according to working environment by the Danish Working Environment Authority based on a scale described in more detail ("crown smiley"/"green smiley"). If a tenderer did not already have operations within NT's area, the bid would be awarded 50% of the maximum points.

NT received three bids and found that none of the tenderers had clearly explained the working environment status of the bus facilities that would form part of the operations of the traffic offered. NT therefore obtained various information in those regards, and the Danish Working Environment Authority verified the information received. On that basis, NT awarded Keolis Danmark A/S 17.5 points (weighted) and Umove Vest AS 12.5 points (weighted) in relation to the sub-subcriterion working environment. As these bids were otherwise similarly evaluated in relation to the subcriterion quality of operations in which the sub-subcriterion working environment was included with 25%, the bid from Keolis was given 75.6 and Umove 70.6 points in relation to the subcriterion quality of operations.

In the overall evaluation, Keolis obtained 92.5 points and Umove 91.75 points.

Umove filed a complaint with the Complaints Board and claimed that, *i.a.*, the evaluation model was contrary to Article 36(1) of the Utilities Directive as the bids would be evaluated based on the working environment certification at the time of the bid for the garage facilities that would be used for the performance of the contract. Thus, the model favoured the operators that at the time of the bid already had existing garage facilities within the geographical area which the contract concerned (in practice the previous operator or other operators with a strong presence in Northern Jutland) and excluded other operators from obtaining maximum points for the sub-subcriterion working environment.

NT claimed that, *i.a.*, the sub-subcriterion working environment was legal, fair and in accordance with the principle of equal treatment. The previous operator was not excluded from submitting bids for the task again. According to the nature of the matter, bus traffic in a given area in practice requires facilities to be

established in the area, and NT making requirements for the working environment at those facilities was not contrary to the principle of equal treatment. NT had not made the requirement for a certain working environment standard a minimum requirement, and the sub-subcriterion weighted 6.25% only in the total evaluation. New operators which did not have a sufficiently high degree of working environment certification had the possibility of compensating for that by making themselves more competitive within other criteria. Finally, NT had arranged the points awarded so that a new operator did not get a disproportionate, hard evaluation as it resulted in 50 out of 100 points if a tenderer did not have any certified facilities.

The Complaints Board established that the determined evaluation model only allowed a top score of 100 points for the tenderers whose facilities had obtained a “green smiley” as well as a “crown smiley” from the Danish Working Environment Authority already when submitting bids.

Within the framework of the rules relating to procurement law, a contracting authority determines on its own how the procurement procedure should be arranged. The fact that NT had let the working environment evaluation of each bid be tied to the Danish Working Environment Authority's smiley scheme was not an issue relating to procurement law.

Requirements that the tenderers must hold certain certificates and the like will, however, often be phrased so that the requirement must be met at the beginning of the contract. Thus, imposing unnecessary expenses on tenderers who did not win the contract is avoided.

The principle of equal treatment does not mean that procurement procedures must be organised so that all tenderers must be able to meet every requirement. However, the principle of equal treatment means that no tenderer may be excluded beforehand, due to the chosen evaluation model, from submitting bids which could be given maximum points.

Following the Complaints Board's preliminary assessment, it was likely that the claim for violation of the principle of equal treatment in Article 36(1) of the Utilities Directive and the claim for annulment of the award decision would be allowed. The case was thus considered to be a prima facie case.

However, as the condition of “urgency” had not been fulfilled, the complaint was not granted suspensive effect.

The procurement procedure was subsequently cancelled and the complaint withdrawn. Thus, the interim decision was the Complaints Board’s final decision in the case.

*Interim decision of 6 July 2022, Assemble A/S v the Municipality of Herning and the Municipality of Holstebro*

*The decision of 6 July 2022 is a prima facie decision which have become the Complaints Board’s final decision after the complaint was withdrawn. Evaluation based on a user test did not favour the previous supplier. The possible competitive advantage which the previous supplier may have had been offset to a sufficient degree.*

The case concerned a joint procurement procedure from two municipalities for delivery of an IT system for day institution sign-up services for the children and youth administration of the municipalities. Assemble claimed that the evaluation model used favoured the previous supplier.

The model was a so-called commission model which is acknowledged in, *i.a.*, the judgment of the Court of Justice of the European Union of 20 September 2018 in C-546/16, Montte SL v Musikene, and the Complaints Board's decision of 25 April 2018, BilButikken A/S v Randers Municipality. The idea of the model is that the evaluation is split up into several phases where a minimum score is determined in the first phase within one or more of the subcriteria determined. If a tenderer does not obtain the minimum score, the bid from that tenderer may not proceed to the evaluation in the next phase. The model as such was not in dispute.

The award criterion was best price-quality ratio based on the subcriteria Price (20%), Quality (35%), User involvement (10%) and Service goals and implementation (20%). Various sub-subcriteria were linked to the subcriterion Quality with a mutual weighting described in more detail. The tender specifications contained a description of 104 different requests in relation to the subcriteria, and it was stated that the municipalities gave much importance to the user friendliness and intuitive availability etc. of the systems offered. The evaluation of whether the bids fulfilled the sub-subcriteria would be according to a user test of one day's duration in which a number of persons with various further described competences participated and with the possibility for the tenderers to participate.

Assemble's chief point of view was that evaluation based on a user test in general favoured the previous supplier as a user who is asked to evaluate a system which that person knows and a system which that persons does not know will always find the system which the person knows more user friendly, thus specifically favours the existing supplier.

Furthermore, Assemble's point of view was that the user test was subjective and favoured the previous supplier as no objective measurement criteria had been determined for the user test and there was no description of the objective criteria that formed the basis for the user group's assessment of the systems offered.

The Complaints Board did not allow the complaint and stated that a user test must be assumed to contribute to eliminating a competitive advantage for the previous supplier as a system unknown to the evaluation team can thus be directly visualised. The user test in the case was organised so that the tenderer could participate physically or virtually and so that the tenderer could guide the persons user testing the system. The result of the user test was described in detail in the evaluation report. The user test was performed in connection with a tenderer's prose description of the system, thus based on the 104 specific requests which the municipalities had made for the system.

Thus, the possible competitive advantage which the previous supplier may have had been offset to a sufficient degree.

*Decision of 18 July 2022, Dräger Danmark A/S v Region Zealand, the North Denmark Region, the Central Denmark Region, the Region of Southern Denmark) and the Capital Region of Denmark*

*The decision is an example illustrating that the Complaints Board is undertaking an intensive and detailed review of the evaluation. No annulment of the award decision as the violations found following a concrete evaluation of materiality had been of no importance to the award decision.*

The case concerned a reopening of an open procurement under Title II for a framework agreement on the supply of anaesthesia devices and associated equipment and articles of consumption. The procurement procedure had been initiated by all regions jointly.

Dräger, an unsuccessful tenderer, claimed in particular that in the evaluation of the bids, the regions had attached importance to information which Dräger had submitted during a previous procurement procedure. Thus, no importance had been attached to the content of the current bid. Also claimed that the successful bid had wrongfully been given a score too good within a number of areas.

The Complaints Board stated that, *i.a.*, the contracting entity is not required to provide a detailed description in every respect of what is emphasised in the assessment of the qualitative subcriteria and any sub-subcriteria. Thus, the Complaints Board referred to the judgment of the General Court of 7 October 2015 in T-299/11, European Dynamics Luxembourg SA and others v KHIM from which it follows that circumstances can be considered that are not expressly stated in the procurement documents if the subcriterion gives an express basis. Thus, the contracting authority is not required to provide an exhaustive list of all circumstances that are considered in the assessment of a subcriterion. However, it is a requirement that circumstances to which crucial importance is attached are stated as well as circumstances to which – according to a normal understanding of what lies within the framework of the criterion in question – it is considered unusual to attach importance.

The complaint was, *i.a.*, allowed with regard to a number of claims where the Complaints Board found that the successful bid had wrongfully been given a score too high within a number of areas.

A correction of the points given meant that the bid from Dräger obtained the best rank. However, during the complaint, the regions had been made aware that Drager had wrongfully been given 100 points for the fulfilment of a requirement and that Dräger should have been given 0 points. The Complaints Board agreed that in a correct evaluation Dräger would have been given 0 points for the fulfilment of the requirement, and thus, Dräger would not have obtained the best rank anyway.

On that basis, the violations in terms of procurement law had, following a concrete evaluation of materiality, not been important to the award decision, and the Complaints Board therefore did not allow the claim for annulment.

*Decision of 27 July 2022, Edora A/S v the Municipality of Copenhagen and Aalborg Municipality*

The decision is discussed in detail in section 2.2.2 Requirements for tender specifications, including minimum requirements, and organisation of procurement procedures.

### 2.1.4 Framework agreements

*Decision of 5 May 2022, Peab Asfalt A/S v Øresundsbro Konsortiet I/S*

*The obligation to state an estimated value and an estimated amount for procurement procedures for framework agreements also applies to framework agreements on services.*

The case concerned an open procurement procedure under Title II of the Public Procurement Act for a 2-year framework agreement for resurfacing projects and minor operations and repair works on the Oresund Link. The contract notice did not state an estimated amount or an estimated value of the services to be delivered according to the framework agreement. On the other hand, the tender specifications (called "upphandlingsdokument") stated the following, translated from Swedish: The volume of the agreement was based on historical experience and was expected to be approx. DKK 17m in a 4-year period. The maximum allowed volume in the period of the agreement went up to approx. DKK 22m and constituted the maximum volume ("takvolym") of the framework agreement.

Peab Asfalt, an unsuccessful tenderer, filed a complaint with the Complaints Board and claimed that the contract notice was insufficient as it did not contain information about the estimated amount or the estimated value of the services to be delivered according to the framework agreement put out to tender. The complaint included a number of other claims which the Complaints Board did not consider.

The Complaints Board stated that a contracting authority, as established in the Complaints Board's decision of 9 November 2021, Simonsen & Weel A/S v the North Denmark Region and the Region of Southern Denmark (2021 Annual report, page 33), must state in the contract notice, *i.a.*, the estimated amount or the estimated value of the goods to be supplied according to the framework agreement put out to tender, see the judgment of the Court of Justice of the European Union of 17 June 2021 in C-23/20 between the same parties. Non-observance of that obligation constitutes a violation of Article 49 of the Public Procurement Directive which has been implemented into Danish law through Section 56 and Section 128(2) of the Public Procurement Act and Article 18 which corresponds to Section 2 of the Public Procurement Act.

Section 56 and Section 128(2) of the Public Procurement Act requires the contract notice to contain the information stated in Part C of Annex V to the Public Procurement Directive. As stated in the judgment of the Court of Justice of the European Union in C-23/20, the principle of equal treatment and the principle of prohibition of discrimination as well as the derived principle of transparency mean that all conditions and provisions in connection with the award procedure must be drawn up in a clear, precise and unequivocal manner in the contract notice or tender specifications so that all reasonably informed tenderers exercising ordinary care can understand their exact significance and interpret them in the same way.

Information in the contract notice about the estimated value or scope and frequency of the contracts to be awarded on the framework agreement must be considered a key element in potential tenderers' initial screening of whether they wish to do a more detailed evaluation of whether they should submit bids, including through assessing their ability to meet the obligations under the framework agreement.

On that basis, the Complaints Board's opinion was that Article 49, see Article 33 and items 7 and 8 and item 10, paragraph a in Part C of Annex V to the Directive should be interpreted to mean that the contract notice

must also state the estimated amount and/or the estimated value of the services to be supplied according to a framework agreement.

The consortium had not met the burden of proof that the missing description of the framework of the framework agreement had not caused potential tenderers to refrain from submitting bids, and the Complaints Board then annulled the award decision.

*Decision of 24 May 2022, Netcompany A/S v the Danish Working Environment Authority*

*The Danish Working Environment Authority had given sufficient information in the contract notice about the maximum total value of the contract, see the conditions in the judgment of the Court of Justice of the European Union of 17 June 2021 in C-23/20, Simonsen and Weel. The Complaints Board also found that the way in which the evaluation price had been calculated did not reflect the expenses for the combined, anticipated procurement and that the evaluation model was therefore not suitable to identify the most favourable bid in economic terms.*

The case concerned a procurement procedure for a framework agreement on the supply of development consultants to manage development, maintenance, application operations and consultation in connection with the Danish Working Environment Authority's journal systems.

In the contract notice, II.1.5) "Estimated total value" had not been filled in while a value of DKK 200m had been stated in II.2.6) "Estimated value". It was stated in VI.3) that, *i.a.*, the amount listed in II.2.6) was an "estimated upper consumption" over 4 years calculated based on the historical and anticipated consumption and that the annual consumption was anticipated to be DKK 45-55m.

The Complaints Board stated that in its judgment of 17 June 2021 in C-23/20, Simonsen and Weel, the Court of Justice of the European Union had established that the contracting authority in the contract notice or in the other procurement documents must state a maximum amount or a maximum total value of the goods to be delivered according to the framework agreement put out to tender.

The Complaints Board then reviewed, *i.a.*, the rules on completing the contract notice and found that the Danish Working Environment Authority had stated the estimated total maximum value of the entire contract in a clear, precise and unequivocal manner. The circumstance that the Danish Working Environment Authority had stated that the annual consumption was expected to constitute DKK 45-55m in average did not entail that the information about the total maximum value of the entire contract was then unclear or opaque. The Complaints Board also stated that the circumstance that the Danish Working Environment Authority had not completed II.1.5) could not lead to the information about the total maximum value for the entire contract being considered unclear or opaque when it had been clearly stated in II.2.6) as clarified in field VI.3).

The Complaints Board also considered, *i.a.*, whether the manner in which the evaluation price was calculated was suitable to contribute to identifying the most favourable bid in economic terms.

The evaluation price was calculated as the price for a consumption of 20,000 consultant's hours for one year plus the full transition costs and some further surcharges.

The Complaints Board stated that the evaluation price did not reflect the costs for the total, expected procurement as the transition costs were included for the entire period while the expenses for consultant's hours had merely been included for one year. Furthermore, the assumption about an annual usage of 20,000 consultant's hours did not match the annual expected consumption which had been listed at DKK 45-55m. The Complaints Board found that there was such a big difference between the evaluation model and the expected annual consumption that the Danish Working Environment Authority's determination of the evaluation model was based on an unreasonable basis and that the evaluation model was therefore not suitable to identify the most favourable bid in economic terms.

The Complaints Board consequently annulled the Danish Working Environment Authority's award decision.

### 2.1.5 The Complaints Board Act, including suspensive effect and the Complaints Board's sanctions

*Decision of 28 January 2022, Steelco Nordic A/S v Region Zealand*

*A company that has not submitted bids at a procurement procedure has no legal interest in complaining about the procurement procedure or maintaining a complaint about it if the contracting authority has annulled the procurement, see item 1 in Section 6(1) of the Complaints Board Act.*

In June 2021, Region Zealand launched an open procurement procedure under the Public Procurement Act for some framework agreements on regular procurement of instrument washers etc. Steelco Nordic A/S did not submit a bid but filed a complaint with the Complaints Board on 4 November 2021 claiming that, *i.a.*, the region had not stated the estimated/maximum amounts or the value of the acquisitions. Steelco also claimed annulment of the award decision. On 10 November 2021, the region referred to the Complaints Board's decision of 9 November 2021, Simonsen & Weel A/S v the North Denmark Region and the Region of Southern Denmark (2021 Annual report, page 33) and announced that the procurement procedure would be cancelled. The procurement procedure was cancelled on 16 November 2021.

Steelco then withdrew the claim for violation of the principles stated in the decision of 9 November 2021 and the claim for annulment but maintained the complaint and corrected some other claims.

Region Zealand rejected the complaint.

Referring to item 1 of Section 6(1) of the Complaints Board Act, the Complaints Board stated that the concept "legal interest" should not be interpreted in a narrow sense. However, the complainant must have a specific and direct interest in receiving the Complaints Board's decision on whether the public procurement rules have been disregarded.

As the region had cancelled the procurement procedure, Steelco did not have the necessary legal interest in the complaint, and the Complaints Board therefore rejected the complaint.

*Decision of 10 February 2022, Assemble A/S v the Municipality of Lyngby-Taarbæk*

*In 2014, Staten og Kommunernes Indkøbsservice (SKI) put out to tender a total of five lots for IT consultancy etc. under the then Public Procurement Directive, Directive 2004/18/EC. The case concerned lot 2, Kommunale ASP/Cloud-SaaS services, and a delivery agreement on a public day care system. Assemble A/S as well as KMD A/S were included as suppliers on the framework agreement. In 2018, Lyngby-Taarbæk*

*Municipality awarded the contract to KMD in a direct award. Assemble filed a complaint with the Complaints Board in 2021. The Municipality rejected the complaint due to inaction, but that was not allowed. Assemble had the burden of proof, and the complaint was not upheld.*

In 2018, Lyngby-Taarbæk Municipality wanted to make use of the framework agreement and therefore contacted Assemble as well as KMD and requested information about a specific functionality in connection with a requested delivery agreement on a public day care system. A meeting was subsequently held between Assemble and the municipality, but there was disagreement on the process, including whether Assemble responded to communication from the Municipality. The Municipality then assessed that KMD was the only supplier whose system met all of the needs described by the Municipality and concluded an agreement with KMD in October 2018. The contract remains in force.

In June 2021, Assemble filed a complaint with the Complaints Board claiming that the Municipality had not been entitled to make a direct award to KMD. Assemble claimed the award decision annulled and the contract declared ineffective.

The Municipality claimed dismissal due to inactivity, in the alternative that the complaint would not be allowed.

With regard to the claim for dismissal, the Complaints Board referred to the time limits for filing complaints in Section 7 of the Complaints Board Act which were introduced in 2010 together with the rules on ineffective contract and financial sanction and which still apply with certain changes. According to the comments on the rules on time limits for filing complaints, "no time limits for filing complaints are introduced for direct, illegal award of contracts without publication."

The time limits in Section 7 of the Complaints Board Act starts running form the contracting authority's notification or publication of a notice in the Official Journal of the European Union. As the Municipality had not made use of the possibility to publish a notice for voluntary ex ante transparency under Section 4 of the Complaints Board Act for the purpose of voluntary prior transparency, Assemble was not affected by the preclusive time limits in Section 7 of the Complaints Board Act. As the contract which the complaint concerned was still running, the Complaints Board did not find grounds to dismiss the complaint referring the inactivity.

With regard to the claims that the direct award was contrary to the provisions of the framework agreement and Title II of the Public Procurement Act as Assemble could also offer the solutions requested, the Complaints Board noted that only the provisions in Directive 2004/18/EC applied. A claim for violation of Section 2 of the Public Procurement Act (Article 18(1) of Directive 2014/24/EU) was not allowed already for that reason.

The Complaints Board considered that the Municipality had been under the impression that Assemble's system did not meet a described need for a waiting list feature.

As described in the decision, the parties had different opinions of the process of meetings, but it was certain that prior to the award of the contract to KMD, the Municipality had attempted to clarify particularly whether the potential suppliers met the need for a specific waiting list feature. Assemble did not complain until about three years after the procedure and just under two years after Assemble for certain obtained

knowledge of the direct award. It was therefore for Assemble to prove that the system contained the functionality described and that the municipality should be aware of the circumstances.

As Assemble had not met the burden of proof, the complaint was not allowed.

*Interim decision of 20 April 2022, Umove Vest A/S v Nordjyllands Trafikselskab*

The decision is described in more detail in section 2.2.3 Evaluation, including the choice of evaluation model.

*Decision of 18 May 2022, Assemble A/S v the Municipality of Lejre*

*Deadline for ineffective contract could not be extended when fixing a larger financial sanction than according to common practice. Section 17(3) of the Complaints Board Act did not apply.*

The case concerned the Municipality's direct award under Framework Agreement 02.19 ASP/Cloud-SaaS. Assemble A/S and KMD A/S were suppliers on the framework agreement. The award had favoured KMD and concerned delivery of a public day care system. A four-year contract had been concluded after the award.

The Municipality acknowledged during the case that the provisions for the award had not been observed. According to item 1 of Section 17(1) of the Complaints Board Act, the contract should therefore be declared ineffective as the Municipality had not published a notice in accordance with Section 4 prior to the conclusion of the contract.

The Municipality denied the claim and requested the time for ineffective contract to be deferred as there were “tertiary factors”. The Municipality required postponement of the time for ineffective contract to be under the condition that a proportionally larger financial sanction would be fixed under Section 18(2) and Sections 19-20 of the Complaints Board Act, see the Complaints Board's decision of 10 [February] 2014, Sønderborg Affald A/S v Affaldsregion Nord I/S.

When establishing the time from which the contract should be declared ineffective, the Complaints Board considered a number of specific circumstances in the procedure and the municipality’s need to implement the procurement, the consideration for effective enforcement of the procurement rules and the Municipality's possibilities of arranging and implementing a new procurement procedure. The contract was then declared ineffective as of 1 September 2022. The Complaints Board found that the conditions for applying Section 17(3) of the Complains Board Act had not been met as the situation in hand did not fall within the scope of the provision. Thus, the Complaints Board referred to the legislative history behind the provision.

The Complaints Board therefore did not find the grounds – against a financial sanction larger than according to common practice for which the municipality had prepared the ground – to defer the time for ineffective contract any further. In that case, it would be postponement for a period longer than what was consistent with reasoned considerations. Such a procedure where the contracting authority could avoid an illegal, directly awarded contract being affected by ineffective contract to a further extent subject to a large financial sanction, meaning payment of an amount, would thus not be compatible with the enforcement rules in the Complaints Board Act and the consideration for effective enforcement of the procurement

procedure rules. It was added that a contracting authority had the possibility to publish a notice for voluntary ex ante transparency, see item 1 of Section 17(1), see Section 4, of the Complaints Board Act.

*Decision of 21 June 2022, Inlead ApS v Det Digitale Folkebibliotek (digital public library)*

A detailed account of the decision is provided in section 2.2 Competitive tendering obligation, direct award and modification of contracts.

*Decision of 16 September 2022, Electrolux Professional A/S v Alabu Bolig*

A detailed account of the decision is provided in section 2.2 Competitive tendering obligation, direct award and modification of contracts.

*Decision of 22 September 2022, Branch of Trend Micro Emea Limited v the Capital Region of Denmark*

*The Capital Region of Denmark was entitled to cancel a mini-tender with the reason that the needs of the region were no longer as stated in the submitted procurement documents, particularly based on changed budgetary and structural conditions. A subsequent direct award was declared ineffective, and the contracting region was ordered to pay a financial sanction. When assessing whether the rules on ineffective contract and financial sanction applied, the Complaints Board stated that the direct award could not be considered concluded based on the framework agreement, thus subject to Title II of the Public Procurement Act. As the value of the contract, however, was above the threshold, the acquisition was subject to Title II of the Public Procurement Act, and the rules on ineffective contract and financial sanction therefore applied.*

The case concerned a direct award, partly a mini-tender on the purchase of antivirus software according to an SKI agreement.

The Capital Region of Denmark had initiated a mini-tender for the acquisition of antivirus licenses. However, the region cancelled the mini-tender, and the day after the cancellation, the region concluded a contract with one of the participants in the mini-tender based on a direct award.

As a reason for the cancellation of the mini-tender, the Capital Region of Denmark stated that the needs of the region were no longer as stated in the submitted procurement documents, particularly based on changed budgetary and structural conditions.

In those regards, the Complaints Board stated that it follows from standard practice by the Court of Justice of the European Union and corresponding Danish case law and practice by complaints boards that a contracting authority is entitled to cancel an ongoing procurement procedure if the cancellation does not pursue a purpose that is contrary to the principle of equal treatment or is otherwise subjective and that it generally is for the complainant to prove that the contracting authority has violated the procurement procedure rules.

In the specific case, the Complaints Board found that the reason stated was not so general and without content that the Complaints Board could not review whether the cancellation pursued a purpose that was contrary to the principle of equal treatment or was otherwise subjective. The Complaints Board also found that there were no grounds to assume that the Capital Region of Denmark's reason did not also form the basis for the decision to cancel the mini-tender. As Trend Micro had not proved that the cancellation was

unreasonable, there was no basis to allow Trend Micro's claim to annul the region's cancellation of the mini-tender.

As regards the subsequent direct award, the Capital Region of Denmark acknowledged having acted contrary to the principles of equal treatment and transparency in Section 2 of the Public Procurement Act (Article 18(1) of Directive 2014/24/EU) in that it had made the direct award contrary to the provisions of the framework agreement. On that basis, the Capital Region of Denmark approved of the claim for annulment of the award decision which – together with the claim of having acted contrary to the principles of equal treatment and transparency in Section 2 of the Public Procurement Act (Article 18(1) of Directive 2014/24/EU) in that it had made the direct award – was allowed.

As regards Trend Micro's claim for ineffective contract, the question arose whether the direct award was to be considered as having been made based on the framework agreement which also contained a description of when direct awards were allowed or whether the award had not been made based on the framework agreement. In those regards, the Complaints Board found that the award could not be considered as having been concluded based on the framework agreement. As the value of the contract, however, was above the threshold, the acquisition was subject to Title II of the Public Procurement Act, and the rules on ineffective contract and financial sanction therefore applied.

The contract was then declared ineffective, and the Capital Region of Denmark was ordered to pay a financial sanction of DKK 30,000.

*Decision on compensation of 13 December 2022, Øens Taxa ved Paul Erik Düring Pedersen v FynBus, Sydtrafik and Midttrafik*

*Concerns a procurement procedure under the Utilities Directives on demand responsive transport. The decision on compensation is a continuation of the Complaints Board's decision of 27 October 2020, upheld by the judgment delivered by the District Court of Svendborg on 12 May 2022. A claim for dismissal was not allowed. Øens Taxa awarded compensation of DKK 60,000.*

In its decision of 27 October 2020 concerning the so-called FG6 transport, the Complaints Board established that the transport organisations had violated the procurement procedure rules and ordered them to pay a financial sanction of DKK 7m. (2020 Annual Report, page 16). The transport organisations brought this decision – and a similar decision in the parallel case about FV6 transport, instituted by Alsvognen I/S – before the District Court in Svendborg after which the Complaints Board ordered the action for compensation which Øens Taxa had initiated before the Complaints Board to end.

In judgments delivered on 12 May 2022 by the District Court of Svendborg, the Complaints Board's decisions were upheld.

Øens Taxa requested a reopening of the action for compensation. The transport organisations protested but did not succeed.

Øens Taxa claimed compensation of a little more than DKK 3.5m. The traffic organisations claimed the action for compensation dismissed as incomprehensibly documented, in the alternative dismissal. The Complaints Board did not allow the motion for dismissal as the claimed ambiguity of the claim concerning

documentation for a number of items could not lead to dismissal of the action for compensation in its entirety.

The traffic organisations had demonstrated actionable conduct in relation to Øens Taxa in the violation of the procurement procedure rules which had been found in the decision of 27 October 2020.

Considering the claim for causal connection, the traffic organisations claimed that the vehicle which Øens Taxa had offered, like the successful tenderer's vehicle, did not meet the minimum requirement for room for two large wheelchairs. However, the traffic organisation's interpretation of the minimum requirement was not sufficiently clear in the actual requirement, and the traffic organisations would therefore not have been able to reject the bid from Øens Taxa as non-compliant. Øens Taxa had not acquired the vehicle offered specifically for the FG6 procurement procedure, but the Complaints Board found that Øens Taxa had been entitled to calculate its bid based on the acquisition price. According to information received, the bid from Øens Taxa was ranked on a fourth place, and it could not be rejected that bids no. 2 no. and 3 were in compliance with contract conditions. However, the Complaints Board found it reasonable to have the traffic organisations prove compliance of the two bids in between. As that burden of proof had not been met, the claim for causal connection had not been met either.

Øens Taxa's claim was combined by a number of items. Item A concerned a loss of approx. DKK 1.2m from not having been awarded FG6 traffic from Ærø. Following a regulation of the period which the claim concerned and following deductions described in more detail, the Complaints Board partly allowed the claim based on an estimate of DKK 600,000. Item B concerned the FV6 traffic which was comprised by the parallel case initiated by Alsvognen I/S. The fact that Øens Taxa had taken the role as an intervener for Alsvognen I/S had to be compared with a third-party intervention in the sense of the Administration of Justice Act. Thus, Øens Taxa was not a party to the case, and the Complaints Board had therefore not established any grounds for compensation. Item C concerned loss of profits from not having been able to submit bids in a subsequent procurement procedure for guaranteed traffic, FG7. The claim was not allowed as Øens Taxa's general financial capabilities were irrelevant to the traffic organisations. The requirement for foreseeability was therefore not met. Item D concerned own time consumed in connection with the case and was not allowed according to standard practice. Item E concerned claims due to loss of goodwill and were not allowed as the claim in general was undocumented and did not meet the requirement for foreseeability either

### 2.1.6 Grounds for exclusion

*Decision of 24 October 2022, KN Rengøring v/Henrik Krogstrup Nielsen v Herlev Municipality*

*Complaint dismissed due to the lack of legal interest, see item 1 of Section 6(1) of the Complaints Board Act.*

Herlev Municipality launched a restricted procedure under the Public Procurement Act for two 4-year lots for cleaning services and window cleaning at addresses described in more detail. The contract notice did not contain any specification of the total value of the procurement in II.I.5 or the total value of the lots in II.2.6.

KN Rengøring was the Municipality's prior supplier of cleaning services and window cleaning. On 19 August 2021, the Municipality had terminated the contract with KN Rengøring due to KN Rengøring's material

breach and had raised a claim for damages. KN Rengøring contested the claim and claimed that the termination of the contract was unfounded.

KN Rengøring did not apply for preselection.

The Municipality received five bids for each lot and decided on 7 April 2022 to conclude contracts with two companies.

On 4 July 2022, KN Rengøring filed a complaint with the Complaints Board and claimed that the Municipality had violated the procurement procedure rules in that it had not stated the estimated value for each of the lots put out to tender.

The Municipality claimed dismissal and referred to the fact that the Municipality had selected the voluntary ground for exclusion in item 5 (now 4) of Section 137(1) of the Public Procurement Act (Article 57(4)(g) of Directive 2014/24/EU) concerning exclusion in case of previous breach of a public contract. KN Rengøring would therefore have been excluded if the company had applied for preselection. In the alternative, the Municipality asserted a claim for the complaint to not be allowed.

KN Rengøring referred to its right to self-cleaning, see Section 138 of the Public Procurement Act (Article 57(6) and (7) of Directive 2014/24/EU).

The Complaints Board stated that item 1 of Section 6(1) of the Complaints Board Act on legal interest should not be interpreted in a restrictive sense. A company that has participated in or would have been able to participate in a procurement procedure has a legal interest according to practice. KN Rengøring had not participated in the procurement procedure but operates in the relevant industry. KN Rengøring was therefore basically allowed to file a complaint.

However, the Municipality had selected the ground for exclusion under item 5 (now 4) of section 137(1) of the Public Procurement Act (Article 57(4)(g) of Directive 2014/24/EU). As KN Rengøring was neither an applicant nor a tenderer, the Municipality had not had the possibility to exclude KN Rengøring with that reference, and the rules on self-cleaning in Section 138(2) of the Public Procurement Act (Article 57(6) of Directive 2014/24/EU) therefore did not apply.

On that basis, the Complaints Board allowed the motion for dismissal.

*Interim decision of 27 October 2022, KN Rengøring v/Henrik Krogstrup Nielsen v Frederiksberg Municipality*

*Frederiksberg Municipality had established that Herlev Municipality terminated the contract with KN Rengøring based on conditions which, in Frederiksberg Municipality's discretion, could be qualified as material breach, see item 4 of Section 137(1) of the Public Procurement Act (Article 57(4)(g) of Directive 2014/24/EU). Not grounds to disregard Frederiksberg Municipality's assessment that item 3 of Section 138(3) of the Public Procurement Act (Article 57(6) of Directive 2014/4/EU) had not been met.*

The case concerned a restricted procedure in accordance with Title II of the Public Procurement Act for three lots for cleaning in Frederiksberg Municipality (repeat tender process). Once KN Rengøring had been preselected, Frederiksberg Municipality decided to exclude KN Rengøring from the procurement procedure as the municipality assessed KN Rengøring to be subject to item 4 of Section 137(1) of the Public Procurement Act (Article 57(4)(g) of Directive 2014/24/EU) in connection with the termination of a contract in Herlev Municipality and to not have documented its reliability under items 1 and 3 of Section 138(3) of the Public Procurement Act (Article 57(6) of Directive 2014/24/EU).

KN Rengøring particularly claimed that the conditions for excluding the company had not been met as Herlev Municipality's termination of the cleaning contract was unfounded and that the company's documentation of reliability was sufficient.

The Complaints Board did not find grounds to disregard Frederiksberg Municipality's assessment, and the Municipality has thus proved that Herlev Municipality terminated the contract with KN Rengøring because of circumstances which could be qualified as material breach according to Frederiksberg Municipality's discretion. Thus, Frederiksberg Municipality had documented to a sufficient degree that the ground for exclusion under item 4 of section 137(1) of the Public Procurement Act (Article 57(4)(g) of Directive 2014/24/EU) had been met. Nor were there grounds to disregard Frederiksberg Municipality's assessment that item 3 of Section 138(3) of the Public Procurement Act (Article 57(6) of Directive 2014/4/EU) had not been met. As the conditions in Section 138(3) of the Public Procurement Act (Article 57(6) of Directive 2014/24/EU) are cumulative, it was not considered whether the conditions in item 1 of Section 138(1) of the Public Procurement Act had been met.

The complaint was subsequently withdrawn, and the interim decision is therefore the Complaints Board's final decision.

### 2.1.7 Negotiated procedure

*Decision of 7 March 2022, Albertslund Tømrer og Snedker A/S, VVS & Varmeteknik A/S and HRH EL A/S v Albertslund Municipality*

*The case concerned a municipal negotiated procedure of five lots for workmen services: 1) heating, water and sanitation work, 2) carpentry, 3) electrical work, 4) ventilation work and 5) sewer work. The complainants, which were not preselected, claimed that, i.a., some of the preselected companies – and later successful tenderers – did not meet a fixed minimum requirement for technical and professional capacity and that the municipality had not been entitled to conduct the procurement procedure as a negotiated procedure.*

Albertslund Municipality initiated a negotiated procedure for framework agreements on workmen services. The workmen services were described as "common" work in the contract notice (e.g., carpentry, ventilation work and electrical work). It was a minimum requirement for technical and professional capacity that the applicants for preselection for each lot could list at least one reference showing relevant experience with comparable contracting authorities within each service category.

The companies that filed complaints applied for preselection for lots for carpentry, ventilation work and electrical work. They were not preselected, and they did not complain that they had not been preselected. However, they complained when the Municipality had made its award decisions. The companies that were part of the same group claimed that, *i.a.*, some of the successful tenderers did not meet the fixed minimum requirement for technical and professional capacity as they claimed that some of the successful tenderers had not submitted references that met the minimum requirement.

Albertslund Municipality claimed that that part of the companies' complaint was to be dismissed because it did in fact relate to preselection and because a complaint concerning missing preselection must,

according to Section 7(1) of the Public Procurement Act, be brought before the Complaints Board within 20 days from the notification of not having been preselected. That deadline had not been met.

Although the companies could have filed complaints already at the time of the decision of preselection, the Complaints Board did not allow the Municipality's motion for dismissal as the Board stated that the companies had (now) complained about the award decisions, and the time limit for filing complaints in Section 7(1) of the Public Procurement Act therefore did not apply. Companies who have been rejected for preselection and who do not file complaints about the missing preselection are thus in the same position as potential tenderers in case of complaints about the final award decision.

The companies also claimed that Albertslund Municipality had disregarded Section 55 of the Public Procurement Act (Article 26 of Directive 2014/24/EU), see Section 61(1) (Article 26(4) of Directive 2014/24/EU) in that it had conducted the procurement procedure as a negotiated procedure without the conditions in Section 61(1) of the Public Procurement Act (Article 26(4) of Directive 2014/24/EU) being met. The companies particularly claimed that Albertslund Municipality had conducted a negotiated procedure that was not based on any of the exceptions listed in Section 61(1) of the Public Procurement Act (Article 26(4) of Directive 2014/24/EU). It was a matter of a procurement procedure for framework agreements on workmen services where the service specifications were not to established until the conclusion of the subsequent agreements and where "common" works were put out to tender after the contract notice.

However, it was the Municipality's understanding that it had been entitled to use the form competitive procedure with negotiation as it was – although the fundamental services put out to tender independently were in the nature of generic services – a matter of a conclusion of five lots which contained elements consisting of adjustments of the framework for delivery of the service which was made subject to a negotiation and as the negotiations were conducted and resulted in a changed contractual basis in the form of, *i.a.*, changed service descriptions. The consideration to ensure compliant bids was also met as the Municipality created the broadest possible competitive field with a total of 14 compliant bids received. Thus, the purpose of the negotiation was that the tenderers were allowed to optimise their bids as it was ensured that the tenderers submitted compliant bids and that the service description was clarified. The Municipality finally stated that competitive procedures with negotiations is a form of procedure ranking alongside of public and restricted procedures in the Public Procurement Act. Section 61 of the Public Procurement Act (Article 26(4)(a) and (b) and Article 26(6) of Directive 2014/24/EU) is not an expression of an exemption provision, and the provision may therefore not be interpreted in a restrictive sense but rather as a form of procedure ranking alongside of the other forms of procedure in Section 55 of the Public Procurement Act (Article 26 of Directive 2014/24/EU).

When deciding that issue, the Complaints Board, which consisted of two members of the presidency and two experts, did not agree. A majority of the Board found that Section 61(1) of the Public Procurement Act (Article 26(4) of Directive 2014/24/EU) is an exemption provision to the normal forms of procedure and that based on standard practice of the Court of Justice of the European Union, the provision must then be interpreted in a restrictive sense and that it is for the contracting authority to prove that the conditions have been met. The majority found that the burden of proof had not been met. The majority particularly considered 1) that it was a matter of "common" works which the Municipality itself had acknowledged independently were in the nature of "generic services", i.e., "off-the-shelf items" which is further described in a preamble as an example of when the negotiated procedure should not be used, 2) that it is a matter of

a framework agreement which is why the service should in any circumstance be subsequently clarified and 3) that the Municipality did not clarify with which legal basis it believed that the conditions for a competitive procedure with negotiation were met until late in the complaint.

A minority of the Complaints Board believed that the burden of proof had been met.

In a writ of 29 April 2022, the Municipality of Albertslund referred the matter to the courts.

# 3. DANISH JUDGMENTS ON THE COMPLAINTS BOARD'S CASES

*Judgment of the City Court of Copenhagen of 3 March 2022, G4S Security Services A/S v Post Danmark A/S, see the Complaints Board's decisions of 22 January 2019 and 8 October 2020.*

The case concerned a procurement procedure under the Utilities Directive for, *i.a.*, security services. In its decision of 22 January 2019, the Complaints Board found that Post Danmark had violated the procurement rules in that it maintained a decision to conclude a contract with a tenderer after G4S Security Services had made them aware that the tenderer did not have a statutory permit to perform security services. The Complaints Board interpreted a clause in the procurement documents to mean that the authorisation should exist at the time of the bid which it did not. It was not sufficient that a sub-supplier, on which the tenderer relied, had the necessary permit. In its decision of 8 October 2020, the Complaints Board found for Post Danmark in a claim for damages of DKK 35,900,000 with statutory interest as of 12 July 2018 as it was highly probable that Post Danmark would have cancelled the procurement procedure if Post Danmark had realised that the successful bid was non-compliant. The condition damages for causal connection in damages had therefore not been met.

G4S brought that decision before the City Court of Copenhagen which, however, found for Post Danmark in its judgment of 3 March 2022. The Court considered that the Danish Act on Security Activities (*lov om vagtvirksomhed*) should be interpreted to mean that anyone concluding an agreement on security activities must have the authorisation itself. However, it could not be deduced from the Act on Security Activities that the authorisation requirement should be met at the time of the bid. Thus, there was no basis for damages.

*The District Court of Svendborg's judgment of 12 May 2022, FynBus, Midttrafik and Sydtrafik v Alsvognen I/S, Betina Thomsen and Allan Peter Gramstrup Thomsen, and the District Court of Svendborg's judgment of 12 May 2022, FynBus, Midttrafik and Sydtrafik v Øens Taxa ved Paul Erik Düring Pedersen, see the Complaints Board's decisions of 19 May and 27 October 2020 (2020 Annual Report 2020 p. 16).*

In two decisions, the Complaints Board had found that the transport organisations had violated the Utilities Directive in connection with open procurements procedures for, *i.a.*, demand responsive transport. The complainants claimed that the transport organisations had waived a minimum requirement stating that the vehicles offered needed room for two large wheelchairs at the same time. The fact that the minimum requirement was waived was a significant change to the contracts which the minimum requirement concerned. The Complaints Board found that the transports awarded were direct awards contrary to the tendering obligation, and the transport organisations were ordered to pay a financial sanction of DKK 3m. (decision of 19 May 2020) and DKK 7m (decision of 27 October 2020).

The transport organisations brought the decisions before the courts where the two cases were heard at the same time at the District Court in Svendborg. In its judgments of 12 May 2022, the District Court upheld the

Complaints Board's assessment of the minimum requirement for room for two wheelchairs and found for the defendant transport companies.

Øens Taxa ved Paul Erik Düring Pedersen then requested damages. In its decision of 13 December 2022, the Complaints Board ordered the transport organisations to pay DKK 600,000 in damages for expectation damages (Annual Report 2022, p. 43).

*The District Court of Frederiksberg's judgment of 30 June 2022, Gentofte Municipality v Eksponent ApS, see the Complaints Board's decisions of 29 April 2020 and 10 February 2021 (Annual Report 2021, p. 35).*

The case concerned an open procedure for the design and implementation of a new website for the municipality. As a minimum requirement, the municipality established that the tenderers were to submit at least three references from similar tasks. Bids were received from three tenderers. Eksponent, an unsuccessful tenderer, claimed that the successful tenderer did not meet the minimum requirements. The Municipality then acknowledged that at least one of the references could not be used, but instead of rejecting the bid, the Municipality allowed the company to submit new references to ensure observance of the minimum requirement. Eksponent complained of that as well. In the Complaints Board's decision of 29 April 2020, the Complaints Board found that, *i.a.*, the municipality had violated the procurement procedure rules by subsequently obtaining information about a required reference from the successful tenderer. The Complaints Board annulled the award decision.

In the Complaints Board's decision of 10 February 2021, Eksponent was awarded damages to cover the expectation damages, estimated at DKK 1.2m.

The Municipality brought the case before the District Court of Frederiksberg which found that the Municipality had been entitled to obtain new references from the successful tenderer and found for the Municipality.

The judgment has been appealed to the Court of Appeal of Eastern Denmark.

*The judgment of 9 December 2022 by the District Court of Glostrup, Ringkøbing-Skjern Municipality v De Forenede Dampvaskerier A/S, see the Complaints Board's decisions of 15 May and 17 December 2020.*

Ringkøbing-Skjern Municipality launched an open procurement procedure under the Public Procurement Act for a 6-year framework agreement with an actor for renting and washing clothing for healthcare workers. The award criterion was price. The Municipality received two bids. The Municipality rejected the bid with the lowest price as non-compliant and concluded a contract with the tenderer that had submitted the other bid.

The rejected tenderer filed a complaint with the Complaints Board. In its decision of 15 May 2020, the Complaints Board found that the complainant's bid was not non-compliant and annulled the Municipality's decision to conclude a contract with the other tenderer. In the decision of 17 December 2020, the complainant, who had claimed damages of approx. DKK 4.1m., was awarded expectation damages of DKK 2.5m.

The Municipality brought the decisions before the District Court of Glostrup claiming that the procurement rules had been violated and that the Municipality therefore was not liable. The complainant moved for

dismissal and repeated its claim to the Complaints Board for damages of approx. DKK 4.1m. The complainant also claimed that the Municipality should terminate the contract with the other tenderer pursuant to Section 185(2) of the Public Procurement Act.

The Court upheld the Complaints Board's assessment that the complainant's bid was compliant and, like the Complaints Board, found that the Municipality was liable to the complainant. The Court increased the damages to approx. DKK 4.1m according to the complainant's claim.

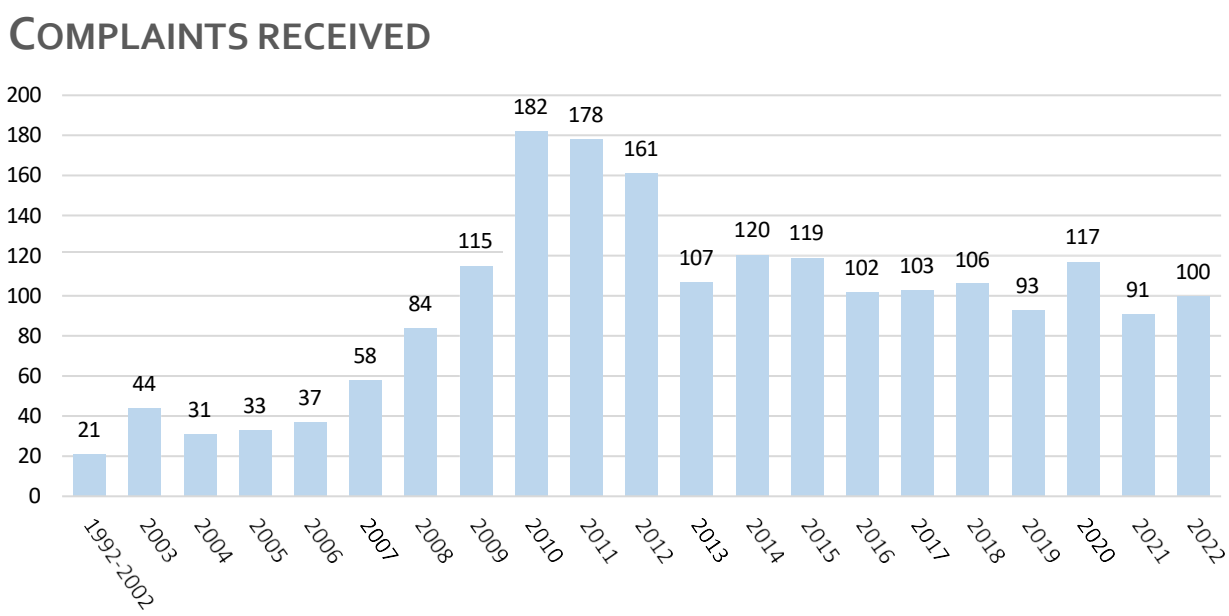
However, the Court did not order the Municipality to terminate the contract with the other tenderer pursuant to Section 185(2) of the Public Procurement Act. According to this – purely national – provision, the tenderer must terminate a contract with an annulled award decision unless special circumstances speak for continuation of the contract. The Court referred to the legislative history behind the provision according to which a contract can be continued if a tenderer that has been wrongfully rejected for the award has received damages in the form of expectation damages and the tenderer who was awarded the contract should also have been awarded the contract if the wrongfully rejected tenderer had not submitted a bid. It was such a situation that was to be adjudicated.

# 4. THE COMPLAINTS BOARD FOR PUBLIC PROCUREMENT'S ACTIVITIES IN 2022

The statistical information below is based on a manual count and on the annual statistics prepared each year by the Complaints Board.

## 4.1 Complaints received

The Complaints Board received 100 complaints in 2022. The below overview illustrates the development in the number of complaints received in 1992-2022.




The number of complaints received in 2022 is slightly above the level in 2021, and the number of complaints remains significantly lower than in 2010-2012.

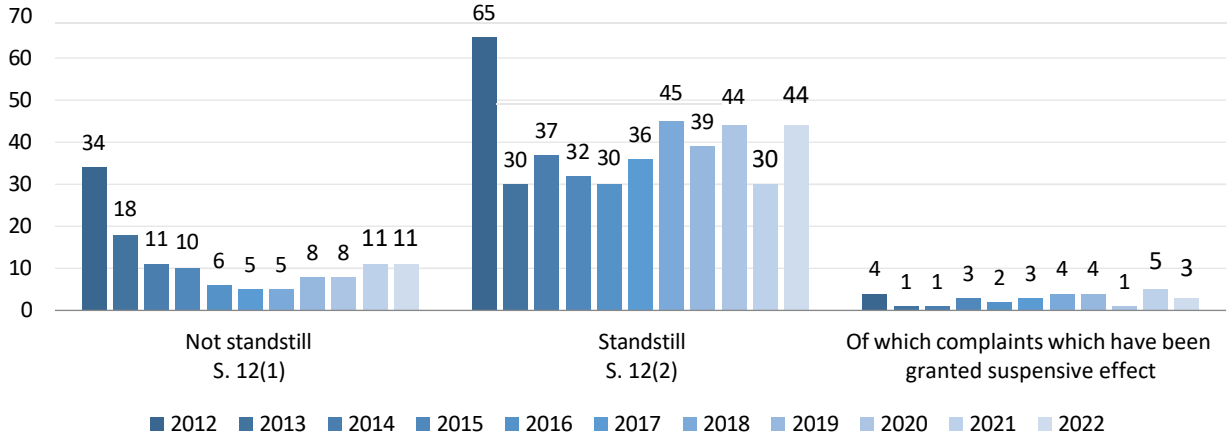
As stated in section 4.1 of the 2013 Annual Report, the sharp decline in the caseload was due to the amendment of the Enforcement Act (now the Complaints Board Act) and the Executive Order on the Complaints Board in 2013, the purpose of which was to bring down the increasing number of complaints. The increase of the complaint fee to DKK 20,000 in cases concerning infringement of the Public Procurement Directive (the majority of cases) as well as the fact that the complainant risks being ordered to pay the respondent contracting authority's costs must be assumed to be decisive factors. The slight decline in the number of cases in 2016-2019 may be explained by the fact that, because of the implementation of the major amendments to the substantive procurement rules, potential complainants have been more cautious and by the fact that the Complaints Board is no longer competent to adjudicate cases on procurement below the thresholds without a clear cross-border interest, see Title V of the Public Procurement Act.

## 4.2 Standstill cases and other decisions regarding suspensive effect

As shown below, the Complaints Board made interim decisions in 11 cases in 2022 where a request for suspensive effect had been made under Section 12(1) of the Complaints Board Act and interim decisions in 44 cases received in the standstill period under Section 12(2) of the Act where the Complaints Board has a statutory deadline of 30 days to make its decision on whether to grant suspensive effect. The Board decided to grant suspensive effect to a complaint in three cases in 2022, see section 1.4 above. In some cases, the Complaints Board's decisions on suspensive effect are made in writing and not as an actual order. These decisions in writing are also included in the figures.

The number of standstill decisions and other decisions etc. regarding suspensive effect made in 2012-2022 is shown below.

### STANDSTILL DECISIONS AND OTHER DECISIONS CONCERNING SUSPENSIVE EFFECT



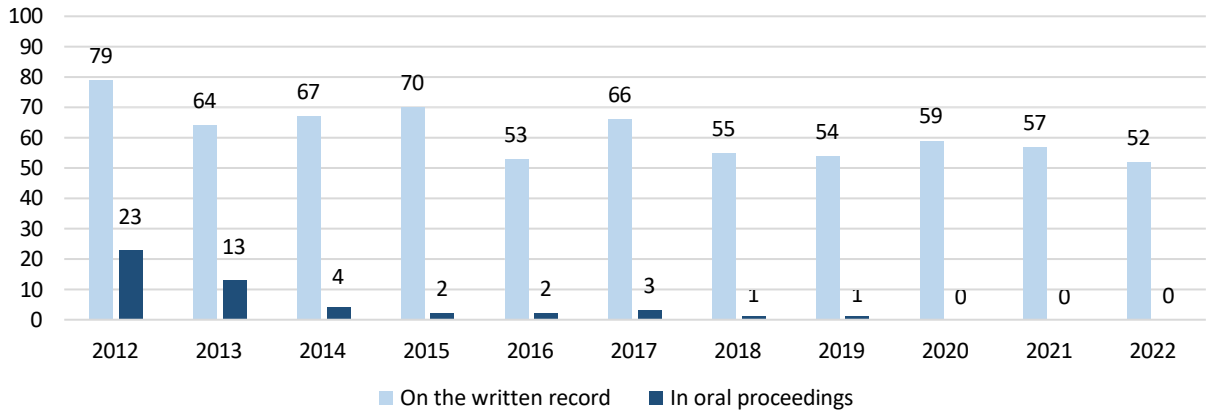

In a number of cases, the Complaints Board's decisions etc. regarding suspensive effect will lead to withdrawal of the complaint due to the Complaints Board's prima facie order where the Complaints Board, based on a preliminary assessment, delivers an opinion on whether the public procurement rules are likely to have been violated. Such decisions are very resource-intensive for the Complaints Board as the decision in most cases must be prepared and handed down within 30 days under considerable time constraints and as the decisions, although they are preliminary in nature, often comprise a comprehensive statement of claim and detailed grounds. Generally, the standstill rules and the rules on suspensive effect imply that in a significant proportion of all cases, the Complaints Board is required to make two decisions, namely a decision on suspensive effect and a substantive decision on the alleged infringements. In addition to this are possible decisions on damages and perhaps also one or more decisions on access to documents during the case.

## 4.3 Cases decided on the written record or in oral proceedings

The 42 cases in which the Complaints Board adjudicated on their merits in 2022 (see section 4.4) were all decided on the written record.

Below is an overview of cases considered on the written record and in oral proceedings, respectively, in the years 2012-2022.

## CASES DECIDED ON THE WRITTEN RECORD OR IN ORAL PROCEEDINGS



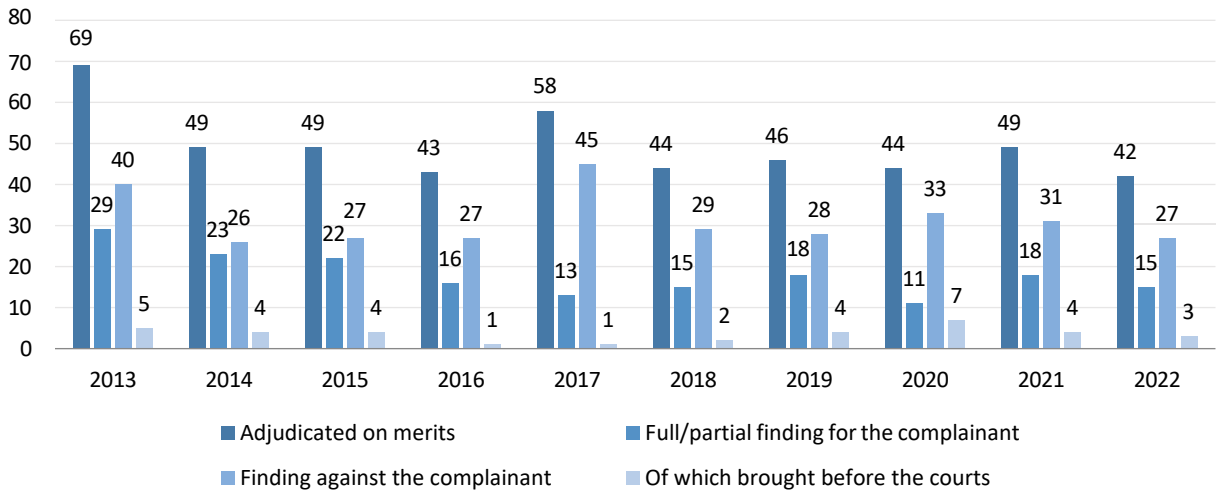

Note: These figures include rejected cases.

The distribution of cases decided on the written record/cases adjudicated in oral proceedings shows that only very few cases are reviewed in oral proceedings. As stated in section 4.3 of the 2013 Annual Report, this decline is in accordance with the legislator's intention. In 2010, Section 11(1) of the Enforcement Act (now the Complaints Board Act) laid down that a case is prepared by the parties exchanging written pleadings and is adjudicated on this basis unless the president of the case decides that the case needs to be heard in oral proceedings. In 2009, which was the year before the entry into force of Section 11(1), there was an equal distribution of these two types of cases. During the case preparation, the parties may request that oral proceedings be held, but experience shows that this only happens in very few cases.

### 4.4 Resolved cases and their outcome

The Complaints Board adjudicated 42 cases on their merits in 2022. Of these cases, 15 complaints were fully or partly sustained, while 27 complaints were unsuccessful. In the majority of cases, the Complaints Board's decision is the final ruling in the case. Of these 42 decisions, only four were thus referred to the courts of law. The number of decisions referred to the courts is almost at the same level as in the previous year.

## RESOLVED CASES AND THEIR OUTCOME




Note: The number of cases brought before the courts is primarily based on the number of writs of which the Complaints Board has been informed. The Complaints Board cannot be certain that it receives all writs. The Complaints Board requests a copy for its information of all writs submitted to the courts in relation to decisions made by the Complaints Board.

The below table shows that the percentage of successful cases in 2020 was approx. 36%, thus at almost the same level as in 2021.

The figures in the graph and in the table below do not include prima facie decisions where they are the final decision made in a complaint case. In 2022, the Complaints Board delivered 34 prima facie decisions. In eight of these, the Board considered the cases to be prima facie cases (that the complaint seems to be well-founded). In seven cases, this led the contracting authority to cancel the procurement procedure or annul its award decision after which the complaint was withdrawn. The interim decision was thus the Board's final decision.

In the remaining 26 prima facie decisions, the Complaints Board assessed that the case was not a prima facie case. In 13 of these, the complaint was withdrawn, which made the interim decision the final decision.

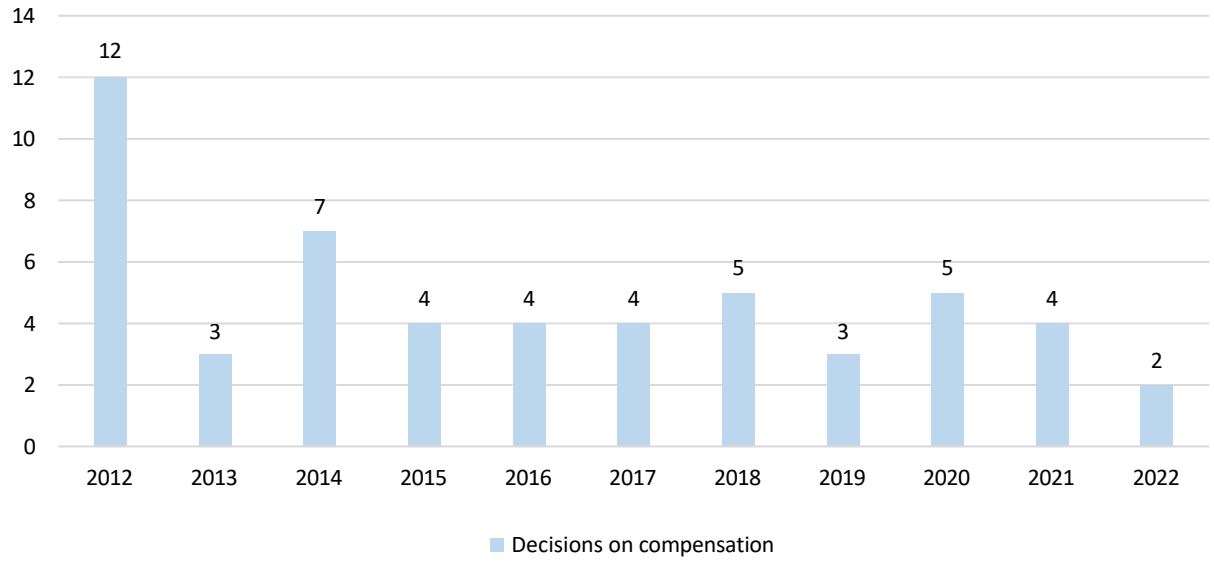
| **Year** | **Full/partial finding for the complainant** | **Finding against the complainant** |
|---|---|---|
| 2013 | 42% | 58% |
| 2014 | 47% | 53% |
| 2015 | 45% | 55% |
| 2016 | 37% | 63% |
| 2017 | 26% | 74% |
| 2018 | 34% | 66% |
| 2019 | 39% | 61% |
| 2020 | 25% | 75% |
| 2021 | 37% | 63% |
| 2022 | 36% | 64% |

## 4.5 Decisions on compensation

In 2022, the Complaints Board made two decisions on compensation.

The average length of proceedings for the issue of compensation was approx. seven months.

### DECISIONS ON COMPENSATION HANDED DOWN BY THE BOARD

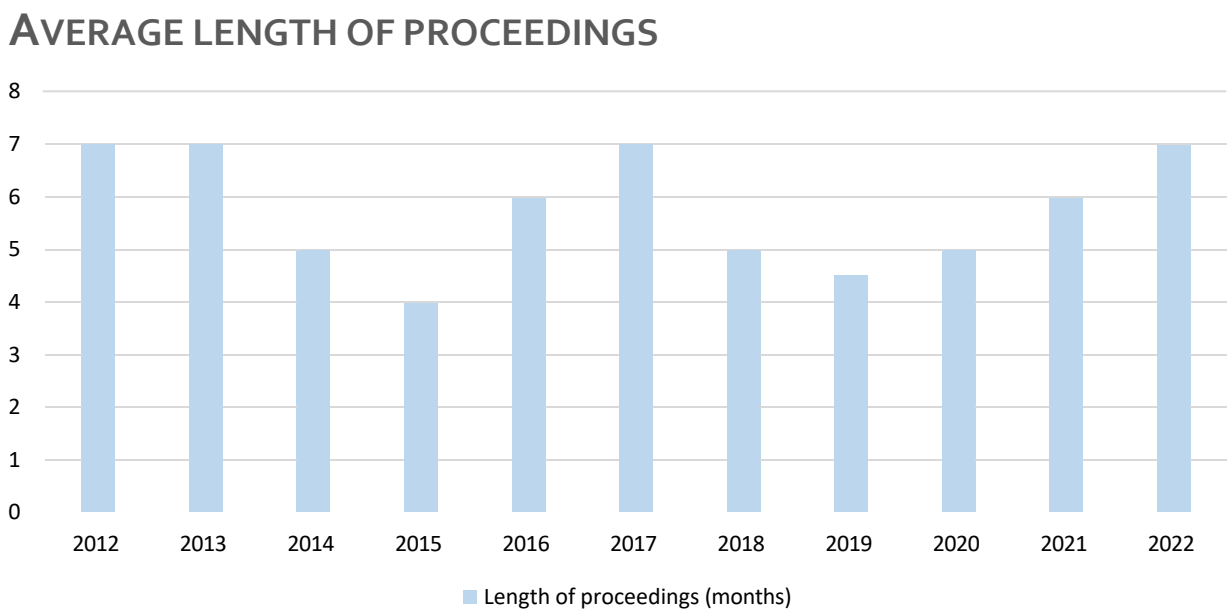



As described in section 4.5 of the 2013 Annual Report, experience shows that in many of the cases in which the Complaints Board has found fully or partly in favour of the complainant in its substantive decision, the issue of compensation is resolved without the Complaints Board where the parties reach a settlement instead of letting it be up to the Complaints Board to decide the case in a decision on compensation. The number of decisions on compensation in 2012 should be compared with the large number of complaints received in the years before.

## 4.6 Average length of proceedings

The Complaints Board's average length of proceedings in 2022 was seven months.

Below is an overview of the development in the average length of proceedings for rejected cases and substantive decisions in months in 2012-2022.




The average length of proceedings, which showed a decreasing trend in 2014 and 2015 from seven months in 2012-2013 to five months in 2014 and to four months in 2015, increased to six months in 2016 and to seven months in 2017, which is on a level with 2012-2013. In 2018, the length of proceedings decreased again to five months and to 4.5 months in 2019. In 2020 and 2021, the average length of proceedings increased to five months in 2020 and six months in 2021.

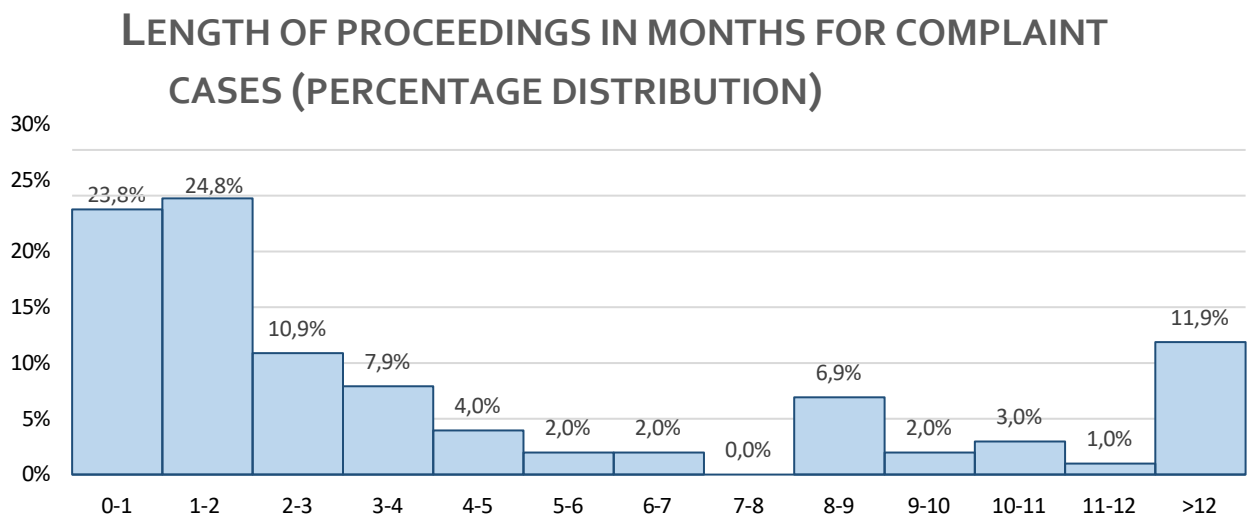
The average length of proceedings increased to seven months in 2022, which is on a level with the length of proceedings in 2012-2013 and 2017.

At the end of 2022, there were 42 pending cases which is equal to the years 2017-2021.

## 4.7 Length of proceedings in months for complaint cases (percentage distribution)

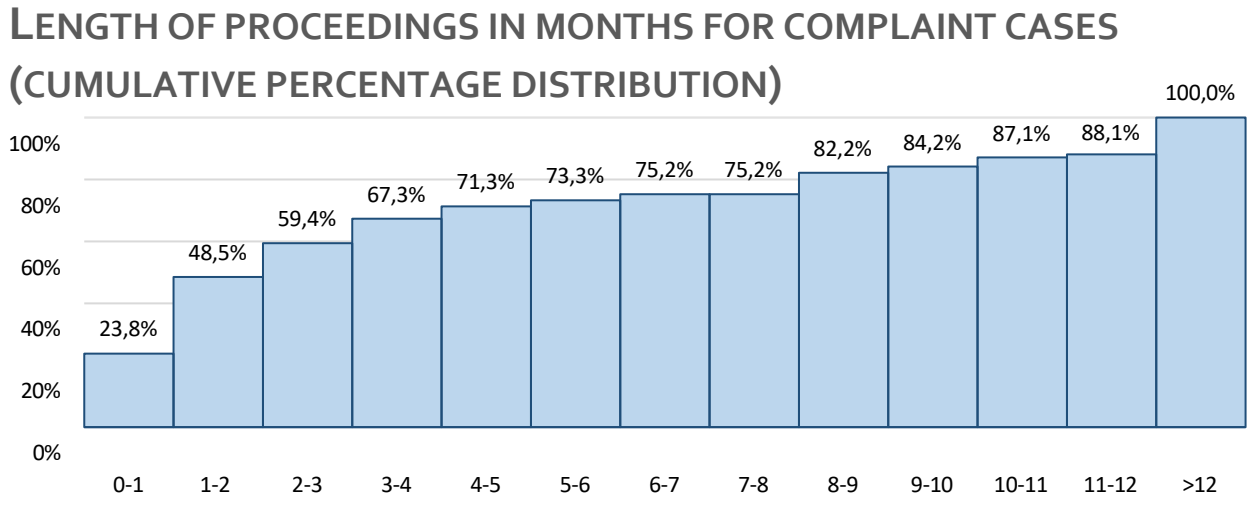
The figure below shows the percentage share of all cases that were closed within 0-1 month, 1-2 months etc. and more than 12 months in 2022. This includes all complaints, i.e., also cases where the complaint was rejected and cases where the complaint was withdrawn, including after the Complaints Board's prima facie decision. Decisions on compensation, which are few and far between, are not included. Reference is made to section 4.8 below for an overview of the cumulative percentage distribution of the length of proceedings in months for complaint cases.

Proceedings are regarded as completed when the Board makes a substantive decision in the case or rejects the complaint or when the complaint is withdrawn. For more information about the length of proceedings in cases where a decision on compensation is also made, please see section 4.5.




## 4.8 Length of proceedings in months for complaint cases (cumulative percentage distribution)

The figure below shows the cumulative percentage distribution of the length of proceedings in 2022.

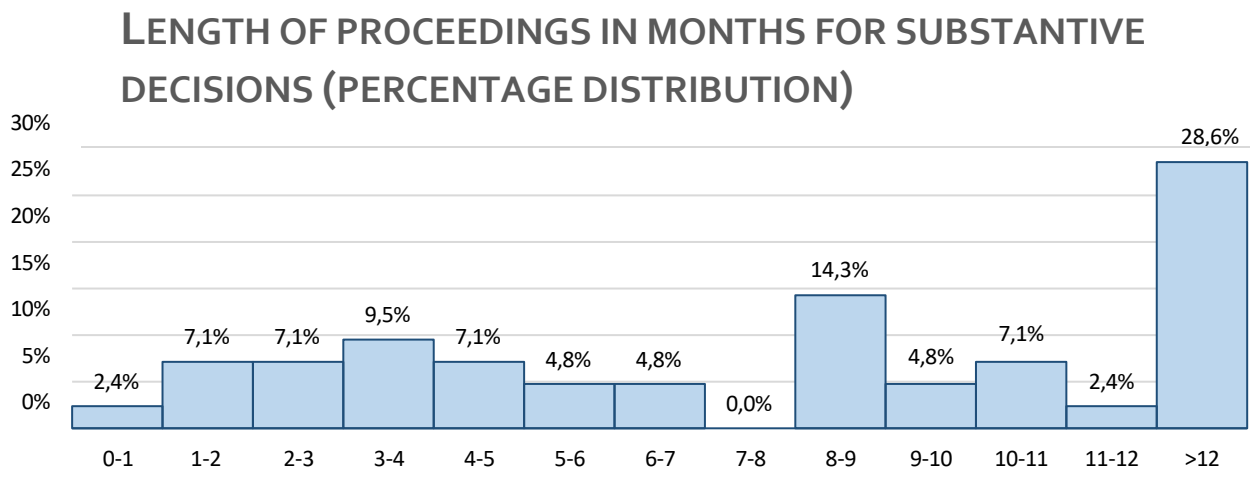



Approx. 24% of the cases were closed within the first month of receipt of the complaint in 2022 against approx. 32% in 2020 and approx. 23% in 2021. Approx. 49% of the cases were closed within the first two months of receipt of the complaint in 2022 against approx. 54% in 2020 and approx. 37% in 2021. It can also be seen that approx. 59% of all cases received in 2022 were closed within three months against approx. 63% in 2020 and approx.46 % in 2021. The figures for 2022 include, *i.a.*, 45 cases where the complaint was withdrawn. In about half of these cases, the complaint was withdrawn following the Complaints Board's prima facie decisions where the Complaints Board makes a preliminary decision on whether the public procurement rules have likely been violated. In addition, approx. 73% of the cases in 2022 were closed within five-six months of receipt of the complaint against 80% in 2020 and approx. 75% in 2021, and approx. 84% of the cases are brought to a conclusion within nine-ten months against approx. 94% in 2020 and approx. 93% in 2021.

As can be seen, the length of proceedings is generally short, and the Complaints Board closes a significant share of its cases within a short period of time considering their scope, factual and legal complexity and the often extremely large sums involved.

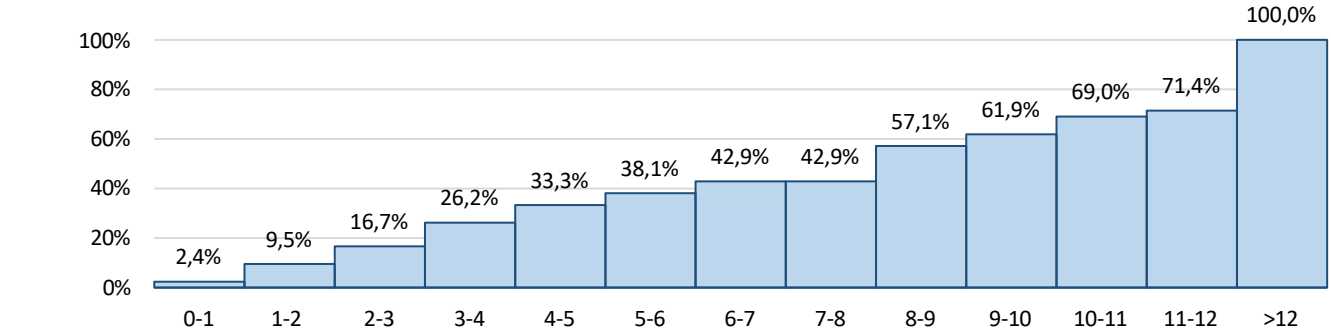
### 4.9 Length of proceedings in months for substantive decisions (percentage distribution)

The figure below shows the percentage share of all substantive decisions that were closed within 0-1 month, 1-2 months, 2-3 months etc. and more than 12 months in 2022.




### 4.10 Length of proceedings in months for substantive decisions (cumulative percentage distribution)

The figure below shows the cumulative percentage distribution of the length of proceedings for substantive decisions in 2022.




The table shows that in 2022, substantive decisions were made within 3-4 months in approx. 26% of the cases in which such a decision was made against approx. 41% in 2020 and approx. 20% in 2021. In 2022, substantive decisions had also been made within five-six months in approx. 38% of cases against 50% in 2020 and approx. 55% in 2021. It can also be seen that substantive decisions were made within seven-eight months in approx. 43% of cases in 2022 against approx. 77% in 2020 and approx. 67% in 2021. The remaining 57% (2020: 23% and 2021: 33%) of cases where the length of proceedings was longer belong in

the category of particularly large and legally/technically complex cases which necessarily take longer to process. With regard to the Complaints Board's length of proceedings for substantive decisions, it is important to note that the work does not only involve making the substantive decision but that in many cases considerable resources go into making one or more decisions on suspensive effect and access pursuant to the Public Administration Act, see section 4.2 above.

# 5. THE COMPLAINTS BOARD'S OTHER ACTIVITIES

The Complaints Board's outreach activities in 2022 were not limited due to the COVID-19 pandemic to the same extent as the two previous years. The Complaints Board therefore had a number of activities in addition to hearing complaints.

*Consultation responses*

On 7 March 2022, the Complaints Board submitted a consultation response concerning draft bills to amend the Public Procurement Act, the Act on invitations to tender for certain public and publicly funded contracts and the Act on the Complaints Board for Public Procurement.

*Participation in conferences etc.*

The Complaints Board's President, Jacob O. Ebbensgaard, and Maiken Nielsen, Legal Special Advisor, made presentations at the Danish State Procurement Conference on 6 April 2022.

The Complaints Board and the Board's secretariat attended meetings virtually on 4 May 2022 and on 23 September 2022, respectively, in Network of first instance procurement review bodies arranged by the EU Commission.

On 30 September 2022, the Complaints Board held a meeting with the Board's expert members.

The Complaints Board's President, Jacob O. Ebbensgaard, and Kirsten Thorup, Vice-President, made presentations at JUC Procurement Conference on 2 November 2022. The Board's secretariat also attended the conference.

Kirsten Thorup, Vice-President, attended the conference "Into the northern light – In memory of Steen Treumer" which was held on 2 December 2022.