The Complaints Board for Public Procurement

Annual Report 2016

CONTENTS

INTRODUCTION

The Complaints Board for Public Procurement hereby publishes its fourth annual report setting out the Complaints Board's decisions in its leading cases in accordance with the Danish Executive Order on the Complaints Board for Public Procurement (*klagenævnsbekendtgørelsen*). Chapter 1 provides an explanation of the Complaints Board's legal basis, establishment and composition, including presidency, experts and secretariat, which already began the move to its new offices in Viborg at the start of September 2016 as part of the Danish Government's relocation plan.

The criteria for selecting the decisions set out in chapter 2 are whether they may be regarded as leading cases or are otherwise of particular interest. This report focuses on the aspects that the Complaints Board found particularly interesting. The Complaints Board's decisions are published on an ongoing basis on its website at www.klfu.dk. This applies to decisions concerning violation of the public procurement rules, decisions awarding compensation and a selection of decisions granting a complaint suspensive effect. The Complaints Board's case law in cases concerning access is not published quite as systematically, for which reason the Complaints Board has chosen to describe some of these cases from 2016 in chapter 3.

Chapter 4 gives an account of the Danish judicial decisions in cases that were previously heard by the Complaints Board, and chapter 5 describes the cases that are being or have been heard by the Complaints Board and which have been the subject of judgments from the EU Court of Justice in 2016. More generally, it should be mentioned in this connection that the EU Court of Justice's Grand Chamber (yet again) has ruled that the Complaints Board is a court or tribunal within the meaning of the Treaty on the Functioning of the European Union, and that the Complaints Board is thus entitled to refer questions on the interpretation of EU law to the Court for a preliminary ruling.

Chapter 6 contains statistics on the Complaints Board's activities with comments. The Complaints Board received 102 complaints in 2016. As concerns the length of proceedings in 2016, approx. 39% of all cases (settled and rejected cases) were closed during the first month after receipt of the complaint (2015: approx. 47%). Approx. 54% of all cases were closed within the first two months of receipt (2015: approx. 62%), while approx. 61% of all cases were closed within three months of receipt (2015: approx. 69%). The Complaints Board's average length of proceedings in 2016 was six months (2015: four months). The increase in the length of proceedings may probably be attributed mainly to a backlog of old cases from the previous year which were completed in 2016, an increased workload in the secretariat, including as a result of the relocation (see section 1.3), and the fact that both the parties in the different cases and the Complaints Board's presidency had to consider the significant amendments and new rules in the Complaints Board's legal basis that entered into force in 2016, including:

- The Public Procurement Act (*udbudsloven*) (Act no. 1564 of 15 December 2015), implementing, in particular, the new Public Procurement Directive (Directive 2014/24/EU).
- Amendments in the Danish Act on invitations to tender in the construction sector (*lov om indhentning af tilbud i bygge- og anlægssektoren*) (previously: Act on invitations to tender for

certain public and publicly funded contracts (*lov om indhentning af tilbud på visse offentlige og offentligt støttede kontrakter*)). The amendments were included in the Public Procurement Act.

- Amendments in the Danish Act on the Complaints Board for Public Procurement (*lov om Klagenævnet for Udbud*) (previously: Act on enforcement of the public procurement rules etc. (*lov om håndhævelse af udbudsreglerne m.v.*)). The amendments were included in the Public Procurement Act.
- Executive Order no. 1624 of 15 December 2015 on the conclusion of contracts within water and energy supply, transport and postal service (*bekendtgørelse nr. 1624 af 15. december 2015 om fremgangsmåderne ved indgåelse af kontrakter inden for vand- og energiforsyning, transport samt posttjenester*), which implements the new Utilities Directive (Directive 2014/25/EU).
- Executive Order no. 1625 of 15 December 2015 on the award of concession contracts (*bekendtgørelse nr. 1625 af 15. december 2015 om tildeling af koncessionskontrakter*), which implements the new Concession Directive (Directive 2014/23/EU).
- Executive Order on the advertising of public procurement under the thresholds with a clear cross-border interest and on the use of electronic means of communication in tenders according to Titles II and II of the Public Procurement Act (*bekendtgørelse om annoncering af offentlige indkøb under tærskelværdierne med klar grænseoverskridende interesse og om anvendelsen af elektroniske kommunikationsmidler i udbud efter udbudslovens afsnit II og III*).
- Executive Order no. 1643 of 15 December 2015 on the advertising of public procurement below the thresholds with a clear cross-border interest and on the use of electronic means of communication in tenders according to Titles II and II of the Public Procurement Act (*bekendtgørelse om annoncering af offentlige indkøb under tærskelværdierne med klar grænseoverskridende interesse og om anvendelsen af elektroniske kommunikationsmidler i udbud efter udbudslovens afsnit II og III*) (repealed and replaced by Executive Order no. 1572 of 30 November 2016; cf. below).

The following amendments were introduced in the legal basis in 2016:

- Commission Implementing Regulation (EU) 2016/7 of 5 January 2016 establishing the standard form for the European Single Procurement Document (ESPD).
- Executive Order no. 178 of 11 February 2016 amending the Executive Order on the Complaints Board for Public Procurement (*bekendtgørelse nr. 178 af 11. februar 2016 om ændring af bekendtgørelse om Klagenævnet for Udbud*).
- Executive Order no. 689 of 8 June 2016 amending the Executive Order on the award of concession contracts (*bekendtgørelse nr. 689 af 8. juni 2016 om ændring af bekendtgørelsen om tildeling af koncessionskontrakter*).
- Executive Order no. 1572 of 30 November 2016 on the use of electronic communication in tenders and on the advertising of public procurement below the thresholds with a clear cross-border interest (*bekendtgørelse nr. 1572 af 30. november 2016 om anvendelse af*

elektronisk kommunikation i udbud og om annoncering af offentlige indkøb under tærskelværdierne med klar grænseoverskridende interesse).

Nikolaj Aarø-Hansen, President

Viborg, September 2017

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 92/123/EEC). In 2007, a directive (Directive 2007/66/EC) amending the Control Directives was adopted. The amending directive was implemented in 2010 with the adoption of the Enforcement Act (Act no. 492 of 12 May 2010 on enforcement of the public procurement rules etc.). This Act was subsequently amended by Act no. 1556 of 21 December 2010, Act no. 618 of 14 June 2011, Act no. 1231 of 18 December 2012 and Act no. 511 of 27 May 2013. Also, in 2011, it was determined that the Act also applies to public procurement under the Directive on Security and Defence Procurement, cf. Executive Order no. 892 of 17 August 2011. The Act was most recently amended by the Public Procurement Act (Act no. 1564 of 15 December 2015), which entered into force on 1 January 2016, and now has the title "Act on the Complaints Board for Public Procurement" (the Complaints Board Act). In 2016, the Danish Ministry of Business and Growth drafted a new consolidated Act, cf. Consolidated Act no. 593 of 2 June 2016.

The Complaints Board Act sets out 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, most recently amended by Executive Order no. 178 of 11 February 2016. The Complaints Board Order regulates, among other things, the submission of complaints and the Complaints Board's procedure.

1.2 The Complaints Board's composition

The Complaints Board's organisation is set out in Section 9 of the Complaints Board Act and Section 1 of the Complaints Board Order.

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 Business and Growth for a period of up to four years, and they are eligible for re-election.

In 2016, the presidency consisted of six High Court judges and three 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. Please see section 1.5 below.

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

In 2016, the members of the Complaints Board's presidency were:

President of the Complaints Board for Public Procurement:

Michael Ellehauge, High Court Judge, PhD

Other members of the Complaints Board's presidency:

- Kirsten Thorup, High Court Judge
- Niels Feilberg Jørgensen, Judge
- Erik P. Bentzen, High Court Judge
- Nikolaj Aarø-Hansen, High Court Judge
- Katja Høegh, High Court Judge, LLM
- Poul Holm, Judge
- Mette Langborg, Judge
- Kristian Kortfits Nielsen, High Court Judge (from 1 May 2016)

On 15 April 2016, a new term started for the Complaints Board's expert members. The names of the Complaints Board's experts in the previous term are listed in the 2015 Annual Report. Some of the former experts still have cases pending before the Complaints Board, and their appointment runs until these cases have been completed. From 15 April 2016, the following experts were appointed/reappointed:

- Michael Jacobsen, Chief Consultant
- Vibeke Steenberg, Chief Consultant
- Allan Åge Christensen, CPO
- Pernille Hollerup, Head of Team Legal Competition & Tender Law, Senior Manager
- Erik Bøgward Christiansen, Chief Consultant
- Henrik Fausing, Project Director
- Jan Eske Schmidt, Deputy Manager
- Lene Ravnholt, Developer Consultant, LLM, Mediator
- Preben Dahl, General Counsel
- Steen Treumer, Professor, PhD
- Stephan Falsner, Lawyer
- Helle Carlsen, Lawyer
- Palle Skaarup, Legal Manager
- Anette Gothard Mikkelsen, Chief Consultant, LLM

- Jeanet Vandling, CPO
- Ole Helby Petersen, Professor with Special Responsabilities, PhD
- Grith Skovgaard Ølykke, Professor with Special Responsabilities, PhD
- Christina Kønig Mejl, Project Manager and Special Consultant, LLM
- Claus Pedersen, Procurement and Construction Lawyer
- Jan Kristensen, Development Manager

1.3 The Complaints Board's secretariat

In 2016, the Complaints Board's secretariat was located in the Danish Business Authority under the Ministry of Business and Growth.

The president of the Complaints Board is the head of the secretariat, which had three lawyers and one secretary in 2016 in addition to a student assistant during parts of 2016.

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 secretary participates in case preparation, answers written inquiries regarding questions on whether a complaint of a completed tender has been submitted within the standstill period, performs a number of administrative tasks and provides telephone support.

In 2016, the secretariat consisted of the following employees:

- Nancy Elbouridi, Legal Special Advisor
- Anne-Mette Schjerning, Legal Special Advisor (from 1 July 2016)
- Johannes Krogsgaard, Legal Administrative Officer (until 30 September 2016)
- Dorthe Hylleberg, Administrative Officer (from 1 May 2016)
- Lauge Bruun, Law Student (until 7 September 2016)

In the first half of 2016, the Complaints Board was still without a secretary, and the secretarial function was performed by the Board's legal secretariat during this period. On 1 May 2016, an experienced secretary joined the secretariat, and later in the year also an experienced lawyer. Naturally, they both spent their first weeks in the secretary getting acquainted with the Board's special field of responsibility and procedures.

As one of the first of the complaints boards in the Government's relocation plan, the secretariat already started the move to its new offices in Viborg on 12 September 2016. The move was gradual, which gave rise to an additional administrative burden in the transition period. The secretariat was charged with the establishment of the new, now very well-functioning facilities in Viborg, which were transferred to the new agency, Nævnenes Hus (The Danish Appeals Boards Authority), on 2 January 2017, while it still had to carry out its functions in the Danish Business Authority's offices in Copenhagen. At the end of September 2016, one of two experienced lawyers left the Complaints Board, and his replacement was only employed with effect from the new year.

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

In accordance with Section 10(1), first sentence, 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 entities' violations of:

- The Public Procurement Act and rules adopted under it, except for violations of Sections 1 and 193 of the Act.
- EU law on the award of public contracts and supply contracts (the EU public procurement rules).
- The Act on invitations to tender in the construction sector (the Act on Invitations to Tender).

Pursuant to Section 37 of the Danish Access to Public Administration Files Act (*offentlighedsloven*), the Complaints Board is charged with the consideration of complaints of other authorities' decisions on access to documents in public procurement cases. Reference is made to chapter 3 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' violation of the Control Bid Order (Order no. 607 of 24 June 2008) (*kontrolbudsbekendtgørelsen*) as well as in particular areas where regulations in accordance with governing law grant access to submit complaints to the Complaints Board.

The majority of the cases heard by the Complaints Board concern the Public Procurement Act, which mainly implements the new Public Procurement Directive (Directive 2014/24/EU) and the other EU public procurement rules, while only a small 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 decisions and not to attach too much significance where it is not warranted by the decision. Please see in this regard the article in the Danish weekly law reports 2013 B, page 241 et seq. (U.2013B.241, Michael Ellehauge: "Erfaringer med håndhævelsen af EU's udbudsregler" (*Experiences 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 EU Court of Justice. However, the Complaints Board's case law, perhaps in particular decisions made within the past 10 years, must be regarded as an important source of law in the application of the public procurement rules in Denmark. In addition, the Complaints Board has the advantage of being able to act faster than the courts of law. In 2016, the average length of proceedings for public procurement cases was six months, and to this should be added that a very large portion – approx. 61% – 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). Please see chapter 5 of the Annual Report.

The Complaints Board's actions and sanctions

Sections 12-14a, 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 procurement rules.

Suspensive effect

In standstill cases (Section 12(2) and (3) of the Complaints Board Act) and in other cases on request (Section 12(1) of the Complaints Board Act), the Complaints Board may 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 test"). If the complaint immediately 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 a 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 finalising the process.

Reference is made to the articles on this subject in the Danish weekly law reports 2010 B, page 303 et seq., and 2016 B, page 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*).

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 test". The objective is to explain to the complainant and the respondent that, on the present 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 tender 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 two complaints in 2016: Decision of 12 May 2016 in the case Johs. Gram-Hanssen A/S, Hauschildt Marine A/S and Western Mariane Shipyard Ltd. v Thyborøn-Agger-Færgefart and decision of 28 July 2016 in the case UCplus A/S v the Municipality of Esbjerg and others (the cases are described in chapter 2).

Sometimes, complainants will request that the complaint be granted suspensive effect even after the contract has been concluded. In these cases, the tender procedure is completed, which means that suspensive effect will be pointless, unless the purpose is to declare the contract ineffective.

If the Complaints Board assesses that a case may be adjudicated on the written record, it may instead decide to settle the case and not decide on whether to grant suspensive effect. The parties will then be allowed to submit supplemental pleadings. Five such decisions were made in 2016 (decision of 5 April 2016, Brian Madsen A/S v the Municipality of Slagelse, decision of 21 April 2016, Apodan Nordic Healthcare A/S v the City of Copenhagen, decision of 30 September 2016, Applied Medical Distribution Europe B.V. v the Central Denmark Region, decision of 7 October 2016, Viking Medical Scandinavia ApS and Heraeus Medical GmbH v Amgros I/S, and decision of 23 November 2016, Dominus A/S v the Central Denmark Region).

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 13-14a and 16-19 of the Complaints Board Act):

- to suspend the contracting entity's tender procedure or decisions in connection with a tender procedure;
- to annul the contracting entity's unlawful decisions or cancel a tender procedure;
- to declare a contract ineffective and order that it be terminated;
- to impose an alternative sanction on the contracting entity;
- to order the contracting entity to pay compensation.

"Ineffective contract" in combination with the rules on alternative sanctions 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.

As a new feature of the Public Procurement Act, if an award decision is annulled by a final decision or judgment, the contracting entity 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 cover situations where the "ineffective

contract" sanction applies, cf. Section 185(2), first and second sentences. 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 entity even though it is justified in believing that no complaint has been made to the Complaints Board within the standstill period, because the complainant has neglected to inform the contracting entity 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, and decision of 6 January 2014, KMD A/S v the Municipality of Aalborg. However, the contracting entity may write to the Complaints Board's secretariat to ask whether a complaint has been filed against a procurement procedure before concluding a contract with the winning tenderer. The Complaints Board's secretariat will as far as possible answer such written enquiries after 1 p.m. on the day that they are received.

If the contracting entity is not part of the public administration and hence not covered by Section 19(1) of the Act, the Complaints Board will not impose a financial sanction on the contracting entity. 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 entity, cf. Section 18(3) of the Act. Reference is made to the Complaints Board's decision of 20 August 2012, Intego A/S v NRGi Net A/S, where the Complaints Board filed a police report.

The case law overview shown at the Complaints Board's website under "Årsberetninger" (*Annual reports*) contains other 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, it is composed of one member of the presidency and one expert member. 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 and thus more experts participate in the adjudication of a case. These cases include leading cases or particularly large or complex cases, where two members of the presidency and two expert members will participate.

In 2016, this happened in three cases, namely decision of 9 February 2016, TEAM OPP v the Central Denmark Region, decision of 12 April 2016, Joint Venture Salini-Impregilo-Samsung-Bunte v Femern A/S, and decision of 15 June 2016, Danske Færger A/S v the Danish Ministry of Transport and

Building. The case between TEAM OPP and the Central Denmark Region is discussed below in chapter 2.

Decisions by the president

The president may decide, on a case-by-case basis, to adjudicate cases which may be assessed based on the written evidence, and which are not leading cases, without the involvement of an expert.

This option is hardly ever used, as the expert members' assistance is essential to cases. Only six substantive decisions were made without the involvement of an expert member in 2016: decision of 28 January 2016, M. J. Eriksson A/S v the Municipality of Aarhus, decision of 21 April 2016, ApodanNordic A/S v the City of Copenhagen, decision of 27 September 2016, the Danish Construction Association v the Capital Region of Denmark, decision of 7 October 2016, and decision of 16 November 2016, GPP Arkitekter A/S v the Municipality of Aarhus, Viking Medical Scandinavia ApS and Heraeus Medical GmbH v Amgros I/S.

The president of the individual case may also decide to adjudicate a case without the involvement of an expert in determining procedural issues, 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 10 of the Complaints Board Act and in Sections 4-5 of the Complaints Board Order.

The secretariat is responsible for checking, in cooperation with the president of each individual case, whether the complainant fulfils the formal requirements for submitting a complaint. Complaint guidelines setting out the requirements for a complaint mainly directed at the complainants that are not represented by a lawyer or other professional adviser are available on the Complaints Board's website at www.klfu.dk. In addition, the secretariat offers telephone support on the complaint procedure.

A complaint to the Complaints Board must be filed in writing. When filing the complaint, the complainant must also notify the contracting entity 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 letter to the contracting entity with the complaint.

Section 5(4) of the Complaints Board Order on payment of a fee was amended in 2016. The amounts are largely unchanged. Complaints of violations of Titles I-III of the Public Procurement Act, the Utilities Directive, the Concession Directive and the Directive on Security and Defence Procurement are subject to a fee of DKK 20,000 (EUR 2,685), while other complaints, including of violations of the Act on Invitations to Tender are subject to a fee of DKK 10,000 (EUR 1,342). If the fee is not paid

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 the complainant with the formulation of relevant claims, but it may provide guidance to complainant, cf. decision of 9 December 2015, Varmecenteret ApS v the Agency for Culture and Palaces. If, after such guidance, the claims can still not be used as basis for consideration of the case, the Complaints Board will reject the claims or the entire complaint.

It is also a condition that the complainant has a cause of action. Companies that had an interest in winning a certain contract and which believe to have suffered a loss as a result of a violation of the public procurement rules are eligible to complain. Typically, complainants will be companies that have applied for pre-selection or submitted a tender, but companies that would have had access to apply for pre-selection or submit a tender (potential candidates/tenderers) may also have a cause action. If the complainant is not able to prove that it has a cause of action, the complaint will be rejected. The Complaints Board has made a number of decisions that illustrate the cause of action requirement. Some of these decisions are shown in the case law overview at the Complaints Board's website under "Årsberetninger" (*Annual reports*).

The Danish Competition and Consumer Authority and certain organisations and public authorities mentioned in the annex to the Complaints Board Order 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 purchasing 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 (only applies to complaints about EU procedures)

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 Regulation on Time Limits (Council Regulation no. 1182/71 of 3 June 1971 on determining the rules applicable to periods, dates and time limits) applies to the calculation of the time limits set out in the Complaints Board Act.

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 Complaints Board Order.

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, cf. 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 and extent of the case. During the hearing of the case, the Complaints Board will decide on any disputes between the parties as to the extent of the complainant's right to access to documents as a party. Such decisions are made in accordance with the relevant rules in the Danish Public Administration Act (*forvaltningsloven*), cf. chapter 3. 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, and thus regardless of the complainant's restricted access, the Complaints Board will have access to all the material and may use it 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 entity (Section 6(3) of the Complaints Board Act). If the issue concerns whether a

contract is ineffective, the party with whom the contract was concluded has an unconditional right to intervene and to be informed hereof, cf. 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*), which means that the intervener is not allowed to make separate claims or raise its own allegations.

The Complaints Board is responsible for ensuring that it has sufficient information before it. 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 Complaints Board Order). 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 13 September 2016, Forenede Service A/S v SKAT, cf. chapter 2.

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 hold a hearing, which, however, only occurs in a few cases.

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

Hearings, which are now held in Nævnenes Hus in Viborg after the secretariat's relocation, 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 to the Complaints Board will normally be preferred. 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. 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. Then, the parties' counsel may proceed to their closing statements. Hearings will normally take 4-5 hours, but in large cases, they may take up to 1-2 days. In 2016, hearings were held in two cases (2015: two cases), while 53 cases were adjudicated on the written record (2015: 70 cases). Reference is made to the overview of cases decided on the written record and in oral proceedings in section 5.3.

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

In connection with substantive decisions and decisions on compensation, 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.

As a general rule, costs are limited to a maximum of DKK 75,000 (EUR 10,067), but the Complaints Board may order the respondent to pay a higher amount if justified by the amount of the contract or special circumstances.

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.

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 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 it is not brought before the courts within the statutory time limit.

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

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

- Complaints of contracting entities' 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.
- Cases where a third party, e.g. a journalist, applies for access pursuant to the Act to documents 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 entity. As the respondent contracting entity naturally also has the documents in its possession, it will normally also be possible to apply for access directly to this entity.

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 for a detailed description of the Complaints Board's case law on access.

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 2016 that have all been published at www.klfu.dk. Some of these cases were leading cases, while 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
- Clear cross-border interest
- Requirements for tender specifications and organisation of tender procedures
- Preselection
- Evaluation, including choice and publication of evaluation model
- Assortment tenders
- Requirement to state reasons when awarding contracts
- The Complaints Board Act, including (interim) suspensive effect and the Complaints Board's sanctions
- Costs

2.2 Selected interim decisions and decisions

2.2.1 Competitive tendering obligation, direct award and modification of contracts

Decision of 4 May 2016, CGI Danmark A/S v the Agency for Modernisation

Additional contract to original contract for an IT service between the contracting entity and the company could not be concluded without putting the accessory contract out to competitive tender.

In 2012, the Agency for Modernisation concluded a contract with CSC on the operation etc. of the Danish State's payroll system called SLS. In the summer of 2015, the Agency for Modernisation concluded an additional contract with CSC on the operation and development of the "HR-Løn" functionality, which is a web-based user interface for SLS. According to this contract, CSC would take over the delivery of HR-Løn from the previous supplier, CGI. The additional contract was concluded without a prior notice for voluntary ex ante transparency pursuant to Section 4 of the then current Enforcement Act (cf. Article 2d(4) of Directive 2007/66/EC) announcing that the Agency planned to conclude the additional contract without a new procurement procedure on the grounds that the additional contract was concluded in accordance with a review clause in the 2012 contract.

Shortly after the conclusion of the additional contract, CGI complained to the Complaints Board claiming that the Agency was not entitled to conclude the additional contract without a new procurement procedure. The Complaints Board found for the complainant and stated: A contract that must be and has been put out to competitive tender may contain review clauses, giving the contracting entity a certain flexibility during the term of the contract without having to launch a new procedure. It is a condition for this, however, that the possible modification is clearly described in the review clause, which means that it is predictable for tenderers and potential tenderers. HR-Løn was

not part of the SLS tender, and the tender documents contained no proviso that the contract could be modified to include HR-Løn. Consequently, the additional contract was not a modification pursuant to the SLS contract and could not be concluded without a new procurement procedure unless the modification was insignificant. This had not been submitted by the Agency for Modernisation, and the value of the additional contract was almost DKK 29 million (EUR 3,9 million). In its decision, the Complaints Board referred to Section 179 of the Public Procurement Act (point a) of the first subparagraph of Article 72(1) of Directive 2014/24/EU on review clauses).

The Complaints Board thus upheld the claim that the additional contract should be declared ineffective for the future pursuant to Section 17(1)(1) of the then current Enforcement Act (cf. Article 2d(1) of Directive 2007/66/EC) and imposed a financial penalty of DKK 250,000 (EUR 33,557) on the Agency for Modernisation in accordance with Section 18(2)(3) and Section 19 of the Act (cf. Article 2d(2), cf. Article 2e, of Directive 2007/66/EC). The Complaints Board held that, according to Section 4(1) of the Enforcement Act, a contracting entity may take steps to ensure that a contract that must be put out to competition will not be declared ineffective by issuing a notice for voluntary ex ante transparency and complying with a prescribed standstill period. However, it is also a condition that the contracting entity – acting diligently – must have ascertained that there was no obligation to put the contract out to competition, cf. in this regard judgment of the EU Court of Justice of 11 September 2014 in case C-19/13, Fastweb. However, the contracting entity had not acted diligently when assessing that the additional contract did not require a new procurement procedure, as the Complaints Board found that the Agency for Modernisation's assessment had to be regarded as manifestly wrong.

Decision of 26 May 2016, Boston Scientific Nordic AB v the North Denmark Region

Following a notice for voluntary ex ante transparency, a contract for the purchase of medical equipment was concluded without a prior procurement procedure on the grounds that, for technical reasons, the equipment could only be provided by the supplier in question. However, the part of the contract that concerned consumables for the equipment could be supplied by others and should thus be put out to competition. This part of the contract was thus declared ineffective, and the contracting entity was ordered to pay DKK 40,000 (EUR 5,369). The respondent acknowledged violation. Costs.

Following a notice for voluntary ex ante transparency, the North Denmark Region concluded a contract for endoscopic equipment on the grounds that, for technical reasons, the equipment could only be provided by the supplier in question. Another company complained that the contract also comprised consumables for the equipment, claiming that this part of the contract exceeded the threshold for purchases and could be delivered by other suppliers. The regional authorities acknowledged their violation and terminated the contract with effect from 14 April 2016, claiming that there was now no basis for declaring the contract ineffective and imposing a financial penalty. The Complaints Board upheld the claim that the contract was ineffective and the claim for a financial penalty in accordance with its legal basis, cf. Section 17(1)(1) and Sections 19 and 20, cf. Section 18(2)(3) of the Complaints Board Act. The Region was also ordered to pay costs. The Complaints

Board explained that it is not a condition for reimbursement of the complaints fee or for ordering a party to pay costs that the case is continued.

Decisions of 24 May and 26 October 2016, Danske Care A/S v the Municipality of Egedal

The Complaints Board held that a contract for services subject to the light regime was neither covered by Title III of the Public Procurement Act *(Articles 74-76 of Directive 2014/24/EU)* nor by Title IV on contracts with a clear cross-border interest considering the value and nature of the contract. For a detailed description of this case, see section 2.2.2.

2.2.2 Clear cross-border interest

Decisions of 24 May and 26 October 2016, Danske Care A/S v the Municipality of Egedal

The value of a contract for services subject to the light regime was rightly deemed not to exceed the threshold in Section 7 of the Public Procurement Act (Article 4(d) of Directive 2014/24/EU). The contracting entity was thus not obliged to follow the procedure in Title III of the Public Procurement Act (Articles 74-76 of Directive 2014/24/EU), and the contract did not have a clear cross-border interest.

A Municipality concluded a two-year exclusive supply framework contract with a company on the performance of various aid and relief care services for people with disabilities without a prior procurement procedure. A former supplier of some of the services complained, claiming that the Municipality should have followed the procedure in Title III of the Public Procurement Act (Articles 74-76 of Directive 2014/24/EU), as the threshold in Section 7 of the Public Procurement Act (Article 4(d) of Directive 2014/24/EU) was exceeded, or in the alternative, that the Municipality should have followed Title IV of the Act on public procurement below the threshold with a clear cross-border interest. The Municipality principally claimed that the case should be dismissed on the grounds that the threshold had not been exceeded, that the contract was not of cross-border interest, and that the procurement procedure was thus regulated by Section 193 of the Public Procurement Act which is not under the Complaint's Boards jurisdiction. In its decision on suspensive effect of 24 May 2016, the Complaints Board stated that the claim concerned Section 2 of the Public Procurement Act (Article 18(1) of Directive 2014/24/EU), and the claim for dismissal was thus not upheld, cf. Section 1(4) of the Complaints Board Act. Referring to, among other things, Section 30 of the Public Procurement Act (Article 5(1) and (3) of Directive 2014/24/EU), the Complaints Board then found that the contracting entity must assess the value of the contract based on a reasoned and conservative estimate and by performing necessary and adequate investigations of the general price level on the market. The Municipality had obtained price information from other suppliers, and there was no basis for setting aside the Municipality's estimate, according to which the threshold of approx. DKK 5.6 million (EUR 751,678) had not been exceeded. This meant that the Municipality was not required to follow the procedure in Title III (Articles 74-76 of Directive 2014/24/EU). The subject-matter and the limited value of the contract were important factors that would deter any foreign company in another member state from bidding on the contract. Accordingly, the Municipality was also not required to observe Title IV of the Act. In this connection, in its decision of 26 October 2016, the Complaints Board found that the Municipality had been entitled to base its estimate of the future

consumption during the term of the contract on the expected number of hours required, even if the number of hours approved was higher, regardless of what applies to options to be taken into account. The complainant's claims were not upheld.

2.2.3 Requirements for tender specifications and organisation of procurement procedures

Decision of 9 February 2016, TEAM OPP represented by DEAS A/S v the Central Denmark Region

Complaint of unclear specifications in multi-billion kroner PPP project upheld. The tenderer's change of identity did not preclude annulment of the award decision, as the changes had been accepted by the contracting entity during the procurement procedure.

In early 2013, the Central Denmark Region launched a procurement procedure for a PPP project for the construction and operation of a new psychiatric centre at Skejby Hospital at a total value of approx. DKK 2.2 billion (EUR 295.7 million). As part of this contract, the supplier was required to purchase the property in Risskov where the psychiatric unit was located. Three consortia were selected to participate in the negotiation process ("the competitive dialogue") during the procurement procedure. Two consortia, TEAM OPP and TEAM KPC, ended up submitting a final tender in the spring of 2014. When the Central Denmark Region evaluated the tenders on 25 June 2014, TEAM KPC's tender was selected as the most favourable tender, and the unsuccessful tenderer complained to the Complaints Board for Public Procurement on 1 July 2014. The president decided that the case should be heard by two expert members and two judges (presidents of this case) from the Complaints Board's presidency.

In its decision of 9 February 2016, the Complaints Board held that the Central Denmark Region had acted in contravention of the principles on equal treatment and transparency, cf. Article 2 of the Public Procurement Directive 2004/18/EC, by setting and applying unclear and conflicting criteria for the evaluation of the tenders received in the sub-criterion "Price – the present value of the total payments during the term of the PPP contract". What was not clear was how the purchase price offered by the tenderers for the Risskov property was to be included in the assessment of the total price in the tenders. The sheet in which the tenderers were to indicate their prices – and which the Region had referred to in a reply to a question on the price assessment in a corrigendum immediately before the tenders were submitted – implied that one method was to be used (called the "gross method" during the case (which TEAM OPP cited)), while other parts of the specifications implied that another calculation method (called "the net method" (which the Central Denmark Region cited)) was the right one. The Complaints Board thus annulled the Central Denmark Region's decision to award the contract to TEAM KPC.

The Central Denmark Region was fully aware of and accepted different changes to the group of participants in TEAM OPP's consortium during the negotiation process from the selection of tenderers and up to the final tenders. For this reason, the Central Denmark Region's (subsequent) assessment that the changes in TEAM OPP were not lawfully justified could not lead to the result that the award decision should not be annulled.

Shortly after the submission of the complaint, the Complaints Board (the two presidents who presided over the case) made an interim decision on 29 July 2014 on a request from TEAM OPP to grant the complaint suspensive effect. The Complaints Board did not grant the complaint suspensive effect, but found that a claim as the one that was later upheld by the decision of 9 February 2016 would likely be granted. The Central Denmark Region did not agree, and the case continued. In another interim decision of 17 August 2015, the Complaints Board (the two presidents and the two experts) stated that there was no basis for rejecting the complaint, as the Central Denmark Region had claimed, on the grounds of the changes to TEAM OPP's identity.

Decision of 2 August 2016, the Danish Construction Association v the Capital Region of Denmark

The contracting entity had not violated the EU proportionality principle by opening a procurement procedure for a contract divided into lots by trade containing labour clauses and social clauses with chain liability.

In a restricted procedure according to the previous Public Procurement Directive for a contract divided into lots by trade for a large public construction project, the contracting entity had stipulated the following in the specifications: 1) The contract was to be performed with respect for human rights, labour rights, the environment and anti-corruption. Neither the contractor nor subcontractors/subsuppliers were entitled to use labour contrary to the conventions. 2) The contractor was to ensure that the contractor's and its subcontractors'/subsuppliers' employees were guaranteed pay and working conditions that were not less favourable than those applicable to the same type of work according to a Danish collective agreement between representative social partners. 3) Failure to comply with 1) and 2) amounted to material breach, and the contractor would be liable to remedy the situation by paying compensation to the employees, including subsuppliers' employees. If the contractor was liable to pay additional wages to employees, the contractor would also be liable to pay a specified penalty to the contracting entity. 4) If the contractor or a subcontractor/subsupplier had taken on persons without the required residence or work permit, the contractor would be liable to pay a specified penalty to the contracting entity.

The Danish Construction Association claimed that providing in the specifications that the contractor had to pay compensation to a subcontractor's employees and to pay penalty in the stipulated cases was in contravention of the EU proportionality principle. The Danish Construction Association argued that chain liability was unnecessary and inappropriate and that the financial risk associated with chain liability was very difficult or impossible to assess. The Complaints Board did not uphold these claims, stating, among other things, that a principal contractor could prevent this by including labour clauses in its contracts with any subcontractors. A contractor having liability under labour clauses with chain liability towards the client for a subsupplier's failure to comply with a labour clause is in accordance with the general principles of contract law on contractual obligations. Labour clauses with chain liability was thus an appropriate measure to ensure that everyone involved in a construction process have pay and working conditions corresponding to those generally applicable on the Danish labour market, which meant that the clauses could not be regarded as artificially restricting competition. It was irrelevant if the chain liability resulted in a greater administrative and financial burden on the principal contractor, as a tenderer could factor this into the offer price. It was

also irrelevant that the contractor would possibly be liable to pay a penalty to the contracting entity, as the contractor could pass this onto the subcontractor by contract.

The Danish Construction Association also claimed that the requirement in the specifications for respect for human rights, labour rights, the environment and anti-corruption was contrary to the transparency principle, and that it was in contravention of the proportionality principle that failure to fulfil this requirement would amount to breach of contract. The Complaints Board did not uphold these claims, stating that the international declarations etc. referred to in the specifications contained fundamental principles of civilisation which were of such a nature than any tenderer would be familiar with them, that the transparency principle is a principle under procurement law which does not apply to contractual terms on social responsibility etc., and that the requirement for social responsibility was not discriminatory or in violation of the equal treatment principle. In addition, if a contractor or a subcontractor is clearly in violation of the mentioned declarations etc., this would have to be regarded as material breach of contract. Accordingly, and since the provision on material breach was not discriminatory or contrary to the principle of equal treatment, the proportionality principle had not been violated.

Decision of 22 August 2016, Struensee & Co I/S v Statens og Kommunernes Indkøbsservice A/S

A procurement procedure for a framework agreement for management services was not organised in such a way that the framework agreement was used improperly or in such a way as to prevent, restrict or distort competition.

In a restricted procedure according to the previous Public Procurement Directive (2004/18/EC), Statens og Kommunernes Indkøbsservice A/S (SKI) invited tenders for a voluntary framework agreement with three lots concerning the performance of management consulting services at a total estimated value of DKK 250 million (EUR 33.6 million). The award criterion was “the most economically advantageous tender”. According to the contract notice, SKI intended to contract with seven suppliers for each lot, and the award of contracts under the framework agreements was to take place in mini-competitions based on, among other things, price competition.

The complainant, which was part of a consortium that had unsuccessfully applied for preselection, had principally claimed that SKI had violated the last sentence of Article 32(2) of the Public Procurement Directive, according to which the contracting entities “may not use framework agreements improperly or in such a way as to prevent, restrict or distort competition”. In addition, the complainant claimed that SKI by placing emphasis on the selection criteria of “revenue” and “production capacity” had organised the procedure in such a way that it was in reality only large consultancy firms that had access to participating, which amounted to discrimination against small companies. The Complaints Board dismissed the complaint. The Complaints Board found that there is no basis in the wording of that provision or the recitals in the preamble for drawing the conclusion that the contracting entities are obliged to ensure that the suppliers under the framework agreement are selected so that they reflect the market or to ensure that the framework agreement does not create a risk of dominant suppliers. As the contracting entity, SKI had a wide discretion in the organisation of the procurement procedure, and SKI had divided the contract into three lots and

preselected 10 candidates for each, focusing on, among other things, revenue and production capacity in relation to the requested services. These are objective, non-discriminatory, reasoned and customary criteria considering SKI's aim to guarantee security of supply for its customers, including in relation to tasks with short and critical deadlines. Also, small and medium-sized companies that wished to participate in the procedure could, as is usual in similar situations, make their application more likely to succeed by entering into collaborations, which was what they had done in this case. In addition, the preselected candidates included two consortia consisting of, among others, small companies, which meant that the preselection had not in fact closed the framework agreement off to other companies than large consultancy firms, although the organisation of the procurement procedure had led to preselection of – and later conclusion of contracts with – mainly large companies.

In addition, the complainant claimed that SKI had violated Article 44(3) of the Public Procurement Directive, as the number of preselected companies was not sufficient to ensure genuine competition. The complainant argued that the provision in Article 44(3) of the Public Procurement Directive, according to which at least five candidates must be preselected, covers cases where only one of these are awarded the contract. According to the specifications, framework agreements would be concluded with seven for each lot, and the complainant argued that around 35 candidates should have been preselected for each lot, and not only 10. The Complaints Board dismissed the complaint, but held that the requirement that at least five candidates were to be preselected had been met, and that the requirement that the number of candidates invited to participate were to be sufficient to ensure genuine competition had also been met, even though contracts were concluded with seven of the 10 preselected candidates. This complaint related to the same procurement procedure as the decision of 27 June 2016, the Consortium QUARTS P/S and Copenhagen Economics A/S v SKI, cf. section 2.2.6.

Decisions of 26 February and 15 September 2016, SIM Lægekørsel I/S v the Region of Southern Denmark

A framework agreement on emergency medical services was put out to tender with the award criterion "lowest price" and the proviso that the contract could only be awarded to tenderers with a limousine licence to the extent that there were no tenderers with a taxi licence that complied with the conditions. Condition set aside. Annulment. Culpa, but no compensation.

The Region of Southern Denmark launched a procurement procedure for a two-year framework agreement for emergency medical services with the award criterion "lowest price". The contract notice and specifications, referring to a statement from the Danish Competition Authority, stipulated that the contract could only be awarded to tenderers with a limousine license if there were no tenderers with a taxi licence that complied with the conditions. The view that taxi licences were to be preferred over limousine licences also appeared from statements from the Danish Road Safety Agency. The Region received three tenders that complied with the conditions. The tender with the lowest price came from the company that had had the contract for the past five years and which had a limousine licence. The Region awarded the contract to a tenderer who had a taxi licence and whose

tender was more than DKK 2 million (EUR 268,456) higher than the tender with the lowest price. The Complaints Board stated that the condition that tenderers with a taxi licence would be preferred over other tenderers had no authority in the Danish Taxi Act (*taxiloven*) etc. In a procedure where a tenderer actually has obtained a limousine licence for medical emergency services and has submitted a tender on that basis, this condition was in contravention of the principle of equal treatment. Accordingly, the Complaints Board cancelled the award decision by its decision of 26 February 2016.

In its decision of 15 September 2016, the Complaint Board considered a claim for compensation in the form of expectation damages. The Region denied liability on the grounds that it acted in good faith because the specifications followed the advisory opinions from (now) the Danish Competition and Consumer Authority and the Danish Transport and Construction Agency, and as the Region had consulted the latter before awarding the contract. However, the Complaints Board found that the Region had committed a wrongful act, because the fact that it had relied on the opinions of the competent authorities did not relieve it of liability towards the tenderer that had submitted the tender with the lowest price but which had not been successful because of the unlawful condition. But as the unlawful condition was included in the specifications, the causal link requirement had not been met, and the Complaints Board found for the Region.

2.2.4 Preselection

Decision of 13 July 2016, B. Nygaard Sørensen A/S v the Danish Building and Property Agency

Candidates for preselection were rightly excluded from participating in the procurement procedure based on the contracting entity's experience with the candidate from a previous contract in accordance with Section 137(1)(5) of the Public Procurement Act (Article 57(1)(g) of Directive 2014/24/EU. *The contracting entity had terminated the previous contract because it believed that the candidate/contractor had committed material breach of the contract by wrongly suspending work.*

The Danish Building and Property Agency launched a restricted procedure with negotiation pursuant to the Public Procurement Act for a principal contract in a construction project. It was provided in the contract notice that candidates for preselection would be excluded if they were covered by one or more of the non-compulsory grounds for exclusion in Section 137(1) of the Public Procurement Act (Article 57(1) of Directive 2014/24/EU). The Danish Building and Property Agency excluded B. Nygaard Sørensen A/S (BNS) pursuant to Section 137(1)(5) (Article 57(1)(g) of Directive 2014/24/EU), referring to the Agency's termination of a previous contract with BNS concerning another construction project due to BNS's material breach. Before the exclusion, the Agency had given BNS the opportunity in accordance with Section 138 of the Public Procurement Act (Article 57(6) and (7) of Directive 2014/24/EU) to provide evidence showing that BNS had taken measures sufficient to demonstrate its reliability. In response, BNS had merely stated that it had not been in breach of the previous contract. BNS complained of the exclusion and claimed that it was in contravention of the principles of equal treatment, transparency and proportionality. BNS submitted that the Danish Building and Property Agency's termination of the previous contract was unjustified because BNS had not committed breach of this contract. On the other hand, the Danish Building and Property

Agency accounted for the previous construction case up to the Agency's termination of the contract with BNS. A case was pending before the Danish Building and Construction Arbitration Board between the parties concerning the previous contract, and they had, among other things, brought large claims for compensation against each other.

The Complaints Board found that the Danish Building and Property Agency's exclusion of BNS was justified, and thus dismissed the complaint. The Complaints Board stated that it is for a contracting entity to prove that the conditions under Section 137(1)(5) of the Public Procurement Act (Article 57(1)(g) of Directive 2014/24/EU) have been met, and the burden of proof may, among other things, be carried by a final judgment or an arbitration award. However, according to the legislative history behind this provision, evidence based on own experience or the experience of others may in the circumstances justify exclusion according to the provision. Accordingly, it was not a requirement in the case that a final judgment or arbitration award had been issued, as the Agency's own experience with BNS could be sufficient reason to exclude the company. The Complaints Board was not required to undertake a full review of whether the Agency was entitled to terminate the previous contract with BNS. However, based on a general assessment of the available information on the parties' dispute about the construction project and the events leading up to the Danish Building and Property Agency's termination of the previous contract, the Complaints Board found that the contracting entity had proven that the contract had been terminated for reasons that the Board deemed to qualify as material breach, and that the Board therefore had provided sufficient evidence to show that the ground for exclusion in Section 137(1)(5) (Article 57(1)(g) of Directive 2014/24/EU) had been fulfilled. In addition, there was no basis for ascertaining that the Danish Building and Property Agency by excluding BNS had acted in contravention of the principles of equal treatment, transparency and proportionality, and the Agency had given the complainant the opportunity to demonstrate its reliability ("self-cleaning") before the exclusion, cf. Section 138 of the Public Procurement Act (Article 57(6) and (7) of Directive 2014/24/EU).

Decision of 29 June 2016, Johs. Gram-Hanssen A/S, Hauschildt Marine A/S and Western Marine Shipyard Ltd. v Thyborøn-Agger Færgeoverfart

As it could not be ruled out that the contracting entity's grounds for not preselecting candidate in a procurement procedure for the delivery of a ferry were based on information that could not be included in the assessment, the Complaints Board found for the complainant.

Pursuant to the previous Public Procurement Directive (2014/18/EC), Thyborøn-Agger Færgeoverfart organised a restricted procedure for a contract for the delivery of a new ferry for the Thyborøn-Agger service. A company that had been unsuccessful in its application for preselection complained of the rejection, claiming that the principles of equal treatment and transparency had been violated, as the contracting entity had not made an objective assessment of the complainant's references.

As the ferry service had not laid down any limitations on the number of references to be included, how they should be described or the length of the descriptions, it could not be held against the candidate that it had not wished to participate in the "selection of relevant references". In the evaluation of the references, Thyborøn-Agger Færgeoverfart had used expert assistance. The experts

stated the following in their opinion: "We have assessed all candidates as objectively as possible, partly based on the material received, and partly based on our knowledge of the individual candidates". The Complaints Board has previously on several occasions, e.g. decision of 20 April 2016, Backbone Aviation v DMI, held that a contracting entity's evaluation of applications for preselection must be based on the information contained in the applications, and that the contracting entity is generally not entitled to take into account previous experience with a specific candidate in favour of this candidate if this is not specifically warranted by the application. In a declaration drafted for the purpose of the case, it was stated that this was a case of "injudicious wording", but it was not described how the evaluation of the specific references had been made, including the reasons why the complainant's references had been judged to be significantly inferior to the references from the other candidates that were preselected. As it could not be ruled out based on a concrete assessment that the preselection had been based on, among other things, the consultant's experience with the candidates, the Complaints Board found for the complainant and annulled the preselection.

2.2.5 Evaluation, including choice and publication of evaluation model

Decision of 13 September 2016, Forenede Service A/S v SKAT

The Complaints Board found that the obligation in Section 160 of the Public Procurement Act to publish the evaluation method in the tender documents does not apply to mini-competitions according to a framework agreement tendered before the Public Procurement Act entered into force on 1 January 2016. Referring to Section 10(1) of the Complaints Board Act, the Complaints Board refused to consider views of the complainant that were not included in the claim.

In 2016, SKAT (the Danish tax authorities) launched a mini-competition for cleaning services in accordance with a framework agreement that had been put out to tender in 2015. The award criterion was "the most economically advantageous tender". The complaint was filed by a company that had submitted a tender in the mini-competition which was not selected. The complainant submitted that the contracting entity had acted in contravention of the principles of transparency and proportionality in Section 2 of the Public Procurement Act (Article 18(1) of Directive 2014/24/EU) by only determining the final weighting of the sub-criterion "total price" after the contracting entity had read the tenders.

The Complaints Board dismissed the complaint. The Complaints Board found that the obligation in Section 160 of the Public Procurement Act to publish the evaluation method in the tender documents does not apply to mini-competitions according to a framework agreement tendered before the Public Procurement Act entered into force on 1 January 2016. The Complaints Board also found that, according to its case law, it was not a requirement that the evaluation method be published in the tender documents, unless a completely unusual and unpredictable assessment method is used. In addition, an obligation to publish the evaluation method in the tender documents could not be inferred from EU law, cf. judgment of the EU Court of Justice of 14 July 2016, TNS Dimarso NV v Vlaams Gewest. In this regard, the Complaints Board essentially concurred in the

conception of law that the Danish Competition and Consumer Authority had previously expressed in an opinion of 1 July 2016, where the Complaints Board, however, determined that the decisive cut-off date was the launch of the procedure for the framework agreement. Referring to Section 10(1) of the Complaints Board Act, the Complaints Board refused to consider views of the complainant that were not included in the claim. The Complaints Board could thus not consider whether the evaluation model in specific respects violated the principles of transparency and proportionality in Section 2 of the Public Procurement Act (Article 18(1) of Directive 2014/24/EU).

Decision of 22 November 2016, Abigo Medical AB v the Region of Southern Denmark, the North Denmark Region and Region Zealand

A linear evaluation model regarding the price criterion that had been adopted after the opening of tenders as the lowest tender + 1,000% was set aside, even though all tenders received could be accommodated in the model. The contracting entity had not managed to prove that the model could reveal a relatively large difference in the price of the lowest and second-lowest tender. The model was thus not suited to identify the "most economically advantageous tender".

Pursuant to the previous Public Procurement Directive 2004/18/EC, the Regions launched a procedure for a framework agreement for the delivery of clinical nutrition with associated equipment. The case concerned one of the lots of the framework agreement on infant formula. The award criterion was the most economically advantageous tender based on the sub-criteria of "Price" (55%) and "Quality" (45%). Three companies (A, B and C) submitted tenders, and the tender prices, which were calculated based on the prices stated and the estimated consumption, were approx. DKK 3,000 (EUR 403) for A, approx. DKK 8,000 (EUR 1,074) for B and DKK 96,000 (EUR 12,886) for C. The tenders from A and B were thus much lower than the contracting entity's previous cost prices, while the price calculated for C exceeded the Regions' total expenses for 2015 of approx. DKK 91,000 (EUR 12,215). In the evaluation of the tenders according to the sub-criterion "Price", the Regions used a scale from 0 to 5. Points were awarded according to a linear point model, where the lowest price was given the maximum score, and a tender with a price that was more than 1,000% higher than this price was given the minimum score. As a result, A was awarded 5 points, B 4.73 points and C 0.17 points. These scores and the scores awarded for the qualitative sub-criterion meant that B's total score was slightly higher than A's, and the contracting entity thus awarded the contract to B.

The Complaints Board stated that the lowest point in the linear function (more than 1,000% higher than the lowest price) meant that the curve was very flat. Unless exceptional circumstances exist in that market, such a flat curve is unusual and also unpredictable for tenderers, just as it could shift the balance between the sub-criterion "Price" and the qualitative sub-criterion. It is for the contracting entity to prove the existence of such exceptional circumstances, and in this case, the burden of proof was elevated because it had to be assumed that the evaluation model was developed after the receipt of the tenders. The Complaints Board found that the evaluation model effectively made it impossible to reflect the price difference of more than 50% between the lowest and second lowest tender. The Complaints Board held that the contracting entity had not been able to prove that the evaluation model had been able to reflect a relatively significant difference in the price of the lowest

and second lowest tender nor that it had served to identify "the most economically advantageous tender". Consequently, the Complaints Board annulled the award decision. The provision in Section 160 of the Public Procurement Act did not apply, as the Public Procurement Order had been published before the entry into force of the Act on 1 January 2016.

Decision of 17 August 2016, Holmris + Flexform A/S v Professionshøjskolen UCC, University College Capital

A linear evaluation model regarding the price criterion which had been adopted after the opening of tenders as lowest bid + approx. 10% was set aside, even though all tenders received could be accommodated in the model. The contracting entity had not managed to prove the existence of exceptional circumstances in the market that meant that the model could be regarded as predictable, even after having obtained an expert statement.

University College Capital (UCC) launched a restricted procedure pursuant to the previous Public Procurement Directive (2004/18/EC) for a framework contract for the purchase of furniture for the new Campus Carlsberg which spanned 56,000 square metres. Five companies submitted tenders. The award criterion was "the most economically advantageous tender" based on the sub-criteria of "Price" (40%) and "Design and quality" (60%). After UCC's award decision, an unsuccessful tenderer complained of the evaluation of the tenders concerning "Price", in particular, because it had been made based on a linear model that had not been disclosed, and where the maximum score was awarded to the lowest price, while zero points were awarded to tenders with a price that was more than DKK 2 million (EUR 268,456) higher than the lowest price, i.e. lowest price + just over 10%. With the scoring model used, the difference in the scores for price was increased tenfold relative to the difference in the tender prices. The Complaints Board found that a curve that was so steep – and which was not published as part of the specifications, and in the absence of exceptional circumstances in the market – would be unpredictable for tenderers and could shift the balance between the sub-criteria of "Price" and "Design and quality". It is for the contracting entity to prove that such exceptional circumstances exist. This burden of proof is elevated by the fact that the specific model used was only adopted after the receipt and opening of the tenders. During the case, UCC submitted that furniture of the quality requested in the specifications was categorised as standard products, and that experience shows that there is a very limited price differential for such products. This was supported by the fact that the prices received by UCC as part of the procedure only varied by up to 6%. During the case, UCC also obtained an expert opinion, according to which a realistic price differential in the procurement procedure would be around 15%. After a concrete assessment of the evidence, the Complaints Board found that it was for UCC to prove that the model was predictable and did not shift the balance between the sub-criteria "Price" and "Design and quality". In addition, the unusually narrow price differential of just over 10% was actually decisive for the choice of tender. According to UCC's own calculations, even with a scoring model with a curve that was so steep as the lowest price + 20%, the complainant would have been awarded the contract. The Complaints Board found that UCC when developing the evaluation model was actually free to decide which tenderer would win the contract. For this reason and others, the Complaints Board annulled the UCC's award decision. The provision in Section 160 of the Public Procurement Act did

not apply, as the Public Procurement Order had been published before the entry into force of the Act on 1 January 2016.

Decision of 5 July 2016, Lekolar LEIKA A/S v KomUdbud represented by the Municipality of Randers – evaluation model in assortment tender set aside

Evaluation model in assortment tender did not take into account the expected consumption, which meant that only a few of the prices offered were included in the evaluation, and which changed the slope in a linear price evaluation for each evaluated product, depending on the prices offered. For this reason, the model was set aside as not being transparent. The decision has been described in more detail in section 2.2.6.

2.2.6 Assortment tenders

Decision of 5 July 2016, Lekolar LEIKA A/S v KomUdbud represented by the Municipality of Randers – evaluation model in assortment tender set aside

Evaluation model in assortment tender did not take into account the expected consumption, which meant that only a few of the prices offered were included in the evaluation, and which changed the slope in a linear price evaluation for each evaluated product, depending on the prices offered. For this reason, the model was set aside as not being transparent.

KomUdbud represented by the Municipality of Randers launched a procurement procedure pursuant to the previous Public Procurement Directive (2004/18/EC) for a compulsory framework agreement for 13 Municipalities for the supply of an assortment of daycare furniture. The award criterion was the "most economically advantageous tender" with the following sub-criteria: "Quality" (30%), "Case" (30%), "Price" (20%) and "Assortment range" (20%). After having received the award decision, an unsuccessful tenderer complained of, among other things, the evaluation of the tenders received in relation to the sub-criterion "Price". In that connection, the complainant submitted, among other things, that the respondent had violated the principles of equal treatment and transparency, cf. Article 2 and Article 53 of the Directive, by using an evaluation model that was unusual and not published as well as unfit to identify the "most economically advantageous tender". In support of this, the complainant argued, among other things, that the evaluation did not take into account the expected consumption of the priced items, which generated an incorrect result in relation to KomUdbud's actual consumption. Also, it favoured tenderers who speculated in the fact that no weighting was indicated in the evaluation, which meant that the actual differences in the tenders received were not reflected. According to the specifications, regarding the sub-criterion "Price", the tenderers had to complete a list containing a total of 39 line items, including a list price and the tender price per line. In addition, it was stated that the net price would be taken into account in the evaluation. During the case, the Complaints Board learned that in a single year during the term of the most recent joint purchasing agreement, more than 2,459 different products had been purchased, and that the contracting entity did not believe that it was possible to predict which products and how many would be purchased under this agreement. This had led the contracting entity to perform the

evaluation for 39 product categories which would then constitute a representative selection of the products to be sold under the agreement.

The Complaints Board took the view that KomUdbud had evaluated the tenders in accordance with the information received, and that KomUdbud had thus not included an expected purchase volume in its evaluation. In addition, in order to be able to perform the evaluation, KomUdbud had adapted the prices to "reflect the prices received and the competing prices for each product line". This meant that the lowest price per line was awarded maximum points, while a price that was 50% higher was awarded 0 points, but that this limit was raised in increments of 50% until all of the prices for the individual product could be contained in the model. It turned out that the tenderers had tried to offer the best possible overall tender, after which KomUdbud for the purpose of its price evaluation adapted the tender prices to ensure that they could be contained in the evaluation model. The Complaints Board found that the evaluation model was unusual, and that it should therefore have been published during the procedure. By not evaluating on the estimated volumes, by only evaluating on the 39 product categories and by adapting the prices, KomUdbud had created a completely non-transparent evaluation. Accordingly, the Complaints Board found for the complainant and annulled the contracting entity's award decision.

2.2.7 Requirement to state reasons when awarding contracts

Decision of 27 June 2016, the Consortium QUARTZ P/S and Copenhagen Economics A/S v Statens og Kommunernes Indkøbsservice A/S

The statement of reasons mainly accounted for the evaluation of the tender from the receiving company and an explanation of why it was not awarded a contract and why its tender was deemed not to be as good as the "last successful", but contained no information on the evaluation of the seven successful tenders (a total of nine tenders had been submitted) or of the "last successful tender". The reasons provided were not deemed to be adequate.

The consortium QUARTZ P/S (Quartz) complained of a restricted procurement procedure launched by Statens og Kommunernes Indkøbsservice A/S (SKI) for a framework agreement. SKI had awarded contracts to seven of the nine tenderers. Quartz complained of both the evaluation model, the evaluation and the reasons given.

Only the claim concerning insufficient reasons was upheld. The Complaints Board referred to Section 2(1) of the then current Act on the enforcement of public procurement rules etc. and the background to the provision. The provision implements Article 2a(2) of the Control Directive (Council Directive 89/665, as most recently amended by Directive 2007/66/EC of the European Parliament and of the Council), according to which the reasons must meet the requirements in Article 41(2) of the previous Public Procurement Directive (Directive 2004/18/EC). According to this rule, the name of the successful tenderer must be disclosed and the reasons must contain an account of the "characteristics and relative advantages of the tender selected". Reference was also made 1) to the fact that after the implementation of the new Public Procurement Directive (Directive 2014/24/EU), a similar provisions is contained in Section 171(4)(2) of the Public Procurement Act (Article 55(2) of

Directive 2014/24/EU), "... state the successful tender's characteristics and advantages compared to the rejected tender...", 2) to the Complaints Board's decision of 23 June 2015 in the case European Dynamics Luxembourg SA v SKAT and 3) to the Court's case law, according to which the statement of reasons must disclose in a clear and unequivocal fashion the reasoning followed by the contracting entity in such a way as to enable the persons concerned to ascertain the reasons for the measure and to enable the competent Community Court to exercise its power of review. The Complaints Board then held that SKI's statement of reasons – in addition to general information on the evaluation and information on the score awarded – mainly only contained an evaluation of the consortium's tender and an explanation of why Quartz was not among the seven out of nine companies that were awarded contracts. SKI had also explained which aspects of Quartz' tender were deemed to be inferior to the "last successful tender". Other than this, the statement of reasons contained no information on the evaluation of the successful tenders or of the "last successful tender". Accordingly, the Complaints Board found that the statement of reasons was not adequate. Following a concrete evaluation of materiality, the Complaints Board rejected a claim for cancellation of the award decision. This complaint related to the same procurement procedure as the decision of 22 August 2016, Struensee & Co v SKI, cf. section 2.2.3.

2.2.8 The Complaints Board Act, including (interim) suspensive effect and the Complaints Board's sanctions

Decision of 28 July 2016, UCplus A/S v the Municipality of Esbjerg, the Municipality of Varde and the Municipality of Vejen

Complaint granted suspensive effect, as the complainant, which had not submitted a tender, would not be awarded compensation, and the prima facie test and balancing of interests test had been passed. Requirements concerning economic and financial standing discriminated against established companies in favour of start-up companies.

This is one of the relatively few cases where the complainant is granted suspensive effect because all three tests, namely 1) the prima facie test (that the complaint seems on a preliminary assessment to be justified), 2) the urgency test and 3) the balancing of interests test (in favour of the complainant), have been passed. Considering the Complaints Board's decision, the contracting entities (the Municipalities of Esbjerg, Vejen and Varde) chose to cancel the procedure. The decision thus was the final ruling in the case.

This was a public procurement procedure pursuant to Title III of the Public Procurement Act (the light regime, Articles 74-76 of Directive 2014/24/EU) for Danish language instruction for participants referred from the Municipalities of Esbjerg, Vejen and Varde according to Consolidated Act no. 772 on Danish language instruction for adult foreigners etc. (*lovbekendtgørelse nr. 772 om danskuddannelse til voksne udlændinge m.fl.*) The Municipalities' requirements for the tenderers' economic and financial standing were that tenderers that were established companies had a revenue in 2015 of at least DKK 40 million (EUR 5.37 million) from instruction covered by the above-mentioned Act and that they furnish a specified bank guarantee. On the other hand, start-ups were

required to submit CVs for the management of the company, which had to have documented management experience of four years in total, (principal, head of department or the like) within the area covered by the legislative area ("Danish language instruction for adult foreigners etc.) as well as responsibility for contracts within this area of a minimum value of DKK 40 million (since 2010). Also, they were required to furnish a bank guarantee of DKK 10 million (EUR 1.34 million). The complainant, UCplus A/S, was an established company which had made many unsuccessful attempts to contact the Municipalities to ask them to change the requirement for established companies, and which had refrained from submitting a tender, because it did not meet the requirement for revenue of DKK 40 million. After having received the Municipalities' award decision, UCplus A/S complained to the Complaints Board, claiming 1) that the revenue requirement was unreasoned and disproportionate and therefore contrary to the principle of equal treatment, and 2) that the difference between the requirements for established and start-up companies was unreasoned and thus also contrary to the principle of equal treatment.

Firstly, the Complaints Board noted that in procurement procedures concerning light services pursuant to Title III of the Public Procurement Act (Articles 74-76 of Directive 2014/24/EU), the same requirements may be made for the tenderer's economic and financial standing as in procurement procedures according to Title II (Articles 2-72 of Directive 2014/24/EU). The Complaints Board found it likely that the complainant would be successful in claim 2 on discrimination between established and start-up companies. The Complaints Board stated that although less strict requirements may to some extent be laid down for start-ups, the significant difference in the requirements for start-ups amounted to discrimination which could not be justified by the companies' different situations. In addition, considering the nature of the infringement, it was likely that the award decision would be annulled. The prima facie case test had thus been passed. The Complaints Board also regarded the urgency test as having been passed, as the complainant had been barred from bidding due to the above-mentioned infringement, and could thus not be awarded compensation during the complaints case, regardless of whether the Board found for it in its final ruling. The Complaints Board noted in relation to urgency and balancing of interests that UCplus A/S had brought the possible infringements to the Municipalities' attention during the procurement procedure and had filed the complaint without undue delay when the Municipalities insisted on the revenue requirement. The Complaints Board also found that UCplus A/S's interest in the complaint being granted suspensive effect outweighed the Municipalities' interest in timely conclusion of the contract, which would only take effect on 1 January 2017. The Complaints Board thus granted suspensive effect to the complaint.

Decision of 14 September 2016, Motus A/S v the Danish State represented by the Agency for Modernisation

The complainant was not allowed to issue new claims concerning other consequences of the infringements during the hearing of a claim for compensation after the substantive decision.

The Agency for Modernisation launched a restricted procurement procedure according to the Public Procurement Act for a two-year binding framework agreement for "servers, associated storage

solutions, accessories and associated services" on behalf of the entire State. In its decision of 4 July 2016, the Complaints Board held that the Agency for Modernisation had acted in contravention of the principles of equal treatment and transparency, cf. Article 2 of the Public Procurement Directive, by establishing and enforcing illegal specifications and by not having provided sufficient information about the products to be delivered in the contract notice. Consequently, the Complaints Board annulled the award decision.

Motus A/S, which had reserved the right to make additional claims when submitting its complaint, raised four new claims on 12 August 2016. One of the claims was for compensation, while the other three claims were for 1) the Complaints Board to declare that the Agency for Modernisation following the decision of 4 July 2016 was not entitled to purchase goods from the successful tenderers, that such purchases could be declared ineffective, or, in the alternative, that they be cancelled pursuant to Section 185(2) of the Public Procurement Act, 2) the Complaints Board to issue an order for the Agency for Modernisation to regularise a notice to the successful tenderers to the effect that the framework agreement could still be used, and 3) the framework agreements concluded to be declared ineffective because fundamental amendments had been made.

On 14 September 2016, the Complaints Board decided to reject three of the four claims, as they were not allegations in support of claims already made and had no bearing on whether and to what extent Motus had a claim for compensation. The Complaints Board gave importance to the fact that the Agency for Modernisation's procurement procedure had been finalised when the framework agreements were concluded. Any subsequent purchases made based on the framework agreement and the notice sent by the Agency for Modernisation to the contracting entities under the framework agreement and to the successful tenderers thus concerned subsequent decisions against which separate complaints would have to be filed. The case was closed with the Complaints Board's decision on compensation of 31 October 2016. The Complaints Board's decisions of 4 July 2016 and 31 October 2016 were brought before the courts.

Decision of 19 December 2016, Zøllner A/S v Hundested Havn I/S and the Municipality of Halsnæs

Compensation in the form of expectation damages awarded taking into account options in the contract tendered and the possibility of work on a time and materials basis. The Complaints Board denied jurisdiction over claim from the Municipality for exemption in the relationship between the two respondents (compensation and costs) and concerning the distribution of costs between these parties.

In its decision of 19 April 2016, the Complaints Board held that Hundested Havn I/S and the Municipality of Halsnæs had acted contrary to the principle of equal treatment in Section 2(3) of the Act on Invitations to Tender by not rejecting a tender that did not meet the conditions. The Complaints Board annulled the award decision and gave importance to the fact that, considering the nature of the infringements, both the port authorities' and the Municipality's actions gave rise to liability towards Zøllner A/S. The Complaints Board stated that it was for the port authorities and the Municipality to render it probable that the restricted procurement procedure would have been annulled instead of the contract being awarded to the complainant, Zøllner A/S, which had

submitted the lowest tender fulfilling the conditions, if the tender not fulfilling the conditions had been rejected. Referring to a number of specific aspects of the case, the Complaints Board found that this burden of proof had not been carried. Zøllner A/S was awarded compensation of DKK 250,000 (EUR 33,557) according to the rules on expectation damages.

The Municipality had made a separate claim against the port authorities that if the decision was not in the Municipality's favour, the port authorities should indemnify the Municipality for the compensation and costs paid to Zøllner A/S, and that the port authorities should be ordered to pay costs to the Municipality at the same amount as the Municipality may be ordered to pay costs to Zøllner A/S. The Complaints Board rejected the claim, as the Board is not competent to make such decisions on compensation and costs in the relationship between the two respondents, cf. Section 14(1) of the Complaints Board Act, and Section 9(4) of the Complaints Board Order.

Decision of 5 January 2016, MultiLine A/S v Aarhus University

The standstill rules of the Enforcement Act (now the Complaints Board Act) did not apply to award decision in a negotiated procedure without publication of a contract notice. The complaint was not granted suspensive effect.

Aarhus University launched a negotiated procedure without publication of a contract notice pursuant to Article 30(1)(a) of the previous Public Procurement Directive (2004/18/EC) for a framework agreement for the supply of cleaning products. Prior to the procedure at issue in this case, a public procurement procedure had been cancelled by the University on the grounds that none of the tenders fulfilled the conditions. An unsuccessful tenderer, Multiline, whose tender for the negotiated procedure was also deemed by the University as not fulfilling the conditions, complained, among other things, that the University in the complainant's opinion had indicated the wrong expiry date of the standstill period in its award notice.

In this regard, the Complaints Board noted that the rules on a standstill period after award notices do not apply to award decisions in procedures without publication of a contract notice. cf. Section 3(2)(1) of the then current Enforcement Act that was applicable until 1 January 2016. This was also expressly stated in the provision, which was in accordance with the standstill provisions of the Control Directive which the Complaints Board carefully examined. The same derogation from the standstill rules is now provided in Section 3(3)(1) of the Complaints Board Act, which corresponds to the previous provision in Section 3(2)(1) of the Enforcement Act. The fact that the procedure followed on from a procedure with prior publication of a contract notice did not change the fact that this was a new procedure, including a new procedure without prior publication of a contract notice, and thus not covered by the standstill rules. Also, it was not likely that Multiline would succeed in its claim concerning incorrect guidance on the standstill period. The Complaints Board added that Aarhus University in its award notice of 27 November 2015 had provided for a standstill period that expired on 8 December 2015, which gave the tenderers whose tenders were not accepted a reasonable time to submit a request for suspensive effect, cf. – in so far as these decisions are relevant to the cases where the standstill provisions laid down in accordance with the Control Directive do not apply – the judgments in case C-81/98, Alcatel, and C-212/02, the Commission v

Austria. In these judgments, which were handed down before the standstill rules in the Control Directive were implemented, the Court of Justice ruled that a non-statutory standstill obligation applied to EU procurement procedures.

The Complaints Board also found in its decision that it was likely that the Board would uphold a claim that the University had violated the principles of equal treatment and transparency by stating in the specifications for the negotiated procedure that it reserved the discretion to reject or accept tenders that did not meet the minimum requirements in the negotiated procedure, and that this would lead to annulment. The prima facie case test had thus been passed. On the other hand, the urgency test was not considered to have been passed, for which reason the complaint was not granted suspensive effect. This decision ended up being the final ruling in this case, as Aarhus University decided to cancel the procedure in light of the decision.

Decisions of 26 February and 15 September 2016, SIM Lægekørsel I/S v the Region of Southern Denmark

In its decision of 26 February 2016, the Complaints Board set aside a condition in a framework agreement on emergency medical services which was put out to tender with the award criterion "lowest price" and the proviso that the contract could only be awarded to tenderers with a limousine licence to the extent that there were no tenderers with a taxi licence that complied with the conditions. The Complaints Board annulled the award decision. In its decision of 15 September, the Complaints Board found that the Region had committed a wrongful act, because the fact that it had relied on the opinions of the competent authorities did not relieve it of liability towards the tenderer that had submitted the tender with the lowest price but which had not been successful because of the unlawful condition. The complainant was not awarded compensation, as the unlawful condition was included in the specifications and there was thus no causal link. The decision has been described in more detail above in section 2.2.3.

Decision of 13 September 2016, Forenede Service A/S v SKAT

In accordance with Section 10(1) of the Complaints Board Act, the Complaints Board refused to consider the complainant's views to the extent that they were not stated in the claim. The decision has been described in more detail above in section 2.1.6.

Decision of 4 May 2016, CGI Danmark A/S v the Agency for Modernisation

This case concerned the use of the "ineffective contract" sanction despite a prior notice for voluntary ex ante transparency. The decision has been described in more detail above in section 2.1.1.

Decision of 26 May 2016, Boston Scientific Nordic AB v the North Denmark Region

Claim for the "ineffective contract" sanction and a financial sanction was upheld, even though the respondent, who acknowledged the violation, had terminated the contract, because the Complaints Board was legally bound to do so according to Section 17(1)(1) and Sections 19 and 20, cf. Section

18(2)(3), of the Complaints Board Act. The decision has been described in more detail in section 2.1.1.

2.2.9 Costs

Decision of 26 May 2016, Boston Scientific Nordic AB v the North Denmark Region

The Complaints Board explained, among other things, that it is not a condition for reimbursement of the complaints fee or for ordering a party to pay costs that the case is continued (see section 2.1.1 above).

3. THE COMPLAINTS BOARD'S DECISIONS ON ACCESS TO DOCUMENTS

3.1 Introduction

In 2016, the Complaints Board was asked to rule on requests for access in a number of cases.

These requests may, in principle, be made in a number of different situations, and the type of situation dictates which rules should be applied. These situations and the Board's handling of them will be briefly described in the following.

When a company submits a complaint regarding an alleged violation of the public procurement rules, the Complaints Board will set a deadline for the respondent contracting entity's submission of its statement of the case. As the Complaints Board's final decision in the complaints case is an administrative decision, and since the complainant is a party to the complaints case, the complainant is entitled to party access to the documents in the case according to the rules of the Danish Public Administration Act. Accordingly, the Complaints Board will already in its first letter to the respondent in the case explain that it will advise the complainant of the documents submitted by the respondent to the Board in accordance with Section 7(1) of the Complaints Board Order. In this connection, the Complaints Board will inform the respondent that the complainant is entitled to information on the respondent's documents, unless one of the exemptions in the Danish Public Administration Act applies. This means that if there are documents or parts of documents (information) that the respondent believes to be exempt from the complainant's party access according to these provisions, the respondent must inform the Complaints Board stating its reasons with a reference to the relevant exemption in the Danish Public Administration Act. The respondent sends the case documents to the Complaints Board and the complainant, but may refrain from sending such documents to the complainant or, if only a part of a document is exempt from party access, only send extracts of such documents. In addition, the Complaints Board will explain that it may later consider whether the documents or information in question may be excluded from the complainant's party access. Due to the close connection between the complaint and the decision on access, the cases will often be heard by the judge who is the president of the complaints case in question.

Public authorities' procurement, including the selection of suppliers by public procurement procedures, are not categorised as administrative acts but rather as actual administrative activities, cf. Niels Fenger, "Forvaltningsloven med kommentarer" (*The Danish Public Administration Act with comments*, page 94). Consequently, cases concerning public authorities' procurement procedures are not covered by the Public Administration Act, cf. Section 2 of the Act. This means that questions on access in such cases must be settled in accordance with the Danish Access to Public Administration Files Act by a public authority. The authority's decisions on access may be appealed to the Complaints Board for Public Procurement according to Section 37 of the Access to Public

Administration Files Act. This type of decisions will in many cases be handled by the Complaints Board's president, or by the secretariat by delegation.

If the party requesting access to documents is not a party to the complaints case, the decision will be made pursuant to the rules in the Access to Public Administration Files Act. For example if the applicant is a journalist. Such decisions are often made by the Complaints Board's secretariat by order of the president.

Regardless of the types of cases mentioned above, the most disputed issue between the parties is whether it is possible to have or restrict the applicant's access to the successful tenderer's tender. There are strong interests at stake here. The complainant has a legitimate interest in being able to ascertain whether the successful tenderer's tender fulfils the conditions, and the successful tenderer, on the other hand, has a legitimate interest in ensuring that the company's confidential information is not disclosed to a competitor to the detriment of the company's ability to succeed in future procurement procedures. However, other interests may also be at stake: The contracting entity may have an interest in preventing a document showing that the successful tender maybe should have been rejected for not fulfilling the conditions is disclosed, and the complainant may want to have access to the successful tender to gain a better position in the next procurement procedure or the like.

In the following, the Complaints Board's case law in these types of access cases will be described. In rarer cases, there may be issues concerning the protection of personal information or exemption from access due to the public interest in keeping the information secret.

3.2 General information on the legal basis in relation to exclusion of confidential business information from public access

3.2.1 The Public Procurement Act

According to Section 5(1) of the Public Procurement Act, a contracting entity is not entitled to disclose confidential information provided by a candidate or a tenderer in connection with a public procurement procedure, unless otherwise stipulated in the Public Procurement Act or in other legislation. This provision implements the provision in Article 21(1) of the Public Procurement Directive, which covers information "which they have designated as confidential, including, but not limited to, technical or trade secrets and the confidential aspects of tenders".

As can be seen, the provision does not – in accordance with Article 21(1) of the Directive – change the right of access arising from the general statutory provisions, including the general provisions of the Access to Public Administration Files Act and the Public Administration Act.

These provisions and selected decisions from the Complaints Board's case law in 2016 are described below.

3.2.2 The Access to Public Administration Files Act

The general rule in Section 7 of the Danish Access to Public Administration Files Act is that any person may demand that he be apprised of documents received or issued by an administration authority etc. in the course of its activity.

According to Section 30, no. 2, the right of access does not apply to information on technical plant or processes or on operating or business procedures or the like, provided it is of material importance to the economy of the person or enterprise that grant of the request be refused. It is not possible to exhaustively enumerate the information covered by the provision in Section 30, no. 2, but examples include information on production methods, production conditions, business connections, customer lists, business terms, contract terms, business strategies and marketing efforts. Other information include start-up costs, operating costs, distribution costs and information on a company's financial statements and financial situation in general, including its tax affairs. Reference is made in this regard to White Paper no. 1510/2009, page 706, which forms the basis of the Bill (L 144 of 7 February 2013), on which the Access to Public Administration Files Act is based.

The explanatory notes to Bill no. L 144 of 7 February 2013 for the Act explain that Section 30(2) requires that access to information must be assumed to entail an obvious risk that the person or company in question will suffer significant financial damage, typically in terms of competition. Further, it appears that information covered by no. 2 is subject to a clear presumption that disclosure of the information will entail an obvious risk that the company or the person to which the information relates will suffer important damage. It is also stated in the explanatory notes that the relevant company or person should be consulted to determine whether disclosure of information on business conditions etc. would cause the mentioned risk of financial damage.

According to Section 34 of the Act, if the considerations set out in Sections 30-33 only apply to a part of a document, right of access must be granted to the other parts of the document. However, this does not apply if it will lead to abandonment of the considerations set out in Sections 30-33, if it would entail disclosure of clearly misleading information, or if the remaining contents of the document are not understandable or coherent.

3.2.3 The Public Administration Act

According to Section 9(1) and (2) of the Danish Public Administration Act, any party to a case in which a decision has been or will be made by an administrative authority may ask to see the case documents, subject to the exemptions in Sections 12-15b.

According to Section 15b, no. 5, of the Act, the right of access may be restricted to the extent that it is considered that the party's interest in using knowledge of the case documents to protect its interests should give way to vital private or public interests where secrecy is warranted by the circumstances. In White Paper no. 1510/2009, page 74 et seq., it is explained that exclusions according to Section 15b, no. 5, must be granted based on a balancing of the party's interest in being able to use knowledge of the information to protect its interests on the one hand and fundamental considerations for, among other things, private interests on the other. With regard to private interests, the White Paper explains that information on companies' operating and business

conditions may only be excluded if access to this information could harm the company's competitiveness or otherwise significantly damage the company.

According to Section 15c, no. 3, of the Act, entire documents may be excluded according to the provisions in Sections 15-15b, if the remaining contents of the document are not understandable or coherent.

This means that, as a general rule, there is no basis for assuming in a public procurement case that access to the case documents cannot be granted. Consequently, whether a party has a right of access in a public procurement case pursuant to the rules of the Access to Public Administration Files Act or the Public Administration Act must be decided based on the documents and information in the individual case, which tenderers must take account of and consider when submitting their tenders.

3.3 The Complaints Board's case law in relation to frequently occurring information

3.3.1 Description of solution in the tender

In many cases, solution descriptions in tenders contain information relating to technical devices or processes or operating or business conditions that are covered by the provision in Section 30, no. 2, of the Access to Public Administration Files Act and/or Section 15b, no. 5, of the Public Administration Act.

However, the Complaints Board's case history shows that a significant part of the successful tender's descriptions of the solution is often not this type of information.

This applies to, for example, information of an *overall* and *general nature*, describing and praising the solution's *functionality* and *advantages*, but not the specific technical means of achieving these. Such information, which must be regarded as being intended for a wider audience of potential customers and external users of the solution, may generally not be categorised as business secrets that may be excluded pursuant to Section 30, no. 2, of the Access to Public Administration Files Act and/or Section 15b, no. 5, of the Public Administration Act.

To the extent that the company's tender includes *commonly known products* and *solutions* that have been combined in a special way for the specific tender, such solution would also generally only be of interest to the completed procedure, and the description may thus not be excluded for reasons relating to future procurement procedures.

Generally, the same applies to information on *manufacturer* and *type* of the products in the tender, such as in assortment tenders, which were the subject of several decisions in 2016.

> The Complaints Board's decision of 11 July 2016 (file no. 2016-1441), which concerned access to a tender for a framework agreement for the purchase of catering equipment, including lots for, among other things, refrigerators and freezers, where the Complaints Board held that information on the manufacturer and type of the refrigerators and freezers does not in itself constitute information on technical devices or processes covered by the provision in Section 30, no. 2, of the Access to Public Administration Files Act or such information on confidential

operating and business conditions that may be excluded under the provision in Section 15b, no. 5, of the Public Administration Act. Here, the Complaints Board gave importance to the fact that the information was of a general nature and thus did not concern, for example, details about production methods, production conditions or business connections. The fact that the tender could be regarded as having been drafted based on the tenderer's strategic considerations could thus not lead to a different result.

The Complaints Board's decision of 12 August 2016 (file no. 2016-2671) concerned, among other things, the issue of access to the successful tenderer's list of products in a procurement procedure for ostomy and urology products. Here, the Complaints Board held that information on subheading number per series, product designation, manufacturer, manufacturer's product number and tenderer's product number was not information on business secrets within the meaning of Section 30, no. 2, of the Access to Public Administration Files Act, as it was only general information on the products in question and did not comprise details on, e.g., production methods, production conditions, business terms or distribution costs etc.

Information about the dimensions and characteristics, performance, power consumption of the products and the like may generally not be excluded, if it is deemed to be *commonly known in the market,* e.g. because these properties are objectively ascertainable from the products, as they are thereby available to an indefinite broad range of citizens, including customers and users. This category also includes published datasheets of the products in the solution. This applies regardless of whether the party requesting access is a competitor to the company that has submitted the tender.

In the above-mentioned decision of 7 July 2016 (file no. 2016-1441), the Complaints Board also gave importance to the fact that technical information on the relevant refrigerators and freezers had to be published by the manufacturer pursuant to an EU Regulation. In addition, the Complaints Board granted access to information in the tender on catalogue references or links to a website for the products, which was regarded as information that was already in the public domain.

The following decision concerns a situation where the information is not yet publicly known in the market:

The Complaints Board's decision of 9 December 2016 (file no. 2016-13027) concerned the issue of access to a tender for cleaning agents and consumables and related services. The complainant, a competing company, requested access to the list of products for the successful tender. The list of products contained, among other things, information on packaging sizes and dosage which was (currently) not known by the market as they had been developed specifically for this procurement procedure. The Complaints Board based its decision on the fact that dosage and package sizes were of significant importance to the competition in the market concerned. Although the successful tenderer would not be able to keep the information secret for any extended period, the Complaints Board found that at that time there were compelling reasons to protect the successful tenderer's financial interests in other ongoing procedures that outweighed the complainant's interest in obtaining access to the information in question for use in the case before the Complaints Board. The fact that the procurement procedures could be expected to be completed within a very short period of time had no bearing on this. The Complaints Board noted in this respect that similar information on dosage etc. in tenders for these procurement procedures could only be expected to reach the

market if the tenderer in question was awarded the contracts, or if the contracting entity in the procedure in dispute concluded a contract with the company. Against this background, the Complaints Board excluded the information in the list of products, cf. Section 15b, no. 5, of the Public Administration Act.

3.3.2 Price information

According to the Complaints Board's case law, information on tenderers' price components, including hourly rates and product prices, in a procurement procedure may often be excluded from access under Section 30, no. 2, of the Access to Public Administration Files Act, as a competing company's knowledge of a tenderer's pricing will often, depending on the circumstances, entail an obvious risk of harming the tenderer's competitiveness in future procurement procedures or other agreements.

However, such risk does not exist if the request for access concerns the pricing of a not entirely simple part of the solution, as it is not possible to derive any detailed information on the tenderer's pricing which could be used in other procedures. In these cases, the price information cannot be transferred to other procedures. There is therefore no basis for exempting the information on the total price from access, cf. Section 30, no. 2, of the Access to Public Administration Files Act and/or Section 15b, no. 5, of the Public Administration Act.

This case law has been followed in several cases, but there are exceptions and nuances, including in cases on the free-choice scheme according to Section 112(3) of the Danish Act on Social Services (*serviceloven*), where the successful tenderer's price components in some cases due to the rules in the Act may be expected to be disclosed to potential users of the products, which means that the information cannot be exempted from access, cf. the Complaints Board's decision of 13 December 2012. This was not the case in the Complaints Board's decision of 24 August 2016 (file no. 2016-3082), and the Board thus upheld the rejection of the request for access.

In addition, where product prices in a framework agreement are posted on the Internet or are otherwise made available to an indefinite wide audience, this information will likely not be excluded.

3.3.3 CVs etc.

The names of the winning tenderer's employees who were comprised by the tender are normally not excluded from access out of consideration for the winning tenderer pursuant to Section 30, no. 2, of the Danish Access to Public Administration Files Act or Section 15b of the Danish Public Administration Act. In its decision of 12 August 2016 (file no. 2016-1800), the Complaints Board's thus held that the name of the person who had signed the tender from the successful tenderer, either by itself or in the context in which it is included, may be regarded as being "information on operating or business conditions or the like". This information could thus not be excluded from access under Section 30, no. 2, of the Access to Public Administration Files Act. In addition, in line with its decision of 31 October 2014, this information could not be excluded to protect the person in question, cf. Section 30, no. 1, of the Act.

The extent to which information about employees may otherwise be excluded depends on an assessment of the circumstances of the individual case. CV information of a more general nature on education and qualifications will generally be open to access, while more specific information in special cases may be excluded.

In the Complaints Board's decision of 12 August 2016 (file no. 2016-1800), as described above, the Board thus found that some excluded information on the CVs of the employees involved could only partly be considered business secrets within the meaning of Section 30, no. 2, of the Access to Public Administration Files Act. Consequently, the Complaints Board did not find that information on the relevant employees' names, places of employment, telephone numbers and email addresses as well as information on their education, experience and career as well as language skills could be excluded from access, just as the Complaints Board stated that this information could not be excluded pursuant to Section 30, no. 1, of the Act. On the other hand, information in the CVs, including on the employees' particularly relevant competences and projects could, following a detailed assessment of the nature of this information, be excluded from access under Section 30, no. 2. Here, the Board also based its decision on certain information on the competitive situation in that market.

4. DANISH JUDGMENTS ON THE COMPLAINTS BOARD'S CASES

The District Court of Hillerød's judgment of 15 March 2016, House of Waldorf ApS v the Capital Region of Denmark, cf. the Complaints Board's decision of 18 February 2015

The case concerns a public procurement procedure according to the previous Public Procurement Directive (2004/18/EC) for a framework agreement with several suppliers for the supply of wigs. The procedure was a fixed-price procedure with qualitative sub-criteria only. The complaint included a number of claims concerning the Region's errors in its assessment of the complainant's tender.

In the Complaints Board's decision of 18 February 2015, the complaint was not upheld, except for one claim, which the respondent had acknowledged, but which had no bearing on the outcome of the procedure. Accordingly, the Complaints Board did not uphold the claim for annulment of the award decision, and it ordered the complainant to pay costs of DKK 30,000 (EUR 4,027).

The complainant brought the decision before the District Court with the same claims as those not upheld by the Complaints Board. The Region denied liability and claimed that the complainant should be ordered to pay the costs imposed by the Complaints Board. The complainant rejected this claim on the grounds that the amount should not be paid twice.

The District Court found for the Region and upheld the Complaints Board's decision, just as it ordered the complainant to pay the costs from the Board of Appeal, as the Complaints Board's decision on costs could not be enforced pursuant to Section 478 of the Danish Administration of Justice Act.

The Eastern High Court's judgment of 13 September 2016, the Central Denmark Region v Medtronic Danmark A/S and Globus Medical Denmark ApS, cf. the Complaints Board's decisions of 12 August 2013

This judgment affirms the City Court of Copenhagen's judgment of 7 June 2015 in the case that was settled by the Complaints Board in its decisions of 12 August 2013 (see the 2015 Annual Report, page 40).

5. THE EU COURT OF JUSTICE'S JUDGMENTS ON THE COMPLAINTS BOARD'S CASES

Judgment of the EU Court of Justice of 24 May 2016 in case C-396/14, MT Højgaard A/S and Züblin A/S v Banedanmark.

The judgment is based on a reference for a preliminary ruling from the Complaints Board for Public Procurement of 18 August 2014 on the interpretation of Article 10 and Article 51 of the Utilities Directive (Directive 2004/17/EC). The Complaints Board made its decision in this case on 20 June 2017.

In January 2013, Banedanmark, the railway infrastructure operator in Denmark, launched a negotiated procedure according to the Utilities Directive for the construction of a new railway line – TP 4 Urban Tunnel – between Copenhagen and Ringsted. Banedanmark pre-selected, among others, MTH-Züblin JV ("MTH") and JV Pihl-Aarsleff-TP 4 Urban Tunnel I/S.

The partnership consisted of E. Pihl & Søn A/S (Pihl) and Per Aarsleff A/S (Aarsleff). On 26 August 2013, a bankruptcy order was issued against Pihl. On 27 August 2013, the partnership submitted a first tender, which had, however, not been signed by the liquidator, and on 15 October 2013, Banedanmark allowed Aarsleff to participate in the procedure in the place of the partnership. Aarsleff then submitted the second and third tenders in its own name. On 20 December 2013, Banedanmark announced that Aarsleff had submitted the most economically advantageous tender. The price offered by MTH was 0.8% higher than Aarsleff's, and MTH decided to complain to the Complaints Board.

In its decision of 28 January 2014, the Complaints Board decided not to grant the complaint suspensive effect, as the condition therefor had not been met. The Complaints Board's preliminary view was that there was a good possibility that MTH would prevail in any claim that Banedanmark was in breach of Article 10 of the Utilities Directive by allowing Aarsleff to participate in the procedure in the place of the pre-selected partnership, and in a claim for annulment of the award decision.

During its hearing of the case, the Complaints Board decided on 18 August 2014 to submit a request for preliminary ruling to the EU Court of Justice concerning whether the principle of equal treatment in Article 10 of the Utilities Directive is to be interpreted as precluding, in a situation such as that in the main proceedings, a contracting authority from awarding a contract to a tenderer which had not applied for pre-selection and therefore was not pre-selected. The Complaints Board asked the Court to take into account that had Aarsleff made an application for an invitation to take part in the procedure instead of the now terminated partnership, it would have been pre-selected.

The Court first considered in the grounds for its ruling whether the Complaints Board for Public Procurement meets the criteria set out in the Court's case law for being a "court or tribunal" within the meaning of Article 267 TFEU.

The Court then went on to answer the question as follows:

> "The principle of equal treatment of economic operators, stated in Article 10 of Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors, read together with Article 51 of that directive, must be interpreted as meaning that a contracting entity is not in breach of that principle where it permits one of two economic operators who formed part of a group of undertakings that had, as such, been invited to submit tenders by that contracting entity, to take the place of that group following the group's dissolution and to take part, in its own name, in a negotiated procedure for the award of a public contract, provided that it is established, first, that that economic operator by itself meets the requirements laid down by the contracting entity and, second, that the continuation of its participation in that procedure does not mean that other tenderers are placed at a competitive disadvantage."

Judgment of the EU Court of Justice of 7 September 2016 in case C-549/14, Finn Frogne A/S v Rigspolitiet ved Center for Beredskabskommunikation

On 3 November 2011, the Complaints Board for Public Procurement passed its decision in this case. The decision was upheld by a decision of the Eastern High Court of 20 December 2013 which was appealed to the Supreme Court. By order of 27 November 2014, the Supreme Court referred a question for a preliminary ruling to the EU Court of Justice concerning the criteria for a contracting authority's right to enter into settlement agreements to waive the application of remedies for breach and to avoid subsequent litigation in connection with difficulties encountered in the performance of a contract. The EU Court of Justice answered this question in its judgment of 7 September 2016. The case is still pending before the Supreme Court.

The original contract ("the control room contract") for an IT service comprising control room servers etc. at a total value of DKK 527 million (approx. EUR 70.7 million) was concluded in 2008 between a supplier, Terma, following a competitive dialogue, and Rigspolitiet ved Center for Beredskabskommunikation (Centre for Emergency Communication of the National Police, Denmark; "CFB") subsequently became the competent public authority for that contract. Frogne had not applied for pre-selection. In 2009-2010, difficulties arose in meeting delivery deadlines, with the parties disagreeing as to which party was responsible, and in 2010, a "settlement agreement" was concluded with a view to terminating the control room contract. The settlement agreement had two components: Firstly, the contract was to be reduced to the supply of a radio communications system worth approx. DKK 35 million (approx. EUR 4.69 million), while CFB would acquire two servers, worth approx. DKK 50 million (approx. EUR 6.7 million), which Terma had itself acquired with a view to leasing them to CFB in performance of the original contract. CFB published a notice for voluntary ex ante transparency pursuant to Section 4 of the Danish Act on the Complaints Board for Public Procurement, and Frogne brought an action before the Complaints Board.

The Complaints Board and the Eastern High Court held that the part of the settlement agreement that concerned radio dispatchers did not require publication of a new notice of contract. However, the part of the settlement agreement that concerned the servers could not have been concluded without reopening the contract to competition. A claim that the agreement should be declared invalid in this respect was not upheld, as CFB's assessment to the effect that the conclusion of the settlement agreement with Terma was permitted without prior publication of a notice of contract under the EU rules was not manifestly wrong.

Before the Supreme Court, Frogne argued that the settlement agreement could not be concluded without reopening the contract to competition. The significantly reduced value of the contract of DKK 85 million, and the corresponding lower requirements for security, would have made it possible for smaller undertakings to participate. CFB argued that the settlement agreement significantly limited the scope of the services to be provided by Terma. This was thus not a new agreement within the meaning of the Public Procurement Directive. According to paragraph 24 of the EU Court of Justice's judgment, the Supreme Court was "unsure as to the scope of Article 2 of Directive 2004/18, in particular as to whether the principle of equal treatment and the obligation of transparency imply that a contracting authority cannot consider entering into a settlement to resolve the difficulties arising from the performance of a public contract without this automatically giving rise to the obligation to organise a new tendering procedure relating to the terms of that settlement". The Supreme Court's question was:

> "Is Article 2 of [the Public Procurement] Directive 2004/18, read in conjunction with the judgments of the Court of Justice of the European Union of 19 June 2008, Pressetext Nachrichtenagentur (C-454/06, EU:C:2008:351), and of 13 April 2010, Wall (C-91/08, EU:C:2010:182), to be interpreted as meaning that a settlement agreement which introduces limitations on and amendments to the services to be provided as originally agreed by the parties under a contract previously put out to tender and also mutual agreement to waive the application of remedies for breach in order to avoid subsequent litigation constitutes a contract which in itself requires a tendering procedure, in a situation where performance of the original contract has encountered difficulties?"

The Court of Justice held, among other things, that it follows from the Court's case-law that the principle of equal treatment and the obligation of transparency resulting therefrom preclude, following the award of a public contract, the contracting authority and the successful tenderer from amending the provisions of that contract in such a way that those provisions differ materially in character from those of the original contract. Such will be the case if the proposed amendments would either extend the scope of the contract considerably to encompass elements not initially covered or to change the economic balance of the contract in favour of the successful tenderer, or if those changes are liable to call into question the award of the contract, in the sense that, had such amendments been incorporated in the documents which had governed the original contract award procedure, either another tender would have been accepted or other tenderers might have been admitted to that procedure (paragraph 28). According to the Court's judgment, it is not relevant that the amendment was not made with a view to circumvention. The question whether there has been a material amendment must be analysed from an objective point of view, on the basis of the criteria set out in paragraph 28. The Court then explained that substantial amendment of a contract cannot be effected by the parties if that amendment was not provided for by the terms of the original contract. The fact that the material amendments were made to resolve objective difficulties encountered in the performance of the contract, which were unpredictable where complex contracts on the development of information systems as in this case are concerned, could not justify failure to respect the principle of equal treatment from which all operators potentially interested in a public contract must benefit. In conclusion, the Court clarified that "all of those developments are without prejudice to the potential consequences of the notice for voluntary ex ante transparency which has been published in connection with the contract at issue in the main proceedings". The Court then went on to answer the question as follows:

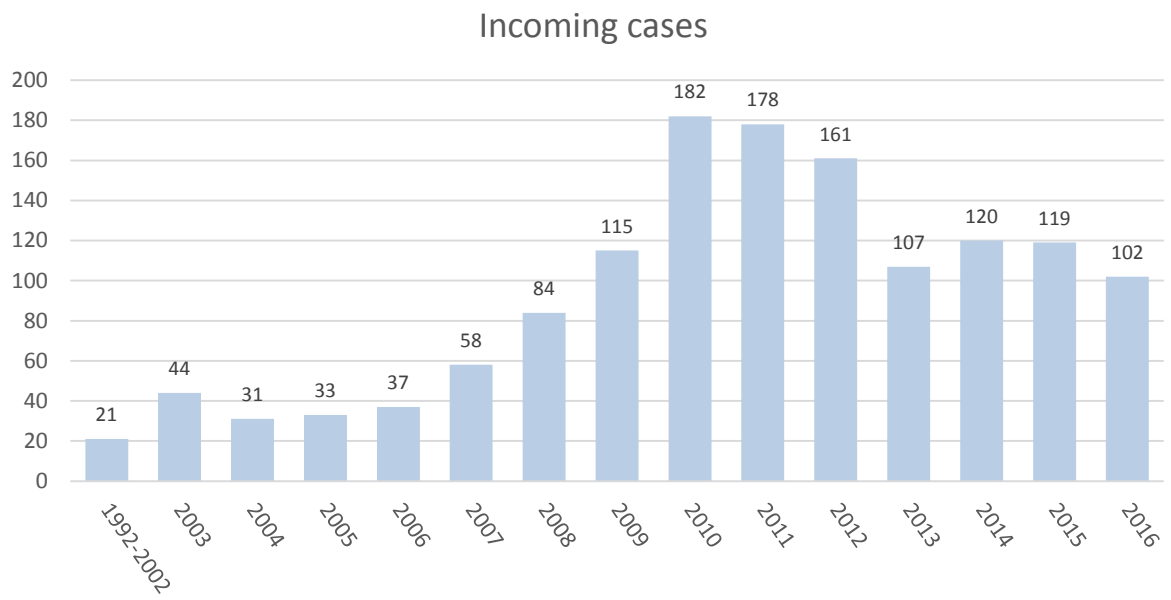
"Article 2 of [the Public Procurement Directive] must be interpreted as meaning that, following the award of a public contract, a material amendment cannot be made to that contract without a new tendering procedure being initiated even in the case where that amendment is, objectively, a type of settlement agreement, with both parties agreeing to mutual waivers, designed to bring an end to a dispute the outcome of which is uncertain, which arose from the difficulties encountered in the performance of that contract. The position would be different only if the contract documents provided for the possibility of adjusting certain conditions, even material ones, after the contract had been awarded and fixed the detailed rules for the application of that possibility."

6. THE COMPLAINTS BOARD'S ACTIVITIES IN 2016

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

6.1 Complaints received

The Complaints Board received 102 complaints in 2016. The below overview illustrates the development in the number of complaints received in 1999-2016.



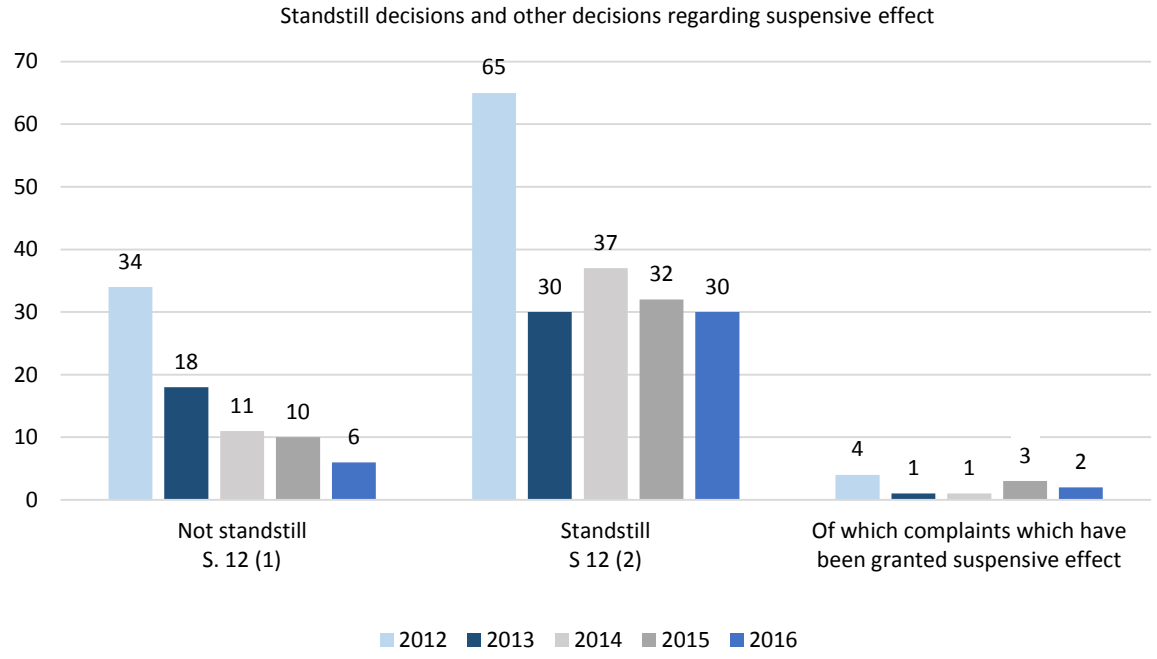
The number of complaints received in 2016 is slightly lower than the previous two years and roughly on a level with 2013. This continues the trend of the number of complaints cases being significantly lower than in 2010-2012

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 Complaints Board Order 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 (EUR 2,685) in cases on 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 entity's costs must be assumed to be decisive factors. The slight decline in the number of cases in 2016 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 purchases below the thresholds without a clear cross-border interest, cf. now Title V of the Public Procurement Act.

6.2 Standstill cases and other cases regarding suspensive effect

As shown below, in 2016, the Complaints Board made interim decisions in six cases where a request for suspensive effect had been made under Section 12(1) of the Complaints Board Act, and interim decisions in 30 cases received in the standstill period pursuant to 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 two cases in 2016, cf. section 1.4 above and the description of the decisions in chapter 2.

The number of standstill decisions and other decisions regarding suspensive effect made in 2012-2016 is shown below.

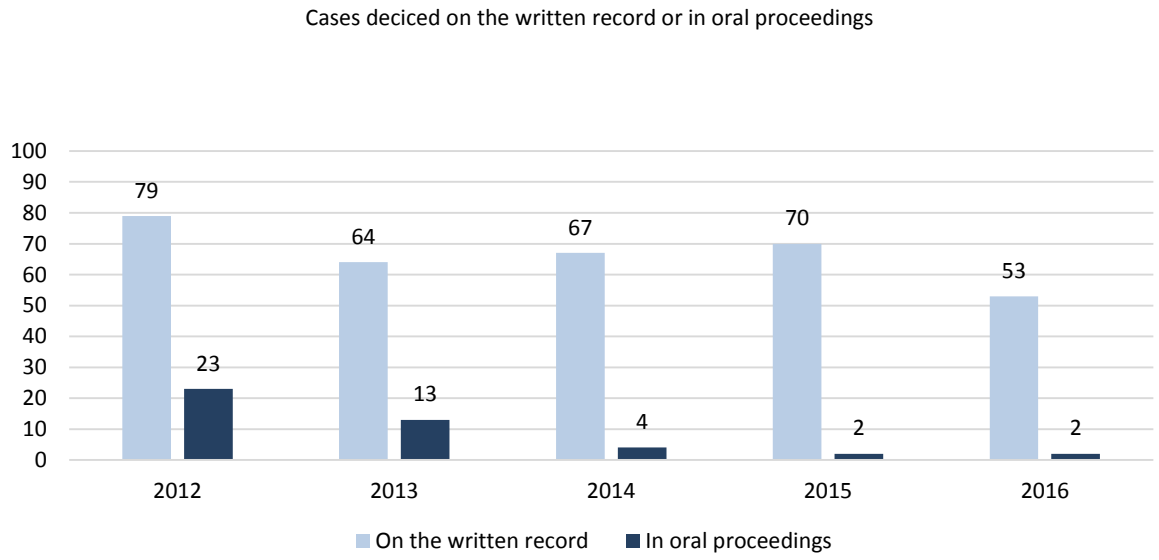


In a number of cases, the Complaints Board's decisions regarding suspensive effect – also where the request is not granted – will lead to withdrawal of the complaint due to the Complaints Board's prima facie orders, where the Complaints Board based on a preliminary assessment delivers an opinion on whether 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 the Complaints Board in a very significant proportion of all cases is required make to two decisions, namely a decision on suspensive effect and a substantive decision on the alleged infringements. In addition to this are possible decisions on compensation and perhaps also one or more decisions on access during the case.

6.3 Cases decided on the written record or in oral proceedings

In 2016, 53 cases where decided on the written record, while two cases were adjudicated in oral proceedings.

Below is an overview of cases considered on the written record and in oral proceedings, respectively, in the years 2012-2016.

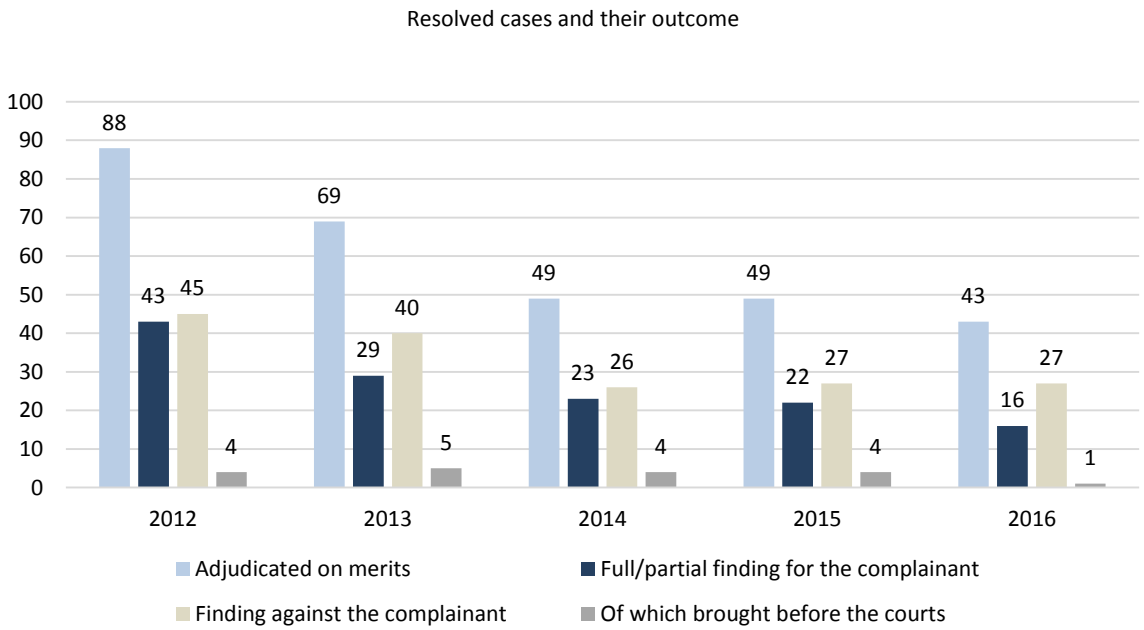


Note: These figures include rejected cases.

The distribution of cases decided on the written record/cases adjudicated in oral proceedings in 2016 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 accord with the legislator's intention. In 2010, Section 11(1) of the Enforcement Act (now the Complaints Board Act) provided 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.

6.4 Resolved cases and their outcome

The Complaints Board adjudicated 43 cases on their merits in 2016. Of these cases, 16 complaints were fully or partly sustained, while 27 complaints were unsuccessful. In the vast majority of cases, the Complaints Board's decision is the final ruling in the case, and only one of the 43 cases was brought before the courts. The figures for 2016 are roughly on a level with 2015.



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

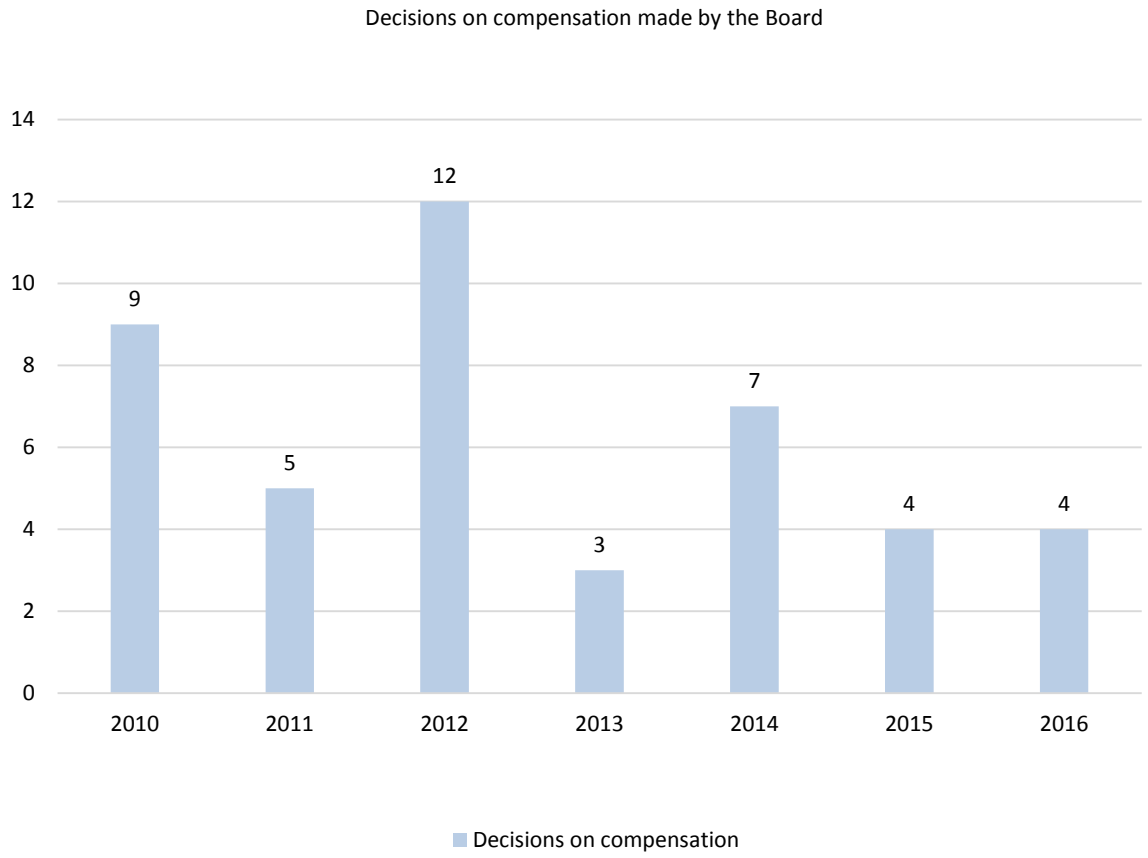
The below table shows that the percentage of cases upheld in 2016 was 37%, slightly below the average percentage for 2011-2015 which was 45.4%.

Since 2011, the Complaints Board has found for the complainant in fewer cases, which means that it has found fewer errors than in the past. As stated in section 4.4 of the 2013 Annual Report, this may be because the contracting entities commit fewer errors than they used to. Another, perhaps more obvious explanation is that in 2011, the legislator (Act no. 618 of 14 June 2011) introduced the provision in Section 10(1) of the Enforcement Act (now the Complaints Board Act), which removed the Complaints Board's right to raise issues for consideration and adjudication of its own motion. Please see in this regard the article in the Danish weekly law reports 2013 B, page 241 et seq. (U.2013B.241, Michael Ellehauge: "Erfaringer med håndhævelsen af EU's udbudsregler" (*Experiences with the application of the EU public procurement rules*, sections 1 and 4) where the Complaints Board's decision of 17 April 2012, PH-Byg Faaborg A/S v Faaborg Church Council is discussed.

Year	**Full/partial finding for the complainant**	**Finding against the complainant**
2012	49%	51%
2013	42%	58%
2014	47%	53%
2015	45%	55%
2016	37%	63%

6.5 Decisions on compensation

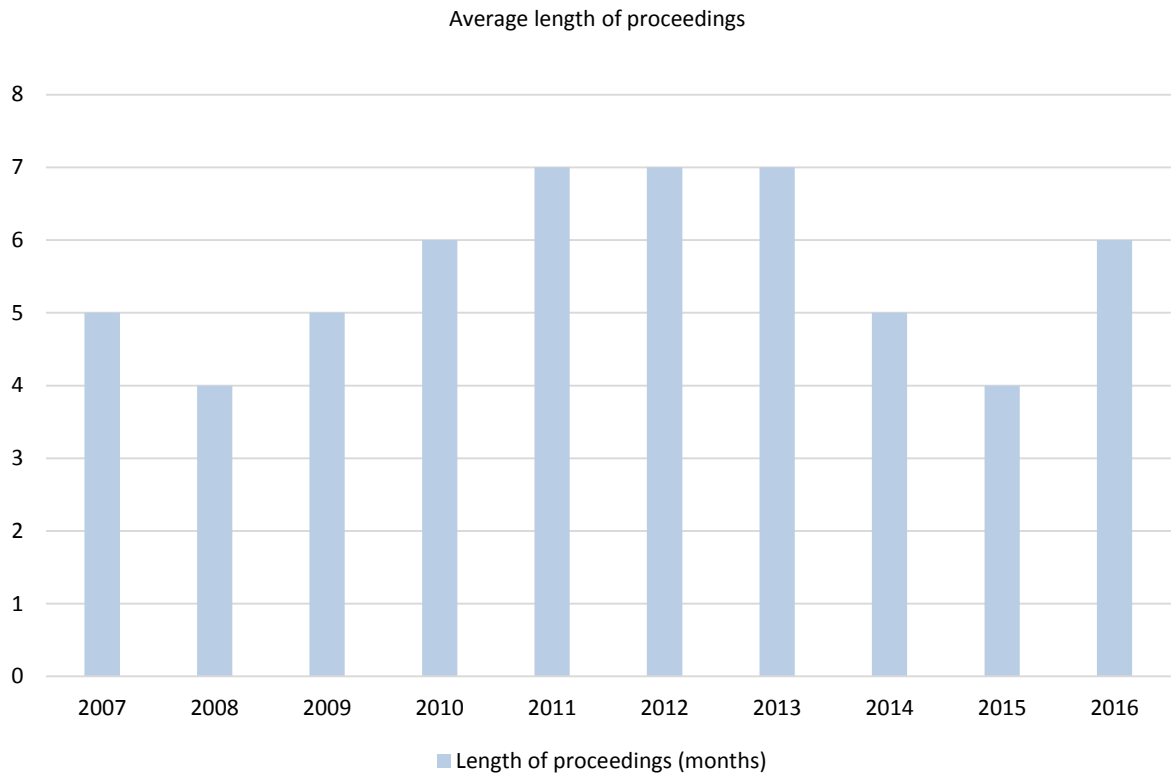
In 2016, the Complaints Board made four decisions on compensation.



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 awaiting the Board's decision on compensation. The number of decisions on compensation in 2012 should be compared with the large number of complaints received in 2010 and 2011 (182 and 178 complaints, respectively).

6.6 Average length of proceedings

The Complaints Board's average length of proceedings in 2016 was six months. Below is an overview of the development in the average length of proceedings for rejected cases and substantive decisions in months in the years 2007-2016.

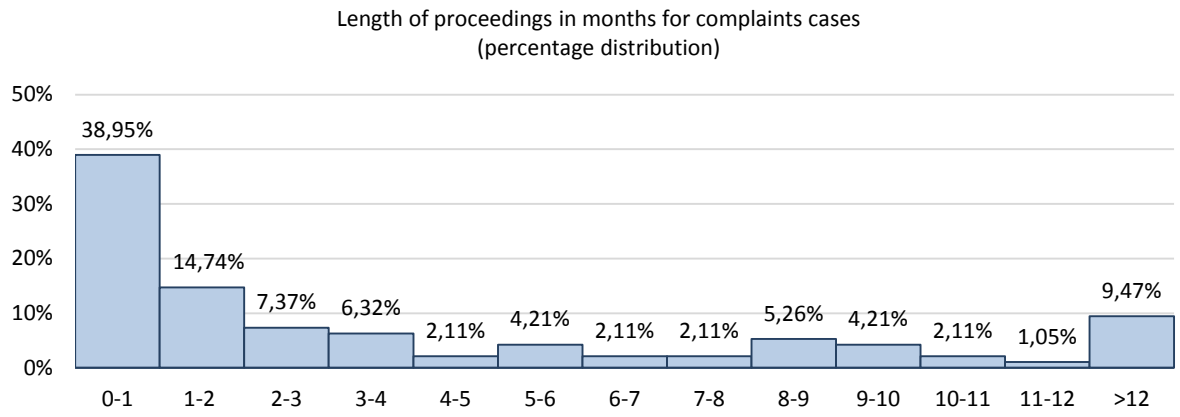


The average length of proceedings, which showed a decreasing trend in 2014 and 2015 from seven months in 2011-2013 to five months in 2014 and to four months in 2015, has increased to six months in 2016, which is on a level with 2010. The number of complaints received in 2010-2015 was 182, 178, 161, 107, 120 and 119, cf. section 6.1 above. It should be noted that there were 42 pending cases at the end of 2016, which is on a level with 2013 and 2014, where 45 cases were registered at year-end. The figure is slightly higher than in 2015 where 35 cases were pending at the end of the year, which was the lowest level since 2007 (22 cases).

As stated in the 2015 Annual Report, the fact that the Complaints Board's secretariat did not have a secretary in 2015 due to illness must be assumed to have had an impact on the length of proceedings for the cases that were being processed in 2015 but only completed in 2016, and thus also the length of proceedings in 2016. Also, a similar increase must be expected in 2017, where the Complaints Board expects to finalise a number of major cases that have been ongoing for a long time.

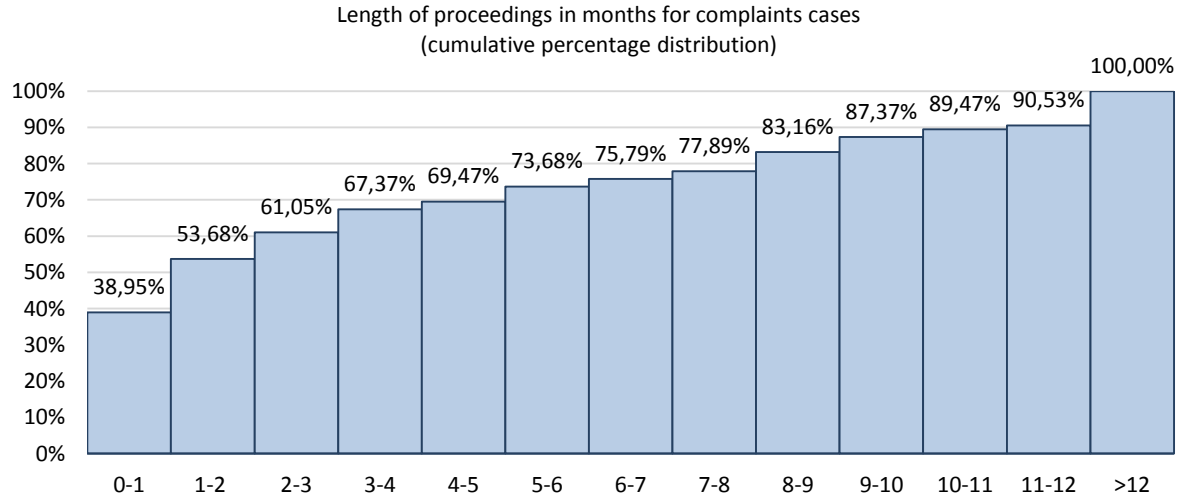
6.7 Length of proceedings in months for complaints cases (percentage distribution)

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 2016. This includes all cases, 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 6.8 for an overview of the cumulative percentage distribution of the length of proceedings in months for complaints cases.



6.8 Length of proceedings in months for complaints cases (cumulative percentage distribution)

The figure below shows the cumulative percentage distribution of the length of proceedings in 2016.

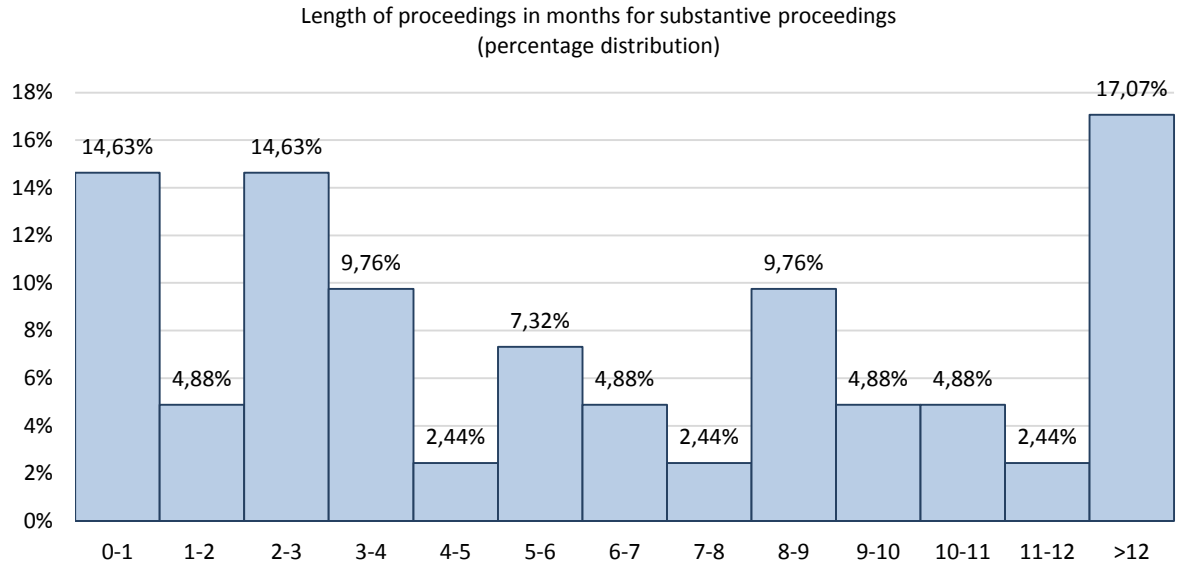


Approx. 39% of the cases were closed within the first month of receipt of the complaint in 2016 against 29% in 2013, 33% in 2014 and approx. 47% in 2015. Approx. 53% of the cases were closed within the first two months of receipt of the complaint in 2016 against 42% in 2013, 54% in 2014 and 62% in 2015. It can also be seen that approx. 61% of all cases received in 2016 were closed within three months against 49% in 2013, 60% in 2014 and 69% in 2015. The figures for 2016 include 39 cases where the complaint was withdrawn. In a number 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. 74% of the cases in 2016 were closed within 5-6 months of receipt of the complaint against 37% in 2013, 62% in 2014 and 65% in 2015, and that approx. 87% of cases were closed within 9-10 months against 86% in 2013, approx. 87% in 2014 and 92% in 2015.

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.

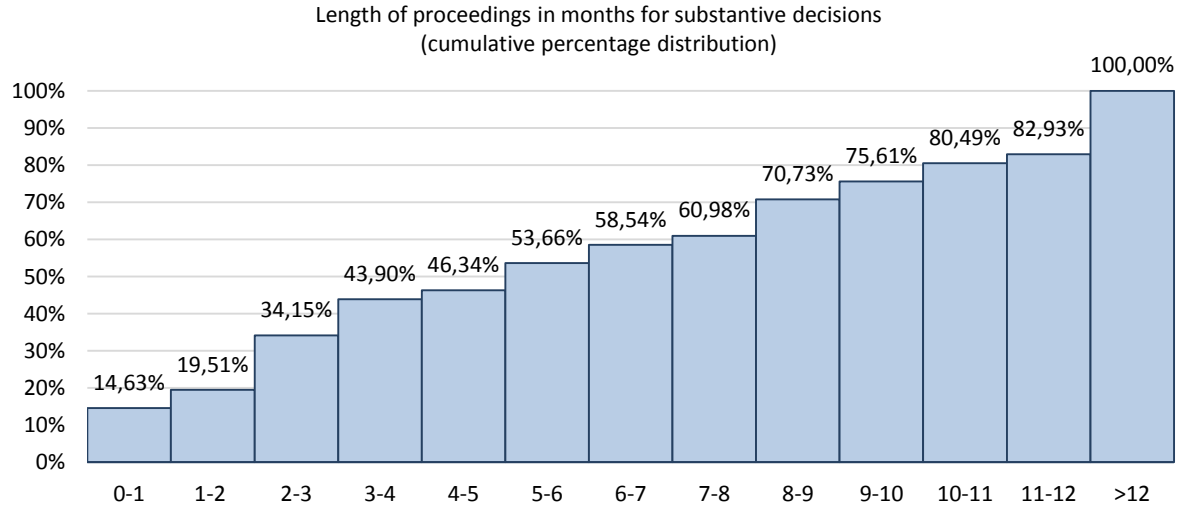
6.9 Length of proceedings in months for substantive decisions (percentage distribution)

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 2016.



6.10 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 2016.



The table shows that substantive decisions were made in approx. 44% of cases within 3-4 months against 20% in 2013, 30% in 2014 and 41% in 2015. In 2016, decisions had also been made within 5-6 months in approx. 54% of cases against 37% in 2013, 62% in 2014 and 65% in 2015. It can also be seen that the Complaints Board made a substantive decision within 8-9 months in approx. 71% of cases in 2016 against approx. 69% in 2013, 87% in 2014 and 90% in 2015. Experience shows that the remaining 29% (2013: 31%, 2014: 13% and 2015: 10%) 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. The increase in the length of proceedings should probably be attributed mainly to a backlog of old cases from the previous year which were completed in 2016, cf. above, an increased workload in the secretariat, including as a result of the relocation (see section 1.3), and the fact that both the parties in the different cases and the Complaints Board's presidency had to consider the significant amendments and new rules in the Complaints Board's legal basis that entered into force in 2016. With regard to the Complaints Board's length of proceedings for substantive decisions, it is also 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, cf. section 6.2 above.

7. THE COMPLAINTS BOARD'S OTHER ACTIVITIES

In addition to hearing complaints, the Complaints Board also performed certain outreach activities in 2016:

Participation in conferences etc.

In 2016, members of the presidency participated as presenters at conferences and other events focusing on public procurement law.

Publications etc.

Two of the Board's vice-presidents, Katja Høegh and Kirsten Thorup, wrote the article "Standstill og opsættende virkning inden for udbudsretten – endnu engang" (*Standstill and suspensive effect in procurement law – revisited*), which was published in the Danish weekly law reports, UfR 2016.B403. Also, Kirsten Thorup contributed the chapter on the Public Procurement Act and the Complaints Board for Public Procurement for the book "Udbudsloven" (*The Public Procurement Act*), edited by Steen Treumer, which was published in January 2016. Finally, the Complaints Board's president, Michael Ellehauge, contributed to the drafting of the annotations for the new Public Procurement Act in Karnov Law.