The Complaints Board for Public Procurement

Annual Report 2017

CONTENTS

INTRODUCTION

The Complaints Board for Public Procurement hereby publishes its fifth 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 the presidency, experts and secretariat. As will be evident, 2017 has been a year of significant changes.

Chapter 2 contains summaries of the Board's cases that are regarded as leading cases or are otherwise of particular interest. These include a number of decisions concerning the interpretation of key provisions of the Danish Public Procurement Act (*udbudsloven*). 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 once again chosen to describe some of these cases from 2017 in chapter 3.

Chapter 4 gives an account of the Danish judicial decisions in cases that were previously heard by the Complaints Board.

Chapter 5 contains statistics on the Complaints Board's activities with comments. In 2017, the Complaints Board received 103 complaints, which is almost equal to the number of complaints received in 2016. However, the Complaints Board adjudicated approx. 35% more cases on their merits compared to 2016. This significant increase is largely attributable to the additional resources allocated to the Board's well-run secretariat in 2017 by the Danish Appeals Boards Authority (Nævnenes Hus). The Complaints Board found fully or partly in favour of the complainant in approx. 22% of all cases, representing a significant drop compared to last year when the figure stood at 37%.

In 2017, approx. 50% of all cases heard by the Complaints Board were closed within the first three months of receipt. Still, the average length of proceedings increased from six to seven months relative to 2016. It is likely that the average length of proceedings was substantially affected by the fact that the Complaints Board handed down more decisions in 2017 and thus finalised a number of older cases. In addition, the cases heard by the Complaints Board in 2017 were more complex and involved more work, including deciding on requests for access to case documents in the often extensive cases during the case preparation stage, and both the parties in the individual cases and the Complaints Board have had to navigate through a relatively new set of rules since 2016.

Nikolaj Aarø-Hansen, President

Viborg, August 2018

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). The Board's activities are governed by the Danish Act on the Complaints Board for Public Procurement (the Complaints Board Act), cf. Consolidated Act no. 593 of 2 June 2016, which 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 (the Complaints Board Order), 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. The history of the law governing the Board's work was described in detail in chapter 1 of the Board's 2016 Annual Report, to which reference is made.

1.2 The Complaints Board's composition

The Complaints Board's organisation is 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.

Until March 2017, the presidency consisted of six High Court judges and three District Court judges. One of the High Court Judges was appointed to the Supreme Court, so the Board only had five High Court judges from March to July, when a replacement was appointed. In addition, one of the District Court judges was replaced, and an additional District Court judge was allocated to the Board, which means that the presidency now consists of six High Court judges and four District Court judges.

In mid-March 2017, one of the vice-presidents became new president, and the previous president became vice-president of the Board. 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 nomina-

tion 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. The Board welcomed a few new expert members during the year, as shown below.

In 2017, the members of the Complaints Board's presidency were:

President of the Complaints Board for Public Procurement:

Michael Ellehauge, High Court Judge, PhD (retired as president on 12 March 2017)

Nikolaj Aarø-Hansen, High Court Judge (appointed on 13 March 2017)

Other members of the Complaints Board's presidency:

- Kirsten Thorup, High Court Judge
- Niels Feilberg Jørgensen, Judge
- Erik P. Bentzen, High Court Judge
- Katja Høegh, High Court Judge, LLM
- Poul Holm, Judge
- Mette Langborg, Judge (to 5 October 2017)
- Kristian Korfits Nielsen, High Court Judge (to 30 March 2017)
- Hanne Aagaard, High Court Judge (from 1 July 2017)
- Jesper Stage Thusholt, Judge (from 1 July 2017)
- Charlotte Hove Lasthein, Judge (from 5 October 2017)

The Board's expert members in 2017 were:

- Michael Jacobsen, Chief Consultant
- Vibeke Steenberg, Chief Consultant
- Allan Åge Christensen, CPO (to 5 October 2017)
- 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 Responsibilities, PhD
- Grith Skovgaard Ølykke, Commercial Law Consultant, PhD

- Christina Kønig Mejl, Project Manager and Special Consultant, LLM
- Claus Pedersen, Procurement and Construction Lawyer
- Jan Kristensen, Development Manager
- Birgitte Nellemann, Head of Strategic Purchasing (from 5 October 2017)

The expert members during the previous term before 15 April 2016 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.

1.3 The Complaints Board's secretariat

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

The president of the Complaints Board is the head of the secretariat, which welcomed several new members of staff in 2017. At the start of the year, an additional administrative officer was recruited to the secretariat, which now has two administrative officers. At the start of the year, the Board had one legal special advisor, but in March 2017, an additional special advisor joined the secretariat along with a legal administrative officer who worked part time from abroad during the first couple of months, but who is now working full time in the secretariat. In addition, the secretariat included a student assistant and an intern, who worked for the Board during parts of 2017 as part of the final stages of their legal studies. On 1 November 2017, one of the Board's experienced lawyers took up a senior position at the High Court of Western Denmark, and her position was vacant for the remainder of the year.

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

In 2017, the secretariat consisted of:

- Anne-Mette Schjerning, Legal Special Advisor (to 31 October 2017)
- Jeanne Schou, Legal Special Advisor (from 1 March 2017)
- Julie Just O'Donnell, Legal Administrative Officer (from 1 March 2017)
- Dorthe Hylleberg, Administrative Officer
- Heidi Thorsen, Administrative Officer
- Nathalie Vestergaard Bull, Law Student (to 30 June 2017)
- Josephine Hyldal Sørensen, Law Student (from 1 August 2017)
- Camilla Kjær Bonné Bjerre, Intern, Business Law Student (from 20 august 2017)

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 of the 2016 Annual Report for a detailed description of this part of the Complaints Board's work. The Complaints Board is the final appeals body for local and regional governments' 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 submitting 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, only a very small share of the Board's decisions are brought before the courts of law; in 2017, only 1 out of 58 decisions. The Complaints Board's case law, and perhaps particularly decisions made within the past ten years, must be regarded as an important source of law in the application of the public procurement rules in Denmark. In addition, in his opinion of 18 December 2014 in the Ambisig case, C-601/13, paragraph 79, the Advocate General referred to one of the Complaints Board's decisions. The Complaints Board also has the advantage of being able to act faster than the courts of law. In 2017, the average length of proceedings for public

procurement cases was seven months, and to this should be added that a very large portion – approx. 50 % – 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 the 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 case 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 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 case 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 procurement procedure or reversing its award decision, if possible.

Although a decision to grant suspensive effect is not a final assessment and thus a substantive decision in the case, the Complaints Board's "prima facie decision" will in practice often serve to inform the party adversely affected that it must bring new evidence in the case to have a chance of the Complaints Board finding in its favour in the subsequent substantive decision in the case. The Complaints Board granted suspensive effect to three complaints in 2017: Decision of 30 January 2017 in the case CFD v the National Interpreters Funding Authority, decision of 26 June 2017 in the case Eltel Networks A/S v the Region of Sourthern Denmark and decision of 11 July 2017 in the case EnviDan A/S and SUEZ Water A/S v Assens Spildevand A/S (two of these decisions are discussed 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 procurement procedure is completed, which means that suspensive effect will be pointless, unless the complainant's purpose is to declare the contract ineffective. If the Complaints Board assesses that a case may be adjudicated on the written record, 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. Seven such decisions were made in 2017 (decision of 7 April 2017, Orkideen Hjemmepleje og Personlig Service ApS v the Municipality of Horsens, decision of 31 May 2017, Arthrex Danmark A/S v the Central Denmark Region, decision of 23 June 2017, MultiLine A/S v the Municipality of Furesø, decision of 4 July 2017, Munck Gruppen A/S v Rønne Havn A/S, decision of 11 July 2017, Inventarland ApS v Region Zealand, decision of 22 September 2017, Simonsen & Weel A/S v the Central Denmark Region, and decision of 26 September 2017, G4S Security Services A/S v the Mental Health Services of the Capital Region of Denmark).

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 procurement procedure or decisions in connection with a procurement procedure;
- to annul the contracting entity's unlawful decisions or cancel a procurement 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, Section 185(2) dictates that 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, of the Public Procurement Act. According to the explanatory notes to the Act, "final decision or judgment" means a final decision from the Complaints Board or a judgment from the ordinary courts which may no longer be appealed.

The "ineffective contract" sanction may be used against the contracting 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 successful tenderer. The Complaints Board's secretariat will as far as possible answer such written enquiries after 1 p.m. (weekdays) 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 a general rule 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 also more experts participate in the adjudi-

cation of a case. These cases include leading cases, particularly large or complex cases, where two members of the presidency and two expert members will participate.

In 2017, this happened in five cases, namely decision of 9 February 2017, Bricks A/S (formerly TEAM OPP represented by Bricks A/S, formerly represented by DEAS A/S) v the Central Denmark Region, decision of 20 June 2017, MT Højgaard A/S and Züblin A/S v Banedanmark, decision of 7 August 2017, Danske Færger A/S v the Ministry of Transport, Building and Housing, decision of 8 August 2017, the Danish Competition and Consumer Authority v the Central Denmark Region, and decision of 9 November 2017, C. F. Møller Danmark A/S and COWI A/S, CCO A/S, Nordic Office of Architecture and AART architechts A/S v the Capital Region of Denmark represented by Nyt Hospital and Ny Psykiatri. The four latter cases are 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 record, 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 one substantive decision was made without the involvement of an expert member in 2017: Decision of 22 September 2017, Simonsen & Weel A/S v the Central Denmark Region.

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

1.6 Eligibility conditions for complaints and complaint guidelines

The eligibility conditions for complaints are set out in Sections 6-7 and 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. In addition, the complainant must state whether there is information in the statement of claim that may, in the complainant's view, be excluded from access under the rules of the Danish Access to Public Administration Files Act.

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 on submission of the complaint or before the expiry of the time for payment fixed by the Complaints Board, the complaint will be rejected.

The complaint must describe the claims of violations that the Complaints Board is requested to consider. The Complaints Board is bound by the parties' claims and allegations (arguments), which means that it is not allowed to award more than the party has claimed or take into account arguments that were not included in the parties' submissions (Section 10(1) of the Complaints Board Act). This means that the Complaints Board will not help the complainant with the formulation of appropriate claims, but it may provide guidance to the 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 preselection or submitted a tender, but companies that would have had access to apply for preselection or submit a tender (potential candidates/tenderers) may also have a cause of 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 time limits set out in the Complaints Board Act are calculated in accordance with 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).

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 of the 2016 Annual Report. The complainant will normally be given the opportunity to make additional submissions when the Complaints Board has settled the issue of access, and before the Complaints Board makes the substantive decision in the case. In any case, 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). This is most commonly the case when a claim for annulment of the award decision has been set up. 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 allegations 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 6 December 2017, Imatis A/S v the Capital Region of Denmark, 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 statements are necessary or desirable, including if the parties agree that the case should be considered in a hearing.

Hearings are held in the offices of the Danish Appeals Boards Authority in Viborg and will generally start with a review of the parties' claims and the key documents. It is possible to supplement the information in the case with statements given at the hearing, but written statements submitted in advance to the Complaints Board will normally be preferred. In some cases, the Complaints Board deems the initial presentation of the documents in the case to be unnecessary. In that case, the Complaints Board will announce that it is acquainted with the documents in the case and the parties' positions in the pleadings. The Complaints Board may have questions that need clarification. Then, the parties' counsel may proceed to their closing statements. The hearing ends with the parties' or their counsel's closing statements, after which the case is set down for decision. Deliberations normally start immediately thereafter. Hearings will normally take 4-5 hours, but in large cases, they may take up to 1-2 days. In 2017, hearings were held in three cases (2016: two cases), while 59 cases were adjudicated on the written record (2016: 53 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. In the Complaints Board's decision of 9 November 2017, C. F. Møller Danmark A/S and COWI A/S, CCO A/S, Nordic Office of Architecture and AART architechts A/S v the Central Denmark Region represented by Nyt Hospital and Ny Psykiatri, costs were set at DKK 125,000 (EUR 16,778) for each of the successful parties.

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. However, the Complaints Board is not the appeals body in cases concerning refusal to grant access to cases on the performance of agreements concluded as a result of a procurement procedure, cf. chapter 3.
- Cases where a third party, e.g. a journalist, applies for access pursuant to the Act to documents executed or received in a complaints case that is or has been pending before the Complaints Board. In these cases, the decision whether to grant access generally lies with the Complaints Board and not the respondent contracting 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 of the 2016 Annual Report as well as chapter 3 in this Annual Report for a detailed description of this part of the Complaints Board's case law in access cases.

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 2017 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
- Requirements for specifications and organisation of procurement procedures
- Preselection
- Evaluation, including choice and publication of evaluation model
- Assortment tenders
- The Complaints Board Act, including (interim) suspensive effect and the Complaints Board's sanctions

2.2 Selected interim decisions and decisions

2.2.1 Competitive tendering obligation, direct award and modification of contracts

Interim decision of 11 July 2017, EnviDan A/S and SUEZ Water A/S v Assens Spildevand A/S

On a preliminary assessment, the contracting entity had not lifted the burden of proving that a contract on the construction of a wastewater treatment plant could be awarded without a competitive procedure in accordance with the derogation provided for in Section 22 of the Public Procurement Act (Article 14 of Directive 2014/24/EU) on public service contracts for research and development services. The complaint was granted suspensive effect.

In a notice for voluntary ex ante transparency, the utility company Assens Spildevand A/S announced that the company intended to conclude a so-called OPI agreement for the construction of a wastewater treatment plant in the Municipality of Assens at an estimated value of DKK 55 million (EUR 7.4 million). According to the notice, the Municipality had not managed to identify any wastewater treatment plant meeting the Municipality's requirements on the market, and the Municipality was not able to draw up a requirements specification without first consulting one or more private parties in a development project for the development, setup and testing of new technology. The agreement was thus to cover (applied) research with provision of original work to obtain new knowledge and experimental development. Against this background, the Municipality assessed that the OPI agreement in its entirety was exempted from the competitive tendering obligation pursuant to Section 22 of the Public Procurement Act (Article 14 of Directive 2014/24/EU) on the exemption

from the competitive tendering obligation for public service contracts for research and development services. The complainants, who requested that the complaint be granted suspensive effect, primarily asserted that the agreement was not covered by Section 22 (Article 14 of Directive 2014/24/EU), and that this was thus a case of unlawful direct award of contracts, as the principal subject-matter and the most important part of the contract was usual design services which could easily be put out to competition, or in the alternative, be made subject to a separate procedure.

The Complaints Board stated that it is for the contracting entity to prove that the conditions in the derogating provision in Section 22 of the Public Procurement Act (Article 14 of Directive 2014/24/EU) have been met. If this can be assumed to be the case only for a part of the contract, the respondent must also prove that the remaining part does not constitute the principal subject-matter of the contract, and that it is not objectively separable, cf. Section 26(4), cf. Subsection (1), of the Public Procurement Act (Article 3(3), (4) and (6) of Directive 2014/24/EU). Both parties had provided scientific material to demonstrate their views on the issue of whether the complaint should be granted suspensive effect. The Complaints Board found that it would only be relevant to consider whether the burden of proof had been lifted following further exchange of pleadings in order to assess the weight of the parties' technical views and the technical information produced in the case. On the preliminary basis, the burden of proof had thus not been lifted at the time with regard to the issue of fulfilment of the conditions in Section 22 of the Public Procurement Act (Article 14 of Directive 2014/24/EU), and the Complaints Board thus held that the prima facie case test had been passed. In keeping with the Board's practice in other cases concerning direct award, the Complaints Board also found that the condition that the complaint must be urgent had been met.

With regard to the "balancing of interests" condition, the Complaints Board stated that a contracting entity that is considering applying the derogating provision in Section 22 of the Public Procurement Act (Article 14 of Directive 2014/24/EU), which involves direct award of a contract, and also wishes to publish a prior notice for voluntary ex ante transparency, must always take into account the possibility that a complaint may be raised, and that the complaint is granted suspensive effect, cf. the Complaints Board's decision of 16 March 2015, Thermo Electron A/S v the University of Copenhagen. In addition, the damage resulting from granting the complaint suspensive effect had not been described or documented, and based on an overall assessment, the Complaints Board concluded that the third condition that the complainant's interests must outweigh the respondent's had also been fulfilled. The Complaints Board thus granted suspensive effect to the complaint. Assens Spildevand later announced that it would not be concluding a contract in accordance with the notice for voluntary ex ante transparency, after which the complaint was withdrawn. The interim decision was thus the Complaints Board's final decision in the case.

Decision of 30 November 2017, GlaxoSmithKlinePharma A/S v Statens Serum Institut and the Danish Ministry of Health

The separate parts of a mixed contract on the spin-off of vaccine production by privatisation and on purchase of vaccines, which was concluded by direct award, were inseparably linked and thus formed an indivisible whole. The principal subject-matter was not to buy vaccines, but to transfer the produc-

tion of vaccines in a privatisation, and there was no basis to conclude that a requirement for proportionality had not been complied with.

The case concerned whether Statens Serum Institut (SSI) and the Danish Ministry of Health had infringed the procurement rules by awarding a contract on the supply of vaccines to the Danish children's vaccination programme. The contract was awarded when SSI's loss-making vaccine production business was transferred to a private company as part of a privatisation that also included another activity (SSI Diagnostica). This thus amounted to a mixed contract covering the divestment of a company and the purchase of vaccines. The Complaints Board decided the case based on the case law of the European Court of Justice on mixed contracts (cf. judgments of 6 May 2010 in joined cases C-145/08 and C-149/08, Club Hotel Loutraki AE and others, paragraphs 48 and 49, and of 22 December 2010 in case C-215/09, Mehiläinen Oy and Terveystalo Healthcare Oy v Oulun kaupunki, paragraphs 36 and 37). The Complaints Board stated, among other things, that the impending sale of the company was made public in a process that respected the principles of transparency and equal treatment. In that connection, GlaxoSmithKlinePharma A/S had, like other companies, the opportunity to obtain information on the purchase of vaccines, but the company had chosen not to do so.

The Complaints Board made a specific assessment of a number of factors, including the supply difficulties in the general market for the vaccines that were comprised by the direct award and were required in the vaccination programme. The Complaints Board found that both the agreement on the transfer of the vaccine production business and the vaccine supply agreement were necessarily a part of the overall agreement on the transfer of the vaccine production business following from the decision to privatise. Against this background, it must be assumed that the different parts of the contract were inseparably linked and thus formed an indivisible whole.

Also, the Complaints Board held that the principal purpose of the overall agreement on the transfer of the vaccine production business and on the supply of vaccines for a limited period of time was not to purchase vaccines, but to transfer SSI's vaccine production activities to a private company as part of a privatisation process whereby the spun-off activities would no longer be placed in the public sector. Finally, the Complaints Board stated that – regardless of the fact that the directly awarded contract only had a term of 30 months, and not two years as had previously been announced – there was no basis for concluding that the directly awarded contract for the supply of vaccines did not meet a proportionality requirement. The complaint was thus not upheld.

2.2.2 Requirements for specifications and organisation of procurement procedures

Decision of 18 May 2017, Scan Office A/S v the Agency for Modernisation

Open procedure under Title II of the Public Procurement Act covering a framework agreement with three operators for the supply of furniture etc. with the award criterion "Price". No qualitative award criteria had been set, as all requirements were minimum requirements. It was not in breach of Section 2 of the Public Procurement Act (Article 18(1) of Directive 2014/24/EU) that tenderers were only required to declare that the minimum requirements would be met and not provide documentation for this. The decision has been described in more detail in section 2.2.5 on assortment tenders.

Decision of 6 December 2017, Imatis A/S v the Capital Region of Denmark

The Complaints Board did not agree with a tenderer that the Public Procurement Act applied in a case where an open procedure pursuant to the previous Public Procurement Directive (2004/18/EC) *was cancelled, and the contracting entity chose to change it to a negotiated procedure after the entry into force of the Public Procurement Act.*

The Capital Region of Denmark issued a contract notice on 22 December 2015 launching an open procedure pursuant to the Public Procurement Directive in force at the time covering a contract with two lots on the purchase of package solutions for patient call systems and critical alarms. Tenderers were asked to submit tenders for the supply of a central platform for a patient call system and a central platform for critical alarms.

At the expiry of the deadline, three tenderers had submitted tenders. On 20 May 2016, i.e. after the Public Procurement Act entered into force on 1 January 2016, the Region cancelled the procurement procedure on the grounds that all tenders were found to be non-compliant, after which time the Region launched a negotiated procedure without prior publication of a contract notice pursuant to Article 30(1)(a) of the previous Public Procurement Directive (2004/18/EC). The award criterion and minimum requirements etc. used in the open procedure remained unchanged. Two of the original tenderers submitted a new tender in the negotiated procedure, including Imatis. The Region rejected Imatis' tender for one of the lots as being non-compliant and decided to contract with the other tenderer for both lots.

Imatis complained to the Complaints Board against the Capital Region of Denmark, claiming, among other things, that the Region had violated the Public Procurement Act, including Section 2 (Article 18(1) of Directive 2014/24/EU) on equal treatment and transparency, by launching the negotiated procedure pursuant to the previous Public Procurement Directive and not the Public Procurement Act, as the negotiated procedure had been launched after 1 January 2016 when the Act entered into force. When the Region chose to cancel the open procedure and launch a new procedure with negotiation after the date of entry into force, the new rules applied.

The Complaints Board dismissed the claim. The Complaints Board stated that the transitional provisions do not expressly regulate all the transitional issues that may arise as a result of the new rules. Based on an overall assessment of the wording and legislative history of the provisions, the Complaints Board found that, unless there are any specific grounds to consider otherwise, they should be interpreted on the assumption that the legislator's fundamental purpose of the transitional rules was to allow ongoing procedures to continue under the existing rules, while the new rules would only apply to procurement procedures launched after the entry into force of the Act. It appeared from the legislative history behind the transitional provision in Section 196(2) of the Public Procurement Act that a negotiated procedure pursuant to Section 80(1) of the Act (Article 32(2) of Directive 2014/24/EU) would in a similar situation be regarded as having been launched before the entry into force of the Act, and the Complaints Board found that the transitional provision should be interpreted in the same way in both situations. The complainant's claim that the Public Procurement Act should have been applied was thus not upheld. One of Imatis' claims was upheld, but as this violation

was not listed as grounds for the complainant's claim for annulment, the award decision was not annulled.

Decision of 24 November 2017, Simonsen & Weel A/S v the Central Denmark Region

The procedure for award of a contract on the basis of a framework agreement on the procurement of equipment and consumables for patient monitoring fulfilled the requirements in Sections 98-100 of the Public Procurement Act for transparency, objectivity and non-discrimination (Article 33(4) and (5) of Directive 2014/24/EU). A patient safety criterion based on a medical assessment met the requirement for objectivity in Section 98(2) (Article 33(4) of Directive 2014/24/EU).

The issue in this case was the legality of the provisions on the award of a contract under a framework agreement on the procurement of patient monitoring equipment and consumables for all hospital units and institutions in the Central Denmark Region.

The contract had been put out to tender as a framework agreement with three parties. Only two companies submitted tenders, namely Vicare Medical A/S and Simonsen & Weel A/S, and the Region awarded the contract to both companies. Simonsen & Weel A/S claimed that the Complaints Board should annul the award decision, arguing essentially that the procurement documents did not contain any transparent and objective criteria for direct award of contract based on the framework agreement.

The Complaints Board dismissed the complaint. In its grounds, the Board outlined the provisions of the Public Procurement Act on the award of contracts based on a framework agreement with more than one party, including the possibilities for direct award and for reopening of the competition. The choice between the two award methods must be based on objective criteria, including the quantity, value or characteristics of the goods or services and the contracting entity's other specific procurement needs. The objective criteria must be set out in the procurement documents for the framework agreement, cf. Section 98(2) of the Act (Article 33(4) of Directive 2014/24/EU), and the procurement documents must also specify how contracts will be awarded (use of the framework agreement, cf. Section 98(3) of the Act (Article 33(4) of Directive 2014/24/EU) Direct award must be based on the terms of the framework agreement and the objective criteria set out in the procurement documents for the framework agreement, cf. Section 99 of the Act (Article 33(4)(a) of Directive 2014/24/EU), while reopening of the competition (mini-competitions) must be based on "(1) the same terms as applied for the award of the framework agreement and, (2) where necessary, more precisely formulated terms, and, (3) where appropriate, other terms referred to in the procurement documents for the framework agreement", cf. Section 100(1) of the Act (Article 33(5) of Directive 2014/24/EU). The Complaints Board went on to cite the explanatory notes to Section 98(2) (Article 33(4) of Directive 2014/24/EU) and Section 99 (Article 33(4)(a) of Directive 2014/24/EU) and the terms of the specifications governing when direct award or reopening of the competition will be applied and the criteria for this. According to the procurement documents, the choice between the two award methods depended on whether "patient safety based on a medical assessment" could have a significant impact on the patient's health and potential of cure. The specifications contained a detailed description of the criterion relating to patient safety, namely whether, according to a medical assessment, it is nec-

essary that the equipment allows for access to the monitoring data, including historical data. The Complaints Board determined that the method for the award of a contract based on the framework agreement fulfilled the requirements in the Public Procurement Act for transparency, objectivity and non-discrimination. There was no basis for considering that the specifications gave the Region full discretionary power in breach of the provisions on framework agreements in the Public Procurement Act, and it had not been proven on a balance of probabilities that the Region intended to circumvent the rules on additional supplies. As mentioned above, the patient safety criterion was based on a medical assessment. The Complaints Board assessed that the criterion met the requirement for objectivity, cf. Section 98(2) of the Public Procurement Act (Article 33(4) of Directive 2014/24/EU), just as the provision allowed for consideration to be had to the characteristics of the goods and the contracting entity's specific procurement needs.

The Complaints Board's decision in the case was an expedited decision, meaning that the case was adjudicated within the deadline for settling the issue of suspensive effect, as the case was a standstill case.

Interim decision of 22 December 2017, Tolkdanmark ApS v National Interpreters Funding Authority

The Complaints Board is not competent to adjudicate in matters concerning whether the competition rules have been complied with, unless the procurement documents stipulate otherwise. The contracting entity's statements on the legality under competition law of consortia did not amount to a minimum requirement, cf. Section 137(1)(4) of the Public Procurement Act (Article 57(4)(d) of Directive 2014/24/EU).

TolkDanmark ApS (Tolkdanmark) complained during the standstill period of a procurement procedure for live captioning and sign language interpretation for the hearing-impaired. According to the specifications, tenderers were required to be able to provide at least 15 hours of interpreting weekly. It was also a possibility for several tenderers to submit a tender as a consortium. The following was stated with regard to suppliers forming a consortium: "[They] must ensure that the competition rules are complied with. According to these, competing companies are allowed to submit joint tenders, but only if they do not each have the capacity to perform the service alone. Otherwise, this may be deemed to be a cooperation aimed at restricting competition, i.e. a cartel." In the ESPD in the digital procurement system, tenderers were asked to confirm that they were not subject to any grounds for exclusion, and, for consortia, to list the members of the consortium. Finally, it was a "minimum requirement that at least 15 hours of interpretation is offered per week per framework agreement". During the procurement procedure, tenderers asked, among other things, how many members were allowed in a consortium, and how it would be assessed whether the number of members in a consortium complied with the competition rules, and finally, how many self-employed interpreters were allowed in a consortium. The National Interpreters Funding Authority replied that "it depends on the composition of the individual companies" and gave a couple of examples of legal consortia and illegal cartels. Another question concerned whether a supplier able to provide five hours a week for social jobs for the National Interpreters Funding Authority and ten hours per week directly to local authorities, e.g. working for hearing-impaired people who have been granted interpretation assistance by a job centre, could work as a supplier or subsupplier to another interpretation supplier that was al-

ready able to provide 15 hours per week. The National Interpreters Funding Authority replied that the question of whether this would be in breach of the competition rules on anti-competitive agreements would have to be assessed on a case-by-case basis, and also referred to guidelines issued by the Danish Competition and Consumer Authority on consortia. For one of the partial framework agreements, the National Interpreters Funding Authority concluded a contract with, among others, DB-tolkene which comprised five named interpreters and offered 40 hours of interpreting a week. During the complaint procedure, Tolkdanmark, one of the unsuccessful tenderers, claimed that this consortium had been created in breach of the competition rules, that the participants should have submitted separate tenders, and that the National Interpreters Funding Authority should have rejected the tender from DB-tolkene because it was contrary to the specifications for five self-employed interpreters to submit a joint tender offering 40 hours of interpreting per week, and that this thus amounted to an illegal cartel.

The Complaints Board did not uphold the complaint, stating that the Board was not competent to adjudicate in matters concerning whether the competition rules have been complied with pursuant to Section 10(1) of the Complaints Board Act. However, if the National Interpreters Funding Authority had made failure to comply with the competition rules a ground for exclusion for consortia, the issue could have been considered by the Complaints Board as part of its assessment of whether the tenderer was subject to the ground for exclusion.

As the National Interpreters Funding Authority's statements in the specifications and in its replies during the procurement procedure concerning tenders from consortia could only be considered to be provided for guidance on the competition rules on consortia, the National Interpreters Funding Authority had not made consortia's compliance with the competition rules a ground for exclusion. Against this background, the Complaints Board held that the prima facie case test had not been passed, as it was not likely that the complaint would be upheld. Tolkdanmark later withdrew its complaint.

2.2.3 Preselection

Decision of 20 June 2017, MT Højgaard A/S and Züblin A/S v Banedanmark

Decision on the consequences under public procurement law of a consortium participant's insolvency during a negotiated procedure under the Utilities Directive. The decision is the Complaints Board's decision after the European Court of Justice's judgment of 24 May 2016 in case C-396/14 in response to the Complaints Board's request for a preliminary ruling (2016 Annual Report, chapter 5, to which reference is made).

Banedanmark, the railway infrastructure operator in Denmark, launched a negotiated procedure according to the Utilities Directive for the construction of a new railway line between Copenhagen and Ringsted. In addition to the complainant, which was a consortium, the preselected tenderers also included a joint venture between E. Pihl & Søn A/S and Per Aarsleff A/S. After being preselected, but before submitting its first negotiating tender, E. Pihl & Søn A/S was declared insolvent. However, despite this, the joint venture submitted its first negotiating tender. Per Aarsleff A/S then proceeded

alone and submitted the second and third tenders in its own name, and Banedanmark awarded the contract to Per Aarsleff A/S. During this final part of the case, in its consideration of the individual claims, the Complaints Board referred to, among other things, the fact that the decisive point in the Court of Justice's judgment was whether Per Aarsleff A/S would, by itself, fulfil the preselection requirements, which remained undisputed. Another factor was whether the continuation of Per Aarsleff A/S's participation in the procedure meant that the other tenderers were placed at a competitive disadvantage.

After having reviewed the case, the Complaints Board held that Per Aarsleff A/S did not have a competitive advantage at the expense of its competitors by not being bound by the first negotiating tender. In addition, Per Aarsleff A/S did not acquire any priority right to hire the now unemployed employees from the insolvent company or any information that put the company in a particularly advantageous position, thereby putting the other tenderers at a disadvantage in the competition. A number of claims concerning the evaluation were also not upheld. Accordingly, there was no basis for upholding the claim for annulment of the award decision.

2.2.4 Evaluation, including choice and publication of evaluation model

Decision of 7 April 2017, Orkideen Hjemmepleje og Personlig Service ApS v the Municipality of Horsens

Complaint concerning the contracting entity's failure to provide sufficient information in the procurement documents about the scoring model used was not upheld.

After having conducted a market dialogue, the Municipality of Horsens launched a restricted competition under Title III of the Public Procurement Act (the light regime) (Articles 74-76 of Directive 2014/24/EU). After the Municipality's announcement of its award decision, an unsuccessful tenderer who had also participated in the market dialogue complained to the Complaints Board. The complainant submitted, among other things, that the Municipality had infringed the principle of equal treatment set out in Section 2(1) of the Public Procurement Act (Article 18(1) of Directive 2014/24/EU) by using an unsuitable model for the evaluation of the tenders in respect of the subcriterion "Price" and by not having provided sufficient information in the procurement documents about the scoring model used for evaluating the tenders in respect of the subcriterion "Quality". According to the specifications, the most economically advantageous tender would be identified using the award criterion "best price-quality ratio", where price weighted 60%. With regard to the subcriterion "Price", it appeared that this would be evaluated using three sub-subcriteria. The evaluation model was not detailed. The Municipality evaluated the tenders based on the sub-subcriteria in accordance with a memo drafted by the Municipality before the procurement documents were submitted to the preselected tenderers. The Complaints Board dismissed the complaint. The Complaints Board first stated that the procedure was covered by Title III of the Public Procurement Act (Articles 74-76 of Directive 2014/24/EU), for which reason the provision in Section 160 of the Act dictating that the evaluation method to be used must be described in the procurement documents did not apply. Against this background, and since the Municipality accordingly had a wide discretion to determine its evaluation model and to evaluate the tenders, the complaint was not upheld. The Com-

plaints Board's decision in the case was an expedited decision, meaning that the case was adjudicated within the deadline for settling the issue of suspensive effect, as the case was a standstill case.

With regard to the requirements in Section 160(1) of the Public Procurement Act when this provision does apply, see, i.a., decision of 8 August 2017, the Danish Competition and Consumer Authority v the Central Denmark Region.

Cases on the application of Section 160(1) of the Public Procurement Act to procurement procedures under the Utilities Directive include decision of 7 November 2017, Vojens Taxi og Servicetrafik ApS v Midttrafik, Sydtrafik and Fynbus.

Decision of 27 April 2017, Tolkegruppen Oversættergruppen P/S v the Municipality of Copenhagen

Service certificate from the Danish Business Authority documented that a tenderer was not covered by the ground for exclusion concerning bankruptcy etc. (Section 137(1)(2) of the Public Procurement Act (Article 57(4)(b) of Directive 2014/24/EU). Also, the Board stated that a contracting entity is only required to verify the information in a tender etc. if there are any particular grounds that warrant such verification in special cases (Section 159(3) of the Public Procurement Act (Article 56(1) and (3) of Directive 2014/24/EU).

The procurement procedure concerned a framework agreement with several suppliers for the performance of interpretation services. The complaint disputed the compliance of one of the successful tenders. The Complaints Board stated that, as provided for in the specifications, the Municipality had obtained a service certificate from the Danish Business Authority that documented that the successful tenderer was not covered by the ground for exclusion in the specifications concerning bankruptcy etc. (Section 137(1)(2) of the Public Procurement Act (Article 57(4)(b) of Directive 2014/24/EU). The procedure had followed Section 137(1)(2) of the Public Procurement Act (Article 57(4)(b) of Directive 2014/24/EU) and Section 153(1)(2) of the Act (Article 60(2), first and second paragraphs, of Directive 2014/24/EU) and the legislative history behind these provisions, which expressly stipulates that documentation may be provided in the form of, among other things, a service certificate issued by the Danish Business Authority.

Another claim was that the Municipality had been required to undertake further examination, which, according to the complainant, would have shown that the successful tenderer was not able to provide the required number of interpreters. The Complaints Board stated that, according to Section 159(3) of the Public Procurement Act (Article 56(1) and (3) of Directive 2014/24/EU), the contracting authority must *in case of doubt* carry out effective verification of the information and documentation in the application or tender. The explanatory notes to Section 159(3) of the Act (Article 56(1) and (3) of Directive 2014/24/EU) do not provide any interpretative aid for this provision. It must be read in conjunction with the corresponding provision in Section 164(2) of the Act (Article 67(4) of Directive 2014/24/EU). According to both these provisions and previous case law, the general rule is that a tender must be evaluated on its merits, cf., i.a., the Complaints Board's decision of 28 March 2007, Fujitsu Siemens Computers A/S v the Danish Ministry of Finance and SKI. The contracting entity is

only required to verify the information in the tender, if there are any particular grounds that warrant such verification *in special cases*.

The Complaints Board also stated that the obligation to verify information in such special cases is supplemented by the discretionary option provided for in Section 159(5) of the Public Procurement Act (Article 56(3) of Directive 2014/24/EU) for the contracting entity to request a tender to submit, supplement, clarify or complete the application or tender. Regard must also be had to the European Court of Justice's case law concerning the contracting entity's right to obtain further information, cf., i.a., its judgment of 10 October 2013, Manova v the Danish Ministry of Education, and, i.a., the Complaints Board's decision of 10 March 2010 in that case (the Complaints Board's 2013 Annual Report, page 21 et seq.). The contracting entity's decision on whether to request further information and documentation from an applicant or a tenderer is, according to the wording of Section 159(3) (Article 56(1) and (3) of Directive 2014/24/EU) and Section 164(2) (Article 67(4) of Directive 2014/24/EU), of a discretionary nature. The Complaints Board cannot overrule the contracting entity's discretion and can thus only verify whether the boundaries of such decision have been exceeded, cf. also the Complaints Board's decision of 10 February 2017, Viking Medical Scandinavia ApS and others v Amgros I/S.

In this case, the Complaints Board found no basis for holding that the Municipality had been obliged to verify the information in the tender from the successful tenderer, and this claim was therefore also not upheld. The decision is an interim decision concerning suspensive effect. When the decision had been made, the complaint was withdrawn, as the Complaints Board had stated that the complaint appeared to be unfounded (no "fumus").

Decision of 7 August 2017, Danske Færger A/S v the Ministry of Transport, Building and Housing

Complaint regarding award of contract for ferry services to Bornholm at a value of approx. DKK 3.7 billion (EUR 497 million) not upheld. The successful tenderer, Mols-Linien, had declared that it would meet all minimum requirements. The Complaints Board considered that the tender, which comprised, among other things, renovation and new construction of ferries and change to the local development plan for a port, was compliant in respect of a number of objections raised in the complaint.

The contract for ferry services to Bornholm was put out to tender under the Utilities Directive and had a term of ten years. The award criterion was "the most economically advantageous tender". Two companies submitted tenders, namely Mols-Linien and Danske Færger A/S. Danske Færger A/S had operated the service for a number of years, most recently under a contract awarded in a procurement procedure in 2009. Ten claims had been made in this case, including that Mols-Linien's tender for various reasons should have been rejected as non-compliant. Because of its scale and importance, the case was heard by two members of the Complaints Board's presidency and two expert members.

The Complaints Board stated, among other things, that a tender must be evaluated on its merits, cf., i.a., the Complaints Board's decision of 28 March 2007, Fujitsu Siemens Computers A/S v the Ministry of Finance and SKI, and that the contracting entity is only obliged to verify the information if there

are any particular grounds that warrant such verification in special cases. The contracting entity's decision on whether to request further information and documentation from an applicant or a tenderer is of a discretionary nature. The Complaints Board cannot overrule the contracting entity's discretion and can thus only verify whether the boundaries of such decision have been exceeded, cf. also the Complaints Board's decision of 10 February 2017, Viking Medical Scandinavia ApS and others v Amgros I/S, and decision of 27 April 2017, Tolkegruppen v the Municipality of Copenhagen. In its judgment of 15 June 2012, Montaneisen GmbH v the Danish Coastal Authority (Danish Weekly Law Reports 2012.2952 H), the Supreme Court held that a contracting entity is obliged to also verify – and, if relevant, react to – information of which the contracting entity only becomes aware after the award decision, but before conclusion of the contract. If the information is only received after contract conclusion, the matter is to be settled according to contract law and not public procurement law. In this case, the specifications could not be taken to mean that documentation showing that the tender and the ferries already met all the requirements in the performance specification was required to be available already at the time of submission of the tender.

The Complaints Boards also stated, among other things, that the facts that there were restrictions on the number of calls at the Port of Ystad, and that Danske Færger A/S had advised that it was not easy to be granted an exemption for additional calls at the Port, did not in itself give reason to consider that the Ministry should have rejected the tender from Mols-Linien as being non-compliant. There is no general rule dictating that, when submitting the tender, the tenderer must already be in possession of all the public law permits and the like necessary to perform the contract. Accordingly, that Mols-Linien after being awarded the contract had to apply for a change of the local development plan for the Port of Rønne did not mean that Mols-Linien's tender was non-compliant. The Complaints Board gave importance to the facts that Mols-Linien in its tender had stated that all minimum requirements would be met, and that there was no reason to believe at the time of submission of the tender that such change would not be allowed, and that it could not be assumed at the time of the Complaints Board's decision that the application would not be granted. The Complaints Board thus dismissed the claims.

Decision of 8 August 2017, the Danish Competition and Consumer Authority v the Central Denmark Region

With regard to the interpretation of Section 160(1) of the Public Procurement Act, the Complaints Board held that there was no legal basis for requiring that the slope of the linear scoring model for the evaluation of the tenders based on the financial subcriterion should be indicated in the procurement documents.

The case concerned a procurement procedure launched by the Central Denmark Region to purchase anaesthesia equipment. The complainant was the Danish Competition and Consumer Authority who considered the case a leading case. For that reason, the case was heard by two members of the presidency and two expert members. The case concerned the interpretation of the key provision in Section 160(1) of the Public Procurement Act, according to which: "A contracting entity must state the award criteria, describe the evaluation method and describe the elements of importance in the evaluation of the tender in the procurement documents".

The Danish Competition and Consumer Authority's primary claim in the case was that the Region had violated Section 160(1) by "not stating in the procurement documents the slope of the linear scoring model for the evaluation of the tenders based on the financial subcriterion". The secondary claim was that the Region had violated the provision by "not providing sufficient information in the procurement documents about how the tenders would be evaluated based on the financial subcriterion". The Danish Competition and Consumer Authority submitted, among other things, that according to the wording of Section 160(1), purposive construction and preconditions in the Public Procurement Act, the contracting authority was obliged to inform tenderers of the slope. Conversely, the Central Denmark Region submitted that Section 160(1) does not imply a duty to indicate the slope in the form of a specific percentage or two specific amounts used for interpolation when using linear scoring models. The Complaints Board did not uphold the Danish Competition and Consumer Authority's claims.

The Complaints Board considered that Section 160(1) of the Public Procurement Act does not implement a provision in the Public Procurement Directive, but is a purely Danish rule. There is no indication in the Public Procurement Act of what is meant by "evaluation method". In addition, a precondition in the explanatory notes that the Public Procurement Directive contained a stricter requirement for ex-ante transparency of the evaluation than that following from Danish case law in complaints cases had not been confirmed by the European Court of Justice's – subsequent – case law. Accordingly, Section 160(1) should not be given a wider interpretation than is warranted by its actual wording and the explanatory notes.

The Complaints Board went on to refer to the explanatory notes to Section 160(1), according to which the contracting entity must describe "the methodology used by the contracting entity in its evaluation of the tenders to identify the most economically advantageous tender", and according to which the purpose of designating an evaluation method in advance is to ensure that the contracting entity is not completely free to choose how to evaluate the tenders. According to the explanatory notes, another purpose is to ensure that tenderers are able to assess whether they wish to spend resources on preparing a tender and to optimise their tenders. Finally, according to the explanatory notes, the tenderers are also better placed to check the contracting entity's evaluation of the tenders.

The Region had stated that it would use a linear scoring model that the maximum score would be awarded to tenders with the lowest price, and that 0 points would be given to the tender that was "xx%" above the tender with the lowest price. Further, the price level that was anticipated before the deadline for tenders and the spread between the actual prices quoted in the tenders, adjusted for any abnormally low or abnormally high prices, would be taken into account when determining the percentage used to calculate the reference point. Accordingly, the slope of the linear scoring model could not have been determined before knowing the content and distribution of the tenders.

The evaluation method chosen and described did not allow the Region to freely choose how to evaluate the tenders. Also, it was not clear how knowing the slope (possibly indicated as a secondary or tertiary slope) in a linear evaluation model would in itself give potential tenderers who know the market a better basis for choosing whether to submit a tender, or to optimise such tender, than the

description of the evaluation method provided by the Region, and where the price weighted 35%. For any tenderer, the most important consideration in terms of the financial subcriteria must undoubtedly be not to quote a price that is too high. Finally, the tenderers did have full access to verifying that the Region had used the evaluation method stipulated in the specifications. The Complaints Board thus held: "Accordingly, there is no legal basis in Section 160(1) of the Public Procurement Act for requiring in a procurement procedure as the one at issue in this case that the slope of the linear scoring model for the evaluation of the tenders based on the financial subcriterion should be indicated in the procurement documents."

The Danish Competition and Consumer Authority has subsequently revised its guidance on evaluation methods based on this decision.

Decision of 9 November 2017, C.F. Møller A/S v the Capital Region of Denmark represented by Nyt Hospital and Ny Psykiatri Bispebjerg and COWI A/S, Nordic Office of Architecture and AART architects A/S v the same

The Capital Region of Denmark launched a negotiated procedure in accordance with point (3) of Article 31 of the previous Public Procurement Directive (2004/18/EC) following a design competition for total consultancy services for the construction of a building at Bispebjerg Hospital. The three winners of the design competition selected by the Region submitted compliant tenders, after which time three negotiating meetings were held with each of the three tenderers. The award criterion was "the most economically advantageous tender" with the subcriteria "Project", "Organisation and staffing" and "Fee", including four equal sub-subcriteria. The evaluation was to be made by representatives from the hospital's management and a principal consultant backed by three subconsultants and an external competition secretary.

The principal consultant received drafts from the subconsultants and submitted two draft evaluations just before the summer holidays of 2015. Both of these pointed to the tender from C.F. Møller as the most economically advantageous tender. During the following weeks, the management, supported by the principal consultant, made five so-called "numerical evaluations", after which the final evaluation was made, still without the help of the subconsultants. In the final evaluation, the consortium whose tender was deemed to be the least advantageous after the previous evaluations was considered the best, while the tenders from the two other tenderers received the exact same evaluation. The subconsultants disclaimed responsibility for this evaluation on which the Region's award decision was subsequently based.

The two unsuccessful tenderers complained to the Complaints Board, which held, among other things, that the Region's evaluation of one of the complainants' project had been in breach of the specifications, and that one of the contracting entity's subconsultants had to be regarded as disqualified due to certain connections to one of the participants in the successful consortium. Furthermore, the Complaints Board considered that the contracting entity had violated the principles of equal treatment and transparency by giving an element of the tender a negative weight, although it had to be taken into account that the contracting entity had stated in connection with the evaluation in the design competition that this would be verified later, and considered that the contracting entity dur-

ing the negotiation meetings with the tenderer in question had said that this had indeed been verified. In the assessment of the evidence on this aspect of the case, importance was given, among other things, to the fact that the contracting entity had failed to draft minutes of the negotiating meetings, which was in breach of the specifications. In that connection, the Complaints Board stated that, if the contracting entity only changes its assessment of an element of the tender during its evaluation of a tenderer's final tender, and this is contrary to information previously given, the contracting entity will not be entitled to use this new assessment, as this would be in breach of the principle of transparency. According to the principle of equal treatment, this may, in the given circumstances, also result in the contracting entity not having access to making an award decision, unless the competition is reopened and the contracting entity corrects this misleading information provided to the tenderer(s) concerned. After having conducted a thorough review of the evidence, the Complaints Board also found that the Region's negotiating organisation and evaluation group comprised people who had already early on in the process selected which tenderer they believed that the contract should be awarded to, which was unjustified at this point in time. During the negotiations, the tenderers were not treated equally, and the result of the evaluations was affected unfairly. In that context, the contracting entity gave the successful tenderer information before a negotiation meeting about which issues the contracting entity was going to bring forward at the meeting. Against this background, the Complaints Board annulled the award decision.

2.2.5 Assortment tenders

Decision of 9 January 2017, Abena A/S v Statens og Kommunernes Indkøbsservice A/S (SKI)

A complaint claiming that the contracting entity in an assortment tender, according to information available to the complaint, had used incorrect consumption estimates in the evaluation of the tenders in relation to the subcriterion "Price" was not upheld, although this information could have led to a more qualified estimate, because the contracting entity was not and should not have been in possession of the complainant's information on the past consumption.

The case concerned an assortment tender pursuant to the previous Public Procurement Directive (2004/18/EC) concerning a framework agreement for the supply of nursing articles, primarily for the municipal health service. With regard to the subcriterion "Price", the tenders were evaluated based on the quoted price per product, where the weighting of the individual product lines depended on "the customers' total, estimated consumption" which is "based on historical data and expected consumption" for the individual products. The information about the consumption estimates was indicated in the specifications. After the conclusion of the procurement procedure, an unsuccessful tenderer claimed that SKI had breached the principles of equal treatment and transparency in Article 2 of the Directive and the provision in Article 53, as the price evaluation model was not suitable to identify the most economically advantageous tender, as it was based on unrealistic consumption estimates. In support of its complaint, the complainant had referred to the fact that the stated consumption estimates for the individual products showed that the expected consumption was 0 or 1 during the term of the agreement, despite the fact that the complainant had seen quite significant sales of these products in Denmark. In respect of a number of other products, the complainant referred to its own sales to 16 of the 54 municipalities covered by the framework agreement and in-

formation from other suppliers and submitted that the estimates provided were much too low or too high.

The Complaints Board dismissed the complaint. The Complaints Board stated in this context that the Public Procurement Directive does not set out any requirements for contracting entities' factual basis, including special studies, for the expected consumption estimates indicated in assortment tenders as the one at issue in this case. The information used by SKI, including input and experience from a project group that was set up for this purpose, was not unjustified. SKI was not and should not have been in possession of information such as that produced by Abena during the complaints case, which meant that the information was irrelevant to the case, regardless of whether it could have given rise to a more qualified estimate. Furthermore, as a general rule, it is not a matter of public procurement law whether the contracting entity was wrong in basing its estimate, which was performed using professional judgment, on the assumption that the individual product lines could be substituted and that this would affect consumption. There was no basis for assuming that the estimates were provided to put one of the tenderers in an advantageous position in the competition, or that they were based on unjustified considerations, for which reason it was held that the estimates reflected SKI's best estimate of the expected consumption. The evaluation model was thus suited to identify the "most economically advantageous tender". That the tenderers, who believed to know more about the expected consumption, were able to optimise their tenders could not lead to another result.

Decision of 18 May 2017, Scan Office A/S v the Agency for Modernisation

Open procedure under Title II of the Public Procurement Act covering a framework agreement with three operators for the supply of furniture etc. with the award criterion "Price". No qualitative award criteria had been set, as all requirements were minimum requirements. It was not in breach of Section 2 of the Public Procurement Act (Article 18(1) of Directive 2014/24/EU) that tenderers were only required to declare that the minimum requirements would be met and not provide documentation for this. Documentation in the form of a service certificate showing that an applicant was not covered by the grounds for exclusion, cf. Section 153(1)(2) of the Public Procurement Act (Article 60(2), first and second paragraphs, of Directive 2014/24/EU), and there was no reason to verify this, cf. Section 159(3) of the Act (Article 56(1) and (3) of Directive 2014/24/EU).

In a comprehensive procurement procedure under Title II of the Public Procurement Act concerning a framework agreement for the purchase of furniture for government institutions etc., the award criterion was "Price", and all requirements for the products were minimum requirements that had to be met. The minimum requirements were divided into general minimum requirements for all products, requirements relating to the environment, health and safety at work and energy and specific minimum requirements for each of the products. The tenderers were only required to submit a completed price appendix, a completed ESPD and an automatically generated cover letter containing a passage stating that the tenderer confirmed that it met all minimum requirements. A tenderer, whose price was very close to that of the three successful tenderers, complained that it had not been possible for the Agency for Modernisation to verify whether the minimum requirements had been met and stated that the Agency for Modernisation had remained ignorant of whether the tenders were

compliant, and that the Agency would not have been able to perform effective verification, cf. Section 164(2) of the Public Procurement Act (Article 67(4) of Directive 2014/24/EU) and Section 159(2) and (3) (Article 56(1) and (3) of Directive 2014/24/EU).

The Complaints Board stated that the Agency had been justified not to lay down qualitative award criteria and instead choose to ensure quality by only setting minimum requirements. It is a matter of contract law whether a tenderer actually meets a minimum requirement as confirmed. The Complaints Board noted that the quoted prices were very similar, which implied that none of the tenders failed to meet the minimum requirements. Similarly, the principle of effectiveness does not entail an obligation on the contracting entity to ensure in advance that it is possible to verify that the minimum requirements for a tender would be met on delivery. The complainant had stated that it is common practice in the industry not to take action against non-compliant deliveries, but this did not change the assessment of the claim.

The complainant also claimed that the Agency had acted in breach of Section 151(1) of the Public Procurement Act (Article 59(4) and (5) of Directive 2014/24/EU) and Section 159(2) (Article 56(1) and (3) of Directive 2014/24/EU) by not having obtained the necessary documentation that two of the successful tenderers were not covered by any of the mandatory grounds for exclusion, as there was a lack of information on some foreign board members. Referring to Section 159(3) of the Public Procurement Act (Article 56(3) of Directive 2014/24/EU) and Section 164(2) (Article 67(4) of Directive 2014/24/EU) and to the case law in complaints cases read in conjunction with Section 159(5) (Article 56(3) of Directive 2014/24/EU), the Complaints Board stated that the contracting entity is only obliged to verify the information if there are any particular grounds that warrant such verification in special cases. After having received the service certificates etc., the Agency found no reason – and thus had no duty – to obtain additional information. None of the claims in the complaint were thus upheld.

Decision of 3 October 2017, Oluf Brønnum & Co. A/S v the Municipality of Copenhagen

The contracting entity had not breached Section 159(5) of the Public Procurement Act (Article 56(3) of Directive 2014/24/EU) when it obtained documentation for the technical specifications of the products from the successful tenderer, as this did not change the tender or amount to a new tender. On the other hand, it was not possible to ask the complainant to " supplement, clarify or complete" its tender, which was clearly non-compliant. The claim for the Board to order that the contract be terminated, cf. Section 185(2) of the Public Procurement Act, was not upheld.

The Municipality of Copenhagen organised an open procedure pursuant to Title II of the Public Procurement Act concerning the delivery of catering equipment etc. A complainant, whose tender had been rejected as non-compliant, submitted that the successful tenderer's tender was non-compliant as it failed to meet a number of minimum requirements. The Municipality then performed a technical clarification of the successful tender, cf. Section 159(5) of the Public Procurement Act (Article 56(3) of Directive 2014/24/EU). The Complaints Board held that this did not result in new products being offered or a new tender being made. Accordingly, there was no basis for upholding the claim on incorrect evaluation of the successful tender. The equal treatment principle had not been

breached, cf. Section 2 of the Public Procurement Act (Article 18(1) of Directive 2014/24/EU) when the Municipality did not perform a similar technical clarification of the complainant's tender, which was non-compliant. The claim that the Complaints Board should order the Municipality to terminate the contract was not upheld, as the complainant had no cause of action to request that the Board order the Municipality to comply with the provision and terminate the contract.

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

Interim decision of 21 April 2017, Den selvejende Institution Ringkøbing Svømmehal v the Municipality of Ringkøbing-Skjern

The urgency test had been passed, and a balancing of interests would in this specific case favour the complainant. However, as the prima facie case test had not been passed, the complaint was not granted suspensive effect.

The Municipality of Ringkøbing-Skjern organised a procurement procedure pursuant to Title III of the Public Procurement Act (the light regime) (Articles 74-76 of Directive 2014/24/EU) for the operation of a swimming facility. This was a fixed-price procedure, where the contract would be awarded to the tenderer that best matched the Municipality's requirements within the annual operating grant of DKK 1.4 million (EUR 188,000). Two tenders were submitted, and the contract was not awarded to the complainant who had operated the swimming facility up to now. The complainant, who had had various disagreements with the Municipality, submitted, among other things, that the Municipality had made a prior agreement with the successful tenderer. The Complaints Board did not grant the complaint suspensive effect, as it was not likely that the award decision would be annulled. The prima facie case test had thus not been passed. The facts that the urgency test had been passed, and that a balancing of interests would in this specific case favour the complainant, could not lead to a different result. In the final decision of 18 August 2017, only one claim was upheld, and this did not justify annulment.

Interim decision of 26 June 2017 and decision of 23 August 2017, Eltel Networks A/S v the Region of Southern Denmark

A complaint was granted suspensive effect, as it was likely that the complainant would be successful in the claim that the Region had failed to use the previously announced evaluation model and had instead used a model that, in relation to a part of the delivery, was based on the Region's actual product portfolio with the suppliers rather than the product overview provided in the specifications, and that this amounted to such a particularly serious prima facie case that the requirement for urgency was eased in line with the European Court of Justice's case law.

In March 2017, the Region of Southern Denmark launched an open procedure pursuant to Title II of the Public Procurement Act for an agreement for the operation and maintenance etc. of a telephone system. The award criterion was "the best price-quality ratio". The financial subcriterion (which weighted 45%) included sub-subcriterion no. 5, which weighted 25%, on remuneration for maintenance of software and hardware service. According to the procurement documents, this sub-

subcriterion in effect meant that tenderers were asked to state discount rates for hardware and software. According to the description of the evaluation method for this sub-subcriterion in the procurement documents, the Region would calculate part and total standard prices from the suppliers and then calculate each tenderer's part and total prices with the discount rates offered based on a product overview in an appendix to the specifications and current product catalogues showing the standard prices of the Region's hardware and software suppliers. However, the Region of Southern Denmark did not use the evaluation method described in the procurement documents in its evaluation. Instead of using the product overview in the appendix, the Region updated the product portfolio with assistance from the Region's principal supplier. Based on the principal supplier's current prices, the Region calculated a total price for the portfolio from the principal supplier, and then, based on the discounts offered by each tenderer, it calculated the prices and price specifications quoted as described in the specifications. According to the information provided, the same procedure with an update of the product overview was used for the other products. During the standstill period, the previous supplier Eltel Networks A/S ("Eltel"), which was not awarded the contract, complained, claiming in particular that the procurement documents lacked transparency and were inadequate.

The Complaints Board granted suspensive effect to the complaint. Based on a preliminary assessment, the Complaints Board found that the evaluation method had been changed, and that this had to be assumed to be contrary to the principle of transparency and equal treatment in Section 2 of the Public Procurement Act (Article 18(1) of Directive 2014/24/EU) and Section 160(1) of the Act. Furthermore, it was likely that Eltel's claim for annulment would be upheld. The prima facie case test had thus been passed. According to the information available on the volume and significance for Eltel of the tendered contract, it had been established that Eltel would suffer a major loss by not being granted suspensive effect. Based on an overall assessment of the nature of the infringement, the Complaints Board further held that this amounted to such a particularly serious prima facie case that easing the requirement for urgency was justified, cf. the principle in the European Court of Justice's judgment of 23 April 2015 in case C-35/15 P(R), Vanbreda.

This is the first decision where the Complaints Board has expressly eased the requirement for urgency in accordance with the European Court of Justice's judgment in the Vanbreda case. That easing implies that the requirement for urgency is eased when the complaint is filed during the standstill period, before contract conclusion, in cases where the infringement is particularly serious. In several unpublished interim decisions, which predate the Eltel decision, the Complaints Board has not granted suspensive effect for complaints filed during the standstill period, as any infringement could not, on the present basis, be assumed to be particularly serious. After the Complaints Board's decision to grant suspensive effect, the Region annulled the award decision and made a new evaluation as set out in the specifications, i.e. based on the product overview in the appendix. The new evaluation led to the same result as the first evaluation. During the standstill period for the new award decision, Eltel then made a claim for annulment of the new award decision. On 23 August 2017, the Complaints Board adjudicated the case on its merits and did not address the issue of suspensive effect. In this decision, the Board only upheld very few of Eltel's claims about ambiguities in the procurement documents etc., and the infringement ascertained did not justify annulment of the new award decision.

Interim decision of 11 July 2017, EnviDan A/S and SUEZ Water A/S v Assens Spildevand A/S

On a preliminary assessment, the contracting entity had not lifted the burden of proving that a contract on the construction of a wastewater treatment plant could be awarded without a competitive procedure in accordance with the derogation provided for in Section 22 of the Public Procurement Act (Article 14 of Directive 2014/24/EU) on public service contracts for research and development services, as the Complaints Board found that this required further exchange of pleadings in order to assess the weight of the parties' technical views and the technical information produced in the case. The requirement for urgency was satisfied, as the case concerned a direct award procedure. A balancing of interests exercise favoured the complainant, as a contracting entity that is considering applying the derogating provision in Section 22 of the Public Procurement Act (Article 14 of Directive 2014/24/EU), which involves direct award of a contract, and also wishes to publish a prior notice for voluntary ex ante transparency, must always take into account the possibility that a complaint may be raised, and that the complaint is granted suspensive effect. The complaint was granted suspensive effect. A detailed account of the decision is provided in section 2.2 "Competitive tendering obligation, direct award and modification of contracts".

Decision of 12 July 2017, Tieto Denmark A/S v the Ministry of Finance

Complaint against the Ministry of Finance for having acted in contravention of the principles of equal treatment and transparency by having cancelled a mini-competition and reopening the competition and for having awarded the contract to a tenderer with an abnormally low tender in the new competition. There was no basis for splitting the complaint into two cases, considering the claims concerning the original competition and the claims concerning the new competition separately. The award decision in the reopened competition was disputed, after which the Ministry revoked the award and made a new award decision. After the annulment of the first award decision, the complainant had withdrawn a number of claims concerning that decision, and when the standstill period for the Ministry's second award decision expired, it announced that it wished to "maintain" its earlier claims; however such that they now concerned the second award decision. The Complaints Board considered that these claims had been made after the standstill period.

On 12 October 2016, the Ministry of Finance had launched a mini-competition (the first procedure) under an SKI framework agreement that entered into force on 4 November 2013, which meant that the procedure was subject to Directive 2004/18/EC (the previous Public Procurement Directive). On 22 December 2016, the Ministry of Finance cancelled the procedure. On 23 February 2017, the Ministry reopened competition for the contract (the second procedure). On 31 March 2017, the Ministry notified the tenderers of who had submitted the most economically advantageous tender. However, on 27 April 2017, the award was revoked "due to errors in the evaluation of tenders". Prior to the annulment of 27 April 2017, Tieto Denmark A/S had complained to the Complaints Board. On 23 May 2017, the Ministry of Finance made a new award decision. In the complaint filed before the annulment on 27 April 2017, claims 1-3 were principals claims, while claims 4-7 were alternative claims. The two groups of claims concerned different procedures. The Ministry of Finance requested that the Complaints Board split the complaint into two, such that claims 1-3 and claims 4-7 would be considered as separate complaints. On 28 April 2017, the Complaints Board rejected a request from the

Ministry of Finance to split the complaint into two, stating: *"In this complaint, claims 1-3 are principals claims, while claims 4-7 are alternative claims. Regardless of the fact that the two groups of claims concern two different procedures, they are connected in that claims 4-7 regards a procedure that was launched after the annulment of the procedure at issue in claims 1-3. Accordingly, the Complaints Board does not find that there is basis for splitting the case into two. The fact that the issue of suspensive effect in respect of some of the claims must be decided in accordance with Section 12(1) of the Complaints Board Act and others in accordance with Section 12(2) cannot lead to a different result. Nor do the rules on costs and complaints fee justify splitting the case into two."*

After the Ministry's annulment of the award decision in the second procedure, Tieto Denmark A/S withdrew claims 4-7, and its request for suspensive effect pursuant to Section 12(2) of the Complaints Board Act was abandoned. However, Tieto Denmark A/S maintained its request that the complaint be granted suspensive effect pursuant to Section 12(1) of the Complaints Board Act. By decision of 16 May 2017, the Complaints Board held that suspensive effect should not be granted, as it would not be able to order the Ministry of Finance to reopen the procedure that had already been annulled, and it would thus be futile to grant the complaint suspensive effect. In addition, it was not likely that Tieto Denmark A/S would succeed in its complaint. When the Ministry of Finance made a new award decision on 23 May 2017, Tieto Denmark A/S announced that it now wished to "maintain" claims 4 and 7 which it had previously withdrawn. At the same time, Tieto Denmark A/S requested that the complaint be granted suspensive effect pursuant to Section 12(2) of the Complaints Board Act. On 21 June 2017, Tieto Denmark A/S clarified that claims 4 and 7 now concerned the award decision of 23 May 2017 and not the award decision of 31 March 2017.

In its decision of 30 June 2017, the Complaints Board held that there was no basis for granting suspensive effect to the complaint. The decision was made in accordance with Section 12(1) of the Complaints Board Act, as the Complaints Board stated, referring to its decision of 25 January 2017, Euro Group v the Municipality of Roskilde, that "*In situations where a clear and unambiguous claim has not been asserted, a complaint relating to Section 12 of the Complaints Board Act will be regarded as having been submitted only when a complaint is filed that may indisputably form the basis for the proceedings*". Accordingly, in relation to claims 4 and 7, the complaint was considered to have been filed on 21 June 2017. As the Complaints Board assessed that the prima facie case test had not been passed, it did once again not grant the complaint suspensive effect.

Finally, in its final decision of 12 July 2017, the Complaints Board found no basis for upholding any parts of the complaint.

Decision of 18 August 2017, Omada A/S v the Municipality of Copenhagen

In an interim decision, the Complaints Board considered that it was likely that a claim of violation of Section 42 of the Public Procurement Act (Article 42(4) of Directive 2014/24/EU) would be upheld, as the Municipality of Copenhagen had stipulated that an IGA system should be based on specific software although the conditions for this were not satisfied. However, the complainant had not made a claim for annulment of the award decision, for which reason alone the prima facie case test could not be considered as having been passed. Accordingly, the complaint was not granted suspensive effect.

In May 2017, the Municipality of Copenhagen launched a mini-competition under an SKI framework agreement on standard software compatible with SAP software for the purchase of an Identity Governance & Administration (IGA) system, which is a system used to manage access rights etc. for individual employees. According to the specifications, tenders were required to be based on Sailpoint software. Tenderers were not allowed to base their tenders on similar products. One tender was received, and the Municipality decided to enter into a contract with this tenderer. Omada was supplier of another IGA system based on a different software product than Sailpoint. During the standstill period it complained, claiming that the Municipality had violated Section 42 of the Public Procurement Act (Article 42(4) of Directive 2014/24/EU) by stipulating a specific make (Sailpoint). Already during the mini-competition, Omada had approached the Municipality to point out that it believed that the Sailpoint requirement violated the procurement rules.

Based on a preliminary assessment, the Complaints Board found that the Municipality had failed to lift the burden of proving that the conditions for stipulating a specific make in Section 42(2) (Article 42(4) of Directive 2014/24/EU) had been satisfied. The Municipality's requirement seemed to be based on considerations of appropriateness rather than the lack of other method of describing the required IGA system in a sufficiently precise and intelligible manner. In addition, the Municipality had already violated Section 42(2) of the Public Procurement Act (Article 42(4) of Directive 2014/24/EU) when it failed to include the words "or equivalent" software. Regardless of this, the prima facie case test had not been passed, as Omada had failed to make a claim for annulment of the award decision, cf. hereby the second sentence of Section 10(1) of the Complaints Board Act. When forwarding its decision, the Complaints Board stated that Omada in light of the decision would be assumed to make a claim for annulment and referred in that connection to Section 185(2) of the Public Procurement Act. The Municipality then cancelled the mini-competition.

Decision of 25 September 2017, Tømrer- og Snedkermester Børge Nielsen A/S and others v the Municipality of Hillerød

A Municipality's decision to cancel a procurement procedure for craftsman services did not trigger a standstill period. As the Municipality was not able to conclude a contract due to the cancelled procedure, there was also no basis for granting suspensive effect to the complaint. No basis for the complaint against the Municipality's cancellation.

The Municipality of Hillerød launched a restricted procurement procedure according to the Public Procurement Act for a number of framework agreements on various craftsman services. After having received the tenders, the Municipality cancelled the procedure. Three of the tenderers complained of the cancellation and requested that suspensive effect be granted, cf. Section 12(2) of the Complaints Board Act.

One of their claims was that the Municipality's cancellation of the procedure was not objectively justified. Referring to the judgments of the European Court of Justice in case C-92/00, Hospital Ingenieure, and case C-244/02, Kauppatalo Hansel OY, the Complaints Board stated that there was no basis for concluding that the Municipality had acted in breach of the fundamental rules of the Treaty or otherwise in an arbitrary manner by cancelling the procedure. When a public authority launches a

procurement procedure, it is not subject to an obligation to contract. When the Complaints Board received the complaint, it had not granted the request for suspensive effect, cf. Section 12(2) of the Complaints Board Act, because cancellation of the procurement procedure does not trigger a standstill period, as no award decision has been made. In addition, the complaint was not granted suspensive effect according to Section 12(1), as the Municipality had cancelled the procurement procedure, which meant that it was not possible to suspend the procedure further, as no contract would be concluded based on the cancelled procedure.

Decision of 4 October 2017, Lekolar LEIKA A/S v KomUdbud represented by the Municipality of Randers

The award decision in an assortment tender was annulled, as the price evaluation model, which had not been disclosed, was unusual, which the complainant could not have foreseen. As the complainant's documentation for its loss due to wasted expenditure incurred in relation to the preparation of the tender was inadequate and calculated incorrectly, the amount of damages was estimated.

An assortment tender for daycare furniture was changed to a negotiated procedure without publication of a contract notice pursuant to Article 30(1)(a) of the previous Public Procurement Directive (2004/18/EC) as all tenders were non-compliant. Lekolar LEIKA A/S (Lekolar) was successful in its claim that the evaluation model used was unusual, and that it should therefore have been made public during the procurement procedure. With regard to the subcriterion "Price", KomUdbud had not evaluated the estimated volumes, but had only evaluated on the 39 product categories and adapted the prices, whereby KomUdbud had created a completely non-transparent evaluation. The Complaints Board annulled the contracting entity's award decision (see the Complaints Board's decision of 5 July 2016 and the Complaints Board's 2016 Annual Report, chapter 2). Lekolar proceeded to claim reliance damages of DKK 158,803.70 (EUR 21,315.93). The Complaints Board found that, by violating Articles 2 and 53 of the Public Procurement Directive, which the Complaints Board established in its decision of 5 July 2016, KomUdbud was liable in damages to Lekolar. Considering the nature of the infringements, there was no basis for assuming that the complainant was or should have been aware of KomUdbud's infringements before submitting its tender. Against this background, the Complaints Board found that there was a sufficient causal link between KomUdbud's infringements and the complainant's loss relating to the expenses incurred in relation to the preparation of the tender. Based on the inadequate documentation and the method of calculating time spent and hourly rates, both for internal and external employees, and the fact that no compensation is payable for loss of margin, and finally the fact that it had not been proven that Lekolar had documented a loss of value in respect of the sample furniture, which was still in its possession, the amount of damages was estimated at DKK 50,000 (EUR 6,711).

3. SELECTED DECISIONS ON ACCESS TO DOCUMENTS

3.1 Introduction

In chapter 3 of the 2016 Annual Report, the Complaints Board examined the rules governing the Board's consideration of applications for access to documents. These rules have not been amended since then, and reference is made to the 2016 Annual Report for further information.

For that reason, the following will only be a supplementary account of the Complaints Board's case law on access in selected areas.

3.2 The Complaints Board's competence in right of appeal cases pursuant to the Access to Public Administration Files Act

According to Section 37(1) of the Access to Public Administration Files Act, complaints against decisions on access may be brought separately and directly before the authority acting as the final appeals body in respect of the decision or the proceedings in the case where a request for access has been made. In the legislative history behind Section 37(1) of the Access to Public Administration Files Act, cf. the special notes for the provision in Bill no. L 144 of 7 February 2013, it is provided that: "*In cases where the right of appeal against the substantive decision is subject to specific regulation, e.g. in the form of a dedicated appeals body, it follows from Subsection (1) that complaints against decisions on access to documents must also be brought before the special appeals body.*" Accordingly, the Complaints Board's competence in right of appeal cases follows the Board's subject-matter jurisdiction which is set out in the Complaints Board Act. According to this Act, the Board is competent to hear complaints against public contracting entities' infringements of the public procurement rules. On the other hand, the Complaints Board is not competent to hear complaints that do not concern the actual procurement procedure, including generally issues involving the subsequent performance of a contract concluded after a procurement procedure.

> The Complaints Board's decision of 21 September 2017 (file no. 17/01222): A company had applied to the Danish Coastal Authority for access to unloading reports and invoices regarding the sand replenishment efforts at Årgab, which the Authority rejected on the grounds that it could harm the operator's business interests. The sand replenishment contract had been awarded to a company after a procurement procedure, and the decision on access was brought before the Complaints Board. The Complaints Board considered that the unloading reports and invoices for the work performed were not information to be found in documents received or created by the Danish Coastal Authority in connection with the procurement, as the information did not relate to the actual procedure but to the performance of a contract which the Authority was assumed to have concluded with the successful tenderer after completion of the procedure. As the information concerned the performance of this contract, the Complaints Board was not competent to hear the complaint.

The Complaints Board's decision of 11 October 2017 (file no. 17/01402): A Municipality had conducted a procurement procedure for the design of a noise screen. The specifications contained no requirements for documentation for the services described in the tenders, and the complainant had not submitted such documentation with its tender. However, after the completion of the procurement procedure, the Municipality had received information concerning documentation for technical devices from the successful tenderer. An unsuccessful tenderer requested access to, among other things, this information, which the Municipality refused, leading the tenderer to complain to the Complaints Board. As the Municipality had not received the information as part of the procurement procedure, but only in connection with the performance of the contract it had concluded, the Complaints Board found that it was not competent to hear the case and rejected this part of the complaint.

3.3 Exclusion of confidential business information from public access

As mentioned in chapter 3 of the 2016 Annual Report, the successful tenderer's tender often contains information relating to technical devices or processes or operating or business conditions that are covered by the exemptions in Section 30, Paragraph (2), of the Access to Public Administration Files Act and/or Section 15b, Paragraph (5), of the Public Administration Act.

In rare cases, typically in the sections on the statement of claim, the parties' pleadings in complaints cases before the Complaints Board may contain such factual information that may, in the circumstances, be exempt from access. However, the fact that a complainant has complained, and the allegations and submissions made by the parties during the case are not confidential business interests eligible for exemption.

The Complaints Board's decision of 09 November 2017 (file no. 17/01582): A law firm had requested access to pleadings without exhibits on behalf of a competing company in two pending complaints cases concerning a framework agreement subject to a procurement procedure. The complainants objected against this on a number of counts, submitting that the pleadings contained confidential business information covered by Section 30, Paragraph (2), of the Access to Public Administration Files Act. The information about the complainants' identity was known, and the Complaints Board held that the nature of the complainants' claims, the procedural requests and allegations was not such that this information could be exempted pursuant to Section 30, Paragraph (2), of the Act. The same applied to information on who had submitted tenders for a specific lot.

As mentioned in the 2016 Annual Report, the Complaints Board's case history often shows that a significant part of the successful tender's descriptions of the solution is often not the type of information that may be exempted from access pursuant to Section 30, Paragraph (2), of the Access to Public Administration Files Act or Section 15b of the Danish Public Administration Act. However, there are also examples of cases where access to almost the entire tender is refused.

The Complaints Board's decision of 6 July 2017 (file no. 17/00890): In 2014, ATP had arranged a public procurement procedure for an electronic pension solution. At the beginning of 2015, a company was awarded the contract. Due to later disagreements, this contract was terminated at the beginning of 2017, and ATP reopened the competition for essentially the same contract as in the first procedure. The tenderer that was awarded the contract in the first procedure requested access to the solution description in the two competitors' tenders, which ATP almost fully refused with reference to the provision in Section 30, Paragraph (2), of the Access to Public Administration Files Act. ATP expected that the tenderers who had participated in the first procedure would also participate in this one. The Complaints Board considered that there was a very high degree of repetition between the original, now completed, procedure on the one hand and the pending reopened competition on the other, and that it had to be assumed that the relevant competitors would to a very large extent reuse their first tender when preparing their tenders for the new procedure. On this basis, the Complaints Board held that the tenders from the first procedure – just as a first tender in a negotiated procedure – could be regarded as a draft for the tenderers' later tender for the same procedure. In these circumstances, the Complaints Board did not find basis for setting aside ATP's assessment that the tenders contained confidential business information covered by Section 30, Paragraph (2), of the Access to Public Administration Files Act, for which reason it upheld ATP's decision on refusal of access.

3.4 Exclusions to protect public economic interests

According to Section 33, Paragraph (3), of the Access to Public Administration Files Act, the right of access may be restricted to the extent this is necessary to protect public economic interests, including the performance of public commercial activities. The purpose of this provision is to protect public economic interests, including in connection with public procurement, as there is a need to ensure in these cases that public authorities are able to act on equal terms with private commercial companies. It is assumed that the provision also applies in relation to protection of public interests in future procurement procedures, where there would otherwise be an obvious risk that the authority would not be able to attract qualified tenders in the next procurement round or that the public authorities' bargaining position is weakened. This will, in the circumstances, often be the case during an ongoing negotiated procedure, whereas the provision can only very rarely be applied when the procedure has been completed, cf. hereby Mohammed Ashan: "Offentlighedensloven med Kommentarer" (*The Danish Access to Public Administration Files Act with comments*), 2014, page 578. The provision corresponds to Section 15b, Paragraph (3), of the Public Administration Act, cf. Niels Fenger: "Forvaltningsloven med Kommentarer" (*The Danish Public Administration Act with comments*), 2013, page 451. Following the same reasoning, the Complaints Board has concluded in a great number of cases concerning access to completed procurement procedures that were not negotiated procedures that the conditions for restricting access to documents were not fulfilled. A prominent example from 2017 is: Decision of 15 September 2017 (file no. 17/01283): Fælles Udbud Sjælland represented by the Municipality of Holbæk had launched a procurement procedure for the purchase of places in homes and residential institutions for young people between the ages of 15 and 23. However, the buying group cancelled the procedure on the grounds that an internal profit calculation had shown that the

Municipalities would gain more by keeping these services under their own remit. Against this background, LOS, which is an association of private social services, requested access to all tenderers' material, including price specifications, and the mentioned profit calculation. None of the tenderers objected to the procurement documents being disclosed, which meant that the exclusion in Section 30, Paragraph (2), of the Access to Public Administration Files Act was not relevant in this case. However, Fælles Udbud Sjælland represented by the Municipality of Holbæk refused to grant access to the tenderers' price lists and the profit calculation, as this information must be regarded as relevant to a possible future procurement procedure in this area, and as the price information – if the competition was to be reopened – could harm competition and distort the tenders in such a procedure, which would not be appropriate. The Complaints Board found no basis for excluding the information pursuant to Section 33, Paragraph (3), of the Access to Public Administration Files Act. In that connection, the Board gave importance to the fact that the quoted prices had proved to be uncompetitive and, thus, no contract was awarded, for which reason the information about the prices could not hamper competition in future procedures. In addition, a decision had not yet been made to reopen competition, which meant that the risk could not be considered to be obvious.

3.5 The contracting entity's internal documents

According to Section 23(1)(1) of the Access to Public Administration Files Act, the right of access does not apply to internal documents that have not been disclosed to outsiders. Section 23(2) dictates that documents are no longer considered internal when they are disclosed to outsiders, unless this is prescribed by law, for research purposes or other similar purposes.

In procurement procedures launched by several authorities together, such as in joint municipal procurement procedures, it may give rise to doubts whether material exchanged in the group in charge of the procedure were exchanged in an ad hoc authority set up for this purpose, which would mean that it is considered internal, or exchanged between representatives of different cooperating authorities. In this connection, it must be considered whether the cooperation is in the nature of an independent authority. With regard to the question of whether an authority is an independent authority, the special notes on the provision in Section 23 of the Access to Public Administration Files Act (Bill no. L 144 of 7 February 2013) explain, among other things, that this must be "*based on an organisational assessment of the relationship between the different entities. In this connection, one consideration is whether the relevant administrative entity's tasks are clearly separate from those of other administrative entities, whether the entity performs extensive and independent tasks, whether the entity is subject to other entities' power of direction, whether there is a right of appeal to another entity, whether the entity makes decisions on its own behalf, and the degree of autonomy, cf. chapter 16, section 2.2 (page 519 et seq.) and section 6.1.4 (page 576 et seq.)*".

If the authority is independent, there may also be the issue of whether the authority's material was disclosed by this authority and thus may no longer be considered internal. The parliamentary commission on the Access to Public Administration Files Act concluded, among other things that a document should not "*be considered not to be internal when members of special ad hoc authorities, such as bills committees and inter-ministerial working groups disclose internal material to the member's superiors in the authority or organisation etc. that the member represents in the working group, to*

the extent that disclosure is necessary for the member to perform its duties in the committee, including obtaining a negotiating mandate.". Reference is made to the parliamentary committee's report, page 576 (chapter 16, section 6.1.3.3.2), which the government endorsed in the notes for the bill behind the Access to Public Administration Files Act, cf. Bill no. L 144 of 7 February 2013 (general notes, section 4.14.4.1).

> In the decision of 15 September 2017 (file no. 17/01283), which is summarised above, the respondent also submitted that Fælles Udbud Sjælland had set up a working group that met the conditions for being considered an independent authority, and that the profit calculation at issue was an internal document in this authority, which meant that it could be exempt from access pursuant to Section 23 of the Access to Public Administration Files Act. In this connection, it was explained that the working group consisted of representatives from various municipalities, that the working group's activities had been strictly limited in both time and scope to tasks directly connected with this specific procurement procedure, that the working group's coordinator had acted independently of the administrative and political leadership in the Municipality of Holbæk, which had only been briefed about the procedure and the subsequent cancellation, that the working group's decision to cancel the procedure could not be reversed by other authorities, such as the Municipality of Holbæk or any other of the municipalities involved, FUS's chairmanship or the like. Finally, it was explained that the working group had acted on behalf of the Municipality of Holbæk in the access case, using the Municipality's letterhead and mail signature. The Complaints Board found no basis for overruling the respondent's assessment that Fælles Udbud Sjælland's working group was to be considered an independent authority. During the proceedings, the Board had been informed that the profit calculation had been exchanged internally within the working group and forwarded to the heads of procurement in the respective municipalities involved in the procedure "for their information". As the profit calculation was only forwarded to the heads of procurement "for information", the Complaints Board did not consider that this was only done in the interests of the members' appointing authorities, for which reason there was no basis for regarding the profit calculation as an internal document in respect of the working group.

3.6 Refusal to consider a request for access on the grounds of time

According to Section 9(2)(1) of the Access to Public Administration Files Act, an authority may refuse to consider a request for access made under Section 7 to the extent that this would be unduly resource-consuming. In the notes for Bill no. L 144 of 7 February 2013 for the Access to Public Administration Files Act and the special notes in the Bill for Section 9(2)(1), it is explained, among other things, that for a right to refuse to consider a request for access on the grounds that it would be too resource-consuming to apply, the total time spent by the authorities on the request – both on retrieving the cases and considering whether to grant access – must be expected to exceed approx. 25 hours (corresponding to more than three full working days). Also, it is stated in the explanatory notes that, if the party requesting access proves that it has a particular interest in the cases or documents, the authority will generally, i.e. regardless of the scale of the case or documents, be obliged to consider the request. In this connection, an authority will only very rarely be justified in not considering

a request for access made by the mass media or a researcher with a recognised research institution, as such media and researchers must generally be assumed to have a special interest in access.

> Decision of 2 March 2017 (file no. 17/00333): A person had, among other things, been given access to general information on a number of consultancy contracts concluded by the Capital Region of Denmark within the last five years. Subsequently, he requested access to the information about which of the mentioned contracts had been tendered, and, where appropriate, who had participated. The Region refused to grant access on the grounds that this would be unduly time-consuming, cf. Section 9(2)(1) of the Access to Public Administration Files Act. The Complaints Board considered that the overview previously disclosed to the complainant was ten pages long, each containing 15-20 suppliers. The Complaints Board found no basis for overruling the Region's assessment that the amount of time required to consider the request was expected to be 50-60 hours. Based on the above-mentioned explanatory notes for the provision in Section 9(2)(1) of the Access to Public Administration Files Act, the Complaints Board found that this would be unduly time-consuming when weighed against the applicant's interest in obtaining access to the information. In this context, the Complaints Board took account of the facts that the complainant was not a journalist at a mass medium, and that there was no reason to assume that he had a special interest in obtaining access to the material in question. The complainant was invited to clarify his complaint, but as he did not respond, the Complaints Board upheld the Region's refusal to grant access.

4. DANISH JUDGMENTS ON THE COMPLAINTS BOARD'S CASES

This chapter gives an account of final judgments handed down in 2017 in cases which have been heard by the Complaints Board. When making its decisions, the Complaints Board asks the parties to notify the Board if the case is referred to the courts and to be informed of the outcome of the case. However, it is not certain that the Board is informed of all such cases. Judgments which did not become final in 2017, because they were appealed to a higher court, have not been included here.

Judgment of the City Court of Copenhagen of 14 March 2017, the Danish State represented by the Agency for Modernisation v Motus A/S, cf. the Complaints Board's decisions of 4 July 2016 and 31 October 2016 (compensation).

The case concerned a restricted procurement procedure according to the Public Procurement Directive (2004/18/EC) for a framework agreement on the delivery of servers, associated storage solutions, accessories and associated services. The Agency for Modernisation organised the procedure on behalf of the Danish State.

Motus A/S, whose tender had been rejected as non-compliant, submitted a complaint to the Complaints Board. In its decision of 4 July 2016, the Complaints Board held that the Agency for Modernisation had acted in contravention of the public procurement rules by establishing and enforcing illegal requirements in the 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.

In its decision of 31 October 2016, the Complaints Board ordered the Agency for Modernisation to pay compensation to Motus A/S.

The Agency for Modernisation brought the case before the City Court of Copenhagen which upheld the Agency's claim in its judgment of 14 March 2017 on the grounds that Motus A/S had admitted the claim during the proceedings.

The District Court of Roskilde's judgment of 1 December 2017, Kirstine Hardam A/S v the Municipality of Køge, cf. the Complaints Board's decision of 10 January 2017.

The case concerned the Municipality of Køge's contract with Abena A/S for an aid for citizens under the Act on Social Services. According to this contract, which was concluded without a prior procurement procedure, citizens ordered the aid and had it delivered directly from Abena A/S, and the Municipality paid Abena A/S for the aid on the receipt of invoices.

Kirstine Hardam A/S complained to the Complaints Board, submitting that an EU procedure for the contract should have been conducted. In its decision of 10 January 2017, the Complaints Board did not uphold the complaint, as it considered that the contract did not involve reciprocal obligations and thus was not covered by the public procurement rules.

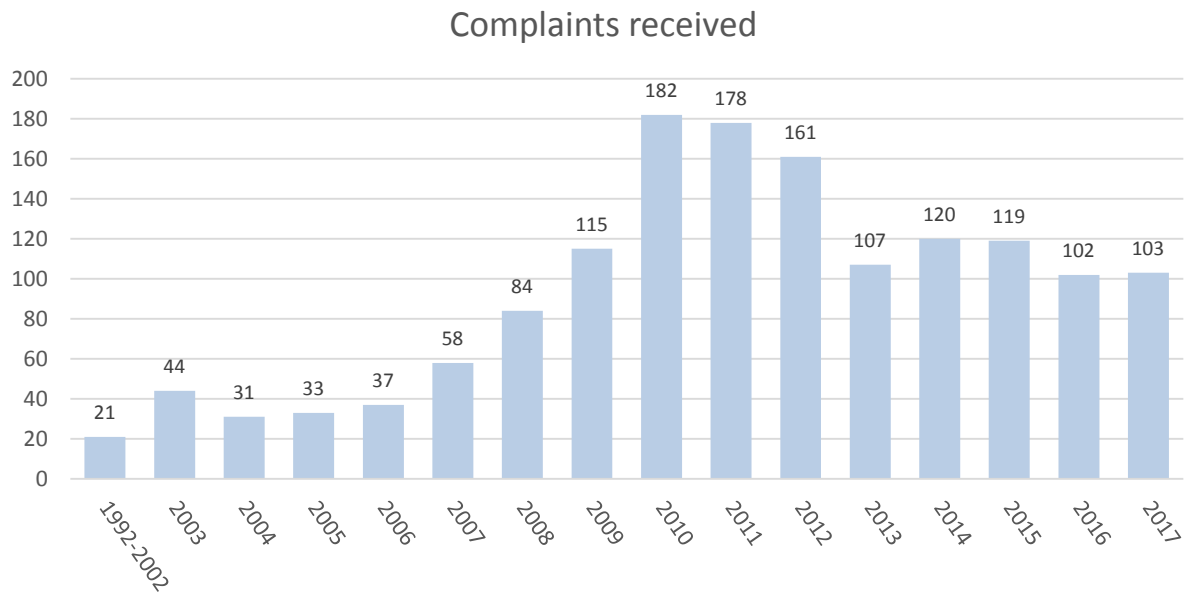
In its judgment of 1 December 2017, the District Court of Roskilde held that the contract should have been put out to tender, and that the Municipality of Køge had violated, among other things, Section 55 of the Public Procurement Act (Article 26 of Directive 2014/24/EU) by not having launched an EU procedure for the agreement. The Court stated, among other things, that the contract was in effect a supply contract pursuant to Section 112(2) of the Act on Social Services, that the contract involved reciprocal obligations, and that the Municipality undoubtedly had a direct economic interest in the contract. The Court declared the contract ineffective for future deliveries. An appeal was submitted to the High Court, but this was rejected for formal reasons.

5. THE COMPLAINTS BOARD'S ACTIVITIES IN 2017

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

5.1 Complaints received

The Complaints Board received 103 complaints in 2017. The below overview illustrates the development in the number of complaints received in 1999-2017.



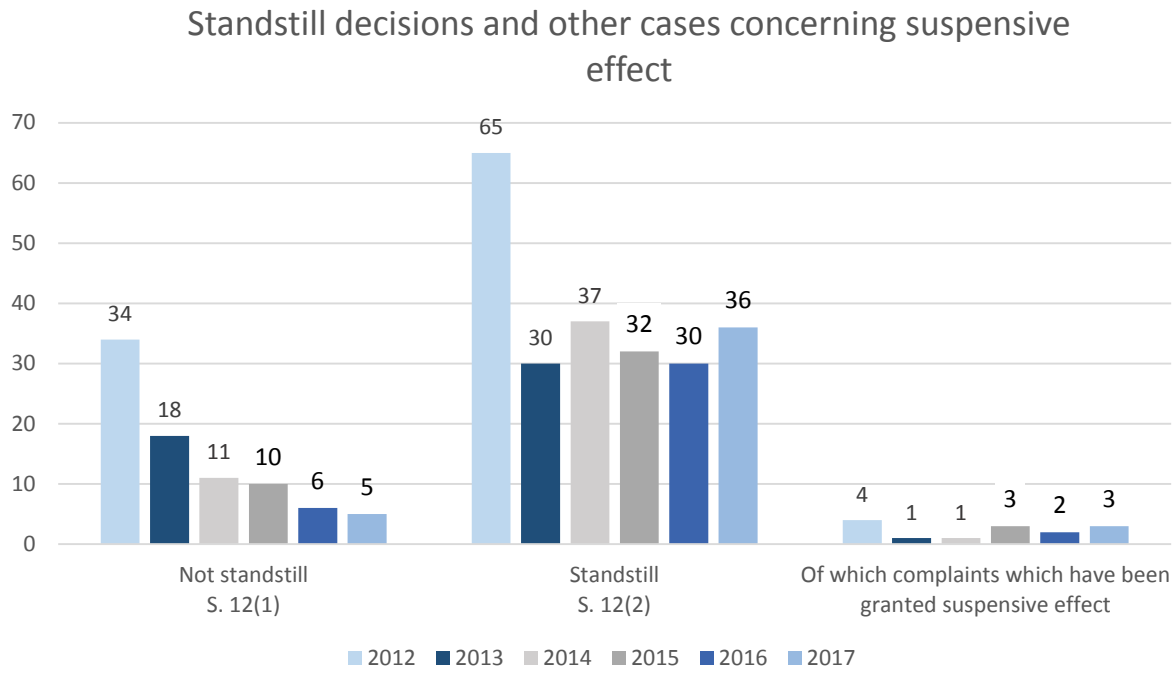
The number of complaints received in 2017 equals the number received in 2016, and is slightly lower than in 2014-2015 and roughly on a level with 2013. The number of complaints cases is thus still significantly lower than in 2010-2012.

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 and 2017 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.

5.2 Standstill cases and other cases regarding suspensive effect

As shown below, in 2017, the Complaints Board made interim decisions in five cases where a request for suspensive effect had been made under Section 12(1) of the Complaints Board Act, and interim decisions in 36 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 three cases in 2017, 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 2012-2017 is shown below.

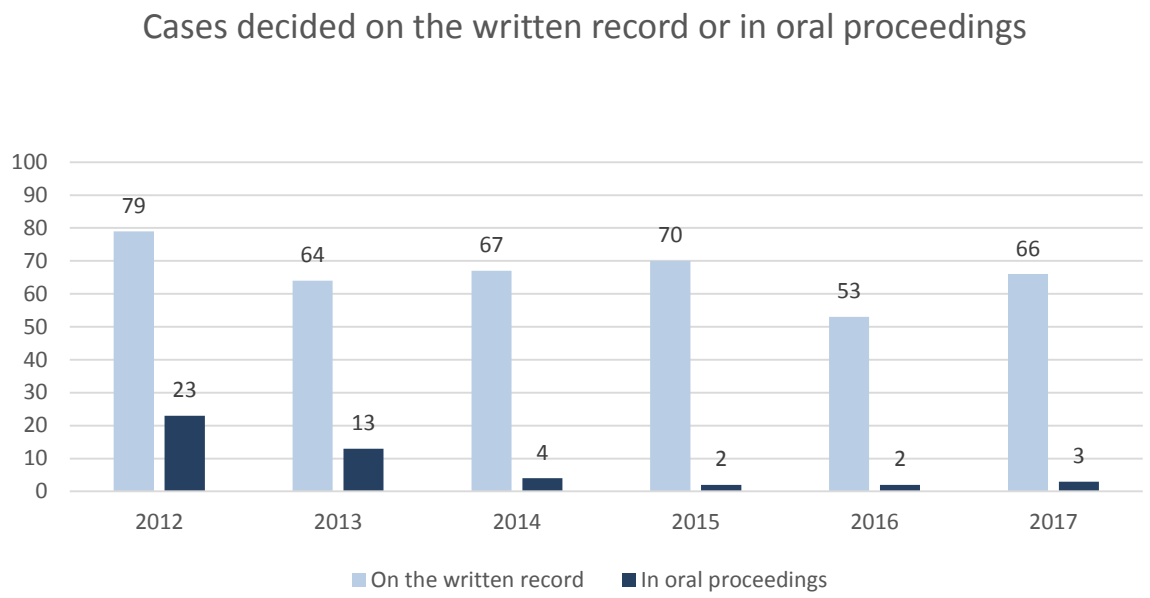


In a number of cases, the Complaints Board's decisions regarding suspensive effect – also where the request is not granted – will lead to withdrawal of the complaint due to the Complaints Board's prima facie orders, where the Complaints Board based on a preliminary assessment delivers an opinion on whether 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.

5.3 Cases decided on the written record or in oral proceedings

In 2017, 66 cases where decided on the written record, while three 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 2012-2017.

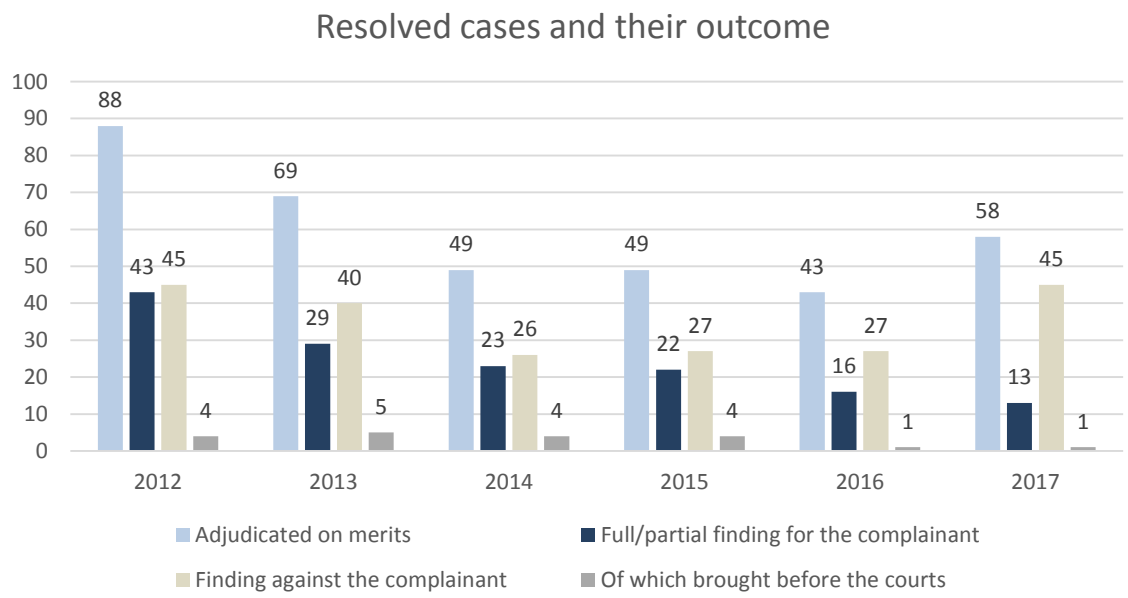


Note: These figures include rejected cases.

The distribution of cases decided on the written record/cases adjudicated in oral proceedings in 2017 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.

5.4 Resolved cases and their outcome

The Complaints Board adjudicated 58 cases on their merits in 2017. Of these cases, 13 complaints were fully or partly sustained, while 45 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 58 cases was brought before the courts. The figures for 2017 are slightly higher than in 2016 with 15 more decisions rendered in 2017. The number of decisions referred to the courts is at the same level as in 2016.



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 2017 was 22%, considerably below the average percentage for 2011-2016 which was 44%.

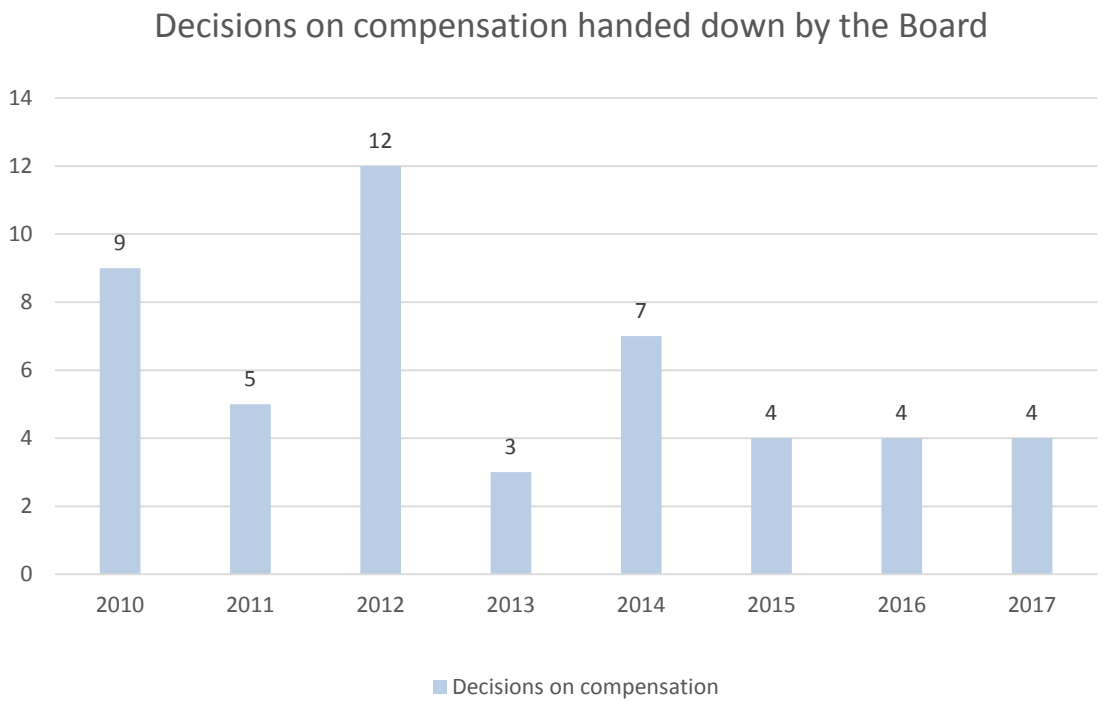
Since 2011, the Complaints Board has found for the complainant in fewer cases, which means that it has found fewer errors than in the past. As stated in section 4.4 of the 2013 Annual Report, this may be because the contracting entities commit fewer errors than they used to. Another, perhaps more obvious 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. It is yet too early to say whether the lower percentage of cases upheld relative to last year is only due to yearly fluctuations.

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 %

2017	22 %	78 %

5.5 Decisions on compensation

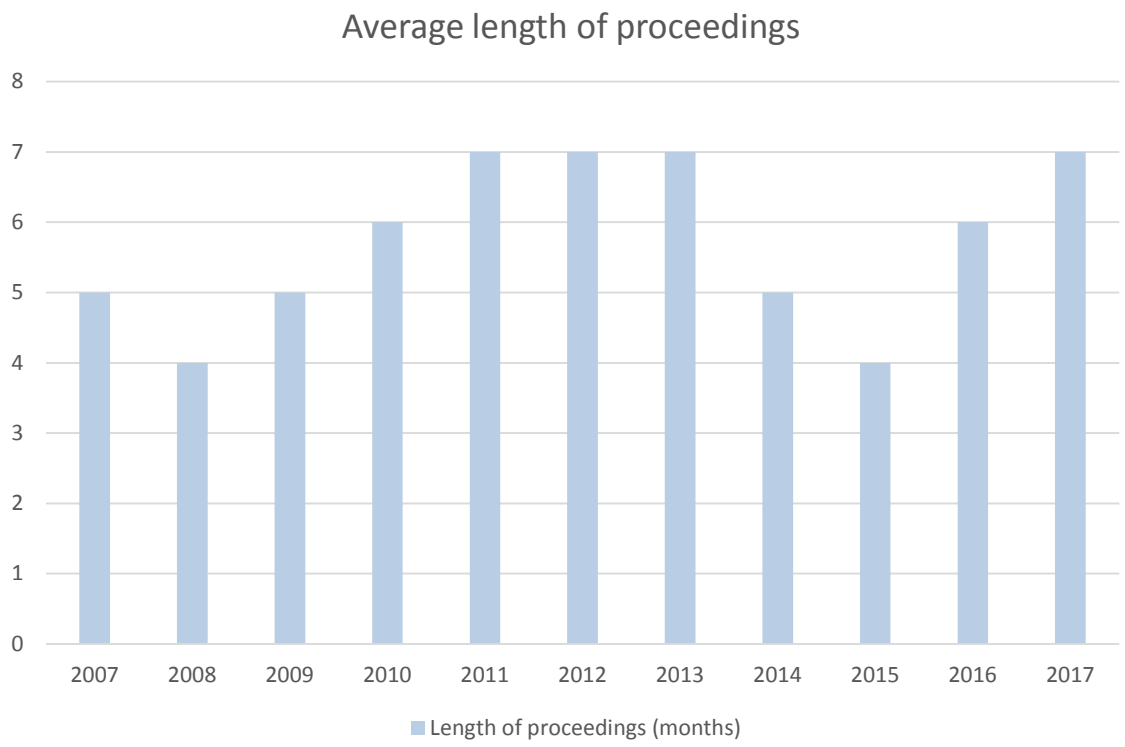
In 2017, the Complaints Board made four decisions on compensation.



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).

5.6 Average length of proceedings

The Complaints Board's average length of proceedings in 2017 was seven months. Below is an overview of the development in the average length of proceedings for rejected cases and substantive decisions in months in the years 2007-2017.



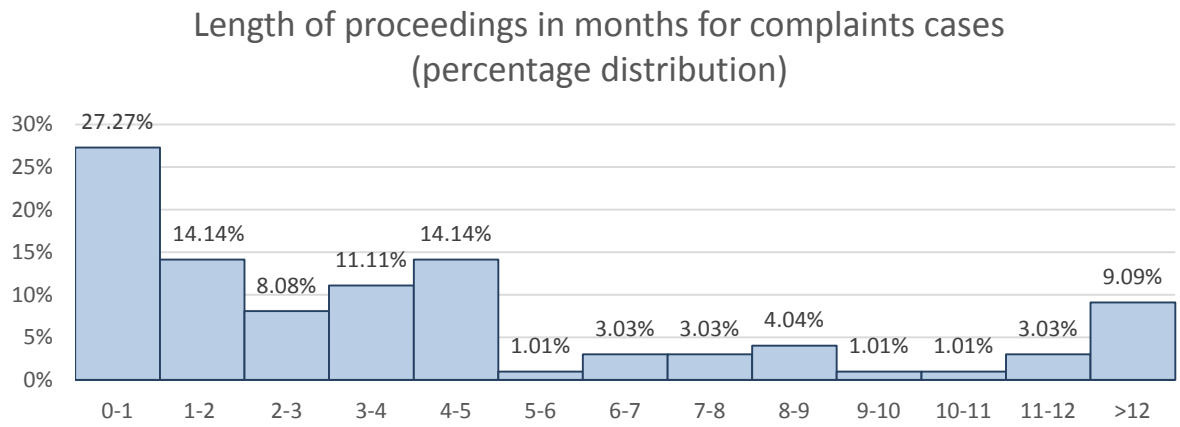
The average length of proceedings, which showed a decreasing trend in 2014 and 2015 from seven months in 2011-2013 to five months in 2014 and to four months in 2015, increased to six months in 2016 and to seven months in 2017, which is on a level with 2010-2013. The number of complaints received in 2010-2016 was 182, 178, 161, 107, 120, 119 and 102, cf. section 5.1 above. The number of pending cases at the end of 2017 was 43, which is on a level with 2013 and 2014, where 45 cases were registered at year-end, and with 2016, where 42 cases were registered. 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 2016 Annual Report, the Complaints Board also finalised a number of major cases in 2017, which affected the length of proceedings negatively. At the same time, the length of proceedings is increasingly burdened by requests for access not immediately granted by the contracting entity, which means that the case must be stayed until the issue of access has been settled. These cases are often substantial in scale, and it is not rare that the pleadings on this issue are as extensive as the pleadings in the substantive case. Finally, it is noted that the Complaints Board heard many more cases on their merits than in previous years (58 cases against 43 in 2016 and 49 in 2015 and 2014), including several older cases.

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

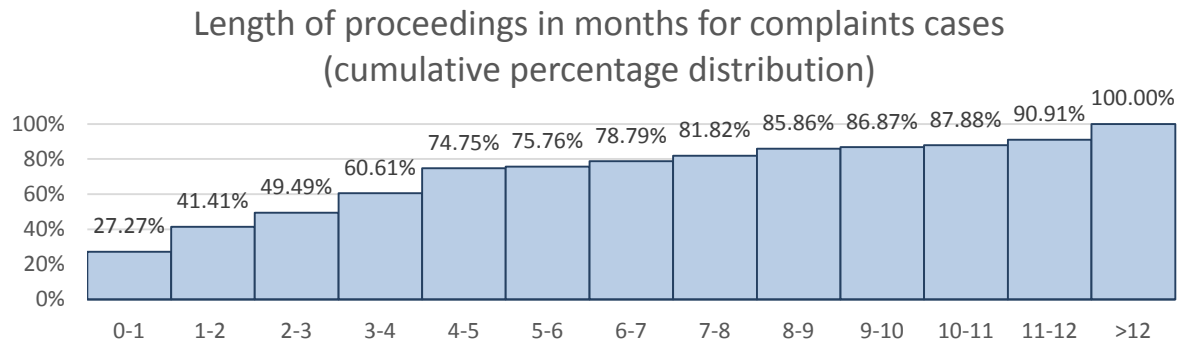
The figure below shows the percentage share of all cases that were closed within 0-1 month, 1-2 months etc. and more than 12 months in 2017. This includes all cases, i.e. also cases where the complaint was rejected and cases where the complaint was withdrawn, including after the Complaints

Board's prima facie decision. Decisions on compensation, which are few and far between, are not included. Reference is made to section 5.8 for an overview of the cumulative percentage distribution of the length of proceedings in months for complaints cases.



5.8 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 2017.

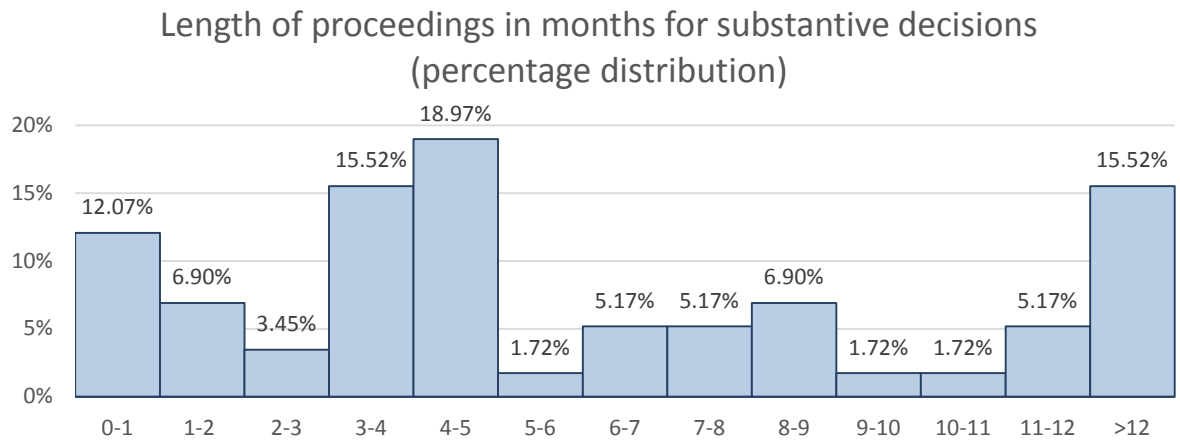


Approx. 27 % of the cases were closed within the first month of receipt of the complaint in 2017 against 29% in 2013, 33% in 2014, 47% in 2015 and approx. 39 % in 2016. Approx. 42% of the cases were closed within the first two months of receipt of the complaint in 2017 against 42% in 2013, 54% in 2014, 62% in 2015 and 53% in 2016. It can also be seen that approx. 50% of all cases received in 2017 were closed within three months against 49% in 2013, 60% in 2014, 69% in 2015 and 61% in 2016. The figures for 2017 include 33 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. 77% of the cases in 2017 were closed within 5-6 months of receipt of the complaint against 37% in 2013, 62% in 2014, 65% in 2015 and 74% in 2016, and that approx. 88% of cases were closed within 9-10 months against 86% in 2013, approx. 87% in 2014, 92% in 2015 and 87% in 2016.

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.

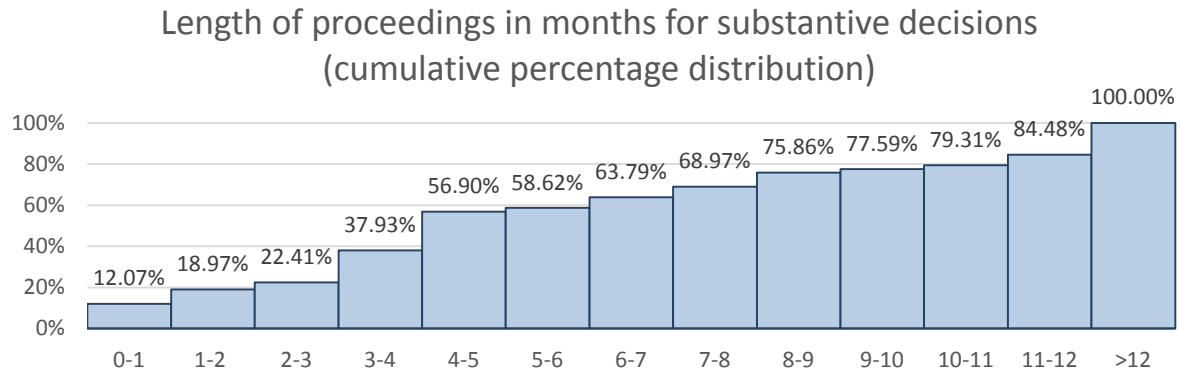
5.9 Length of proceedings in months for substantive decisions (percentage distribution)

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 2017.



5.10 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 2017.



The table shows that substantive decisions were made in approx. 38% of cases within 3-4 months against 20% in 2013, 30% in 2014, 41% in 2015 and 44% in 2016. In 2017, decisions had also been made within 5-6 months in approx. 59% of cases against 37% in 2013, 62% in 2014, 65% in 2015 and 54% in 2016. It can also be seen that the Complaints Board made a substantive decision within 8-9 months in approx. 76% of cases in 2017 against approx. 69% in 2013, 87% in 2014, 90% in 2015 and

71% in 2016. Experience shows that the remaining 24% (2013: 31%, 2014: 13%, 2015: 10% and 2016: 29%) 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 2017, cf. above, an increased workload in the secretariat, including as a result of the vacant position left by one of the Board's experienced lawyers who was appointed to a senior position at the High Court of Western Denmark (see section 1.3), and the fact that both the parties in the different cases and the Complaints Board's presidency had to navigate through a relatively new set of rules during 2017. 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 5.2 above.

6. THE COMPLAINTS BOARD'S OTHER ACTIVITIES

In addition to hearing complaints, the Complaints Board also performed certain outreach activities in 2017:

Participation in conferences etc.

In 2017, members of the presidency participated as presenters at conferences and other events focusing on public procurement law.

On 30-31 March 2017, four members of the presidency participated in the "Annual Conference on European Public Procurement Law 2018" held by Europäische Rechtsakademie (ERA), Trier.

Also, a member of the presidency participated in the "Network of first instance procurement review bodies" held in Brussels on 2 October 2017.