The Complaints Board for Public Procurement

Annual Report 2018

CONTENTS

INTRODUCTION

The Complaints Board for Public Procurement hereby publishes its sixth 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.

Chapter 2 contains summaries of the Board's cases from 2018 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 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 2018 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 2018, the Complaints Board received 106 complaints, which is slightly more than the number of complaints received in 2017 and 2016. The Complaints Board found fully or partly in favour of the complainant in approx. 34% of all cases, which is slightly higher than in 2017 and on a level with 2016. Moreover, in approx. 26% of the Complaints Board's decisions regarding suspensive effect, where the Board applied the prima facie case test (examined whether the complaint seemed to be well-founded on a preliminary assessment), it considered the case to be a prima facia case. This typically led the parties to find a solution, and the complaint was withdrawn.

In 2018, the Complaints Board's average length of proceedings was reduced to five months compared to seven months in 2017 and six months in 2016.

The European Court of Justice's (ECJ) copious case law on procurement guides the decisions of the Complaints Board for Public Procurement, among others. It is therefore essential that the Board maintains and develops a thorough knowledge of ECJ jurisprudence. With this end in view, the Board's judges and lawyers visited the ECJ in Luxembourg in the autumn of 2018. A very impressive programme had been put together for this visit, including presentations on the latest procurement law judgments as well as insightful and inspirational talks with several of the Court's judges and advocates-general on procurement law issues and much more.

Nikolaj Aarø-Hansen, President

Viborg, July 2019

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

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

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

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

In 2018, the members of the Complaints Board's presidency were:

President of the Complaints Board for Public Procurement:

Nikolaj Aarø-Hansen, High Court Judge

Other members of the Complaints Board's presidency:

- Kirsten Thorup, High Court Judge
- Michael Ellehauge, High Court Judge, PhD
- Niels Feilberg Jørgensen, Judge
- Erik P. Bentzen, High Court Judge
- Katja Høegh, High Court Judge, LLM
- Poul Holm, Judge
- Hanne Aagaard, High Court Judge
- Jesper Stage Thusholt, Judge
- Charlotte Hove Lasthein, Judge

The Board's expert members in 2018 were:

- Michael Jacobsen, Chief Consultant
- Vibeke Steenberg, Chief Consultant
- Pernille Hollerup, Head of Team Legal Competition & Tender Law, Senior Manager
- Erik Bøgward Christiansen, Chief Consultant (to 3 April 2018)
- 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, Head of Office, 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, Legal Advisor, LLM
- Jan Kristensen, Development Manager
- Birgitte Nellemann, Head of Strategic Purchasing
- Lise Ridderholm Husted, Chief Consultant (from 3 April 2018)

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 had three lawyers and two secretaries in 2018, in addition to a junior clerk during parts of 2018. During most of the year, the secretariat only had two lawyers for different reasons.

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 2018, the secretariat consisted of:

- Jeanne Schou, Chief Advisor (to 31 October 2018)
- Klaus Tougaard Kristensen, Chief Advisor (1 April – 15 June 2018)
- Maiken Nielsen, Legal Special Adviser (from 1 October 2018)
- Julie Just O'Donnell, Legal Administrative Officer
- Dorthe Hylleberg, Administrative Officer
- Heidi Thorsen, Administrative Officer
- Katrine Kirkegaard Gade, Junior Clerk (from 1 September 2018)

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 entity 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) (*tilbudsloven*).

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 the Complaints Board has status as appeals body by law or in accordance with law.

The majority of the cases heard by the Complaints Board concern the Public Procurement Act, which mainly implements the Public Procurement Directive (Directive 2014/24/EU) and the other EU public procurement rules, while only a 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 is brought before the courts of law; in 2018, only 2 out of 44 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 2018, the average length of proceedings for public procurement cases was five months, and to this should be added that a very large portion – approx. 66% – 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 to a complaint 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 four complaints in 2018: Decision of 10 January 2018, Næstved Sprog- og Integrationscenter v the Municipality of Næstved, decision of 26 January 2018, Icomera AB v DSB, decision of 11 April 2018, Albertslund Tømrer og Snedker A/S v the Municipality of Hillerød, and decision of 12 December 2018, KMD A/S v the City of Copenhagen (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 already completed, which means that suspensive effect will be pointless, unless the complainant's purpose is to declare the contract ineffective.

If the Complaints Board assesses that a case may be adjudicated on the written record, 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 2018: Decision of 17 January 2018, Opel Danmark A/S v the Danish Police, represented by the National Police, decision of 1 February 2018, ABB A/S v Trafikselskabet Movia, decision of 26 March 2018, Idemia Identity & Security v the Agency for Digitisation, decision of 11 April 2018, Israel Aerospace Industries Ltd. v the Danish Ministry of Defence's Acquisition and Logistics Organisation, decision of 28 May 2018, Danske Slagtermestre acting for Gert Nielsen A/S v the Municipality of Høje-Taastrup, decision of 20 June 2018, Icomera AB v DSB, and decision of 12 September 2018, Selex ES Inc. v Danish Ministry of Defence's Acquisition and Logistics Organisation.

Other sanctions

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

Section 185(2) of the Public Procurement Act 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. the first and second sentences of Section 185(2) of the Public Procurement Act. According to the explanatory notes to the Act, "final decision or judgment" means a final decision from the Complaints Board or a judgment from the ordinary courts which may no longer be appealed.

The "ineffective contract" sanction may be used against the contracting 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. However, the contracting entity may write to the Complaints Board's secretariat to ask whether a complaint

has been filed against a procurement procedure, stating the contract notice number, before concluding a contract with the successful tenderer. 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 may 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 adjudication 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 2018, this happened in six cases: interim decision of 5 January 2018, Salini Impregilo S.p.A v Metroselskabet I/S, decision of 9 February 2018, Dansk Cater A/S v Staten og Kommunernes Indkøbsservice A/S, decision of 21 February 2018, Deloitte Statsautoriseret Revisionspartnerselskab v the Agency for Modernisation, decision of 26 March 2018 Idemia Identity & Security v the Agency for Digitisation, decision of 12 April 2018, Lekolar Leika A/S v Fællesudbud Sjælland represented by the Municipality of Køge, decision on compensation of 3 July 2018 in that case and decision of 11 October 2018, Konsortiet Sprogpartner v the National Police and others. The five latter cases are discussed below in chapter 2.

Decisions by the president

The president of the case may decide 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. No substantive decisions were thus made without the involvement of an expert member in 2018.

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, which is to be written in Danish, must describe the claims of violations that the Complaints Board is requested to consider. The Complaints Board is bound by the parties' claims and allegations (arguments), which means that it is not allowed to award more than the party has claimed or take into account arguments that were not included in the parties' submissions (Section 10(1) of the Complaints Board Act). This means that the Complaints Board will not help the complainant with the formulation of appropriate claims, but it may offer guidance to the complainant, cf. decision of 21 March 2018, Scientia Ltd. v Aarhus University. 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 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 applying for preselection or submitting a tender (potential candidates/tenderers) may also have a cause action. If the complainant is not able to prove that it has a cause of action, the complaint will be rejected. The Complaints Board has made a number of decisions that illustrate the cause of action requirement. Some of these decisions are shown in the case law overview at the Complaints Board's website under "Årsberetninger" (*Annual reports*).

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

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

In general, the time limits for filing complaints are:

No preselection: 20 calendar days.

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

"Ordinary contracts": 45 calendar days.

Framework agreements: 6 months.

Contracts directly awarded where the Section 4 procedure has been followed (notice for voluntary ex ante transparency): 30 calendar days (only applies to complaints about EU procedures).

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

The 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 (see section 1.6), the Complaints Board will ask the respondent to submit an account of the factual and legal circumstances of the case and the exhibits in the case within a prescribed time limit (defence). After this time, additional pleadings (reply and rejoinder etc.) will generally be exchanged between the parties. The length of this part of the proceedings depends on the nature of the case. During the hearing of the case, the Complaints Board will decide on any disputes between the parties as to the complainant's right of access to documents as a party. Such decisions are made in accordance with the relevant rules in the Danish Public Administration Act (*forvaltningsloven*), 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 made. 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*). This means that the intervener is not allowed to make separate claims or raise its own allegations and can thus not be ordered to pay costs, cf. decision on costs of 30 October 2018 in the complaints case Konsortiet Sprogpartner v the National Police and others (discussed in chapter 2)

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 (see 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 conduct 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 and the counterparty will normally be preferred. In some cases, the Complaints Board deems the initial presentation of the documents in the case to be unnecessary and will communicate this to the parties. The Complaints Board may have questions that need clarification. 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 2018, a hearing was held in one case (2017: three cases), while 51 cases were adjudicated on the written record (2017: 66 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 February 2018, Dansk Cater A/S v Staten og Kommunernes Indkøbsservice A/S, costs were set at DKK 100,000 (EUR 13,423) for the successful party.

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 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 and 2017 Annual Reports as well as chapter 3 of 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, and can be accessed directly at https://klfu.naevneneshus.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 2018 that have all been published at the Complaints Board's website. 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:

- Requirements for specifications, including minimum requirements, and organisation of procurement procedures
- Preselection
- Grounds for exclusion
- Evaluation, including choice of evaluation model
- Assortment tenders
- Horizontal cooperation agreements
- Division of contracts into lots
- The Complaints Board Act, including (interim) suspensive effect and the Complaints Board's sanctions

2.2 Selected interim decisions and decisions

2.2.1. Requirements for specifications, including minimum requirements, and organisation of procurement procedures

Decision of 17 January 2018, Opel Danmark A/S v the Danish Police represented by the National Police

Procurement procedure for servicing etc. of Opel vehicles. The successful tenderer was not an authorised Opel service centre, but had declared that it would comply with the minimum requirements. The Complaints Board had regard to this fact and to EU regulation aiming to give independent repairers access to the market on an equal footing with authorised dealers and repairers. The Board thus held that the tender fulfilled the conditions.

The case concerned a public procurement procedure covering 57 lots under Title II of the Public Procurement Act for a framework agreement for repair services, spare parts and consumables, including tyres, for police vehicles. The complaint concerned one of the lots, for repair services etc. for the North Jutland Police's Opel vehicles and had been submitted by the importer of Opel vehicles which had not submitted a tender. The Complaints Board found that the complainant, a subcontractor to

the Opel service centres that had submitted a tender for the lots and was not awarded a contract, was eligible to complain. The complainant submitted that a number of minimum requirements could not or only just be fulfilled by the successful tenderer because it was not an authorised Opel service centre.

In its decision, the Complaints Board explained that independent service centres' access to repair and maintenance information is guaranteed by Regulation (EC) No 715/2007 of the European Parliament and of the Council of 20 June 2007, cf. Recital 27 and Article 6(1) of the Regulation. The Board noted that the successful tenderer had declared in its tender that it would meet the minimum requirements, and that the undertaking had confirmed this to the National Police when the National Police had looked into the matter. On the evidence, including the EU Regulation, which aims to give independent service centres equal access to the market on the same terms as authorised dealers and repairers, the Complaints Board found that the complainant had not proved that the winning tender did not fulfil the conditions. Also, the complainant failed to demonstrate that the National Police had not examined this issue sufficiently. For these reasons, the Complaints Board dismissed the complaint. The complaint was filed in the standstill period. Instead of considering whether to grant suspensive effect, the Complaints Board made a final decision in the case before the expiry of the 30-day deadline stipulated in Section 12(3) of the Complaints Board Act. The decision was thus an example of an expedited decision.

Decision of 22 February 2018, Axcess A/S v the Capital Region of Denmark

Framework agreement with a term of more than four years in contravention of Section 95(2) of the Public Procurement Act (Article 33(1) of Directive 2014/24/EU). Award decision annulled.

The case concerned the Capital Region of Denmark's procurement procedure under Title II of the Public Procurement Act for a framework agreement for network components. The contract was divided into four lots, two of which concerned the supply of network equipment, while the other two concerned support etc. for the Region's existing network equipment. The term of the contract was fixed at 48 months with the option of extending it once or several times by up to 36 months in total, i.e. a potential term of seven years. The complainant, an unsuccessful tenderer, submitted that the Capital Region of Denmark had not demonstrated the existence of exceptional circumstances justifying an exemption from the general rule in Section 95(2) of the Public Procurement Act (Article 33(1) of Directive 2014/24/EU) that the term of a framework agreement must not exceed four years, and that the Region's award decision should be annulled.

The Complaints Board, finding for the complainant, stated that it fell on the Region to prove the existence of extraordinary circumstances justifying a potential term of seven years for the framework agreement. The Region had not demonstrated such exceptional circumstances. The Complaints Board gave particular importance to the fact that the framework agreement covered acquisition of standard network components, where the Region was free to put together its own solutions based on its needs when using the hardware covered by the framework agreement. In addition to this, the framework agreement replaced a previous contract with a significantly shorter term, the procurement procedure, including its division into four lots, seemed to depend on the possibility to launch

further procedures to find other suppliers, and it would be possible to ensure that the equipment would be compatible with the existing network equipment. As the violation of Section 95(2) of the Public Procurement Act (Article 33(1) of Directive 2014/24/EU) had to be regarded as being of material importance, the Complaints Board annulled the Region's award decision.

Interim decision of 27 June 2018, Abena A/S v Staten og Kommunernes Indkøbsservice A/S (SKI)

This case concerned a complaint claiming that the contracting entity had not carried out effective verification of the accuracy of the information in the tenders regarding the subcriterion Assortment range, that the contracting entity had not checked information in the tender from the successful tenderer, that the contracting entity had allowed inclusion of optional assortment B in the procedure, although it was not included in the evaluation, that no objective and transparent requirements for optional assortment A had been set up, and that the description in the specifications of the award procedure was charged. The Complaints Board did not grant suspensive effect, as the case was not considered to be a prima facie case.

The case involved a procurement procedure under Title II of the Public Procurement Act concerning a framework agreement with several suppliers for the supply of nappies and other products for certain citizens. The award criterion was best price-quality ratio based on the subcriteria Price (60%), Service (20%) and Assortment range (20%).

According to the specifications, tenderers were to indicate prices of each product comprised by the tender for the part of the list of products relating to "mandatory assortment", and only one product was allowed per product line. The list of products also included an optional "Assortment A", where the tenderer could – but was not required to – offer additional products that were not identical to any of the products offered under the mandatory assortment and were different from such a product with respect to various properties. However, such products were required to meet certain requirements for the corresponding product under the mandatory assortment and be offered at the same price. In addition, it had been provided that the tender evaluation of the subcriterion Assortment range would be based on the number of products offered under "Assortment A". Tenderers could also offer products not included in the list of products or "Assortment A" under an optional "Assortment B". The prices for these products could not exceed the tenderers' list prices or the producer's recommended retail price, and the products under "Assortment B" were not included in the tender evaluation. Use of the framework agreement was to be based on either direct award or award based on a quality check performed by a group of experts or award based on quality testing in practice by eligible citizens, and the contracting entities were to indicate in advance which of these they would use. In the specifications, use of the framework agreement based on a quality check and based on quality testing was referred to as "reopening of competition". In a Q&A, prospective tenderers protested against these award methods, after which the contracting entity changed the title to "award of term contract based on quality testing" (by a group of experts) and "award of term contract based on a quality check" (by eligible citizens). Two companies submitted tenders. It was an absolute condition for the award that the successful tenderer's tender had achieved a significantly higher score for

the Assortment range subcriterion. The contracting entity decided to conclude framework agreements with both tenderers and disclosed how they were ranked.

The complainant, the tenderer who came second, submitted that SKI had failed to carry out effective verification of the accuracy of the information in the tenders regarding the subcriterion Assortment range. The Complaints Board held that public procurement law does not dictate that the contracting entity must carry out effective verification of the information contained in a tenderer's tender with regard to each subcriterion or sub-subcriterion. According to Section 159(3) of the Public Procurement Act (Article 56(1) and (3) of Directive 2014/24/EU), the contracting entity 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 Public Procurement Act (Article 56(1) and (3) of Directive 2014/24/EU) do not provide any interpretative aid for this provision which must be read in conjunction with the corresponding provision in Section 164(2) of the Act (Article 67(4) of Directive 2014/24/EU). The general rule under both these provisions and according to case law is that a tender must be evaluated on its merits. 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*. In such cases, the contracting entity must perform an effective verification of the accuracy of the information and the documentation submitted by the candidate or tenderer. Against this background, the Complaints Board found that SKI had not been obliged to perform a mandatory effective verification of the accuracy of the information contained in the tenders with regard to the Assortment range subcriterion, even if such verification was possible. The Board noted that if it becomes clear after contract conclusion that the successful tenderer is not able to deliver what was promised in its tender, the contracting entity could be required in the given circumstances to terminate the contract, because accepting the non-compliant products would change the subject-matter of the contract to such an extent that the competitive tendering obligation would not be met with the procurement procedure.

The complainant also argued that SKI had allowed optional assortment B to be included in the procedure, although it was not included in the evaluation, which was contrary to Section 2 of the Public Procurement Act (Article 18(1) of Directive 2014/24/EU) and Sections 45(2) and 161 of the Act (Article 67(1) of Directive 2014/24/EU). The Complaints Board held that the general rule according to public procurement law is that the tenders must be evaluated against the entire contract tendered. However, according to Section 45(2) of the Public Procurement Act, in relation to the performance of a procurement procedure with reference by the contracting entity to specific product categories, the evaluation of the tender cf. Section 160 may be based on a typical example of comparable products in the product ranges offered by the tenderers. Accordingly, the contracting entity may evaluate tenders based on a typical example of comparable products in the tenderer's product range in terms of both price and quality. In consideration of the specifications and the structure of the lists of products, the Complaints Board also found that it had been made clear to the tenderers that the products offered in the mandatory assortment and in optional assortment A – as opposed to assortment B – constituted the part of the total products offered, including assortment B, that would be subject to evaluation. In addition, considering the requirement specifications and the lists of products, the

products comprised by the procedure had been described in such detail that it left no doubt as to the scope of the products for which tenders were invited.

The complainant moreover claimed that no objective and transparent requirements had been set up for optional assortment A. After having reviewed the specifications, the Complaints Board held that it was not possible to offer exactly the same products under the mandatory assortment and optional assortment A, and the tenderers had not done so. The description of the products in the mandatory assortment was found to be sufficiently clear to allow tenderers to assess whether they wanted to bid, including for assortment A, and which products or services could form the basis of the tender for the individual assortments.

The complainant also submitted that it was in breach of Section 2 of the Public Procurement Act (Article 18(1) of Directive 2014/24/EU) and Section 100 of the Act (Article 33(5) of Directive 2014/24/EU) for SKI to change the description of the procedure for awarding contracts under the framework agreement by not having given the opportunity to reopen the competition. The Complaints Board ruled that whether a change of certain conditions constitutes a change of an essential element, a material change or an insignificant change must be assessed on a case-by-case basis. A decisive factor in such assessment is whether the change affected the potential candidates or tenderers or distorted competition between them. When the contracting entity changed the models for use of the framework agreement, tenderers were only asked to submit the products offered from the assortment that were identified as being a representative, which meant that they had no opportunity to influence or improve the tender which was subject to evaluation by the contracting entity. Regardless of the initial wording, competition had in effect not been reopened, which must also have been clear to the tenderers. Against this background, the Complaints Board held that the changed wording only introduced an objective clarification where the terminology was adjusted to reflect the actual model, and where the prescribed award method was not changed. Accordingly, there was no basis for assuming that this change was likely to affect potential tenderers' decision to participate or distort competition between the tenderers participating.

The complaint was subsequently withdrawn. The interim decision was thus the Complaints Board's final decision in the case.

Decision of 17 September 2018, New Printtex of Denmark ApS v the Danish Ministry of Defence's Acquisition and Logistics Organisation

No basis for concluding that a procedure for a framework agreement covered products which could with certainty be expected not to be purchased, and the weights applied were regarded as being reasonable based on the information available in the case.

In March 2018, the Danish Ministry of Defence's Acquisition and Logistics Organisation (FMI) launched a public procurement procedure under the Public Procurement Act for the purchase of "metal objects" for soldiers' uniforms (badges showing unit and place of duty, distinctions and honours for use by the Danish Defence). The award criterion was best price-quality ratio based on the subcriteria Price and Quality, each with a weight of 50%. The procedure covered a large number of

products in three categories, each with a different weighting in the calculation of the prices. The products had the same weighting within the three product categories.

The complainant, which had not submitted a tender, claimed that some of the products on the list of products were discontinued and would therefore (most likely) not be used. Accordingly, these products could not be regarded as being related to the subject-matter of the contract, cf. Section 163 of the Public Procurement Act (Article 67(3) of Directive 2014/24/EU), just as the weighting in the evaluation model was not representative, as all products within each category weighted the same, regardless of the fact that some of them were discontinued and therefore would not be sourced to the same extent as the other products. The complainant also considered that FMI should have indicated which products were discontinued. On this basis, the complainant submitted that FMI had acted contrary to the principles of equal treatment and transparency in Section 2 of the Public Procurement Act (Article 18(1) of Directive 2014/24/EU).

In response to this, FMI argued that the fact that some of the metal objects were marked as discontinued did not mean that FMI would not be purchasing these metal objects during the term of the framework agreement. It was more accurate to say that they had been "put on hold". In that context, FMI gave an account of the Danish Defence's practice for putting metal objects on hold and reusing them. FMI also stated that the weighting of the prices of the individual products was based on a project group's specific assessment of the estimated procurement needs.

The Complaints Board dismissed the complaint, referring in particular to the fact that, based on the information available on the nature of the disputed metal objects and the Danish Defence's practice for putting metal objects on hold and reusing them, there was no basis for concluding that the list of products contained a substantial number of products that would with certainty not be purchased within the term of the framework agreement, which would mean that they should have been excluded from the procurement procedure. Also, the Complaints Board found no basis for concluding that the information provided by FMI, including input and experience from a project group set up for this purpose, on which the classification of the products into different product groups was based, was unjustified. Moreover, there was no basis for setting aside FMI's conclusion that it was not relevant to perform a further detailed differentiation of the weighting within the three product groups. Finally, the Complaints Board found that FMI had not acted contrary to the principle of transparency in Section 2 of the Public Procurement Act (Article 18(1) of Directive 2014/24/EU) by not disclosing which products were marked as discontinued in FMI's IT system, or that the metal objects had been put on hold.

2.2.2. Preselection

Decision of 26 March 2018, Idemia Identity & Security France SAS v the Agency for Digitisation

Preselection criteria were objective, non-discriminatory, transparent and proportionate. In the selection, an assessment had been made "across" the references from the company in question for each main service, which meant that one or two references could add to the overall assessment for a main deliverable. This did not imply the selection was not objective, non-discriminatory, transparent and

proportionate. No basis for assuming that nationality had been considered in the assessment of candidates.

On behalf of the Danish State, regions and municipalities, the Agency for Digitisation launched a restricted procurement procedure with negotiation under Title II of the Public Procurement Act concerning a contract for the development, operation, maintenance, support and further development of a national identity and authentication solution (MitID) worth an estimated DKK 900 million (EUR 121 million). The MitID solution would be the next generation of the current NemID and be used by companies and private individuals in Denmark. Nine companies, including Idemia Identity & Security France SAS (Idemia), applied for preselection. The Agency for Digitisation preselected three companies. Idemia, which was not preselected, complained to the Complaints Board claiming that the Agency had not established clear guidelines for the evaluation method, and that the Agency had discriminated against the candidates in its assessment of the references and by only selecting Danish companies for the next stage. The case was heard by two judges and two expert members.

The Complaints Board ruled that the Agency of Digitisation in its assessment of the candidates' qualifications had assessed the references "across" the individual main services, as it gave importance to the score given to the company's qualifications based on the reference(s) scoring highest for the main service in question. It had not subtracted from the score if the companies also had references judged to be less favourable in relation to the main service in question. The Complaints Board ruled that the criteria and provisions governing the selection procedure were objective and non-discriminatory, transparent and proportionate, and that the same was true for the Agency of Digitisation's decision to preselect the four companies.

The Complaints Board gave importance to the fact that the contract notice stipulated that a relevance assessment of the references would be performed and described the criteria for the relevance assessment. The Agency had also stated that it would look at whether the references "taken together" documented a high level of relevant experience. There was no basis for assuming that nationality had been considered in the Agency's assessment of candidates. The Complaints Board thus held that the description in the contract notice and the replies to questions from the candidates had made the selection process and the criteria applied sufficiently transparent. It could not lead to a different result that an assessment "across" the references had been performed in relation to each of the main services, such that, for example, one or two references could add to the overall assessment of a main service. The Complaints Board further held that there was no basis for setting aside the Agency for Digitisation's reasoned estimate. The complaint was thus not upheld.

Decision of 20 June 2018, Icomera AB v DSB

In a procurement procedure under the Utilities Directive, the contracting entity was entitled to demand that a candidate submit a separate ESPD and a statement of support for entities on which the candidate relied to demonstrate its suitability. No basis for setting aside the contracting entity's decision not to preselect the complainant.

DSB launched a negotiated procedure under the Utilities Directive concerning a contract for installation of wireless internet in trains. Icomera AB, which was not preselected, complained to the Complaints Board for Public Procurement, requesting that the Board grant suspensive effect, cf. Section 12(1) of the Complaints Board Act. The Complaints Board decided to make a substantive decision in the case and not grant the complaint a suspensive effect. Icomera submitted that DSB had violated Article 36(1) of the Utilities Directive and/or Section 11 of the Implementing Order, cf. Section 148 of the Public Procurement Act (Article 59(1), first paragraph, of Directive 2014/24/EU) and Section 152(2) of the Act (Articles 60(1) and 61(2) of Directive 2014/24/EU) by rejecting the company's application for preselection and by requiring a statement of support in the form of a completed contract document.

The Complaints Board stated that Section 152(2) of the Act (Articles 60(1) and 61(2) of Directive 2014/24/EU) did not apply to procurement procedures governed by the Utilities Directive, cf. Executive Order No. 1624 of 15 December 2015 implementing the Directive. The Complaints Board also explained that the negotiated procedure was reopening of a previous procedure with only seven tenderers which had been cancelled. DSB thus had a duty to ensure that the procedure involving preselection could be completed with the candidates that were able to provide documentation of support. The Complaints Board further stated that the statement of support could easily be submitted by filling in a brief form attached to the specifications. Accordingly, participating companies that relied on other entities could with little difficulty obtain the statement of support when they secured the necessary support from another entity, which was what they actually did. It added that a statement of support was only binding if the candidate was eventually awarded the contract. The obligation to enclose the declaration of support was set out in a transparent manner in the contract notice, and the requirement for supplementary documentation only covered support from other entities. Against this background, the Complaints Board held that a decision made to avoid imposing an unnecessary administrative burden on the participating companies – i.e. a requirement for submission of documentation for support and an ESPD – did not have any significant impact during this procurement procedure, and that there were no grounds for setting aside DSB's assessment that it was necessary to obtain the supplementary documentation.

The Complaints Board ruled that the rejection was not based on the use of another form than the one prescribed, but on the fact that the supporting entity had limited its liability in the statement of support enclosed with the application. This applied to both the scope of the obligations and their duration, which was also the likely intent behind the wording in the statement of support. As Icomera was not able to meet the minimum requirements for economic and financial standing, and as the statement of support contained significant restrictions in the liability assumed, as mentioned above, DSB could not preselect Icomera. On these grounds, there was no basis for holding that DSB had violated Article 36(1) of the Utilities Directive and/or Section 11 of the Implementing Order, cf. Section 148 of the Public Procurement Act (Article 59(1), first paragraph, of Directive 2014/24/EU). The Board noted in that context that Section 11 of the Implementing Order is not clear in its wording with regard to the application of Section 148 (Article 59(1), first paragraph, of Directive 2014/24/EU).

Decision of 24 July 2018, Albertslund Tømrer og Snedker A/S v the Municipality of Hillerød

A candidate that had not been preselected was successful in its claim that the contracting entity had violated the principles of equal treatment and transparency in Section 2(1) of the Public Procurement Act (Article 18(1) of Directive 2014/24/EU) by not having stated in the contract notice which objective and non-discriminatory criteria would be applied in the selection, cf. Section 145(3)(3) of the Public Procurement Act (Article 65 of Directive 2014/244/EU). The contracting entity's preselection decision was therefore annulled.

The case concerned a restricted procurement procedure under Title II of the Public Procurement Act for framework agreements for craftsman services. The procedure was divided into lots, and the case concerned one of the lots, which was for carpentry work. According to the preselection criteria, up to eight candidates would be preselected. The preselected candidates would be selected based on an assessment of the comparability and relevance of the references relative to the lot in question, and it would be considered positively if the candidate had enclosed a positive statement from the client. The contract notice did not detail the required references, how many candidates would be preselected or how the preselected candidates would be chosen.

The complainant, which had not been preselected, mainly submitted that the Municipality had not provided any criteria for selection of candidates in the contract notice.

In its interim decision of 11 April 2018, the Complaints Board decided to grant suspensive effect to the complaint. The case was considered to be a prima facie case (it seemed well-founded on a preliminary assessment), as it was likely that claim 1 and a claim for annulment would be upheld. Condition no. 2 (urgency) was also met, as the company, according to the claim, had wrongfully not been preselected to participate in the procedure, which meant that it would potentially sustain a loss for which no compensation could be claimed under the general law of damages if the company's complaint was upheld by the Complaints Board's final decision. Suspensive effect was thus necessary to avoid serious and irreparable damage. With regard to condition no. 3 (balancing of interests), the Complaints Board noted that this condition should be interpreted narrowly, as conditions no. 1 and 2 had been met. The Complaints Board found that the company's interest in being granted suspensive effect outweighed the Municipality of Hillerød's interest in the opposite, and the Complaints Board held, among other things, that there was no information on the interests of the public good or other special considerations that would lead to a different conclusion. The Municipality had not raised any separate allegations regarding this issue.

The Complaints Board stated that according to Section 145(3) of the Public Procurement Act (Article 65 of Directive 2014/24/EU), the contracting entity must indicate in the contract notice the information on which the preselection will be based. The purpose of the obligation to publish a contract notice is to allow potential candidates or tenderers to assess whether it is relevant for them to spend resources on preparing an application. By using contract notices, a great deal of important information is made available in a uniform, simple, clear and easily available manner to enable companies to keep up-to-date on and consider participating in the procedures that may be relevant to them, without spending a disproportionate amount of resources. In that connection, the Complaints Board

stated that, regardless of the fact that the explanatory notes to Section 145 of the Public Procurement Act (Article 65 of Directive 2014/24/EU) uses the term "tender documents" , which must be interpreted in accordance with Section 24(36) of the Public Procurement Act) (Article 2 of Directive 2014/24/EU), according to the wording of the provision read in conjunction with the substance of the Directive, it must be applied that the information in Section 145(3)(1)-(3) of the Public Procurement Act (Article 65 of Directive 2014/24/EU) must be provided in the contract notice, such that candidates and tenderers will only have to rely on the content of the contract notice when deciding whether to participate or apply to participate. The fact that all the procurement documents had been made electronically available at the date of publication of the contract notice pursuant to Section 59(6) of the Public Procurement Act (Article 28(1), second paragraph, and 28(6)(a)), cf. Section 132(1) (Article 53(1), first and second paragraphs) of Directive 2014/24/EU), could not lead to a different interpretation of Section 145(3) (Article 65 of Directive 2014/24/EU) than prescribed by the wording and purpose of the rules on publication of contract notices. It could not lead to a different result that the contract notice referred to "Selection criteria stated in the procurement documents".

Against this background, the preselection decision was annulled, as the Municipality had not been entitled to use the selection criteria in the rest of the procurement documents, as these were not mentioned in the contract notice. The criteria could also not be applied in a preselection decision. Considering the nature of the infringement, the Municipality of Hillerød had not demonstrated that it did not influence which candidates applied for preselection and thus the outcome of the procurement procedure.

Interim decision of 12 December 2018, KMD A/S v the City of Copenhagen

The contract notice did not state that the most suitable candidates would be those who achieved the highest average score for each reference area, and that this would be assessed based on a mathematical model using five references, regardless of whether a candidate had submitted fewer references, and that it would detract from the qualitative assessment if a candidate submitted fewer than five references. On the preliminary basis, the City of Copenhagen had therefore acted contrary to the principles of equal treatment and transparency in Section 2(1) of the Public Procurement Act (Article 18(1) of Directive 2014/24/EU), cf. Section 145(3)(3) of the Act (Article 65 of Directive 2014/24/EU). The case was considered a prima facie case. The complaint was granted suspensive effect.

The case concerned a negotiated procedure under Title II of the Public Procurement Act on the supply and operation etc. of an IT system for use within the social and healthcare area. In the contract notice, the contracting entity requested references demonstrating experience within eight specified reference areas. It was a minimum requirement that candidates for preselection identified at least one relevant reference in the last three years, and a maximum of five references could be provided. Four candidates would be preselected to tender based on the most relevant references. The contracting entity would thus focus primarily on broad experience in all reference areas. In the assessment of the six candidates' references, the contracting entity first assigned a score on a scale from 0 to 4 to each of the above-mentioned eight reference areas. These scores were then added together, and the sum was divided by the maximum number of references (five), no matter how many references were actually provided. The result amounted to each candidate's scores for the references,

and the contracting entity preselected the four candidates with the highest scores. An unsuccessful candidate then complained to the Complaints Board. The complainant had provided three references, while all the other candidates had provided five. In the letter from the contracting entity informing the complainant that it had not been preselected, the contracting entity stated, among other things, that it had subtracted from the score that the complainant was not able to demonstrate a broader experience by providing more references.

The Complaints Board found that it was not stated in the contract notice that the most suitable candidates would be those who achieved the highest average score for the individual reference areas based on a mathematical model using five references, regardless of whether a candidate provided fewer references. Nor was it indicated that it would subtract from the qualitative assessment if a candidate submitted fewer than five references. According to the contract notice, the candidates' experience should have been assessed based on the score given to each relevant reference in the eight reference areas in order to identify and select the most suitable candidates in terms of "the most relevant references". Against this background, the City of Copenhagen had failed to describe in a transparent manner what would be emphasized in the evaluation of the references in relation to the qualitative subcriterion, as it was not set out in the contract notice which objective and non-discriminatory criteria would be applied in the selection, cf. Section 145(3)(3) of the Public Procurement Act (Article 65 of Directive 2014/24/EU), which was contrary to the principles of equal treatment and transparency in Section 2(1) of the Public Procurement Act (Article 18(1) of Directive 2014/24/EU).

Condition no. 2 (urgency) was also met, as the issue of the complaint was that the company had wrongfully not been preselected to participate in the procedure, and as KMD was thus not sufficiently protected by the general law of damages, if its complaint was upheld by the Complaints Board's final decision. On these grounds, the Complaints Board found that there was urgency, as it was necessary to grant suspensive effect to avoid serious and irreparable damage to KMD.

As conditions 1 and 2 had been met, and the balancing of interests should thus be interpreted narrowly, the Complaints Board found that KMD's interest in being granted suspensive effect outweighed the City of Copenhagen's interest in the opposite, due to, among other things, the fact that there was no information on the interests of the public good or other special considerations that would warrant a different conclusion.

The City of Copenhagen then cancelled the procedure, and the complaint was withdrawn. The interim decision was thus the Complaints Board's final decision in the case.

2.2.3 Grounds for exclusion

Decision of 28 September 2018, Bayer A/S v Banedanmark

Cooperation between the successful tenderer and another tenderer. The contracting entity carries the burden of proving that the conditions for applying one of the voluntary grounds for exclusion in Section 137(1)(4) and (6) (Article 57(4)(d) and (i) of Directive 2014/24/EU) were met. A "suspicion" or the like which is not adequately substantiated by evidence does not entitle the contracting entity to reject

a tender according Section 137(1)(4) or (6) (Article 57(4)(d) and (i)). When a voluntary ground for exclusion is used, the contracting entity must also observe the principle of proportionality. No evidence for agreement on distortion of competition or provision of misleading information.

On 16 January 2018, Banedanmark (the national railway infrastructure manager) launched a public procurement procedure under the Utilities Directive for a contract for the supply of detection, registration and chemical spraying of weeds in Banedanmark's tracks. The complainant, an unsuccessful tenderer, mainly claimed that the winning tenderer, Weedfree on Track Ltd., was covered by the voluntary ground for exclusion in Section 137(1)(4) and/or (6) (Article 57(4)(d) and (i) of Directive 2014/24/EU).

In overall terms, the Complaints Board stated that it is provided in Article 80(1) of the Utilities Directive that the objective rules and criteria for the exclusion and selection of economic operators may include the exclusion grounds listed in Article 57 of the Public Procurement Directive on the terms and conditions set out therein. Article 57 of the Public Procurement Directive has been implemented in Danish law by different provisions in the Public Procurement Act, including Section 137 on voluntary grounds for exclusion. And pursuant to Section 10 of the Implementation Order, Section 137 of the Public Procurement Act also applies to contracting entities when launching procurement procedures under the Utilities Directive. Referring to the wording of and explanatory notes to this provision, the Complaints Board stated that the contracting entity carries the burden of proving that the conditions for applying one of the voluntary grounds for exclusion in Section 137(1)(4) and (6) (Article 57(4)(d) and (i) of Directive 2014/24/EU) were met. If the standard of proof in Section 137(1)(4) of the Public Procurement Act (Article 57(4)(d) of Directive 2014/24/EU) ("the contracting entity has sufficient plausible indications to conclude"), or the stricter standard of proof in Section 137(1)(6) of the Public Procurement Act (Article 57(4)(i) of Directive 2014/24/EU) ("the contracting entity can prove") has not been met, a tender may only be rejected if so provided by other statutory rules. An indication, a "suspicion" or the like which is not adequately substantiated by evidence does not entitle the contracting entity to reject a tender according Section 137(1)(4) or (6) (Article 57(4)(d) and (i) of Directive 2014/24/EU). The standard of proof in these provisions prevents arbitrariness and uncertainty in cases of exclusion of companies, but the provisions also give the contracting entity the authority to reject a tender, subject to certain terms, that should not take part in the competition. When a voluntary ground for exclusion is used, the contracting entity – as also stated in the explanatory notes to Section 137 of the Public Procurement Act (Article 57(4)(a), (b), (c), (d), (g) and (i) of Directive 2014/24/EU) – must also comply with the principle of proportionality.

The Complaints Board found that there was not sufficient evidence to establish that Weedfree on Track had entered into an agreement with another tenderer, G&G Növényvédelmi és Kereskedelmi Kft., in order to distort competition, or that the company had acted with gross negligence and given misleading information which could have significantly influenced Banedanmark's decisions by not informing the contracting entity of its cooperation with G&G. The Complaints Board found that the fact that the two companies worked together on other projects, in conjunction with the fact that both companies took part in this procurement procedure, could not lead to the conclusion that the conditions for exclusion in Section 137(1)(4) or (6) of the Public Procurement Act (Article 57(4)(d) and

(i) of Directive 2014/24/EU) were met, neither seen in isolation nor in conjunction with the information otherwise available, including the tenders submitted. This claim was thus not upheld.

2.2.4 Evaluation, including choice of evaluation model

Interim decision of 25 January 2018, CSC Danmark A/S v the National Police

Evaluation based on subcriteria using a difference model did not constitute a relative evaluation of the tenders.

The case concerned a competitive dialogue under the Directive on Security and Defence Procurement for a framework agreement worth an estimated value of between DKK 200 and 500 million (EUR 26,8 to 67,1 million) with a single supplier for the operation etc. of the National Police's IT systems. The service comprised by the procedure was to replace various legacy systems which had been run by CSC for a number of years. The award criterion was the most economically advantageous tender based on the subcriteria Price (30%), Quality (50%) and Security of supply (20%). In its evaluation of the tenders, the National Police used a so-called difference model, which was described in the specifications. The National Police received tenders from CSC and IBM and decided to contract with IBM. In the award notice, the National Police explained that, based on the difference method, IBM's weighted quality score was 22.92% better than CSC's, and IBM had offered a price that was only 20.34% higher when weighted. IBM had therefore offered the best price-quality ratio.

CSC mainly claimed that the National Police had used an inappropriate evaluation method by making a relative assessment of the tenders.

The Complaints Board stated that it was not likely that CSC would succeed in its claims. The National Police had used the so-called "difference model" to answer the question of whether a better quality in this specific case could make up for the higher price. The method used did not – as the complainant alleged – imply that the two tenders were assessed on a relative basis in respect of the qualitative subcriteria. In contrast, with this method, each tender was allocated a score reflecting the degree to which it satisfied the subcriteria.

Since it was not likely that a claim for annulment of the award decision would be upheld, the complaint was not granted suspensive effect.

The complaint was subsequently withdrawn, and the Complaints Board's decision not to grant the complaint suspensive effect was thus the final decision in the case.

Decisions of 23 February and 5 September 2018, Sigmax Law Enforcement BV v Rejsekort A/S

During a negotiated procedure under the Utilities Directive, the contracting entity changed the evaluation method described in the procurement documents. This meant that an essential element was changed, and the Complaints Board annulled the award decision. No compensation, as the specifications could not constitute the basis for a lawful award, and hence, the causal link requirement had not been met.

The case concerned a procurement procedure for a system for use by ticket inspectors when checking passengers' travel cards. The award criterion was best price-quality ratio. According to the procurement documents, the tenders would also be assessed relatively in relation to the qualitative subcriterion and be given a score of 20, 40, 60, 80 and 100, respectively, where the best tender would be awarded a score of 100. Four tenders were received, and the contracting entity held negotiations with two of the tenderers, including the complainant, which then submitted new tenders. In its evaluation, the contracting entity gave the best tender a score of 100 and the next best a score of 0 for the qualitative subcriteria. According to the contracting entity, the reason for this was that the scoring guidelines in the procurement documents were not suitable in a situation where only two tenders were to be evaluated.

The complainant submitted that the contracting entity had not been entitled to score the tenders as described. The Complaints Board found for the complainant, stating that the change of evaluation method amounted to a change of an essential element, which required a new procurement procedure. The change had undisputedly been decisive for the final outcome and had thus distorted competition between the two tenderers. It could not lead to different result that the evaluation model, as it was described in the specifications, proved to be unsuitable in this case, because the contracting entity bears the risk of the drafting of the procurement documents.

The Complaints Board also annulled the award decision.

In its decision of 5 September 2018, the complainant's claim for compensation was not upheld. The evaluation model described in the specifications assumed that five tenders would be received, which meant that the model did not take into account the situation where fewer tenderers than expected submitted an initial or a final tender. It could not be inferred how the evaluation would be carried out, if fewer than five tenders were received, which implied that the model was not in conformity with the principle of transparency. Moreover, with this model, it was not possible to award the same score to tenders where the tenderers had managed the same or almost the same degree of fulfilment of the quality requirements. The "steps" in the model with a 20-point difference between each of the five expected tenders were thus also in violation of the principle of equal treatment. As compensation cannot be awarded if the procurement procedure to which the claim relates could not form the basis of a lawful award decision, and the requirement for a causal link has thus not been met, the Complaints Board found for the contracting entity in respect of this claim.

Decision of 18 April 2018, A/S Julius Nielsen & Søn v the Danish Ministry of Defence's Estate Agency

Notwithstanding the fact that a contracting entity is generally bound by the evaluation method stated in the procurement documents, the Complaints Board found, based on the facts of the case, that an adjustment of the scale used for the subcriterion Price was lawful, and that the contracting entity had thus not violated the principles of equal treatment and transparency in Section 2 of the Public Procurement Act (Article 18(1) of Directive 2014/24/EU) and the second sentence of Section 66(5) of the Public Procurement Act (Article 29(2)-(5) of Directive 2014/24/EU).

The case concerned a negotiated procedure under Title II of the Public Procurement Act for the carpentry contract of a construction project. The award criterion was best price-quality ratio based on the subcriterion Price with a weight of 40% and three qualitative subcriteria each with a weight of 20%.

According to the specifications, the assessment based on the subcriterion Price would be made using a linear scale with a maximum of five points, and the evaluation of the tenders according to the qualitative subcriteria would be performed using a scale of 1 to 10. Three preselected tenderers submitted tenders, and negotiations were held with these tenderers. The Ministry of Defence's Estate Agency then made some changes in the specifications. Here, the maximum points on the linear scale used to assess the tenders on the subcriterion Price were changed to 10. The Estate Agency explained that the reason for this was that the maximum score of five points described in the original specifications was an error, and that the change was meant to correct this error by using the same scale for the subcriterion Price and the qualitative subcriteria. None of the current tenderers objected to the change of the scores for the price criterion.

The Complaints Board, which did not uphold the complaint, stated that for an evaluation to ensure that the respective subcriteria of the overall evaluation would be given the weight set out in the specifications, it would require that the two scales are comparable. If the Estate Agency had not changed the scale for Price to make it identical to the scale for the score given to the tenders in the evaluation of the subcriterion Quality, the Agency would subsequently have to recalculate the scores given to a common scale, which had to have been clear to the tenderers. The Complaints Board also gave regard to the fact that the adjustment of the scale did not shift the relationship between the weighting of the subcriterion Price and the weighting of the other subcriteria in relation to what was set out in the specifications. Neither would the adjustment of the scale influence any company's decision to take part in the procurement procedure if the change had been known, and it could be assumed that the adjustment in effect had not upset the competition between the tenderers, who were made aware of the change. Finally, the Complaints Board considered that the tenderers had had the opportunity to take the information about the initial tenders, which was provided in the published procurement protocol of 5 May 2017, into account in preparing their final tenders. Notwithstanding the fact that a contracting entity is generally bound by the evaluation method stated in the procurement documents, the Complaints Board found, in these circumstances, that the adjustment was, by way of exception, lawful, and that the Estate Agency had thus not violated the principles of equal treatment and transparency in Section 2 of the Public Procurement Act (Article 18(1) of Directive 2014/24/EU) and the second sentence of Section 66(5) of the Public Procurement Act (Article 29(2)-(5) of Directive 2014/24/EU).

The Complaints Board had decided not to grant the complaint suspensive effect in its interim decision of 29 November 2017.

Decision of 23 May 2018, Coloplast Danmark A/S v the Capital Region of Denmark

The wording of a minimum requirement was unclear, which made it unsuitable as a minimum requirement. However, as there was no basis for assuming that this violation had had a real impact on the award decision, it was unlikely that the decision would be annulled.

The case concerned a public procurement procedure under Title II of the Public Procurement Act for a framework agreement for the supply of wound care products. The complaint concerned two lots, both for foam dressings for moderately exuding wounds "with and without silver". One of the lots was for such dressings "without adhesive", while the other lot was for dressings "with a silicone contact layer and an adhesive silicone border". The award criterion was best price-quality ratio.

The complainant, an unsuccessful tenderer, claimed, among other things, that one of the Region's minimum requirements was worded unclearly and arbitrarily. The complainant referred to the final sentence of the description of the minimum requirements: "... On this basis, the Region will assess whether the product may be offered". Referring to this, the Complaints Board found that the requirement was so unclear that it was unsuitable as a minimum requirement, as it had not been specified which information should be provided to meet the minimum requirement under the given circumstances. This minimum requirement was common to all the lots of the procedure.

However, since all tenderers but one had met the minimum requirement in question, and as the rest of the tenderer's tender did not fulfil the conditions for other reasons, there was no basis for assuming that the unclear wording had any impact on the Capital Region of Denmark's award decision. It was therefore not likely that the Region's award decision would be annulled, which meant that the case was not a prima facie case.

Accordingly, the complaint was not granted suspensive effect, and it was subsequently withdrawn. The interim decision was thus the Complaints Board's final decision in the case.

Decision of 3 October 2018, Efkon GmbH v Fjordforbindelsen Frederikssund

The provision in Section 169(3) of the Public Procurement Act (Article 69 of Directive 2014/24/EU) had to be interpreted such that it provides an exhaustive list of the special circumstances where a contracting entity is obliged to reject a tender which is abnormally low, with the effect that the previous practice in this area is no longer of direct application. There was no information in the case that warranted setting aside Fjordforbindelsen Frederikssund's estimate and deeming the tender to be abnormally low. Accordingly, Fjordforbindelsen Frederikssund had not been obliged to obtain a statement from the successful tenderer prior to making its award decision. However, as the case was not considered a prima facie case, the complaint was not granted suspensive effect.

The case concerned a procurement procedure under Title II of the Public Procurement Act in the form of the competitive dialogue for the supply and operation of toll booths for a bridge. The award criterion was best price-quality ratio based on the subcriterion Price and other qualitative subcriteria. The price offered by one of the tenderers was significantly lower than the other tenderers' prices. The contracting entity reviewed and compared the prices and their composition, but did not contact the tenderer in that regard. Based on its review, the contracting entity concluded that the price did not appear abnormally low. The contracting entity also decided to contract with this tenderer.

The complainant, an unsuccessful tenderer, mainly claimed that the winning tender was abnormally low, that the contracting entity had therefore been obliged to follow the procedure in Section 169 of the Public Procurement Act (Article 69 of Directive 2014/24/EU) and ask the tenderer for an account for the prices and costs, and that the contracting entity should have rejected the winning tenderer.

The Complaints Board ruled that the principles of proportionality and equal treatment in Section 2(1) of the Public Procurement Act (Article 18(1) of Directive 2014/24/EU) had to be considered when determining whether a contracting entity is obliged to request an account for the prices and costs stated in the tender in accordance with Section 169 of the Public Procurement Act (Article 69 of Directive 2014/24/EU). The purpose of the provision should also be considered. The Complaints Board found that neither the wording of Section 169 of the Public Procurement Act (Article 69 of Directive 2014/24/EU), the explanatory notes to the provision nor the Procurement Directive could give rise to an interpretation of the provision where the contracting entity has an obligation to reject tenders regarded as abnormally low that goes beyond the exhaustive list of special circumstances in Section 169(3) of the Act (Article 69 of Directive 2014/24/EU). The provision should be interpreted to the effect that it exhaustively lists the special circumstances under which a contracting entity is obliged to reject an abnormally low tender. The Complaints Board's previous case law in this area is thus no longer directly relevant. In this connection, the Complaints Board found that the last sentence of paragraph 89 (that the contracting entity must reject a tender which is abnormally low) of judgment of the General Court in case T-392/15, European Dynamics Luxembourg and others, could not give rise to a different interpretation of Section 169(3) of the Public Procurement Act (Article 69 of Directive 2014/24/EU), as the opinion was not further substantiated and has not been repeated in other case law, including that of the Court of Justice. The opinion set out in this paragraph should thus be seen in light of the particular situation prevailing in that particular case, and there was no reason to apply it to other cases.

There was no information in the case that warranted setting aside Fjordforbindelsen Frederikssund's estimate and deeming the tender to be abnormally low. Accordingly, Fjordforbindelsen Frederikssund had not been obliged to obtain a statement from the successful tenderer prior to making its award decision.

The fact that there was a significant difference in the prices of the indicative tenders during the dialogues and in the final tender from the successful tenderer, and that Fjordforbindelsen Frederikssund due to the differences in prices examined whether the tender from this tenderer "seemed" abnormally low, could not in itself impose an obligation on Fjordforbindelsen Frederikssund to regard the tender as being abnormally low or to obtain an account of the price and cost in accordance with Section 169(1) of the Public Procurement Act (Article 69 of Directive 2014/24/EU).

The complaint was subsequently withdrawn. The interim decision was thus the Complaints Board's final decision in the case.

Decision of 25 October 2018, Dommerby Stål A/S v the Danish Ministry of Defence's Acquisition and Logistics Organisation (FMI)

In its evaluation of the tenders, the contracting entity was not obliged to verify the accuracy of the information and documentation submitted by the successful tenderer. There were also no grounds to establish that the supporting entity had formally or effectively been replaced, or that a new additional supporting entity had been introduced, after the time of the preselection and until the award decision was made/the contract was concluded.

The case concerned a negotiated procedure under the Directive on Security and Defence Procurement for a framework agreement for the supply and servicing of mobile workshops. The award criterion was the most economically advantageous tender based on the subcriteria Price and Quality. FMI received tenders from three preselected tenderers and decided to contract with one of them.

The complainant, an unsuccessful tenderer, submitted that the successful tenderer had added an additional subcontractor than the subcontractor whose technical capability the tenderer had relied on in the application for preselection, that it was actually the new subcontractor (who had also submitted an application for preselection which was rejected) that had drafted certain parts of the tender, that FMI should have realised this, that this should have led FMI to verify the accuracy of certain parts of the tender, and that this should have led it to conclude that the successful tender did not fulfil the conditions. In addition, the complainant claimed that such addition to the "supporting entities" was contrary to the principles of equal treatment and transparency, as the pre-selected entity and the tenderer were no longer identical.

The Complaints Board, which did not uphold the complaint, firstly stated that a contracting entity is only obliged to verify the accuracy of the information in the tender in case of doubt as to whether the candidate or tenderer meets the requirements in the contract notice and in the other procurement documents. In such case, the contracting entity must perform an effective verification of the accuracy of the information and the documentation submitted by the candidate or tenderer. When it received the tenders, there was no information available to FMI indicating that the company on which the successful tenderer relied in terms of technical capability from the start of the preselection process was no longer bound by its statements of support. FMI had thus not been obliged to verify the information in the selected tender, but could rely on the statements of support. The fact that an additional company was added in the final tender did not change the supporting entity's commitments.

However, after the award decision, FMI received a request from the complainant and requested information from the selected tenderer, which confirmed that the tenderer could still rely on the technical capability of the other company. At this time, there was no other information that should lead FMI to assume that the supporting entity would no longer be making the required resources available to the successful tenderer, or that an entity had effectively or formally been replaced, cf. in this regard the principles set out in Section 147(1) of the Public Procurement Act. In addition, there was no reason to assume that the supporting tenderer no longer undertook an important function in the performance of the contract, or that the successful tenderer had received support from another company in such a way and to such an extent that it could be considered a supporting entity within the meaning of public procurement law. In this connection, the Complaints Board noted that a contracting entity is free to decide its organisation and use subcontractors for the performance of the

contract, unless the contracting entity has imposed restrictions on the access to using subcontractors, cf. Article 21 of the Directive on Security and Defence Procurement. No such restrictions had been described in the contract notice. Further, the Complaints Board stated that the Directive on Security and Defence Procurement, which governed the procurement procedure, does not contain any provisions corresponding to Section 144(3) of the Public Procurement Act (Article 63 of Directive 2014/24/EU). Consequently, this provision did not apply. In its cover letter to its final tender, the successful tenderer had stated that it would abide by "INDO" for six months, which was obviously a typing error. According to the substance of the letter, its context and the tender, and as there would be no point in abiding by the initial tender again in connection with the submission of the final tender, the Complaints Board found that it should be assumed that the tenderer meant to abide by the final tender for six months.

2.2.5 Assortment tenders

Decision of 9 February 2018, Dansk Cater A/S v Staten og Kommunernes Indkøbsservice A/S

Assortment tender. Change during negotiated procedure (Section 61(1)(2) of the Public Procurement Act (Article 26(4)(b) of Directive 2014/24/EU)) of minimum requirement not considered to be change of an essential element. The contracting entity was not obliged to examine whether some products offered met product-specific requirements, and the winning tender was considered to fulfil the conditions. The evaluation model was considered transparent, but not suitable to identify the most economically advantageous tender in relation to the subcriterion Price. The evaluation was considered inadequate in relation to the subcriterion Quality, as different scores had been given to identical products, and because the sensory evaluation performed was contrary to the principles of transparency and equal treatment.

Staten og Kommunernes Indkøbsservice A/S (SKI) launched a public procurement procedure under the Public Procurement Act for a four-year framework agreement for the supply of food for public kitchens. The assortment included about 4,500 product lines, and the estimated value was about DKK 1,6 billion (EUR 215 million). Tenders were received from three companies. All tenders were deemed not to fulfil the conditions and were rejected, after which SKI decided to change to a negotiated procedure under Section 61(1)(2) of the Public Procurement Act (Article 26(4)(b) of Directive 2014/24/EU). One of the unsuccessful companies, Danish Cater A/S, filed a complaint with the Complaints Board for Public Procurement. The case was heard by two judges and two expert members. A *threshold on non-fulfilment of the conditions* in respect of errors on the product lines was changed from 3% to 5%. The change was made during the preceding public procedure and not – as assumed in the claim – during the subsequent negotiated procedure, for which reason this claim was not upheld. During the negotiated procedure, the specifications were also *changed* to the effect that it would now be accepted if a tender contained errors in up to 20 critical product lines. The Complaints Board stated that the change was made by SKI on its own initiative before negotiations began. For this reason alone, Section 66(2) of the Public Procurement Act (Article 29(2)-(5) of Directive 2014/24/EU) had not been violated. In addition, the change was not directly covered by "negotiated procedure with prior publication", where it is assumed in the special notes for Section 2 of the Public Procurement Act (Article 18(1) of Directive 2014/24/EU) that a change of a minimum requirement

will always amount to a change of essential elements. However, according to the explanatory notes, there is a clear assumption that such changes could be characterised as a change of essential elements that cannot be made without launching a new procurement procedure. Moreover, the general clause in Section 2 of the Public Procurement Act (Article 18(1) of Directive 2014/24/EU) must be read in conjunction with the special provision in Section 66(5) of the Public Procurement Act (Article 29(2)-(5) of Directive 2014/24/EU), according to which the contracting entity "may not introduce material changes to the original procurement documents". The Complaints Board went on to state that the contested change only concerned the number of errors in the lists of products, which were of such a nature that they would lead to non-fulfilment of the conditions according to the specifications. By contrast, the changes did not concern "legal" or "functional" aspects of the contract, cf. the explanatory notes to Section 2 of the Public Procurement Act (Article 18(1) of Directive 2014/24/EU), but only relaxation of a formal requirement for the tender. The purpose of this relaxation was to prevent that tenders would be considered not to fulfil the conditions because of a single error, and the change would therefore be able to promote effective competition. Against this background and in view of the nature and value of the procurement procedure, it had been demonstrated that the change was not liable to change any potential tenderers' decision or to distort competition between the actual tenderers. Accordingly, changing of the minimum requirement was also not contrary to the principles of equal treatment and transparency in Section 2 of the Public Procurement Act (Article 18(1) of Directive 2014/24/EU).

The successful tenderer had offered four butter products that failed to meet requirements for the fat composition, and the issue was whether this could be considered to be *non-fulfilment of the conditions* for the procedure. Referring to the specifications, Section 159(3) and (5) of the Public Procurement Act (Article 56(1) and(3) of Directive 2014/24/EU), Section 164 (Article 67(4)) and the contents of the tender, the Complaints Board found that SKI was generally not obliged to examine whether the products offered met the requirements, and that SKI had no reason to doubt that this was the case. With regard to another product offered, the Complaints Board stated that, based on the tender and the test of the sample of the product, there was no reason to doubt that it met the requirement in the list of products, just as the product was not clearly defined by SKI. Accordingly, the tender did fulfil the conditions.

Concerning the *evaluation based on the subcriterion Price* (45%), the Complaints Board stated that, in respect of this subcriterion, it is contrary to the principles of equal treatment and transparency in an assortment tender as the one in dispute not to perform an evaluation that is representative of the expected purchase. Such evaluation can be performed by using the expected procurement need/volume or by weighting each product line. The Complaints Board further stated that the issue of whether SKI in its estimates had been mistaken as to the extent to which substitution was possible between the products offered was, as a general rule, not to be settled with reference to procurement law. The Complaints Board found that "importance to SKI's customers", which was included as an element of the price evaluation model, did, according to its wording, not affect the price of the tender, and that the element should therefore not be included in the evaluation based on the subcriterion Price. The Complaints Board also found that it had been demonstrated that the indirect weighting of product lines at product subgroup level did not reflect the expected procurement

needs. The evaluation model was thus not adequate in terms of identifying the tender with the best price-quality ratio, which meant that the model, as expressly described in the specifications, was contrary to the principles of transparency and equal treatment in Section 2 of the Public Procurement Act (Article 18(1) of Directive 2014/24/EU).

Finally, the Complaints Board considered the *evaluation based on the subcriterion Quality*. The Complaints Board found that different scores had been given to identical products in approx. 47% of the cases where it was possible to compare the scores for identical products. Thus, there was no significant difference in how often identical products were given the same or different scores. In addition to this, both the complainant and the successful tenderer were given a lower score for a sample than the other tenderer received for a similar sample in a significant proportion of the cases. Against this background, the Complaints Board found that it considered it unlikely that this was essentially due to the tenderers' incorrect treatment of their own product in the period up to delivering the samples. Rather, it was assumed that the different scores were due to inconsistencies in the evaluation settings. The Complaints Board also found that it was contrary to the principles of equal treatment and transparency in Section 2 of the Public Procurement Act (Article 18(1) of Directive 2014/24/EU), and to the specifications, that SKI had disregarded product lines where all three tenderers had offered the same product in its evaluation. The Complaints Board went on to explain after having examined the evaluation that, regardless of the relatively large number of samples that were assessed, it had been demonstrated that SKI had not used a representative sample of the products offered in its qualitative evaluation (sensory test), which was required according to the specifications. As the qualitative evaluation had thus not been performed on a representative sample, it could not be considered appropriate to use this to help identify the most economically advantageous tender.

Considering these violations, the Complaints Board upheld the claim for annulment.

The Complaints Board's decision has been referred to the courts of law.

Decisions of 12 April and 13 July 2018, Lekolar Leika A/S v Fællesudbud Sjælland represented by the Municipality of Køge.

Negotiated procedure under Title II of the Procurement Act for a framework agreement for the supply of furniture for day care centres (assortment tender). Incorrect application of Section 61(1)(2) of the Public Procurement Act. No standstill period. Contract declared ineffective, and financial sanction imposed. Compensation.

The Municipality of Køge launched an assortment tender for the supply of furniture for day care centres as a negotiated procedure under Title II of the Public Procurement Act. The award criterion was best price-quality ratio. The qualitative criterion, which weighted 50%, was worded as follows: "Case 1-4/Implementation/Maintenance of quality". The Municipality received three tenders and then informed Lekolar that it had submitted the most economically advantageous tender and would be awarded the contract following a standstill period. During the standstill period, the Municipality asked Lekolar to document that the products offered met the requirement specifications. After the expiry of the standstill period, the Municipality notified the three tenderers that none of their ten-

ders fulfilled the conditions, and that it would therefore launch a negotiated procedure without prior notice, cf. Section 161(1)(2) of the Public Procurement Act (Article 26(4)(b) of Directive 2014/24/EU). According to the Municipality, the tenderers were only allowed to change the lines in the list of products that did not meet the conditions.

After having received the revised tenders, the Municipality of Køge announced its new award decision. It also explained that Lekolar's tender still did not fulfil the conditions on five product lines, and that there would be no standstill period, cf. Section 3(3)(1) of the Complaints Board Act. On the same day, the Municipality entered into a contract with the successful tenderer.

The complaint was heard at a meeting. The Complaints Board held that the evaluation method in respect of the qualitative subcriterion was not transparent or suitable, as it had not been made clear what the contracting entity would have regard to, and as it had considered services that were not covered by the procurement procedure. The Board could not take into account whether the Municipality had explained the sub-subcriteria to the subcriteria in further detail during the negotiation meetings. The Complaints Board further held that the contracting entity had not been entitled to reject the complainant's tender as not fulfilling the conditions. However, the complainant's claim that the winning tender did not fulfil the conditions was not upheld.

The Complaints Board also established that the contracting entity had not been entitled to apply Section 61(1) of the Public Procurement Act (Article 26(4)(a) and (b) of Directive 2014/24/EU), since this provision does not apply to a situation arising during a negotiated procedure, and the conditions were not met. Since the contracting entity as a consequence had failed to have a standstill period, which was required, as the negotiated procedure should rightfully be considered the original negotiated procedure, and as the contracting entity had also violated the public procurement rules such that the complainant's ability to win the contract was affected, the contract with the selected tenderer was declared ineffective, cf. Section 17(1)(2) of the Complaints Board Act. In addition, the Complaints Board ordered the contracting entity to pay a financial sanction of DKK 50,000 (EUR 6,711), cf. Sections 18(2)(3) and 19 of the Act.

In its decision of 3 July 2018, the Complaints Board awarded Lekolar DKK 60,000 (EUR 8,054) in compensation, which was calculated in accordance with the rules on reliance damages. The amount was significantly lower than requested by the complainant, as large parts of the claim were undocumented.

2.2.6 Horizontal cooperation agreements

Decisions of 22 May and 22 March 2018, Det Danske Madhus A/S v the Municipality of Norddjurs.

The conditions for applying the exclusion for procurement procedures in Section 15 of the Public Procurement Act (Article 12(4) of Directive 2014/24/EU) on contracts that establishes cooperation between public entities for the purpose of ensuring that the public services to be carried out are supplied – the so-called "horizontal agreements" or "extended in-house agreements" – were met.

The Municipality of Norddjurs decided that the meals services that the Municipality is obliged to offer to certain people according to Section 83(1)(1), cf. Subsection (2), of the Act on Social Services should in future be provided in an inter-municipal cooperation with one or more other municipalities, after which the Municipality concluded a cooperation agreement with the Municipality of Randers without undertaking a public procurement procedure.

Almost one month before the entry into force of the agreement, Det Danske Madhus complained to the Complaints Board, claiming that the agreement had been concluded without a prior public procurement procedure in accordance with Title III of the Public Procurement Act (Articles 74-76 of Directive 2014/24/EU) and requesting that suspensive effect was granted to the complaint. Det Danske Madhus also claimed that the agreement should be declared ineffective.

Before the agreement entered into force, the Complaints Board, with the assistance of an expert member, decided not to grant suspensive effect, as the case was not considered a prima facie case. On 22 March 2018, the Complaints Board adjudicated the case on its merits and reached the same conclusion, namely that the conditions for applying the exclusion on horizontal cooperation agreements had been met.

In its decisions, the Complaints Board stated that the ECJ's case law, in particular in case C-480/06 (the Hamburg judgment) and Case C-386/11, Piepenbrock, has essentially been codified in Article 12(4) of the Procurement Directive and Section 15 of the Public Procurement Act, which should be interpreted in accordance with this case law. However, Sections 15(1)(3) and 16 of the Public Procurement Act and Article 12(4)(c), cf. (5), of the Directive, contain a limitation in respect of market shares, which cannot be found directly in the ECJ's case law. With regard to the interpretation of this limitation, the Complaints Board stated that according to the special notes on Section 15, Paragraph 3, of the Public Procurement Act and recitals 31 and 32 of the Procurement Directive, it aims to prevent distortion of competition, e.g. where the benefits of cooperation between the contracting entities are used to undercut competitors in the open market through cross-subsidisation between the activities that make up the public service, and any related services provided in the open market. Against this background and considering the wording of the provision, it should be interpreted to the effect that it covers situations where contracting entities undertake activities in the open market – where they not only provide services to themselves – which compete with private operators. In such cases, the resulting risk of cross-subsidisation from the in-house public service to the activity in the open market is countered by setting a limit on the activity in the open market (20%), if the authorities also wish to enter into horizontal cooperation where a procurement procedure is not required. However, the provision cannot be understood to limit the authorities' right to produce and supply services of general interest to themselves – in the extended form of in-house public services that is the horizontal cooperation under Section 15 of the Public Procurement Act (Article 12(4) of Directive 2014/24/EU). This applies regardless of whether such services could also be purchased from a private supplier.

The Complaints Board also noted that the agreement had been concluded with a view to fulfilling the Municipalities of Norddjurs and Randers' obligations under Section 83(1)(1), cf. Subsection (2), of the Act on Social Services, to offer meal services to certain persons and under Section 91(1) to give recip-

ients of assistance under Section 83 the option of choosing between two or more suppliers of such assistance, one of whom must be a municipal supplier. The cooperation did not generate a profit for the Municipalities, just as it was not of a commercial nature. It involved no private operators that could be treated more favourably than their competitors as a result of the cooperation. The Complaints Board assumed that the meal service required pursuant to Section 83(1)(1), cf. Subsection (2), of the Act on Social Services, which was only provided to the two Municipalities' own citizens who were eligible to receive this service, was a service of general interest. The conditions in Section 15, Paragraphs 2 and 3, and Paragraph 1, of the Public Procurement Act (Article 12(4) of Directive 2014/24/EU) requiring that the purpose is to ensure delivery of public services, which the two Municipalities have a duty to deliver, were therefore regarded as fulfilled. In its decision, the Complaints Board particularly noted that according to the ECJ's case law, e.g. paragraph 48 of case C-26/03, Stadt Halle, and Article 1 of Protocol no. 26 to the Lisbon Treaty on services of general interest, there was no basis for a narrow interpretation of the concept of public services of general interest (public service tasks). Also, there was nothing that indicated that public authorities – in situations where private operators operate on a private open market and would be able to offer public services such as meal services or waste disposal – are obliged to launch procurement procedures for such services instead of performing them in-house.

With regard to the condition in Section 15, Paragraph 1, of the Public Procurement Act (Article 12(4)(a) of Directive 2014/24/EU) on "cooperation" for "joint targets", or, in other words, effective cooperation, the Complaints Board referred to recital 33 of the Procurement Directive, which corresponds to the Hamburg judgment. Accordingly, such cooperation does not require all participating authorities to assume the performance of main contractual obligations, as long as there are commitments to contribute towards the cooperative performance of the public service in question. Although the Municipality of Randers undoubtedly provided the main service (food production) against cost reimbursement, the Complaints Board found that the Municipalities in light of the other provisions of the agreement should be regarded as having entered into a mutually binding cooperation in the public interest for both production and development of meal services pursuant to Section 83 of the Act on Social Services. It also considered that the Municipality of Norddjurs had thereby assumed other obligations than mere payment for the Municipality of Randers' food production, which were different than the management and cooperation mechanisms that would be covered by a normal service contract that was subject to a competitive tendering obligation.

Section 15, Paragraph 3, of the Public Procurement Act (Article 12(4)(c) of Directive 2014/24/EU) requires that the public authorities carry out less than 20% of the activities affected by the cooperation in the open market. The Complaints Board regarded the compulsory meal service for citizens who are eligible to receive this service in the two municipalities as an (extended) in-house service which is not provided in the open market. Some so-called "additional services" for the citizens (extra food/accompaniments) must be regarded as negligible relative to the main service. The threshold of less than 20% in Section 15, Paragraph 3, of the Public Procurement Act (Article 12(4)(c) of Directive 2014/24/EU) had therefore not been exceeded.

This decision marks the first time that the Complaints Board has been required to consider the new market share threshold in the Public Procurement Act and the Procurement Directive.

2.2.7 Division of contracts into lots

Decision of 28 May 2018, Danske Slagtermestre A/S acting for Gert Nielsen A/S v the Municipality of Høje-Taastrup.

Provision in Section 49(2) of the Public Procurement Act (Article 46(1) of Directive 2014/24/EU) on the obligation to state the grounds for not dividing a contract into lots (in this case, on meat products). No obligation to divide into lots. Subsequent justification, cf. Section 134 of the Public Procurement Act (the first sentence of article 53(2) of Directive 2014/24/EU).

The Municipality of Høje-Taastrup launched a public procurement procedure according to Title II of the Public Procurement Act for a framework agreement for the supply of food. Danske Slagtermestre, acting for Gert Nielsen A/S, complained to the Complaints Board, claiming that the Municipality had "without full knowledge of the facts" failed to comply with Section 49(2) of the Public Procurement Act (Article 46(1) of Directive 2014/24/EU) on the duty to state the grounds for not dividing a contract into lots, that the Municipality had thereby violated the principles of equal treatment and transparency in Section 2 of the Public Procurement Act (Article 18(1) of Directive 2014/24/EU), and that the procurement procedure should therefore be annulled.

With regard to the interpretation of Section 49 of the Public Procurement Act (Article 46(1)-(3) of Directive 2014/24/EU), the Complaints Board noted that the legislator has not availed by the possibility given in Article 46(4) of the Procurement Directive to render it obligatory to award contracts in the form of separate lots. According to Section 49 of the Public Procurement Act, which implements Article 46(1)-(3) of Directive, the contracting entity merely has the option to divide contracts into lots, cf. Section 49(1) of the Public Procurement Act and the first sentence of Article 46(1) of the Procurement Directive. If this option is not used, the contracting entity has a duty to explain why, cf. Section 49(2) of the Public Procurement Act (the second sentence of Article 46(1) of Directive 2014/24/EU). There is, however, no obligation to divide contracts into lots. However, according to the special notes to Section 49 of the Public Procurement Act, the principles of equal treatment and transparency in Section 2 of the Public Procurement Act (Article 18(1) of Directive 2014/24/EU) may be violated, if, for example, the contracting entity has deliberately chosen not to divide a contract into lots or failed to do so with the intention of bypassing the competitive tendering obligation, put specific suppliers in a more favourable position or the like. Without any interpretative aid in the Directive and explanatory notes, the justification requirement in Section 49(2) of the Public Procurement Act (Article 46(1) of Directive 2014/24/EU) must be interpreted to the effect that grounds must be given if it is possible to divide the contract into lots considering its content and scope. If the contracting entity (as was the case in this case) has not provided any reasons for the division into lots in the contract notice or the rest of the procurement documents to be published with the contract notice, and questions are later put to the contracting entity regarding division, the contracting entity may provide its grounds for not dividing the contract into lots as additional information, cf. Section

134 of the Public Procurement Act, which implements the first sentence of Article 53(2) of the Procurement Directive. As neither the Public Procurement Act nor the Procurement Directive contains any sanctions against non-fulfilment of the justification obligation, it cannot be assumed that violating the obligation can or should under normal circumstances lead to annulment of the procedure or the contracting entity's award decision.

Against this background, the Complaints Board found that considering the scope and content of this particular contract, it was possible to divide it into lots, e.g. by food types or geographically. That means that the Municipality had been obliged to justify its decision not to. The fact that the Municipality believed that dividing the contract into lots would be highly inappropriate did not affect its obligation. The Municipality's response to Gert Nielsen A/S's question during the procurement procedure, where the Municipality as grounds for its decision mentioned ease of ordering and logistics and that the use of lots with several suppliers would lead to a greater environmental impact in terms of transport, had to be assumed to be the real reason not to divide the contract into lots. Concerns for ordering, logistics and the environment could not be regarded as not being based on facts, and they could not be considered to be contrary to the principles of equal treatment and transparency in Section 2 of the Public Procurement Act (Article 18(1) of Directive 2014/24/EU). As the Municipality during the procurement procedure provided the justification missing in the contract notice and the original procurement documents (in response to Gert Nielsen A/S's question), the Municipality had fulfilled its justification obligation.

The complaint was thus not upheld.

This is the first decision on the interpretation of Section 49(2) of the Public Procurement Act (Article 46(1) of Directive 2014/24/EU), which is a new provision in the Procurement Directive.

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

Interim decision of 10 January 2018 and decision of 5 October 2018, Næstved Sprog- og Integrationscenter v the Municipality of Næstved

An award decision was revoked following a complaint. When the Municipality made a new award decision with the same winning tenderer, a complaint concerning irregularities in this evaluation was granted suspensive effect. However, this decision was annulled, as the contracting entity revoked the award decision yet again and made a new award decision, again with the same winning tenderer. A complaint of the third award decision was only submitted after the expiry of the standstill period, and no request for suspensive effect was made. For this reason alone, there were no grounds to declare the contract ineffective relative to the final contract. Based on a detailed assessment, there was no basis for concluding that the Municipality had had an unreasonable and unjustified interest in selecting the tender. The fact that the Municipality entered into a temporary contract with the successful tenderer during the complaints case did not give that tenderer an unfair advantage.

In September 2017, the Municipality of Næstved launched a procurement procedure under Title III of the Public Procurement Act (Articles 74-76 of Directive 2014/24/EU) for a contract for Danish lan-

guage instruction for adult foreigners, as Danish Municipalities have a statutory obligation to offer such instruction. Three tenderers were selected to participate in a round of negotiations. On 27 October 2017, the Municipality announced that it planned to contract with Lærdansk. On 6 November 2017, the previous supplier, Næstved Sprog- og Integrationscenter (NSI), which had also submitted a tender, complained to the Complaints Board, requesting it to grant suspensive effect to the complaint. On 17 November 2017, the Municipality withdrew the award decision and intended to make a new award decision. On 30 November 2017, the Municipality announced that it had decided to award the contract to Lærdansk again after having re-evaluated the three tenders. On 11 December 2017, NSI complained to the Complaints Board again, requesting that the complaint be granted suspensive effect. On 19 December 2017, the Municipality entered into a temporary contract with Lærdansk on Danish language instruction for adult foreigners without a public procurement procedure, referring to Section 193 of the Public Procurement Act.

In its interim decision of 10 January 2018, the Complaints Board ruled that the complaint should be granted suspensive effect, as it was likely, based on a preliminary assessment, that the Complaints Board would find that the Municipality of Næstved had violated the procurement rules by wrongfully derogating from the evaluation method set out in the specifications, thus acting in contravention of the principles of equal treatment and transparency in Section 2 of the Public Procurement Act (Article 18(1) of Directive 2014/24/EU). Consequently, it was likely that the claim for annulment of the award decision would be upheld. The Complaints Board found that NSI was a self-governing institution with only a modest profit, for which reason it could be assumed that the institution would suffer significantly if a contract was concluded with another tenderer. The urgency condition was therefore satisfied. Finally, the Complaints Board found that NSI's interest in granting the complaint suspensive effect outweighed the Municipality's interest in contracting with another tenderer.

On 18 January 2018, the Municipality of Næstved withdrew the award decision of 30 November 2017. NSI maintained its complaint and added additional claims, including a claim for annulment of the procedure, as NSI argued that the suspensive effect granted to the complaint on 10 January 2018 still applied.

On 23 March 2018, the Municipality of Næstved announced that it had yet again decided to award the contract to Lærdansk. NSI did not complain of this award decision within the standstill period of 10 days, which would automatically have suspended the contract. Nor was a request for suspensive effect received before the Municipality contracted with Lærdansk.

In line with its interim decision of 10 January 2018, the Complaints Board found for the complainant in a number of complaints of the Municipality's award decision of 30 November 2017. However, as this award decision, as mentioned above, had been withdrawn by the Municipality, this had no impact on the final decision. In accordance with Section 10 of the Complaints Board Act, the Complaints Board did not consider an additional complaint also concerning the award decision of 30 November 2017 as well as some questions about justifications in the two first award decisions. One complaint about lack of justification in the final award decision of 23 March 2018 was not upheld.

In addition, NSI had claimed that the Complaints Board declare the contract between the Municipality and Lærdansk ineffective, as the contract was concluded in a period when the Complaints Board had granted the complaint suspensive effect. The Complaints Board noted that NSI had only made its claim for annulment of the procedure after the announcement of the interim decision of 10 January 2018. The Complaints Board found that the decision to grant the complaint suspensive effect concerned the award decision of 30 November 2017, and that the Municipality had withdrawn this award decision on 18 January 2018, for which reason the suspensive effect ended on that day. On 23 March 2018, the Municipality made a new award decision and notified the tenderers, after which a new standstill period of 10 days began to run. No complaints were made within this deadline, just as no request for suspensive effect was received before the contract with Lærdansk was concluded. For this reason, the Complaints Board found no basis for declaring the contract between the Municipality and Lærdansk ineffective.

In addition, NSI mainly claimed that the Municipality had had an unreasonable and unjustified interest in selecting Lærdansk's tender in all three award decisions and, thus, it preferred a specific outcome, and that the Municipality had awarded the contract to Lærdansk after having given this company an unfair competitive advantage with the temporary contract. As "evidence" NSI referred to email correspondence between the Municipality and Lærdansk on the procurement procedure, to statements from the Municipality to the local media, to a pending survey case and to the fact that the evaluation of the Quality criterion ended in the same digits in the second and third evaluations. The Complaints Board did not find that it had been documented to the required standard that the Municipality had an unreasonable interest in selecting the tender from Lærdansk. The Complaints Board noted that the Municipality had an obligation to offer Danish language instruction to adult foreigners. Due to the complaints case, the Municipality was entitled to enter into a temporary contract for such services. There is no obligation to enter into a temporary contract with the previous supplier, which means that a temporary contract may be concluded with another supplier, provided that this supplier does not thereby get an unfair advantage. There was no basis for assuming that Lærdansk had obtained such an advantage, and the Complaints Board noted that the temporary contract was concluded after Lærdansk had submitted its tender for the contested procurement procedure. The Complaints Board also held that the fact that the Municipality had held meetings with Lærdansk on the planning of the teaching did not in itself imply that Lærdansk was given an unfair advantage. Some additional claims for other evaluation methods, annulment of the award decision, annulment of the procedure and for a financial penalty to be imposed on the Municipality were also not upheld.

Decision of 26 January 2018, Icomera AB v DSB

Complaint from potential candidate of unclear suitability requirements which had kept the complainant from applying for preselection was granted suspensive effect. The contracting entity then cancelled the procedure.

DSB launched a negotiated procedure under the Utilities Directive concerning a contract for the supply of wireless internet in trains. According to the contract notice, the applicants for preselection were to submit a maximum of three references for the performance of various services. This was

repeated in a so-called preselection letter included in the procurement documents, but due to a clerical error, the word "maximum" was left out. The complainant, which had been listed as a subcontractor of a preselected company, and which had not submitted a tender by itself, argued, among other things, that DSB had violated the principles of equal treatment and transparency in Article 36(1) of the Utilities Directive by having used non-transparent selection criteria. In this respect, the complainant referred to the fact that the company had not applied for preselection due to the wording of the preselection letter, as the company was only able to provide two references and had not understood that only a *maximum* of three references was required.

Firstly, the Complaints Board found that the complainant was eligible to complain as a potential applicant for preselection. The Complaints Board also noted that a contracting entity has full responsibility for ensuing that the specifications are clear and unambiguous, including that the procurement documents do not contain different descriptions of the same requirements that may lead to legitimate doubts about the scope of the requirements. Based on a preliminary assessment, the Complaints Board found that this ambiguity could have kept potential candidates, including the complainant, from applying for preselection, and that the contracting entity had thereby violated the principles of equal treatment and transparency. Moreover, it was likely that the complainant's claim for annulment of the award decision would be upheld. The case was thus considered to be a prima facie case. The urgency condition was also satisfied, as the ambiguity had kept the complainant – and perhaps also other potential candidates – from applying for preselection. Accordingly, no compensation could be granted to remedy the violation. The Complaints Board found, based on a balancing of interests, that granting suspensive effect would be justified, and this claim was thus upheld. DSB subsequently informed the Board that the award decision and procurement procedure had been annulled, after which the complaint was withdrawn.

The interim decision was thus the Complaints Board's final decision in the case.

Decision of 28 June 2018, Egons A/S v Trafikselskabet Movia

On the last day of the standstill period, a complaint of a procurement procedure was received after the close of business by the contracting entity which forwarded it to the Complaints Board the next morning. Notwithstanding the fact that it also contained a complaint of the contracting entity's refusal of access which, pursuant to the rules in Section 37 of the Access to Public Administration Files Act, should be submitted to the contracting entity, the complaint was not considered to be submitted within the standstill period, cf. Section 12(2) of the Complaints Board Act.

The case concerned a public procurement procedure under the Utilities Directive involving several lots for transport of individuals from sheltered workshops, public day care facilities and the like with a regular schedule. After having received the award decision, the complainant, an unsuccessful tenderer, first applied to the contracting entity for access to documents. The contracting entity partially refused the request for access, enclosing guidelines for complaints in accordance with the provision on complaints to public authorities in Section 37 of the Access to Public Administration Files Act. The complainant drafted one complaint which was sent to the contracting entity on the last day of the standstill period after the close of business. However, this complaint contained both a complaint of

the decision on access and a complaint of the award decision. In that connection, the complainant asked the respondent to confirm that the complaint was received before the expiry of the standstill period. The contracting entity did not believe that it had, but sent the complaint to the Complaints Board already the following morning. In its decision, the Board ruled that the rules in Section 37(2) of the Access to Public Administration Files Act regarding complaints of decisions on access do not apply to complaints concerning the public procurement rules. The facts that the complaint also concerned a complaint of a decision on access in accordance with the respondent's guidelines for complaints in its decision on access, and that it had been submitted to the respondent before the expiry of the standstill period, did not lead to the conclusion that the provision in Section 12(2) of the Complaints Board Act on automatic suspensive effect applied. Against this background, the Complaints Board treated the complaint as a subsidiary request for suspensive effect. However, as the urgency condition was not fulfilled, the complaint was not granted suspensive effect. The complaint was therefore rejected, and no decision was made in the case.

Decision of 11 October 2018, Konsortiet Sprogpartner v the National Police and others and decision on costs in that case

There was no basis for considering that the winning tenderer's tender did not fulfil the conditions, for which reason the contracting entity was not obliged to reject the tender. There was also no basis for setting aside the contracting entity's opinion in the evaluation of whether the qualitative subcriteria and sub-subcriteria had been met. According to Section 160 of the Public Procurement Act, the contracting entity is not required to provide a description that is complete and comprehensive in all respects of what is emphasized in the assessment based on the qualitative criteria. The National Police had been entitled to evaluate how the tenderers fulfilled a minimum requirement, as the different methods and tools applied to fulfil the minimum requirement could be of greater or lesser use to the National Police. However, as the case was not considered a prima facie case, the complaint was not granted suspensive effect.

The case concerned a public procurement procedure under Title II of the Public Procurement Act for a framework agreement for interpretation services. The award criterion was best price-quality ratio based on the subcriteria Price (30%), and Quality (70%). The latter subcriterion comprised several sub-subcriteria, and the specifications contained different descriptions of what they covered.

The complainant, an unsuccessful tenderer, mainly argued that the winning tender did not fulfil the conditions due to its failure to meet a number of minimum requirements, and that the National Police had given the quality of the winning tender a positive assessment, and the complainant's tender a negative assessment, which was contrary to the specifications.

Based on a preliminary assessment, the Complaints Board stated that the National Police had been entitled to select the tender in question, as the tenderer had confirmed that it met the requirement regarding video interpretation without reservations, and that there was otherwise no basis for assuming that the successful tenderer would not be able to meet the requirements for video solutions in the procurement documents, or that it was not possible to comply with the provisions of the framework agreement on unannounced inspections. In addition, the tender contained sufficient in-

formation to allow the National Police to assess whether the tender met requirements for the implementation phase, which was part of the evaluation based on the subcriterion Implementation and thus not a minimum requirement.

With regard to the issue of incorrect qualitative assessments, the Board first stated that the contracting entity is not required to provide a description that is complete and comprehensive in all respects of what is emphasized in the assessment based on the qualitative criteria. However, if a contracting entity in its award decision puts emphasis on a certain property in the services offered, the contracting entity must specify this in the procurement documents. According to established practice, the Complaints Board may only set aside the contracting entity's opinion in the evaluation of the degree to which the tenders met the qualitative subcriteria and sub-subcriteria, if the contracting entity has clearly overstepped its wide margin of discretion in the evaluation, and the Complaints Board's opinion will thus not supersede that of the contracting entity. After having reviewed the procurement documents and the tenders from the successful tenderer and the complainant as well as the National Police's evaluation notes, the Complaints Board found that, based on a preliminary assessment, there was no basis for setting aside the National Police's opinion in the evaluation.

The Complaints Board also stated that the National Police had been entitled to evaluate how the tenderers' fulfilled a minimum requirement, as the different methods and tools applied to fulfil the minimum requirement could be of greater or lesser use to the National Police. The qualitative assessment performed by the National Police did not concern whether or not the minimum requirement had been met, but the quality of the methods applied.

The complaint was subsequently withdrawn. The interim decision was thus the Complaints Board's final decision in the case.

In its decision on costs of 30 October 2018, considering the extent and nature of the case and the proceedings, the complainant was ordered to pay DKK 25,000 (EUR 3,356) to the National Police. However, the complainant was not required to pay costs to the intervener who had filed two pleadings, as the intervener was not a party to the complaints case, cf. Section 9(4) of the Executive Order on the Complaints Board for Public Procurement (see section 1.7).

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. Also, the Complaints Board's practice was described in chapter 3 of the 2017 Annual Report.

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 Right to complain

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.

However, it is generally only the party applying for access to a case or a document that may appeal against refusal of access. According to the Board's case law, the natural or legal person whom the information concerns is thus not allowed to complain of a decision to grant access.

> The Complaints Board's decision of 19 June 2018 (file no. 18/02544): The Municipality of Odense had granted a company access to the list of products of the winning tender in a procurement procedure for technical plant, in which six out of seven tenders had been considered non-compliant. The procurement procedure was subsequently cancelled. Access to the file covered, among other things, the product name, manufacturer and manufacturer's product number. The tenderer concerned complained to the Complaints Board for Public Procurement, arguing in particular that access could help a competitor submit a compliant tender in a later procedure for the contract. The Complaints Board rejected the complaint, as the complainant company could not be considered a party to the access case and was thus not eligible to complain.

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

As mentioned above, the Complaints Board's authority in appeals against decisions on access to files is set out in Section 37 of the Access to Public Administration File Act or – where relevant – in the corresponding provision in Section 16(4) of the Public Administration Act. It is a condition, however, that the contested decision was made with reference to the Access to Public Administration Files Act (the Public Administration Act).

The Complaints Board's decision of 16 November 2018 (file no. 18/07120): Hovedstadens Letbane had, among other things, granted full access to reports on drill samples, including appendices containing geotechnical reports. In that connection, Hovedstadens Letbane ordered the applicant not to make the material subject to commercial exploitation in any way, neither by the complainant nor anyone given access to the material by the complainant. The Complaints Board noted that the complaint did not concern the question of right of access, but an issue of limitation of the right to use the material to which access had been granted. After the Board's hearing of the complaint, Hovedstadens Letbane did not provide a specific legal basis for the order. On this basis, the Complaints Board refused to consider this part of the complaint.

In the special notes for Section 37(1) of the Access to Public Administration Files Act, cf. 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.*" As mentioned in the 2017 Annual Report, it follows from Section 37 of the Access to Public Administration Files Act that 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 same also applies, however, to initial considerations of how to organise procurement procedures.

The Complaints Board's decision of 2 July 2018 (file no. 18/02619): The Ministry of Higher Education and Science had partially refused access for Omnibus – the Aarhus University newspaper – to the Government's decisions on opening of the research-based public-sector services to competition, both external and internal documents (including ministerial documents). The Complaints Board rejected the complaint. In this connection, the Complaints Board explained that the Board is not competent to hear complaints of matters that concern decisions made prior to the actions regulated by public procurement law. Nothing in public procurement law obliges "Member States to contract out or externalise the provision of services that they wish to provide themselves or to organise by means other than public contracts", cf. e.g. recital 5 of the Procurement Directive (Directive 2014/24/EU). Against this background, the Board found that the Government's previous political decisions to open research-based public-sector services to competition were not covered by public procurement law, but were rather decisions that could lead to situations where procurement that may in the circumstances be covered by public procurement law would be undertaken. In this respect, the Board noted that the rules of the Public Procurement Act only to a limited extent apply to research and development services, cf. Section 22 of the Act (Article 14 of Directive 2014/24/EU).

The Complaints Board's decision of 16 November 2018 (file no. 18/07120) (cf. also above): Hovedstadens Letbane had, among other things, partially refused access to some invoices re-

ceived by Hovedstadens Letbane from the company COWI in the period from 2010 to 3 April 2018 as well as board minutes from the period from 2014 to 3 April 2018. The Complaints Board rejected the complaint regarding invoices, as it had to be considered that these were related to the performance of a contract between Hovedstadens Letbane and COWI, and as the Complaints Board is not competent to hear cases on the performance of such contracts. According to the minutes, the board meetings included briefings of several procurement procedures for works on the light railway prior to, during and after the finalisation of the procurement procedures. The Complaints Board noted that it is not competent to hear complaints of matters that relate to circumstances existing or decisions made prior to the actions regulated by public procurement law, for which reason the Board refused to consider minutes containing such information. However, the Board did consider the complaint regarding minutes concerning decisions made during the procurement procedures, where the Board upheld the refusal of access to these minutes in accordance with Section 23(1)(1) of the Access to Public Administration Files Act on internal documents.

The question of whether the Complaints Board may be regarded as a "special appeals body" in relation to a case has been considered by the Board in a specific case:

The Complaints Board's decision of 28 September 2018 (file no. 18/02618): The Ministry of Environment and Food had partially refused access for Omnibus – the Aarhus University newspaper – to, among other things, the replies received from universities and other parties in connection with the Ministry's efforts to obtain information as part of a market analysis prior to opening its research-based public-sector services to competition. The Complaints Board noted that it was important to determine its competence that the Ministry of Environment and Food had published a prior information notice on one part of the planned opening to competition, and in that connection, the Ministry had stated that it was covered by the exclusion in Section 22 of the Public Procurement Act (Article 14 of Directive 2014/24/EU). Moreover, in its decision of 27 March 2018, the Complaints Board had stated that provision of research-based public-sector services was covered by a corresponding exclusion in the then applicable Procurement Directive (Article 16(f) of 2004/18/EC, which was kept in the current Procurement Directive (Article 1 of Directive 2014/24/EU), which was implemented in Danish Law by Section 22 of the Public Procurement Act. Against this background, the Complaints Board rejected the complaint on the grounds that the Board could not be considered a special appeals body in relation to the planned opening to competition, as the services covered by Section 22 of the Public Procurement Act (Article 14 of Directive 2014/24/EU) could generally not be considered to be covered by the Public Procurement Act – and thus not by Section 39 of the Act (Article 40 of Directive 2014/24/EU) on market analyses either. The fact that the Complaints Board, if asked to hear a complaint of breach of a substantive provision of public procurement law, could decide whether a specific opening to competition is covered by Section 22 of the Public Procurement Act (Article 14 of Directive 2014/24/EU), as was the case with this decision, could not lead to a different result.

3.4 Exclusion of confidential business information from public access

As mentioned in the 2016 and 2017 Annual Reports, 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. However, 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.

This therefore applies to more general descriptions and claims concerning the functionality and benefits of the solution, not detailing how these are achieved. Such information, which must be regarded as being intended for a wider audience of potential customers and users, may not be characterised as business secrets that may be excluded pursuant to these provisions. Similarly, information on how the tender is meeting a particular requirement laid down by the contracting entity in the specifications may not be exempted from public access. This is because such information is related to the specific procurement procedure and tender in question and thus not directly considered important for other procedures.

Price information

According to the Complaints Board's established case law, information about the tenderer's price specifications or unit prices will often be exempted from access pursuant to Section 30, Paragraph 2, of the Access to Public Administration Files Act. This is due to the fact that this is normally confidential business information, and that a competing company's knowledge of the tenderer's pricing will often in the circumstances imply a clear risk of reducing that the tenderer's competitiveness in any future procurement procedures or other agreements, resulting in a substantial financial loss. However, the free-choice scheme in Section 112(3) of the Act on Social Services may imply that the citizens concerned and the contractors selected would obtain knowledge of the successful tenderer's prices of the products covered by the supplier agreement, cf. also the Complaints Board's decision of 13 December 2012 in ReaMed (Tødin A/S) v the Municipality of Gribskov. On the other hand, as mentioned in the 2016 Annual Report, the usual practice applies if the free-choice scheme does not lead to the price information being published. The Complaints Board has been called on to consider disputes regarding prices covered by the free-choice scheme in a number of decisions from 2018.

> The Complaints Board's decision of 21 November 2018 (file no. 18/08113): The Complaints Board upheld the Municipality of Kolding's refusal of access to price specifications of, among others, the successful tenderer in a procurement procedure for diabetes aids. The Complaints Board explained that no contract had been awarded, as the procurement procedure had been cancelled. Unlike the situation in the decision of 13 December 2012, no agreement had thus been made after the procedure which would mean that the successful tenderer's price specifications would be made publicly available under Section 112(3) of the Act on Social Services.

The price information at issue should therefore be regarded as business secrets covered by the provision in Section 30, Paragraph 2, of the Access to Public Administration Files Act.

The Complaints Board's decision of 26 November 2018 (file no. 18/08668): The Complaints Board upheld Sydjysk Kommuneindkøb's refusal of access to, among other things, price specifications in connection with a procurement procedure for diabetes products. The procurement procedure was brought before the Complaints Board for Public Procurement, and at the time of the decision, Sydjysk Kommuneindkøb had not concluded a contract, because it waited for the Board to decide whether the complaint would be granted suspensive effect. The Complaints Board stated that, unlike the situation in the decision of 13 December 2012, no agreement had been made after the procedure which would mean that the successful tenderer's price specifications would be made publicly available under Section 112(3) of the Act on Social Services. The price information at issue should therefore be regarded as business secrets covered by the provision in Section 30, Paragraph 2, of the Access to Public Administration Files Act.

The Complaints Board's decision of 4 December 2018 (file no. 18/08116): The Complaints Board upheld the Municipality of Aalborg's refusal of access to price specifications from all tenderers in a procurement procedure for diabetes aids. Here, the Complaints Board held that the free-choice scheme does not imply that citizens or businesses have access to the unsuccessful tenderers' price specifications. This also applied to the successful tenderer, as, according to information from the Municipality on the administration of the free-choice scheme, information about specific price specifications would not be disclosed to the affected citizens, even if they wished to avail themselves of the right to free choice of supplier. The price information at issue should therefore be regarded as business secrets covered by the provision in Section 30, Paragraph 2, of the Access to Public Administration Files Act.

Other tender information

In, for example, major construction projects or IT projects, a detailed *time schedule* may contain specific information about a tenderer's processes which are not only specifically linked to the current project. Accordingly, such information may, in the circumstances, be exempted from access in accordance with Section 30, Paragraph 2, of the Access to Public Administration Files Act or Section 15b of the Public Administration Act. However, this does not apply to general information about how the service is split into different parts or procedures for, e.g., project cooperation, which must be regarded as generally known, or the tenderer's claims about the relative benefits of the services. Also, it does not cover information about milestones and timelines etc. described by the contracting entity in the specifications. Access must therefore often be granted to large parts of such time schedules.

Moreover, in several cases, the Complaints Board has ruled that information about a cooperation and project organisation in a tender and about such organisation's specific strengths and advantages cannot be considered business secrets within the meaning of Section 30, Paragraph 2, of the Access to Public Administration Files Act.

Please refer to the Complaints Board's decision of 6 July 2018 (file no. 17/01856).

4. DANISH JUDGMENTS ON THE COMPLAINTS BOARD'S CASES

This chapter gives an account of final judgments handed down in 2018 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 2018, because they were appealed to a higher court, have not been included here.

The District Court of Herning's judgment of 5 July 2018, Den Selvejende Institution Ringkøbing Svømmehal v the Municipality of Ringkøbing-Skjern, cf. the Complaints Board's decision of 21 April og 18 August 2017 (2017 Annual Report, p. 32)

The case concerned a municipal 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. The complainant, which had been in charge of the operation up to this time, was not awarded the contract. In its interim decision of 21 April 2017, the Complaints Board did not grant the complaint suspensive effect, as the case was not considered a prima facie case. In the final decision of 18 August 2017, the complainant was only successful in one claim which could not be assumed to have affected the complainant's drafting of its tender or the procurement process and outcome. The award decision was thus not annulled.

The complainant appealed to the District Court of Herning, arguing, among other things, that the violation committed had resulted in favouring of the winning tenderer in contravention of the Public Procurement Act. The complainant also submitted that the Municipality had violated the Public Procurement Act by changing an essential element of the procurement documents in connection with the conclusion of the contract and claimed that the contract should be declared ineffective. The complainant also claimed compensation.

According to the Municipality, the complainant's claims should be dismissed, as the complainant's object was to operate the swimming facility, which meant that the complainant no longer had a basis for existence.

By judgment of 5 July 2018, the District Court upheld the Complaints Board's decision of 18 August 2017. The Municipality's claim for dismissal was dismissed, as the complainant that had participated in the procurement procedure had legal personality in a subsequent dispute concerning whether the procurement rules had been complied with.

The Eastern High Court's judgment of 3 May 2018, the Department of Prisons and Probation v Kai Andersen A/S, cf. the Complaints Board's decision of 18 May and 19 November 2015

The case concerned a restricted procedure under the Procurement Directive (2004/18/EC) concerning 12 contracts divided into lots for the construction of a state prison on the island of Falster. The

award criterion was lowest price. In its decision of 18 May 2015, the Complaints Board held that the Department had acted illegally by accepting the winning tender, as it contained a reservation that could not be priced.

The complainant had offered the second-lowest price, which meant that the complainant was entitled to compensation in the form of expectation damages. The complainant had claimed DKK 8,750,603 (EUR 1,174 million) in damages. In its decision of 19 November 2015, the Complaints Board assessed damages at DKK 6 million (EUR 805,369), referring, among other things, to the uncertainty as to whether the complainant could actually have realised the expected profit and whether the project would have required a capacity expansion and thus higher fixed costs, just as the removal of the litigation risk had to be taken into account.

The Department of Prisons and Probation appealed to the District Court of Lyngby, claiming that the award decision should not be annulled, and that it was not liable in damages or liable to pay less than DKK 6 million. In its judgment of 6 January 2017, the District Court upheld both decisions, but increased the damages to DKK 8,750,603 as claimed.

The Department appealed to the High Court. In its judgment of 3 May 2018, the High Court upheld the District Court's judgment, but reduced the damages to DKK 4 million (EUR 536,913), referring to the uncertainty as to whether the complainant could actually have realised the expected profit and whether the project would have required a capacity expansion and thus higher fixed costs.

The Western High Court's judgment of 1 March 2018, Kemp & Lauritzen A/S v the Central Denmark Region, cf. the Complaints Board's decision of 17 August 2015

The Central Denmark Region launched a public procurement procedure under the Procurement Directive (2014/18/EC) in the form of a competitive dialogue on a PPP contract for the construction of a new psychiatric centre at Skejby. The complainant was TEAM OPP v/DEAS A/S. The decision – which is one of several decisions in the complaints case – concerned a claim tried separately on full or partial rejection, because the complainant's identity and composition had been changed, where it would specifically have to be determined which companies could be considered part of TEAM OPP that had originally lodged the complaint. The Complaints Board held that, because it was a subcontractor, Kemp & Lauritzen A/S was not part of the complainant consortium, and hence the company's complaint was rejected.

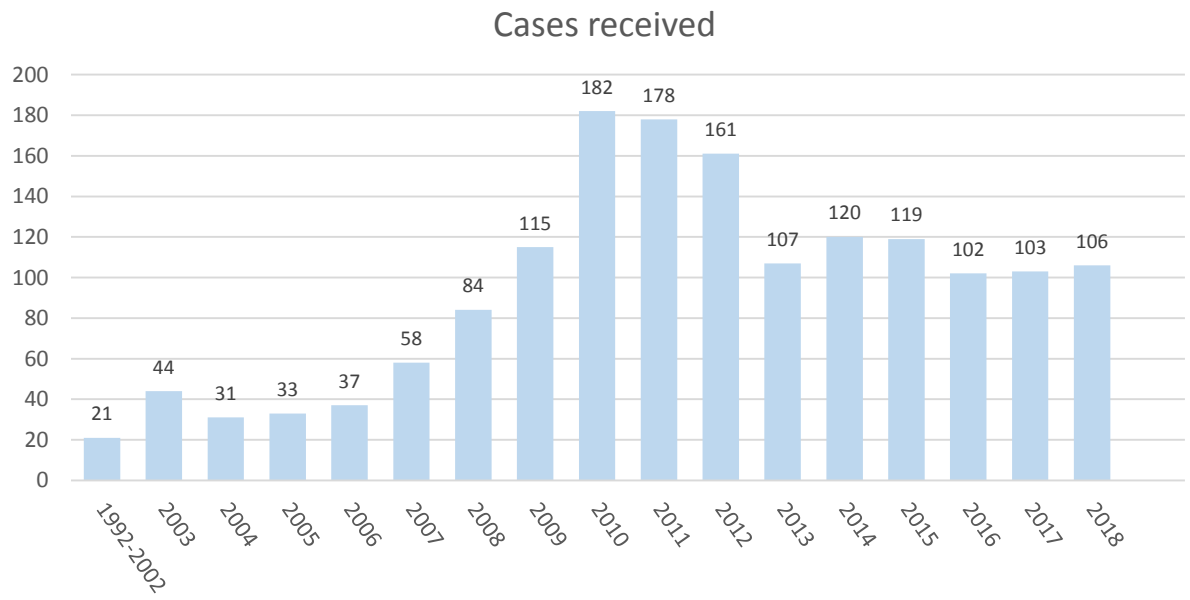
In their judgments of 10 March 2017 and 1 March 2018, the District Court of Viborg and the Western High Court reached the same conclusion.

5. THE COMPLAINTS BOARD'S ACTIVITIES IN 2018

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 106 complaints in 2018. The below overview illustrates the development in the number of complaints received in 1999-2018.



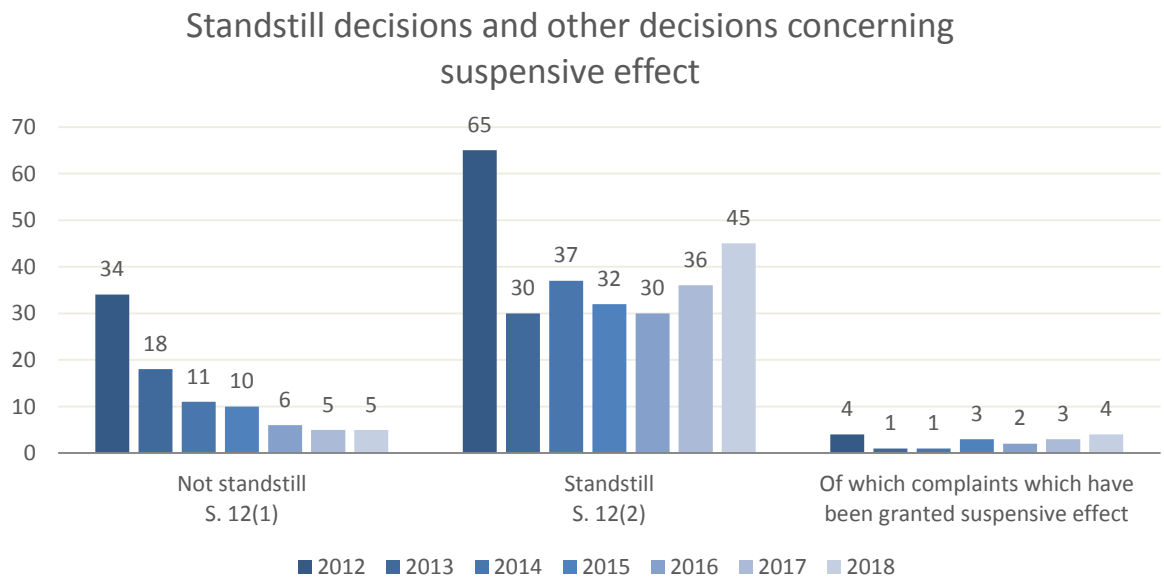
The number of complaints received in 2018 are more or less on a level with 2017 and 2016, and is slightly lower than in 2014-2015 and roughly on a level with 2013. The number of complaints cases is thus still significantly lower than in 2010-2012.

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 2016-2018 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 decisions regarding suspensive effect

As shown below, in 2018, 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 45 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 four cases in 2018, cf. section 1.4 above and the description of the decisions in chapter 2. In some cases, the Complaints Board's decisions on suspensive effect are made in writing – and not as an actual order. These decisions are also included in the figures.

The number of standstill decisions and other decisions etc. regarding suspensive effect made in 2012-2018 is shown below.

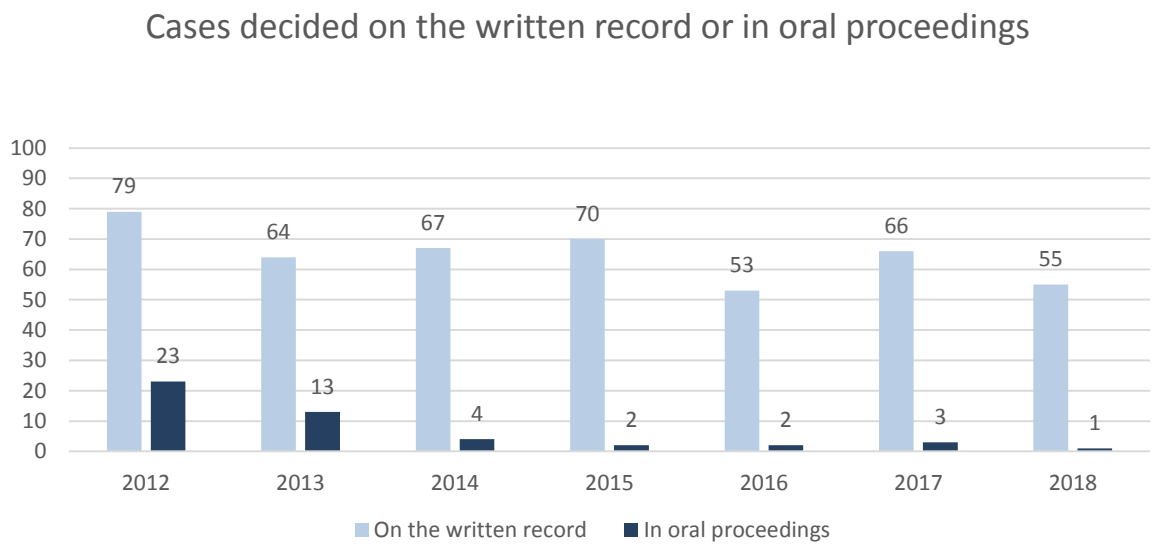


In a number of cases, the Complaints Board's decisions etc. regarding suspensive effect – also where the request is not granted – will lead to withdrawal of the complaint due to the Complaints Board's prima facie orders, where the Complaints Board based on a preliminary assessment delivers an opinion on whether the public procurement rules are likely to have been violated, and whether it is justified to annul the decision. In 2017, this was the case in 72.7% of the Board's decisions on suspensive effect, rising to 76.1% in 2018. 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

Of the 44 cases which the Complaints Board adjudicated on their merits in 2018 (see section 5.4), 43 cases where decided on the written record, while one case was heard in oral proceedings.

Below is an overview of cases considered on the written record and in oral proceedings, respectively, in the years 2012-2018.

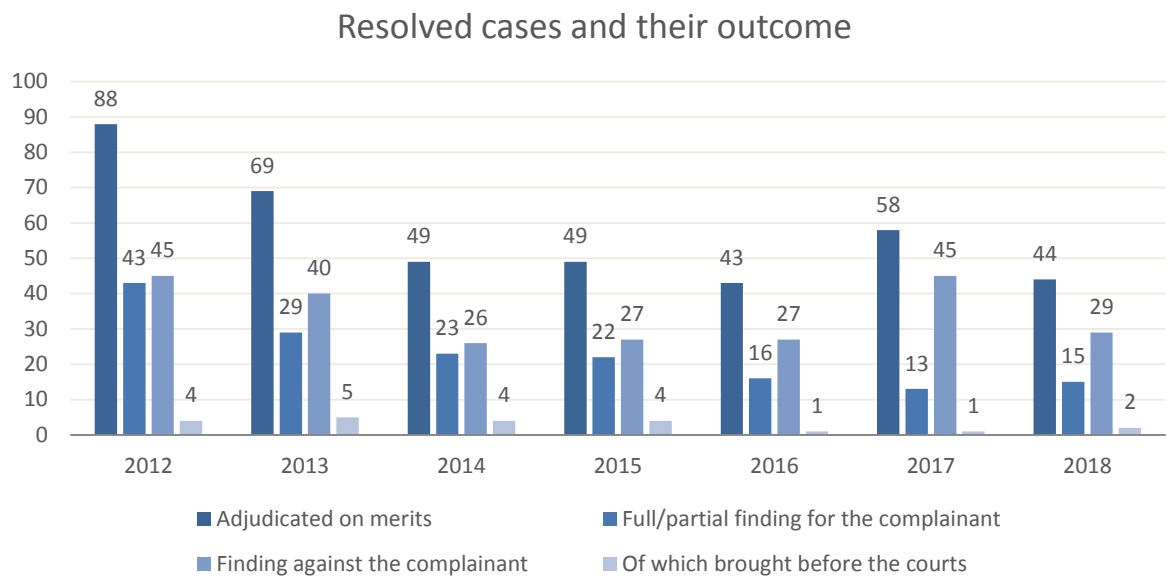


Note: These figures include rejected cases.

The distribution of cases decided on the written record/cases adjudicated in oral proceedings in 2018 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 44 cases on their merits in 2018. Of these cases, 15 complaints were fully or partly sustained, while 29 complaints were unsuccessful. In the vast majority of cases, the Complaints Board's decision is the final ruling in the case. Of these 44 decisions, only two where thus referred to the courts of law. The number of decisions referred to the courts is at the same level as in 2017.



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 2018 was 34%, which was higher than in 2017, but considerably below the average percentage for 2011-2017 which was 41.4%.

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

The figures in the graph and in the table below do not include prima facie decisions where they are the final decision made in a complaints case. In 2018, the Complaints Board delivered 35 prima facie decisions, and in nine of these, it considered the cases to be prima facie cases. In a majority of the cases, this led the contracting entity to cancel the procurement procedure or withdraw its award/preselection decision, after which the complaint was withdrawn. The interim decision was thus the Board's final decision in the case.

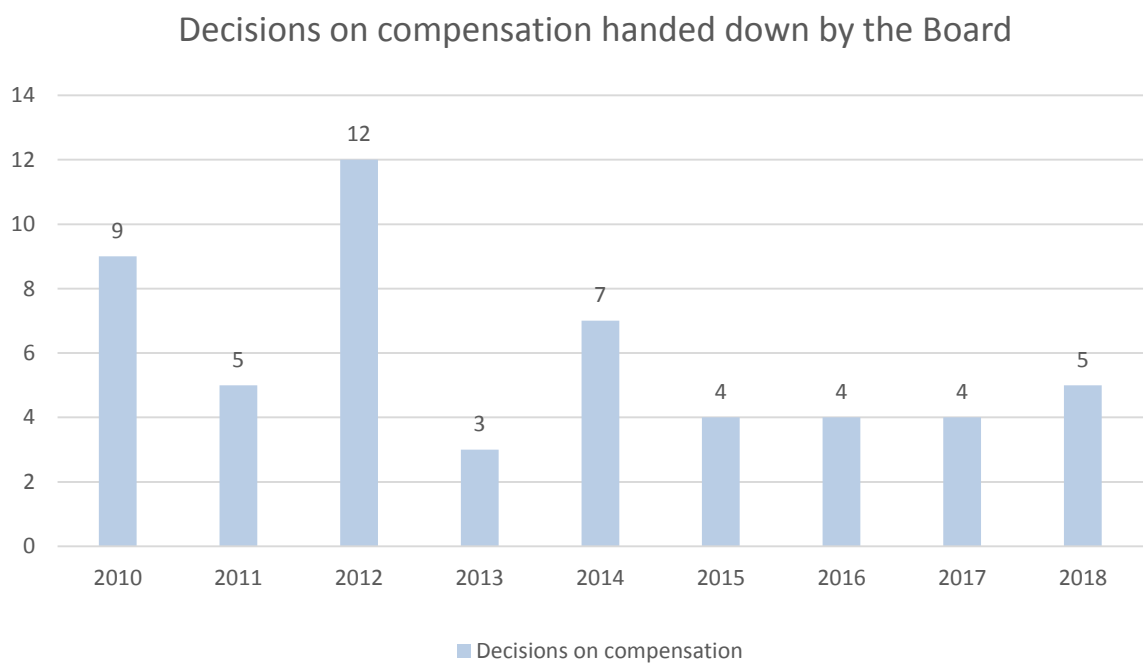
In the remaining 26 prima facie decisions, the Complaints Board assessed that the case was not a prima facie case. In 12 of these, the complaint was revoked, which made the interim decision the final decision in these cases as well.

Year	Full/partial finding for the complainant	Finding against the complainant
2011	44%	56%
2012	49%	51%
2013	42%	58%
2014	47%	53%
2015	45%	55%
2016	37%	63%
2017	26%	74%
2018	34%	66%

5.5 Decisions on compensation

In 2018, the Complaints Board made five decisions on compensation.

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



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. With regard to the length of proceedings in respect of decisions on compensation, it should be noted that these cases

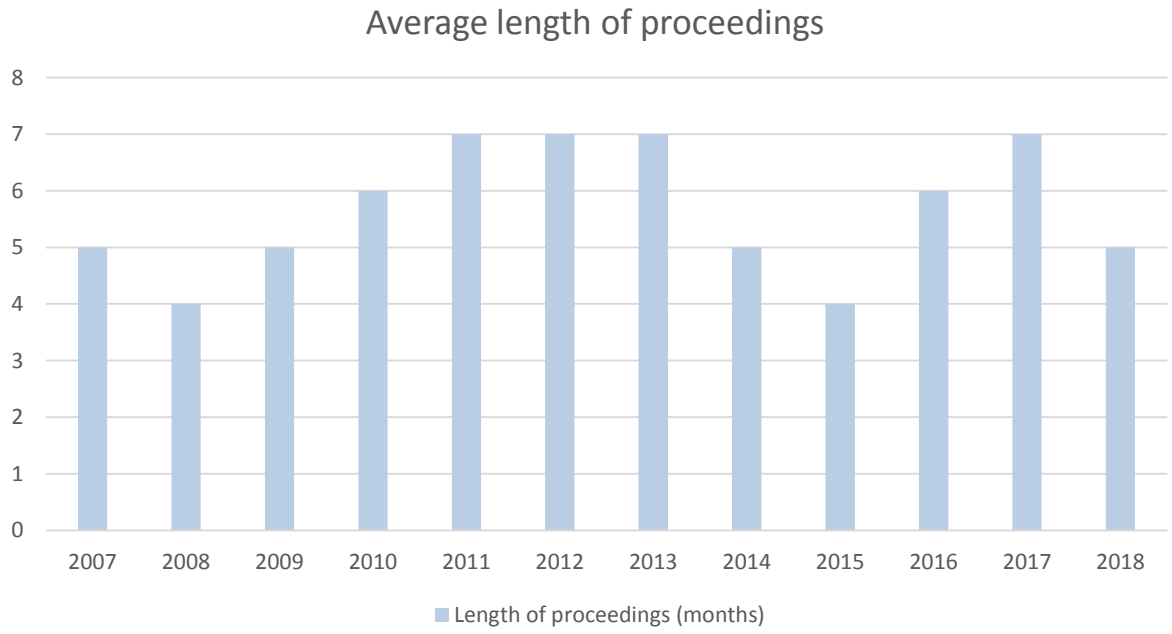
have also involved negotiations between the parties which did not result in an amicable settlement. The number of decisions on compensation in 2012 should be compared with the large number of complaints received in 2010 and 2011 (182 and 178 complaints, respectively).

5.6 Average length of proceedings

The Complaints Board's average length of proceedings in 2018 was five months.

Proceedings are regarded as completed when the Board makes a substantive decision in the case or rejects the complaint, or when the complaint is withdrawn. For more information about the length of proceedings in cases where a decision on compensation is also made, please see section 5.5.

Below is an overview of the development in the average length of proceedings for rejected cases and substantive decisions in months in the years 2007-2018.



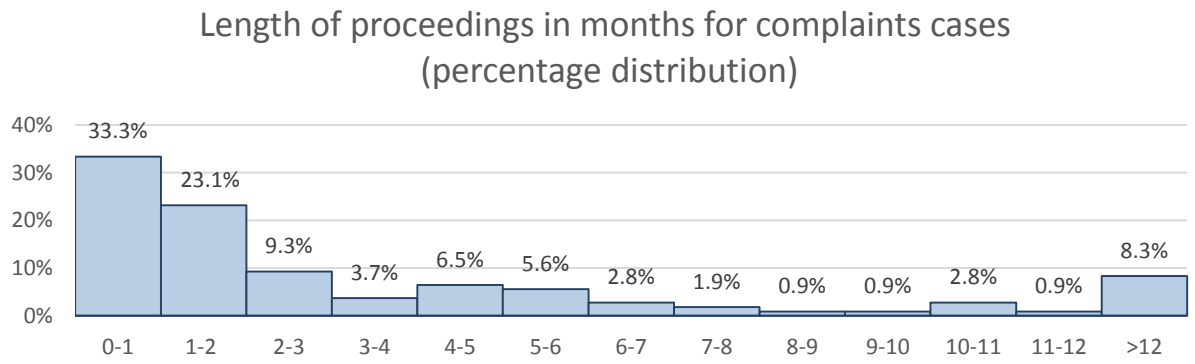
The average length of proceedings, which showed a decreasing trend in 2014 and 2015 from seven months in 2011-2013 to five months in 2014 and to four months in 2015, increased to six months in 2016 and to seven months in 2017, which is on a level with 2010-2013.

The average length of proceedings decreased to five months in 2018, which is on a level with 2007, 2009 and 2014. The number of complaints received in 2018 was 106 against 58 in 2007, 115 in 2009 and 120 in 2014. For further information about the number of complaints received in other years, refer to section 5.1.

At the end of 2018, there were 39 pending cases, which is slightly below the 43 in 2017 and 42 in 2016.

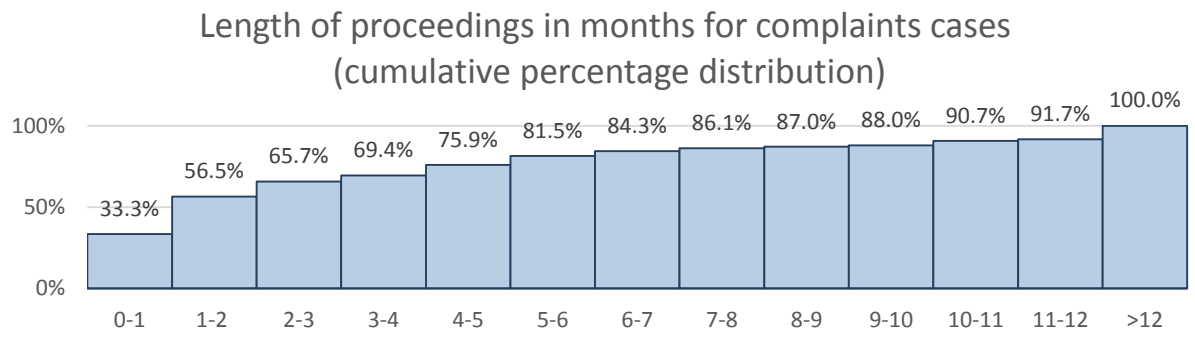
5.7 Length of proceedings in months for complaints cases (percentage distribution)

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 2018. 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 2018.



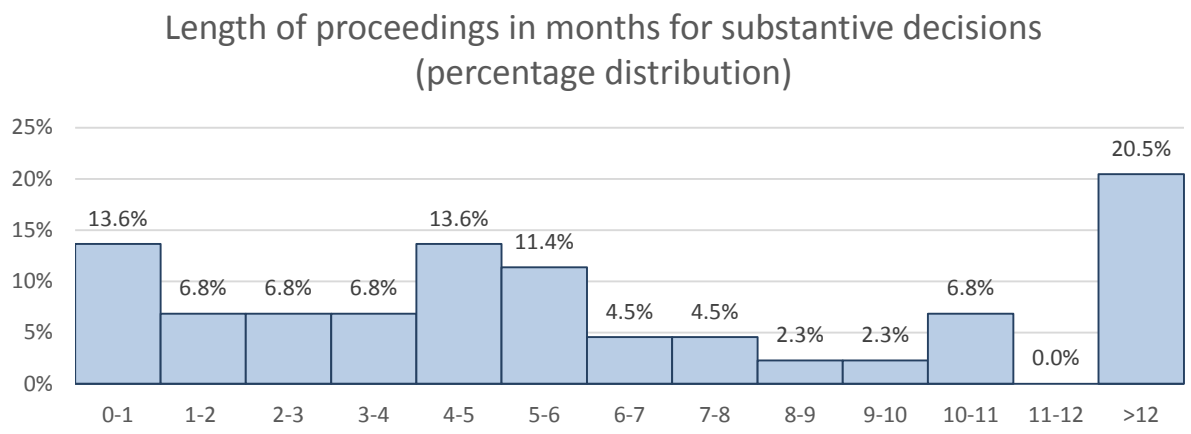
Approx. 33% of the cases were closed within the first month of receipt of the complaint in 2018 against 29% in 2013, 33% in 2014, 47% in 2015, approx. 39% in 2016 and approx. 27% in 2017. Approx. 56% of the cases were closed within the first two months of receipt of the complaint in 2018 against 42% in 2013, 54% in 2014, 62% in 2015, 53% in 2016 and 41% in 2017. It can also be seen that approx. 66% of all cases received in 2018 were closed within three months against 49% in 2013, 60% in 2014, 69% in 2015, 61% in 2016 and approx. 49% in 2017. The figures for 2018 include 52 cases where the complaint was withdrawn. In about half of these cases, the complaint was withdrawn following the Complaints Board's prima facie decisions, where the Complaints Board makes a preliminary decision on whether the public procurement rules have likely been violated. In addition, approx.

81% of the cases in 2018 were closed within 5-6 months of receipt of the complaint against 37% in 2013, 62% in 2014, 65% in 2015, 74% in 2016 and approx. 77% in 2017, and 88% of cases were closed within 9-10 months against 86% in 2013, approx. 87% in 2014, 92% in 2015, 87% in 2016 and on a level with 2017.

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.

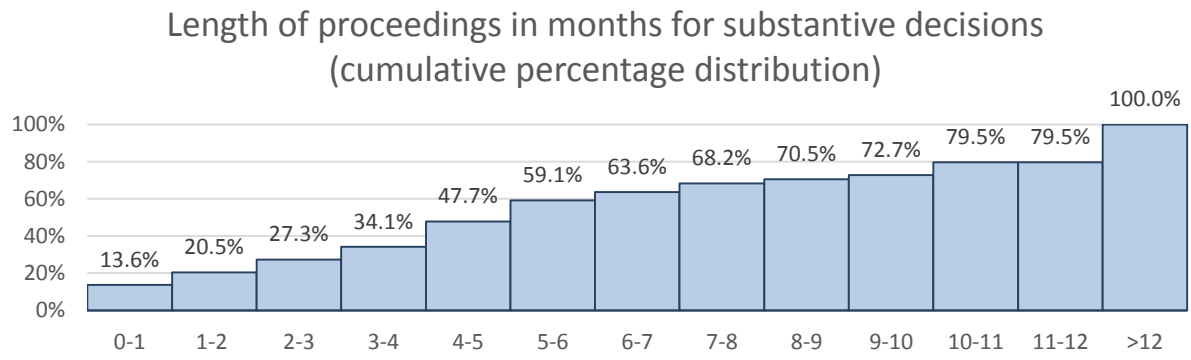
5.9 Length of proceedings in months for substantive decisions (percentage distribution)

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 2018.



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 2018.



The table shows that substantive decisions were made in approx. 34% of cases within 3-4 months in 2018 against 20% in 2013, 30% in 2014, 41% in 2015, 44% in 2016 and 38% in 2017. In 2018, deci-

sions had also been made within 5-6 months in approx. 59% of cases against 37% in 2013, 62% in 2014, 65% in 2015, 54% in 2016 and on a level with 2017. It can also be seen that the Complaints Board made a substantive decision within 8-9 months in approx. 70% of cases in 2018 against approx. 69% in 2013, 87% in 2014, 90% in 2015, 71% in 2016 and 76% in 2017. Experience shows that the remaining 30% (2013: 31%, 2014: 13%, 2015: 10%, 2016: 29% and 2017: 24%) of cases where the length of proceedings was longer in the category of particularly large and legally/technically complex cases which necessarily take longer to process. With regard to the Complaints Board's length of proceedings for substantive decisions, it is important to note that the work does not only involve making the substantive decision, but that in many cases considerable resources go into making one or more decisions on suspensive effect and access pursuant to the Public Administration Act, 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 2018:

Consultation responses

On 5 November 2018, the Complaints Board submitted a consultation response on a draft legislative proposal amending the Public Procurement Act.

Statistical information

In 2018, the Complaints Board contributed statistics and information about its organisation and activities to the Network of First Instance Procurement Review Bodies, a network launched by the Commission.

Participation in conferences etc.

In 2018, members of the presidency participated as presenters at conferences and other events focusing on public procurement law.

On 22-23 March 2018, one of the presidency members 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 a meeting of the Network of First Instance Procurement Review Bodies held in Malta on 4 May 2018.

In October 2018, the Complaints Board's presidency and the secretariat's lawyers paid a three-day visit to the European Court of Justice and the General Court. The programme had been put together especially for the Complaints Board and included attendance at court hearings as well as insightful and inspirational talks on general and procurement law issues with the Danish Judge at the ECJ, Lars Bay Larsen, the Danish Advocate-General, Henrik Saugmandsgaard Øe, and the two Danish Judges at the General Court, Sten Frimodt Nielsen and Jesper Svenningsen. The visit also featured presentations and talks with Advocate-General Michal Bobek and a number of the Court's specialists.