The Complaints Board for Public Procurement

Annual Report 2019

CONTENTS

INTRODUCTION

The Complaints Board for Public Procurement hereby publishes its seventh 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. From the summer of 2019, the preparation of the Board's decisions on access, which in many cases are substantial in scale, moved from the secretariat to an interdisciplinary unit in the offices of the Danish Appeals Boards Authority (*Nævnenes Hus),* which now processes cases on access for all the boards. This freed up a considerable amount of capacity for the secretariat to focus on preparing drafts for the Board's decisions in the field of public procurement law.

Chapter 2 contains summaries of the Board's cases from 2019 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.naevneneshus.dk. This applies to decisions concerning violation of the public procurement rules, decisions awarding compensation and a selection of decisions granting a complaint suspensive effect. The Complaints Board's case law in cases concerning access is not published quite as systematically, for which reason the Complaints Board has once again chosen to describe some of these cases from 2019 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 2019, the Complaints Board received 93 complaints, which is slightly less than the number of complaints received in 2017 and 2018. The Complaints Board found fully or partly in favour of the complainant in approx. 39% of all cases, which is on a level with 2018 and slightly higher than in 2017. Moreover, in approx. 35% 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 2019, the Complaints Board's average length of proceedings was reduced to 4.5 months compared to five months in 2018 and seven months in 2017.

Nikolaj Aarø-Hansen, Chairman

Viborg, June 2020

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 2019, 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 (until 25 June 2019)
- Hanne Aagaard, High Court Judge
- Jesper Stage Thusholt, Judge
- Charlotte Hove Lasthein, Judge

The Board's expert members in 2019 were:

- Michael Jacobsen, Chief Consultant
- Vibeke Steenberg, Chief Consultant
- Pernille Hollerup, Head of Team Legal Competition & Tender Law, Senior Manager
- 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 (until 13 March 2019)
- Palle Skaarup, Legal Manager
- Anette Gothard Mikkelsen, Chief Consultant, LLM
- Jeanet Vandling, CPO
- Ole Helby Petersen, Professor (MSO), PhD
- Grith Skovgaard Ølykke, Commercial Law Consultant, PhD (until 13 March 2019)
- Christina Kønig Mejl, Project Manager and Special Consultant, LLM
- Claus Pedersen, Procurement and Construction Lawyer
- Jan Kristensen, Development Manager
- Birgitte Nellemann, Head of Strategic Purchasing
- Lise Ridderholm Husted, Chief Consultant (from 3 April 2018)
- Kurt Helles Bardeleben, Lawyer (from 13 March 2019)

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 2019, in addition to a junior clerk during parts of 2019.

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 2019, the secretariat consisted of:

- Maiken Nielsen, Legal Special Advisor, MSc in Business Administration and Commercial Law
- Julie Just O'Donnell, Legal Administrative Officer, LLM
- Tanja Rosendahl Bøtker, Legal Administrative Officer, LLM (from 1 July 2019)
- Dorthe Hylleberg, Administrative Officer
- Heidi Thorsen, Administrative Officer
- Katrine Kirkegaard Gade, Junior Clerk (until 10 May 2019)

Since the summer of 2019, one of the secretariat's duties, preparing the Board's decision on access, including right of appeal cases pursuant to the Access to Public Administration Files Act (*offentlighedsloven*), was moved to an interdisciplinary legal unit in the offices of the Danish Appeals Boards Authority that also processes access cases for the other boards. These cases are often substantial in scale and give rise to an extensive exchange of pleadings. This change, which has been introduced with only positive results, has freed up a considerable amount of capacity for the Complaints Board's own secretariat to prepare draft decisions for the Board's complaints cases concerning public procurement law.

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

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

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

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

Pursuant to Section 37 of the Danish Access to Public Administration Files Act, 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' violations 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 new Public Procurement Directive (Directive 2014/24/EU) and the other EU public procurement rules, while only a small number of cases concern the Act on Invitations to Tender.

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

As a source of law, the Complaints Board's decisions are subordinate to judgments from Danish courts of law and the EU Court of Justice. However, only a very small share of the Board's decisions is brought before the courts of law; in 2019, only four out of 46 decisions. The Complaints Board's case law, and perhaps particularly decisions made within the past ten years, should 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 2019, the average length of proceedings for public procurement cases was 4.5 months, and to this should be added that a very large portion – approx. 56% – 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*) and the same in the chapter on standstill and suspensive effect in public procurement law in Treumer (ed.) 2019.

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

The Complaints Board's case law shows that it is common practice to provide a detailed explanation in relation to the first "prima facie case test". The objective is to explain to the complainant and the respondent that, on the 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 2019: Decision of 12 July 2019 in Semi-Stål A/S v the Capital Region of Denmark, decision of 4 September 2019 in Kinnarps A/S v the Capital Region of Denmark, decision of 4 October 2019 in VITRONIC – Dr. Ing.Stein Bildverarbeitungssysteme GmbH v Sund & Bælt Holding A/S, and decision of 20 December 2019 in Smith & Nephew A/S v the North Denmark Region, the Central Denmark Region and Region Zealand (these decision 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. One such decision was made in 2019: Decision of 6 November 2019, Lotus Behandlingscenter ApS v the Department of Prisons and Probation.

Other sanctions

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

- to suspend the contracting entity's procurement procedure or decisions made 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. Section 185(2), first and second sentences. According to the explanatory notes to the Act, "final decision or judgment" means a final decision from the Complaints Board or a judgment from the ordinary courts which may no longer be appealed.

The "ineffective contract" sanction may be used against the contracting entity even though it is justified in believing that no complaint has been made to the Complaints Board within the standstill period, because the complainant has neglected to inform the contracting entity of the complaint to the Complaints Board contrary to Section 6(4) of the Complaints Board Act. Reference is made to the above-mentioned article by Katja Høegh and Kirsten Thorup in U.2016B.403, referring to the Complaint Board's decision of 7 May 2015, Rengoering.com A/S v the Municipality of Ringsted. 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 24 April 2019, Sagemcom Energy & Telecom SAS v Vores Elnet A/S, and decision of 15 February 2019, KONE A/S v Staten og Kommunernes Indkøbsservice A/S, where the Board in both cases 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 2019, this happened in three cases, namely decision of 15 January 2019, ALSTOM Transport Danmark A/S v DSB, decision of 15 February 2019, KONE A/S v Staten og Kommunernes Indkøbsservice A/S, and decision of 15 May 2019, Salini Impregilo S.P.A. v Metroselskabet I/S. The three latter cases are discussed below in chapter 2.

Decisions by the president

The president of the case may decide to adjudicate cases without the involvement of an expert, if they may be assessed based on the written record and are not leading cases.

This option is hardly ever used, as the expert members' assistance is essential to cases. In 2019, only two substantive decisions were made without the assistance of an expert member: decision of 8 January 2019, Finmann VVS/Entreprise ApS v Udviklingsselskabet By & Havn I/S, and decision of 27 February 2019, Zurich Danmark, Filial Zurich Insurance PLC, Ireland v the City of Copenhagen.

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.naevneneshus.dk. In addition, the secretariat offers telephone support on the complaints 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, and where annulment under Section 185(2) of the Public Procurement Act would, as a general rule, oblige the contracting entity to terminate the contract giving a reasonable notice. If the issue is 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.

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), cf. for example, the above-mentioned decision of 24 April 2019, Sagemcom Energy & Telecom SAS v Vores Elnet A/S. 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.

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

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

Hearings are held in the offices of the Danish Appeals Boards Authority in Viborg and will generally start with a review of the parties' claims and the key documents. It is possible to supplement the information in the case with statements given at the hearing, but written statements submitted in advance to the Complaints Board 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. In that case, the Complaints Board will announce that it is acquainted with the documents in the case and the parties' positions in the pleadings. The Complaints Board may have questions that need clarification or ask for a demonstration of the issue in dispute, cf., for example, decision of 15 March 2019, Leo Nielsen Trading ApS and Glock Ges.m.b.H. v FMI. 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 2019, a hearing was held in one case (2018: one case), while 54 cases were adjudicated on the written record (2018: 55 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.

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

In connection with substantive decisions and decisions on 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.

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

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

1.8 Cases on access pursuant to the Access to 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, 2017 and 2018 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. As mentioned above, since the summer of 2019, the Complaints Board's decisions on access have been prepared by an interdisciplinary legal unit in the offices of the Danish Appeals Boards Authority that processes access cases for all the boards.

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.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 2019 that have all been published at www.klfu.naevneneshus.dk. Some of these cases were leading cases, while others deal with issues that, regardless of their specific nature, are likely to be of interest to a wider audience.

The decisions are categorised as follows:

- Requirements for specifications, including minimum requirements, and organisation of procurement procedures
- Preselection
- Grounds for exclusion
- Evaluation, including choice of evaluation model
- Assortment tenders
- The Complaints Board Act, including (preliminary) 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

Interim decision of 8 January 2019, Mølbak Landinspektører A/S v Banedanmark

In its evaluation of tenders in a procurement procedure for a four-year contract, the contracting entity was entitled not to include an option for a four-year extension of the contract. The technical minimum requirements at issue were lawful and did not amount to discrimination.

The case concerned a public procurement procedure under the Utilities Directive for a four-year framework agreement on the scanning of 3,125 km of railway track and processing of the scanned data. The contract included an option for a four-year extension.

Mølbak Landinspektører claimed, among other things, that Banedanmark (the national railway infrastructure manager) had violated Article 82(2) of the Utilities Directive and the transparency principle, cf. Article 36(1), by using a method for the calculation of the evaluation price that only included the prices for the first four years of the framework agreement, although the framework agreement had a maximum term of eight years if the option was exercised. It also claimed that because the calculation of the price was based on four years instead of eight, the price of the services to be rendered during the first year carried a greater weighting in the overall evaluation.

The Complaints Board held that it was stated clearly and unambiguously in the specifications read with the list of products that only the prices for the first to the fourth year of the framework agreement would be included in the evaluation according to the award criterion "lowest price", and that the calculated evaluation price should thus not include the option of a four-year extension of the contract. The Board also found that a contracting entity is entitled (and obliged) to evaluate tenders solely based

on the price of the initial contract term, provided that this was set out in the specifications, cf. to that effect the Complaints Board's decision of 30 March 2017, Euro Therm A/S v Hinnerup Fjernvarmeværk A.m.b.a.
The Complaints Board added that it had to be considered that, after having exercised the option, the contracting entity would be required to pay for the services at the unit prices that applied during the initial term of the contract, and which had been used in Banedanmark's evaluation in accordance with the description in the procurement documents. The Complaints Board thus gave importance to the fact that the (unit) prices that would be charged after extension of the contract using the option had been exposed to competition in the procurement procedure.

The Complaints Board also found that a contracting entity is entitled to stipulate, at its own discretion, the technical specifications and requirements that it deems to be necessary or expedient for the tendered contract, and that is linked to the subject-matter of the contract, cf. Article 60 of the Utilities Directive. Following a preliminary assessment of the case, the Complaints Board found no basis for assuming that the technical minimum requirements regarding the categorisation of the point cloud or the requirement relating to rolling stock infringed the requirement for equal access of economic operators to the procurement procedure or had the effect of creating unjustified obstacles to the opening up of public procurement to competition, cf. Article 60(2) of the Directive. The Board relied on, among other things, the facts that Banedanmark had accounted for the reasoning behind the minimum requirements, and that no information had been produced to the Board that substantiated or indicated that the requirements were "tailor-made" to the successful tenderer.

Against this background, the case was not considered a prima facie case, and the complaint was not granted suspensive effect. The complaint was subsequently withdrawn, and the interim decision was thus the Complaints Board's final decision in the case.

Decision of 15 March 2019, Leo Nielsen Trading ApS and Glock Ges.m.b.H v the Danish Ministry of Defence's Acquisition and Logistics Organisation (FMI)

Restricted procedure under the Directive on Security and Defence Procurement for a framework agreement for the delivery of a new pistol for the Danish defence. After a demonstration given at the hearing, the Board found that the successful tenderer did not meet a minimum requirement for the pistol, and that the contracting entity had thus violated the principle of equal treatment in Article 4 of the Directive. The award decision was thus annulled.

The case concerned a restricted procedure under the Directive on Security and Defence Procurement for a seven-year framework agreement for the delivery of a new pistol for the Danish defence. The award criterion was best price-quality ratio where price weighted 30% and quality 70%. The specifications contained, among other things, a number of technical minimum requirements, including requirement no. 79 stipulating that "no parts of the pistol shall be possible to mount incorrectly or in the wrong places". This requirement would be verified using tests. FMI received tenders from five tenderers, including the complainant. After the tests, one of the tenders was deemed to the inadmissible because it did not comprise a silencer. The contract was since awarded to a tenderer who had offered a Sig Sauer pistol. Following objections from the later complainant, FMI withdrew its first award decision. FMI then went on to make a new award decision, offering the contract to the same tenderer. FMI also announced that two of the other tenders were inadmissible, including the later complainant's tender. Among other things, FMI claimed that it did not meet requirement no. 79.

The tenderer then complained to the Board, claiming that FMI had violated the principle of equal treatment in Article 4 of the Directive, as the winning Sig Sauer pistol did not meet requirement no.

79. This was contested by FMI, maintaining that there was no basis for setting aside FMI's assessment after thorough user tests. FMI stated that the purpose of this minimum requirement was to protect the soldiers in operative, challenging situations. The complainant contested that the minimum requirement should be construed as only applying to the user level, and submitted that the complainant's pistol could not be mounted incorrectly by the user, and that FMI went further than to only disassemble the complainant's pistol at the user level in the test. Detailed technical drawings and demonstration videos were produced in the pleadings. In an interim decision, the Complaints Board held that the requirements specification did not specify that the minimum requirement only applied to the user level, just as it was not stipulated that the test would only be performed by users.

The pistols at issue were then demonstrated in a hearing, where the relevant parts of the pistols were disassembled and reassembled. In that connection, FMI described how all Danish soldiers are trained in how to disassemble and assemble these parts of a pistol.

Based on this demonstration, the Complaints Board concluded that the Sig Sauer pistol could be assembled without using any special tools or exerting a disproportionate amount of force, although one part was mounted incorrectly according to the recess on the part. The Complaints Board further held that the incorrect assembly was not obvious, and that the pistol could fire several rubber bullets before it jammed. Against this background, the Complaints Board held that the pistol selected by FMI did not meet requirement no. 79, and that FMI had therefore violated the principle of equal treatment in Article 4 of the Directive on Security and Defence Procurement. The complainant's claim for annulment of the award decision was herewith upheld.

Decision of 1 May 2019, NetNordic Communication A/S v Region Zealand

The complaint was lodged by an unsuccessful tenderer who claimed, among other things, that the contracting entity had not, as prescribed in Section 164(2) of the Public Procurement Act (Article 67(4) of Directive 2014/24/EU) carried out an effective verification of whether the winning tender met the minimum requirements after the complainant had contacted the contracting entity, questioning the admissibility of that tender.

The case concerned a public procurement procedure under Title II of the Public Procurement Act for a framework agreement for the provision of service and support for existing videoconferencing equipment, procurement of video conferencing equipment and related services. The award criterion was best price-quality ratio where price weighted 60% and quality 40%. The framework agreement had an estimated value of DKK 10 million (EUR 1.3 million).

After gaining access to the successful tenderer's (KMD) tender, NetNordic contacted the Region and questioned whether KMD's tender was inadmissible because it did not meet a number of minimum requirements. The Region forwarded NetNordic's views to KMD, who answered that KMD's tender did meet the mentioned minimum requirements.

NetNordic complained to the Complaints Board, arguing that KMD's tender was inadmissible because it did not meet these minimum requirements, and that the Region had violated Section 164(2) of the Public Procurement Act (Article 67(4) of Directive 2014/24/EU) and 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 performed an effective verification of whether the products offered by KMD met the minimum requirements set out in the procurement documents, despite NetNordic having requested it to do so.

After NetNordic had lodged a complaint with the Complaints Board, the Region approached KMD again, and KMD confirmed that its tender complied with the minimum requirements in question and substantiated this claim. The Region claimed that the complaint should not be upheld.

The Complaints Board stated that even if a tenderer submits a tender without reservations and confirms that the minimum requirements are met, a contracting entity must in case of doubt carry out effective verification of the information and documentation in a tender, cf. Section 164(2) of the Public Procurement Act (Article 67(4) of Directive 2014/24/EU), and the contracting entity is not allowed to conclude a contract with the successful tenderer if it is made aware that the successful tenderer's tender is inadmissible before that time. The questions raised by NetNordic gave rise to such doubt that the Region was obliged to carry out effective verification under Section 164(2) of the Public Procurement Act (Article 67(4) of Directive 2014/24/EU) of whether KMD's tender was admissible in view of the minimum requirements called into question by NetNordic. As a general rule, it falls on the contracting entity to assess how to perform such effective verification, including the checks to be undertaken. Based on the specific circumstances, it will be sufficient for the contracting entity to request the winning tenderer to reconfirm that the (minimum) requirements will be met and to account for or document how. The requirements for the successful tenderer's account and possible documentation depends on the specific circumstances of the case, including the nature of the complainant's objections, the successful tenderer's possibility of providing proper documentation before the start of the contract and the contracting entity's experience in the field and its own investigations.

The Complaints Board examined the minimum requirements that, according to NetNordic, had not been met in KMD's tender, and concluded that by contacting the supplier, and considering the answers received, the Region had done enough to verify that the tender was admissible. The Complaints Board held that there was no basis for considering KMD's tender to be inadmissible in respect of the issues raised by the complainant.

Decision of 14 June 2019, APCOA PARKING Danmark A/S v the Capital Region of Denmark

One of the contracting entity's employees who had previously been employed by the complainant was not disqualified. The contracting entity had disclosed confidential information to the successful tenderer about a previous tender from the complainant. The contracting entity had failed to provide information in the concession documents on the methodology used to calculate the estimated value of the procedure, but this could not lead to annulment.

The case concerned a concession procedure for the operation of parking facilities at the Capital Region's hospitals and is the first complaint under the new Concessions Directive.

The complainant, an unsuccessful tenderer, claimed, among other things, that the Region had breached Article 35 of the Concessions Directive in the concession procedure by having used a person who could have affected the outcome of this procedure and who had a direct or indirect personal interest in the outcome of the procedure, which in the complainant's view compromised their impartiality and independence in the context of the concession award procedure. In support of its claim, the complainant argued that one of the Region's employees, who participated in the evaluation along with three others, had previously been employed by the complainant, and that when this person left his job, he had expressed dissatisfaction with his former manager and the complainant's CEO, that he had said that the complainant could not be sure to win the contract, that he had told a former colleague that he had held meetings with the later successful tenderer, and that he had told several of the complainant's employees that he found the later successful tenderer's s technical solutions better

than the complainant's. The Region produced statements from the two people who had worked with the former employee in the evaluation, in which they declared that they did not believe that the former employee had acted in a partial manner. Furthermore, the Region claimed that the person concerned had resigned from the complainant, that at the time of the procedure there was no unsettled account between him and the complainant, and that he had held meetings with several operators, including the complainant and the successful tenderer, as part of the prior market dialogue. This part of the complainant's complaint was not upheld. The Complaints Board stated in that regard that, as a general rule, a former – and now terminated employment relationship – did not give rise to a conflict of interest under Article 35 of the Concessions Directive, and that there were no circumstances that could lead to a ruling of disqualification.

In addition, the complainant claimed, among other things, that the contracting entity had violated Article 28 of the Concessions Directive by having disclosed to the successful tenderer all or significant parts of the complainant's tender from a procedure for the same service which was annulled shortly before the procedure at issue, and that this resulted in the solution in the tender from the successful tenderer being virtually identical to the solution in the complainant's tender. This claim was not upheld, as the Complaints Board after having conducted a thorough review of the evidence was not satisfied that the Region had disclosed information about the complainant's tender from the annulled procedure to the successful tenderer in this procedure.

Furthermore, the complainant claimed, among other things, that the Region had breached Article 8(2) and (3) of the Concessions Directive by not having provided an estimated value of concessions and the method for calculating this value in the contract notice. The Complaints Board ruled that, according to Article 8(3) of the Concessions Directive, the concession documents must describe the objective method used to calculate the estimated value of the contract to be used in the assessment of whether the contract was subject to a competitive tendering obligation, cf. Article 8(1). The Board then concluded that the Region had not complied with this requirement.

This was the only one of the complainant's claims that was upheld. However, as the infringement only amounted to a procedural error and could not be regarded as having had an impact on the concession procedure, there was no basis for annulment of the award decision.

Interim decision of 12 July 2019, Semi-Stål A/S v the Capital Region of Denmark

Successful tenderer's tender contained significant uncertainties and a clear reservation for minimum requirements, and it was therefore inadmissible, although the tender confirmed that the minimum requirements were met. The tenderer had also changed the list of products in violation of the specifications. Some minimum requirements were withdrawn by the Region in order to enable this tenderer to participate in the procedure. This amounted to a change of an essential element, which required a new procurement procedure. The complaint was granted suspensive effect, as the urgency condition was also satisfied.

The case concerned a procurement procedure launched pursuant to Title II of the Public Procurement Act for the supply of bed washing tunnels etc. to Herlev Hospital and Nordsjællands Hospital, Hillerød. Both lots were awarded to Weber Hospital Systems BV ("WHS"). Semi-Stål filed a complaint in the standstill period and requested that the complaint was granted suspensive effect. During the proceedings, the Region revoked its award decision and made a new decision awarding the contracts to WHS again.

The Complaints Board found on a preliminary assessment that WHS' tender for lot 1 (Herlev Hospital) contained significant uncertainties as to the capacity of the systems to meet a minimum requirement on the number of beds and mattresses (capacity requirement) while at the same time meeting a hygiene requirement for the use of water/steam with a minimum temperature of 90 degrees. The wording of the tender expressed a clear reservation for this minimum requirement. It was therefore inadmissible, although it was confirmed elsewhere in the tender that the minimum requirements were met. In view of the coinciding requirements for capacity and hygiene in the two lots in the procurement documents, the Complaints Board held that the tender for lot 2 (Hillerød Hospital) should also be considered to contain reservations for minimum requirements, thus making it inadmissible.

The Complaints Board also referred to the fact that WHS had changed the list of products, as the original text about 320 beds per day was changed to 160 beds per day. The Complaints Board found that due to the company's change of list of products, the tender was in contravention of a provision in the specifications that expressly stated that the list of products should simply be filled in, which implied that its content could not be changed, including changes in assumptions for operating costs and the number of beds. The tender and the list of products from WHS could therefore not form the basis for evaluation according to the established criteria.

During the procedure, the Region had decided that certain minimum requirements should be deleted from the procurement documents. The Complaints Board found that, according to the information in the case, it had to be considered that a minimum requirement on automatic brushing of mattresses could exclude companies from bidding. Changing the requirement, or effectively removing it, meant that the group of potential tenderers generally widened. The Complaints Board stressed that the change was implemented almost two months after publication of the contract notice and after the end of the initial deadline for submission of tenders, but shortly before the expiry of the extended deadline. The purpose was to allow WHS, which was not able to meet the requirements, to bid, which it subsequently did. In those circumstances, the Complaints Board found that the Region had failed to lift the burden of proving that the change of the minimum requirement did not – in accordance with the clear purpose set out in the explanatory notes to the Public Procurement Act – constitute a change of an essential element that could only be made in connection with a new procurement procedure.

The Complaints Board then found that it was likely that the complaint would be upheld (the "prima facie case test").

The Complaints Board also found, based on the information that several errors had been identified during the procedure, that Semi-Stål had demonstrated that a prima facie case had been established and that the company was thus only required to prove that it would suffer irreparable harm if the complaint was not granted a suspensive effect. The urgency condition was therefore also satisfied.

Finally, the Appeals Board held that, due to the balance of interests of the parties, suspensive effect should be granted to the complaint. This conclusion was based on the errors committed, the nature of such errors and the interests to which the Region had referred, i.e. Its interest in being able to conclude a contract to start delivery and installation as soon as possible.

The complaint was thus granted suspensive effect. The Region then cancelled the procurement procedure, and the Complaints Board's decision to grant suspensive effect was thus the final decision in the case.

Interim decision of 23 July 2019, Urbaser A/S v the Municipality of Ringkøbing-Skjern

Open procedure pursuant to Title II of the Public Procurement Act on waste collection etc. The complaint was lodged by a tenderer whose tender was rejected on the grounds that it did not meet the required solvency ratio. A complaint against the rejection was not upheld. However, the Complaints Board did conclude that the reasons given for the rejection were insufficient, but this did not give rise to annulment of the award decision.

The case concerned a public procurement procedure for the collection and transport of organic waste in the Municipality of Ringkøbing-Skjern. The complainant (the former RenoNorden A/S), a rejected tenderer, in particular claimed that the minimum requirement for tenderers' economic and financial standing as regards revenue (DKK 30 million (EUR 4 million)), equity (DKK 3 million (approx. EUR 0.4 million) and solvency ratio (15%) – all in the last three audited and approved financial years – was contrary to, section 152(2) of the Public Procurement Act (Article 60(1) of Directive 2014/24/EU), cf. Section 154 (Article 60(3) of Directive 2014/24/EU), and Section 140(2) (Article 58(1) and (5) of Directive 2014/24/EU), Section 142 (Article 58(3) of Directive 2014/24/EU) and Section 154 (Article 60(3) of Directive 2014/24/EU), respectively. The complainant also alleged that the company did meet the requirement, as it had indicated that it was relying on the capacity of the parent company, and that the grounds given for the rejection did not meet the requirement in Section 171(2) of the Public Procurement Act (Article 55(1) and (2) of Directive 2014/24/EU).

The Complaints Board ruled that the wording of the minimum requirements for tenderers' economic and financial standing in the contract notice could not be interpreted as meaning that tenderers would be precluded from providing any other relevant documentation if they had a valid reason to do so, cf. Section 154(2) of the Public Procurement Act (Article 60(3) of Directive 2014/24/EU). The requirements for equity and solvency ratio were also considered to be objective and proportional, and to not prevent newly established companies from bidding.

In its tender, the complainant, who did not meet the requirements for economic and financial standing, had stated that it would be relying on its Norwegian parent company. The parent company, however, was newly established and could only document its compliance with the requirements in one financial year, but had produced other documentation to demonstrate that it met the requirements. In its interim decision of 12 April 2019, the Complaints Board held that the Municipality had acted in breach of Section 2 of the Public Procurement Act (Article 18(1) of Directive 2014/24/EU) and Section 144 (Article 63 of Directive 2014/24/EU) by rejecting the tender from Urbaser as inadmissible without having taken account of the parent company's information in the assessment of economic and financial standing. However, in its final decision, it was satisfied that the Municipality had used the parent company's documentation for economic and financial standing, and that the Municipality had assessed that the documentation was not appropriate, cf. Section 154(2) of the Public Procurement Act (Article 60(3) of Directive 2014/24/EU). The Complaints Board found no basis for setting aside this assessment.

As the rejection decision did not specify how or whether the Municipality had taken the information on the parent company's economic and financial standing into account, the grounds given did not meet the requirements in Section 171(4)(1) of the Public Procurement Act (Article 55(2) of Directive 2014/24/EU). This was the only one of the complainant's claims that was upheld. However, in accordance with the Board's established practice, insufficient reasons could not lead to annulment of the award decision.

Decision of 25 September 2019, e-Boks A/S v the Agency for Digitisation

The complaint was filed by an unsuccessful tenderer and included several claims, some of which were upheld. The Complaints Board did not rule on a claim for annulment, as the contracting entity cancelled the procurement procedure after the complainant filed the complaint. The contracting entity claimed that the complaint be dismissed due to the annulment, but the Complaints Board did not uphold this claim.

The case concerned a negotiated procedure pursuant to Title II of the Public Procurement Act for a contract for the development, including conversion, operation, maintenance, support and further development of Digital Post. The contract was described as a contract for the next generation of public-service digital mail solution. The award criterion was best price-quality ratio based on the subcriteria Price (35%), Quality (35%), Methods, processes and tools (20%) and Security of supply (20%).

In its complaint, e-Boks claimed that the Agency for Digitisation had violated the principles of equal treatment and transparency by holding meetings with the successful tenderer (Netcompany) after submission of the final tenders and before the award decision, that the Agency had violated the principles of equal treatment and transparency and Section 159(5) of the Public Procurement Act (Article 56(3) of Directive 2014/24/EU) by having asked Netcompany to clarify how it intended to meet a minimum requirement, that Netcompany's tender was inadmissible because it did not meet the minimum requirement concerned, that the Agency had made a manifest error of assessment in its evaluation of the tenders in relation to the qualitative subcriteria, and that the Agency had violated Section 171(4) of the Public Procurement Act (Article 55(2) of Directive 2014/24/EU) and the principles of equal treatment and transparency by not in the notice of the award decision to e-Boks highlighting the grounds for the Agency for Digitisation's doubts as to whether Netcompany's tender fulfilled the requirements in the procurement documents.

The Agency for Digitisation received initial tenders from e-Boks, who was the former supplier of the public-sector digital mail solution, and Netcompany. The Agency conducted negotiations with the tenderers, and they both submitted final tenders. Before making the award decision, the Agency for Digitisation asked Netcompany to confirm that a proviso in Netcompany's tender was not to be interpreted as a restriction of the Agency's right to withdraw from the contract if a specified test was not passed. This right was indicated as a minimum requirements for a contract in the procurement documents. On the same day, Netcompany confirmed to the Agency that this proviso was not to be construed as a restriction of this right.

The Agency for Digitisation prepared a draft evaluation note, and its final draft was dated 2 October 2018. According to this draft, Netcompany's tender had the best price-quality ratio. On 12 October 2018, the Agency issued a final evaluation note which corresponded to the draft. In the period from 31 October to 14 November 2018, the Agency for Digitisation and Netcompany were in contact to discuss the particulars of the project. There was an email correspondence between the Agency and Netcompany and a meeting was held on 9 November 2018. On 13 November 2018, the Agency for Digitisation decided to contract with Netcompany, and notified e-Boks the same day.

e-Boks complained to the Complaints Board on 7 December 2018. In its contract notice of 20 December 2018, the Agency for Digitisation announced that the procurement procedure had been cancelled, and that it would be reopened, as the Agency had found inaccuracies or reservations in both the tenders received, which had raised doubts as to the admissibility of the tenders. Against this background, the Agency held that the complaint should be rejected, as e-Boks no longer had a cause of action.

The Complaints Board stated that e-Boks had a cause of action regardless of whether the procedure was cancelled.

The Complaints Board then established that meetings had been held between Netcompany and the Agency for Digitisation after the submission of the final tenders but before the award decision was made. As Netcompany had thus been given the opportunity to improve its tender, and as it could not be ruled out that this had influenced the evaluation, the Agency had acted in breach of Section 2 of the Public Procurement Act (Article 18(1) of Directive 2014/24/EU). It had been stipulated that the tenders should clearly and unequivocally meet the requirements, and for that reason alone, the Agency, after having determined that the tender was unclear, had not been entitled to ask Netcompany to "confirm" the Agency's interpretation that a certain proviso should be regarded as a reservation, as the company was thereby given an opportunity to improve its tender. Finally, the Complaints Board ruled that Section 171(4) of the Public Procurement Act (Article 55(2) of Directive 2014/24/EU), or the explanatory notes to this provision, does not provide for an interpretation where the contracting entity is obliged to account for its assessment of the admissibility of the winning tender, when the contracting entity has concluded that the tender is admissible, or when ambiguities are clarified under Section 159(5) of the Public Procurement Act (Article 56(3) of Directive 2014/24/EU).

As the Agency for Digitisation had already cancelled the procedure, the Complaints Board did not rule on the claim for annulment.

Interim decision of 23 October 2019, Hydrema Denmark A/S v the Danish Ministry of Defence's Acquisition and Logistics Organisation (FMI)

Error in the contracting entity's granting of access to the successful tenderer's tender gave a competitor access to unit prices. As a consequence of this error, a new procurement procedure for roughly the same contract had to be launched.

The case concerned an open procurement procedure under Title II of the Public Procurement Act for a framework agreement for the provision of services, spare parts and accessories for construction machinery, contractor's equipment and tractors, and the value was estimated at DKK 12 million (EUR 1.6 million). This was reopening of a procedure for a framework agreement for the provision of services, spare parts and accessories for construction machinery, contractor's equipment and tractors, where the value was estimated at DKK 3 million (EUR 0.4 million). The award criterion was Price.

The framework agreement was first tendered by FMI on 30 November 2017. FMI received tenders from, among others, Hydrema and United Military Services (UMS). On 31 January 2018, FMI decided to award the contract to Hydrema. UMS then requested access to Hydrema's tender. UMS was granted access, including to Hydrema's list of products, after which it filed a complaint with the Complaints Board claiming that Hydrema's tender was inadmissible because Hydrema had failed to indicate prices for all product lines in the list. FMI cancelled the procurement procedure, and UMS withdrew the complaint.

Hydrema requested access to the documents that had been disclosed to UMS in response to UMS' request for access to Hydrema's list of products. In a review of what FMI had granted UMS access to, Hydrema discovered that a number of unit prices were readily available/visible to UMS, although they were crossed out. In Hydrema's opinion, the prices were visible in four of the pages of the list of products.

FMI launched a new procedure on 4 June 2019 and received tenders from UMS and Hydrema at the expiry of the deadline for submission of tenders. FMI decided to award the contract to UMS, which

had submitted the tender with the lowest price. Hydrema complained about the decision to the Complaints Board, claiming, among other things, that FMI should have excluded UMS because UMS had had an unfair competitive advantage in the new procedure that FMI was not able to offset. FMI argued that UMS had not had a competitive advantage in the new procedure as a result of the insight gained into some of Hydrema's unit prices, and even if UMS had an advantage, this was offset by FMI's organisation of the new procedure, which differed from the first procedure in several respects.

The Complaints Board stated that FMI, due to the error committed in granting access in the first procedure, was obliged to ensure in the second procedure that the advantage given to UMS from gaining access to some of Hydrema's unit prices was offset. In the Complaints Board's preliminary assessment, FMI had indeed done so. The Complaints Board gave importance to the fact that more than a year had passed between the two procedures, that the second procedure comprised considerably more units and a value that was approximately four times that of the first procedure, and that it was only possible to see the prices of 18 out of 168 units in the first procedure. Against this background, UMS actually did not have a competitive advantage as a result of the error.

As the Complaints Board found that there was also no basis for upholding another claim brought by Hydrema, the prima facie case condition had not been met, and the Complaints Board did not grant suspensive effect to the complaint.

The case was finally settled by decision of 22 April 2020, in which the Complaints Board with a few additions to the reasoning maintained that there was no basis for upholding Hydrema's claims.

2.2.2 Preselection

Decision of 18 January 2019, ALSTOM Transport Danmark A/S v DSB

According to Article 79(2), second paragraph, of the Utilities Directive (2014/25/EU), the contracting entity may require that the economic operator replaces an entity which does not meet a relevant selection criterion. A preselected undertaking that was relying on the capacities of other entities for the fulfilment of a minimum requirement for financial standing, discovered an error in the ESPD for one of the supporting entities and asked to be allowed to replace this entity with another, as the undertaking would otherwise not meet the minimum requirement. Since the provision was applicable, and as the principle of equal treatment did not preclude this specific replacement, the Complaints Board annulled the contracting entity's refusal to allow replacement.

DSB launched a negotiated procedures under the Utilities Directive for a contract for the supply and maintenance of trains at an estimated value of DKK 50 billion (EUR 6.7 million). Alstom applied for preselection, stating that it would rely on the capacities of four supporting entities, including "AT Netherlands", in order to meet the minimum requirements for economic and financial standing. The ESPD for Alstom and the four supporting entities were attached. DSB preselected four out of five admissible applications, including Alsom, and requested documentation for the fulfilment of the prescribed minimum requirements. Alstom then discovered an error in the ESPD for "AT Netherlands", and that a minimum requirement concerning the total average debt ratio had therefore not been met. Alstom therefore requested permission to replace "AT Netherlands" with "AT Holdings", whereby the minimum required debt ratio would be met. DSB refused the request, and Alstom complained on 12 December 2018 to the Complaints Board, which treated the case as urgent.

Alstom claimed that DSB was required to apply Article 79(2) and accept the replacement, referring to the similar provision in Section 63(1) of the Procurement Directive (Directive 2014/24/EU), as

implemented by Section 144(4) and (5) of the Public Procurement Act and the explanatory notes to this provision. The company stated in that regard that the provision applied in a situation such as this, where Alstom could identify "AT Netherlands" as the entity that was the reason why a relevant criterion was not met, and where Alstom by replacing "AT Netherlands" with "AT Holdings" would ensure that it fulfilled the criterion while the other requirements for economic and financial standing would continue to be met. Alstom would also have been preselected, if the company had initially relied on "AT Holdings" (along with "AT Poland", "AT UK" and "AT Spain") for its economic and financial standing. The wording of Article 79(2) provides no basis for assuming that it merely seeks to regulate a situation where the supporting entity after the submission of the application loses the capacity required to meet the relevant criterion. Furthermore, it is not a condition that the supporting entity at the time of application for preselection had the capacity required to meet the relevant selection criterion. The provisions must be seen in light of the purposes of the introduction of the new procurement rules, in particular, to promote flexibility in public procurement and ensure greater competition. Finally, DSB could not restrict the application of Article 79(2) by stipulating in section 10 of the specifications that replacement was only possible if it was due to "circumstances beyond the applicant's control", see Section 147(1) of the Public Procurement Act. On the contrary, a situation such as this was regulated by Section 144(5) of the Act (Article 63 of Directive 2014/24/EU).

DSB argued that it had indeed referred to Article 79(2). In the absence of any legal or administrative practice on the scope of the new provision, it had to be determined from its wording, context and impact. In this regard, DSB argued that Article 79(2) according to its wording is concerned with the situation where there are minimum requirements for the capacities of supporting entities (e.g. a requirement that the supporting entity has positive equity). Consequently, the provision does not apply to a situation as this one where there is no minimum requirement for the capacity of the supporting entity, but rather only for the applicant's own capacity. It has never been the intention of the provision that applicants relying on the capacities of supporting entities should be favoured over applicants who are not. The opposite interpretation would mean that the applicant would be free to choose which supporting entity to replace to meet the minimum requirement. The wording of this provision, according to which it is the contracting entity that must demand that a supporting entity be replaced, also shows that it does not apply to a situation where it is not possible to identify which supporting entity should, where appropriate, be replaced. According to its context, Article 79(2) does not apply where the need for replacement is due to an error on the part of the applicant, especially where this error means that the applicant has never fulfilled the minimum requirements and therefore should not have been preselected in the first place. Permission may only be given to changing an application after the deadline for submitting applications, if it complies with the principles of equal treatment and transparency, cf. Article 76(4) of the Utilities Directive and the judgment of the EU Court of Justice in Case C-336/12 Manova. There is nothing in the wording or in the preamble to the Directive or otherwise substantiating that the purpose of the provision is to provide greater flexibility or greater competition in public procurement. It must also be assumed that replacement according to the provision must be carried out in accordance with the procurement rules, including the principle of equal treatment. A replacement will generally be contrary to this principle. DSB thus referred in particular to the fact that it had stipulated in section 10 of the specifications that replacement was only possible if it was due to circumstances beyond the applicant's control. It was undisputed that this was not the case. Accordingly, notwithstanding Article 79(2), it would have been in breach of the principle of equal treatment if DSB had authorised the replacement. DSB also stated that it "took more" than establishing that Alstom would also have been preselected with "AT Holdings" as supporting entity. Finally, DSB brought up the issue of what the consequences would be if replacement is allowed, including the risk of abuse. Two other applicants who had given correct information in their ESPDs, and who did not meet the specified minimum requirements for economic and financial standing, were not given the same opportunity to change their applications.

The Complaints Board opened with an account of the legal basis and cited the provision in Article 79(2), second paragraph, of the Utilities Directive in the French, English, German, Swedish, Italian and Dutch language versions. The Complaints Board then went on to ascertain that the preambles to the Utilities Directive and the Procurement Directive do not contain any recitals setting out the purpose of the provisions in Article 79(2) of the Utilities Directive or Article 63(1) of the Procurement Directive, respectively. The Complaints Board then reproduced Section 144(5) of the Public Procurement Act which implements Article 63(1), second paragraph, of the Procurement Directive and the special notes to that provision. Finally, it included excerpts of the report by the Public Procurement Act Committee on the provision in Article 63(1), second paragraph, of the Procurement Directive.

The Complaints Board started by examining whether the provision in Article 79(2) of the Utilities Directive applies to a situation where Alstom as an applicant relied on the capacities of other entities to meet the specified minimum requirements for economic and financial standing, and where Alstom in the ESPD for the supporting entity had provided incorrect information, which meant that the applicant did not meet the minimum requirements.

The Complaints Board ascertained that this provision expressly regulates the situation where a relevant selection criterion is not met. In such a situation, the application would generally be held to be inadmissible. According to the provision, which is new, if the company does not meet a minimum requirement, the contracting entity must, however, request the applicant to replace the company on which the applicant intended to rely to meet such minimum requirement. According to the substance of the provision, its systematic placement in the Directive, including in particular the interplay with the rules on the use of ESPD information as preliminary evidence for applicants'/tenderers' compliance with minimum requirements, the purpose of the provision must be assumed to be to counter the risk of loss of transaction costs for both contracting entities and tenderers if it is only discovered late in the procedure that one or more tenderers do not meet the suitability requirements, for reasons owing to a supporting entity, and would otherwise be excluded in accordance with Article 76(1)(a) of the Directive.

The Complaints Board underlined that the wording of Article 79(2), second paragraph, of the Utilities Directive in some of the language versions, including the Danish version, is not completely clear. The term "selection criteria" in Article 76(1)(a) and (b) of the Directive (cf. Article 80, cf. Article 58 of the Procurement Directive) refers to the minimum requirements for participation in the procedure for applicants and tenderers. The selection criteria do not – at least not directly – refer to requirements for the companies on which applicants rely in order to meet the selection criteria, but only economic operators who wish to participate as applicants or tenderers. Consequently, the Complaints Board did not agree with DSB's interpretation that the provision relates only to the situation where the contracting entity has set up special minimum requirements for the supporting entities. Such requirements would not be regarded as "selection criteria". In relation to selection criteria, the provision implies that the contracting entity is obliged to request the replacement of a supporting entity, if the applicant would otherwise not meet the selection criterion for which it relies on the supporting entity concerned.

The wording or systematic placement of the provision in the Directive does not give rise to a restrictive interpretation where it only applies until the preselection stage has been completed, or where it does not apply if the information in the ESPD turns out to be wrong. Finally, there is no basis for concluding that the provision does not apply to existing errors in the ESPD but only to errors that arose after its submission. At least in the present situation where it was found that the information in the ESPD for a given supporting entity ("AT Netherlands") was incorrect, and where it is common ground that this

was the reason why the applicant did not meet the relevant minimum requirement, it could be determined without any doubt that this was the entity which DSB should have demanded be replaced according to the provision.

DSB was therefore obliged to ask Alstom to replace "AT Netherlands" as supporting entity.

The Complaints Board then went on to consider the issue of whether the principle of equal treatment precluded replacement of "AT Netherlands" with "AT Holdings".

The Complaints Board stated in this regard that it must be regarded as being the intention behind the provision in Article 79(2), second paragraph, that the fact that an applicant who is relying on the capacities of other entities to meet a minimum requirement is given the opportunity to change its application by meeting the contracting entity's demand for replacement of a supporting entity is not in itself in in violation of the basic principles of procurement law, including the principles of equal treatment and transparency. The Complaints Board therefore did not agree with DSB that it "took more".

The Complaints Board then held that the question whether the principle of equal treatment specifically precluded replacement in this case depended on the circumstances of the procurement procedure, including when in the process the contracting entity will be obliged to demand replacement, and which company the applicant/tenderer wishes to use instead.

Article 79(2), second paragraph, of the Utilities Directive does not include a condition that only one entity can be replaced if the replacement is due to circumstances beyond the applicant's control. For that reason alone, section 10 of the specifications did not preclude replacement. The fact that it was Alstom who raised the issue of replacement could not lead to a different assessment.

Whether Alstom's continued participation with "AT Holdings" as supporting entity instead of "AT Netherlands" was contrary to the principle of equal treatment had to depend on whether this would lead to a deterioration of the other applicants'/tenderers' competitive position.

The Complaints Board started by noting that all potential applicants/tenderers had the opportunity to take account of Article 79(2), second paragraph, when deciding whether to participate in the procurement procedure. All applicants/tenderers had also been able to take this provision into account when they prepared their applications/tenders. It was common ground that Alstom also would have been preselected if the company had used "AT Holdings" instead of "AT Netherlands" as supporting entity. Accordingly, Alstom had not been given an unfair competitive advantage over the applicants that were not preselected. Finally, referring to the Complaints Board's decision of 20 June 2017 (MT Højgaard A/S and Züblin A/S v Banedanmark, discussed in the 2017 Annual Report, page 23) the Complaints Board noted that the other tenderers' competitive position could not be considered impaired only because the number of tenderers were not reduced by the disqualification of Alstom.

Since the burden of proving that replacing "AT Netherlands" with "AT Holdings" would not imply that Alstom was given an unjustified competitive advantage was not lifted, DSB was obliged to allow the replacement, and the Complaints Board therefore annulled DSB's decision to reject the request for replacement.

The case was heard by two members of the presidency and two experts, cf. Section 10(4) of the Complaints Board Act, according to which the Complaints Board's President may in special cases decide to let more members of the presidency and experts participate in the adjudication of a case.

Decision of 6 February 2019, Brande Buslinier ApS v Midttrafik

Normally informed, experienced and reasonably diligent companies could not have any real doubt as to whether the company's references and their content would be included in the basis for selection, or as to the content of some specified selection criteria. Indicating "No" in the ESPD was an obvious error which the contracting entity had rightly disregarded.

The case concerned a negotiated procedure under the Utilities Directive of two lots for the operation of the airport routes Aarhus – Billund Airport and Aarhus – Aarhus Airport with a total of ca. 24,000 scheduled hours annually.

In connection with the preselection, Brande Buslinier requested that the Complaints Board give the complaint suspensive effect, which the Board refused. After Midttrafik had awarded the contract to Keolis Danmark A/S (Keolis), Brande Buslinier filed a supplementary complaint. The Complaints Board made af final decision instead of granting the complaint suspensive effect.

In its decision, the Complaints Board referred to the previous decision not to grant the complaint suspensive effect. The Complaints Board found that the basis and criteria on which applicants would be selected were sufficiently clear from the procurement documents. Normally informed, experienced and reasonably diligent companies could thus not have had any real doubt as to whether their references would be included in the basis for selection and that importance would be had to the content of the references. Similarly, according to the wording of the selection criteria in conjunction with the nature of the tendered coach service contracts, the applicants could not have had any real doubt as to the content of the criteria concerning volume, experience in customer-service initiatives and participation in projects on the introduction of new initiatives for coach services. It was up to the individual applicant to draft its list of references with the established selection criteria in mind.

In its ESPD, Keolis had indicated "No" in "Part V: Reduction of the number of qualified applicants" to making a declaration on its compliance with the selection criteria. Brande Buslinier therefore maintained that the tender from Keolis was inadmissible. The Complaints Board referred to the fact that the company had completed the other parts of the ESPD in relation to preselection, including "Part IV: Selection criteria", with the aim of describing how the selection criteria were met. Accordingly, Keolis indicating "No" in its application could under these circumstances not meaningfully be construed as anything other than an obvious error. Although Midttrafik did not contact Keolis to have this error rectified – which it could have done – the answer to the question in this situation could not lead to dismissal of the application for preselection as inadmissible. The judgment of the Court of Justice of the European Union of 10 October 2013 in Case C-336/12, Manova, could, under the circumstances set out above, not lead to a different result. The complaint was thus not upheld.

Brande Buslinier subsequently referred the matter to the courts.

Decision of 15 May 2019, Salini Impregilo S.P.A v Metroselskabet I/S

During a negotiated procedure under the Utilities Directive (Directive 2004/17/EC), four companies were preselected and subsequently submitted tenders. The complainant, who was unsuccessful, submitted several claims, including that the winning tender price was abnormally low, that the successful tenderer was not identical to the preselected company, that various violations had been committed in the assessment of the successful tenderer's economic standing, and that competition had been distorted as the successful tenderer's advisor was also advisor to the contracting entity. None of the complainant's claims were upheld.

In 2016, in the context of a negotiated procedure under the Utilities Directive (Directive 2004/17/EC) for a construction project for the "Cityringen – branch off to Sydhavnen" (the "Sydhavn Line") Metroselskabet preselected four companies, including the consortium TUNN3L JV I/S (comprising MT Højgaard A/S, Hochtief Infrastructure GmbH and VINCI Construction Grand Projects) and Salini-Impregilo.

In June 2017, TUNN3L JV requested Metroselskabet's approval of MT Højgaard A/S's withdrawal from the consortium, which would continue with Hochtief and VINCI. In accordance with the specifications, Metroselskabet made an assessment of whether TUNN3L JV would also have been preselected as one of the four without MT Højgaard, and came to the conclusion that TUNN3L JV could continue.

All the preselected applicants submitted tenders, and on 27 November 2017, Metroselskabet decided to contract with TUNN3L JV. On 7 December 2017, Salini complained to the Complaints Board, but the complaint was not granted suspensive effect, and the contract was concluded on 8 March 2018.

Salini's claims related to a number of breaches of Article 10 of the Utilities Directive etc., and are summarised as follows:

1) TUNN3L JV's tender was abnormally low and therefore inadmissible. Salini based this claim on the fact that Salini's tender, which was the most expensive, was 22.8% more expensive than TUNN3L JV's tender, and, in Salini's opinion, the price offered would not be sufficient to cover costs and an appropriate contribution margin. The Complaints Board ruled that Metroselskabet was not required to regard the tender from TUNN3L JV as abnormally low.
2) Metroselskabet had awarded the contract to TUNN3L JV, which was not identical to the tenderer who had been preselected. This claim referred to the fact that MT Højgaard A/S had withdrawn from the consortium. The Complaints Board referred to the European Court of Justice's judgment of 24 May 2016 in Case C-396/14, MT Højgaard v Banedanmark, and noted that the complainant had only claimed that the consortium would not have been preselected without MT Højgaard A/S, as another applicant, MS4, would in that case have been better qualified. The complaint was not upheld. Firstly, the Complaints Board based its decision on the fact that MS4, which was the applicant who would have the strongest incentive to appeal against the preselection decision, had not done so. Moreover, in the specifications, Metroselskabet had established a procedure for examining requests for changes to the composition of preselected consortia, and had used this procedure to perform a thorough review of whether the conditions were met (including references, the consortium's organisational suitability and the applicants' economic and financial standing) before granting permission. Against this background, the Complaints Board examined each of the objections raised by Salini and ruled that there was no basis for upholding this claim.
3) Metroselskabet had based the assessment of TUNN3L JV's application for preselection and its reevaluation after MT Højgaard A/S's withdrawal on Hochtief's parent company's financial resources in the form of a so-called DPLTA agreement (Domination and Profit and Loss Transfer Agreement) concluded between Hochtief and its parent company. Based on the information provided on the German legislation on DPLTA agreements, the Complaints Board did not uphold the claims concerning this issue.
4) Competition had been distorted, because TUNN3L JV's financial advisors, Arup, had been advisor to Metroselskabet for many years, including in connection with the previous procurement procedure for Cityringen and the Nordhavn Line, and had thus gained a special insight. The measures taken by Metroselskabet, including through special instructions to Arup, were not sufficient. The Complaints Board did not consider it likely that Arup as advisor to

Metroselskabet in relation to the Cityringen and the Nordhavn Line had become aware of information which directly concerned the Sydhavn Line, and gave importance to the fact that Metroselskabet through its document management system had ensured that Arup's staff were not given access to information about the procurement procedure for the Sydhavn Line. There was therefore no real and obvious risk that competition had been distorted to any appreciable degree.

5) TUNN3L JV's tender did not meet fundamental terms of the specifications in a number of respects. This claim was based on a series of descriptions in the winning tender, as the complainant referred to an expert opinion in arguing that the tender did not meet specific minimum requirements in the specifications in a number of respects. The Complaints Board ruled that the procedure concerned a turnkey contract ("design and build"), where the requirements specification essentially contained functional requirements. The project design would only be made after the conclusion of the contract, and the descriptions requested in the procurement documents were only to allow the tenderers to demonstrate their understanding of the requirements. This was thus not supposed to be the final solution. In its tender, TUNN3L JV had stated that no reservations were made for the requirements in the procurement documents, that – even if some parts of the tender may be interpreted as a reservation – there was no intention of making any reservations, and that TUNN3L JV intended to meet all the requirements. For that reason alone, the Complaints Board did not uphold the claim that the tender from TUNN3L JV was inadmissible.

It also did not uphold a claim for annulment of the award decision.

The case was heard by two members of the presidency and two experts, cf. Section 10(4) of the Complaints Board Act, according to which the Complaints Board's President may in special cases decide to let more members of the presidency and experts participate in the adjudication of a case.

Salini subsequently referred the matter to the courts.

2.2.3 Grounds for exclusion

Interim decision of 16 January 2019 and decision of 5 December 2019, Kailow Graphic A/S v the Agency for Modernisation

Complaint from unsuccessful tenderer about, among other things, one of the three successful tenderers' partial ownership of another company that was part of one of the other successful tenderers – a consortium of 13 companies. Legality of the consortium under competition law. Voluntary ground for exclusion under section 137(1)(4) of the Public Procurement Act (Article 57(4)(d) of Directive 2014/24/EU).

The case concerned an open procurement procedure under Title II of the Public Procurement Act for a framework agreement for the purchase of printing and copying services to the Danish State at a value of around DKK 200 million (EUR 27 million). The framework agreement was to be awarded to the three tenderers who submitted the most economically advantageous tender on the basis of the award criterion "Price".

In the Complaints Board's hearing of the request for a suspensive effect (interim decision of 16 January 2019), Kailow claimed that a key appendix in the procurement documents was too vague to form the basis for the procurement procedure, that the grounds given for the award decision were inadequate, and that the condition that only one tender per company could be submitted had been violated. It thus

appeared that one of the successful tenderers (A) owned 100% of the shares of another company (E), which was indirectly part of another successful tenderer (B) – a consortium of 13 companies – with E holding 50% of one of the companies in B. A also owned 25% of another company (J) in the B consortium. The CEO of A was chairman of the board of E and board member of J.

The Complaints Board ruled that the specifications were clear on the disputed issue, and that the requirements to state reasons were met. With regard to the final question concerning the rule that a tenderer is only allowed to submit one tender, the Complaints Board held that the Agency for Modernisation had laid down in the specifications that the Agency, if the entity in any way participated in several tenders, could ask the tenderers to "prove" that this had not "restricted competition in violation of the Danish Competition Act (*konkurrenceloven*), including that this did not allow the tenderers to mutually influence the content of the various tenderers' tenders". The Agency had accordingly found that one of the tenderers (A) owned 25% of the shares in a company (J) that was part of the winning consortium (B), and took statements from the three parties involved. Following a review of the statements, which mainly described how the ownership shares were of a financial nature, and that there had been no communication of relevance to the case, the Complaints Board ruled that it could not be held as established that the ownership relationships had restricted competition by influencing the content of the tenders from the two tenderers, or that this was likely to happen in connection with any future mini-competition. The Complaints Board thus did not grant suspensive effect to the complaint.

After the Complaints Board's interim decision on suspensive effect, Kailow withdrew its original claims and submitted new claims that were the subject of the Board's decision of 5 December 2019. Here, Kailow claimed that A and B should have been excluded with reference to the ground for exclusion in Section 137(1)(4) of the Public Procurement Act (Article 57(4)(d) of Directive 2014/24/EU). In addition, A and B had violated the Competition Act. Kailow finally claimed that the Complaints Board should exclude A and B from the procedure.

It was stated in the procurement documents, among other things, that the voluntary ground for exclusion in Section 137(1)(4) of the Public Procurement Act (Article 57(4)(d) of Directive 2014/24/EU) would apply. According to this provision, a contracting entity must state in the contract notice if a tenderer will be excluded from participation in a procurement procedure because the contracting entity has sufficient plausible indications to conclude that the tenderer has concluded agreements with other economic operators for the purpose of distorting competition.

The Complaints Board ruled that, based on the information available to it, it could not be held as established that A's ownership of 25% of the shares in J (which was part of consortium B) had led to restriction of competition by influencing the content of tenders. The Complaints Board referred to the information obtained from the A's CEO that he attended two to three annual board meetings in J, but did not participate in the daily management of J, and that this information was confirmed by J's CEO.

With regard to B, Kailow claimed that Section 137 of the Public Procurement Act (Article 57(4)(d) of Directive 2014/24/EU) and the Competition Act had been violated, as B's membership structure threatened transparency and distorted competition. The Agency for Modernisation claimed rejection of the claim, as it concerned violation of the Competition Act, which is not within the Complaints Board's remit. The Complaints Board did not uphold the claim for rejection of the complaint, referring to the fact that the Complaints Board is not competent to hear complaints of violation of competition law, but when the Agency for Modernisation in its specifications stated that, if the same legal entity is part of or otherwise participates in several tenders, the Agency is entitled to ask a tenderer to prove that this legal entity's participation in several tenders has not had the effect of restricting competition

in violation of the Competition Act, the issue may be heard by the Complaints Board as part of its assessment of whether the tenderer is covered by the ground for exclusion in Section 137(1)(4) of the Public Procurement Act (Article 57(4)(d) of Directive 2014/24/EU).

The Complaints Board then held that the contracting entity had not had a duty to investigate whether B's consortium generally violated the competition rules, but as described above, the contracting entity was obliged under the specifications to examine whether there were sufficient plausible indications to conclude that the tenderer has concluded agreements with other economic operators for the purpose of distorting competition, cf. Section 137(1)(4) of the Public Procurement Act (Article 57(4)(d) of Directive 2014/24/EU).

B, which acted as intervener in the case, had stated that B did not dispute that some of the consortium members were able to meet the minimum requirements set out in the specifications alone and also had the production machinery required to deliver the requested services to some extent. This could indicate that the consortium was not legal. However, the Complaints Board found no basis for setting aside the Agency for Modernisation's conclusion that there were not sufficient indications to conclude that the consortium was established for the purpose of distorting competition The Complaints Board based its decision on the facts available in the case, including information from B on the consortium's opportunity to optimise its tender, on the fact that the Agency for Modernisation received tenders from seven other tenderers besides B, and on the fact that B submitted the tender with the second-lowest price. The composition of B did thus not threaten transparency or distort competition.

Kailow's claims that the Complaints Board should exclude A and B from the procedure were rejected, as the Board is not authorised to exclude tenderers during a procurement procedure under Section 13 of the Complaints Board Act.

The Complaints Board thus dismissed the claim for annulment.

Kailow subsequently referred the matter to the courts.

Interim decision of 12 March 2019, edgemo a/s v Statens og Kommunernes Indkøbscentral (SKI)

In a procurement procedure for a framework agreement with several suppliers for the supply of hardware, a number of companies applied for preselection, including ATEA A/S which had been convicted of bribery and was thus covered by Section 135(1)(2) of the Public Procurement Act (Article 57(1)(b) of Directive 2014/24/EU) on compulsory grounds for exclusion. ATEA submitted an account for the purpose of "self-cleaning" in accordance with Section 138(2) of the Public Procurement Act (Article 57(6) and (7) of Directive 2014/24/EU), after which it was preselected. Not illegal organisation of the procurement procedure to accommodate ATEA, cf. the principle of equal treatment in Section 2 of the Public Procurement Act (Article 18(1) of Directive 2014/24/EU) to postpone the effective date of the contract. The complaint was not granted suspensive effect as the prima facie case condition (and the condition of urgency) was not met.

SKI launched a restricted procedure under Title II of the Public Procurement Act for a framework agreement with several suppliers for the supply of hardware etc. at an estimated value of DKK 700 million (EUR 94 million), with operations expected to begin on 1 January 2019. By the deadline on 17 August 2018, SKI had received 12 applications for preselection from, among others, edgemo and ATEA, which had been convicted of bribery on 27 June 2018. On 2 July 2018, ATEA submitted an account as "Documentation of reliability" ("Self-cleaning"). On 13 September 2019, SKI preselected eight candidates, including edgemo and ATEA. The deadline for submitting bids was postponed to 23

October 2018 (and later postponed to 29 October 2018) "due to a number of questions received". On 3 October 2019, SKI announced on its website that the effective date of the framework agreement had been postponed to 1 March 2019.

All preselected applicants submitted tenders. Four tenders were considered to be inadmissible, including the tender from edgemo. On 1 February 2019, SKI awarded the contract to the four bidders whose tenders were admissible. On 13 February 2019, edgemo then complained to the Complaints Board claiming firstly that the procurement procedure had been organised such that it took account of ATEA's circumstances, as the procedure had been put on hold pending a decision in the ATEA case, and that this was in contravention of Section 2 of the Public Procurement Act (Article 18(1) of Directive 2014/24/EU). It had a significant impact on edgemo's product range that commencement of the contract was postponed until 1 March 2019. Secondly, edgemo claimed that the four successful tenders were inadmissible, as edgemo had identified errors in 1,341 positions in the product lists. SKI denied that it had violated the procurement rules and regretted that the announcement of the postponement of the effective date was made on SKI's website on 3 October, but not on the Ethics procurement portal until 16 October 2018 – at the request of edgemo.

The Complaints Board ruled that the fact that SKI had had to comply with its obligation under Section 138(2) of the Public Procurement Act (Article 57(6) and (7) of Directive 2014/24/EU) to give ATEA a suitable time limit to document its reliability did imply that the procurement procedure had been organised with special regard for ATEA. The verdict was publicly known, and ATEA's use of its self-cleaning option with the resulting postponement of deadlines was foreseeable to everyone involved. Postponement of the effective date of the contract by two months, one of the grounds for which was that the assessment of the admissibility of the tenders was more time-consuming than expected, was, moreover, common, particularly in large and complex procedures as this one. The postponement had not affected edgemo's preparation of its own tender. According to SKI's very thorough account of the evaluation, the four successful tenders were all admissible, even when edgemo's subsequent comments were considered.

As the prima facie case condition had not been met, the complaint was not granted suspensive effect. The Complaints Board noted that the condition of urgency had not been met either, as edgemo's tender was inadmissible.

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

2.2.4 Evaluation, including choice of evaluation model

Interim decision of 8 January 2019, Mølbak Landinspektører A/S v Banedanmark

In its evaluation of tenders in a procurement procedure for a four-year contract, the contracting entity was entitled not to include an option for a four-year extension of the contract. The technical minimum requirements at issue were lawful and did not amount to discrimination.

The decision has been discussed in detail in section 2.2.1 on requirements for specifications, including minimum requirements, and organisation of procurement procedures.

Interim decision of 9 January 2019, Wedel Installation ApS vs the University of Copenhagen

Specifications stipulating that the slope of the price evaluation method would be determined after receipt of the tenders were in breach of section 160(1) of the Procurement Act, as the criteria on which the contracting entity would base its final model had not been disclosed.

The case concerned a procurement procedure under Title II of the Public Procurement Act for framework agreements for electrician's services. The complainant, an unsuccessful tenderer and a former supplier, primarily claimed that the description in the specifications of the elements of importance in the evaluation did not meet the requirements in Section 160(1) of the Public Procurement Act. According to the former wording of this provision, a contracting entity was required to state the award criteria, describe the evaluation method and describe the elements of importance in the evaluation of the tender in the procurement documents. According to the explanatory notes to this provision, the contracting entity must describe "the methodology used by the contracting entity in its evaluation of the tenders to identify the most economically advantageous tender", and the purpose of designating an evaluation method in advance is to ensure that the contracting entity is completely free to choose how to evaluate the tenders. According to the explanatory notes, another purpose is to ensure that tenderers are able to assess whether they wish to spend resources on preparing a tender and to optimise their tenders. Finally, according to the explanatory notes, it also allows tenderers to check the contracting entity's evaluation of the tenders.

The specifications stated that the prices offered would be evaluated using a linear evaluation model, where the midpoint was calculated as the average of the tenders received, and where the endpoints were calculated based on the midpoint "plus/minus [x] percent". After having received the tenders, the contracting entity determined the spread to be +/- 20% of the average based on one of the five framework agreements tendered.

The Complaints Board held that the slope cannot in itself be considered unfair or unusual. As the Board ruled in its decision of 8 August 2017, the Danish Competition and Consumer Authority v the Central Denmark Region (see the 2017 Annual Report, page 26), it was not in itself contrary to the then applicable provision in Section 160(1) of the Public Procurement Act that the contracting entity had not determined the percentage slope in the linear point model in advance. However, the specifications contained no information on which elements would be considered in the determination of the spread of 20%, including whether account would be taken of the expected price level and/or the spread in the prices actually received, whether adjustments would be made for any abnormally low or abnormally high prices, and whether – which seems to be the case – the same slope would be used for all five lots irrespective of any differences in the price spread of the individual lots. It was not obvious that the lack of information on this point had been irrelevant to the tenderers in their assessment of whether they wished to prepare a tender or optimise their tender. The Board held that the requirements in Section 160(1) had not been met. However, as the urgency condition was not fulfilled, the complaint was not granted suspensive effect.

The contracting entity subsequently cancelled the award decision, and the complaint was withdrawn. The provision in Section 160(1) of the Public Procurement Act has subsequently been amended to the effect that all elements of an evaluation model must be described in the specifications. This also applies to the slope for a linear point model.

Decision of 13 March 2019, N.T. Falke A/S v National Agency for Education and Quality

Procurement procedure under Title III of the Public Procurement Act for a framework agreement for the provision of services with the award criterion best price-quality ratio. The complaint was filed by an

unsuccessful tenderer and included several claims of errors in the evaluation of the tenders by the contracting entity. None of the complainant's claims were upheld.

The National Agency for Education and Quality launched an open procurement procedure under Title III of the Public Procurement Act for a framework agreement for the supply of personal assistance for students with disabilities. The award criterion was best price-quality ratio based on the following subcriteria: 1. Price (25%), 2. Quality (40%) and 3. Security of supply (35%). The contracting entity received two tenders and decided to contract with one of the tenderers, the previous supplier of the services concerned. The other tenderer, N.T. Falke A/S, complained to the Complaints Board, claiming that the Agency had committed errors in the evaluation of the tenders.

The Complaints Board did not uphold any of the claims. Firstly, the Board found that the Agency had only been required to arrange a procedure in accordance with Section 2 of the Public Procurement Act (Article 18(1) of Directive 2014/24/EU), including establishing award criteria and making the award decision in accordance with the prescribed procedure, cf. Section 186 of the Public Procurement Act (Article 74 of Directive 2014/24/EU) and Section 188 (Article 76) as the procedure was conducted pursuant to Title III of the Act (Articles 74-76 of Directive 2014/24/EU). However, the Agency was bound by and obliged to follow the evaluation method that it had stipulated and published.

The Complaints Board further stated the following in its grounds:

There is no requirement that Price and Quality are assessed based on the same model, which means that different descriptive categorisations may be used for Price and qualitative subcriteria, respectively, but it must be clear what is required to comply with the specified weighting, which generally requires conversion of the descriptive categorisations.

The successful tenderer was cheaper and also scored higher than N.T. Falke on both qualitative subcriteria. It was therefore not necessary for the contracting entity to calculate the relative weighting of the subcriteria, as a calculated weighting of the subcriteria was only relevant to the evaluation if one tenderer scored higher on one or more criteria, but not all.

As it was stated in the procurement documents that the basis for assessment according to the subcriterion Price was the hourly rate, the Agency was not required to disclose which evaluation method had been used to determine the total tender sum. Against this background, the Agency was not required to estimate the expected consumption. Neither was the Agency obliged to disclose the successful tenderer's hourly rate, as this information is considered to be subject to Section 30, para (2), of the Access to Public Administration Files Act.

It is not a requirement that the contracting entity provides a detailed and exhaustive description in the procurement documents of the basis of its assessment of the qualitative criteria, and Title III of the Public Procurement Act is even more lenient on this point. Thus, the Agency is entitled to accord weight to elements not expressly stated in the procurement documents, provided that this is warranted by the subcriteria. However, it is a requirement that the Agency informs tenderers of any matters given importance that would be considered unusual according to the usual understanding of the criterion concerned.

A contracting entity must prepare a written evaluation report showing how it reached its award decision. The evaluation report must, among other things, be able to serve as documentation and justification in connection with the contracting entity's notice to unsuccessful tenderers. It is not a requirement that the evaluation report must include an account of all the details of the evaluation,

and the contracting entity is not required to give reasons for each subcriterion, unless such subcriterion had a significant influence on the outcome of the evaluation.

The Complaints Board found that the Agency had not given weight – neither positively nor negatively – to any matters that were not stipulated or could not be deduced from the procurement documents by a reasonably informed and normally diligent tenderer. The Agency therefore had not given importance to any matters in its evaluation that were beyond the scope of the Agency's wide margin of discretion in the evaluation, just as there was no reason to assume that the Agency had acted in an arbitrary manner.

Decision of 24 April 2019, Sagemcom Energy & Telecom SAS v Vores Elnet A/S

The complaint concerned the respondent electricity company's decision to annul a decision to award the complainant a framework agreement for the supply of electricity meters and the electricity company's subsequent decision, which was published in a prior notice for voluntary ex ante transparency, to contract with its former supplier for the supply of electricity meters.

After the complaint was filed, the electricity company announced that it would not contract with the former supplier after all. The former supplier (still) supplied the control software that the complainant's electricity meters would be integrated with.

However, following a number of questions posed by the Complaints Board and the Board's request for documentation, including correspondence between the electricity company and the former supplier, it emerged that the electricity company and the supplier had entered into an (oral) agreement for the supply of electricity meters. Under this agreement, the electricity company had purchased a considerable number of electricity meters of a significant value after their original agreement expired and during the appeal proceedings.

The electricity company referred to the exemption in Article 50(e) of the Utilities Directive, according to which additional deliveries by the original supplier where a change of supplier would result in incompatibility or disproportionate technical difficulties in operation and maintenance are allowed. The electricity company claimed that it had considerable difficulties integrating the electricity meters the complainant was to provide with the control software provided by the former supplier. The electricity company relied also on Article 50(d), which permits direct award if it impossible to comply with the time limits for a procedure for reasons of extreme urgency brought about by events unforeseeable by the contracting entity, and for reasons which must not in any event be attributable to the contracting entity.

The Complaints Board ruled that the electricity company had failed to lift its burden of proving that the conditions for applying the derogation on technical difficulties were met. The integration problems asserted were thus only based on the information provided to the electricity company by the former supplier about the high cost and the risks this would allegedly entail when the supplier was asked to assist with the integration. The conditions for applying the derogation on extreme urgency which could not be foreseen were also not met.

Against this background, the Complaints Board upheld the complainant's claim for annulment of the contracting entity's decision to cancel the award decision. In addition, the complainant's claim that it was unlawful to enter into an oral agreement was upheld, and the agreement was declared ineffective for the future. The Complaints Board filed a police report against the electricity company citing liability to pay a fine for the period in which the oral agreement had been in force, cf. Section 18(3) of the

Complaints Board Act. The electricity company, which was a public limited company, was not part of the public administration, which meant that the Complaints Board was not authorised to impose an alternative sanction.

The case is the only case in recent times where a decision to cancel an award decision has been annulled. And indeed, the arbitrary nature of the decision, which was only founded on the former supplier's statements and reluctance to assist with the integration – was quite striking. In addition, the decision is one of several examples of the strict burden of proof resting on contracting entities to prove that they fulfil the conditions for invoking the derogations on direct award.

Interim decision of 2 October 2019, e-Boks A/S v the Agency for Digitisation

The complaint was granted temporary suspensive effect on receipt. The complaint was filed by an unsuccessful tenderer and included various claims, including that the evaluation model, a so-called "difference model", was not suitable to identify the most economically advantageous tender, and that the deadline for submission of tenders was not reasonable. The complaint was not granted suspensive effect as the prima facie case condition (whether the complaint seems to be well-founded on a preliminary assessment) was not met.

The case concerned the reopening of a procedure pursuant to Title II of the Public Procurement Act for a contract for the development, including conversion, operation, maintenance, support and further development of Digital Post. The award criterion was best price-quality ratio based on the subcriteria Price (25%), Quality of the solution (35%), Methods, processes and tools (25%) and Security of supply (15%). See also the Complaints Board's decision 25 September 2019, as referenced in section. 2.2.1.

e-Boks, the former supplier, complained of the Agency for Digitisation's decision to award the contract to Netcompany. e-Boks in particular claimed that the deadlines for submitting tenders during the preceding public procedure were too short in light of the complexity of the service, that the evaluation method was unsuitable as it could result in several different tenders being selected as the best tender, that the winning tender was inadmissible or – alternatively – had been evaluated too favourably, and that the evaluation of e-Boks' tender had been manifestly wrong.

According to the Agency for Digitisation's notification of the award decision, the Agency had stated that a 10-day standstill period applied pursuant to Section 3(1) of the Complaints Board Act, and that the Agency would therefore not sign the contract before the expiry of this period. The complaint was submitted to the Complaints Board before the expiry of the standstill period, and e-Boks also requested that the complaint should be given suspensive effect.

The Agency for Digitisation had initially launched an open procurement procedure, and this was subsequently changed to a negotiated procedure without publication of a contract notice, cf. Section 61(1), para (2), and Subsection (4). The complaint concerned the award decision made in this procedure.

According to Section 3(3)(1) of the Complaints Board Act, Subsections (1) and (2) of the provision on statutory and voluntary standstill periods, respectively, did not apply if a contract is awarded in a procedure without prior contract notice. This is the case, for example, in negotiated procedures under Section 61(1), para 2, and Subsection (4), of the Public Procurement Act (Article 26(4)(b), and (6), cf. Article 32, of Directive 2014/24/EU). As a result, the provision in Section 12(2) of the Complaints Board Act on automatic suspensive effect of, among other things, complaints submitted during a standstill period according to Section 3(1) or (2) of the Act does not apply either.

However, based on the information produced in the case, where the Agency for Digitisation in its letter of rejection to e-Boks had stated that a standstill period applied according to Section 3(1) of the Act, and as e-Boks had not been given the opportunity to plan for this, the Complaints Board's president decided to grant the complaint suspensive effect pending the Complaints Board's consideration of e-Boks' request for the Complaints Board to grant the complaint (continued) suspensive effect pending the final decision in the case. This decision was made in accordance with Section 12(1) of the Complaints Board Act.

e-Boks argued that the Agency for Digitisation had violated Section 57(1) of the Public Procurement Act (Article 27(1), second paragraph, and (2)-(4) of Directive 2014/24/EU) and Section 93(1) (Article 47 of Directive 2014/24/EU) as well as the proportionality principle by setting a short deadline for receipt of tenders in the open procurement procedure. The Complaints Board did not uphold e-Boks' complaint, stating that the minimum period according to Section 57 of the Public Procurement Act was 30 days, cf. Subsections (2) and (4), (Article 27(1), second paragraph, and (4) of Directive 2014/24/EU), and the deadline for submitting tenders set by the Agency for Digitisation in the open procedure was 39 days. Although this was a complex procedure with comprehensive procurement documents, the Complaints Board did not find any basis for setting aside the Agency's considerations for the determination of the deadline. In this respect, the Complaints Board referred to the fact that the deadline was nine days longer than the minimum period, that the Agency had market knowledge from the previous – and later cancelled – procurement procedure, and that no other possible tenderers than e-Boks and Netcompany had responded.

The Agency for Digitisation had evaluated the tenders using the so-called difference model, in which the percentage differences between the scores given to the tenders for the subcriterion Price are compared to the percentage differences between their scores for the qualitative subcriteria. The model was described in the specifications. e-Boks argued that the evaluation model was unsuitable to identify the tender with the best price-quality ratio, and the company had made some calculations that showed that the model could lead to conflicting results in some situations. The Complaints Board did not uphold e-Boks's claims, as the specifications contained a description of the model, and the evaluation was conducted accordingly, and as the model in this specific case had been capable of identifying the best tender.

The Complaints Board also found that there was no basis for upholding e-Boks' other claims. The prima facie case condition was thus not met, and the Complaints Board did not grant the complaint suspensive effect. e-Boks finally withdrew its complaint.

2.2.5 Assortment tenders

Decision of 15 February 2019, KONE A/S v Staten og Kommunernes Indkøbsservice A/S (SKI)

The case concerned an open procurement procedure under Title II of the Public Procurement Act for a framework agreement for the provision of servicing and maintenance of up to 4,500 lifts with three lots. The equipment and parts, amounting to up to 250,000 different parts, to be used for maintenance, repair and renovation work were also covered by the procedure. This latter part was therefore in the nature of an unspecified assortment tender. The rest of the procedure was a traditional procurement procedure for a contract for the acquisition of a specified number of different services to be awarded based on the price, including different hourly rates. The purchase of spare parts amounted to at least 10% of the total estimated contract value or at least DKK 22 million (EUR 3 million) in total.

The complaint concerned whether SKI's evaluation method was unsuitable to identify the most economically advantageous tender, as the complainant did not regard the "scenario price" used in the evaluation as representative of the expected purchase of assistance for emergency calls. The claim was dismissed because the specifications contained clear and precise information on the expected purchase volume, and as the evaluation model with a scenario price was described clearly and unequivocally in the specifications. There was also no basis for concluding that SKI had based its estimates of the expected purchase volume on unjustified considerations.

Another issue raised by the complainant was that the customers purchasing the services also undertook to buy the required spare parts, and that the tenders did not contain prices for these parts. This meant that these prices, with a few exceptions, were not used in the evaluation and not exposed to competition. SKI had assessed that the most fair and suitable "model" was to make the price a "minimum requirement" with an "effective control measure" and to ensure that the competitive price of the spare parts was subsequently found in a mini-competition as well as to include the purchase of some of the spare parts in the exposure to competition of the statutory inspection services.

The Complaints Board stated that it was irrelevant to the evaluation of the tenders for the framework agreement whether the purchase of spare parts would be exposed to competition in a subsequent (future) mini-competition. The Board further stated that SKI had not specified the legal basis nor lifted the burden of proving that the conditions for concluding a contract for the supply of spare parts without conducting a procurement procedure – and thus without exposure to competition – were met in relation to the disputed parts. On the contrary, it had to be assumed that an agreement for the purchase of such spare parts would be subject to a competitive tendering obligation. The design of the procedure in fact resulted in purchases being made under a binding framework agreement of spare parts for a significant total value without exposure to competition. The spare parts differed significantly from the evaluated services, which meant that there was no basis for assuming that the prices of the services should reflect the prices of spare parts. The agreement's terms for the supply of spare parts at the "Market price" and according to a "Best customer clause" did not constitute real exposure to competition, but rather indirect regulation by using thresholds for the suppliers' final prices of spare parts, as it was up to the suppliers to determine their prices during the term of the agreement within these thresholds. SKI had not referred to any product categories in the procurement documents so that it was clear to potential tenderers which specific products within the product categories may subsequently become included in the framework agreement, as required in Section 45(1) of the Public Procurement Act. In addition, SKI had not conducted an evaluation based on a typical example of comparable products in the product ranges offered by the tenderers, cf. Section 45(2) of the Act. The Complaints Board found in those circumstances that the evaluation could generally not be considered representative of the expected purchases under the framework agreement. The fundamental requirement of public procurement law on exposure to competition in a situation as this did not infringe the principle of proportionality, and in this respect, the Board referred to the more lenient rule in Section 45 of the Public Procurement Act on assortment tenders, which SKI had been entitled to apply.

The complainant had made a claim for "ineffective contract". Referring to the fact that the purchase of spare parts was neither discussed in, could be derived from nor deemed to be described implicitly in the contract notice, the Complaints Board held that the contracts awarded were subject to Section 17(1)(1) of the Complaints Board Act as regards the part which concerned the purchase of spare parts, except for the parts to be used for statutory inspections. Section 17(3) of the Complaints Board Act, which gave the Board authority to dismiss claims for ineffective contract, did not apply. The claim for ineffective contract was thus upheld as regards the parts of the agreements which related to spare parts, except for the spare parts to be used in statutory inspections, from 1 April 2019. As SKI was not

covered by Section 19(1) of the Act, the Complaints Board filed a police report according to Section 18(3) instead of imposing an alternative penalty. A claim for annulment of the award decision was upheld based on specific grounds as regards the remaining elements of the procedure.

The case was heard by two members of the presidency and two experts, cf. Section 10(4) of the Complaints Board Act, according to which the Complaints Board's President may in special cases decide to let more members of the presidency and experts participate in the adjudication of a case.

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

Decision of 4 January 2019, Apcoa Parking Danmark A/S v the Capital Region of Denmark

Complaint granted temporary suspensive effect.

The case concerned a public procurement procedure for parking services under the Concessions Directive. The complainant was an unsuccessful tenderer. In the procurement documents and the award notice, the Region had indicated that the usual standstill period applied, and the complaint had been submitted within this period. However, according to Section 3 of the Complaints Board Act, no standstill period applies in concession procedures, and the relevant rules have not been implemented under the Implementation Order. Taking into account the amendments to the Control Directive establishing such a standstill period, which were implemented by the final provisions of the Concessions Directive, pursuant to Section 12(1) of the Complaints Board Act, the Complaints Board decided already a few days after receipt of the complaint to grant the complaint preliminary suspensive effect in order to allow a decision to be made – within the general 30-day deadline – on whether the usual conditions for (continued) suspensive effect were met. In its interim decision of 1 February 2019, the Complaints Board decided to lift the suspensive effect, as the prima facie case condition was not met. The Board made a final decision in the case on 14 June 2019, as described above under section 2.2.1. on requirements for the specifications, including minimum requirements and organisation of procurement procedures.

Decision of 5 April 2019, Danish Chamber of Commerce v the Municipalities of Holstebro, Lemvig and Struer

Complaints concerning a cancelled procurement procedure where the Municipalities had decided to assume the task themselves are not subject to a time limit. The annulment decision was not arbitrary. However, deliberately stating a lower expected consumption constituted violation of the procurement rules.

The case concerned an open procurement procedure under Title II of the Public Procurement Act for the operation etc. of an aid depot in the three above-mentioned Municipalities. After receipt of the tenders, the Municipalities decided to cancel the procedure on the ground that operating the depots would be more expensive than before. In the end, the Municipalities decided to assume the task themselves and establish a municipal group, which is now operating the depot.

Firstly, the Municipalities claimed that the complaint should be dismissed, primarily alleging that the deadline for complaints in Section 7(2)(1) of the Complaints Board Act had been exceeded, but this argument was dismissed. According to this provision, complaints must be submitted to the Complaints Board for Public Procurement within 45 days of the contracting entity's publication of a notice in the Official Journal of the European Union announcing that the contracting entity has signed a contract.

The deadline is calculated from the day following the date in which the notice was published. After having reviewed the wording of and explanatory notes to the provision and the applicable EU legislation, the Complaints Board found that no deadline applied in this case, as no award decision had been made. The fact that the notice on the cancellation of the tender published by the Municipalities in the Official Journal was entitled "Contract award notice" could not lead to a different conclusion.

The Danish Chamber of Commerce, which is competent to hear complaints as a trade organisation, in particular claimed that the cancellation decision was unfair since it would be significantly cheaper to accept the lowest tender than to assume the task, and in particular that the Municipality Holstebro had an unfair aversion to the cheapest tenderer. At the same time, it was alleged that the grounds given were contrary to the principle of loyalty, as the Municipalities had in effect decided beforehand to carry out the task themselves. Finally, it was alleged that the procurement documents in violation of the principle of equality contained consumption estimates that were deliberately set too low, and that the cost evaluation model in which these estimates were used was unfit to help identify the most economically advantageous tender.

The Complaints Board stated – in line with its established practice – that unless otherwise stated in the specifications or required in the circumstances, a contracting entity is generally allowed to cancel the procurement procedure with the effect that none of the tenders submitted will be accepted. However, the purpose of such cancellation must not be in contravention of the equal treatment principle in EU public procurement law or otherwise be deemed to be unfair, and the burden of proof in this regard rests with the complainant. The Board ruled that the Municipalities' economic grounds were not unfair and that the decision was not based on insufficient grounds. In this connection, the Complaints Board stated that the decision to cancel a procurement procedure is different from the evaluations made by a contracting entity to make its award decision, and that, when deciding whether to cancel a procedure, the contracting entity was not required to only give importance to the content of the tenders received. It had also not been proven that the Municipalities based their decision on unjustified considerations, or that the procedure was launched for show.

On the other hand, after having reviewed the figures, calculations and information produced in the case, the Complaints Board held that the consumption estimates stated in the specifications were so low that they could not be deemed to be within the limits of a reasonable estimate. It may also be assumed that this was done intentionally to avoid disappointing a future contractor. The complainant's claim that such an incorrect estimate was contrary to the principle of equality, since it could lead to potential tenderers refraining from submitting tenders, was upheld. As the evaluation model was not used to identify the successful tenderer (but only to cancel the procedure), the complainant's claim that an inappropriate price evaluation model had been used was upheld.

Decision of 7 June 2019, Pankas A/S v the Municipality of Haderslev

Complainant awarded compensation in the form of expectation damages.

In its decision of 30 August 2018, the Complaints Board held that the successful tender was inadmissible, and that the contracting entity's actions gave rise to liability in damages towards the complainant, an unsuccessful tenderer. During the action for damages, the Municipality primarily submitted that if the specifications should be interpreted as held by the Complaints Board in its substantive decision, the complainant's tender was also inadmissible. However, the Board did not agree with the Municipality on this point and gave detailed grounds to substantiate why. The complainant's tender was then the lowest admissible tender in a procedure where the award criterion was Price. The Municipality had not proven on a balance of probabilities that the Municipality would

have cancelled the procedure, as the Municipality had only argued that it was not obliged to accept the complainant's tender. The Complaints Board therefore held that the complainant was entitled to compensation in the form of expectation damages. The complainant had claimed approx. DKK 1.6 million (EUR 215,000) in damages, but was only awarded DKK 600,000 (EUR 80,500), as the compensation had to be estimated.

Decision of 25 June 2019, Justesen Energiteknik A/S v SK Varme A/S

Complainant awarded compensation in the form of expectation damages.

In its decision of 13 November 2018, the Complaints Board held the successful tender to be inadmissible. The contracting entity was thus liable in damages to the complainant, an unsuccessful tenderer. The complainant's tender was then the only admissible tender. The Complaints Board ruled that the contracting entity had not lifted the burden of proving that the contracting entity to ensure competition would have cancelled the procedure and launched a new one. The Board took account of the facts that this was a reopened procedure, that the complainant's tender was scored almost as high as the successful tender, and that one of the three original tenderers went bankrupt between the first and the second procedure. The Board therefore held that the complainant was entitled to compensation in the form of expectation damages. The complainant had claimed compensation in the amount of DKK 7.6 million (EUR 1 million), but the Board estimated it at DKK 1 million (EUR 134,000).

Decisions of 19 July 2019 and 4 September 2019 on suspensive effect and decision of 11 October 2019, Kinnarps A/S v the Capital Region of Denmark.

Mini-competition under dynamic purchasing systems. Decision on temporary suspensive effect and decision on continued suspensive effect, where the contracting entity was not allowed to take delivery under contracts entered into nor to take any measures to implement the contracts. In its substantive decision, the Complaints Board held that Section 2 of the Public Procurement Act (Article 18(1) of Directive 2014/24/EU), Section 40(4) (Article 42(2) of Directive 2014/24/EU), and Section 42 (Article 42(4) of Directive 2014/24/EU) (proportionality, make, trade marks etc.). Contracts not declared ineffective, cf. Section 17(3) of the Complaints Board Act, but alternative sanction imposed.

Decision of 19 July 2019

In 2018, the Capital Region of Denmark established two dynamic purchasing systems under Title II of the Public Procurement Act for the purchase of "lighting for offices, canteens, waiting areas, meeting rooms and similar" and of "standard furniture for offices, canteens, waiting areas, meeting rooms as well as furniture for patients, such as reclining furniture". In June 2019, the Region launched three mini-competitions within the dynamic procurement systems for lamps (mini-competition 1) and furniture (mini-competitions 2 and 3) for Rigshospitalet's new building "Nordfløjen" (the North Wing). On 1 July 2019, the Region decided to contract with Holmris B8 A/S for all three mini-competitions. The Region had stated that when the contract had been awarded, "standstill and collection of documentation" would begin, and in its award decisions, it had indicated that the standstill periods would expire on 11 July 2019 at 23:59. On 9 July 2019, Kinnarps ApS filed a complaint to the Complaints Board with a request for suspensive effect.

The Complaints Board first set a deadline for the Capital Region of Denmark's submission of a statement on the issue of suspensive effect, and this was extended to week 32 2019 at the request of the Region. However, considering this deadline and following an assessment of the preliminary information in the case, the Complaints Board found that there were special reasons to grant the

complaint preliminary suspensive effect pending the Complaints Board's decision on the question of whether to grant the complaint (continued) suspensive effect during the complaints proceedings and until the final decision in the case. The Complaints Board then decided to grant the complaint suspensive effect. In its decision, the Complaints Board held that, in light of the information on standstill in the specifications and the award notices, the parties must be assumed to have had an expectation that the lodging of a complaint before the expiry of the standstill period would automatically lead to the complaint being granted suspensive effect, as the Complaints Board had ruled on the issue of substantive effect during the complaints proceedings. The Board further stated that the condition of *urgency* did not preclude suspensive effect, as Kinnarps had not had the opportunity to participate in the mini-competitions due to the issues at stake in the complaint, cf. below. The condition that the complaint must be well-founded ("*prima facie case*") was also met. The complaint concerned a number of very specific minimum requirements and requests (regarding technical specifications, design and 5-10-year product warranty) for lamps, desks and wall-mounted desks and deadlines that Kinnarps could not meet. The contracts under mini-competitions 1, 2 and 3 were awarded to Holmris which, according to the information provided, was a previous supplier to the Capital Region. Against this background, the Complaints Board found that the burden of proving that the very specific requirements to be met within a short timeframe were lawful and proportionate rested with the Capital Region. The Complaints Board found that it would only be relevant to consider whether this burden of proof had been lifted following further exchange of pleadings in order to establish the parties' views as well as the technical information and other information produced in the case. Consequently, on the preliminary basis, for that reason alone, the burden of proof had not been lifted. Considering that the assumption on which the parties could rely that a complaint filed within the standstill period would be granted preliminary suspensive effect, the condition of *balancing of interests* was also met.

The decision to grant the complaint preliminary suspensive effect meant that the Region was not entitled to sign the contract before the Complaints Board had ruled on the question of (continued) suspensive effect in the complaints proceedings.

Decision of 4 September 2019

In its decision of 19 July 2019, the Complaints Board stated that it would seek to resolve the matter of extending the suspensive effect by 21 August 2019, which was later postponed to 5 September 2019. However, on *3 September 2019 at 18:28,* the Capital Region of Denmark announced that it had contracted with Holmris on 14 August 2019 for all three contracts covered by the complaint, thus ensuring that the furniture and lamps would be supplied according to the delivery schedule set out in the mini-competitions. The Region stated that the delivery schedule had been planned to coincide with the completion and commissioning of the North Wing of the hospital, and that the issue of suspensive effect was thus no longer relevant. On 19 September 2019, the Region's lawyer announced that due to a clerical error at the lawyer's office, neither the Region nor the lawyer was notified of the Complaints Board's decision of 19 July 2019 on temporary suspensive effect before they received an email on 4 September 2019 from Kinnarps. On *4 September 2019 at 10:53*, Kinnarps stated in response to the Region's email of 3 September 2019 that the company expected the Complaints Board to immediately take steps to prevent the Region from completing the planned purchases – contrary to the Board's decision of 19 July 2019 on suspensive effect. Kinnarps also claimed at this time that the contracts concluded should immediately be declared ineffective under Section 16, para (2), of the Complaints Board Act. Kinnarps stated that the Complaints Board should still rule on the issue of suspensive effect. Secondly, Kinnarps requested that it be clarified in a decision on suspensive effect that no further deliveries could be made under the supply contracts concluded, as it was probable that the contracts would be declared ineffective for future deliveries under Section 17(1)(2) of the

Complaints Board Act, if the company's complaint was successful. In addition, Kinnarps claimed that the Complaints Board should impose a financial penalty on the Region under Section 19 of the Complaints Board Act. On the *same day*, the Complaints Board decided to grant the complaint continued suspensive effect. In the grounds for its decision, the Board stated that the Region had contracted with Holmris on 14 August 2019, i.e. after the Board had granted the complaint suspensive effect, when the Region was therefore not allowed to contract. Under the three mini-competitions, delivery was to start on 1 October 2019. Against this background, and on the grounds stated in the Complaints Board's decision of 19 July 2019 on preliminary suspensive effect, the Board decided to grant the complaint continued suspensive effect pending its further consideration of the case, cf. Section 12(1) of the Complaints Board Act. The decision to continue suspensive effect meant specifically that the Region was not allowed to receive deliveries under the contracts, and that it was not allowed to take any steps to implement the contracts.

The Complaints Board's substantive decision of 11 October 2019

From the autumn of 2018 to June 2019, the Region had launched four mini-competitions on the same supply of furniture and lamps, but all were cancelled due to errors in the procurement documents. The mini-competition at issue in this case was launched on 4 June 2019. The procurement documents included a schedule with the following deadlines: receipt of questions from tenderers: 12 June; publication of responses from the Region: 14 June; receipt of tenders: 17 June; and delivery of sample furniture and lamps: 19 June 2019. On 13 June 2019, Kinnarps informed the Region that it would not be able to submit an admissible and competitive tender, as the technical specifications were designed so that they could in effect only be met by products of one particular brand/design, namely the products previously purchased by the Region. Furthermore, the deadline for providing sample furniture was so short that it could only be met by the former supplier.

The Complaints Board firstly considered that Holmris, which according to the information provided was one of several former suppliers to the Region that submitted a tender for mini-competition 1, that two companies, Holmris and EFG Bondo A/S, submitted tenders for mini-competitions 2 and 3, and that all contracts were awarded to Holmris. According to the evaluation report for mini-competitions 2 and 3, the tenders submitted by the two tenderers were given the same scores for Quality and design (50%), as their products were identical, which meant that the subcriterion Price (50%) became decisive. It also appeared from the order confirmations produced by the Region regarding mini-competitions 2 and 3 that Montana storage furniture, Montana height adjustable desks and HiLow Wall 1 and 2 wall-mounted height adjustable desks had been ordered.

In relation to the procurement of *lamps*, the case concerned the matter of whether the Region had acted in breach of Section 2 of the Public Procurement Act (Article 18(1) of Directive 2014/24/EU) and Section 40(4) (Article 42(4) of Directive 2014/24/EU), according to which technical specifications must afford equal access of economic operators to the procurement procedure and must not have the effect of creating unjustified obstacles to the opening up of public procurement to competition. Another question was whether the Region had acted in breach of Section 42 of the Public Procurement Act (Article 42(4) of Directive 2014/24/EU) prohibiting the specification of a specific make or trade mark etc. The Complaints Board considered that this mini-competition concerned the purchase of lamps for standard furniture for the North Wing at Rigshospitalet. Considering the detailed minimum requirements and specifications for the lamps, where the Region included in its procurement documents a so-called "Inspiration list" specifying Flos work lights and pendants, the Complaints Board found that the requirements and specifications had the potential to restrict competition in the mini-competition. Under these specific circumstances, the Region had the burden of proving that it had reasonable and proportionate reasons to include these provisions in the procurement documents, cf.

the explanatory notes to Section 40 of the Public Procurement Act (Article 42(1) and (2) of Directive 2014/24/EU). The burden of proof for this was not lifted. The Complaints Board further held that the Region had not lifted the burden of proving that there were any special considerations warranting the specific reference to Flos lamps to provide a sufficiently precise and comprehensible description of the subject-matter, cf. Section 42(2) of the Public Procurement Act (Article 42(4) of Directive 2014/24/EU).

Relating to the procurement of *furniture*, the Complaints Board took account of the detailed minimum requirements and specifications for "standard furniture" such as desks and storage furniture, considered in conjunction with provisions in the procurement documents on a long-term warranty for the durability of the furniture and the short deadline for the submission of tenders and sample furniture and found that these requirements and specifications in combination with the deadlines had been such as to restrict competition in the mini-competitions. In these specific circumstances, the burden of proving that there had been reasonable grounds to include these provisions in the procurement documents, and that the requirements were proportionate, rested with the Region. The Complaints Board found that the Region had lifted the burden of proving that the proportionality requirement was met. The needs that the Region had cited as grounds for the disputed requirements did not justify specifying such detailed requirements, including, e.g. for the core material used in the furniture, as these requirements should be considered in combination with the other requirements for a long-term product warranty. In the specific circumstances of this case, the requirements were considered disproportionate, cf. Section 2 of the Public Procurement Act (Article 18(1) of Directive 2014/24/EU).

In relation to the question of whether the contract should be considered *ineffective*, the Complaints Board held that the products to be purchased under mini-competition 3 were part of the total purchase of furniture and lamps to be made, the value of which exceeds the threshold for procurement procedures, and were accordingly subject to the provisions in the Public Procurement Act on dynamic purchasing systems in order to award contracts for specific purchases according to these provisions. It was common ground that the Region had signed the three contracts in a period when the complaint had been granted suspensive effect pursuant to the decision of the Complaints Board for Public Procurement, cf. Section 12 of the Complaints Board Act. The contracts, which were covered by Title II of the Public Procurement Act, could be declared ineffective, cf. Section 16, para (2), of the Complaints Board Act. As the Region had simultaneously violated the Public Procurement Act with the effect of removing Kinnarp's possibility of being awarded the contracts, as the violations had prevented the company from participating in the procedure, the Complaints Board *was required to* declare the contracts ineffective subject to Section 17(1)(2), second indent, of the Complaints Board Act.

However, with reference to the special provision in Section 17(3) of the Complaints Board Act, the Complaints Board decided that the contracts should not be declared ineffective. The Complaints Board stated in this connection that the mini-competitions concerned the procurement of desks, storage furniture and lamps for a new building at Rigshospitalet, the North Wing, which would have over 200 beds, a large number of operating rooms, an intensive care unit and a number of other functions related to these. The furniture was scheduled to be delivered from 1 to 15 October 2019, and the first patients would start using the North Wing in January 2020. Already early on in the proceedings, Kinnarps had made the Region aware of the issues that were raised in the complaint. The Region had launched a total of five mini-competitions in the period from October 2018 for the same products, four of which had been cancelled by the Region due to irregularities and errors in the procurement documents and use of the wrong dynamic purchasing system. Finally, the Complaints Board referred to the explanatory notes to Section 17(3) of the Complaints Board Act (Bill no. L 110, Folketinget 2009-10). Economic reasons cited by the Region could not be considered in the assessment pursuant to Section 17(3) of the Complaints Board Act. On the other hand, the need to avoid the consequences for

patients' health that would result from declaring the contracts ineffective was a compelling argument. The need to protect the public interest thus meant that the contracts concluded should still be held to be ineffective. This decision is the first decision that the Board has made under Section 17(3) of the Complaints Board Act. The Complaints Board has informed the Danish Competition and Consumer Authority and the European Commission about the decision, cf. Section 17(4) of the Complaints Board Act. The Complaints Board imposed an alternative sanction of DKK 460,000 (EUR 62,000). With reference to, e.g., the exceptional nature of the proceedings and its outcome as well as the workload involved for the Board's lawyers, including in connection with the issues of suspensive effect, the Complaints Board ordered the Region to pay DKK 70,000 (EUR 9,400) in legal costs to Kinnarps.

Interim decision of 4 October 2019, VITRONIC – Dr.- Ing. Stein Bildverarbeitungssysteme GmbH v Sund & Bælt Holding A/S

Restricted procurement procedure under Title II of the Public Procurement Act for a system for automatic recognition of number plates. Following the award decision, the contracting entity published a notice for voluntary ex ante transparency in the Official Journal of the European Union announcing that the contract with the successful tenderer would be concluded with certain specified changes relative to the information provided in the procedure. In the standstill period after the notice for voluntary ex ante transparency, another tenderer complained to the Complaints Board of the proposed changes, arguing that they required a new procedure. In its interim decision, the Board granted the complaint suspensive effect. Sund & Bælt Holding A/S annulled the award decision, and the complaint was withdrawn.

The rules on changes subsequently made to contracts subject to a competitive tendering obligation that had been concluded after a procurement procedure did not apply to this situation where the issue was conclusion of the original contract based on a procurement procedure with changes relative to the information provided in the procedure. On the other hand, whether such change was permissible depended on whether it concerned an essential element, i.e. whether it could have affected potential economic operators' participation in the procurement procedure or have distorted competition. Since the change concerned an essential element, it was not permissible and could only be implemented with a new procedure.

The case concerned a restricted procedure under Title II of the Public Procurement Act for a framework agreement on a system for automatic recognition of number plates on foreign vehicles for the collection of toll. The procedure included a system to be supplied immediately, called "Deliverable A", and a second system to be supplied at the request of Sund & Bælt, called "Deliverable B". The award criterion was best price-quality ratio.

Tenders were received from pre-selected tenderers, and on 17 June 2019, Sund & Bælt decided to contract with one of the tenderers. At the same time, Sund & Bælt rejected the tender from another tenderer, VITRONIC, as inadmissible, which decision was the subject of another case before the Complaints Board.

On 18 June 2019, the European Court of Justice passed its judgment in Case C-591/17, Austria v Germany, on a German toll for foreign vehicles. In that connection, in August 2019, Sund & Bælt published a notice for voluntary ex ante transparency in the Official Journal of the European Union concerning some proposed changes to the contract with the successful tenderer relative to what was stated in the procedure. The notice for voluntary ex ante transparency contained a description of the changes, including that certain supplies under "Deliverable A" would be postponed.

VITRONIC filed a new complaint with the Complaints Board in the standstill period after the notice for voluntary ex ante transparency. In its complaints, VITRONIC claimed that Sund & Bælt had violated the principles of equal treatment and transparency in Section 2 of the Public Procurement Act (Article 18(1) of Directive 2014/24/EU) by awarding a contract to the successful tenderer with the content that was described in the notice for voluntary ex ante transparency, as this constituted a change of an essential element which required a procurement procedure.

On the issue of the conditions for granting the complaint suspensive effect, the Complaints Board stated with regard to the prima facie case condition (whether the complaint seems to be well-founded) that the change was not covered by the principles governing permitted changes to contracts etc. in Sections 178-184 of the Public Procurement Act (Article 72(1)(a)-(d), Article 72(1), second paragraph, and Article 72(3)-(5) of Directive 2014/24/EU), as these provisions aim at the special situation where the question is whether the contracting entity is required to arrange a new procedure, after which an existing contractual relationship will be fully or partly terminated. The Complaints Board found that the rules could be extended to apply in a case such as this, where the complaint was filed in the standstill period before the contract was signed.

The decisive factor was then whether the change constituted a change of an essential element in violation of the principles of equal treatment and transparency in Section 2 of the Public Procurement Act (Article 18(1) of Directive 2014/24/EU), as a contracting entity as outlined in the explanatory notes to this provision "is not allowed to make material changes to the procurement documents during a procurement procedure". Accordingly, such changes require a new procurement procedure.

Referring to Section 24, para (37), of the Public Procurement Act, which defines a "material change", and the explanatory notes to this provision, the Complaints Board noted that the change implied that the deliverable to be supplied immediately after the conclusion of the framework agreement according to the specifications (physical portals for time-based toll) was postponed indefinitely and would only be required to be delivered when Sund & Bælt so requested. The time of delivery was thus extended for a material parts of "Deliverable A", and this change, if it had applied at the time of the procedure, may have influenced the participation of potential tenderers in the procurement procedure, if they were not able to make delivery by this deadline. It also had to be assumed that the change could have influenced the content of the tenders.

The burden of proving that the change did not constitute a change of an essential element, contrary to what was described above, rested with Sund & Bælt, and this burden was not lifted.

Moreover, the Complaints Board found it likely that the complainant's claims for annulment of the award decision etc. would be upheld. In this respect, it referred to the fact that Sund & Bælt was not entitled to make the change without launching a new procurement procedure, and that the award was therefore equivalent to a direct award. As the award actually corresponded to a direct award of a contract, the Complaints Board also found that the condition for suspensive effect relating to *urgency* was met. Finally, the Complaints Board held that the condition for suspensive effect relating to a *balancing of interests* was met.

Sund & Bælt later annulled the award decision, and the complaint was withdrawn. The interim decision was thus the Complaints Board's final decision in the case.

Interim decision of 2 December 2019, Remondis A/S v Silkeborg Genbrug og Affald A/S

The first condition for suspensive effect (prima facie case) was met. The second condition (urgency) did not preclude suspensive effect of complaint about unlawful direct award and ineffective contract. The third condition (balancing of interests) was not met, as the it was the complainant who terminated an ongoing contract with the contracting entity on the job, and since there was an important public interest in ensuring that waste was collected in the municipality after the expiry of the terminated contract. No suspensive effect.

The case concerned the direct award of a contract for waste collection in the Municipality of Silkeborg. Following a procurement procedure in 2016, in January 2017, Silkeborg Genbrug og Affald A/S ("SGA") contracted with Remondis for waste collection for a six-year period. On 27 February 2019, Remondis terminated the contract giving 10 months' notice. The parties disagreed on whether the termination was justified. On 30 April 2019, SGA launched a new procedure for the project, but later cancelled it due to technical errors in the procurement process. In June 2019, SGA launched a new open procurement procedure, also scheduled to start on 1 January 2020, i.e. about six months after the launch of the procedure. On August 2019, SGA decided to award the contract to HCS A/S Transport & Spedition. On 13 September 2019, the Complaints Board for Public Procurement made an interim decision on a complaint brought by Remondis. The Complaints Board held that there were grounds for annulment, but the complaint was not granted suspensive effect. On 30 September 2019, SGA annulled the award decision and cancelled the procurement procedure. On 27 September 2019, SGA contracted with HCS without publication of a notice for voluntary ex ante transparency, cf. Section 4 of the Complaints Board Act. On 25 October 2019, Remondis complained about the direct award to the Complaints Board, requesting that suspensive effect be granted and claiming that the contract be declared ineffective.

The issue in the case was whether SGA had awarded the contract legally in accordance with Section 80(5) of the Public Procurement Act (Article 32(2) of Directive 2014/24/EU), according to which a contracting entity may use a negotiated procedure without prior publication when strictly necessary owing to circumstances resulting from events unforeseeable to the contracting authority as a result of which time limits for open procedures, restricted procedures or competitive procedures with negotiation cannot be observed In its decision on suspensive effect, the Complaints Board referred to Article 32(2) and recital 80 of the Procurement Directive (Directive 2014/24/EU) and to general and special explanatory notes in the Public Procurement Act. According to these notes, the Bill must be interpreted in accordance with the Procurement Directive. The example given in the Directive (and in the explanatory notes to Section 80(5) (Article 32(2) of Directive 2014/24/EU) of exceptional situations is natural catastrophes which require immediate action. The explanatory notes also state that the condition that the events giving rise to extreme urgency must have been unforeseeable to the contracting entity means that the contracting entity should not have been able to foresee this. SGA thus had the burden of proving that the contract with HCS could be lawfully concluded without a procurement procedure. Based on its assessment of this case, the Complaints Board held that the burden of proof was not lifted. The Complaints Board noted that SGA had sufficient time to carry out a procurement procedure. Accordingly, the first condition for suspensive effect (*prima facie case*) was met. As regards the second condition (*urgency*), the Complaints Board noted that this condition did not prevent it from granting the complaint suspensive effect, as the complaint concerned unlawful direct award and ineffective contract.

As regards the third condition (*balancing of interests*), the Complaints Board held that importance should be given to the fact that Remondis was awarded a six-year contract for waste collection in Silkeborg following the procedure in 2016/2017. The contract was then concluded in January 2017, but terminated by Remondis in February 2019 for expiry on 31 December 2019. It should also be considered that SGA was responsible for the overall municipal waste collection in the Municipality of

Silkeborg. There were thus essential public interest considerations associated with making sure that the task of waste collection in the municipality would continue to be solved even after the terminated contract expired at the end of 2019. Against this background, a balancing of the parties' conflicting interests led the Complaints Board to conclude that Remondis' interest in the complaint being given suspensive effect did not outweigh SGA's interest in the opposite outcome. The condition on the balancing of interests was thus not met, and the Complaints Board did not grant the complaint suspensive effect.

Interim decision of 20 December 2019, Smith & Nephew A/S v the North Denmark Region, the Central Denmark Region and Region Zealand

The North Denmark Region, the Central Denmark Region and Region Zealand published a notice for voluntary ex ante transparency in the Official Journal of the European Union, announcing that the Regions intended to contract with a certain supplier without a competitive procedure for the supply of medical equipment, as the equipment could only be supplied by this supplier because competition was absent for technical reasons, cf. Section 80(3)(2) of the Public Procurement Act (Article 32(2) of Directive 2014/24/EU). In the standstill period after the notice for voluntary ex ante transparency, a company complained to the Complaints Board that the Regions were going to award the contract without a competitive procedure. The Board decided to grant the complaint suspensive effect. The Regions subsequently cancelled the award decision, and the complaint was withdrawn.

The Regions published a joint notice for voluntary ex ante transparency in the Official Journal of the European Union on a negotiated procedure without prior notice pursuant to Section 80(3)(2) of the Public Procurement Act (Article 32(2) of Directive 2014/24/EU), according to which the Regions intended to conclude a framework agreement with an estimated value of DKK 40 million (EUR 5.4 million) with a specified company for the supply of equipment for NPWT treatment (Negative Pressure Wound Therapy).

According to the notice for voluntary ex ante transparency, the grounds for the Regions' decision were that, after having conducted a market analysis, they found that only one supplier was able to meet their requirements, and that the contract would therefore be awarded to this supplier for technical reasons. An expert group comprising representatives of the three Regions had come to the conclusion that the correlation between the products resulted in different overall requirements to ensure optimal and appropriate treatment. The notice for voluntary ex ante transparency contained a list of these requirements in the form of a description of various features of the products.

Smith & Nephew complained during the standstill period after the notice for voluntary ex ante transparency to the Complaints Board about the Regions' intention to conclude a contract without a competitive procedure, as the conditions for this were not met.

On the prima facie case condition (that the complaint seems to be well-founded), the Complaints Board noted that the Regions had the burden of proving that the conditions for direct award of the contract were met. However, the Regions had not submitted any arguments to support that these conditions were met and had not indicated why they had chosen not to divide the contract into lots, cf. Section 49(2) of the Public Procurement Act (Article 46(1), second paragraph, of Directive 2014/24/EU). The Regions had also not produced the market analysis mentioned in the notice for voluntary ex ante transparency. In this regard, the Complaints Board referred to information provided by Smith & Nephew that it was one of only three major suppliers of NPWT products worldwide, and that the company had not contributed to any prior market analysis.

Against this background, the Complaints Board found based on a preliminary assessment that it had not been documented that an optimal and effective NPWT treatment could not be achieved by the use of other products which, in a similar way and as a reasonable alternative or substitute, could meet the technical and functional requirements, just as the Board was not satisfied that the contract could not be divided into lots, cf. Section 49(2) of the Public Procurement Act (Article 46(1), second paragraph, of Directive 2014/24/EU).

As it was thus likely that the complaint and a claim for annulment would be upheld, the prima facie case condition was met.

The urgency condition was satisfied in a comparable case concerning direct award of a contract.

Based on a balancing of the parties' opposing interests, the Complaints Board found that Smith & Nephew's interest in having suspensive effect given to the complaint under the circumstances outweighed the Regions' interest.

The complaint was thus granted suspensive effect. The Regions subsequently cancelled the award decision, and the complaint was withdrawn. The interim decision was thus the Complaints Board's final decision in the case.

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 and 2019 Annual Reports.

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

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

According to Section 37(1) of the Access to Public Administration Files Act, complaints against decisions on access may be brought separately and directly before the authority acting as the final appeals body in respect of the decision or the proceedings in the case where a request for access has been made. In the special notes to 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 and 2018 Annual Reports, 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. If the contracting entity has not heard the underlying case as a procurement case etc., the Complaints Board must assess whether it is competent to hear the case.

> The Complaints Board's decision of 9 July 2019 (file no. 19/04040). The Department of Prisons and Probation had rejected G4S Security Services A/S's request for access to the contract prices on a number of agreements between the institutions under the Department and SIKOM Denmark A/S. G4S brought this decision before the Complaints Board for Public Procurement. However, the Department of Prisons and Probation submitted that the Board was not the competent appeals authority, and that the complaint should instead be heard by the Ministry of Justice's department. The Department of Prisons and Probation stated in this connection that this access case concerned agreements that had not been exposed to competition. No complaint had been filed with the Complaints Board about the conclusion of any of the agreements. In its decision, the Complaints Board noted that the Board in accordance with Section 1(2)(3) of the Complaints Board Act is competent to hear complaints concerning violations of the Act on Invitations to Tender, which generally regulates, among other things, public authorities' procedures for inviting tenders for the construction or design and execution of works and for awarding the contract, cf. Section 1(1) and (2) of the Act. The agreements in question appeared to be construction contracts entered into with reference to the General conditions for the provision of works and supplies within building and engineering of 1992 (AB 92). In all contracts,

the Department or the relevant prison or jail were listed as "builder". Against this background, the Board ruled, on the preliminary evidence, that the nature of the contract was such that the Board should be regarded as the clear appeals authority in respect of the underlying construction cases up to the time of the award decision. The Board then went on to rule on the complaint regarding access.

Decisions on access regarding the invitation of tenders under Section 122(3) of the Danish Act on Social Services (*serviceloven*) which are not covered by public procurement law cannot be referred to the Complaints Board for Public Procurement.

The Complaints Board's decision of 11 November 2019 (file no. no. 19/06472). The Municipality of Vejle had refused the company Kristine Hardam A/S's request for access to price specifications in quotes invited by the Municipality for ostomy aids under Section 112(3) of the Act on Social Services. The complaint was dismissed because the Complaints Board could not be considered the competent appeals authority under Section 37 of the Access to Public Administration Files Act. The Complaints Board stated in that regard that inviting quotes could not be considered subject to the public procurement rules, as the Municipality did not intend to conclude a mutually binding agreement, cf. Section 6 of the Public Procurement Act (Article 4(a)-(c) and Article 13 of Directive 2014/24/EU), cf. Section 24, para (24) (Article 2(5) of Directive 2014/24/EU). The Complaints Board gave importance to the facts that the Municipality only invited quotes to determine the support to be granted under Section 122(3), last sentence, of the Danish Act on Social Services, that it was the citizen who would be purchasing the aid required, that the citizen would become owner of the aid in question, and that the Municipality would not be released from any of its obligations otherwise resting on it by obtaining quotes. The District Court of Roskilde's judgment of 1 December 2017, in which the same complainant in a case also concerning invitation of quotes was successful in the claim that a public procurement procedure should have been launched, could not lead to a different conclusion, as in that case, it had to be applied that it actually amounted to a supplier agreement covered by Section 112(2) of the Act on Social Services and thus not an invitation of quotes under Section 112(3). For more information about the judgment, in which the Court came to a different conclusion than the Complaints Board in its decision of 10 January 2017, reference is made to the Board's 2017 Annual Report, page 44.

Similarly, decisions on access cannot be referred to the Complaints Board for Public Procurement, if the legislation governing the substantive proceedings dictates another special appeals authority which precludes filing a complaint with the Complaints Board for Public Procurement about the underlying procurement case:

The Complaints Board's decision of 21 March 2019 (file no. no. 19/01265). The case concerned a complaint about the Danish Energy Authority's refusal of partial access to a "procurement procedure" for technology-neutral price supplements under the Promotion of Renewable Energy Act (*lov om fremme af vedvarende energi*). According to the procurement documents, the procedure was not covered by the Public Procurement Act or any of the procurement directives; instead its legal basis was the general principles of EU law governing, among other things, equal treatment, proportionality and non-discrimination on grounds of nationality. Furthermore, it was a procedure for state aid which would be granted to the successful tenderer. The legal basis for the tender was the Promotion of Renewable Energy Act. According to Section 1(2)(2) of the Complaints Board Act, the Complaints Board is competent to hear complaints of violations of EU law on public procurement, and the Complaints Board stated

that the procurement procedure according to its terms should be regarded as being covered by this provision. However, as it is expressly stated in the Promotion of Renewable Energy Act that decisions made under that Act may only be challenged before the Energy Board of Appeal, the Complaints Board for Public Procurement was not competent to review complaints of such procedures and thus not competent to review the refusal of access. The Board therefore dismissed the case.

3.3 The contracting entity's internal documents

As mentioned in the Board's 2017 Annual Report, according to Section 23(1)(1) of the Access to Public Administration Files Act, the right of access does not apply to internal documents that have not been disclosed to outsiders. Section 23(2) dictates that documents are no longer considered internal when they are disclosed to outsiders, unless this is prescribed by law, for research purposes or other similar purposes. In procurement procedures launched by several authorities together, such as in joint municipal procurement procedures, it may give rise to doubts whether material exchanged in the group in charge of the procedure were exchanged in an ad hoc authority set up for this purpose, which would mean that it is considered internal, or exchanged between representatives of different cooperating authorities. In this connection, it must be considered whether the cooperation is in the nature of an independent authority. With regard to the question of whether an authority is an independent authority, the special notes on the provision in Section 23 of the Access to Public Administration Files Act (Bill no. L 144 of 7 February 2013) explain, among other things, that this must be "*based on an organisational assessment of the relationship between the different entities. In this connection, one consideration is whether the relevant administrative entity's tasks are clearly separate from those of other administrative entities, whether the entity performs extensive and independent tasks, whether the entity is subject to other entities' power of direction, whether there is a right of appeal to another entity, whether the entity makes decisions on its own behalf, and the degree of autonomy, cf. chapter 16, section 2.2 (page 519 et seq.) and section 6.1.4 (page 576 et seq.)*".

The Complaints Board's decision of 18 October 2019 (file no. no. 19/06486). The case concerned the question of access to notes and scores produced by a test panel in connection with FMI's procurement procedure for work and safety footwear, cf. the Complaints Board's decision of 31 January 2020 (LeBock Fodtøj ApS v FMI). FMI had refused access on the grounds that these were internal working documents that were not covered by the right of access, cf. Section 23(1)(1) of the Access to Public Administration Files Act. The Complaints Board ruled that the test panel did not qualify as an independent authority. The Board based this view on the facts that the participants represented different authorities in the Defence group, that the authorities performed different tasks, and that the members of the group were each subject to their respective authorities' powers of direction. As the test panel was therefore not an independent authority, and as the notes had been exchanged between participants from different authorities, they were not internal, and therefore could not be exempted from access pursuant to the relevant provision.

3.4 Exclusion of confidential business secrets from public access

As mentioned in the 2016-2018 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, para (2), of the Access to Public Administration Files Act and/or Section 15b, para (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, para (2), of the Access to Public Administration Files Act or Section 15b of the Danish Public Administration Act.

> The Complaints Board's decision of 25 February 2019 (file no. no. 19/00762). The case concerned a refusal pursuant to Section 30, para (2), of the Access to Public Administration Files Act of access to the winning tender in the Danish Evaluation Institute's procurement procedure for proofreading and language revision. The Complaints Board ruled that information about the names of the specific employees who were part of the team that the company had designated for the procedure, information about the employees' work experience and level of education and the names of back-up staff did not concern the company's professional capacity as such, but only the professional capacity included in the tender. The information could therefore not be regarded as business secrets within the meaning of Section 30, para (2), of the Access to Public Administration Files Act. However, an exam grade of one of the persons mentioned had to be considered private information, for which reason it was exempted by Section 30, para (1), of the Access to Public Administration Files Act. Furthermore, there was no basis for considering information about, e.g., delivery times to be trade secrets that could be exempted under Section 30, para (2), of the Act.

3.5 Other information on specific tenders

It is not unusual that the undertakings concerned request that the Board refuses to grant access to parts of the contracting entity's tender evaluation containing more or less critical remarks about the relevant tender. Although it might be inconvenient to have such criticism published, according to the Complaints Board's practice, this does not constitute information on business secrets, which may be exempted under Section 30, para (2), of the Access to Public Administration Files Act.

> The Complaints Board's decision of 10 April 2019 (file no. 19/02861). The case concerned a complaint of refusal of a request from a journalist at Danish newspaper Ekstra Bladet for access to certain documents from the Complaints Board's case *Leo Nielsen Trading ApS and Glock Ges m.b.H. V FMI*, cf. the Board's decision of 15 March 2019 referred to above in section 2.2.1 on requirements for specifications, including minimum requirements, and organisation of procurement procedures. FMI had stated that there were no safety-related concerns or concerns relating to the public finances that barred access, and the case thus only concerned the issue of whether the information could be exempted under Section 30, para (2), of the Access to Public Administration Files Act. The information that the company requested be exempted was FMI's comments for the requirements fulfilment and thus not concrete descriptions of products or processes. Nor was it trade secrets that could be exempted under that provision.

3.6. Information about complaints cases before the Complaints Board for Public Procurement

As mentioned in the 2017 Annual Report, the fact that a complainant has complained, and the allegations and submissions made by the parties during the case are not confidential business interests eligible for exemption under Section 30, para (2), of the Access to Public Administration Files Act. Such information may generally not be excluded from access by virtue of the provision in Section 33, para (3), of the Access to Public Administration Files Act on exclusions to protect public economic interests.

> The Complaints Board's decision of 8 November 2019 (file no. no. 19/07457). The case concerned a complaint against refusal of access to pleadings in a pending complaints case,

Simonsen & Weel A/S v the North Denmark Region and Region of Southern Denmark, cf. the Complaints Board's reference order of 16 January 2020. The Region's refusal was justified on grounds of public conduct of business, cf. Section 33, para (3), of the Access to Public Administration Files Act. The Region mainly submitted that access to the pleadings could give rise to the risk that tenderers would in future take a more critical stance to the Region's procurement documents or not be willing to negotiate with the Region at all. The Complaints Board held that this referred only to a general risk and that there was no basis for assuming that there was such specific and imminent risk that would justify excluding the information under that provision. In that connection, the Complaints Board also gave importance to the fact that it is a known risk in all procurement procedures within the Board's sphere of competence that contracting entities' decisions may be referred to the Board, that according to its established practice the parties' claims and allegations are reproduced in the Board's decisions, and that these decisions are published, cf. Section 11 of the Complaints Board Order. Against this background, the Complaints Board held that the fact that a complaint of a contracting entity is filed with the Board and the details of the dispute generally cannot be regarded as involving a risk that would justify excluding information pursuant to Section 33, para (3), of the Access to Public Administration Files Act.

For more information on the Board's practice concerning Section 33, para (3), of the Act, reference is made to the 2017 Annual Report.

4. DANISH JUDGMENTS ON THE COMPLAINTS BOARD'S CASES

This chapter gives an account of final judgments handed down in 2019 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 2019, because they were appealed to a higher court, have not been included here.

The Western High Court's judgment of 11 July 2019 (UfR 2019.3829), Esbjerg Maritime Service ApS v Den Kommunale Selvstyrehavn Esbjerg Havn (the municipal self-governing port of Esbjerg), cf. the Complaints Board's decision of 10 March 2015 (2015 Annual Report, page 21).

The case concerned the Port's invitation of tenders for a concession for the supply of water to ships etc. at the Port of Esbjerg. Esbjerg Maritime Service ApS, which had the concession since 2010, was one of the two tenderers, but was not awarded the contract. It sued the contracting entity, claiming compensation on the grounds that it had violated the principles of EU law on equal treatment and transparency as well as the general principles of administrative law.

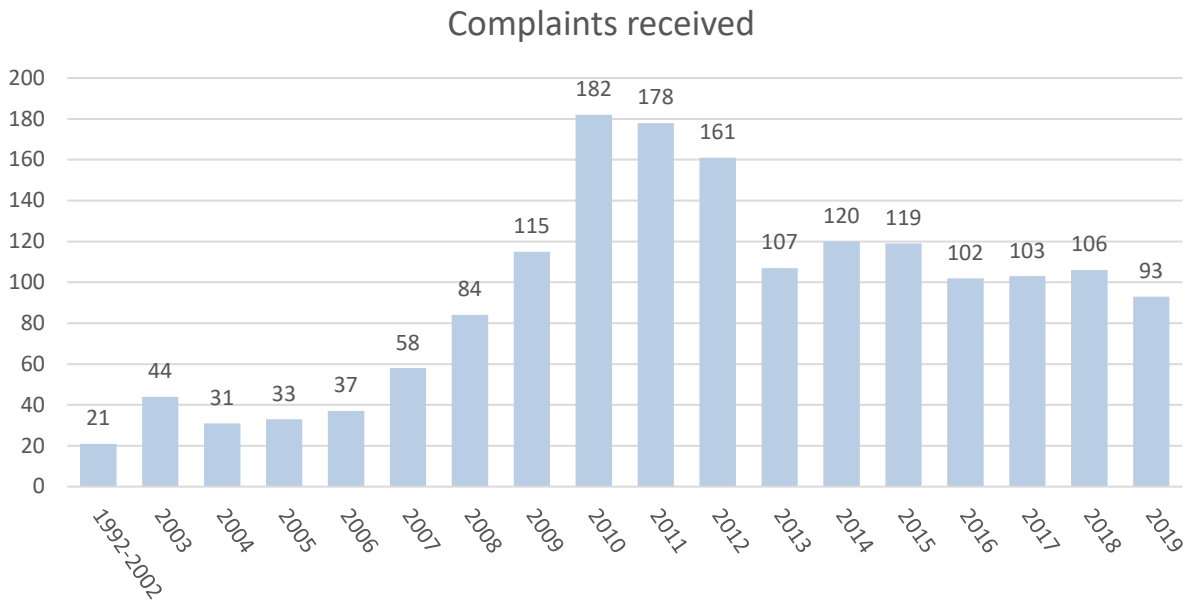
The High Court came to the same conclusion as the Complaints Board, which had received the complaint on 9 January 2015, namely that the contract did not have a clear cross-border interest. The principles of EU law were therefore not applicable, and as it had not been proven that the contracting entity had violated the principles of administrative law, the contracting entity was acquitted.

5. THE COMPLAINTS BOARD FOR PUBLIC PROCUREMENT'S ACTIVITIES IN 2019

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 93 complaints in 2019. The below overview illustrates the development in the number of complaints received in 1999-2019.



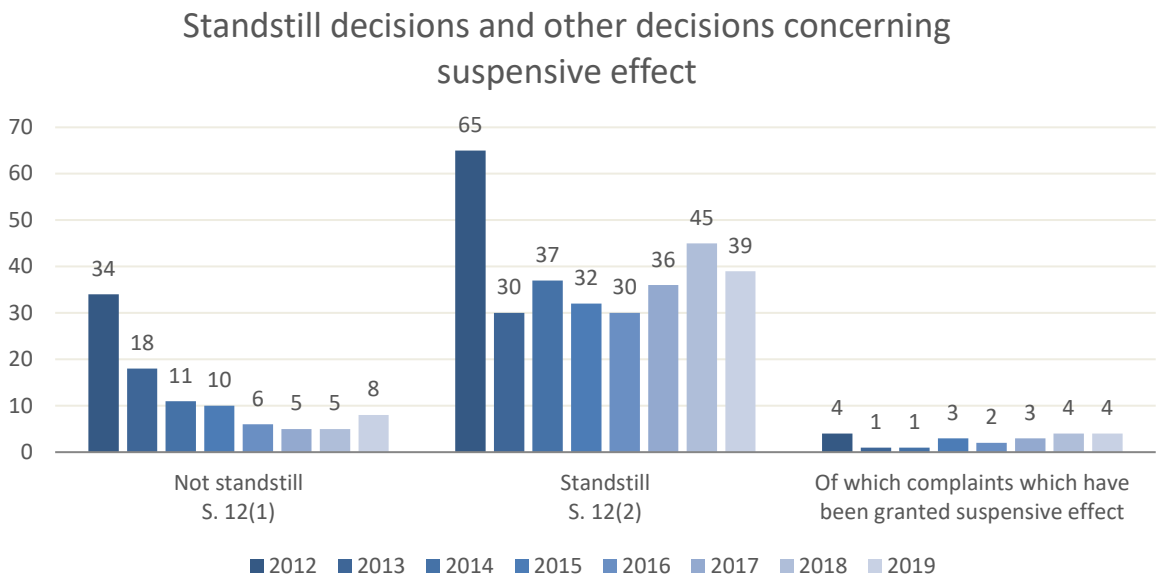
The number of complaints received in 2019 is slightly below the level of 2015-2018. The number of complaints cases is thus still significantly lower than in 2010-2012.

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 2016-2019 may be explained by the fact that, because of the implementation of the major amendments to the substantive procurement rules, potential complainants have been more cautious, and by the fact that the Complaints Board is no longer competent to adjudicate cases on purchases below the thresholds without a clear cross-border interest, cf. Title V of the Public Procurement Act. The further decline in 2019 is attributable to significantly fewer cases than usual were received during the first months of the year. This accelerated later in the year, resulting in only a slight decrease in the number of cases relative to the year before.

5.2 Standstill cases and other decisions regarding suspensive effect

As shown below, in 2019, the Complaints Board made interim decisions in eight cases where a request for suspensive effect had been made under Section 12(1) of the Complaints Board Act, and interim decisions in 39 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 2019, 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 2012-2019 is shown below.

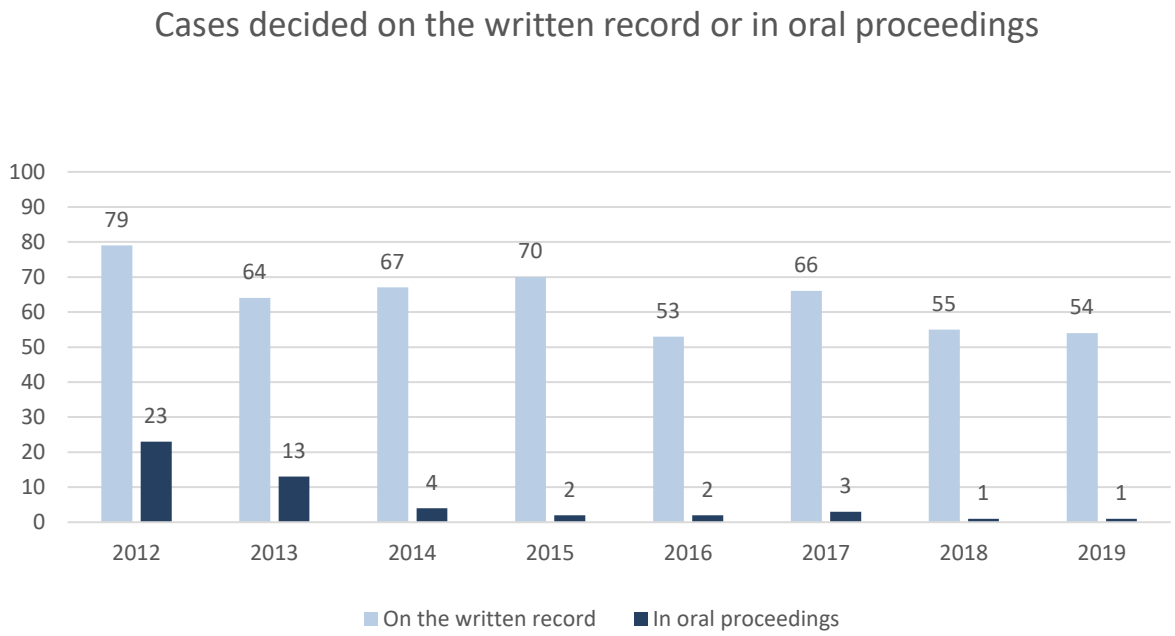


In a number of cases, the Complaints Board's decisions etc. regarding suspensive effect – also where the request is not granted – will lead to withdrawal of the complaint due to the Complaints Board's prima facie orders, where the Complaints Board based on a preliminary assessment delivers an opinion on whether the public procurement rules are likely to have been violated. 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 to make two decisions, namely a decision on suspensive effect and a substantive decision on the alleged infringements. In addition to this are possible decisions on 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 46 cases which the Complaints Board adjudicated on their merits in 2019 (see section 5.4), 45 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 2012-2019.

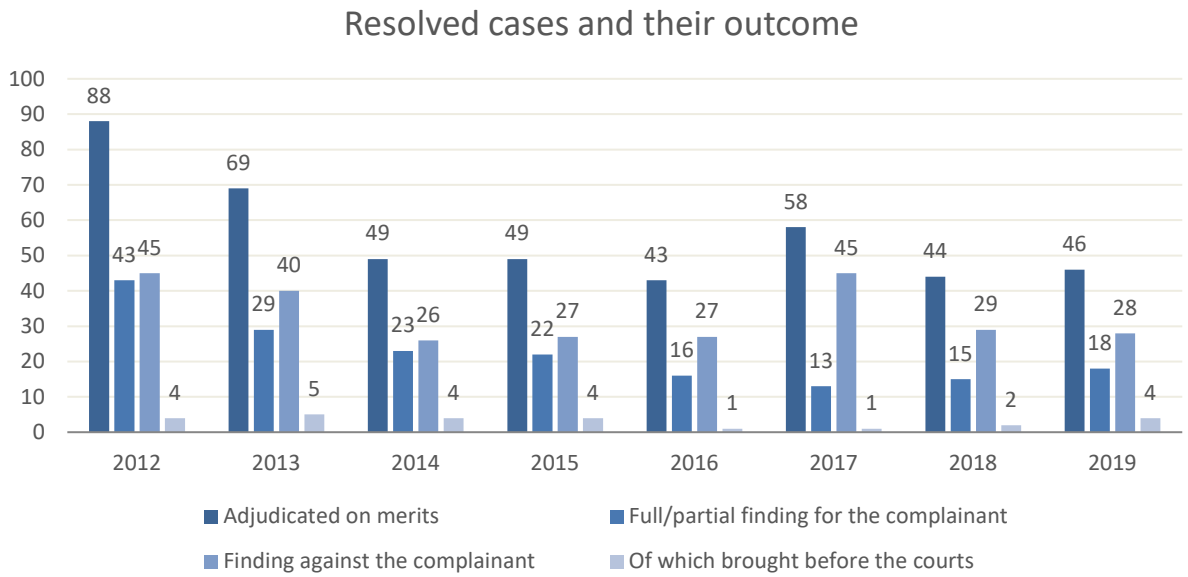


Note: These figures include rejected cases.

The distribution of cases decided on the written record/cases adjudicated in oral proceedings in 2019 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 46 cases on their merits in 2019. Of these cases, 18 complaints were fully or partly sustained, while 28 complaints were unsuccessful. In the vast majority of cases, the Complaints Board's decision is the final ruling in the case. Of these 46 decisions, only four where thus referred to the courts of law. The number of decisions that are brought before the courts is slightly higher than the previous year, but at the same level as in the 2013-2015 period.



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 2019 was 39%, which was higher than in 2018, but considerably below the average percentage for 2011-2018 which was 40.5%.

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 2019, the Complaints Board handed down 32 prima facie decisions. In 11 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.

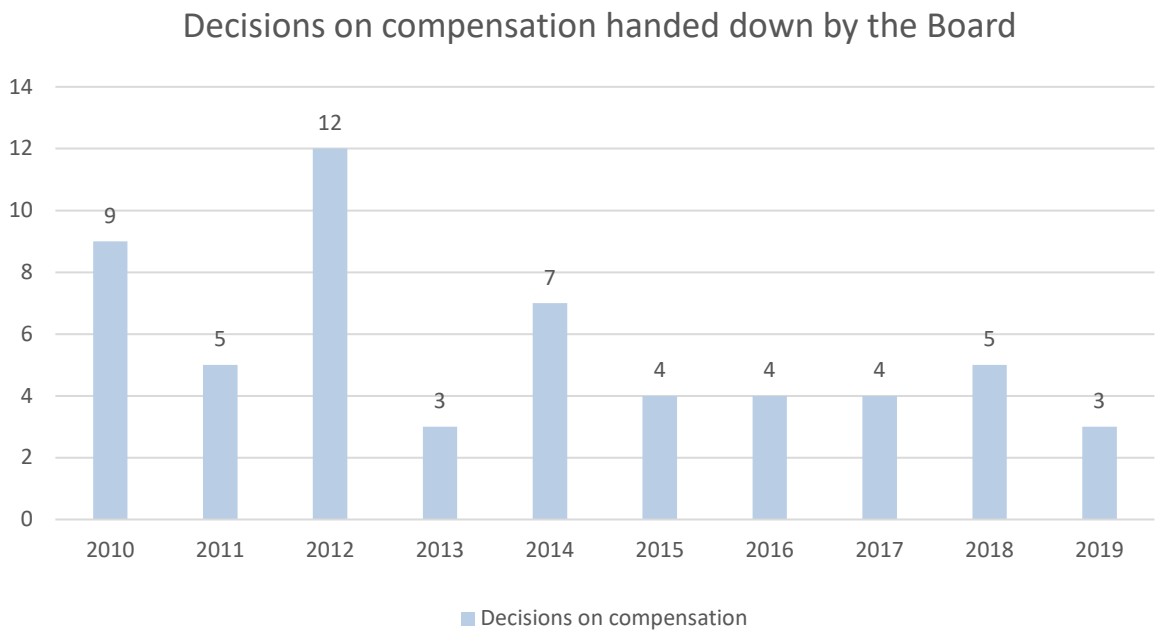
In the remaining 21 prima facie decisions, the Complaints Board assessed that the case was not a prima facie case. In seven of these, the complaint was revoked, which made the interim decision the final decision in the case.

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%
2019	39%	61%

5.5 Decisions on compensation

In 2019, the Complaints Board made three decisions on compensation.

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

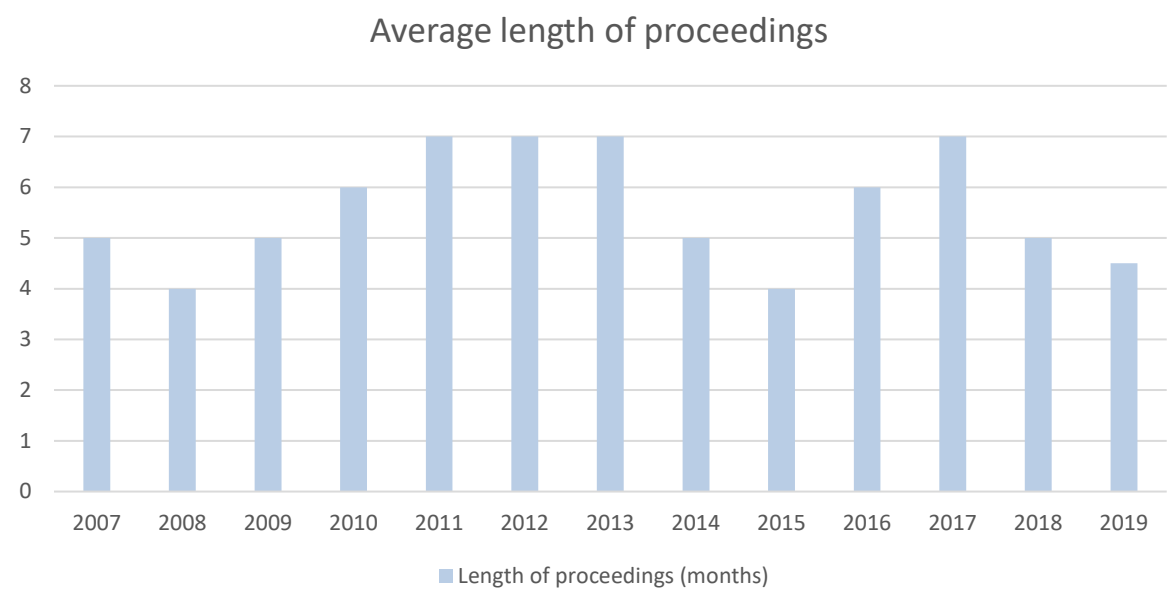


As described in section 4.5 of the 2013 Annual Report, experience shows that in many of the cases in which the Complaints Board has found fully or partly in favour of the complainant in its substantive decision, the issue of compensation is resolved without the Complaints Board, where the parties reach a settlement instead of letting it be up to the Complaints Board to decide the case in a decision on compensation. The number of decisions on compensation in 2012 should be compared with the large number of complaints received in 2010 and 2011 (182 and 178 complaints, respectively).

5.6 Average length of proceedings

The Complaints Board's average length of proceedings in 2019 was 4.5 months.

Below is an overview of the development in the average length of proceedings for rejected cases and substantive decisions in months in the years 2007-2019.



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. In 2018, the length of proceedings decreased again to five months.

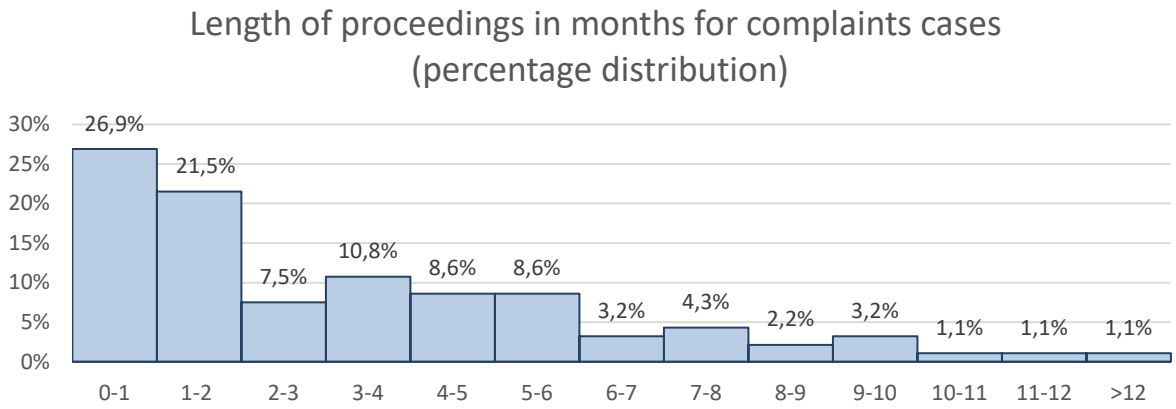
The average length of proceedings has decreased to 4.5 months in 2019. The number of complaints received in 2019 was 93 against 84 in 2008 and 119 in 2015 and 58 in 2007, 115 in 2009, 120 in 2014 and 106 in 2018. For further information about the number of complaints received in other years, refer to section 5.1.

At the end of 2019, there were 40 pending cases, which is slightly above the 39 at the end of 2018 and slightly below the 43 cases at the end of 2017.

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

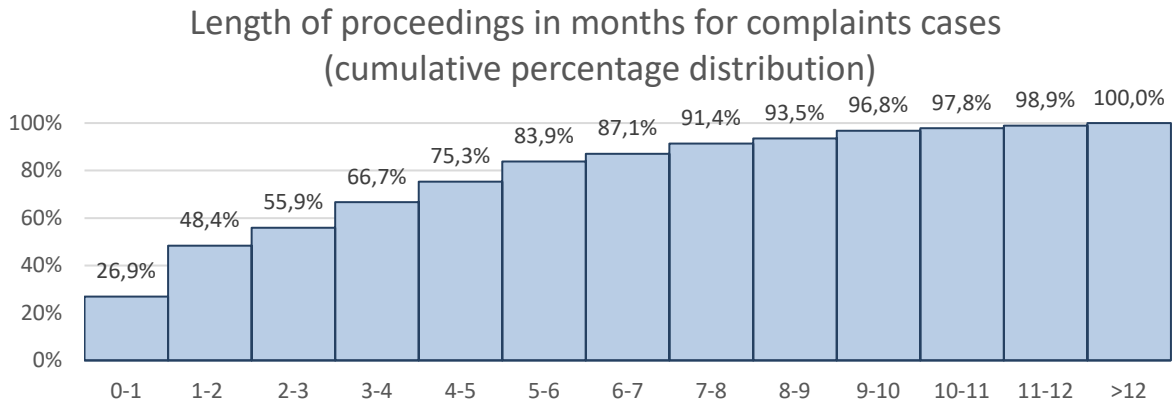
The figure below shows the percentage share of all cases that were closed within 0-1 month, 1-2 months etc. and more than 12 months in 2019. This includes all cases, i.e. also cases where the complaint was rejected and cases where the complaint was withdrawn, including after the Complaints Board's prima 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.

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.



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 2019.

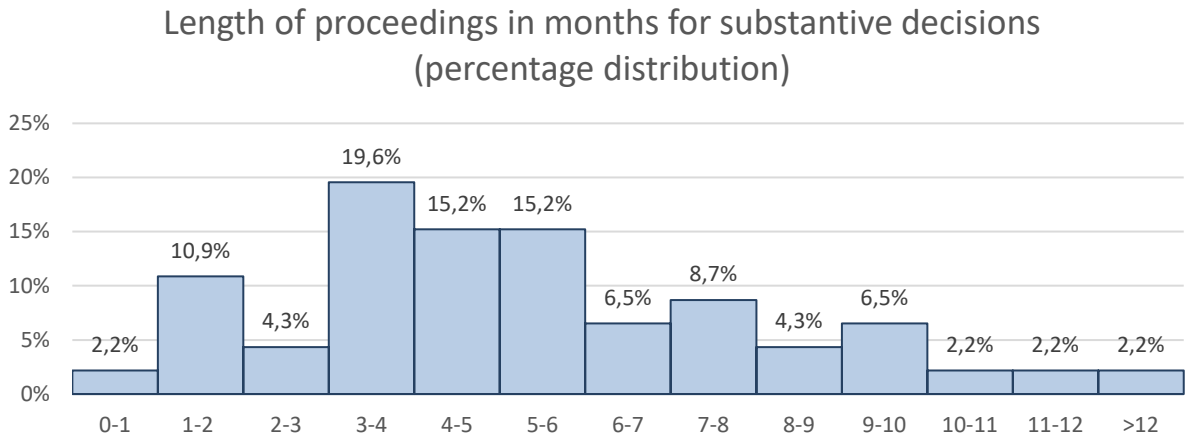


Approx. 27% of the cases were closed within the first month of receipt of the complaint in 2019 against 29% in 2013, 33% in 2014, 47% in 2015, approx. 39% in 2016, approx. 27% in 2017 and approx. 33% in 2018. Approx. 48% of the cases were closed within the first two months of receipt of the complaint in 2019 against 42% 2013, 54% in 2014, 62% in 2015, 53% in 2016, approx. 41% in 2017 and approx. 56% in 2018. It can also be seen that approx. 56% of all cases received in 2019 were closed within three months against 49% in 2013, 60% in 2014, 69% in 2015, 61% in 2016, approx. 49% in 2017 and approx. 66% in 2018. The figures for 2019 include 39 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. 84% of the cases in 2019 were closed within 5-6 months of receipt of the complaint against 37% in 2013, 62% in 2014, 65% in 2015, 74% in 2016, approx. 77% in 2017 and approx. 81% in 2018, and approx. 93% of cases were closed within 9-10 months against 86% in 2013, approx. 87% in 2014, 92% in 2015, 87% in 2016 and 88% in 2017 and 2018.

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.

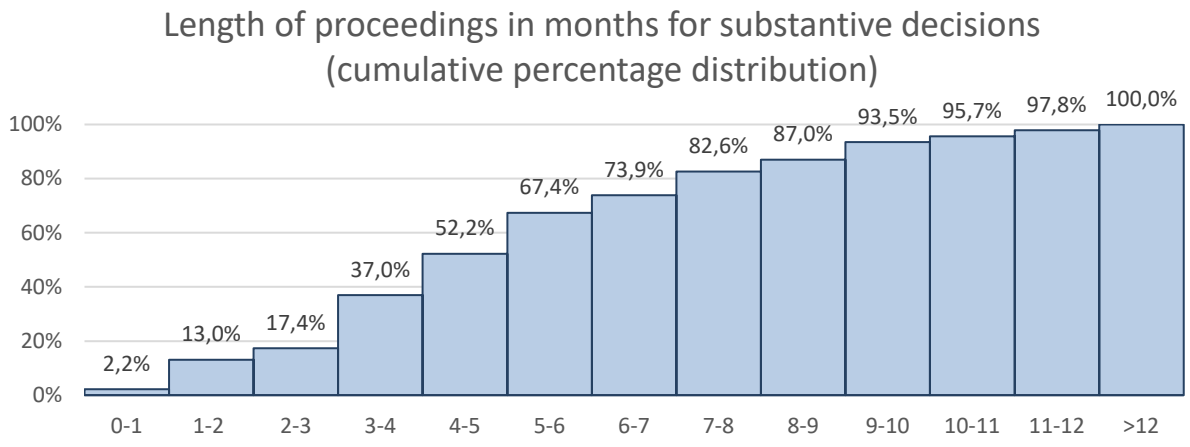
5.9 Length of proceedings in months for substantive decisions (percentage distribution)

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 2019.



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 2019.



The table shows that substantive decisions were made in approx. 37% of cases within 3-4 months in 2019 against 20% 2013, 30% in 2014, 41% in 2015, 44% in 2016, 38% in 2017 and approx. 34% in 2018. Furthermore, in 2019, substantive decisions were made within 5-6 months in approx. 67% of cases against 37% in 2013, 62% in 2014, 65% in 2015, 54% in 2016, 57% in 2017 and 59% in 2018. It can also be seen that the Complaints Board made a substantive decision within 8-9 months in approx. 87% of

cases in 2019 against approx. 69% 2013, 87% in 2014, 90% in 2015, 71% in 2016, 76% in 2017 and approx. 70% in 2018. Experience shows that the remaining 13% (2013: 31%, 2014: 13%, 2015: 10%, 2016: 29%, 2017: 24% and 2018: 30%) of cases where the length of proceedings was longer belong in the category of particularly large and legally/technically complex cases which necessarily take longer to process. With regard to the Complaints Board's length of proceedings for substantive decisions, it is important to note that the work does not only involve making the substantive decision, but that in many cases considerable resources go into making one or more decisions on suspensive effect and access pursuant to the Public Administration Act, cf. section 5.2 above.

6. THE COMPLAINTS BOARD'S OTHER ACTIVITIES

In addition to hearing complaints, the Complaints Board also undertook certain outreach activities in 2019:

Consultation responses
On 21 August 2019, the Complaints Board submitted a consultation response on a draft legislative proposal amending the Public Procurement Act.

Network of first instance procurement review bodies
In 2019, Nikolaj Aarø-Hansen produced a presentation on the use of experts by the Complaints Board for the Network of First Instance Procurement Review Bodies, a network launched by the European Commission. On 18-23 September 2019, the Board had a successful visit from Legal Assistant Jugatx Ortiz from the European Commission's secretariat for the EU Network. The visit was part of the Commission's programme "PUBLIC PROCUREMENT EXPERIENCE"/"Hands on experience", where jurists from the Network's secretariat visit the different Member States' appeals bodies to learn more about their day-to-day activities, work assignments and case types.

Participation in conferences etc.
In 2019, members of the presidency participated as presenters at conferences and other events focusing on public procurement law.

In the spring of 2019, Katja Høegh was a panellist for the second consecutive year at King's College, London – George Washington University Law School Annual Transatlantic Symposium on Public Procurement Law. Katja Høegh was also a panellist at the British Public Procurement Lawyers' Associations debate meeting on 5 December 2019 on review bodies.

On 7-8 March 2019, Kirsten Thorup participated in the Annual Conference on European Public Procurement Law 2019 held by Europäische Rechtsakademie (ERA), Trier.

Kirsten Thorup and Katja Høegh have contributed to the book "Udbudsretten" ("Procurement Law") (2019) edited by the Board's expert member, Professor Steen Treumer.