The Complaints Board for Public Procurement

Annual Report 2021

CONTENTS

INTRODUCTION

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

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

Chapter 2 contains summaries of a number of the Board's decisions from 2021 that are considered leading cases or are of particular interest otherwise. 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 the Complaints Board's website at www.klfu.naevneneshus.dk. This applies to decisions concerning violation of the public procurement rules, decisions awarding compensation and a selection of decisions regarding suspensive effect and access to documents.

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

In chapter 4, the Complaints Board wrote about the judgment of the EU Court of Justice in C-23/20, Simonsen & Weel A/S v the North Denmark Region and the Region of Southern Denmark.

Chapter 5 contains statistics on the Complaints Board's activities with comments. In 2021, the Complaints Board received 91 complaints which is nearly on a level with the number received in 2019 but is below the level of 2020. The Board's decisions fully or partly found in favour of the complainant in approx. 37% of the cases, which is a higher percentage than in 2020 but slightly lower than in 2019. Moreover, in approx. 43% 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 This typically led the parties to find a solution, and the complaint was withdrawn.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 2021, the Complaints Board's average length of proceedings increased to 6 months compared to five months in 2020.

Nikolaj Aarø-Hansen, President

Viborg, July 2022

1. THE COMPLAINTS BOARD FOR PUBLIC PROCUREMENT

1.1 Legal basis and establishment

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

1.2 The Complaints Board's composition

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

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

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

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

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

In 2021, the Complaints Board's presidency was composed of the following judges:

President of the Complaints Board for Public Procurement:

Nikolaj Aarø-Hansen, High Court Judge

Other members of the Complaints Board's presidency:

- Kirsten Thorup, Former High Court Judge
- Michael Ellehauge High Court Judge, PhD
- Niels Feilberg Jørgensen, Former Judge
- Erik P. Bentzen, High Court Judge
- Katja Høegh High Court Judge, LL.M. (until 15 April 2021)
- Jesper Stage Thusholt, Judge
- Charlotte Hove Lasthein, Judge
- Jakob O. Ebbensgaard, High Court Judge
- Anders Raagaard, Judge (until 1 April 2021)
- Jesper Jarnit, High Court Judge (from 15 April 2021)
- Mette Langborg, Judge (from 20 August 2021)

The Board's experts in 2021 were:

- Pernille Hollerup, Senior Director
- Jan Eske Schmidt, Knowledge Partner
- Lene Ravnholt, Legal Advisor
- Preben Dahl, General Counsel
- Steen Treumer, Professor, PhD (until 16 August 2021)
- Stephan Falsner, Lawyer
- Palle Skaarup, Public Procurement Advisor (until 23 November 2021)
- Jeanet Vandling, CPO
- Ole Helby Petersen, Professor with Special Responsibilities, PhD
- Christina Kønig Mejl, Chief Advisor
- Claus Pedersen, General Counsel, LL.M.
- Birgitte Nellemann, Office Head
- Kurt Helles Bardeleben, Lawyer
- Maria Haugaard, Office Head
- Carina Risvig Hamer, Associate Professor
- Trine Kronbøl, Head of Service
- Johan Iversen Møller, Lawyer (until 23 September 2021)
- Mikael Kenno Fogde, Lawyer
- Rikke Fog Bach, Sales Manager
- Louise Kirkegaard Folling, Chief Advisor
- Torkil Schrøder-Hansen, Lawyer, Chief Advisor (from 20 September 2021)
- Michael Steinicke, Professor (from 23 November 2021)
- Christian Lund Hansen, Chief Advisor (from 23 November 2021)

1.3 The Complaints Board's secretariat

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

The Complaints Board's President is the head of the secretariat, which had three lawyers and two secretaries for the major part of 2021.

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 2021, the secretariat consisted of:

- Dorthe Hylleberg, Administrative Officer (until 31 October 2021)
- Heidi Thorsen, Administrative Officer (until 31 October 2021)
- Julie Just O'Donnell, Legal Special Advisor, LLM (until 30 September 2021)
- Maiken Nielsen, Legal Special Advisor, MSc in Business Administration and Commercial Law
- Mona Rosenlund, Legal Special Advisor, LLM (from 1 November 2021)
- Tanja Bøtker Lindgren, Legal Administrative Officer, LLM

As was the case with the rest of society, the Complaints Board was marked by the COVID-19 pandemic in 2021. The Complaints Board's Secretariat therefore worked from home for extended periods. As proceedings at the Complaints Board are mainly based on written records, it has not, however, been necessary to adjourn proceedings or to implement special measures to consider cases from home.

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

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

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

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

Pursuant to Section 37 of the Danish Access to Public Administration Files Act (*offentlighedsloven*), the Complaints Board is the appeals body for the consideration of complaints of other authorities' decisions on access to documents in public procurement cases. Reference is made to chapter 3 of the 2016 Annual Report for a detailed description of this part of the Complaints Board's work. The Complaints Board is the

final appeals body for local and regional governments' violations of the Executive Order on Reference Bids (Order no. 607 of 24 June 2008) (*kontrolbudsbekendtgørelsen*) as well as in particular areas where the Complaints Board has status as an appeals body by law or in accordance with law.

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

The Complaints Board's primary task is to make specific decisions in specific complaints cases. When the Complaints Board makes decisions in leading cases, it often makes general statements on the rule of law, and care should be taken not to over-interpret the Complaints Board's decisions and not to attach too much significance where it is not warranted by the relevant decision. Please see the article in the Danish weekly law reports 2013 B, pages 241 et seq. (U.2013B.241, Michael Ellehauge: Erfaringer med håndhævelsen af EU's udbudsregler (*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 small share of the Board's decisions is brought before the courts of law; in 2021, only 4 out of 49 decisions. The Complaints Board's case law, and perhaps particularly decisions made within the past ten years, must be regarded as an important source of law in the application of the public procurement rules in Denmark. The Complaints Board also has the advantage of being able to act faster than the courts of law. In 2021, the average length of proceedings for public procurement cases was six months, and to this should be added that a very large portion – 46% – of the cases are brought to a conclusion within the first three months of receipt of the complaint (this figure includes both settled and rejected cases). See chapter 5 of the Annual Report.

The Complaints Board's actions and sanctions

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

Suspensive effect

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

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

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

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

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

Reference is made to the articles on this subject in the Danish weekly law report 2010 B, pages 303 et seq., and 2016 B, pages 403 et seq. (U.2010B.303, Mette Frimodt Hansen and Kirsten Thorup: Standstill og opsættende virkning i udbudsretten (*Standstill and suspensive effect in public procurement law*) and U.2016B.403, Katja Høegh and Kirsten Thorup: Standstill og opsættende virkning inden for udbudsretten – endnu engang (*Standstill and suspensive effect in public procurement law - revisited*)) and the same in the chapter Standstill og opsættende virkning i udbudsretten (*Standstill and suspensive effect in public procurement law*) in Treumer (ed.) Udbudsretten 2019 (*Procurement Law 2019*).

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

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

Although a decision to grant suspensive effect is not a final assessment and thus a substantive decision in the case, the Complaints Board's "prima facie decision" will in practice often serve to inform the party adversely affected that it must bring new evidence in the case to have a chance of the Complaints Board finding in its favour in the subsequent substantive decision in the case. The Complaints Board granted suspensive effect to five complaints in 2021: In its decision of 22 January 2021, Systematic A/S v the municipalities of Greve, Holbæk, Ringsted, Køge, Vordingborg, Kalundborg, Roskilde, Næstved, Guldborgsund, Lejre and Slagelse, in its interim decision of 7 April 2021, Babcock Scandinavian AirAmbulance AB v the Central Denmark Region, the North Denmark Region, the Region of Southern Denmark, Region Zealand and the Capital Region of Denmark, in its interim decision of 15 October 2021, Verdo Teknik A/S v the City of Copenhagen, in its decision of 27 October 2021, Bolt Services DK ApS v the Municipality of Aarhus and in its interim decision of 30 November 2021, Holbøll A/S v Næstved Fjernvarme a.m.b.a.

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

If the Complaints Board assesses that a case may be adjudicated on the written record, The Complaints Board may instead decide to settle the case so that the Complaints Board will not decide on whether to grant suspensive effect. The parties will then be allowed to submit supplemental pleadings. Five such decisions were made in 2021: Decision of 26 January 2021, Ishøj Ny Antenneforening v Ishøj Municipality, decision of 17 February 2021, Systematic A/S v the municipalities of Greve, Holbæk, Ringsted, Køge, Vordingborg, Kalundborg, Roskilde, Næstved, Guldborgsund, Lejre and Slagelse, decision of 25 March 2021, Jacobs Douwe Egberts DK ApS v Fællesindkøb Fyn, decision of 16 April 2021, Biometric Solutions A/S v the

Ministry of Foreign Affairs of Denmark, the Danish National Police and the Danish Ministry of Immigration and Integration and the decision of 1 September 2021, Faaborg Værft A/S v Center for Logistik og Samarbejde ApS. Reference is made to the decisions of 17 February, 25 March and 1 September 2021 in chapter 2 of the Annual Report.

Other sanctions

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

- to suspend the contracting authority's procurement procedure or decisions made in connection with a procurement procedure;
- to annul the contracting authority's unlawful decisions or cancel a procurement procedure;
- to declare a contract ineffective and order that it be terminated;
- to impose an alternative sanction on the contracting authority;
- to order the contracting authority 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 authority must terminate a contract or framework agreement concluded based on this decision giving a reasonable notice unless there are special circumstances justifying continuation of the contract. This provision does not apply where the "ineffective contract" sanction applies, see the first and second sentences of Section 185(2) of the Public Procurement Act. According to the explanatory notes to the Act, final decision or judgment means a final decision from the Complaints Board or a judgment from the ordinary courts which may no longer be appealed.

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

If the contracting authority is not part of the public administration and therefore is not covered by Section 19(1) of the Complaints Board Act, the Complaints Board may not impose a financial sanction on the contracting authority. The Complaints Board will instead report the case to the police if an alternative

sanction in the form of a penalty is to be imposed on the contracting authority, see Section 18(3) of the Act. Reference is made to the Complaints Board's decision of 6 January 2021, Remondis A/S v Silkeborg Genbrug og Affald A/S, and the decision of 10 November 2021, A/S Bladkompagniet v HOFOR A/S (discussed in chapter 2 of the Annual Report) where the Complaints Board filed a police report in both cases.

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

1.5 Decisions by the Board and by the President

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

Decisions by the Board

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

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

In 2021, this happened in four cases: the decision of 11 January 2021, Peak Consulting Group A/S v the Danish Agency for Development and Simplification of the Danish Ministry of Taxation, the decision of 14 January 2021, Audio Visionary Music A/S v Statens og Kommunernes Indkøbsservice A/S, the interim decision of 9 September 2021, ABB Power Grids Denmark A/S v Femern Bælt A/S and the decision of 9 November 2021, Simonsen & Weel A/S v the North Denmark Region and the Region of Southern Denmark.

Decisions by the president

The president of the case may decide to adjudicate cases without the involvement of an expert if they may be assessed based on the written record and are not leading cases. This option is hardly ever used as the experts' assistance is essential to cases.

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

1.6 Eligibility conditions for complaints and complaint guidelines

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

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

www.naevneneshus.dk. In addition, the secretariat offers telephone support on the procedure for the filing of complaints.

A complaint to the Complaints Board must be filed in writing. When filing the complaint, the complainant must also notify the contracting authority in writing of the complaint, stating whether the complaint has been filed in the standstill period. If the complaint has not been filed in the standstill period, the complainant must state whether it has requested that suspensive effect be granted pursuant to Section 12(1) of the Complaints Board Act. The complainant must enclose a copy of this notification with the complaint. In addition, the complainant must state whether there is information in the statement of claim that 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 or the Directive on Security and Defence Procurement are subject to a fee of DKK 20,000 while other complaints, including of violations of the Act on Invitations to Tender, are subject to a fee of DKK 10,000. If the fee is not paid on the filing of the complaint or before the expiry of the time for payment fixed by the Complaints Board, the complaint will be rejected.

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

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 of action. If the complainant is not able to prove that it has a cause of action, the complaint will be rejected. The Complaints Board has made a number of decisions that illustrate the cause of action requirement. Some of these decisions are shown in the case law overview at the Complaints Board's website in relation to annual reports.

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

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

In general, the time limits for filing complaints are:

No preselection: 20 calendar days.

Contracts based on a framework agreement with reopening of the contract to competition or a dynamic 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

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 Executive Order on the Complaints Board.

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

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

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

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

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

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

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

Hearings are held in the offices of the Danish Appeals Boards Authority in Viborg and will generally start with a review of the parties' claims and the key documents. It is possible to supplement the information in the case with statements given at the hearing, but written statements submitted in advance to the Complaints Board and the opposing party will normally be preferred. In some cases, the Complaints Board deems the initial presentation of the documents in the case to be unnecessary. In that case, the Complaints Board will announce that it is acquainted with the documents in the case and the parties' positions in the pleadings. The Complaints Board may have questions that need clarification or ask for a demonstration of the issue in dispute, see for example the decision of 15 March 2019, Leo Nielsen Trading ApS and Glock Ges.m.b.H. V the Danish Ministry of Defence's Acquisition and Logistics Organisation. The hearing ends with the parties' or their counsel's closing statements after which the case is set down for decision. Deliberations normally start immediately thereafter. Hearings will normally take 4-5 hours, but in major cases, they may take up to 1-2 days. No oral proceedings were conducted in 2021.

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.

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

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

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

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

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

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

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

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

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

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

In the middle of 2020, the Complaints Board decided to publish decisions on access to documents to a greater extent for which reason and in the light of descriptions of the Board's practice from previous years the Board decided that there is no need for the 2021 Annual Report to include a separate chapter on decisions on access to documents.

2. DECISIONS IN SELECTED AREAS

2.1 Introduction

All substantive decisions and decisions on compensation are published on the Complaints Board's website at www.klfu.dk and can be accessed directly at https://klfu.naevneneshus.dk. Interim decisions granting suspensive effect and decisions on access to documents are also published if they are of general interest. Below follows a description of a number of decisions from 2021 that have all been published at the Complaints Board's website. Some of the cases were leading cases. Others deal with issues that, regardless of their specific nature, are likely to be of interest to a wider audience.

The decisions are categorised as follows:

- Competitive tendering obligation, direct award and modification of contracts
- Requirements for specifications, including minimum requirements, and organisation of procurement procedures
- Admissibility and reservations of tenders
- Evaluation, including choice of evaluation model
- Obtaining further information
- Framework agreements
- The Complaints Board Act, including suspensive effect and the Complaints Board's sanctions
- Grounds for exclusion
- Preselection
- Indications of behaviour distorting competition

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

2.2 Selected interim decisions and decisions

2.2.1 Competitive tendering obligation, direct award and modification of contracts

Decision of 26 January 2021, Ishøj Ny Antenneforening v Ishøj Municipality

In connection with the sale of Ishøj Fællesantenne to Stofa A/S, Ishøj Municipality had not acted contrary to the Public Procurement Act or the Concession Directive by refraining from a procurement procedure of services subject to a competitive tendering obligation provided to the municipality by Stofa through the agreement. The various parts in the split ownership where the municipality owns minimum 2 optical fibre pairs per fibre cable used to ensure infrastructure for the municipality and Stofa owns the actual fibre cables and the other optical fibre cables that ensure infrastructure to Internet and TV content for citizens were to be considered inseparably linked and forming an indivisible whole.

The case concerned the municipality's sale of Ishøj Fællesantennenet following a public procurement-like sales process with no insertion of a contract notice. As a link in the sale, the buyer undertook to make the facilities available to the institutions of the municipality at any time, including operations and maintenance

of the facilities. The complainant that so far had run the facilities according to a concession contract claimed that the sales agreement included a service subject to a tendering obligation that should either have been put out to tender according to Title II or Title III of the Public Procurement Act or - in the alternative - as a concession contract.

According to the agreement, the municipality receives from the acquirer, Stofa, a free operating and maintenance service not limited in time and a service concerning other works on the optical fibre cables for which the municipality keeps ownership. The municipality is considered to pay for that service through a lower price for the facilities than what would have been offered if the facilities had been put out to tender without that obligation.

Referring to the decision of 30 November 2017, GlaxoSmithKline Pharma A/S v Statens Serum Institut and the Danish Ministry of Health (page 18 of the 2017 Annual Report) and the case law mentioned therein from the EU Court of Justice within the area of mixed contracts, the Complaints Board considered whether the various parts of the agreement were ”inseparably linked, thus forming an indivisible whole”. The municipality had in fact reserved ownership of two optical fibre pairs per fibre cable and had thus obtained a lower selling price. The agreement does not contain a right for Stofa to provide Internet or TV to the municipality, and the company therefore had no security of winning the municipality as a customer for such provisions. Thus, such provisions were not included in the agreement. However, it was part of the agreement that Stofa was to manage operations and maintenance of the cables, thus also the municipality's optical fibre pair without the municipality having to pay for it. However, that part was to be considered an inseparable part of the main purpose of the contract regarding sale of the facilities which was not subject to a competitive tendering obligation. Therefore, the agreement on provision of the relevant operation and maintenance service was not subject to a separate competitive tendering obligation.

The split ownership that was established through the share transfer agreement according to which the acquirer, Stofa, owns fibre cables as well as optical fibre cables used as infrastructure for the citizens while the municipality keeps the optical fibre cables that were previously used for the municipality and its institutions and according to which Stofa is able to - and for a while in part is obliged to - use (its share of) the facilities to provide TV content and Internet services to the citizens did not imply that there is concession within the meaning of the Concessions Directive.

Thus, the complaint was not upheld.

Decision of 20 April 2021, Doctor S, Doctor K and General Practitioner R ApS v the North Denmark Region

The sale of procurement clinics and regional clinics with provider numbers for general practitioners is not subject to the competitive tendering obligation. A general practitioner who has a provider number performs a task for the region in the form of patient care against payment from the region. This task is not subject to a competitive tendering obligation as the competitive tendering obligation requires a selection among tenderers according to statements from the EU Court of Justice. Such selection is not in question as any (qualified) doctor with a provider number can perform the task mentioned against payment from the region. Whether the doctor bought the provider number from the region makes no difference.

A general practitioner runs its clinic as a private business based on a so-called provider number. The provider number qualifies the doctor for payment from the region for patient care according to a collective

agreement between the Danish Organisation of General Practitioners and a specific national authority. Once the doctor discontinues its activities, the doctor will sell the clinic with its provider number to another doctor who is entitled to run the business as a general practitioner. The buying doctor will then continue the clinic based on the provider number. To ensure that there are enough doctors, the regional may, *i.a.*, acquire a clinic that did not sell after which the region may leave the operation of the clinic to a third party for a limited period of time (procurement clinics). If no relevant bid is received for the procurement procedure of a procurement clinic, the region may run the clinic (regional clinic).

The case concerned the North Denmark Region's conversion of three procurement clinics and two regional clinics into ordinary private medical clinics. The region announced that those clinics with their provider numbers were put up for sale stating that the buyers would be selected among the tenderers according to detailed terms. Three doctors who had submitted bids to buy one or more of those clinics but who had not been awarded any of them complained that the clinics had been sold without having been put out to tender according to the light regime in Title III of the Public Procurement Act as the sales of the clinics concerned a service subject to a competitive tendering obligation that consisted of the right to offer medical consultation on behalf of the region and receiving the associated turnover. The value of that service exceeded the market value of the provider numbers, and the sales were therefore subject to a competitive tendering obligation in their entirety pursuant to the rules on mixed contracts in Section 26 of the Public Procurement Act (Article 3(3), (4) and (6) of Directive 2014/24/EU).

The Complaints Board did not uphold the complaint. The Complaints Board specifically referred to the general arrangement on sales of practices and provider numbers among doctors with any resulting right to provide patient care against payment from the public sector which is not subject to the Public Procurement Directive, therefore nor the Public Procurement Act, see the judgments of the European Court of Justice of 2 June 2016 in C-410/14, Falk Pharma, and 1 March 2018 in C-9/17, Tirkkonen, according to which the competitive tendering obligation requires a selection among interested parties. The sale of provider numbers from a region to general practitioners does not involve other obligations to the buyer than what is implied in the collective agreement and legislation. The fact that some doctors buy provider numbers from a region rather than from another doctor does not mean that the general arrangement should not still be considered an arrangement not subject to a competitive tendering obligation or that the provider number cannot be considered part of that arrangement.

Decision of 20 May 2021, Geelmuyden Kiese A/S v the Municipality of Aarhus

Procurement procedure for a service according to the light regime in Title III of the Public Procurement Act with the award criterion quality. The complaint was filed by an unsuccessful tenderer, i.a. claiming that the successful tenderer should have been excluded due to disqualification and that the contract with that tenderer was an expression of a modification of a fundamental element. The Complaints Board did not uphold any part of the claim.

The case concerned a procurement procedure for a contract as the operator of the annual festival “Internet Week Denmark”. The complainant specifically claimed that the successful tenderer should have been excluded due to an unfair competitive advantage because of disqualification of a senior executive. The relevant person had previously been employed by the municipality and lent out to the festival. Furthermore, the complainant claimed, *i.a.*, that fundamental elements had been modified during the

procurement procedure, thus requiring a new procurement procedure as a requirement stating that the successful tenderer had to make sure that the festival had its own CVR number was changed to making sure to do so if expedient.

The claim was not upheld. There may have been a risk that the municipality's former project manager had acquired relevant knowledge during the hiring, but all relevant knowledge had been passed on during the procurement procedure. Particularly because of the nature and organisation of the procurement procedure, there was then no basis to determine that consequently, the successful tenderer specifically had a competitive advantage that had not been offset by having knowledge of the information at a previous point in time.

The original requirement for a CVR number was not suited to affect potential tenderers' participation in the procurement procedure or the content of the bids. Following that, the fact that it became voluntary to have an independent CVR number was no longer a modification of a fundamental element. The Complaints Board referred to, *i.a.*, Section 178 of the Public Procurement Act (Article 72(4) and (5) of Directive 2014/24/EU) (Title II of the Act). The principles in that provision apply to procurement procedures according to Title III of the Public Procurement Act, see the decision of 27 June 2017, CFD v Den Nationale Tolkemyndighed, to which the Complaints Board also referred.

Furthermore, there was no basis to establish that the municipality had committed errors in the evaluation of the tenders.

Thus, no part of the complaint was upheld.

Decision of 13 July 2021, Vikarlæger.dk A/S v Region Zealand

The estimated value of the directly awarded contract had not been sufficiently assessed and documented by the contracting authority. The contract declared ineffective. No basis to obtain further information from the contracting authority to consider the case.

On 23 May 2017, Region Zealand launched a procurement procedure for a four-year framework agreement on delivery of substitute specialist medical services to somatic hospitals as well as psychiatric units in Region Zealand, expiring on 31 October 2021.

On 5 December 2019, the region concluded a contract with SurgiTeam on medical staffing of the surgical unit, Nykøbing Falster Hospital. The contract that applied from 1 January to 31 December 2020 was subsequently renewed. The contract was concluded without a procurement procedure and without a notice for voluntary ex ante transparency, see Section 4 of the Complaints Board Act.

Vikarlæger.dk was one of several suppliers associated with the framework agreement from 2017. It was therefore also assumed that Vikarlæger.dk could have provided the services for which the region had concluded a contract with SurgiTeam. The company therefore had a legal interest in filing a complaint, see Section 6(1), item 1, of the Complaints Board Act.

During the case, Vikarlæger.dk had requested the Complaints Board to obtain information from the region. However, the information did not concern the claims in such a way that the Complaints Board found it necessary to obtain the information in order to consider the claims.

There was a dispute concerning the value of the directly awarded contract and whether the contract should have been put out to tender. The current agreement had no expiry date and therefore applied until termination at a month's notice.

The Complaints Board stated that when assessing whether the value of the contract is to be assumed to at least correspond to the thresholds of the procurement law, the contracting authority must make a reasoned estimate, thus instituting examinations necessary and sufficient to perform the reasoned estimate, see Section 30 of the Public Procurement Act, its travaux preparatoires and, *i.a.*, the Complaints Board's decision of 27 July 2009, Alfa Laval Nordic A/S v Odense Vandselskab A/S. The contracting authority should make sure to ensure documentation for the reasoned estimate and the examinations performed in those regards. According to the nature of the contracting authority's estimate and the effectiveness of the public procurement rules, the contracting authority must make a conservative estimate. It means that a significant degree of uncertainty as to whether the value of the contract is at least the same as a threshold should generally result in the contract being put out to tender.

Throughout 2020 and in January - March 2021, the purchases from SurgiTeam had a combined value of well over DKK 10.6m

The extent of the purchases, including the increase in purchases, meant that at least already in connection with the invoicing in April 2020 for the first three months of the term of the contract (January - March 2020), there was a significant risk of exceeding the threshold as DKK 696,870 were invoiced for March 2020 only. The threshold was exceeded already with the invoicing in October 2020. The purchases then continued at a similar, high level. It was also stated that during the consideration of the case, the region had taken steps to initiate a new procurement procedure. The region had explained why the purchases were necessary but hat not explained or documented how the value had been assessed.

The Complaints Board found that the Region had not lifted the burden of proving that a procurement procedure could be omitted. The Complaints Board gave importance to the basis of the estimate of the value, the process of the contractual relations and the development, scope and value of the purchases.

As there was an illegal, direct award with no notice for voluntary ex ante transparency, see Section 4 of the Complaints Board Act, the Complaints Board declared the contract (contract relations) ineffective, see Section 17(1), item 1 of the Act. The contract was declared ineffective as of 1 December 2021, thus also considering the considerations that the region had stated to support the circumstance that the contract should not, by way of exception, be declared ineffective, see Section 17(3) of the Act.

The Complaints Board also established an alternative sanction regarding the period for which the contract had been in force, see Section 18(2) of the Act. The economic sanction was set at DKK 700,000, see the explanatory notes to Section 19(1)-(3) of the Act.

Decision of 26 August 2021, HydroCharting ApS v the Danish Ministry of Defence's Acquisition and Logistics Organisation ("FMI")

Contract on software licences had a clear cross-border interest. In its announcement of the contract, the contracting authority had stated that the contract had a clear cross-border interest but claimed during the complaints case that the announcement was not an expression of the contracting authority's assessment of

the issue. However, in the complaint case, the contracting authority had not presented a note or the like stating the contracting authority's assessment of the issue regarding a clear cross-border interest.

The case concerned the purchase of licences for software to clean sonar data. The value of the purchase was assessed at DKK 700,000, thus below the thresholds. The purchase was announced, and FMI stated in the announcement that it was a procurement procedure for "goods and services with a clear cross-border interest".

The contracting authority claimed during the complaint case that the case had to be rejected. To support this, it was claimed that the Complaints Board was not competent to consider the case as the contract put out to tender did not exceed the thresholds in the Public Procurement Directive and did not have a clear cross-border interest. The announcement was not an expression of the contracting authority's assessment of the issue of a clear cross-border interest.

The Complaints Board initially stated that the contract put out to tender was not subject to Title II or Title III of the Public Procurement Act and that the crucial factor to the Complaints Board's competence to consider the complaint then was whether the contract had a clear cross-border interest, thus being subject to Title IV of the Public Procurement Act, see Section 191(1) of the Public Procurement Act.

Referring to the explanatory notes, the Complaints Board then stated that following an overall assessment, specifically considering the fact that the contract concerned the development of a software programme to clean sonar data, the contract put out to tender - regardless of the low value of the contract and the circumstance that FMI did not receive bids or inquiries from foreign companies - had a clear cross-border interest. Regarding the issue of the content of the announcement, the Complaints Board noted that FMI had not presented a note or the like stating FMI's assessment of the issue on a clear cross-border interest.

The claim for rejection was therefore not upheld. The Complaints Board also found that FMI had been entitled and obliged to reject HydroCharting ApS' bid as non-compliant as the bid did not fulfil a minimum requirement.

2.2.2 Requirements for tender requirements, including minimum requirements, and organisation of procurement procedures

Decision of 14 January 2021, Audio Visionary Music A/S v Staten og Kommunernes Indkøbsservice A/S (SKI)

A procurement procedure for a framework agreement divided into eight lots of which two of the lots were "subject to" a so-called East/West model which meant that as a general rule, one lot was not awarded to the tenderer with the lowest price but rather to the tenderer with the second lowest price on the condition that the tenderer with the second lowest price would supply the service at the same price as tendered by the tenderer with the lowest price. Prima facie decision that the model was not legal and that it was likely for the award decision to be annulled. Not granted suspensive effect as the urgency condition was not satisfied.

Reference is made to the interim decision of 29 May 2020 in the Complaints Board's 2020 Annual Report. The Annual Report states that a final decision was made on 14 January 2021 and that the Complaints Board maintained that the model was not legal, and the award decision regarding claims 1 and 2 was annulled.

In a writ of 9 July 2021, SKI referred the matter to the courts.

Decision of 25 March 2021, Jacobs Douwe Egberts DK ApS v Fællesindkøb Fyn

Two different coffee products were comparable as it was clear from the procurement documents how the evaluation price, which was the only evaluation criterion, was calculated. The fact that the tenderers were able to submit one tender only was not contrary to the principle of equal treatment and the principle of transparency.

The matter concerned a procurement procedure for a framework agreement with one supplier on the delivery of coffee, tea and machines etc. to a number of municipalities on Funen. The procurement procedure was designed so that either liquid coffee or instant coffee could be offered, and two bid schedules had been prepared - one for each type of coffee. According to the tender requirements, the tenderers were allowed to offer one type of coffee only, and submitting alternative or parallel bids was not allowed. The award criterion was lowest price which, for the coffee, was calculated based on the price per brewed litre.

An unsuccessful tenderer complained to the Complaints Board and claimed that the procurement procedure had been organised so that the assessment, contrary to the principle of equal treatment and the principle of transparency of Section 2 of the Public Procurement Act (Article 18(1) of Directive 2014/24/EU), would involve a comparison of incomparable products. The complainant also claimed that the procurement documents imposed more obligations on the tenderer that would offer liquid coffee than on the tenderer that would offer instant coffee as the bid schedule for liquid coffee also contained an obligation to offer liquid milk or cocoa if the existing machines at the contracting authority so required. The complainant finally claimed that a price regulation agreement in the contract was not uniform for the two types of coffee as the regulation was according to the amount of dry matter which was different for the two types of coffee.

The Complaints Board stated that the two bid schedules were designed so that the price was calculated the same way for both bid schedules based on the price per litre of brewed coffee times the anticipated annual consumption and that a qualitative evaluation of the coffee was not made. As the bid schedules stated how the evaluation price was calculated, bids with liquid coffee and bids with instant coffee were comparable. The contracting authority establishes based on estimates the requirements for the area put out to tender, and the fact that there were a number of differences in liquid and instant coffee could not - when competing on price per litre of brewed coffee only - lead to the principle of transparency and the principle of equal treatment having been violated.

The Complaints Board also stated that the provision on price regulation was not contrary to the principle of equal treatment and the principle of transparency and that the circumstance that the bid schedule with liquid coffee required for the range to include liquid milk/cocoa when it was also clear to the tenderers that liquid milk/cocoa was not part of the evaluation of the bid did not lead to the bid with liquid coffee and the bid with instant coffee being incomparable.

The Complaints Board also stated that the circumstance that the tenderers either had to offer liquid coffee or instant coffee and therefore could submit one bid only was not contrary to the principle of transparency or the principle of equal treatment either as the bid schedules clearly stated how the evaluation price was

calculated. The tenderers were therefore able to calculate themselves which type of coffee to use to submit the cheapest bid. They therefore had no interest in being able to submit more bids.

Decision of 31 May 2021, Familieplejen Bornholm v the Regional Municipality of Bornholm

The rules of the Executive Order on Reference Bids regarding the terms for reference bids, evaluation, evaluation model and qualification had been observed. No obligation to contract.

The case concerned a procurement procedure according to Title III of the Public Procurement Act (the light regime) of a four-year framework agreement on delivery of consultancy services in connection with the placement of children and young people in foster care etc. The complainant, an unsuccessful tenderer (because the municipality decided to assume the task themselves), specifically claimed that the municipality's reference bid that was submitted according to the Executive Order on Reference Bids had been prepared by disqualified staff, that incorrect preconditions had been applied when calculating various hourly rates, that a quality assessment that did not correspond to the tender requirements had been performed and that the evaluation model applied was unfit.

The municipality had acknowledged that it had not observed the obligation to state that a reference bid would be submitted. There was no basis to establish that the reference bid had been prepared by disqualified staff. The complainant's claim that the reference bid had been submitted on a different basis than according to the tender requirements was based on a number of statements that a different basis of calculation had been applied. Following an interpretation of the provision claimed, the Complaints Board established that such questions were regulated by other provisions in the Executive Order, and there was no basis to uphold that claim, see the adversarial system in Section 10 of the Complaints Board Act.

In relation to the quality assessment, the Complaints Board found that the reply of the reference bid exceeded the maximum number of characters but that the evaluation had considered that as the full description in the reference bid was not part of the evaluation in full as the excess characters had been removed from the evaluation sheets that were used. There was no basis to establish that the municipality had exceeded its discretion at the evaluation.

The Complaints Board also established that Section 160 of the Public Procurement Act does not apply in relation to procurement procedures according to the light regime and that the evaluation model otherwise lived up to the fundamental requirements of transparency and equal treatment.

In relation to the claim for annulment, the Complaints Board established partly that the Board had the competence to consider such claims, partly that the reference bid rules do not aim to regulate the contracting authority's possibility of assuming the task themselves and that there was no basis to annul the municipality's decision regarding the assumption of the task.

Decision of 18 June 2021, Vamed Standordentwicklung und Engineering GmbH v the Region of Southern Denmark.

The decision has been described in more detail in 2.2.8 Grounds for Exclusion.

Interim decision of 9 September 2021, ABB Power Grids Denmark A/S v Femern Bælt A/S

Article 60 of the Public Procurement Directive and Section 154 of the Public Procurement Act did not apply in relation to procurement procedures according to the Utilities Directive. The contracting authority was not obliged to assess whether an applicant met the minimum requirement for economic standing different from what has been established or for a briefer period than established, including considering the fact that a downward adjustment of the revenue requirement/length of the period would mean a modification of the minimum requirement contrary to the principles of equal treatment and transparency in Article 36(1) of the Utilities Directive. It must have been clear to the applicant that at least the requirement for the revenue level had not been met, and the applicant therefore could not have a condition for the parent company as a supporting entity to contribute sufficiently to meeting the minimum requirement. On that basis, the considerations behind the second paragraph of Article 79(2) of the Utilities Directive could not in the existing situation lead to the contracting authority being obliged to enable the applicant to replace the parent company. The time of and the process up to the establishment of the company and the parent company could not lead to a different outcome. The circumstance that not all companies could meet the minimum requirement in terms of economic and financial capacity did not in itself lead to the minimum requirements being contrary to Article 36(1) of the Utilities Directive. The principle of equal treatment does not require all terms in the procurement documents to be neutral in terms of competition for all economic operators. The requirements established in terms of economic standing were reasoned, proportionate and in accordance with Article 36(1) of the Utilities Directive.

The case was heard by two members of the Complaints Board's presidency, see Section 10(6) of the Complaints Board Act, see subsection (4).

The case concerned a negotiated procurement procedure under the Utilities Directive for a contract regarding the establishment, operations and maintenance of a transformer station at the Danish side of the Fehmarnbelt link. The contract had a combined value of EUR 70,000,000. In the contract notice, Femern Bælt had established minimum requirements in terms of the applicant's economic and financial capacity so that the applicants had to meet detailed requirements in terms of revenue and solvency in each of the most recent three financial years. There were no requirements in terms of the length of the accounting periods in the annual accounts.

An applicant, ABB Power Grids, did not meet the requirements in terms of revenue and solvency ratio, and the company therefore based its application for preselection on its parent company, Hitachi ABB, as the supporting entity. Femern Bælt rejected the application referring to the fact that ABB Power Grids and the parent company together did not meet the requirement in terms of economic and financial standing.

In its decision, the Complaints Board established that Article 60 in the Public Procurement Directive on documentation does not apply in relation to procurement procedures under the Utilities Directive. The Complaints Board thus found it important that it has been established in Article 80(3) of the Utilities Directive that the provisions of the Utilities Directive in Articles 59 and 61 apply in relation to subarticles (1) and (2) of the provision while no reference is made to Article 60 of the Utilities Directive which - with respect to subarticle 3 - has been implemented in Section 154 of the Public Procurement Act. The Complaints Board also established that Section 154 of the Public Procurement Act does not apply directly to the Utilities Directive either as the reference in Section 11 of Executive Order No. 1624 of 15 December

2015 on procedures when concluding contracts within water and energy supply, transport and postal services on the use of Section 148 of the Public Procurement Act (the first paragraph of Article 59(1) of Directive 2014/24/EU) according to its wording can only be understood to mean that it is the actual use of the European Single Procurement Document that is made applicable as preliminary evidence of the applicant or tenderer not being subject to grounds of exclusion and of the applicant or tenderer meeting the suitability requirements in connection with selection, see Article 78 of the Utilities Directive.

The Complaints Board found it justified that Femern Bælt had rejected ABB Power Grid's application for preselection as ABB Power Grids - based on the information in the ESPDs - did not meet the minimum revenue requirement laid down.

It was also the Complaint Board's assessment that based on the information stated by ABB Power Grids and the parent company in the ESPDs, it was clear that ABB Power Grids did not meet the minimum revenue requirements and that Femern Bælt therefore was not obliged to investigate any further. The circumstances that ABB Power Grids had referred to regarding the time and process up to the establishment of the companies could not lead to Femern Bælt being obliged to assess the fulfilment of the minimum requirements differently that established or for a briefer period, including the fact that a downward adjustment of the revenue requirement/length of the period would lead to a modification of the minimum requirement contrary to the principles of equal treatment and transparency in Article 36(1) of the Utilities Directive.

According to the content of ABB Power Grids' and the parent company's ESPDs, respectively, that did not contain incorrect information, it had to or should - the way the minimum requirements had been established - also have been clear to ABB Power Grids that at least the requirement in terms of the level of revenue had not been met, and on that basis, ABB Power Grids could not have had a condition that the parent company contributed sufficiently to the meeting of the minimum requirement.

In those circumstances, the Complaints Board found that the considerations behind the second paragraph of Article 79(2) of the Utilities Directive in the existing situation could not lead to Femern Bælt being obliged to enable ABB Power Grids to replace the parent company. In support of the claim, ABB Power Grids had referred to the Complaints Board's decision of 18 January 2019, ALSTOM Transport Danmark A/S v DSB.

Finally, the Complaints Board found it justified that Femern Bælt had laid down requirements in terms of revenue and solvency ratio, respectively, and had at the same time determined that the applicants were to present information in those regards in their annual accounts, see Article 80(2) of the Utilities Directive, see subarticle 1, see Article 58(3) of the Utilities Directive.

The circumstance that not all companies could meet the minimum requirement in terms of economic and financial capacity did not in itself lead to the minimum requirements being contrary to Article 36(1) of the Utilities Directive. In those regards, the Complaints Board noted that the principle of equal treatment does not require for all terms in the procurement documents to be neutral in terms of competition for all economic operators.

There was no basis to disregard Femern Bælt's assessment of the need for capital resources in relation to the size of the revenue and solvency ratio and that information had to go back three years as the requirements laid down for the economic standing based on the existing information, including Femern

Bælt's account during the case, were reasoned, proportionate and in accordance with Article 36(1) of the Utilities Directive.

The complaint was not granted suspensive effect as a prima facie case was not made out. ABB Power Grids subsequently withdrew the complaint, and the interim decision was thus the Complaints Board's final decision in the case.

Decision of 27 August 2021, PricewaterhouseCoopers Statsautoriseret Revisionspartnerselskab v the Danish National Police

The case concerned a procedure concerning a contract regarding delivery, maintenance, support and further development of an IAM solution, meaning an Identity Access Management solution to support user administrator tasks. The complainant, an unsuccessful tenderer, specifically claimed that the company's bid had been incorrectly evaluated and that the negotiation process had not been sufficiently described in the contract notice, among other things that it had not been stated whether remuneration had been paid to the tenderers who participated in the negotiations, see Section 62 of the Public Procurement Act (first and second paragraphs of Article 29(1) of Directive 2014/24/EU). The Danish National Police had not acted contrary to Section 62 (first and second paragraphs of Article 29(1) of Directive 2014/24/EU) as there had been sufficient evidence in the procedure and as there only was an obligation to include information about remuneration where relevant. No annulment.

The Danish National Police launched a negotiated procedure under Title II of the Public Procurement Act for a system to manage user access at the police with the subcriteria price, quality and security of supply. An unsuccessful tenderer filed a complaint that the Danish National Police had committed a number of serious errors in the qualitative evaluation of the complainant's bid, including by having based the evaluation on factually incorrect information that was not stated in the bid. Following a review of the bid, the Complaints Board established that the Danish National Police had misevaluated a few points of the bid but otherwise had not committed errors at the bid evaluation and that to the extent that the evaluation was based on an estimate, the Danish National Police had not acted unreasoned or exceeded the limits for the discretion owed to a contracting authority. The errors that were found in the evaluation had no such significance to the award that the claim for annulment should be upheld.

The complainant also claimed that the Danish National Police had acted contrary to Section 62 of the Public Procurement Act (first and second paragraphs of Article 29(1) of Directive 2014/24/EU) by not describing in the contract notice the anticipated course of the negotiation procedure or whether remuneration would be paid to participants in the negotiations.

According to the contract notice, the Danish National Police reserved the right to award the contract based on the first bid without being involved in negotiations, and the applications that were encouraged to submit bids would receive further practical information about the negotiation procedure which was further described in the tender requirements.

The Complaints Board found that potential applicants and tenderers had been made sufficiently aware of the course of the negotiation procedure. That part of the claim was therefore not upheld.

In terms of any remuneration, the Complaints Board found that neither the contract notice nor the procurement documents stated that the Danish National Police would pay remuneration to the participants in the negotiations and that the Danish National Police did not pay such remuneration during the process.

The Complaints Board also established that the remuneration mentioned is to be assumed to be an important element which could potentially have an impact on the overall competitive situation during the procurement procedure. The Complaints Board then stated that there is an obligation to state when remunerations have in fact been paid to the participants.

However, the Complaints Board found no basis to establish that a contracting authority has acted contrary to Section 62 of the Public Procurement Act (first and second paragraphs of Article 29(1) of Directive 2014/24/EU) by not stating that no remuneration is paid for participating in the negotiations.

That part of the claim was therefore also not upheld.

2.2.3 Admissibility and reservations of tenders

Decision of 15 March 2021, Brdr. Thybo A/S v the Municipality of Horsens

The Municipality of Horsens had not been entitled to accept the successful bid as the bid contained a reservation for the schedule of the conditions of tender which constituted a reservation for a fundamental element. The award decision was annulled referring to the nature of the violation found.

The case concerned a public invitation to tender under the Act on Invitations to Tender for the principal contract in a construction project. The award criterion was the bid with the lowest price. The conditions of tender contained a schedule for the construction project in the form of indications of the start date and end date. The successful tenderer's bid was submitted on the condition that the schedule could be extended with minimum one month. According to the content of the notice of the outcome of the tender, the Complaints Board took into account that the Municipality of Horsens accepted this bid which was also supported by the specification of the contract sum in the project contract. It could indisputably be applied that the condition was a reservation for the schedule and that the reservation thus concerned a fundamental element. The circumstance that the successful tenderer had stated in its bid that an amount of DKK 200,000 was to be added to the contract sum if the schedule could not be extended, meaning that the successful tenderer in fact personally fixed a price for the reservation, could not lead to the Municipality of Horsens being entitled to accept the bid with the addition of that amount as it was stated in the project contract.

The case has been referred to the courts.

2.2.4 Evaluation, including choice of evaluation model

Decision of 11 January 2021, Peak Consulting Group A/S v the Danish Agency for Development and Simplification of the Danish Ministry of Taxation

The decision has been described in more detail in section 2.2.8 Grounds for Exclusion

Decision of 14 July 2021, DXC Technology Danmark A/S v the Danish National Court Administration by the Registration Court

Restricted procurement procedure concerning an IT system with the award criterion best price-quality ratio. The contracting authority had violated the procurement rules as the evaluation model for the subcriterion price did not reflect the anticipated procurement and was an expression of a mix of two bids to be submitted by the tenderers, meaning a bid using specific software and a parallel bid using different software. Annulment of the award decision.

The Danish National Court Administration launched a restricted procedure under Title II of the Public Procurement Act concerning a contract on operations, maintenance, support and further development of digital registration (e-TL) at an estimated combined value of DKK 90m. The award criterion was best price-quality ratio based on the subcriteria price (35%) and quality (65%). The tenderers were to submit bids for an option for the replacement of software from Oracle with a similar, more inexpensive alternative. All costs in connection with the pre-project review and implementation of the replacement were to be included in the prices of the bids, and the anticipated reduced license costs also had to be stated. The Danish National Court Administration was obliged to state not later than six months before the signing of the contract whether the option was requested purchased.

Bids were submitted from DXC and Netcompany A/S, and the Danish National Court Administration decided to conclude a contract with Netcompany whose price was the lowest by far. DXC complained to the Complaints Board and specifically claimed that the monthly fee for operations, maintenance and support had been included twice in the total evaluation price and that both scenarios - meaning both with and without exercising the option - would never have to be purchased. In response to this, the Danish National Court Administration claimed that it was not the same fee that was included twice in the evaluation price but rather two different fees (with and without exercising the option.

The Complaints Board only considered the claims that concerned the evaluation in relation to the subcriterion price and initially established that it is a fundamental principle according to procurement law that the contracting authority must clearly describe what purchases are requested and that the bids are to be evaluated accordingly. The option covered the fees for operations, maintenance and support in the same way as the price that was originally offered. The Danish National Court Administration had not stated if the decision of whether the option was requested purchased had been made at the time of the award decision or the amount at which the final price was to be calculated.

The Danish National Court Administration's structuring of the procurement procedure thus caused - contrary to Section 2 of the Public Procurement Act (Article 18(1) of the Directive 2014/24/EU) and the principle of transparency - uncertainty regarding the purchases requested. In consequence, the evaluation model was an expression of a mix of the two bids to be submitted by the tenderers; a bid using Oracle as software and a parallel bid using different, more inexpensive software. Thus, the evaluation model did not reflect the anticipated purchase on the contract that would in no case include both situations. Among the elements that were part of the criterion price, the operations, maintenance and support fees were consequently given importance in the model used in terms of evaluation which did not reflect the actual purchases.

The Complaints Board then also upheld the claim for annulment of the award decision. The fact that a correction of the evaluation in accordance with DXC's statements would possibly mean that Netcompany had submitted the bid with the best price-quality ratio could not lead to a different outcome.

Decision of 7 April 2021, Urbaser A/S v Silkeborg Genbrug og Affald A/S

The failure of excluding two tenderers from submitting coordinated bids was not contrary to Section 137(1) item 4 of the Public Procurement Act (Article 57(4) paras a, b, c, d, g and i of Directive 2014/24/EU) as the information did not come to light until the complaint case, and the procurement procedure was cancelled due to other reasoned grounds immediately afterwards.

The case concerned a procurement procedure under Title II of the Public Procurement Act for municipal waste collection. The complainant, who was an unsuccessful tenderer, specifically claimed that the successful tenderer and a different company that had also submitted a bid should have been excluded according to Section 137(1) item 4 of the Public Procurement Act (Article 57(4), paras a, b, c, d, g and i of Directive 2014/24/EU) as one of the companies had submitted an unrealistically high price for the purpose of influencing the established price evaluation model.

The award criterion was the best price-quality ratio that weighted 70% and 30%, respectively. The contracting authority's price evaluation model laid down that the bid with the lowest tendered price received maximum points while bids with a tendered price of 30% more received minimum points. Other bids were given points according to linear interpolation. If the actual spread between the tendered prices was bigger than 30%, gearing would be extended by 10% at a time until all compliant bids could be included in the model, however, a maximum of 100%.

The contracting authority had selected the voluntary ground for exclusion in Section 137(1), item 4 of the Public Procurement Act (Article 57(4), paras a, b, c, d, g and i of Directive 2014/24/EU) concerning exclusion of an economic operator when the contracting authority had sufficient plausible indications to conclude that the operator has concluded an agreement with other economic operators for the purpose of distorting competition.

Four bids were submitted during the procurement procedure of which three were in the span between DKK 30.4 and 33.4 m in terms of price. The last bid was DKK 55.2 m. That meant that the final evaluation model went from the original “lowest price + 30%” to: “lowest price + 90%”. The successful bid had submitted the second lowest price of approx. DKK 30.8 m.

The complainant specifically claimed that the successful tenderer and the company that had submitted the bid of DKK 55.2 m ultimately had the same owners and that the companies had coordinated their bid prices so that one of the two associated companies offered an unrealistically high price which caused a change in the “gearing” of the price evaluation model established in advance.

Referring to previous practice, the Complaints Board repeated that a certain discretion is owed to the contracting authority when assessing whether there are such plausible indications of an anti-competitive agreement that it should lead to exclusion of the applicant or the tenderer.

In its decision, the Complaints Board established that it had not been proven that the contracting authority knew at the time of the evaluation and award that the two tenderers in dispute ultimately had the same owners. The circumstance that one of the companies offered a very high price therefore did not in itself constitute "plausible indications" of behaviour distorting competition, see Section 137(1), item 4 of the Public Procurement Act (Article 57(4), paras a, b, c, d, g and i of Directive 2014/24/EU). Nor was there at that time grounds for a duty of examination for the contracting authority.

As the information about the ownership which could give rise to further considerations did not come to light until the complaint case and as the contracting authority had cancelled the procurement procedure immediately afterwards on a reasoned basis that had nothing to do with the complaint case, the contracting authority had not violated the procurement rules as claimed.

The circumstance that the price different found between the most expensive bid on the one side and the three other bids on the other side together with the fact that the price evaluation model established significantly changed through a major price span in the light of the (subsequent) ownership stated at the time of the pronouncement of the decision seemed conspicuous could then not lead a different assessment.

Decision of 27 August 2021, PricewaterhouseCoopers Statsautoriseret Revisionspartnerselskab v the Danish National Police

The decision has been described in more detail in section 2.2.2. Requirements for specifications, including minimum requirements, and organisation of procurement procedures.

Interim decision of 3 November 2021, Meldgaard Miljø A/S v the Municipality of Rebild

Parts of the evaluation model had not been sufficiently clearly described in the tender requirements. It was therefore likely that the claim would be upheld. However, as the urgency condition was not fulfilled, the complaint was not granted suspensive effect.

The complaint concerned a public procurement procedure under Title II of the Public Procurement Act for collection of household rubbish. The complainant, who was an unsuccessful tenderer, had claimed, *i.a.*, that the Municipality of Rebild had acted contrary to Section 160, Section 164 of the Public Procurement Act (Article 67(4) of Directive 2014/24/EU) and Section 2 (Article 18(1) of Directive 2014/24/EU) by not "laying down and describing the content of all parts of the evaluation model and by using an evaluation model that is not suited to identify the most favourable bid in economic terms". Among other things, the complainant had claimed that it was not sufficiently clear from the tender requirements what would be weighted positively/negatively and that the evaluation model was specifically unfit, including in relation to a criterion of a "Local operational office where the cars are parked". According to relevant previous practice, the Complaints Board established that it is not a requirement that a tenderer describe in detail everything that is found important for the assessment according to qualitative subcriteria and sub-subcriteria. The Complaints Board then determined that a criterion in terms of local presence may seem discriminatory as regards tenderers who are not present in the local area, and such a criterion can therefore only be applied if it is reasoned, necessary and well-founded. If such a criterion could not be applied, it was also the municipality's responsibility to ensure that it was clear from the procurement documents that local presence would be positively weighted. The requirements stated were not fulfilled. Furthermore,

circumstances to support local presence being specifically suited to identify the most favourable bid in economic terms had not been stated. It was therefore likely that the complaint would be upheld to that extent. However, as the urgency condition was not fulfilled, there was no basis to grant the complaint suspensive effect.

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

2.2.5 Obtaining further information

Decision of 11 January 2021, Peak Consulting Group A/S v the Danish Agency for Development and Simplification of the Danish Ministry of Taxation

The decision has been described in more detail in section 2.2.8 Grounds for Exclusion

2.2.6 Framework agreements

Decision of 17 February 2021, Systematic A/S v the municipalities of Greve, Holbæk, Ringsted, Køge, Vordingborg, Kalundborg, Roskilde, Næstved, Guldborgsund, Lejre and Slagelse

The municipalities had violated Section 100 of the Public Procurement Act (Article 33(5) of Directive 2014/24/EU), partly by letting the tenderers' information about some so-called use cases form part of the qualitative evaluation of the bids although the framework agreement did not allow that possibility. The municipalities had also violated the principles of equal treatment and transparency through unclear and conflicting information about the importance of use cases and by having used a process in the qualitative evaluation of bids that was not suited to ensure an adequate and uniform evaluation of the bids. On that basis, the Complaints Board cancelled the mini-tender.

The case concerned the use of a SKI framework agreement on "software as a service (software running by the supplier)" in the form of a mini-tender concerning 11 individual delivery agreements on the purchase and implementation and operations of a new, shared IT solution to support five main fields - social, health, care, exercise and abuse. The use was initiated by some municipalities working together for the purpose of concluding separate agreements with each of the municipalities. The mini-tender was completed by inviting tenders from two suppliers under the framework agreement. The complaint was filed by an unsuccessful tenderer from the mini-tender, and the Complaints Board granted the complaint preliminary suspensive effect pursuant to the general rule of the Complaints Board Act on suspensive effect as the rules on the standstill period and automatic suspensive effect do not apply in relation to the use of framework agreements, see Section 3(3), item 2 of the Complaints Board Act, see Section 12(2). The Complaints Board did not consider whether the complaint should be granted final suspensive effect but rather made a final decision in the case.

The award criterion was best price-quality ratio based on the subcriteria price and quality, each with a specified weighting. According to the framework agreement, sub-subcriteria were to be linked to the subcriterion quality with specified relative weighting, including the sub-subcriterion test, which was also part of the mini-tender requirements. Under the description "Functional requirement specification", the mini-tender requirements contained a little less than 100 so-called use cases that contained lists of various processes. In the questions/answers of the procurement procedure, the municipalities stated, *i.a.*: "Use

cases are not requirements, including minimum requirements, but the contracting authority's requests for processes. As they form part of the contract documents that form the basis of the interpretation of the Delivery Agreement, they will form part of the contract documents subsequently but NOT of the evaluation. As they are not requirements, the condition will be that use cases are fulfilled as underlying needs expressed." In other answers during the Q&A, the municipalities stated, *i.a.*, that the tenderers themselves had to select the use cases that they wanted to present.

The Complaints Board found that the municipalities had acted contrary to Section 100 of the Public Procurement Act (Article 35(5) of Directive 2014/24/EU) by basing the mini-tender according to the framework agreement on new terms in the form of functional use cases that had not been determined in advance in the procurement documents for the framework agreement. The Complaints Board initially established that the circumstance that use cases were not directly mentioned in the contractual basis for the framework agreement in relation to the mini-tender could not in itself lead to the municipalities being precluded from using use cases, and this in itself could also not lead to the use cases constituting new terms. The use cases were described and laid down in such a way in the procurement material for the mini-tender that they formed part of the basis for the bid evaluation according to the sub-subcriterion test. According to the answers from the municipalities during the Q&A, the use cases used were not requirements but requests for processes that the tenderers could use as a tool to present the technological structure etc. and that the use cases would not form part of the evaluation. On that basis, the tenderers could have had no doubt that the use cases were not meant as requirements and that the intention was not for them to form part of the evaluation. However, the municipalities had at least in part used the use cases in a different way than declared that the use cases had thus - in accordance with the procurement documents - been included in the evaluation as requirements according to the subcriterion test. According to the framework agreement, the tenderers' presentation should not be a review of how the processes were completed specifically, and it had not been laid down or required that specific requirements to be evaluated could be stated for the completion of the test. As the municipalities had included elements regarding the fulfilment of use cases that had not been laid down or required in the framework agreement for the evaluation of the sub-subcriterion test, the municipalities had acted contrary to Section 100 of the Public Procurement Act (Article 35(5) of Directive 2014/24/EU).

The Complaints Board also found that the municipalities' answers during a Q&A made it unclear to the tenderers which role the use cases did in fact have in the mini-tender, and with their answer, the municipalities had given unclear and conflicting information about the importance of the use cases.

The Complaints Board finally found that the municipalities had violated the principles of equal treatment and transparency in that the municipalities' process for the bid assessment according to the sub-subcriterion test was not fit to ensure an adequate and uniform evaluation. The Complaints Board referred to the fact that the conditions for the mini-tender had been laid down so that the tenderers could determine themselves whether they wanted to make use of the use cases to demonstrate their service and, if so, what use cases they wanted to use. That process meant that the municipalities were not given the possibility to assess the tenderers' solutions on a uniform and transparent basis. The evaluation basis for the two bids were also specifically different as the two tenderers did not use the same number of use cases.

The Complaints Board cancelled the mini-tender as the procurement documents had not been able to form the basis of a legal award decision.

Decision of 9 November 2021, Simonsen & Weel A/S v the North Denmark Region and the Region of Southern Denmark

In its decision of 16 January 2020, the Complaints Board presented a number of prejudicial questions to the European Court of Justice (2020 Annual Report, p. 42) that answered the questions in the judgment of 17 June 2021 (C-23/20). On that basis, the Complaints Board then made a decision in the case. Cancellation and non-binding statement, see Section 14 a of the Complaints Board Act.

The case concerned a public procurement procedure under Title II of the Public Procurement Act for a framework agreement on the supply of tubes for patients at home and institutions. The complainant, who was an unsuccessful tenderer, claimed, *i.a.*, that the Complaints Board had to establish that the regions had acted contrary to Section 56 of the Public Procurement Act (Article 49 of Directive 2014/24/EU) and Section 128(2) (Article 51(2) of Directive 2014/24/EU) and the principles of equal treatment and transparency in Section 2 of the Public Procurement Act (Article 18(1) of Directive 2014/24/EU) by not having stated in the contract notice the estimated amount or the estimated value of the goods to be delivered according to the framework agreement put out to tender and that the regions had acted contrary to the principles of equal treatment and transparency in Section 2 of the Public Procurement Act (Article 18(1) of Directive 2014/24/EU) by not having stated in the contract notice or in any other procurement documents the maximum amount or the maximum value of the goods to be delivered according to the framework agreement put out to tender. In its interim decision of 18 September 2019, the complaint was not granted suspensive effect as the requirement for urgency had not been met.

In its decision of 16 January 2020, the Complaints Board asked the European Court of Justice a number of questions that were answered in the judgment of the Court of 17 June 2021 (C-23/20), see chapter 4.

Based on the Court's reply, the Complaints Board established in its decision of 9 November 2021

- that a contracting authority must state in the contract notice the estimated amount or the estimated value of the goods to be delivered according to the framework agreement put out to tender,
- that the contracting authority in the contract notice or in the other procurement documents also must state a maximum amount or a maximum combined value of the goods to be delivered according to the framework agreement put out to tender and
- that the values and amounts mentioned must be stated combined.

These requirements were not fulfilled. The Complaints Board then established that the violations found did not amount to a procedural error only, and the award decision was annulled.

Pursuant to Section 14 a of the Complaints Board Act, the Complaints Board also gave a non-binding statement that there were no special circumstances that prescribed that the framework agreement be continued, see Section 185(2) of the Public Procurement Act.

In its reply of the prejudicial questions, the Court also established that the circumstance that the contract notices do not live up to the requirements stated could not in itself lead to the agreement being considered concluded without a contract notice as the relevant violation was visible to anyone who therefore had the

possibility to complain. On that basis, the complainant had withdrawn a claim that the agreement was to be declared ineffective.

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

Decision of 6 January 2021, Remondis A/S v Silkeborg Genbrug og Affald A/S

Directly awarded contract upheld by way of exception, see Section 17(3) of the Complaints Board Act.

Following three unsuccessful procurement procedures, Silkeborg Genbrug og Affald A/S ("SGA") had made a direct award to the company HCS of a contract subject to a competitive tendering obligation for waste collection without a publication of a notice for voluntary ex ante transparency, see Section 4 of the Complaints Board Act. SGA claimed to the Complaints Board that the conditions in Section 80(5) of the Public Procurement Act (Article 32(2) of Directive 2014/24/EU) had been met and that Section 2 of the Act (Article 18(1) of Directive 2014/24/EU) and Section 6 (Article 4, paras a-c, Article 13 of Directive 2014/24/EU) had thus not been violated. SGA stated that the contract had been concluded due to an urgent need carried by public interest and with a term as brief as possible.

According to Section 80(5) of the Public Procurement Act (Article 32(2) of Directive 2014/24/EU), a contracting authority may use a negotiated procedure without prior publication when strictly necessary where, for reasons of extreme urgency brought about by events unforeseeable by the contracting authority, the time limits for the open or restricted procedures or competitive procedures with negotiation cannot be complied with.

The Complaints Board referred to the fact that Section 80(5) implementing Article 32(2) of the Public Procurement Directive is a continuation of applicable law and should be interpreted according to the Directive. Article 32(2)(c) of the Directive lays down that "The circumstances invoked to justify extreme urgency shall not in any event be attributable to the contracting authority." Recital 80 of the Directive (and the explanatory notes to Section 80(5) also state that natural catastrophes require immediate action. The Complaints Board found that SGA had the burden of proving that the interim contract with HCS could be lawfully concluded without a procurement procedure. Following a review of the process in connection with the three unsuccessful procurement procedures, the Complaints Board found that SGA had not proven that the direct award of the contract with a term from 1 January 2020 until 20 March 2022 was legal. In terms of time, it had therefore been possible to complete a public procurement procedure and to replace the supplier as of 1 January 2020 where the previous contract expired. That would most likely also have been successful if only one of the procurement procedures had been organised and completed in accordance with the rules pertaining to procurement law.

The Complaints Board then made an assessment according to Section 17(3) of the Complaints Board Act in relation to the question of whether the contract directly awarded should not be declared ineffective by way of exception.

The Complaints Board emphasised that the directly awarded contract concerned the universal service obligation for waste collection in the municipality and that the contract at the time of the Board's decision only had a remaining term of approx. 1 year and 2 months and that the time of delivery for new refuse lorries was 14-18 months. On that background, important considerations to the public interest existed,

rendering it necessary for the interim contract to still be effective, see Section 17(3). The Complaints Board filed a police report regarding the violation as SGA as a limited company is not part of the public administration for the purpose of determining a sanction.

Decision on compensation of 10 February 2021, Eksponent ApS v the Municipality of Gentofte

The successful tenderer's submission of references which did not fulfil the established minimum requirements meant that the bid was non-compliant, and in its decision of 29 April 2020, the Complaints Board annulled the contracting authority's award decision. In its decision of 10 February 2021, the Complaints Board ordered the contracting authority to pay an estimated compensation of DKK 1.2 million to cover the complainant's loss from not having been awarded the contract (expectation damages).

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

Eksponent then made a claim for compensation in the form of expectation damages of approx. DKK 2.2 million, in the alternative reliance damages of DKK 120,000.

The municipality denied liability, referring to, *i.a.*, the fact that the municipality would have cancelled the procurement procedure if it had realised that the alternative was to conclude a contract with Eksponent. During the compensation case, the municipality referred to the fact that it could not accept the IT solution which Eksponent had offered. The municipality also contested Eksponent's statements of loss.

The Complaints Board established that the municipality had acted in an actionable way due to the violations of the procurement rules. According to the information about the evaluation of Eksponent's bid, including the points awarded and the municipality's comments on the solution offered, the Complaints Board could not consider that the municipality would not have accepted Eksponent's solution. As the municipality had therefore not rendered probable that the procurement procedure would have been cancelled if the municipality had acknowledged that the successful bid was non-compliant, Eksponent had a right to compensation in the form of expectation damages.

The compensation was to be fixed based on the anticipated contribution margin attributable to the task put out to tender. Some consultancy hours that could not be allocated to other tasks at short notice were not to be included in the statement of damages, but there was no basis to let the part of the contract put out to tender that concerned maintenance and support be deleted from the statement. On the contrary, it

should be considered that part of the contract concerned options. The compensation was estimated at DKK 1.2 million.

In a writ of 6 April 2021, the Municipality of Gentofte referred the matter to the courts.

Decision of 17 February 2021, Systematic A/S v the municipalities of Greve, Holbæk, Ringsted, Køge, Vordingborg, Kalundborg, Roskilde, Næstved, Guldborgsund, Lejre and Slagelse

The decision has been described in more detail in section 2.2.6 Framework Agreements.

Decision of 25 February 2021, SUEZ Water A/S v Danish Oil Pipe A/S

The complainant was ordered to pay the costs to the respondent although the complainant was successful in claiming that there had been a modification of a fundamental element.

The case concerned a negotiated procurement procedure according to the Utilities Directive on the construction of a new wastewater treatment plant to treat wastewater based on a qualification procedure according to the Utilities Directive. The complaint was filed by SUEZ Water whose bid Danish Oil Pipe had rejected as non-compliant. Danish Oil Pipe cancelled the procurement procedure once the complaint had been filed. SUEZ Water maintained the complaint for the purpose of being compensated for the bid costs.

The Complaints Board found it justified that the bid had been rejected as non-compliant as it was unclear in any case whether the bid met a minimum requirement and as the bid contained reservations that were considered to concern fundamental elements, including in relation to the schedule. Danish Oil Pipe had not had an obligation to check the information, and the risk of the ambiguity lied with SUEZ Water as the tenderer. SUEZ Water was successful in claiming that Danish Oil Pipe had modified a fundamental element during the procurement procedure which Danish Oil Pipe acknowledged.

The Complaints Board found for Danish Oil Pipe in a compensation claim in the form of reliance damages as there was no causal link between the violation found and the amount claimed due to the non-compliance of SUEZ Water's bid.

SUEZ Water was ordered to pay the costs to Danish Oil Pipe although SUEZ Water was successful in its claim that there had been a modification of a fundamental element which would normally lead to an annulment of the award decision. The decision therefore meant that SUEZ Water was considered the unsuccessful party which is to be seen on the background that Danish Oil Pipe had satisfied a legal claim already on receipt of the complaint and that the Board did not uphold the compensation claim.

Interim decision of 7 April 2021, Babcock Scandinavian AirAmbulance AB v the Central Denmark Region, the North Denmark Region, the Region of Southern Denmark, Region Zealand and the Capital Region of Denmark

The case concerned a procurement procedure of four helicopter rescue teams staffed around the clock as part of the operations of the national emergency doctor helicopter plan. The complainant had not been preselected on the grounds that the complainant's application did not meet the minimum requirements for economic and financial standing. Prima facie decision that the complainant's application met the minimum requirements and that it was likely that the decision to not preselect the complainant would be annulled. The complaint was granted suspensive effect.

Being responsible for the procurement procedure for the five Danish regions, the Central Denmark Region put out to tender four helicopter rescue teams staffed around the clock as part of the operations of the national emergency doctor helicopter plan. In the contract notice, the regions established, *i.a.*, minimum requirements for an applicant's economic capacity. The applicant must 1) have equity of at least EUR 7 m in the previous financial year, 2) have had a pre-tax profit in two of the last three financial years and 3) have a solvency ratio of 20% in the previous financial year. It was stated that it was important to the regions that the operator of the task had economic resilience to maintain the task throughout the entire contract period. Therefore, there was a requirement that the operator on its own met the minimum requirements for the applicant's economic and financial standing. To the extent that the applicant claimed the economic and financial standing of other entities, it was a requirement that the entity on which the applicant based its economic and financial standing committed to give the applicant capital contribution if the applicant was awarded the contract or, in the alternative, made subordinated loan capital available to the applicant in the ordinary 10-year term of the contract for the equity and solvency ratio to meet the minimum requirements at the time of the conclusion of the contract. If the applicant claimed capital contribution and/or subordinated loan capital that was made available not later than at the time of the conclusion of the contract, the application had to be accompanied by a binding declaration from the supporting entity to make the capital contribution/the subordinated loan capital available for a period of at least 10 years provided that the applicant was awarded the contract.

Babcock applied for preselection. In relation to the minimum requirements for economic and financial standing, Babcock stated that the company did not rely on the standing of other entities, but the company enclosed a Letter of Support from its parent company. Provided that Babcock was awarded the contract, the parent company declared to increase the share capital in Babcock so that it would meet the financial requirements established in the contract or, in the alternative, make subordinated loan capital available to Babcock in the ordinary 10-year term of the contract with the effect that Babcock met the financial requirements at the time of the conclusion of the contract. In its ESPD, Babcock stated that the company was not dependent on the capacity of other entities to meet the minimum requirements.

The regions rejected Babcock's application for preselection as according to the regions, Babcock did not meet the minimum requirements for economic and financial standing, and the regions stated that it was unclear whether Babcock depended on the parent company to meet the economic minimum requirements. Thus, the regions referred to the following: 1) Babcock did not indisputably meet the requirements for economic and financial standing on its own, 2) Babcock stated in its ESPD that its standing was not based on the capacity of other entities, 3) the application did not contain an ESPD for a supporting entity in the same group and 4) the Letter of Support which the parent company had given did not contain a legally binding promise to make subordinated loan capital available to Babcock or provide capital contribution to the company.

Babcock complained to the Complaints Board about the decision of the regions to not preselect the company.

The Complaints Board found that the requirements from the regions on capital injection or subordinated loan capital did in fact mean that following the capital injection or receipt of the subordinated loan capital, an applicant would meet the economic minimum requirements on its own. In that situation, the applicant would not rely on the economic capacity of a different entity but on its own capacity. As that was the case

for Babcock, the company had not had a duty to state that in its ESPD. On that background and according to the wording of the tender requirements and some replies given by the region during the application process, Babcock had not had a duty to submit an ESPD for the parent company. If it was to be assumed that the regions had intended to establish requirements for an ESPD from the entity to inject capital or provide subordinated loan capital from an applicant, the procurement documents had been unclear at best, and the risk of such uncertainty lied with the regions.

The Complaints Board also found that the submitted Letter of Support from the parent company was so clear that it legally bound the parent company to either inject the necessary capital into Babcock or to provide the company with subordinated loan capital if the company was awarded the contract.

The case was thus considered to be a prima facie case. In relation to the urgency condition, the Complaints Board emphasised that Babcock had not been preselected, thus not precluded from submitting bids. According to the general rules of damages, Babcock therefore could not obtain economic compensation if the company was successful in the claim in the final decision. The condition was met. Finally, the Complaints Board found that Babcock's interest in suspensive effect being granted to the complaint outweighed the regions' interest in a continued procurement procedure. The conditions for granting the complaint suspensive effect had therefore been met.

The regions then cancelled the preselection decision at issue which made Babcock withdraw the complaint.

Thus, the interim decision was the Complaints Board's final decision in the case.

Decision of 8 April 2021, C. Møllmann & Co. A/S v the Municipality of Rudersdal

No legal interest in complaining about mistakes which the contracting authority had already corrected.

In a restricted procedure for framework agreements on trade services, C. Møllmann & Co. ("C. Møllmann") was preselected. The municipality decided to conclude a contract with three of the preselected companies ranked as nos. 1, 2 and 3. Once C. Møllmann, which had not been awarded a contract, objected to the award and complained to the Complaints Board requesting suspensive effect, the municipality withdrew the award decision. A new award decision was then made where C. Møllmann was awarded a contract ranked as no. 2. C. Møllmann was subsequently excluded from the procurement procedure as the company had not submitted documentation by the expiry of a set deadline for information supplied in the company's ESPD, see Section 136(3) of the Public Procurement Act (Article 57(4), paras e, f and h of Directive 2014/24/EU).

The complaint was not granted suspensive effect. During the proceedings, C. Møllmann continued to dispute the legality of the first award although the award had been revoked due to errors to which attention had been called by the company and which the municipality had acknowledged. C. Møllmann also stated that the municipality had acted contrary to the standstill rules by reversing the award decision while the complaint case was pending as a standstill case.

The Complaints Board found that by annulling the first award and making a new evaluation and award, the municipality had corrected the acknowledged error in a legal and relevant way. C. Møllmann therefore had

no legal interest in having those claims that concerned those errors adjudicated. The claims were therefore rejected, see Section 6(1), para 1 of the Complains Board Act.

The Complaints Board also stated that the revocation of the award decision and the renewed evaluation were not contrary to the standstill rules, see Section 3(1), Section 12(2) of the Complaints Board Act and Section 173 of the Public Procurement Act. The Complaints Board stated that the municipality had let the contract formation put on hold until the Complaints Board made a decision to not grant the complaint suspensive effect.

Claims concerning errors in the evaluation in connection with award no. 2 were not upheld.

Decisions of 15 April and 4 October 2021, Dansk Uniform/Chriswear v/Iver Sørensen v the Capital Region of Denmark and the Central Denmark Region.

Unfair cancellation of a procurement procedure as the real reason was the request to conclude a contract with a non-compliant tenderer (and to avoid concluding a contract with the compliant complainant). Annulment of the annulment decision. An interim contract declared ineffective and the contracting entity ordered to pay an economic sanction. The complainant awarded DKK 2.5 m in compensation for expectation damages.

In a procurement procedure according to Title II of the Public Procurement Act for workwear for the emergency response, the two regions received compliant bids from Dansk Uniform and Hoffmann Firmatøj A/S. The contract was awarded to Hoffmann. Dansk Uniform then pointed out that the bid from Hoffmann was non-compliant as the two minimum requirements had not been met. The regions cancelled the procurement procedure and gave various reasons which were without substance. The Central Denmark Region also concluded a direct contract at a value above the threshold with Hoffmann. In its decision of 15 April 2021, the Complaints Board established that the annulment was unfair as the reason really was that the bid from Hoffmann was non-compliant. The Complains Board therefore annulled the decision of the regions to cancel the procurement procedure and declared the interim contract ineffective as the contract was not in accordance with Section 80(5) (Article 32(2) of Directive 2014/24/EU) ("in so far as is strictly necessary where, for reasons of extreme urgency brought about by events unforeseeable by the contracting authority, the time limits cannot be complied with") as stated by the Central Denmark Region. Referring to the explanatory notes to the provision that mention natural catastrophes as an example of such situations, the Complaints Board established that the Central Denmark Region had not lifted the burden of proving that it was legal to make a direct award in the existing situation. When the contract had expired, the Central Denmark Region was ordered to pay an economic sanction of DKK 100,000. A claim for the Complaints Board to establish that the procurement procedure could not be cancelled due to the lack of competition was rejected as such a decision had not been made by the regions.

In its decision of 4 October 2021, the Complaints Board established that the violations were carried by a firm wish to conclude a contract with a specific company and a corresponding lack of will to conclude a contract with Dansk Uniform that was the supplier up till that point and that had submitted a compliant bid. Thus, the violation in its core concerned a lack of will from the regions to conclude a contract with the complainant although its bid was the closest to the selected successful party and without the regions having established reasoned grounds for the refusal at any time. The regions therefore had not committed a wrongful act in relation to Dansk Uniform. It was the responsibility of the regions to render probable that

they would also have cancelled the procurement procedure with the legal reason that too few compliant bids had been received, and that burden of proof had not been lifted. Thus, the requirement for a causal link had also been met. Thus, Dansk Uniform was entitled to compensation in the form of expectation damages that were estimated at DKK 2.5 m.

Decision of 13 July 2021, Vikarlæger.dk A/S v Region Zealand

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

Decision of 30 July 2021, EL-TECH TEAM ApS v AAB Vejle

Bid wrongfully refused as abnormally low. Evaluation incorrect. The contracting authority ordered to prove that the company seeking compensation would not have obtained a higher (thus winning) score in case of a correct evaluation. The burden of proof not lifted and compensation awarded according to the rules on expectation damages.

On 26 November 2020, the Complaints Board made a substantive decision in the case (2020 Annual Report, page 36). In its decision, the Complaints Board found that there had been no basis to reject the bid from EL-TECH TEAM for electrical work (put out to tender) as abnormally law as had occurred, see Section 8(3) of the Act on Invitations to Tender. The decision of 30 July 2021 concerns EL-TECH TEAM's claim for compensation as the company required compensation calculated according to the rules on expectation damages.

The Complaints Board initially found that AAB Vejle had acted in a way that gave rise to liability in damages in relation to EL-TECH TEAM as there had been no basis to reject the bid as abnormally low as established in the previous decision.

However, AAB Vejle had claimed that the housing organisation would have cancelled the tender if it had known that the bid from EL-TECH TEAM could not be rejected as abnormally low. AAB Vejle also claimed - as a new allegation - that the evaluation model had been unfit.

The Complaints Board found that it was AAB Vejle's responsibility to lift the burden of proving that the tender would have been cancelled.

The Complaints Board noted that in its decision of 26 November 2020, the Board had not stated that the evaluation model or procurement documents were otherwise unfit to form the basis for a legal award decision. The burden of proving that the housing organisation would have cancelled the tender was not otherwise found to have been lifted. In relation to the question regarding the application of the evaluation model and the possibility of strategic pricing, the Complaints Board emphasised that the bid schedules contained information about the anticipated amounts (consumption) so that the tenderers could optimise their bids and that the evaluation model was based on that.

The question then was whether it could be applied that EL-TECH TEAM would have been awarded at least 2 points in relation to the subcriterion “Cooperation”. That was a condition for the company to be considered as having submitted the most favourable bid in economic terms, thus also a condition for being

able to award compensation calculated according to the rules on expectation damages. As a rule, the burden of proving that rested with EL-TECH TEAM.

The Complaints Board then reviewed the process of the case. First, the housing organisation had awarded the contract to Lindpro as it had also evaluated the bid from EL-TECH TEAM without finding it abnormally low. When assessing the bids in relation to "Cooperation", the housing organisation had awarded 0 points out of 10 possible to EL-TECH TEAM that was the supplier until that point although the bid undoubtedly should have been given a higher score according to its content. Thus, AAB Vejle had violated the principles on equal treatment and transparency by only awarding the company 0 points as had occurred. However, once EL-TECH TEAM had requested a reason for the award, AAB Vejle rejected the company's bid as abnormally low.

As the grades 1 point and 2 points had not been further defined at the tender and as EL-TECH TEAM's bid contained a number of information to meet the subcriterion, it was then up to AAB Vejle to prove that EL-TECH TEAM would not have been awarded at least 2 points in case of an evaluation. The burden of proof was not listed.

The requirement for a causal link in relation to the advanced claim for compensation measured as expectation damages had then been met.

EL-TECH TEAM had finally calculated its loss at DKK 1,095,085.80 based on an annual lost profit of DKK 365,028.60 and a contract period of 3 years.

The calculation of the claim contained elements of uncertainty, including considering the size of the contribution margin. The documentation presented, including auditor calculations and an annual report, did not sufficiently support the size of the claim.

The compensation was then estimated at DKK 450,000 as suitable compensation for the company's expectation damages considering the 3-year contract.

Interim decision of 9 September 2021, ABB Power Grids Denmark A/S v Femern Bælt A/S

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

Interim decision of 15 October 2021, Verdo Teknik A/S v the City of Copenhagen

The case concerned a restricted procurement procedure under Title II of the Public Procurement Act for the operations and maintenance of, i.a., approx. 400 traffic signal systems in the City of Copenhagen. Under the headline "Maintenance of masts", the requirements specification contained various rather detailed specifications concerning the painting of masts including a specification stating that as a minimum, masts had to be painted every ten years. However, in a Q&A, the contracting authority declared that the tenderers should disregard the "requirement concerning the painting of masts" and that the only requirement then was that "damaged masts must be touched up so that they appear uniform with no damage."

The City of Copenhagen decided to conclude a contract with a tenderer, but approx. 14 days later, the municipality cancelled the procurement procedure referring to irregularities in the procurement

documents. The City of Copenhagen then launched a new procurement procedure for the service, now in the form of an open procurement procedure. In the new procurement procedure as well, the requirements specification contained some detailed specifications concerning the painting of masts under the headline "Maintenance of masts", although not specifying that as a minimum, the masts had to be painted every ten years. In a Q&A, the municipality once again declared that the tenderers should disregard the "requirement concerning the painting of masts" and that the only requirement was that "damaged masts must be touched up so that they appear uniform with no damage." Based on the new procurement procedure, the City of Copenhagen decided to conclude an agreement with a new tenderer. The tenderer that had won the first procurement procedure then filed a complaint with the Complaints Board with some claims concerning the bid assessment. The complaint also included a claim that the municipality had violated the principle of transparency by waiving a minimum requirement concerning the painting of masts.

The Complaints Board made the preliminary assessment that the municipality in its declaration during the procurement procedure stating that the tenderers had to "disregard the requirement regarding the painting of masts" had modified the minimum requirements in the procurement documents as it was expressly stated in the introduction to the requirements specification that the requirements described constituted the minimum requirements.

The Complaints Board then found that the municipality had not lifted the burden of proving that the modification of the minimum requirement concerning the painting did not constitute a modification of a fundamental element which, according to the explanatory notes to Section 2 of the Public Procurement Act (Article 18(1) of Directive 2014/24/EU) as a clear rule requires a new procurement procedure.

It was then likely that the complaint would be upheld, and thus, the prima facie case condition was met.

As the modification could not be made without a new procurement procedure, the requirement for urgency had also been met. Finally, the Appeals Board held that, due to the balance of interests of the parties, suspensive effect should be granted to the complaint. The assessment included, *i.a.*, the nature of the error that the municipality had committed according to a preliminary assessment and the interests to which the municipality had referred.

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

Decision of 9 November 2021, Simonsen & Weel A/S v the North Denmark Region and the Region of Southern Denmark

The decision has been described in more detail in section 2.2.6 Framework Agreements.

Decision of 10 November 2021, A/S Bladkompagniet v HOFOR A/S

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

Decision on costs of 22 November 2021, Rally Point Tactical Scandinavia ApS v the Danish Ministry of Defence's Acquisition and Logistics Organisation ("FMI")

The award of compensation in a complaint case requires that a claim has been made, see Section 14 of the Complaints Board Act. Once a complaint has been withdrawn, the case has been closed and cannot be reopened by claiming compensation in connection with a decision on costs.

The case concerned an open procurement procedure for a framework agreement on the purchase of equipment to clean hand weapons and other small arms. A few days after the receipt of the complaint, FMI cancelled the procurement procedure. On that basis, the Complaints Board requested the complainant to state whether the complaint would be maintained or withdrawn. At the same time, the Complaints Board set a deadline for the parties' comments on costs. Soon afterwards, the complainant withdrew the complaint. Thus, the substantive issues of the case would not be considered. During the exchange of pleadings concerning costs, FMI stated that there were no comments on the costs after which the complainant claimed compensation. Before the case was withdrawn, no claim had been advanced and no reservations had been made to claim compensation. The Complaints Board found that in those circumstances, the complainant had been precluded from claiming compensation during the exchange of pleadings concerning costs. The complainant was then awarded DKK 5,000 in costs.

For similar issues, see, *i.a.*, the Complaints Board's decision of 5 October 2018, Næstved Sprog- og Integrationscenter v the Municipality of Næstved and the Complaints Board's decisions of 8 May 2012, PH-Byg Faaborg A/S v Faaborg Menighedsråd and of 31 January 2012, Noe Net A/S v the Danish Safety Technology Authority.

Interim decision of 30 November 2021, Holbøll A/S v Næstved Fjernvarme a.m.b.a.

Restricted procurement procedure according to the Utilities Directive for district heating mains. Complaint from an unsuccessful applicant for preselection granted suspensive effect according to Section 12(1) of the Complaints Board Act.

A district heating company launched a restricted procurement procedure according to the Utilities Directive for approx. 4.2 km of district heating mains, primarily in residential areas. As a minimum requirement for the technical and professional ability, the applicants for preselection should have carried out and completed two comparable projects within the past five years, meaning projects carried out as a general contract with the establishment of a district heating system in an urban area including main lines and service lines, and the total contract sum for each contract should have been minimum DKK 4 m exclusive of VAT. Furthermore, the applicants had to state up to five reference works for similar projects carried out and completed within the past five years.

The district heating company preselected five of six applicants, and the applicant that had not been preselected filed a complaint requesting the Complaints Board to grant suspensive effect to the complaint, see Section 12(1) of the Complaints Board Act.

The complaint included a number of claims. The Complaints Board found that it was likely that the complainant would be successful in claim 3 according to which the district heating company had violated the principles of equal treatment and transparency by preselecting applicant W although W did not meet

the minimum requirement for technical and professional standing. None of the five references that W had stated contained information that the task had been carried out as a general contract. On the contrary, two of the references were listed as general contracts and three of them as framework agreements. With a more detailed reason, the Complaints Board established that it was not sufficiently evident in W's application that it was a general contract. The Complaints Board referred to paragraph 40 in the judgment of the EU Court of Justice of 10 October 2013 in C-336/12, Manova.

The Complaints Board also found that it was likely that the complainant would be successful in claim 4 on violation of Section 11 of the Executive Order on procedures when concluding contracts within water and energy supply, transport and postal services, see Section 148 of the Public Procurement Act (first paragraph of Article 59(1) of Directive 2014/24/EU) by not allowing the possibility of the applicants for preselection to apply the ESPD as preliminary evidence that the applicants met the suitability requirement and in connection with selection.

Consequently, it was likely that claim 6 for annulment of the decision to preselect the five applicants would be upheld. The case was thus considered to be a prima facie case.

When complaining about the lack of preselection, the requirement for urgency has thus also been met just as a balancing of interests favoured the complainant.

The Complaints Board thus granted suspensive effect to the complaint.

Næstved Fjernvarme a.m.b.a. cancelled the procurement procedure, and the complainant withdrew the complaint.

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

2.2.8 Grounds for exclusion

Decision of 11 January 2021, Peak Consulting Group A/S v the Danish Agency for Development and Simplification of the Danish Ministry of Taxation

According to the principle of equal treatment, a contracting authority is, in case of doubt, obliged to examine whether the establishment of a consortium that is an economic operator (applicant or tenderer) is an expression of an agreement restricting competition contrary to the competition law as such an agreement is invalid. The same applies when an economic operator relies on other entities. If the contracting authority has selected the voluntary ground for exclusion in item 4 of Section 137(1) of the Public Procurement Act (paras a, b, c, d, g, and i of Article 57(4) of Directive 2014/24/EU), the contracting authority has a certain discretion in terms of whether the conditions of the ground for exclusion have been met. If that ground for exclusion has not been selected and the review should therefore be according to the principle of equal treatment only, a safer basis must be required to assume that there is violation of the competition rules, but the contracting authority must also be allowed a certain discretion in those cases.

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

The case concerned a restricted procurement procedure according to Title II of the Public Procurement Act for a framework agreement with four suppliers on business and analysis services for IT, technology and data-related projects at a value of DKK 1.6 b. The award criterion was best price-quality ratio based on the following subcriteria: price (30%) and quality (70%). Use of the framework agreement should occur in case of mini-tenders (reopening of the competition). Nine applicants were preselected that all submitted bids. The Danish Ministry of Taxation decided to conclude a framework agreement with four of the tenderers of which one tenderer supported its economic/financial standing and its technical/professional standing on five other companies - for some of the supporting companies both types of standing, for others only one of the types.

The complaint was filed by Peak Consulting that had not been given a framework agreement and was to the effect that one of the selected tenderers' use of other entities to support its standing was an expression of an illegal agreement restricting competition, that the Ministry of Taxation should have checked some information in that tenderer's bid, that the Ministry of Taxation had committed various errors in the qualitative bid assessment and that the Ministry of Taxation's evaluation model was unfit.

The Complaints Board found that the Ministry of Taxation had not violated the principles of equal treatment and transparency or Section 159(3) of the Public Procurement Act (Article 56(1) and (3) of Directive 2014/24/EU) in that they had not excluded the relevant tenderer according to Section 137(1), item 4 of the Public Procurement Act (Article 57(4), paras a, b, c, d, g and i of Directive 2014/24/EU). In those regards, the Complaints Board stated that the Complaints Board did not have the authority to consider whether the competition law is observed. If the voluntary ground for exclusion in Section 137(1), item 4 of the Public Procurement Act (Article 57(4), paras a, b, c, d, g and i of Directive 2014/24/EU) applies, the Complaints Board may, however, consider the issue as part of the assessment of whether a tenderer is comprised by the ground for exclusion. The Complaints Board may assess whether the contracting authority could have examined in more detail the legality of a consortium agreement or a support agreement. If a consortium submits a bid and the consortium agreement is contrary to the Competition Act and possibly Article 101 of TFEU (on agreements preventing competition), this would mean that the agreement is invalid. The consortium would therefore not be able to deliver the service offered. Similarly, an agreement for one or more competing companies to act as supporting companies could be invalid with the consequence that the tenderer does not meet the suitability requirements. Although the ground for exclusion in Section 137(1), item 4 of the Public Procurement Act (Article 57(4) paras a, b, c, d, g and i of Directive 2014/24/EU) has not been selected, it must, according to Section 2 of the Public Procurement Act (Article 18(1) of Directive 2014/24/EU) rest with the contracting authority to examine whether a bid is based on an illegal agreement restricting competition in cases where there is reason for doubt. As regards the suitability requirement, that obligation is also implied in Sections 140-143 of the Public Procurement Act (Article 58(1)-(5) of Directive 2014/24/EU) (on suitability requirements) and Section 159(2), item 2 (Article 56(1) and (3) of Directive 2014/24/EU) (on the duty for verification of the fulfilment of the suitability requirements), see Section 2. If the contracting authority has selected the ground for exclusion in item 4 of Section 137(1) of the Public Procurement Act (Article 57(4), paras a, b, c, d, g, and i of Directive 2014/24/EU), the contracting authority has a certain discretion in terms of whether the conditions of the provision have been met. If this ground for exclusion has not been selected and the review therefore solely must be according to Section 2 of the Act (Article 18(1) of Directive 2014/24/EU), a safer basis must be required to assume that there is violation of the competition rules. However, in these cases, the contracting authority is allowed a certain

discretion when assessing whether there is the necessary safe basis to assume that a consortium agreement or a support agreement is illegal according to the competition rules. The fact that several companies are behind a bid cannot in itself constitute such safe basis. According to the information provided, Peak Consulting had not requested the Danish Competition and Consumer Authority to initiate an examination to see whether an illegal agreement restricting competition had been concluded, nor was there any other information to see if such an examination had been initiated. On that basis, the Complaints Board found that there had been no such doubt whether cooperation between the relevant tenderer and the supporting companies that formed the basis for the bid constituted an invalid agreement restricting competition that the Ministry of Taxation should have initiated an examination.

Furthermore, the Complaints Board assessed that the Ministry of Taxation had not violated Section 164(2) of the Public Procurement Act (Article 67(4) of Directive 2014/24/EU) (on effective verification in case of doubt of the information and proof in a bid) and the principles of equal treatment and transparency by not having effectively verified the information in the relevant tenderer's bid in terms of having various employees available. Thus, the Complaints Board referred to the fact that a contracting authority is generally not obliged to verifying the information in a bid but that such an obligation may arise if the contracting authority subsequently receives information or proof from a third party raising questions about the accuracy of the applicant's or tenderer's information. The fact that Peak Consulting had informed the Ministry of Taxation in the standstill period that the relevant tenderer is a consultant only did not, however, lead to Ministry of Taxation being obliged to subsequently verify the bid. Furthermore, the tender requirements contained no requirement that certain key tasks were to be performed by the tenderer itself, see Section 144 of the Public Procurement Act (Article 63 of Directive 2014/24/EU).

The Ministry of Taxation had not evaluated or emphasised conditions that were not stated in or could be derived from the procurement documents by a reasonably informed and normally attentive tenderer, and the Ministry of Taxation therefore had not included conditions in the bid evaluation that were beyond the framework of the discretion of the Ministry of Taxation. Therefore, there was no basis to assume that the ministry of Taxation had exceeded the framework applicable to the contracting authority's qualitative assessment or that the Ministry of Taxation had acted unreasoned.

There was no basis to establish that the Ministry of Taxation's evaluation model that was a difference model was unfit to identify the most favourable bid in economic terms. Thus, the Complaints Board had taken into account that the evaluation was done according to a mathematical method stated in advance and that made it clear which method would be used to identify the four bids with the best price-quality ratio. The circumstance that the bids were to be compared two and two did not mean that the evaluation method was unfit, and based on the information about the evaluation method stated in the tender requirements, the tenderers had plenty of opportunities to assess how to optimise their bids.

Decision of 18 June 2021, Vamed Standordentwicklung und Engineering GmbH v the Region of Southern Denmark.

The procurement procedure for the fitting of shell rooms at New OUH was organised in such a way that the successful tenderer's de facto inherent advantages were minimised, and the successful tenderer therefore had not had an undue competitive advantage. There was no basis to establish that the bid had been tailored for the successful tenderer.

The case concerned a negotiated procedure for a project contract for the fitting of shell rooms and moving equipment to New OUH (Odense University Hospital). The successful tenderer had previously won the procurement procedure for the turnkey contract for the construction of the buildings. However, this turnkey contract only concerned the contract for shell rooms in selected functional areas of a particularly high fitting and equipment complexity, and these shell rooms were the ones to now be fitted.

The complainant specifically claimed that the successful tenderer, being the contractor for the shell rooms, had a number of competitive advantages, among other things in that the significant risks and costs linked to the interface issues between the construction contract and the fitting contract did not apply to the successful tenderer and in that the successful tenderer was able to save costs for staff and the establishment and stripping of the construction site by being able to continue the works after the completion of the contract for the shell rooms. In those regards, the complainant also claimed that the contracting authority had not done its best to even out these competitive advantages.

The Complaints Board stated that the successful tenderer had not had an unfair competitive advantage because of its knowledge of the contract for the shell rooms and the schedule. The circumstance that the successful tenderer could save costs for staff and the establishment and stripping of the construction site by being able to continue works at New OUH after the completion of the contract for the shell rooms was an inevitable consequence of the successful tenderer having been the contractor on the building contract, thus a de facto inherent advantage. Considering the fact that the construction site costs alone constituted a minor part of the criterion economy which weighted 30%, the Complaints Board found that the contracting authority had minimised that advantage to a reasonable extent in the way the procurement procedure was organised.

The Complaints Board also stated that it was a mistake that it was stated in the procurement documents that the shell construction was to be transferred directly from the contractor of the shell construction contract to the fitting contractor and that there was no basis to establish that the bid was tailored for the successful tenderer.

Decision of 1 September 2021, Faaborg Værft A/S v Center for Logistik og Samarbejde ApS

The case concerned a negotiated procurement procedure according to the Utilities Directive for a prototype vessel meant to form the basis for the development of an unmanned passenger vessel between Aalborg and Nørresundby.

Center for Logistik og Samarbejde ApS (”CLS”), a non-profit industrial initiative that works to develop competences within, *i.a.*, autonomous shipping and environmentally sound technology in Denmark had concluded an agreement with Tuco Værft on a project to develop the vessel. However, at one time, CLS realised that it was necessary to launch a procurement procedure.

Three shipyards were preselected, but only Mathis Værft and Tuco Værft submitted bids. The third shipyard, Faaborg Værft, filed a complaint before the deadline for the submission of tenders, among other things because Tuco Værft had not been excluded from the preselection due to disqualification.

CLS submitted an account and stated, inter alia, that the parties had a preliminary contract on the project in May 2019. In September 2020, CLS asked Tuco Værft for a ship design for the vessel. The parties

continued the negotiations, and in November 2020, the financing of the vessel fell into place. Later that same month, it was, however, clear to CLS that the building of the vessel had to be launched as a procurement procedure.

CLS now concluded a contract with an outside company that was to manage the preparation of the requirements specifications etc. Due to an enquiry from Faaborg Værft, CLS extended the deadline to ask questions in the bidding round as well as the deadline for submitting bids. A template which Tuco Værft had shared with CLS was uploaded for the preselected companies for the purpose of constituting a working document.

Tuco Værft later won the contract.

The Complaints Board stated that it fell on CLS to prove that Tuco Værft had not obtained an unfair competitive advantage because of its involvement prior to the procurement procedure. The Complaints Board referred to the fact that according to case law from the European Court of Justice, the Court and the Complaints Board, contracting authorities have a significant discretionary margin when deciding whether the bid from a tenderer that has assisted with examinations prior to the procurement procedure should be rejected as it would be contrary to the principle of equal treatment to consider it. Add to that, companies cannot generally be excluded from a procurement process because they have done preliminary works associated with the procurement procedure, and the mere possibility of a conflict of interest is not sufficient. Exclusion may only be according to a specific assessment of the bid which the relevant company submits.

Following a specific review of the process, including the evaluations made during the negotiated procedure, the Complaints Board established that CLS had lifted the burden of proving that Tuco Værft had not obtained a specific, undue, competitive advantage.

The Complains Board gave particular importance to CLS's account concerning cooperation and the differences that could be found when comparing the shared template and the drawn up requirements specifications as well as the changes during the submission of bids. The advantages that Faaborg Værft claimed that Tuco Værft had been given had not been expressed at the evaluation. Finally, importance was attached to the fact that Faaborg Værft had no comments to the schedule or the other procurement documents and that Mathis Værft submitted its bid by the deadline set.

The claim that the bid from Tuco Værft should have been rejected was not upheld.

2.2.9 Preselection

Interim decision of 7 April 2021, Babcock Scandinavian AirAmbulance AB v the Central Denmark Region, the North Denmark Region, the Region of Southern Denmark, Region Zealand and the Capital Region of Denmark

The decision has been described in more detail in section 2.2.7 The Complaints Board Act, including suspensive effect and the Complaints Board's sanctions.

Interim decision of 9 September 2021, ABB Power Grids Denmark A/S v Femern Bælt A/S

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

2.2.10 Indications of behaviour distorting competition

Decision of 11 January 2021, Peak Consulting Group A/S v the Danish Agency for Development and Simplification of the Danish Ministry of Taxation

The decision has been described in more detail in section 2.2.8 Grounds for Exclusion.

Decision of 7 April 2021, Urbaser A/S v Silkeborg Genbrug og Affald A/S

The decision has been described in more detail in section 2.2.4 Evaluation, including the choice of evaluation model Exclusion.

Interim decision of 29 September 2021, OneMed A/S v the Capital Region of Denmark

At the time of the evaluation and award, there were sufficient, plausible indications to conclude that the two tenderers that had each been awarded a lot had concluded an agreement for the purpose of distorting competition, and the Capital Region of Denmark therefore should have examined that circumstance in more detail, see Section 159(3) of the Public Procurement Act (Article 56(1)) and (3) of Directive 2014/24/EU) and Section 138 (Article 57(6) and (7) of Directive 2014/24/EU). The fact that the region chose to award the agreements without having made this examination was therefore contrary to the principle of equal treatment and the principle of transparency in Section 2 of the Public Procurement Act (Article 18(1) of Directive 2014/24/EU).

The case concerned an open procedure under Title II of the Public Procurement Act for two lots on the purchase of nitrile examination gloves. The procurement procedure had been launched as part of the establishment of an EU emergency stock for protective equipment (rescEU). Each lot had a value of approx. DKK 40 m, and the lots were to be awarded to the two most favourable bids in economic terms that could be identified based on the best ratio between the quantity, the quality and the initial delivery that could be made for the contract value determined. In connection with the procurement procedure, the region had activated the voluntary grounds for exclusion in Section 137(1) of the Public Procurement Act, including item 4 on distortion of competition (Article 57(4), paras a, b, c, d, g and i of Directive 2014/24/EU). In the Complaints Board's hearing of the request for suspensive effect, the complainant claimed that the two successful tenderers should have been excluded from the procurement procedure as they had submitted coordinated bids. The Complaints Board made a specific assessment of the circumstances that could indicate co-ordination of the two bids, including the circumstance that there were a number of identical typing errors that not only concerned technical specifications and that the assistance that one of the tenderers had made available to the other tenderer was not reflected in the pricing of the gloves. The Complaints Board then found that the region had been aware of the circumstance as it was stated in an appendix to the evaluation report that it was "direct and clear that one of these tenderers has copied in relation to the other in the requirements specification", and that the copy "shows a degree of co-ordination of bids". To exclude the two tenderers from the procurement procedure due to "sufficient, plausible indications" as claimed by the complainant, the region would, see Section 138 of the Public Procurement

Act (Article 57(6) and (7) of Directive 2014/24/EU) be obliged to first give the relevant parties a suitable deadline after the expiry of the deadline for the submission of tenders to present sufficient documentation for their reliability, and next, such documentation had to fail to be presented or be found insufficient. As the procedure in Section 138 of the Public Procurement Act (Article 57(6) and (7) of Directive 2014/24/EU) had not been followed, the Complaints Board stated in the decision that it was likely that claim 1 "to this extent" would be upheld and that subsequently, it was also likely that claim 4 for annulment of the award decision would be upheld. However, as the urgency condition was not fulfilled, the complaint was not granted suspensive effect. The region subsequently annulled the award decision, and the complaint was then also withdrawn.

Thus, the interim decision was the Complaints Board's final decision in the case.

Interim decision of 9 December 2021, Eastwest Instore Aps v the Capital Region of Denmark

The complaint concerned a new award decision in the same procurement procedure as the interim decision of 29 September 2021 just mentioned, OneMed A/S v the Capital Region of Denmark. After having obtained an account pursuant to Section 138 of the Public Procurement Act, the region had made a new award decision, including to one of the tenderers that had previously been awarded one of two lots. As it was not stated in the evaluation report from the region that the region had made an assessment in accordance with Section 138 of the Public Procurement Act (Article 57(6) and (7) of Directive 2014/24/EU), including as to whether the region had found that the tenderer's account contained sufficient documentation for the tenderer's reliability, it was contrary to the principles of equal treatment and transparency in Section 2 of the Public Procurement Act to award a lot to that tenderer.

The case concerned the same procurement procedure as the Complaints Board's interim decision of 29 September 2021, OneMed A/S v the Capital Region of Denmark. Because of that interim decision, the region had annulled its first award decision and in continuation thereof obtained an account pursuant to Section 138 of the Public Procurement Act from one of the two tenderers (A) that had been awarded a contract through the award decision now annulled. The other one of the two tenderers (B) that had been awarded a contract through the award decision now annulled did not wish to abide by the bid previously submitted and therefore was not part of the evaluation for the purpose of a new award decision. The complainant claimed that A could not be awarded a lot already due to the Complaints Board's previous decision. In the period between the first award decision and the second award decision, no important new information had appeared about the connection between A and B. According to the new evaluation report, the region took for its basis that A had never been comprised by Section 137(1), item 4 of the Public Procurement Act (Article 57(4), paras a, b, c, d, g and i of Directive 2014/24/EU). According to this, the region had not emphasised the self-cleaning measures implemented by A in connection with the new evaluation. The region claimed that the measures could be relied on during the complaint case although the region had not undertaken a review. As there was no important new information and as the region had not made an assessment of whether the measures initiated were sufficient documentation of A's reliability, an assessment that above all must be made by the contracting authority rather than the Complaints Board, the Complaints Board found that it was likely that the claim for annulment of the award decision would be upheld. However, as the urgency condition was not fulfilled, the complaint was not granted suspensive effect. The region subsequently annulled the award decision, and the complaint was withdrawn.

Thus, the interim decision was the Complaints Board's final decision in the case.

3. DANISH JUDGMENTS ON THE COMPLAINTS BOARD'S CASES

This chapter gives an account of final judgments handed down in 2021 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 2021 because they were appealed to a higher court have not been included here.

The Eastern High Court's judgment of 22 December 2021, Joca Trading A/S v the Municipality of Allerød, the Municipality of Rudersdal and the Municipality of Hørsholm, see the Complaints Board's decision of 13 June 2019

The case concerned a procurement procedure for a framework agreement on delivery of rubbish bins. The complaint had been filed by an unsuccessful tenderer claiming that the other tenderers' bids were non-compliant, *i.a.*, due to non-observance of a minimum requirement for container lids, that the tenderers had made mistakes at the qualitative bid evaluation and that the reason for the award decision was not satisfactory. Except for the claim regarding the reason, none of the complainant's claims were upheld. A claim for the annulment of the award decision was therefore not upheld.

The Complaints Board's decision was referred to the District Court of Lyngby. In its judgment of 16 February 2021, the District Court upheld the Complaints Board's decision. The case was appealed to the Eastern High Court. In its judgment of 22 December 2021, the High Court upheld the District Court's judgment. In those regards, the District Court as well as the High Court mentioned that the successful tenderer was obliged to meet the minimum requirement based on the content of the tender list, thus close to a view based on the law of contract stating that the bid was compliant on that background as the tenderer in the case in hand had to bear the risk of the uncertainty which the text material in the bid could cause. Furthermore, both courts found that Joca Trading accordingly had no legal interest in a decision as to whether the bid from a different tenderer was non-compliant.

Comment: In the Complaints Board's opinion, the wording of the judgments, which is characterised by contract law, does not give rise to changes to the Board's standard practice that the tenderer bears the risk of uncertainties in its bid and that in case a bid contains an equivocal statement that can be understood as a reservation as well as not as a reservation, the statement should be deemed a reservation. If it is unclear whether a bid meets a minimum requirement, the bid must be considered non-compliant.

The District Court of Kolding's judgment of 17 December 2021, Fyns Almennyttige Boligselskab v Westflyt Kolding ApS, see the Complaints Board's decision of 6 October 2021

The Complaints Board established that the housing association had violated Section 2 of the Public Procurement Act during a procurement procedure for a framework agreement on moving tasks. The Complaints Board annulled the housing association's award decision and declared the contracts concluded to be ineffective.

As the housing association is not comprised by Section 19(1) of the Complaints Board Act, the Complaints Board filed a police report, see Section 18(3) of the Complaints Board Act.

Before the District Court, Westflyt Kolding ApS admitted the claim in relation to the housing association's claims that the housing association had not acted contrary to Section 2 of the Public Procurement Act and that the contracts were effective and could not be declared ineffective. The particular facts of the background are not stated in the judgment.

The alternative sanction in the form of a fine therefore did not become relevant.

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

The EU Court of Justice's judgment of 17 June 2021 in C-23/20, Simonsen & Weel A/S v the North Denmark Region and the Region of Southern Denmark.

In 2019, the North Denmark Region and the Region of Southern Denmark launched a procurement procedure under Title II of the Public Procurement Act for a framework agreement on the supply of tubes for patients at home and institutions. The complainant, who was an unsuccessful tenderer, claimed, *i.a.*, that the Complaints Board had to establish that the regions had acted contrary to Section 56 of the Public Procurement Act (Article 49 of Directive 2014/24/EU) and Section 128(2) (Article 51(2) of Directive 2014/24/EU) and the principles of equal treatment and transparency in Section 2 of the Public Procurement Act (Article 18(1) of Directive 2014/24/EU) by not having stated in the contract notice the estimated amount or the estimated value of the goods to be delivered according to the framework agreement put out to tender and that the regions had acted contrary to the principles of equal treatment and transparency in Section 2 of the Public Procurement Act by not having stated in the contract notice or in any other procurement documents a maximum amount or a maximum value of the goods to be delivered according to the framework agreement put out to tender.

In its interim decision of 18 September 2019, the complaint was not granted suspensive effect as the requirement for urgency had not been met.

During its consideration of the case, the Complaints Board presented - in the light of the Court's judgment of 19 December 2018 in C-216/17, Autorità Garante della Concorrenza e del Mercato - Antitrust and Coopservice Soc. coop. arl v Azienda Socio-Sanitaria Territoriale della Vallecamonica - Sebino (ASST) and others - a number of questions in its decision of 16 January 2020 as to whether the contract notice in case of a procurement procedure for a framework agreement must contain information about an estimated maximum value and amount and about the consequence of missing information in those regards in relation to the use of the sanction "ineffective" (2020 Annual Report, p. 42).

The Court then went on to answer the Complaints Board's question as follows:

> "1) Article 49 in Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC and items 7 and 8 as well as item 10, para a), in part C of Annex V to that Directive, read with Article 33 of said Directive and the principle of equal treatment and the principle of transparency laid down in Article 18(1) of that Directive, should be interpreted to mean that the contract notice must state the estimated amount and/or the estimated value as well as a maximum amount and/or a maximum value of the goods to be delivered according to a framework agreement and that once that threshold has been reached, said framework agreement will have depleted its effect.

2) Article 49 of Directive 2014/24 as well as item 7 and item 10, para a), in part C of Annex V to that Directive, read with Article 33 of said Directive and the principle of equal treatment and the principle of transparency expressed in Article 18(1) of that Directive, should be interpreted to mean that the estimated amount and/or the estimated value as well as a maximum amount and/or a maximum value of the goods to be delivered according to a framework agreement must be stated in total in the contract notice and that the notice may lay down supplementary requirements which the contracting authority decides and adds to the notice.

3) Article 2d(1), para a), of Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts as amended by Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 should be interpreted to mean that that provision does not apply in case the contract notice is published in the Official Journal of the European Union, but when, firstly, the estimated amount and/or the estimated value of the goods to be delivered according to the framework agreement put out to tender is not stated in that contract notice but in the tender requirements and, secondly, neither said contract notice nor the tender requirements mention a maximum amount and/or a maximum value of the goods to be delivered according to said framework agreement."

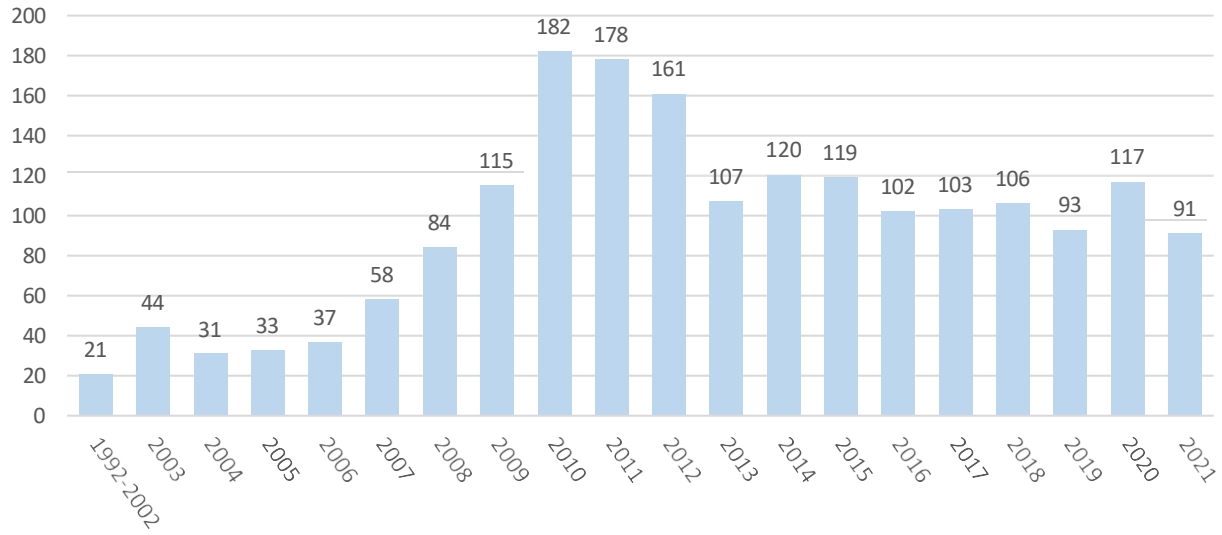
5. THE COMPLAINTS BOARD FOR PUBLIC PROCUREMENT'S ACTIVITIES IN 2021

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 91 complaints in 2021. The below overview illustrates the development in the number of complaints received in 1999-2021.

COMPLAINTS RECEIVED



The number of complaints received in 2021 is below the 2020 level. The number of complaints cases is thus still significantly lower than in 2010-2012.

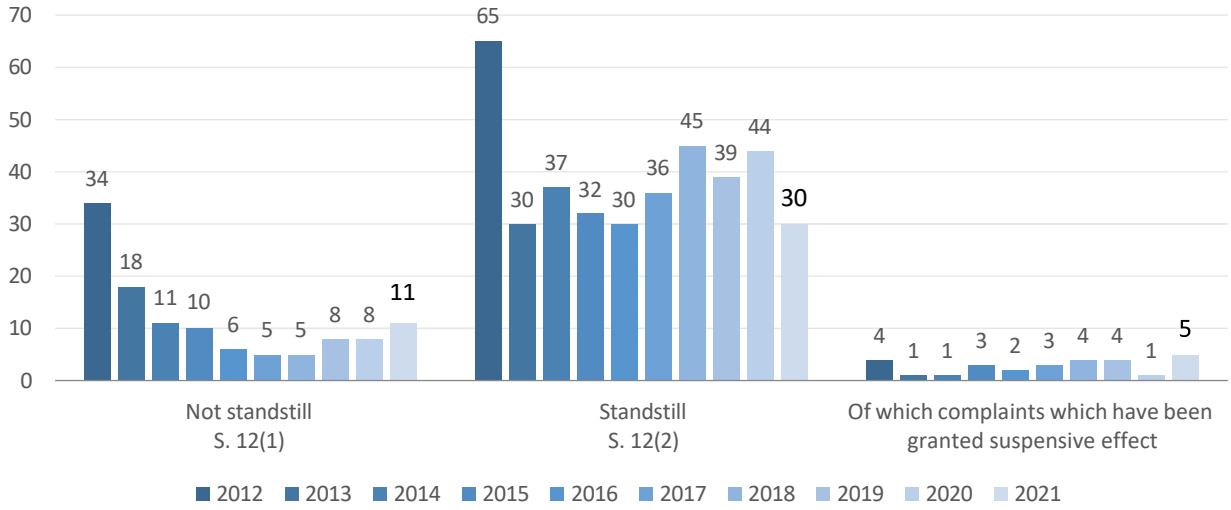
As stated in section 5.1 of the 2013 Annual Report, the sharp decline in the caseload was due to the amendment of the Enforcement Act (now the Complaints Board Act) and the Executive Order on the Complaints Board in 2013, the purpose of which was to bring down the increasing number of complaints. The increase of the complaint fee to DKK 20,000 in cases concerning infringement of the Public Procurement Directive (the majority of cases) as well as the fact that the complainant risks being ordered to pay the respondent contracting authority's costs must be assumed to be decisive factors. The slight decline in the number of cases in 2016-2019 may be explained by the fact that, because of the implementation of the major amendments to the substantive procurement rules, potential complainants have been more cautious, and by the fact that the Complaints Board is no longer competent to adjudicate cases on purchases below the thresholds without a clear cross-border interest, see Title V of the Public Procurement Act.

5.2 Standstill cases and other decisions regarding suspensive effect

As shown below, in 2021, the Complaints Board made interim decisions in eleven cases where a request for suspensive effect had been made under Section 12(1) of the Complaints Board Act, and interim decisions in 30 cases received in the standstill period pursuant to Section 12(2) of the Act, where the Complaints Board has a statutory deadline of 30 days to make its decision on whether to grant suspensive effect. The Board decided to grant suspensive effect to a complaint in five cases in 2021, see section 1.4 above and the description of the decisions in chapter 2. In some cases, the Complaints Board's decision on suspensive effect are made in writing and not as an actual order. These decisions in writing are also included in the figures.

The number of standstill decisions and other decisions etc. regarding suspensive effect made in 2012-2021 is shown below.

STANDSTILL DECISIONS AND OTHER DECISIONS CONCERNING SUSPENSIVE EFFECT



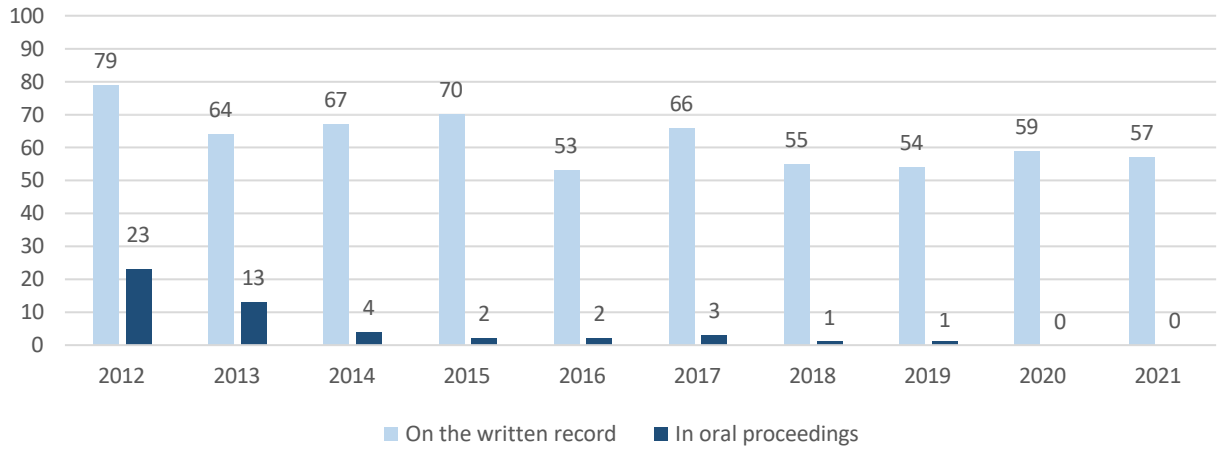
In a number of cases, the Complaints Board's decisions etc. regarding suspensive effect will lead to withdrawal of the complaint due to the Complaints Board's prima facie order where the Complaints Board, based on a preliminary assessment, delivers an opinion on whether the public procurement rules are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

The 49 cases in which the Complaints Board adjudicated on their merits in 2021 (see section 5.4) were all decided on the written record.

Below is an overview of cases considered on the written record and in oral proceedings, respectively, in the years 2012-2021.

CASES DECIDED ON THE WRITTEN RECORD OR IN ORAL PROCEEDINGS



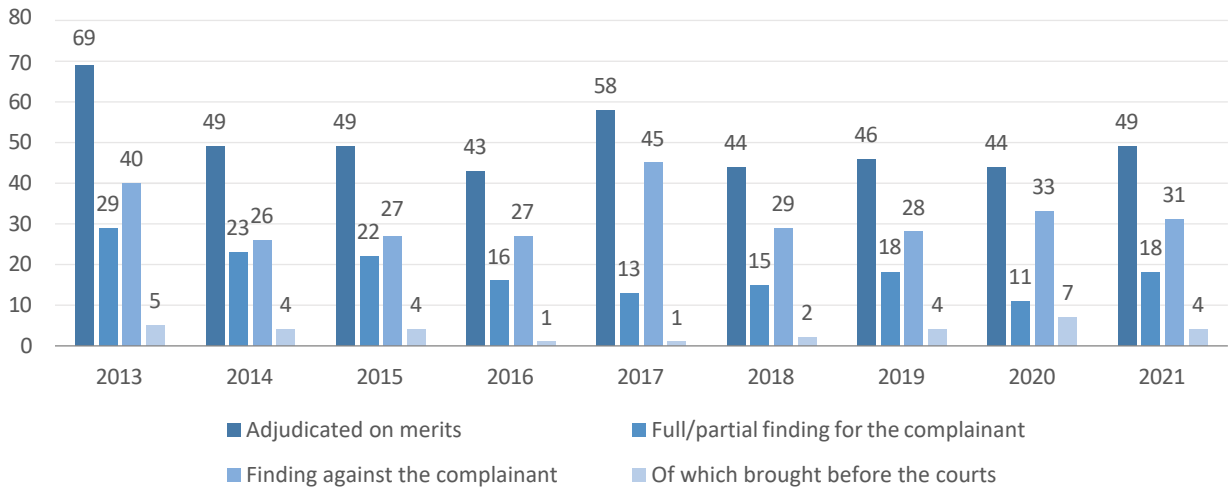
Note: These figures include rejected cases.

The distribution of cases decided on the written record/cases adjudicated in oral proceedings shows that only very few cases are reviewed in oral proceedings. As stated in section 5.3 of the 2013 Annual Report, this decline is in accordance with the legislator's intention. In 2010, Section 11(1) of the Enforcement Act (now the Complaints Board Act) laid down that a case is prepared by the parties exchanging written pleadings and is adjudicated on this basis unless the president of the case decides that the case needs to be heard in oral proceedings. In 2009, which was the year before the entry into force of Section 11(1), there was an equal distribution of these two types of cases. During the case preparation, the parties may request that oral proceedings be held, but experience shows that this only happens in very few cases.

5.4 Resolved cases and their outcome

The Complaints Board adjudicated 49 cases on their merits in 2021. Of these cases, 18 complaints were fully or partly upheld while 31 complaints were not upheld. In the majority of cases, the Complaints Board's decision is the final ruling in the case. Of these 49 decisions, only four where thus referred to the courts of law. The number of decisions referred to the courts is lower than the previous year.

RESOLVED CASES AND THEIR OUTCOME



Note: The number of cases brought before the courts is primarily based on the number of writs of which the Complaints Board has been informed. The Complaints Board cannot be certain that it receives all writs. The Complaints Board requests a copy for 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 2021 was 37%, which was higher than in 2020 but slightly lower than in 2019.

The figures in the graph and in the table below do not include prima facie decisions where they are the final decision made in a complaint case. In 2021, the Complaints Board delivered 23 prima facie decisions. In ten of these, the Board considered the cases to be prima facie cases (that the complaint seems to be well-founded). In seven cases, this led the contracting authority to cancel the procurement procedure or annul its award decision after which the complaint was withdrawn. The interim decision was thus the Board's final decision in the case.

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

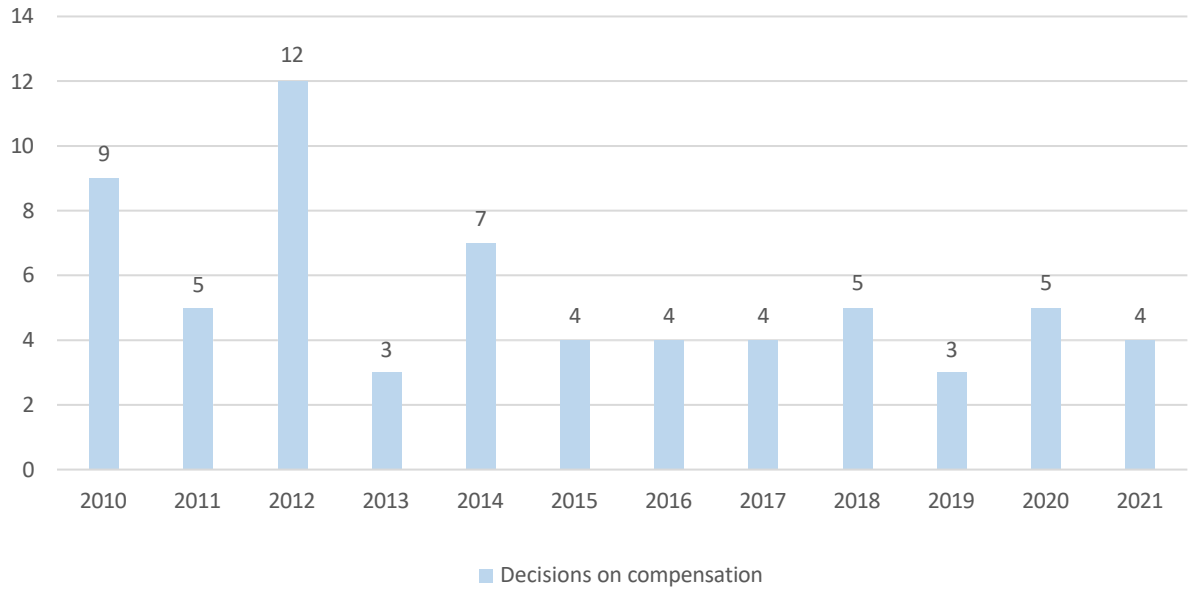
Year	Full/partial finding for the complainant	Finding against the complainant
2013	42%	58%
2014	47%	53%
2015	45%	55%
2016	37%	63%
2017	26%	74%
2018	34%	66%
2019	39%	61%
2020	25%	75%
2021	37%	63%

5.5 Decisions on compensation

In 2021, the Complaints Board made four decisions on compensation.

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

DECISIONS ON COMPENSATION HANDED DOWN BY THE BOARD



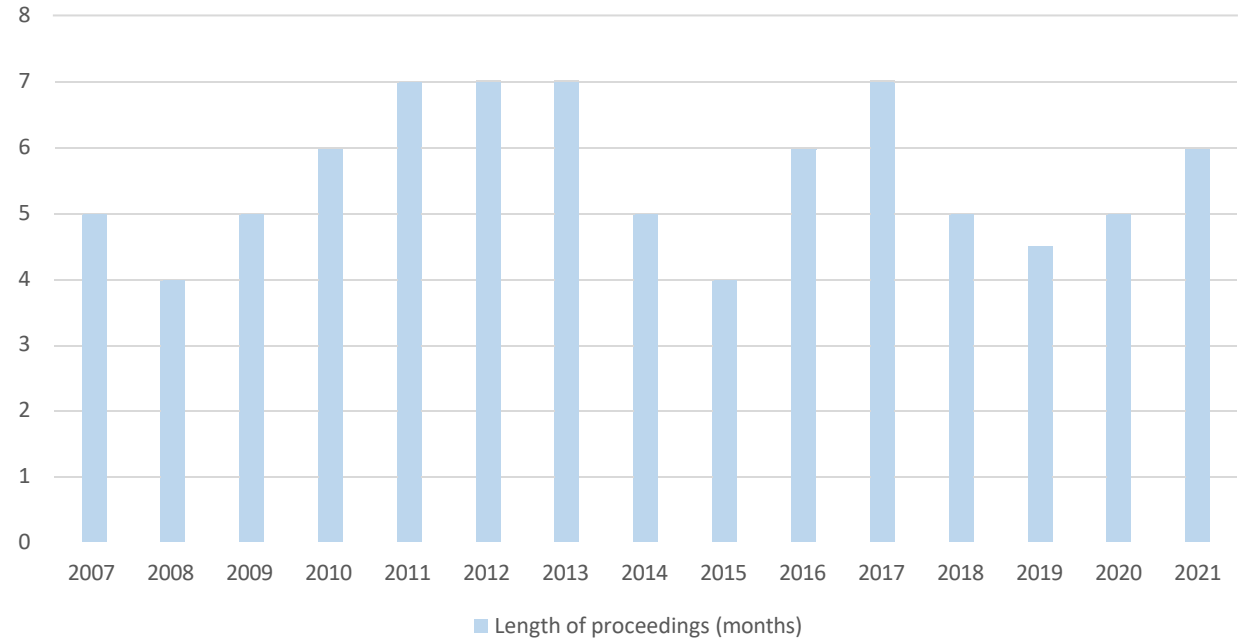
As described in section 5.5 of the 2013 Annual Report, experience shows that in many of the cases in which the Complaints Board has found fully or partly in favour of the complainant in its substantive decision, the issue of compensation is resolved without the Complaints Board where the parties reach 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 2021 was six months.

Below is an overview of the development in the average length of proceedings for rejected cases and substantive decisions in months in 2007-2021.

AVERAGE LENGTH OF PROCEEDINGS



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 and to 4.5 months in 2019.

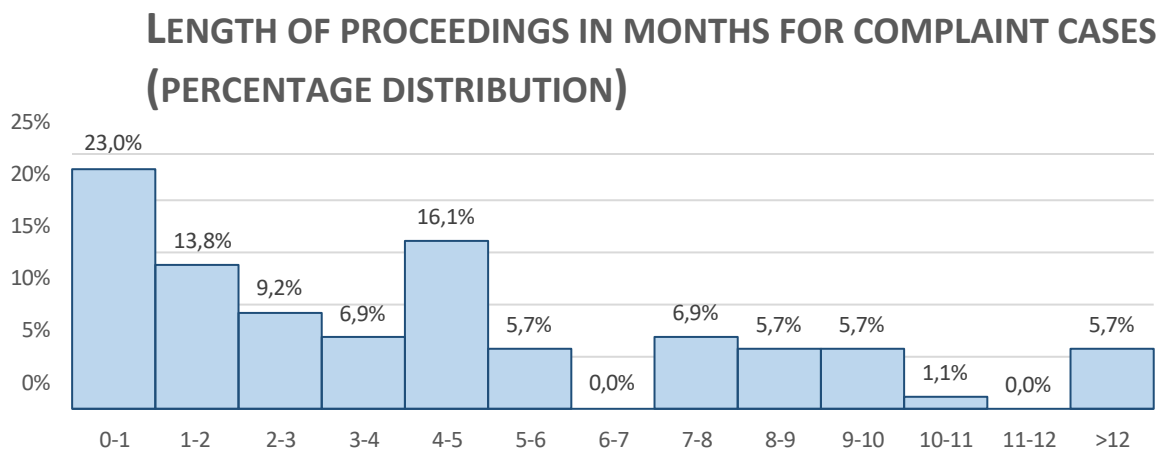
The average length of proceedings increased to six months in 2021, which is on a level with the length of proceedings in 2010 and 2016.

At the end of 2021, there were 43 pending cases which is more or less equal to 2017-2020.

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

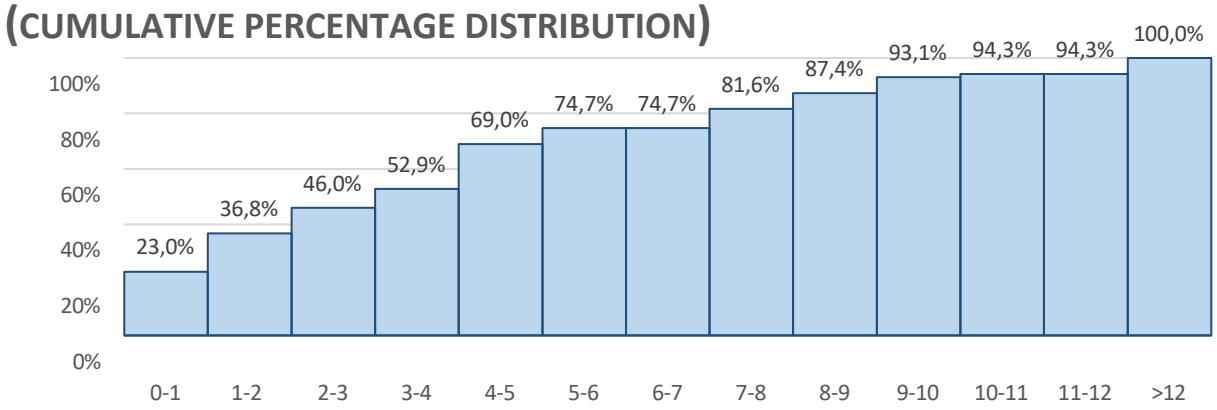
The figure below shows the percentage share of all cases that were closed within 0-1 month, 1-2 months etc. and more than 12 months in 2021. This includes all complaint , i.e. also cases where the complaint was rejected and cases where the complaint was withdrawn, including after the Complaints Board's prima facie decision. Decisions on compensation, which are few and far between, are not included. Reference is made to section 5.8 below for an overview of the cumulative percentage distribution of the length of proceedings in months for complaint cases.

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



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

The figure below shows the cumulative percentage distribution of the length of proceedings in 2021.



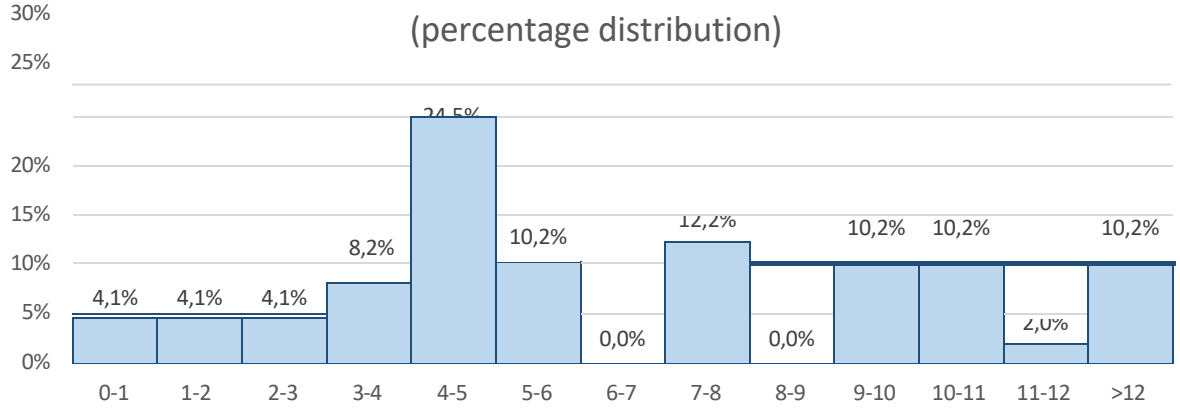
Approx. 23% of the cases were closed within the first month of receipt of the complaint in 2021 against 27% in 2019 and approx. 32% in 2020. Approx. 37% of the cases were closed within the first two months of receipt of the complaint in 2021 against approx. 48% in 2019 and approx. 54% in 2020. It can also be seen that approx. 46% of all cases received in 2021 were closed within three months against approx. 56% in 2019 and approx. 63% in 2020. The figures for 2021 include, *i.a.*, 30 cases where the complaint was withdrawn. In about one third of these cases, the complaint was withdrawn following the Complaints Board's prima facie decision where the Complaints Board makes a preliminary decision on whether the public procurement rules are likely to have been violated. In addition, approx. 75% of the cases in 2021 were closed within five-six months of receipt of the complaint against approx. 84% in 2019 and 80% in 2020, and approx. 93% of the cases are brought to a conclusion within nine-ten months against approx. 97% in 2019 and approx. 94% in 2020.

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 2021.

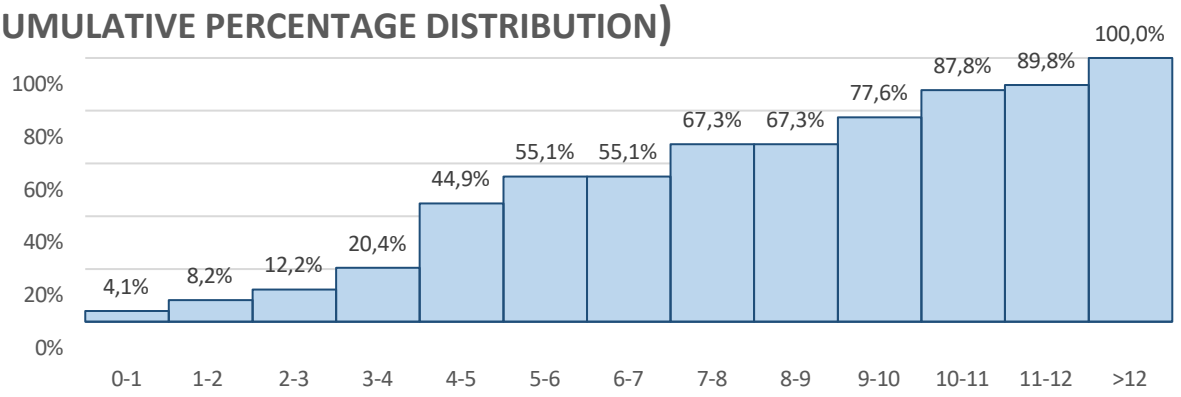
6. LENGTH OF PROCEEDINGS IN MONTHS FOR SUBSTANTIVE DECISIONS



6.1 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 2021.

LENGTH OF PROCEEDINGS IN MONTHS FOR SUBSTANTIVE DECISIONS (CUMULATIVE PERCENTAGE DISTRIBUTION)



The table shows that in 2021, substantive decisions were made within 3-4 months in approx. 20% of the cases in which such a decision was made against 37% in 2019 and approx. 41% in 2020. In 2021, substantive decisions had also been made within five-six months in approx. 55% of cases against approx. 67% in 2019 and 50% in 2020. It can also be seen that substantive decisions were made within seven-eight months in approx. 67% of cases in 2021 against 87% in 2019 and approx. 77% in 2020. The remaining 33% (2019: 13%

and 2020: 23%) of cases where the length of proceedings was longer belong in the category of particularly large and legally/technically complex cases which necessarily take longer to process. With regard to the Complaints Board's length of proceedings for substantive decisions, it is important to note that the work does not only involve making the substantive decision but that in many cases, considerable resources go into making one or more decisions on suspensive effect and access pursuant to the Public Administration Act, see section 5.2 above.

7. THE COMPLAINTS BOARD'S OTHER ACTIVITIES

Due to the COVID-19 pandemic, the Complaints Board's outreach activities in 2021 were limited this year as well compared to the years before the pandemic.

The Complaints Board's President, Nikolaj Aarø-Hansen, and Vice-President, Katja Høeg, made a presentation on 8 February 2021 at JUC Procurement Conference which was virtual. The Board's secretariat participated.

On 29 June 2021, the Complaints Board and the Board's secretariat participated in a virtual meeting in Network of first instance procurement review bodies arranged by the EU Commission.

The Complaints Board's President, Nikolaj Aarø-Hansen, and Vice-President, Kirsten Thorup, made a presentation at JUC Procurement Conference on 17 November 2021, this time with physical attendance. The Board's secretariat also attended the conference.