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Remedies for breaches of the public  
procurement rules in Denmark – Is the  
Danish enforcement system effective?

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# Remedies for breaches of the public procurement rules in Denmark – Is the Danish enforcement system effective?

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## 1 Introduction

Effective enforcement of the EU public procurement rules is important for several reasons. First of all an effective enforcement system has a preventive effect in the sense that it ensures that the EU procurement rules are complied with. If effective remedies are not available, there is greater risk that contracting authorities will not follow the public procurement rules due to the lack of consequences for not doing so. Secondly, effective remedies ensure that an unsuccessful tenderer may seek compensation in cases where a contracting authority has violated the rules or, alternatively, that the procurement procedure is annulled, whereby a new procurement procedure can take place creating a new possibility for the complainant to participate in a competition for the contract. To ensure the above, it is essential that the remedies available are effective, but also that the overall enforcement system is effective including that complaints are dealt with fast and the possibility for a review body to suspend decisions taken by the contracting authorities. This article seeks to analyse whether the system for complaints for breaches of the EU public procurement rules in Denmark is an effective one.

In Denmark, complaints regarding public procurement are dealt with at the Danish Complaints Board for Public Procurement (henceforth the Complaints Board). In Section 2 of this Article, the structure of the Complaints Board is explained, whereas the competences of the Complaints Board is elaborated on in Section 3. Section 4 analyses the types of remedies available for breaches of the EU-procurement rules. Finally, Section 5 states the conclusions and seeks to answer the questions as to whether the Danish complaints system regarding breaches of the public procurement rules is considered as an effective system.

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<sup>1</sup> The rules establishing the Danish Complaints Board for Public Procurement and the remedies available for breaches of the procurement rules in Denmark are analysed in detail by the author in C. Risvig Hamer "*Klagenævnsløven med kommentarer*", Djøf Publishing (a second edition of the book is expected May 19, 2020). See also the annual reports from the Complaints Board, which are published at the website: [www.Klfu.dk](http://www.Klfu.dk).

## 2 The aim and structure of the Danish Complaints Board for Public Procurement

When the Remedies Directive<sup>2</sup> was amended in 2007,<sup>3</sup> this resulted in a new Act regarding enforcement of public procurement rules in Denmark<sup>4</sup>. The Remedies Directives leave it to the Member States to decide, whether complaints should be dealt with at a particular review body or whether the courts alone shall have the competence.<sup>5</sup> In Denmark the Complaints Board for Public Procurement was established in 1992 to ensure potential complainants had an effective and easy access to submit complaints regarding breaches of the EU procurement rules. The legislator had assessed that the regular court system was less suitable for this assignment due to the short period procurement procedures often involve, and there was a need for contracting authorities and tenderers to be guaranteed fast decisions in such cases. Thus, it was the need for rapid and efficient handling of the case, which was the reason that led to creating the Complaints Board.<sup>6</sup>

For complaints in the standstill period, it is mandatory to submit such to the Complaints Board.<sup>7</sup> This is due to the requirement in the Remedies Directive for automatic suspension, which means that if a complaint is launched before the review body during the standstill period, the complaint must lead to an automatic suspension of the conclusion of the contract.<sup>8</sup> In Denmark, the Complaints Board has 30 days from the date of receipt of the complaint to decide upon whether to grant further interim measures.<sup>9</sup> It was found that the regular court system

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<sup>2</sup> 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, [1989] OJ L 395/33.

<sup>3</sup> Directive 2007/66/EC of the European Parliament and the Council of 11 December 2007 amending Council Directives 89/665/EEC with regard to improving the effectiveness of review procedures concerning the award of public contracts, [2007] OJ L 335/31.

<sup>4</sup> Act No 492 of May 12, 2010 on the enforcement of the procurement rules, henceforth the Enforcement Act. The Act was amended by Act No 1556 of December 21, 2010, Act No 618 of June 4, 2011, Act No 1231 of December 18, 2012, Act No 11 of May 27, 2013 and Act nr. 1564 of December 2015 (The Public Procurement Act).

<sup>5</sup> In most Member States it is left to the courts to rule on whether breaches of the EU procurement rules have taken place. See for an overview of certain Member States: S. Treumer & F. Lichère (Eds.) "Enforcement of the EU Public Procurement Rules", DJØF Publishing 2011.

<sup>6</sup> See the preparatory acts to the legislation establishing the Complaints Board, (proposal for Act. No 86/January 1991).

<sup>7</sup> See the enforcement Act, § 5 (1). The standstill-period in Denmark is 10 days, but contracting authorities can choose to have a longer standstill.

<sup>8</sup> See Article 2(3) of the Public Sector Remedies Directive, which, however, only requires an automatic suspension in cases where the subject matter of the complaint concerns the award decision *et. the wording "reviews a contract award decision"*. In Denmark, the suspension has been extended to apply for all sorts of complaints submitted in the standstill period.

<sup>9</sup> See the Enforcement Act, § 12 (2). Each Member State must decide on the length of the automatic suspension, as long as it is ensured that it ends after the expiration of the standstill period, see Article 2(3) of the Amending Remedies Directive.

was not suited for a rapid decision on interim measures and hence complaints in the standstill-period are required to be submitted to the Complaints Board. Complaints outside the standstill-period may still be submitted to the courts, but in practise this does not occur. A decision from the Complaints Board cannot be appealed to another administrative body, but it is possible to bring the case before the regular courts.<sup>10</sup> The Complaints Board receives between 100-120 complaints a year and the average time for deciding a case is currently 5 months.<sup>11</sup>

The Complaints Board consists of a presidency (one chairman and several chairmen) all of which are judges at the courts in Denmark. Furthermore, the Complaints Board has several expert members, which are assigned by the Minister for Industry, Business and Financial Affairs. The expert members must be appointed among persons who have knowledge in particular in the construction field, regarding public procurement, transport, utilities or have legal expertise.<sup>12</sup> One judge, together with one expert member, decides each case.<sup>13</sup> The costs to submit a complaint is 20.000 DKK (approx. 2700 Euro) regarding breaches of the EU-procurement rules and half the amount for breaches of the national procurement rules (below the EU thresholds).

The Complaints Board is an administrative body, but is considered competent to ask preliminary questions to the CJEU, a competence the Complaints Board has used in a few cases and currently three questions relating to the estimates of framework agreements (inspired by C-216/17, *Autoritá*) have been referred to the CJEU.<sup>14</sup>

In Denmark more persons than the minimum requirements in the Remedies Directive dictate<sup>15</sup> are given the possibility to bring complaints to the Complaints Board. This include the Competition and Consumer Authority,<sup>16</sup> as well as other

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<sup>10</sup> See the Enforcement Act, § 8. This did not happen very often. In 2018 only 4 cases were brought before the courts.

<sup>11</sup> In 2018 the average time was 5 months. In 2017 it was 7 months and in 2016 the average time was 6 months. See the Annual Report from the Danish Complaints Board from 2018, p. 4.

<sup>12</sup> The Enforcement Act § 9(2).

<sup>13</sup> Prior to 2011, two expert members and one judge decided the case, making it possible for the judge to be out numbered. This was changed following a few cases where such a situation occurred.

<sup>14</sup> C-23/20, *Simonsen & Weel*, pending. Other cases where questions have been referred to the CJEU are Case of 18 November 1999, *Unitron Scandinavia and 3-S*, EU:C:1999:567 and Case of 24 May 2016, *MT Højgaard and Züblin*, C-396/14, EU:C:2016:347.

<sup>15</sup> According to the Remedies Directive Article 1(3) Member States must ensure that "... the review procedures are available, (...) at least to any person having or having had an interest in obtaining a particular contract and who has been or risks being harmed by an alleged infringement".

<sup>16</sup> The Competition Authority has submitted a complaint to the Complaints Board in 5 cases: Decision of February 25, 1998, *Konkurrencestyrelsen v. Tårnby Kommune*, decision of 24. April 24, 2007, *Konkurrencestyrelsen v. Silkeborg Kommune*, decision of October 16, 2009, *Konkurrencestyrelsen v. Region Hovedstaden & Region Sjælland*, decision of February 10, 2012, *Konkurrence- og Forbrugerstyrelsen v. Frederiksberg Kommune* and decision of August 8, 2017, *Konkurrence- og Forbrugerstyrelsen v. Region Midtjylland*.

authorities and associations (Danish as well as international ones). It is not necessary for these associations to have any particular interest in obtaining the contract in question. Individuals do not have the right to submit complaints.<sup>17</sup>

Certain time limits apply when wishing to complain.<sup>18</sup> The most important ones are 20 calendar days regarding decisions relating to prequalification and 45 calendar days after the contracting authority has published a contract award notice in the OJ.

### 3 The competences of the Complaints Board for Public Procurement

The Complaints Board has competence to decide cases regarding breaches of the EU procurement rules including the Treaty principles for contracts outside the EU Directives. However, if a contract is not covered by any national procurement rules and lack cross-border interest, the Complaints Board cannot rule on the case.<sup>19</sup> This means that if a complainant wishes to bring a complaint regarding breaches of national administrative law principles when awarding a public contract, without cross-border interest a complainant must use the court system. This creates an odd situation where complaints regarding minor procurement do not benefit from the faster and more effective complaints system at the Complaints Body and in practise this means that complaints regarding these contracts have been cut off.

In the Danish procurement Act, Section 1 deals with the aim of the Act and states "*The purpose of this Act shall be to establish the practices for public procurement and thus enable optimum use of public funds via effective competition.*" However, the Danish Complaints Board is not competent to decide cases relating to the aim of the procurement rules. This means that whether or not a given procedure creates sufficient competition is not for the Complaints Board to decide upon. The contracting authority is free to decide what it wants to purchase and under which conditions even if that decision/purchase involves limiting competition as long as there are more than one potential supplier.

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<sup>17</sup> Neither in decision of July 14, 2005, *Nabofronten v. Østkraft* did a group of individuals have standing nor in decision of July 7, 2006, *Heine Petersen v. Økonomisstyrelsen* did a consultant for a potential tenderer have standing.

<sup>18</sup> Prior to the Enforcement Act from 2010 no time limits existed in Denmark, but even though a working group from 2007 had recommended not to introduce time limits, such were introduced when implementing the Amending Remedies Directive.

<sup>19</sup> The Complaints Board is quite reluctant to establish cross-border interest. See on the this topic C. Risvig Hamer, "Kravet om "klar grænseoverskridende interesse" i udbudssager – er kravet egentlig klart? U.2015B.200.

The Complaints Board can only take into account rules and principles, which they have been granted the competence to do.<sup>20</sup> This means that rules relating to e.g. contract law, administrative law, competition law etc. falls outside the competence of the Complaints Board and since not many cases are appealed to the regular courts, the complaints system in Denmark on public procurement mainly deals with breaches of EU public procurement law and in this regard the procurement principles.<sup>21</sup>

## 4 Remedies

The Complaints Board has the power to grant interim measures, to set aside decisions, to award damages for breaches of the procurement rules and to declare certain types of contracts ineffective.

### 4.1 Interim Measures

As mentioned above in the introduction, complaints which are submitted in the standstill-period must be submitted to the Complaints Board. Hereafter, the Complaints Board has 30 days to decide whether further suspension of the procurement procedures must take place. Interim measures are important because procedures to award public contracts are of short duration, which means that potential infringements need to be dealt with urgently.<sup>22</sup> Member States can choose to state conditions for granting interim measures in their national legislation, but the legislation may also be silent on the matter. This is to some extent the situation in Denmark, where the Enforcement Act only states that interim measures can be granted if there are “*special reasons*”. This has let the Complaints Board to turn to the case law from the CJEU to determine the criteria that must be met to grant interim measures.<sup>23</sup> Three conditions must exist before interim measures is granted.<sup>24</sup> First, the granting of interim measures must be justified establishing a *prima facie* case for the interim measures (*Fumus boni Juris*). Second, there must be a need for the interim measures in the sense that the circumstances of the case give rise to urgency in order to avoid serious and

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<sup>20</sup> The Complaints Board is also bound by the parties claims, but can guide in the right direction for certain claims, see e.g. decision of March 21, 2018, Scientia Ltd. V. Aarhus Universitet.

<sup>21</sup> The Complaints Board also have competence to decide cases relating to access to information in procurement cases. See on this point C. Risvig Hamer “Transparency and access to information in public procurement procedures in Denmark.” In A. Sanchez-Graells, A., K.M. Halonen, & R. Caranta, (Eds.), *Transparency in procurement (EPLS vol 9)*, Edward Elgar, pp. 106-128.

<sup>22</sup> Recital 5 of the first Public Sector Remedies Directive. Also repeated in Case of 15 May 2003, *Commission v Spain*, C-214/00, EU:C:2003:276, paragraph 96.

<sup>23</sup> See, for example, decision of October 16, 2007, *Kuwait Petroleum A/S v. Sønderborg Kommune*.

<sup>24</sup> See also Article 104(2) of the Rules of Procedure of the General Court.

irreparable harm to the complainants interests. In practise this means that if damages is an option, there will be no need for interim measures. However, the CJEU has found in *Vanbreda* that if an unsuccessful tenderer is able to show that there is “...a particularly serious *prima facie* case, it cannot be required to establish that the rejection of its application for interim measures risks causing it irreparable harm (...)”.<sup>25</sup> This requirement has also found its way in to practice from the Danish Complaints Board.<sup>26</sup> The final condition for granting interim measures is that the Complaints Board will need to balance the parties interests, which entails considering the complainant’s need for interim measures versus the harm that such interim measures can bring to the contracting authority. This balance will depend on the contract in question, hereunder the public need for receiving the service, and the undertaking’s need for being granted interim measures. It happens that the Complaint Board only refer to one of the conditions when not granting interim measures, this was e.g. the case in a recent decision on a regions procurement for hospital beds (as a consequence of COVID-19), where the Board did not grant interim measures because “...the obvious interest of the regions in being able to conclude contracts on hospital beds as soon as possible in order to secure the necessary capacity in hospitals.”(my translation).<sup>27</sup>

In almost all complaints the complainant will claim that the decision to award the contract should be suspended. However, complaints are rarely suspended in Denmark.<sup>28</sup> Often the decision is taken based on the *fumus* condition, but many cases it is the urgency requirement which is not fulfilled. Most complaints are submitted in the standstill-period, where the procedure is automatic suspended. The Complaints Board have 30 days to decide whether a complaint should be granted further interim measures. The Complaints Board’s reasoning on “*fumus boni juris*” can be quite detailed. This means that the complainant is given an idea whether there is in fact something to complaint about. If there is, then the Contracting Authority will often on this stage annul their own procurement procedure instead of waiting the final judgment. If the Complaints Board on the contrary state regarding *fumus*, that it does not look like there has been a breach, then the complainant will often withdraw the complaint instead of waiting the final judgment. Thus, interim measures here function as a way to stop complaints at an early stage rather than actually stopping the procurement procedure.

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<sup>25</sup> Orders of the Court of 23 April 2015, *Commission v Vanbreda Risk & Benefits*, C-35/15 P(R), EU:C:2015:275.

<sup>26</sup> See e.g. Decision of June 26, 2017, *Eltel Networks A/S v. Region Syddanmark* and decision of July 12, 2019, *Semi-Stål A/S v. Region Hovedstaden*.

<sup>27</sup> Decision of March 18, 2020, *Alcyon ApS v. Region Hovedstaden, Region Midtjylland, Region Nordjylland, Region Sjælland*.

<sup>28</sup> In 2018 suspension was granted in 4 cases and in 2019 also 4 cases.

## 4.2 Ineffectiveness

Only in very few cases has a contract been declared for ineffective by the Complaints Board<sup>29</sup>. The concept of ineffectiveness is a new EU concept,<sup>30</sup> which must lead to “... *that the rights and obligations of the parties under the contract should cease to be enforced and performed.*”<sup>31</sup> It is for Member States’ national law to provide for either the retroactive cancellation of all contractual obligations (*ex tunc*) or limit the scope of the cancellation to those obligations that still have to be performed (*ex nunc*). In the latter case, Member States shall provide for the application of alternative sanctions within the meaning of Article 2e(2).<sup>32</sup> At first the Danish legislator had decided that the Complaints Board should be given the competence to decide whether a contract was ineffective *ex nunc* or *ex tunc*. The key rule was that contracts are declared ineffective *ex nunc* except for cases in which it is possible to return the goods to the contractor in the same condition as they were delivered. However, in 2011 this was changed and it is no longer possible for the Complaints Board to declare a contract ineffective *ex tunc*. The reason for the change was merely to simplify the rules and ineffectiveness *ex tunc* had never been used.

Ineffectiveness is regulated in the Enforcement Act §§ 16-17 and covers only those situations mentioned in the Remedies Directive. § 16 of the Act concerns situations where the Complaints Board has been given discretion to decide whether the sanction of ineffectiveness is appropriate for breaches of the rules on standstill and automatic suspension. In a decision of May 7, 2015, Rengoering.com A/S v. Ringsted Kommune, a complaint had been submitted to the Complaints Board in the standstill period, leading to automatic suspension. However, the contracting authority had not been informed of the complaint (and hence that it was automatic suspended) and signed the contract when the standstill period expired. The Complaints Board found that § 16 did not contain any exceptions for good faith. However, the contract was not declared ineffective but instead a small economic sanction of 25.000 DKK (the minimum sanction) was issued.

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<sup>29</sup> Less than 15 cases, see further C. Risvig Hamer “Klagenævnsloven med kommentarer”, Djøf Publishing (a second edition of the book is expected May 19, 2020).

<sup>30</sup> Regarding ineffectiveness as a new concept see, for example, Clifton, Michael-James “Ineffectiveness – The New Deterrent: Will the New Remedies Directive Ensure Greater Compliance with the Substantive Procurement Rules in the Classical Sectors?” [2009] PPLR n°4, pp. 165-184, p. 168, who states: “It is perhaps unsurprising that the Commission turned to a new term (...) after so many other formulations, which necessarily have long and specified histories in the jurisdiction of the Member States had been used in the waste case (Commission vs. Germany)”.

<sup>31</sup> Recital 21 of the Amending Remedies Directive.

<sup>32</sup> Article 2 d (3) of the Public Sector Remedies Directive. These alternative sanctions must be either fines or shortening of the duration of the contract. However, Member States are not required to implement alternative sanctions, but if they do not provide such alternatives then the contract must be declared ineffective *ex tunc*.



The case has led to the practise that contracting authorities will often ask the Complaint Board after the expiry of standstill whether any complaints have been submitted.

The Enforcement Act § 17 relates to those situations where the Complaints Board is required to use the ineffectiveness sanction (unless exceptions can apply).<sup>33</sup> The most important breach of the procurement rules, which can lead to ineffectiveness after this provision, is direct award of a contract.<sup>34</sup> Direct award of a contract covers both the situation where the contracting authority, on purpose, awards a contract directly to an undertaking without any form of competition and transparency as well as situations where the contracting authority mistake a contract not to covered by the procurement directives, and therefore does not publish a contract notice before entering into the contract. The Complaints Board has declared contracts for ineffective due to wrongful use of the in-house exemption<sup>35</sup> due to the fact that direct award was not permitted because more than one supplier exist<sup>36</sup> as well as substantial modification of contract<sup>37</sup>.

In case a contract is not declared ineffective, alternative sanction applies. Here the Complaints Board may issue an economic sanction for certain public contracting authorities, but not for e.g. utilities and shareholding companies like SKI. In the latter cases it is for the courts to rant a fine. The reason for not giving the Complaints Board the competence to issue economic sanctions in these situations was due to the European human rights convention Article 6 (the right to fair trial). The arguments was that since the economic sanction had character of a penalty it was found that the Complaints Board (as an administrative body) should not be given the competence to issue economic sanctions regarding private undertakings.<sup>38</sup>

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<sup>33</sup> See the Amending Remedies Directive Article 2d (1).

<sup>34</sup> The Amending Remedies Directive Article 2d (1), litra a, states "... if the contracting authority has awarded a contract without prior publication of a contract notice in the Official Journal of the European Union without this being permissible in accordance with Directive 2004/18/EC;" Direct awarding of a contract has by the CJEU been found to be the most serious breach of the procurement rules, see Case of 11 January 2005, *Stadt Halle and RPL Lochau*, C-26/03, EU:C:2005:5, paragraph 37.

<sup>35</sup> See e.g. August 20, 2012, *Intego A / S v NRGi Net A / S*. Fine of 1,5 mil. DKK (approx. 200.000 Euro). See also decision of January 10, 2014, *Sønderborg Affald A/S v. Affaldsregion Nord I/S*. Economic sanction of 500.000 DKK (approx. 67000 Euro).

<sup>36</sup> The first case was decision of January 3, 2012, *Danske Arkitektvirksomheder v. Thisted Gymnasium* (penalty of 80,000 DKK (Approx. 10.700 Euro).) An almost identical situation was found in the Board's decision of January 13, 2012, *Danske arkitektvirksomheder v. Skanderborg Gymnasium*, where the economic sanction was sat at 45.000 DKK (Approx. 6000 Euro).

<sup>37</sup> See e.g. Decision of September 27, 2018, *Staples Denmark A/S mod Aalborg Kommune, Brønderslev Kommune, Læsø Kommune, Nordjyllands Beredskab I/S og Nordjyllandsværket A/S* or decision of May 4, 2016, *CGI Danmark A/S v. Moderniseringsstyrelsen*.

<sup>38</sup> Proposal for Act no. 110/2010.

#### 4.2.1. *Voluntary ex ante transparency notices (VEAT)*

The Remedies Directive contains an exception to ineffectiveness, which can be used under certain situations, the so-called VEAT exception.<sup>39</sup> It cannot be used to avoid other sanctions than ineffectiveness.<sup>40</sup> In order to use the VEAT exception, the contracting authority must be of the opinion that the award of a contract is permissible without following the rules in the Public Sector Directive and, hence for this reason does not publish a contract notice in the OJ. Furthermore, the contracting authority must publish an *ex ante* transparency notice in the OJ “*expressing its intention to conclude the contract and the contract has not been concluded before the expiry of a period of at least 10 calendar days with effect from the day following the date of the publication of this notice*”.<sup>41</sup> If such a VEAT notice is published and no economic operators have challenged the validity of the direct award of the contract during a minimum 10-day waiting period (a sort of standstill period) the contract can be concluded and its ineffectiveness can no longer be invoked at a later stage.<sup>42</sup> In that regard, it is a requirement that ‘*the contracting authority considers that the award of a contract without prior publication of a contract notice in the Official Journal of the European Union is permissible*’.<sup>43</sup>

The wording of the Danish enforcement Act follows the Remedies Directive. However, the preparatory works states [my translation] “... *if the Complaints Board at a later time considers that the contracting authority has made a **manifest error of assessment** regarding whether the contract was covered by the Procurement Directives, the Board can declare the contract for ineffective.*” [Emphasis added]. The statement from the preparatory works shows that it was the legislators intention that it should be possible in some situations to declare a contract for ineffective despite the fact that a VEAT notice had been published. However, the Danish Complaints Board concluded otherwise. In its decision from December 2011, *Konica Minolta Business Solutions Denmark AS v. Erhvervsskolen Nordsjælland*, the Board stated that the statement in the preparatory works to the Enforcement Act was (my translation) “... *not expressed in the legal text and neither by the European Parliament and Council Directive 2007/66/EC of 11 December 2007 amending the Remedies Directives.*” The Board therefore concluded that (my translation) “*Given the terms in the Act on Enforcement of the public procurement rules § 4 and the EU*

<sup>39</sup> Article 2, litra d) (4) of the Remedies Directive.

<sup>40</sup> Which the Danish Complaints Board in decision of December 5, 2011, *Konica Minolta Business Solutions Denmark AS v. Erhvervsskolen Nordsjælland*, also found.

<sup>41</sup> Article 2 d) (4) of the Public Sector Remedies Directive.

<sup>42</sup> Recital 26 of the Amending Remedies Directive furthermore states: ‘The voluntary publication which triggers this standstill period does not imply any extension of obligations deriving from Directive 2004/18/EC or Directive 2004/17/EC’. Thus, requirements such as to state reasons in accordance with the Public Sector Directive Article 41 does not apply.

<sup>43</sup> Article 2d(4) of the Public Sector Remedies Directive.

*legal basis of Directive 2007/66 / EC, the Board finds that the preparatory acts does not permit to set aside the contracting authority's assessment of the acceptability of entering into the contract without prior publication of a contract notice.*" Thus, the Board found that it was not competent to declare a contract ineffective if the contracting authority followed the conditions to ensure *ex ante* transparency.<sup>44</sup> The conclusion from the case might be one of the reasons of the high use of VEAT notices in Denmark (before *Fastweb*).<sup>45</sup>

As is well known, the CJEU case *Fastweb*, opens for the possibility of declaring a contract for ineffective despite the fact that a VEAT notice has been published.<sup>46</sup> Taking a closer look at the reasoning in the case, the Court first argues that the use of VEAT notices shall be considered as an exception to declare a contract directly awarded for ineffective and that exceptions must normally be construed narrowly. The CJEU referred to the Amending Remedies Directive's balance between remedying illegal direct award of contracts and the introduction of VEAT notices to ensure legal certainty, which may occur because of the contracting authority will be sure a given contract was not later on declared ineffective. The CJEU found that to ensure effective remedies were available "...it is important that the body responsible for the review procedure should, (...), carry out an effective review." And most importantly that "In its review, the review body is under a duty to determine whether, when the contracting authority took the decision to award a contract by means of a negotiated procedure without prior publication of a contract notice, **it acted diligently** and whether it could legitimately hold that the conditions laid down in Article 31(1)(b) of Directive 2004/18 were in fact satisfied." (emphasis added).<sup>47</sup> Thus, a review body should therefore assess whether a contracting authority has acted diligently and legitimately could hold that the conditions for not publishing a contract notice is present and hence that the conclusion of the contract could lawfully take place. When assessing whether the contracting authority was right in its evaluation, the contracting authority's reason stated in the VEAT notice must be taken into account. Such reasons must state clearly and unequivocally the contracting authority's considerations, and must of such a detailed nature that interested parties can determine whether the case should

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<sup>44</sup> The Board came to the same conclusion in its decision of March 11, 2014, *HSHansen v. Bygningsstyrelsen*. See also decision of November 3, 2011, *Finn Frogne A/S v. Rigspolitiet, SINE-sekretariatet*. However, the appeal in the latter case shows a small opening in the assessment at the court. The high court came to the same conclusion as the Complaints Board (not to declare the contract for ineffective due to the VEAT notice), but at the same time the court noticed that the contracting authority's assessment as to whether the contract could be amended was not (using the wording of the preparatory works to the Enforcement Act) "... a manifest error of assessment".

<sup>45</sup> See e.g. Cour, Lisbeth la, Milhøj, Anders og Ølykke, Grith "Transparency Notices in the EU Public Procurement Regime: An Empirical Study of the use of Transparency Notices in Sweden and the United Kingdom" in »Book of proceedings« IPPC Dublin 2014, page 738 ff.

<sup>46</sup> Case of 11 September 2014, *Fastweb*, C-19/13, EU:C:2014:2194.

<sup>47</sup> Case of 11 September 2014, *Fastweb*, C-19/13, EU:C:2014:2194, paragraph 50.

be brought before an appeal body. After *Fastweb*, the Danish Complaints Board have set aside ex ante transparency notices in a few cases.<sup>48</sup>

### 4.3 Setting aside decisions (annulment)

As elaborated on in section 4.2. the ineffectiveness sanction has only had a limited use in Denmark and therefore the “traditional” sanction of setting aside a contracting authorities decisions still is perhaps still considered the most important remedy.<sup>49</sup> The Public Sector Remedies Directive requires that review bodies have the power to “*either set aside or ensure the setting aside of decisions taken unlawfully (...)*”, but the Directive is silent as to the consequences of setting aside a contracting authority’s decision. Whether setting aside a contracting authority’s decision affects the contract itself is a topic for discussion. In most Member States, setting aside a decision aims to nullify a decision before awarding the contract and not at annulment of the contract.<sup>50</sup> From a Danish perspective setting aside a contracting authority’s decision to enter into a contract does not mean the contract itself is annulled. The Complaints Board has several times stated that it does not have the competence to terminate contracts.<sup>51</sup> In practice, contracting authorities have not considered themselves to be obliged to bring a contract to an end if an award decision has been annulled by the Complaints Board.<sup>52</sup> The case law from the CJEU on termination of contracts, and particular *Commission v. Germany*,<sup>53</sup> has resulting in case law regarding termination of contracts “outside” the Remedies Directive by the regular courts in Denmark in a few cases, but the state of law is still uncertain<sup>54</sup>.

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<sup>48</sup> Decision of May 4, 2016, CGI Danmark A/S v. Moderniseringsstyrelsen, decision of August 8, 2017, Thermo Electron v. Fødevarestyrelsen, decision of July 11, 2017, EnviDan A/S v. Assens Spildevand A/S, decision of October 4, 2019, VITRONIC v. Sund & Bælt Holding A/S.

<sup>49</sup> For more on the consequences of setting aside a decision see Steen Treumer, “Towards and Obligation to Terminate Contracts Concluded in Breach of EC Public Procurement Rules: End of Status of Concluded Public Contracts as Sacred Cows” [2007] PPLR no 6, pp. 371-386, René Offersen and others in U 2008 B.372 “Ugyldighed og annullation af kontrakter indgået i strid med udbudsreglerne”.

<sup>50</sup> S. Treumer “Enforcement of the EU Public Procurement Rules: The State of Law and Current Issues” in S. Treumer, Steen & F. Lichère (Eds.) “Enforcement of the EU Public Procurement Rules” [2011] DJØF Publishing, p. 32.

<sup>51</sup> See e.g. decision of December 11, 2009, Tabulex v. Tønder Kommune, or decision of March 25, 2010, Visma Services Odense A/S v. Hillerød Kommune.

<sup>52</sup> See e.g. decision of 28 January 2014, Adams Transport Co. ApS v. Ministry of Foreign Affairs.

<sup>53</sup> Case 18 July 2007, *Commission/Germany*, C-503/04, EU:C:2017:432.

<sup>54</sup> See decision of December 22, 2008 from Østre Landsret, Centralforeningen af Taxiforeninger i Danmark m.fl. v. Region Sjælland, U 2009.1331 Ø, decision of March 30, 2009, Region Syddanmark v. Sectra A/S, decision of November 5, 2009, case BS 1-542/2008, Holstebro Kommune, Svendborg Kommune og Sønderborg Kommune v. AV Form A/S and case of December 20, 2010, Retten i Roskilde, BS 9A 108/2010.

When the Procurement Act entered into force, a new provision was inserted which means a contract must be terminated in most cases. The Procurement Act § 185 (2) deals with the consequences for a contract if a decision to enter into the contract has been annulled. According to this provision if a decision to enter into a contract has been annulled by a review body, the contracting authority must seek to terminate the contract unless “particularities apply”. In case the contracting authority is of the opinion that such “particularities” is present it must publish the decision not to terminate the contract the same place it published the procurement documents. The provision shall be seen together with the Enforcement Act 14a, which states that the Complaints Board can give a non-binding preliminary decision as to whether “*particularities*” which suggest the contract be carried on is present. So far there is no case law on the provision, but contracting authorities have terminated contracts where a decision has been annulled by the Complaints Board.<sup>55</sup>

#### 4.4 Damages

The Danish Enforcement Act is silent regarding the type of breaches that can lead to damages and merely states that damages must be available. The preparatory acts states that damages must be awarded in line with “*Dansk rets almindelige principper*”. Briefly speaking this means that there must be a loss on the complainant either loss for not having won the contract (positive interest) or a loss relating to the costs for bidding (negative interest). Regarding the question of liability neither culpa nor the “*sufficiently serious breach*”, applies in Denmark. Thus, the recent Fosen-linjen EFTA case has gained very little attention in Denmark.<sup>56</sup> In principle all types of breaches could lead to damages. Nevertheless, in practise, the breach needs to be such a material breach that leads to setting aside the contracting authority’s decision to award the contract. In addition to this the complainant must proof that it would have won the contract had it not been for the breach of the procurement rules and even more it is necessary that the breach was not such a serious breach that would have meant that the contracting authority could not legally have awarded the contract to the complainant.<sup>57</sup> Finally, if the contracting authority can justify that it would have annulled the procurement procedure if the complainant had won the contract, then positive

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<sup>55</sup> See e.g. Decision of February 8, 2018, Dansk Cater A/S v. SKI, where SKI terminated a framework agreement after the decision.

<sup>56</sup> Judgment of the EFTA Court of 31 October 2017 in Fosen-Linjen AS v AtB AS (E-16/16) (“Fosen-Linjen I”). Judgment of the EFTA Court of 1 August 2019 in Fosen-Linjen AS, supported by Næringslivets Hovedorganisasjon (NHO) v AtB AS (E-7/18) (“Fosen-Linjen II”). See the special edition for European Procurement and Public Private Partnership Law Review 14 [2019], nr. 4, s. 209-261.

<sup>57</sup> See e.g. Decision of September 15, 2016, SIM Læggekørsel I/S v. Region Syddanmark.

interest may not occur either. This could e.g. be the case if tenderer number 2 had a very high price compared to the winning tenderer.<sup>58</sup> In practise it is very difficult to obtain damages for breaches of the procurement rules in Denmark at least when it comes to positive interest.

## 5 Conclusion

The fact that Denmark has one administrative body, which handles most of the complaints regarding public procurement means that the procurement rules are interpreted in the same way. It is an effective system as complaints can be decided rather quickly.<sup>59</sup> The perhaps most effective part of the Danish Complaints system is how complaints submitted in the standstill period is treated, where such have automatic suspension. When deciding whether to grant further interim measures, the complaints board will most often give reasons as to why it is of the opinion on whether a breach has taken place, and this opinion will often lead to the contracting authority annul the procedure themselves or that a complainant will withdraw its complaint. In fact in 2018 106 complaints were submitted, but only 44 cases was decided by final decisions by the Complaints Board.

The question is whether the remedies are considered effective as well. Remedies have gained a lot of focus in Denmark the recent years and are considered a very important aspect of the procurement rules. As elaborated on in this article, the Danish Complaints Board has not declared many contracts for ineffective and damages are very difficult to obtain. On top of this the contracting authority will often “win” the case.<sup>60</sup> This combination might be one of the reasons as to why Denmark does not have that many complaints. However, more complaints does not necessary need to be a goal in order for an effective complaints system. The danger of too effective remedies is a system where the contracting authority has more focus on following the rules rather than buying efficient due to the serious consequences mistakes can have and therefore finding the right balance regarding remedies is a difficult balance to make. If remedies are too effective this could also influence innovative solutions as testing new ways of doing procurement could have high consequences. Although one could very easy point out issues that could work better in Denmark such as easier access to obtain interim measures or damages, it is this authors opinion that the Danish enforcement system is generally

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<sup>58</sup> See e.g. Decision of February 28, 2019 Aarsleff Rail A/S v. Viborg Kommune.

<sup>59</sup> As also argued by Treumer “It is acutally so efficient that by many practioners and politicians it is considered to be too effective which allegedly makes many contracting entities hesitate to tender out” see Chapter 8 ”Enforcement of the EU Public Procurement Rules: Danish Regulation and Practise” in Treumer, Steen & Lichère, Francois (Eds.) “Enforcement of the EU Public Procurement Rules”, DJØF Publishing 2011, p. 255.

<sup>60</sup> 66 per cent of the Complaints Boards decision are in favor of the contracting authority.

a good system where in case of serious breaches of the procurement rules, there are effective remedies available to ensure that these breaches are remedied. It is also a system where contracting authorities still respect the procurement rules, and hence the preventive effect of the system works in order and ensures that the EU procurement rules are complied with.