ENFORCEMENT OF PROCUREMENT

First report on the application of general principles of public procurement law by judicial authorities in Denmark and the EU

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CONTENTS

TABLES

1 INTRODUCTION

This report constitutes the first output of an ongoing project, which has the purpose of conducting a comparative study of the enforcement practice of the Nordic countries in relation to public procurement. The report and the research documentation are available at the project website[1].

The text is distributed in three main chapters covering respectively the research procedure, the legislative development, and a comparative analysis of enforcement of selected provisions in EU and Danish jurisprudence.

The research procedure involved the creation of a cross-sectional and inter-temporal matrix to allow for comparison of procurement legislation from different sources and time periods. The matrix was subsequently used as a framework for plotting elements of jurisprudence from the selected jurisdictions at the EU and Danish level. The matrix results were transferred to a web format, allowing for legislation and jurisprudence to be viewed together for each segment of procurement law.

The legislative development was analysed and presented for the areas of EU public procurement, EU remedies, internal Community procurement, national Danish procurement, and Danish remedies. For each area, only the deciding elements of each legislative step were analysed, with more text devoted to the less well known elements, such as internal Community procurement and national Danish procurement.

The comparative analysis covers a narrower segment that the matrix and the legislative development. It is the intention to continue the comparative analysis, based on the already established research results, and also to expand these results to cover the Nordic area.

[1] See : www.lexnet.dk/nor-proc/index.htm

2 RESEARCH

2.1 General scope

The report is meant to form the first step in a research project that is to cover all the Nordic countries, which traditionally are understood to cover the three Scandinavian states of Denmark, Norway and Sweden, together with the further states of Finland and Iceland.

The selected states share a common cultural heritage that has also left its mark on their legislation, which during the last century in many areas was based on cooperation in the drafting procedure without formal harmonisation. The cooperative drafting did not extend to public procurement as such, but led to common principles in many fields of administrative and contract law that impact on public procurement.

A further aspect of the common cultural heritage has been a de facto common language, as Danish, Norwegian and Swedish are sufficiently close to allow for direct communication, and as the Finns have traditionally mastered Swedish and the Icelandic have traditionally mastered Danish.

These linguistic traditions are diminishing, but still serve to give a Scandinavian speaking researcher access to much, if not all, of the public procurement jurisprudence in the five Nordic countries. However, little of this jurisprudence is available in any other European language, apart from a noble initiative of the Danish Complaint Board during its first years, where summaries of all decisions were made in English. The initiative is presently stopped for budgetary reasons.

2.2 Present scope

In the present stage of the project, focus has been placed on the enforcement of the EU legislation and principles as this is carried out in the EU and Danish jurisdictions, which therefore includes consideration also of the national implementing legislation.

Two adjoining fields are also considered, covering respectively at the EU level the internal procurement rules for Community institutions, and at the Danish level the national rules for procurement outside the scope of the EU directives. The reason for this extension is that the similarity of the legislative principles applied may be reflected also in similar jurisprudence, just like distinctive jurisprudence on principles separate to these adjoining fields may also highlight the understanding of EU principles by means of contrast.

As the focus is placed on the jurisprudence, the ambition is not to present a comprehensive or systematic coverage of procurement law as such. The content of legislation

is presented only to the limited extent necessary for understanding the jurisprudence, and this applies both at the EU and national level.

The jurisprudence considered has been limited to enforceable decisions from judicial and quasi-judicial institutions. This has been done mainly for practical reasons, as the data available at this level of enforcement is substantial in itself. It is therefore not the intention to deny the importance of unenforceable decisions emanating from other procedures, such as an ombudsman system, or of non-judicial decision emanating from administrative procedures. It is the intention to include such elements of case law in later stages of the project.

At the EU level, only the jurisprudence of the European Court of Justice and the European Court of First Instance has been considered presently. It should be noted, that the term European Court of Justice is here used in a generic manner, when there is no specific need to distinguish between the jurisprudence of the European Court of Justice itself and that of the European Court of First Instance. At the national level, only the jurisprudence of the Danish Complaint Board for Public Procurement and that of the national courts has been considered. The national court cases have so far mostly been appeal cases, contesting the decisions of the complaint board, but a direct case on public procurement is presently pending before the Danish courts.

Accordingly, the extensive case law of the Danish competition authority has not been considered at the present stage. In the field of procurement law, the competition council hears cases, either based on complaint or ex officio, following an administrative procedure, and renders both general opinions and specific case decisions, neither of which is enforceable. Thus, this case law does not meet the criteria of enforceable judicial or quasi-judicial decisions

The cases considered may be summarized in the following manner:

Table 1: Case law considered

EU	Court of Justice	Court of First Instance	Total
1976-1991	28	0	28
1992-1999	61	6	67
2000-2008	89	43	132
Total	178	49	227
Denmark	Complaint Board	Courts	Total
1992-1999	100	0	100
2000-2008	277	29	306
Total	377	29	406
Overall total of cases considered			633

2.3 Matrix[2]

The underlying idea has been to make transparent the jurisprudence coming from the different generations and sectors of procurement legislation. The mechanism adopted to achieve this has been the creation of an inter-temporal and cross-sectional matrix.

The point of departure for this matrix was formed by the latest EU directive on public procurement in the so-called classic field, directive 2004/18 (C3)[3]. A first matrix was established to enable a parallel viewing of this directive and the contemporary directive for the utilities field, directive 2008/17 (U3)[4]. This entailed aligning the provisions of directive 2004/17 with the corresponding provisions of directive 2004/18. Where there were no corresponding provisions in directive 2004/18, lines were inserted at the most relevant places to carry the provisions found only in directive 2004/17.

This procedure was the repeated for each of the previous generations of procurement directives, aligning provisions of these directives with the corresponding provisions of directive 2004/18, and inserting new lines when necessary for provisions unique to the earlier directives, including where necessary separate consideration of works, supplies and services. Likewise amendment provisions, whether from directives or other instruments, such as accession treaties, were brought into the matrix.

Similar matrixes were then established for both the internal procurement rules of the EU, taking the latest Financial Regulation 1605/2002[5] as the point of departure, and Danish national procurement legislation, taking the latest consolidated law 1410/07[6] as the point of departure. However, these matrixes were completed backwards in time only to the extent necessary for the analysis of jurisprudence.

Likewise, matrixes were established for remedies legislation, at the EU level taking the directive 89/665[7] as the point of departure, and at the Danish level taking the latest law on the complaint board 415/00[8] as the point of departure. Again, the matrixes were completed only to the extent necessary for the analysis of jurisprudence.

Based on the same principle, it was established that references to the Danish national implementing legislation were so few that a matrix was not required for the analysis of jurisprudence. Likewise, it was established that no references were made, in the case law

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[2] A different matrix approach may be found in Gruber (1), which is based on a more restricted coverage, and a less fragmented presentation of the different parts of the procurement directives
[3] See below in section 3.1.4.1
[4] See below in section 3.1.4.2
[5] See below in section 3.3.4.1
[6] See below in section 3.5.3.1.3
[7] See below in section 3.2.1.1
[8] See below in Section 3.6.2.1

considered, to the international obligations of the EU and Denmark in the field of procurement law[9], including the EEA agreement[10], so that no matrix for international law was required at the present stage of the project[11].

These limitations in drawing up the matrixes were undertaken only for practical reasons, and it is not the intention to deny the value of transparency that a full set of matrixes would establish. It is the plan to complete the matrixes in later stages of the project.

The final step of legislative analysis was the linking of the matrixes, which again was done only to the extent necessary for the analysis of jurisprudence. Thus for every case referring to a provision outside the EU procurement directives, either that provision was aligned to an EU directive provision, or a new line was added.

However, this final adding of new lines did not take place in the EU directives matrix, but instead was undertaken in a new judicial matrix, which in its first column held the provisions of the current EU procurement directives, the provisions of general EU law, and the provisions of the EU remedies directives, as well as the necessary inserted lines to carry provisions singular to the other legal acts considered.

The first column of this judicial matrix thus held a line for each possible regal reference in the procurement jurisprudence considered. In the underlying matrixes, this required a balance between on the one hand subdividing provisions into smaller segments, such as sub-paragraphs or points, in order to achieve alignment, and on the other hand keeping segments together where possible, so as to limit the extent to which a single element of legal reasoning would be found to refer to multiple lines of the first column.

In this connection it should be mentioned that the EU public procurement directives often have contained their own cross-temporal matrixes, aligning the provisions of replaced

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[9] For a consideration of international law on public procurement, see Dahlgaard (1), and also the comments on the Uncitral model law in Arrowsmith (5). For a discussion on international trade implications of public procurement, see Bovis (7) and Yukins (1)

[10] Agreement on the European Economic Area of 2 May 1992, OJ 1994, L 1, p. 1, which in detail regulates procurement issues in annex XVI (p. 461-481). The annex has subsequently been revised on several occasions by decisions of the EEA Joint Committee

[11] International obligations of the EU in the field of public procurement include:
- Council Decision 94/800 of 22 December 1994 concerning the conclusion on behalf of the European Community, as regards matters within its competence, of the agreements reached in the Uruguay Round multilateral negotiations (1986-1994), OJ 1994, L 336, p. 1
- Council Decision 95/215 of 29 May 1995 concerning the conclusion of an Agreement in the form of exchange of letters between the European Community and the United States of America on government procurement, OJ 1995, L 134, p. 25
- Council Decision 97/474 of 24 February 1997 concerning the conclusion of two Agreements between the European Community and the State of Israel on, respectively, procurement by telecommunications operators and government procurement, OJ 1997, L 202, p. 72
- Decision 2002/309 of the Council, and of the Commission as regards the Agreement on Scientific and

directives with the provisions of the replacement directives. These EU matrixes were a useful tool for generating the project matrixes, but they did not have the cross-sectional element, and were often found to be imprecise, or to have a focus level that was not appropriate for the analysis of jurisdiction.

The judicial matrix was then used for entering the cases, with 2 columns allocated to each case. The legal reasoning was analyzed and divided into segments, where necessary combining parts from different locations within the legal reasoning, and also including brief elements of fact or party arguments, where this was essential to understanding the legal reasoning.

For each such segment of the legal reasoning in the case, a reference to the specific point in the text was entered in one cell, and a reference to the legislation on which the reasoning was based was entered in the adjoining cell. In the twin columns of each case, such cells were aligned with the corresponding line of the first column.

Where legal reasoning was based on more than a single legal reference, the same segment of legal reasoning was entered on several lines, each with a reference to the specific legislation on which it was based. Where such references were only implicit, this was noted by a suffix to the reference.

On the other hand, a single element of legislation might be referred to in several segments of the legal reasoning, and in such cases the relevant cell would hold references to each of the segments concerned.

For technical reasons related to software limitations, it became necessary to separate the matrix into several worksheets, covering separate periods of case law and separate jurisdictions, but it was possible from these separate worksheet to generate a statistical overview of the extent to which the various legislative provisions from procurement law were the referred to in the jurisprudence. This was based on counting hits, understood as number of cells holding references.

The distribution of hits may be summarized in the following manner:

Table 2: Hits in case law

Procurement			EU+DK 1972-2008	
Classic	Utilities	Title	Hits	Per cent
Title I	Title I	Definitions and General Principles	615	20.6%
Title II	Title II	Rules on Public Contracts	1002	33.5%

Technological Cooperation, of 4 April 2002 on the conclusion of seven Agreements with the Swiss Confederation, OJ 2002, L 114, p. 1

Procurement			EU+DK 1972-2008	
Classic	Utilities	Title	Hits	Per cent
Title III	-	Rules on Public Works Concessions	3	0.1%
Title IV	Title III	Rules Governing Design Contests	11	0.4%
Title V	Title IV	Statistical Obligations, Executory Powers and Final Provisions	40	1.3%
Annexes	Annexes	-	48	1.6%
General EU law				
European Community Treaty			361	12.1%
European Court of Justice			65	2.2%
EU Legislation			4	0.1%
Other			1	0.0%
Remedies			789	26.4%
Appeal			55	1.8%
Total			2994	100.0%

2.4 Web structure

The next stage of jurisprudence analysis was to transfer the results of the matrix analysis to a web structure, where containers could be held for the full text of all the aligned provisions, as well as for the full text of all the segments of jurisprudence that referred, explicitly or implicitly, to the provisions concerned.

As a first step, the full text of the EU procurement and remedies directives, as aligned in their respective matrixes, was entered into a full-text database so as to ensure ease of access to the aligned texts. This was not expanded to the other fields, such as EU internal procurement and national legislation, as the alignment of these other fields was limited to cover only the extent necessary, as set out above.

As a second step, a web structure was created, based on the first column of the matrix used for analysis of jurisprudence, as described above. Each page held a title according either to its place in directive 2004/18, or in the case of provisions singular to other elements of legislation, the name of that provision.

The substance of the web page held five main parts, three of which concerned legislation and two of which concerned jurisprudence. Under the heading of EU law, the relevant provisions or segments of provisions from the EU directives and other EU provisions were placed, except that the internal procurement rules were placed in a separate part under the separate heading of Communities. Likewise, the Danish provisions or segments of provisions, concerning either national procurement or implementation of the EU directives, were placed under the heading of Danish law. Finally, the excerpts of jurisprudence were placed in two groups, one under the heading of EU cases and the other under the heading of Danish cases.

In this manner, it was possible to use the web structure in a manner comparable to that of using the jurisprudence matrix. However, the matrix allowed for an overview of which other elements of legislation a given case referred to. This was not possible in the web structure, but for the segments of legal reasoning that referred to several points of legislation, it was possible to note this collectively at each place in the web structure, which was not practical in the matrix.

It may be argued that a transfer of the analytical framework to a large capacity data base system would have been advantageous, but at the time of analysis no relevant system was identified. On the other hand, the limitations resulting from the two dimensional structure of both the matrix and the web structure also proved an advantage for the drawing of conclusions from the analysis, as the structures were visible for direct viewing on a large screen.

It is the intention in the longer run to widen the project so as to include also non-judicial decisions, such as those made by the Danish competition authority, as mentioned above, and also to extend the web structure to include materials from preparatory works and official guidelines.

2.5 Notation

2.5.1 Generations

The procurement legislation of the EU, as well as the internal EU rules for Community procurement, and the national Danish rules may be presented as generational systems, as also briefly referred to above. The term generation is used to distinguish between amendment of rules and replacement of rules.

The distribution of generations for procurement legislation may be summarized in the following manner:

Table 3: Generations in procurement legislation

Generation	EU procurement directives	Community procurement	DK national procurement
First	1971 – 1992	1968 – 1972	1967 – 2000
Second	1993 – 2003	1973 – 1976	2001 – 2004
Third	2004 – present	1977 – 2001	2005 – present
Fourth	Na	2002 – present	na

For remedies, the EU system presently has only a single generation, with the period 1989-2008 forming that first generation. The new directive coming into force in December 2009 does not strictly speaking constitute a new generation, as it is drafted as an amendment to the existing directives. However, the new directive may be seen as constituting such a

major change that it should be labelled a new generation. In any case, this is not relevant to the present report, as there is obviously no present jurisprudence based on the new directive.

In this connection it should be mentioned that the new directive on defence procurement, approved by the European Parliament on 14 January 2009, but not yet in force, has not been considered, as obviously there is also no jurisprudence concerning this directive[12].

The Danish remedies system, in the form of the complaint board, has seen 2 generations, the first covering 1992-1999, and the second covering 2000 to the present.

The distribution of generations for remedies legislation may be summarized in the following manner:

Table 4: Generations in remedies legislation

Generation	EU remedies	DK remedies
First	1989 – present	1992 – 1999
Second	From the end of 2009	2000 – present

Common to the implementation, remedies and national procurement rules in Denmark has been the use of consolidation, which is a legislative tradition of the Danish parliament. Thus, at regular intervals the text of amended legislation is consolidated and re-adopted by Parliament. No further amendment is undertaken at the time of re-adoption, but the new act has force of law and a separate reference number, thus placing it in a different category than purely informative consolidations.

The use of consolidation has also been introduced by the EU in compliance with the requirements of the Amsterdam treaty, both in the form of informative consolidations and in the form of re-adoption[13]. However, the field of procurement has so far only benefitted from informal consolidations[14].

2.5.2 Legislative reference

By using generational identifiers, the relationship between main legislation and amendments may be given direct visibility. At the same time, this serves a need for a shorthand notational system for use in the matrix that is described above.

[12] For a discussion of the new directive, see Briggs (1)
[13] See for example Council Directive 2006/112 of 28 November 2006 on the common system of value added tax, OJ 11 December 2006, L 347, p 1
[14] See the informal consolidated versions of the second generation directives at the EurLex web site (http://eur-lex.europa.eu/en/legis/index.htm)

The negative side of this use of generational identifiers is that they replace the otherwise well known names of legislation, such as directive 71/305[15], which is instead referred to in the matrix as W1, indicating that it is the main EU act on works in the first generation, whereas the accession act from 1972[16] is referred to as W1A1, indicating that it is the first amendment of the main act on works.

Likewise, for the sake of use in the matrix, the reference to articles, paragraphs, subparagraphs, and points has been consolidated into a single decimal system. Thus, W1-1.2.3.4 would refer to article 1, paragraph 2, subparagraph 3, point 4 of directive 71/305. However, it could equally well be article 1, point 2, paragraph 3, subparagraph 4[17]. In spite of the ambiguity, the system is sufficiently clear to serve as a precise shorthand indicator.

In some cases, a more detailed indication is needed, and the decimal system therefore also includes the indications s1, being the first sentence, and p1, being the first part, as well as p~, being the last part. The reference to parts is naturally not a unique identifier, but the database of legislation, which is described above, clearly sets out the reference to such parts.

Thus as an example, W2A1-1.2=W1-4.3.s1 would indicate the amended text of article 4, paragraph 3, first sentence of directive 71/305, as amended by article 1, paragraph 2 of the 1972 accession act[18].

The full reference to date and publication of legislation is given at the heading of each of the sections of the following chapter presenting the respective pieces of legislation, and for additional legislation at the place where it is first referred to. Elsewhere, only the official numbers are used, with the notation system numbers added in parenthesis.

However, in order to make references more compact, a slight modification of the official reference system was introduced for Danish legislation. This replaced the usual form, like law 123 of 12 June 2008, with an abbreviated form, like law 123/2008[19].

For EU law a similar slight modification of the official reference system was undertaken, as the reference to the EEC or EC, like in directive 71/123/ECC, were removed, thus becoming directive 71/123. Likewise, for regulations the prefix word number, like regulation no. 123/71, was removed, thus becoming regulation 123/71[20].

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[15] See below in section 3.1.2.1
[16] See below in section 3.1.2.1.2
[17] Hypothetical example
[18] Hypothetical example
[19] Hypothetical example
[20] Hypothetical examples

2.5.3 Case law references

For the jurisprudence of the European Court of Justice, and the European Court of First Instance, the use of numbered paragraphs in the legal reasoning creates also creates a natural point of reference, as does the case numbering used, which refers to the year the case was introduced.

The jurisprudence of the Danish courts and the complaint board do not employ numbered paragraphs, and accordingly a numbering system was introduced into the indexed Pfd files. This covered the parts of the rulings that constitute legal reasoning, as well as other important procedural elements, such as references to interim decisions. It does have the disadvantage of constituting a reference tool that exists only in the version of the jurisprudence used for this project, and thus only available on the project web site. On the other hand, it allows for precise reference to segments of the text.

Likewise, although the Danish system does use reference numbers for court decisions, they are not generally employed in cross references, which more often refer to the date of the ruling. Thus, a numbering system was introduced consisting of a prefix indicating the court or complaint board, a number referring indicating the date, and a suffix in case of several ruling on the same day.

For interim measures, the complaint board most often does not publish its decisions separately, but only briefly refers to the outcome in the main rulings, which are all posted on the internet by the complaint board[21]. This commendable course of action is beginning to be applied by the Danish courts, where instead selected rulings have been published by a private publishing company. In principle, access may be had also to unpublished rulings, but there is no accessible subject indexation. However, the complaint board does follow the court cases that concern public procurement, and publishes extensive summaries of the rulings.

References to case law covered by the matrix system are limited to the case number and the name of the significant party to the case, as well as the relevant point number within the case. The full publication information is available in the project Pdf files. For cases not covered by the matrix system, the full publication information is given at the first mention of the case.

2.6 Data

The objective data used for the project consists of legislation, preparatory works, guidelines and jurisprudence that has been assembled into indexed Pdf files.

The EU legislation includes the procurement directives, the internal Community rules, and the remedies directives. The Danish legislation includes the implementation provisions as well as the national procurement legislation. For legislation, the text holds natural points of reference, such as articles and paragraphs, but as set out above, the use of the matrix system required a notation system for shorthand references.

The legislative and judicial sources may be summarized in the following manner:

Table 5: Legislative and judicial sources

Source	Scope	Pages
EU legislation	EU procurement directives Community procurement regulations EU remedies directives Supporting legislation	6,056
EU case law	European Court of Justice European Court of First Instance	4,901
Danish legislation	Implementation of procurement directives Remedies legislation National procurement legislation Supporting legislation	1,359
Danish case law	Complaint board decisions Court decisions competition authority decisions	6,261
Total		18,577

To this should be added academic literature, primarily within the field of public procurement, as set out in the footnotes and bibliography.

The underlying materials, including the Pdf files with legislation, guidelines and jurisprudence, as well as the matrixes with legislative and judicial cross-references and hit statistics, and also the database and web structure with text excerpts, have all been made accessible at the project website[22].

[21] See www.klfu.dk
[22] See www.lexnet.dk/nor-proc/index.htm

3 APPLICATION

3.1 EU procurement system

3.1.1 Introduction[23]

The procurement system of the EU has been implemented primarily thorough directives, adopted originally with a legal basis as harmonising measures for the achievement of the Common Market under the EEC Treaty, and subsequently with the equivalent measures for establishing the Internal Market, now the EC Treaty[24].

The move from the Common to the Internal Market did not entail any substantial difference, except in that the Internal Market pre-supposes the abolition of internal borders. However, at the time of introducing the Internal Market through the Single European Act[25], the EU did not hold any powers to undertake such border abolition. This was introduced only through the Schengen Agreement[26], which with the Amsterdam Treaty[27] became integrated into the EU treaties.

The distinct legal basis for respectively the Common Market in Article 94 and the Internal Market in Article 95 has been upheld so far in the EC Treaty, but the Common Market legal basis is set to disappear with the Reform Treaty. For goods, Articles 94 and 95 have constituted the general legal basis for harmonisation, whereas for services it has been possible through Article 55 to rely also on the special provisions of Article 47 of the EC Treaty, as well as the corresponding provisions of earlier versions of the treaty.

For that reason, directives that related to goods have been based only Articles 94 or 95, whereas directives that related to works and other services have referred to the combined legal basis of Articles 47 and 55 together with 94 or 95. The same combined legal basis has been applied to the directives spanning several sectors.

The European Court of Justice has established[28] that the term harmonising measures does not require the EU legislation to constitute an average of national legislation, or depend

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[23] A good introduction to the EU public procurement system may be found in Trepte (1), p. 1-87 and Bovis (1) P. 1-62. For an introduction with a Danish perspective, see Nielsen (2), p. 15-56. For an introduction with an economic political perspective, see Durviaux (1), p. 29-52

[24] Originally the Treaty Establishing the European Economic Community, adopted in 1957, revised by the European Single Act in 1986, and renamed the Treaty Establishing the European Community by the Maastricht Treaty in 1992. Further changes were undertaken by the Amsterdam Treaty in 1997, the Nice Treaty in 2001 and the Athens Treaty in 2003, which establishes the current version of the EC-Treaty. The Constitutional Treaty in 2004 proposed to merge the EU and EC treaties, but was not adopted. The same measure was taken by the Lisbon treaty in 2007, but adoption of this treaty is currently awaiting amongst other a renewed referendum in Ireland

[25] Adopted in 1986

[26] Adopted in 1985 (First Convention) and 1990 (Second Convention on implementation)

[27] Adopted in 1997

[28] See for example judgment of 9 August 1994 in case C-359/92, Germany, ECR 1994, p. i-3681, point 38

on the pre-existence of national legislation in the field. The fact that common rules are adopted in it self constitutes the element of harmonisation.

The remedies directives were adopted at a time where the EU did not yet have general competence to legislate in the field of civil procedure. However, the European Court of Justice had established in general[29] that where national rules outside the scope of EU legislative competence could have a negative impact on EU rights, the jurisdictional competence of the EU allowed the Court to set requirements for the content of such national rules.

From this judicial extrapolation it was a short step to establish a similar extrapolation for the legislative competence, although for a while it was hotly contested in the working groups preparing legislation for adoption by the EU Council[30]. However, in time the Member States gave in and accepted an extrapolation that allowed the setting of procedural rules that were closely linked to the achievement of EU policy goals.

Even more, it was accepted that such extrapolation did not require the use of the special legal basis in Article 308 of the EC Treaty. Instead, the same legal basis could be applied as for the substantive regulation of the field of law. In fact, the remedies directives are based only on the general internal market legal basis of Article 95 in the EC Treaty, without reference to the additional legal basis for services in article 47.

3.1.2 First generation[31]

3.1.2.1 Directive 71/305 on works (W1)[32]

3.1.2.1.1 Original directive

This constitutes the first development on procurement rules in the EU or rather the EC as it was at the time. The directive was explicitly linked to the general programmes for abolition of restrictions on establishment[33] and services[34].

This first set of procurement rules in the field of works was also supported by a simultaneous directive on the abolition of restrictions on freedom to provide services in respect of public works contracts and on the award of public works contracts to operators

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[29] See for example judgement of 21 September 1989 in case 68/88, Greece, ECR 1989, p. 2965, point 23
[30] See for example judgment of 23 October 2007 in case C-440/2005, Commission vs Council, ECR 2007, p. i-9097, point 69-70
[31] For a discussion of EU public procurement during the first generation, see Winter (1)
[32] Council Directive 71/305 of 26 July 1971 concerning the co-ordination of procedures for the award of public works contracts, OJ 1971, L 185, p. 5-14
[33] General Programme for the abolition of restrictions on freedom of establishment of 18 December 1961, OJ 1962, No. 2, page 36-45

acting through agencies or branches[35]. No later developments of procurement law were directly supported by such substantive measures.

At the same time, the Advisory Committee for Procurement was created and empowered to follow the implementation of public works procurement in the member states[36]. Later, the scope of the committee was extended also to encompass supplies and services[37]. When the comitology procedure was introduced, the Advisory Committee also became the committee of experts for this purpose[38], as well as gaining other functions in relation to the international procurement obligations of the EU[39]. However, this did not entail any further amendments of the decision setting up the committee.

Also at this first stage, the separation between the classic and utilities fields was introduced[40], as were the main mechanisms of EU public procurement, including open, restricted and negotiated procedures, as well as the alternative criteria of lowest price and economically most advantageous offer.

The reasoning behind excluding the utilities field from the earliest directives, and subsequently regulating this field separately in the later directives, was the concern that the member states showed great differences in the extent to which utilities providers were constituted as public entities. It was therefore deemed more reasonable to exclude the field from procurement obligations, and when this position was later reversed, the concern over this structural difference led to the directive also applying to private utilities provides, as set out below.

Notably in this first directive on public works, the equal treatment principle was not expressly stated in the directive, as it was also not in the first directive on goods. This principle was codified only in the first services directive, but even then it was not carried into the first versions of the second generation directives on works and goods. However, as set out below, the European Court of Justice came early to the conclusion that both transparency and equal treatment formed essential, if unwritten, parts of all the procurement directives.

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[34] General Programme for the abolition of restrictions on freedom to provide services of 18 December 1961, OJ 1962, No. 2, page 32-35

[35] Council Directive 71/304 of 26 July 1971 concerning the abolition of restrictions on freedom to provide services in respect of public works contracts and on the award of public works contracts to operators acting through agencies or branches, OJ 1971, L 185, p. 1-4

[36] Council Decision 71/306 of 26 July 1971 setting up an Advisory Committee for Public Works Contracts, OJ 1971, L 185, p. 15

[37] Council Decision 77/63 of 21 December 1976 amending Decision 71/306/EEC setting up an Advisory Committee for Public Contracts, OJ 1977, L 13, p. 15

[38] See below in section 3.1.2.1.8, and also article 77 of the latest directive 2004/18 (C3).

[39] See for example articles 5 and 15 of directive 2004/18 (C3)

The annexes were kept short and few, with only a very generic listing of public bodies in annex I and a compact definition of technical specifications in annex II. Other details, including requirements for contract notices, were kept in the main text of the directive, which came to a total of 34 articles.

Concessions as such were exempted from this first directive, but the member states used the occasion of the meeting of the EU Council, for the adoption of the directive, for also adopting a declaration concerning procedures to be followed in the field of public works concessions. In general the European Court of Justice has attached little importance to such declarations in its jurisprudence[41], but the specific declaration on concessions has not been dealt with in the case law.

A rather short period of 12 months was set for implementation, which accordingly was to take place by 30 July 1972, i.e. shortly before the coming into effect of the first accession of new member states in the EU.

3.1.2.1.2 Amendments in Accession Act 1972 (W1A1)[42]

The accession of Denmark, Ireland and United Kingdom brought a new administrative and legislative culture into the EU, requiring also a few amendments in the works directive. The concept of public bodies has to be expanded to cover equivalent bodies in member states that did not know this concept[43]. Likewise, the concepts of oaths had to be supplemented by solemn declarations for member states that did not apply oaths as a legal concept[44].

Apart from these conceptual modifications, the implications of accession were limited to expanding the list of authorities in annex I, and granting the new member states an addition 6 months for the implementation of the directive, which was to be implemented on 1 July 1973, instead of the date of accession, 1 January 1973[45].

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[40] See article 3.5

[41] See for example judgement of 26 February 1991 in case C-292/89, Antonissen, ECR 1991, p. i-745, at point 17-18: "The national court referred to the declaration recorded in the Council minutes at the time of the adoption of the aforesaid Regulation No 1612/68 and of Council Directive 68/360/EEC ….. However, such a declaration cannot be used for the purpose of interpreting a provision of secondary legislation where, as in this case, no reference is made to the content of the declaration in the wording of the provision in question. The declaration therefore has no legal significance."

[42] Documents concerning the accession to the European Communities of the Kingdom of Denmark, Ireland, the Kingdom of Norway and the United Kingdom of Great Britain and Northern Ireland, 22 January 1972, OJ 1972, L 73, p. 89

[43] Article 1.b as amended of directive 71/305 (W1)

[44] Article 23 as amended of directive 71/305 (W1)

[45] Section IV of Annex XI of the accession act

Norway was meant to be amongst the accession countries, but subsequent to the signing of the accession treaty, a referendum in Norway turned out against accession. Accordingly, the EU Council adopted a decision adjusting the instruments concerning the accession of new member states, effectively by removing text referring to Norway and drawing consequences for the voting rules[46]. The legal basis for Council to adopt these amendments had been created in the text of the accession treaty[47].

3.1.2.1.3 Amendments in Directive 72/277 (W1A2[48])

This directive was adopted just prior to the expiration of the deadline for implementation of directive 71/305 (W1). Surprisingly for a directive, it did not set a deadline for implementation, but merely held the usual statement that it was addressed to the member states[49].

The directive introduced the concept of model notices, although at this time they were still kept in a text format, as opposed to the later versions that also provide a graphical layout. Interestingly, the directive also supplied model notices and the obligation to apply them for concessions and in doing so expressly referred to the above mentioned declaration on concessions under directive 71/305 (W1)[50]. It may be argued that in doing so, the directive lifted the legal status of the declaration to become actual legislation.

The directive gained binding force on 28 July 1972 and thus should have been implemented at some point subsequent to this date.

3.1.2.1.4 Amendments in Directive 78/669 (W1A3)[51]

This directive merely reflected the change from use of accounting units to the use of newly defined European accounting units that were introduced with the financial regulation 1231/1977 (Q3)[52]. The change was made at a rate of 1 to 1, and the thresholds of the directive are thus left a numerically unchanged value.

A similar amendment was not required for the supply and services directives, as they were both adopted subsequent to the financial regulation.

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[46] Council Decision of the European Communities of 1 January 1973 adjusting the documents concerning the accession of the new Member States to the European Communities, OJ 1973, L2, p. 1-27
[47] Article 2.3 of the accession treaty
[48] Council Directive 72/277 of 26 July 1972 concerning the details of publication of notices of public works contracts and concessions in the 'Official Journal of the European Communities', OJ 1972, L 176, p. 12
[49] See article 4
[50] See above in section 3.1.2.1.1
[51] Council Directive 78/669 of 2 August 1978 amending Directive 71/305 concerning the coordination of procedures for the award of public works contracts, OJ 1978, L 225, p. 41-42

3.1.2.1.5 Amendments in Directive 89/440 (W1A4) [53]

This directive served a double purpose in fully codifying the declaration on concessions under directive 71/305 (W1)[54], by introducing provisions on concessions in the directive text, and by setting an increase in the threshold value for procurement procedures.

This the only occasion where these thresholds have been increased, here from 1 million to 5 million European accounting units[55], as subsequent changes in the procurement directives have seen a lowering of thresholds.

In addition, the directive introduced the first mandatory use of a nomenclature[56], in the form of a list of professional activities as set out in the general industrial classification of economic activities within the European Communities[57].

Several other changes were made, adding detail to directive 71/305 (W1) in relation to definitions and procedures, and replacing the annexes, pointing the way towards the drafting of the subsequent second generation of directives.

3.1.2.1.6 Amendments in Decision 90/380 (W1A5) [58]

This decision replaced the list of bodies and categories of bodies governed by public law, which was set out in directive 71/305 (W1)[59].

3.1.2.1.7 Amendments in Decision 92/456 (W1A6) [60]

This decision once again replaced the list of bodies and categories of bodies governed by public law, as set out in directive 71/305 (W1).

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[52] See below in footnote 190
[53] Council Directive 89/440 of 18 July 1989 amending Directive 71/305 concerning coordination of procedures for the award of public works contracts, OJ 1989, L 210, p. 1-21
[54] See above in section 3.1.2.1.1
[55] See article 4a of directive 71/305 (W1) as amended
[56] See article 10.1, referring to annex III, of directive 71/305 (W1) as amended
[57] This refers to the Nomenclature of Economic Activities in the European Communities (NACE, 1970 edition) , mentioned in Council Directive 72/211 of 30 May 1972 concerning coordinated statistics on the business cycle in industry and small craft industries, OJ 1972, L 128, p. 28-29. NACE had replaced the previous nomenclature NICE, and was in turn replaced by NACE revisions 1 and 2 that are mentioned below in section 3.1.3.6.4
[58] Commission Decision 90/380 of 13 July 1990 concerning the updating of Annex I to Council Directive 89/440, OJ 1990, L 187, p. 55-59
[59] See article 1.b and annex I as amended.
[60] Commission Decision 92/456 of 31 July 1992 concerning the up-dating of Annex I to Directive 71/305, OJ 1992, L 257, p. 33

3.1.2.1.8 Amendments in Directive 93/4 (W1A7) [61]

This constituted the last amendment of directive 71/305 (W1), adopted the same year as the subsequent second generation directive. It broadened the use of the Comitology procedure in the field of procurement, whereby the European Commission could adapt certain provisions in collaboration with a committee of national experts[62], thus avoiding the need for the EU Council, and later the European Parliament, to undertake such changes in the directive.

The use of this procedure was introduced by the preceding amendment directive 89/440 (W1A4)[63], but only in relation to annex I on public bodies. Two such decisions were made, 90/380 (W1A5) and 92/456 (W1A6), as set out above. This moved annex I a further step away from the original generic listing to a very specific institutional listing as in the current directives.

With the new amendment in directive 93/4 (W1A7), the procedure also applied to the list of activities in annex II, as well as the conditions for the contract and other notices, as well as the statistical reports[64]. With this measure, the model notices became a Commission competence.

3.1.2.2 Directive 77/62 on supplies (G1) [65]

3.1.2.2.1 Original directive

The first directive on supplies introduced the element of the procurement vocabulary, whereby reference is made not to goods, but instead to supplies. However, supplies were defined as the delivery of products, which in turn constituted a synonym for goods on the internal market.

Thus, it may be concluded that the distinction between services and goods on the internal market and the field of procurement coincided. The major distinction was that building services were dealt with separately, and the procurement of other services was regulated only during the second generation.

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[61] Council Directive 93/4 of 8 February 1993 amending Directive 71/305 concerning the coordination of procedures for the award of public works contracts, OJ 1993, p. 31
[62] Council Decision 71/306 of 26 July 1971 setting up an Advisory Committee for Public Works Contracts, OJ 1971, L 185, p. 15, as amended by Council Decision 77/63 of 21 December 1976 amending Decision 71/306/EEC setting up an Advisory Committee for Public Contracts, OJ 1977, L 13, p. 15, which is still in force
[63] Article 30b of directive 71/305 (W1) as amended
[64] Article 30b of directive 71/305 (W1) as further amended
[65] Council Directive 77/62 of 21 December 1976 coordinating procedures for the award of public supply contracts, OJ 1977, L 13, p. 1-14

The layout of the directive largely followed the original works directive 71/305 (W1), with the amendments adopted prior to 1977. Thus also in the first supplies directive 77/62 (G1), the field of utilities was excluded, and no explicit provision on equal treatment was to be found.

The major difference was the setting of thresholds, which were set at the much lower level of 200,000 European accounting units, compared to the revised figure of 5 million units for directive 71/305 (W1).

3.1.2.2.2 Amendments in Directive 80/767 (G1A1) [66]

This directive implemented the obligations of the EU under the Government Procurement Agreement (GPA) of the GATT, later constituting an agreement of the WTO[67]. As this agreement only applied to central government institutions, it required a new annex listing such institutions.

However, this new annex was not integrated into the numbering system of directive 77/62 (G1), but retained its own parallel numbering. As later done in the field of works, the use of Comitology was introduced, allowing the Commission to undertake amendment of the new annex[68].

In addition, the thresholds were lowered for purchases by central government institutions, from 200,000 to 140,000 European accounting units, so as to meet the GPA requirements. However, as set out below, application of the GPA agreement has not been the subject of EU or Danish jurisprudence in the field of public procurement.

3.1.2.2.3 Amendments in Directive 88/295 (G1A2) [69]

This directive slightly preceded but otherwise largely corresponded to directive 89/440 (W1A4) in the field of works, by introducing a large number of changes to the original supply directive 77/62 (G1), thus paving the way for the subsequent second generation directive.

In a somewhat unsatisfactory manner, the directive only partially integrated respect for the GPA agreement into the main directive 77/62 (G1), as several provisions as well as the annexes were left in an amended version of directive 80/767 (G1A1)[70].

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[66] Council Directive 80/767 of 22 July 1980 adapting and supplementing in respect of certain contracting authorities Directive 77/62 coordinating procedures for the award of public supply contracts, OJ 1980, L 215, p. 1-28

[67] For a discussion on enforcement of the GPA agreement, see Arrowsmith (9)

[68] Article 1.2 of directive 80/767 (G1A1)

[69] Council Directive 88/295 of 22 March 1988 amending Directive 77/62 relating to the coordination of procedures on the award of public supply contracts and repealing certain provisions of directive 80/767, OJ 1988, L 127, p. 1-14

3.1.2.3 Common amendments to the classic sector

3.1.2.3.1 Amendments in Accession Act 1979 (C1A1) [71]

The 1979 accession treaty inserted technical references to Greece in the EU procurement directives, as set out in annex I.III.D for directive 71/305 (W1) and annex I.X.C for directive 77/62 (G1).

Furthermore, annex XII, part IV, granted an extended deadline for the implementation of directive 77/62 (G1) until 1 January 1983, as opposed to the Greek accession on 1 January 1981. No such extension was granted for the works directive 71/305 (W1).

However, Greece was granted two transition arrangements[72]. The general 8 per cent preference for public contracts in Greece was to be abolished only over a 5 year period, with an initial reduction by 10 per cent on the date of accession, followed by a further reduction by 10 per cent at the end of the first year of membership, and 20 per cent at the end of each of the next four years. Abolition would thus be achieved by 1 January 1986, as set out in article 25.

For a shorter period of 2 years, until 1 January 1983, Greece could postpone opening the lists of approved suppliers to companies from other member states. It was implicit in the text of article 39, and its placement in a section devoted to the free movement of goods, that these transitory measures primarily related to directive 77/62 (G1). However, they could also have an impact on building materials under directive 71/305 (W1).

3.1.2.3.2 Amendments in Accession Act 1985 (C1A2) [73]

The 1985 accession treaty inserted technical references to Spain and Portugal in the EU procurement directives, as set out in annex I.II.e for directive 71/305 (W1) and annex I.IX.D for directive 77/62 (G1).

3.1.2.3.3 Amendments in Directive 90/531 (C1A3) [74]

This directive, which at the same time constituted the first utilities directive (U1), also in article 35 amended the exemptions for utilities in directives 71/305 (W1) and 77/62 (G1),

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[70] Article 6 of directive 88/295 (G1A2), amending article 5 of directive 77/62 (G1)
[71] Documents concerning the accession of the Hellenic Republic to the European Communities, 25 May 1979, OJ 1979, L 291, p. 1
[72] See article 39
[73] Documents concerning the accession of the Kingdom of Spain and the Portuguese Republic to the European Communities, 25 May 1979, OJ 1985, L 302, p. 1
[74] See below in footnote 83

so as to refer expressly to the coverage area of the first utilities directive 90/351 (U1, which is also C1A3).

3.1.2.3.4 Amendments in Directive 92/50 (C1A4) [75]

This directive, which at the same time constituted the first services directive 92/50 (S2), but which belonged to the second generation, amended directives 71/305 (W1) and 77/62 (G1)[76], so as to introduce ECU and SDR for the bi-annual calculation of national currency counter value of procurement thresholds.

3.1.2.3.5 Amendments in Directive 93/38 (C1A5) [77]

This directive, which at the same time constituted the second generation utilities directive 93/38 (U2), set out to modify both directives 71/305 (W1) and 77/62 (G1)[78], by diminishing the field of exclusion for utilities, so that procurement of inshore and river ferry services operated by public authorities would be covered these directives.

However, a modification was carried out only in directive 77/62 (G1)[79], re-stating the same text as already introduced by directive 90/351 (C1A3), which as set out below introduced this limitation to the scope of utilities.

Furthermore, the replacement of directive 77/62 (G1) by the second generation directive 92/36 (G2) had a deadline of 14 June 2004, two weeks prior to deadline of 1 July 2004 for directive 93/38 (U2), which was set even later for some countries[80].

3.1.2.3.6 Recommendation 91/561 (C1X1) [81]

This recommendation was a first step toward the movement from mandatory content of procurement notices to mandatory standard forms. As the legal act was drafted as a non-binding recommendation, it limited itself to recommending to the member states the use of the standard forms drawn up in annex attached to the recommendation.

Although adopted subsequent to the first utilities directive 90/351 (U1), but issued prior to the deadline for implementation of this directive, the recommendation was limited to apply only to the classic field, covering directives 71/305 (W1) and 77/62 (G1), as amended.

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[75] See below in footnote 97
[76] See article 42 of directive 92/50 (C1A4)
[77] See below in footnote 105
[78] See point 19 of the preamble of directive 93/38 (C1A5)
[79] See article 43 of directive 93/38 (C1A5)
[80] See below in section 3.1.3.5
[81] Commission Recommendation 91/561 of 24 October 1991 on the standardization of notices of public contracts, OJ 1991, L 305, p. 19-21

The recommendation also proposed the use of a General Public Works Nomenclature, set out in the annex to the recommendation, that was meant to constitute an option to the list of activities previously inserted into directive 71/305 (W1)[82]. As use of the list was mandatory, it is difficult to see how effectively the recommendation could introduce an alternative.

3.1.2.4 Directive 90/531 on utilities (U1) [83]

3.1.2.4.1 Original directive[84]

The first directive on utilities constituted a new way of addressing the issue that member states had a great variety of manners in which utilities were operated, being mainly either public entities or private companies.

The solution in the classic directives had been to avoid any difference in treatment of the member states by excluding the utilities field. The solution in the utilities directive was to let it apply not only to public entities, but also to private entities operating on the basis of special rights.

In accordance with this criterion, the field of utilities has subsequently been diminished when markets changed from a limited supplier status to an open competition status, such as the case for telecommunications in utilities directive 2004/17 (U3), which expressly was set not to revert into coverage by classic 2004/18 (C3) for public entities, but to be entirely exempted from the procurement directives[85].

This may be contrasted with the removal of inshore and river ferry services from the scope of the transportation coverage by the sector of utilities, which was introduced by the amendment to the previous wider scope of the exemption in the classic directives 71/305 (W1) and 77/62 (G1)[86], and by not including in the wording of the scope of coverage of directive 90/351. By default, public entities in this field became covered by classic directives.

Already with this first utilities directive, the concept of a joint directive for works, supplies and services was introduced. For the classic field, such concentration was undertaken only with the third generation directive 2004/18 (C3).

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[82] See above in section 3.1.2.1.5
[83] Council Directive 90/531 of 17 September 1990 on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors, OJ 1990, L 297, p. 1-48
[84] For a discussion of the Danish implementation, see Larsen (2)
[85] See point 5 of the preamble of directive 2004/17 (U3) in conjunction with point 21of the preamble of directive 2004/18 (C3)
[86] See above in section 3.1.2.3.3

3.1.2.4.2 Amendments in Directive 94/22 (U1A1) [87]

This directive did not as such concern procurement, but regulated the conditions for granting and using authorizations for the prospection, exploration and production of hydrocarbons. However, it did provide in article 12 a specification that implementation of the directive satisfied the conditions in article 3.1 of directive 90/351 (U1) for exempting exploitation of geographical areas, for the purpose of exploring for, or extracting, oil, gas, coal or other solid fuels, from following the utilities procurement procedures.

3.1.2.5 First generation dates for implementation and application

The dates for implementation and application of the first generation provisions on EU public procurement may be summarized as follows:

Table 6: First generation of EU procurement

Legal Act	Notation	Date of effect
Directive 71/305	W1	1972-07-30
Accession Act 1972	W1A1	1973-07-01
Directive 72/277	W1A2	Not specified (Post 1972-07-28)
Directive 78/669	W1A3	1979-02-03
Directive 89/440	W1A4	1990-07-19 (ES, GR, PT: 1992-03-01)
Decision 90/380	W1A5	1990-07-19
Decision 92/456	W1A6	1992-08-04
Directive 93/4	W1A7	1993-07-01
Directive 77/62	G1	1978-06-24
Directive 80/767	G1A1	1981-01-01
Directive 88/295	G1A2	1989-01-01
Accession Act 1979	C1A1	1981-01-01
Accession Act 1985	C1A2	1986-01-01
Directive 90/531	C1A3	1993-01-01
Directive 92/50	C1A4	1993-07-01
Directive 93/38	C1A5	1994-01-01 (ES: 1997-01-01, GR, PT: 1998-01-01)
Recommendation 91/561	C1X1	1992-01-01 (invitation to implement)
Directive 90/531	U1	1993-01-01
Directive 94/22	U1A1	1995-07-01

[87] Directive 94/22/EC of the European Parliament and of the Council of 30 May 1994 on the conditions for granting and using authorizations for the prospection, exploration and production of hydrocarbons, OJ 1994, p. 3-8

3.1.3 Second generation[88]

3.1.3.1 Directive 93/37 on works (W2)[89]

3.1.3.1.1 Original directive

This constituted the works directive of the second generation. Although subsequent to the services directive 92/50 (S2), which introduced a specific equal treatment provision[90], this directive did not include any specific equal treatment provision.

3.1.3.1.2 Amendment by Statement 430/94 (W2A1)[91]

This statement introduced the principle of equal treatment in relation to the specific issue of contact and negotiations with operators during the procurement procedure, drawing a line between fundamental aspects, which were not to be negotiated, and technical clarifications, which the contracting authority could request on a non-discriminatory basis.

Given the case law of the European Court of Justice on declarations[92], the binding force of this statement, issued jointly by the EU Council and the European Commission, may be questioned, although it was published in the Official Journal. As dealt with below, this specific issue has not been raised in case law.

3.1.3.2 Directive 93/36 on supplies (G2)[93]

This constituted the supplies directive of the second generation, and it also did not include any specific equal treatment provision.

Like previously in directive 71/305 (W1) on works, as amended by directive 89/440 (W1A4)[94], the second generation directive on supplies introduced the mandatory use of a nomenclature[95], in the form of the Statistical Classification of Products by Activity (CPA), that was in fact only adopted later the same year by the EU Council[96].

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[88] For a discussion of the case law of the European Court of Justice under the second generation directives, see Treumer (6)
[89] Council Directive 93/37 of 14 June 1993 concerning the coordination of procedures for the award of public works contracts, OJ 1993, L 199, p. 54-83
[90] See article 3.2 of directive 92/50 (S2)
[91] Statement of the Council and Commission 430/94 of 30 May 1994 concerning Article 7 (4) of Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts, OJ 1994, L 111, p. 114
[92] See above in footnote 41
[93] Council Directive 93/36 of 14 June 1993 coordinating procedures for the award of public supply contracts, OJ 1993, L 199, p. 1-53
[94] See above in section 3.1.2.1.5
[95] See article 9.1.2
[96] Council Regulation 3696/93 of 29 October 1993 on the statistical classification of products by activity (CPA) in the European Economic Community, OJ 1993, L 342, p. 1-122

3.1.3.3 Directive 92/50 on services (S2)[97]

This constituted the first services directive[98], and although issued the year before the other second generation directives, it most logically should be classified as a second generation directive, as it shared many features with the directives 93/36 (G2), 93/37 (W2) and 93/38 (U2)[99].

3.1.3.4 Common amendments to the classic sector in Directive 97/52 (C2A1) [100]

This directive, introduced explicit equal treatment provisions[101] in respectively the works directive 93/37 (W2)[102] and the supplies directive 93/36 (G2)[103]. However, as set out below this may be seen more as a codification since by this time, the European Court of Justice had already introduced the understanding that equal treatment constituted an underlying main principle of the EU procurement directives.

It also revised the provisions on communication of decisions and statement of reasons in all of the classic directives[104], as well as adjusting the calculation of threshold values.

3.1.3.5 Directive 93/38 on utilities (U2) [105]

3.1.3.5.1 Original directive

This constituted the second generation utilities directive, which unlike the works directive 93/37 (W2) and the supplies directive 93/36 (G2) did contain a specific equal treatment provision[106].

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[97] Council Directive 92/50 of 18 June 1992 relating to the coordination of procedures for the award of public service contracts, OJ 1992, L 209, p. 1-24
[98] For a discussion of the implementation in Denmark, see Larsen (1)
[99] For comments on the application of the second generation services directive, and relations with other second generation directives, see Høegh (2)
[100] European Parliament and Council Directive 97/52 of 13 October 1997 amending Directives 92/50/EEC, 93/36/EEC and 93/37/EEC concerning the coordination of procedures for the award of public service contracts, public supply contracts and public works contracts respectively, OJ 1997, L 328, p. 1-59
[101] See articles 3.1.b and 2.1.b
[102] See article 6.6 of the directive as amended
[103] See article 5.7 of the directive as amended
[104] See respectively articles 1.2, 2.2 and 3.2 of the directives 93/37 (W2) and 93/36 (G2), as amended, as well as 92/50 (S2)
[105] Council Directive 93/38 of 14 June 1993 coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors, U 1993, L 199, p. 84-138
[106] See article 4.2

3.1.3.5.2 Amendments in Directive 98/4 (U2A1) [107]

This directive introduced compliance with the WTO rules in the field of utilities. As directive 80/767 (G1A1) has previously introduced compliance with the GPA agreement, as set out above[108], the present directive related to the adherence by the EU, through Council decision 94/800[109], to the outcome of the Uruguay round of WTO negotiations.

As in the second generation of the classic field directives, it introduced the Special Drawing Rights (SDR) of the International Monetary Fund (IMF) for calculating threshold values, in combination with the ECU, and introduced the use of most favoured nation treatment of operators from states covered by the WTO agreement[110].

3.1.3.6 Common amendments to the classic and utilities sectors

3.1.3.6.1 Amendments in Accession Act 1994 (P2A1) [111]

The 1994 accession act inserted technical references to Austria, Finland and Sweden in the EU procurement and remedies directives[112].

Such references were also inserted for Norway, but following the negative outcome of the accession referendum, as previously in 1972, the references to Norway were subsequently removed[113].

3.1.3.6.2 Amendments in Directive 2001/78 (P2A2) [114]

3.1.3.6.2.1 Original directive

This directive formed the first use of the new method of harmonisation within the field of procurement. Following up on the Commission recommendation 91/561 (C1X1), this

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[107] Directive 98/4/EC of the European Parliament and of the Council of 16 February 1998 amending Directive 93/38 coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors, OJ 1998, L 101, p. 1-16

[108] See above in section 3.1.2.2.2

[109] Council Decision 94/800 of 22 December 1994 concerning the conclusion on behalf of the European Community, as regards matters within its competence, of the agreements reached in the Uruguay Round multilateral negotiations (1986-1994), OJ 1994, L 336, p. 1-2

[110] See article 42a of directive 93/38 (U2) as amended

[111] Documents concerning the accession of the Republic of Austria, the Kingdom of Sweden, the Republic of Finland and the Kingdom of Norway to the European Union, OJ 1994, C 241, p. 1

[112] See annex I.XI.E of the accession act

[113] Decision of the Council of the European Union 95/1 of 1 January 1995 adjusting the instruments concerning the accession of new Member States to the European Union, OJ 1995, L 1, p.1

[114] Commission Directive 2001/78 of 13 September 2001 amending Annex IV to Council Directive 93/36, Annexes IV, V and VI to Council Directive 93/37, Annexes III and IV to Council Directive 92/50, as amended by Directive 97/52, and Annexes XII to XV, XVII and XVIII to Council Directive 93/38, as amended by Directive 98/4/EC (Directive on the use of standard forms in the publication of public contract notices), OJ 2001, L 285, p. 1-162

Commission directive introduced the mandatory use of standard forms for procurement notices.

3.1.3.6.2.2 Corrigendum (P2A2C1) [115]

Somewhat embarrassing, the first publication of mandatory standard forms contained a number of errors, and as a consequence the entire set of forms was re-published in the Official Journal of the EU.

3.1.3.6.3 Amendments in Accession Act 2003 (P2A3) [116]

The 1994 accession act inserted technical references to the Cyprus, Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovakia and Slovenia in the EU procurement and remedies directives[117].

3.1.3.6.4 Recommendation 96/527 (P2X1) [118]

This recommendation introduced the Common Procurement Vocabulary (CPV) as the nomenclature for use in procurement notices. It contains a classification of all goods and activities subject to procurement and constitutes an adaptation of the Statistical Classification of Products by Activity (CPA), previously adopted by the EU Council[119].

In turn, the CPA was a reduced version of the Statistical Classification of Economic Activities in the European Community (NACE rev. 1)[120]. The CPA was also based on correspondence with the Central Product Classification (CPC) of the United Nations.

As set out above, mandatory use of nomenclatures was first introduced by directive 89/440 (W1A4), amending directive 71/305 on works (W1)[121]. Later, directive 93/36 (G2) on

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[115] Corrigendum to Commission Directive 2001/78 of 13 September 2001 amending Annex IV to Council Directive 93/36, Annexes IV, V and VI to Council Directive 93/37, Annexes III and IV to Council Directive 92/50, as amended by Directive 97/52, and Annexes XII to XV, XVII and XVIII to Council Directive 93/38, as amended by Directive 98/4/EC (Directive on the use of standard forms in the publication of public contract notices), OJ 2002, L 214, p. 1-88

[116] Documents concerning the accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic to the European Union, OJ 2003, L 236, p. 1-988, with annexes in OJ 2003, C 227, p. 1-1654

[117] See annex II.1.I of the accession act

[118] Commission Recommendation 96/527 of 30 July 1996 on the use of the Common Procurement Vocabulary (CPV) for describing the subject matter of public contracts, OJ 1996, L 222, p. 1-12

[119] See above in footnote 96

[120] Council Regulation 3037/90 of 9 October 1990 on the statistical classification of economic activities in the European Community, OJ 1990, L 293, p. 1, subsequently replaced by Regulation 1893/2006 of the European Parliament and of the Council of 20 December 2006 establishing the statistical classification of economic activities NACE Revision 2 and amending Council Regulation 3037/90 as well as certain EC Regulations on specific statistical domains, OJ 2006, L 393, p. 1-39

supplies introduced the mandatory use of the CPA[122], and only with the later third generation directives 2004/17 (U3) and 2004/18 (C3) did the use of the CPV become mandatory in general[123].

3.1.3.6.5 Amendments in Regulation 2195/2002 (P2X2) [124]

This regulation followed up on the recommendation 96/527 (P2X1) and introduced the CPV as an act adopted by the European Parliament and EU Council. However, the obligation to apply the CPV was regulated only in the later third generation EU procurement directives as set out above.

On this background it is lightly confusing that the preamble of the regulation stated the need for an interim period before the CPV becomes binding and for this reason set the date of coming into force as 16 December 2003[125].

3.1.3.6.6 Amendments in Regulation 2151/2003 (P2X3) [126]

This regulation, following the new method of harmonisation, was issued by the European Commission, on the day following the coming into force of regulation 2195/02 (P2X2). It effectively replaced the CPV with a new version.

The new version took into account the new Provisional Central Product Classification (CPC prov.) of the United Nations, the new version of the statistical Classification of Products by Activity (CPA)[127], and also indicated the relations with the Combined Nomenclature (CN) of the EU, which applied to the Common Customs Tariff and the external trade statistics of the Community[128].

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[121] See above in section 3.1.2.1.5
[122] See above in section 3.1.3.2
[123] See article 41.1.1.a.2 of directive 2004/17 and article 35.1.1.a.2 of directive 2004/18.
[124] Regulation 2195/2002 of the European Parliament and of the Council of 5 November 2002 on the Common Procurement Vocabulary (CPV), OJ 2002, L 340, p. 1-562
[125] See article 4
[126] Commission Regulation 2151/2003 of 16 December 2003 amending Regulation (EC) No 2195/2002 of the European Parliament and of the Council on the Common Procurement Vocabulary (CPV), OJ 2003, L 329, p. 1-270
[127] Commission Regulation 204/2002 of 19 December 2001 amending Council Regulation 3696/93 on the statistical classification of products by activity (CPA) in the European Economic Community, OJ 2002, L 36, p. 1-196
[128] Originally introduced by Council Regulation 2658/87 of 23 July 1987 on the tariff and statistical nomenclature and on the Common Customs Tariff, OJ 1987, L 256, p. 1-675

3.1.3.7 Second generation dates for implementation and application

The dates for implementation and application of the second generation provisions on EU public procurement may be summarized as follows:

Table 7: Second generation of EU procurement

Legal Act	Notation	Date of effect
Directive 93/37	W2	Not specified (post 1993-07-05)
Statement 430/94	W2A1	Not specified (post 1994-04-30)
Directive 93/36	G2	1994-06-14
Directive 92/50	S2	1993-07-01
Directive 97/52	C2A1	1998-10-13
Directive 93/38	U2	1994-01-01 (ES: 1997-01-01, GR, PT: 1998-01-01)
Directive 98/4	U2A1	1999-02-16
Accession Act 1994	P2A1	1995-01-01
Directive 2001/78	P2A2	2002-05-01
Corrigendum to directive 2001/78	P2A2C1	Not specified (post 2002-08-09)
Accession Act 2003	P2A3	2004-05-01
Recommendation 96/527	P2X1	1996-08-01
Regulation 2195/2002	P2X2	2003-12-16
Regulation 2151/2003	P2X3	2004-01-06

3.1.4 Third generation[129]

3.1.4.1 Directive 2004/18 on the classic sector (C3)[130]

3.1.4.1.1 Original directive[131]

This is the current directive on procurement in the classic field, combining for the first time works, supplies and services in a single directive. For utilities, this was done already with the first generation directive 90/531 (U1).

[129] The implications of the third generation directives are discussed in Nielsen (3), with contributions from a number of public procurement specialists. See also the discussion on the background for new provisions in Allain (1). The need for amendments was discussed at an early stage in Arrowsmith (10), and the subsequent result was discussed in Arrowsmith (4). A discussion of the state of case law, just prior to the introduction of the third generation directives, may be found in Bovis (5), and comments on the relationship between this case law and the development of the third generation directives may be found in Bovis (3). For a discussion on accelerated procedures, see Williams (2)

[130] Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts, OJ 2004, L 134, p. 114-240

[131] Comments on the provisions of the third generation classical directive may be found in Hjelmborg (1)

3.1.4.1.2 Amendments in Directive 2005/75 (C3A1) [132]

This amendment was adopted prior to the expiration of deadline for implementation of directive 2004/18 (C3) and only served to correct a technical error in the final provisions on revision of the thresholds.

3.1.4.2 Directive 2004/17 on the utilities sector (U3) [133]

3.1.4.2.1 Original directive

This is the current directive on utilities, applying to works, supplies and services, as was the practice from the first utilities directive 90/531 (U1) as mentioned above.

3.1.4.2.2 Amendments in Decision 15/2005 (U3A1) [134]

As for the classic field, this amendment was adopted prior expiration of the deadline for implementing directive 2004/17 (U3). It introduced a mandatory form for use with applications for exemptions from procurement procedures for fields of activity already subject to competition[135].

3.1.4.3 Common amendments to the classic and utilities sectors

3.1.4.3.1 Amendments in Regulation 1874/2004 (P3A1) [136]

This amendment, also adopted prior to the expiration of the deadline for implementation of directives 2004/17 (U3) and 2004/18 (C3), lowered the thresholds for procurement procedures, so as to ensure alignment with the WTO procurement thresholds. The need for alignment comes from the fact that the WTO thresholds are expressed in the Special Drawing Rights (SDR) of the International Monetary Fund (IMF), which were also used in the EU second generation directives when implementing the WTO obligations, whereas the present directives only express the thresholds in Euro, as had been the case in the first generation, referring to the European accounting unit.

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[132] Directive 2005/75 of the European Parliament and of the Council of 16 November 2005 correcting Directive 2004/18 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts, OJ 2005, L 323, p. 55-56

[133] Directive 2004/17 of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors, OJ 2004, L 134, p. 1-113

[134] Commission Decision 2005/15 of 7 January 2005 on the detailed rules for the application of the procedure provided for in Article 30 of directive 2004/17/EC of the European Parliament and of the Council coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors, OJ 2005, L 7, p. 7-17

[135] See article 30.1 of directive 2004/17

3.1.4.3.2 Amendments in Regulation 1564/2005 (P3A2) [137]

This regulation set out the new standard forms to be applied for procurement procedures under directives 2004/17 (U3) and 2004/18 (C3). As set out below[138], a draft version of the standard forms were applied in Denmark during the period of early implementation of the directives from 1 January 2005, prior to the expiration of the deadline for implementation on 1 February 2006.

3.1.4.3.3 Amendments in Directive 2005/51 (P3A3) [139]

This directive, again adopted prior to the expiration of the deadline for implementation of directives 2004/17 (U3) and 2004/18 (C3), amended the reference to mandatory forms, which originally pointed to the directive 2001/78 (P2A2) adopted by the Commission for the second generation, and which now instead would point to the new Commission regulation mentioned above.

3.1.4.3.4 Amendments in Regulation 2083/2005 (P3A4) [140]

This regulation, constituting the final amendment of directives 2004/17 (U3) and 2004/18 (C3) prior to the expiration of the deadline for implementation, once again lowered the thresholds for procurement procedures, so as to ensure alignment with the WTO procurement thresholds.

3.1.4.3.5 Amendments in Directive 2006/97 (P3A5) [141]

This directive amended the annexes of directives 2004/17 (U3) and 2004/18 (C3) to reflect the Bulgarian and Romanian accession. Unlike previous accessions, this issue was not

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[136] Commission Regulation 1874/2004 of 28 October 2004 amending Directives 2004/17 and 2004/18 of the European Parliament and of the Council in respect of their application thresholds for the procedures for the award of contracts, OJ 2004, L 326, p. 17-18

[137] Commission Regulation 1564/2005 of 7 September 2005 establishing standard forms for the publication of notices in the framework of public procurement procedures pursuant to Directives 2004/17 and 2004/18 of the European Parliament and of the Council, OJ 2005, L 257, p. 1-126

[138] See below in section 3.4.4.3.1

[139] Commission Directive 2005/51 of 7 September 2005 amending Annex XX to Directive 2004/17 and Annex VIII to Directive 2004/18 of the European Parliament and the Council on public procurement, OJ 2005, L 257, p. 127-128

[140] Commission Regulation 2083/2005 of 19 December 2005 amending Directives 2004/17 and 2004/18 of the European Parliament and of the Council in respect of their application thresholds for the procedures for the award of contracts, OJ 2005, L 333, p. 28-29

[141] Council Directive 2006/97 of 20 November 2006 adapting certain directives in the field of free movement of goods, by reason of the accession of Bulgaria and Romania, OJ 2006, p. 107

dealt with in the accession act[142], but only in this later act by the Council, which had it legal basis in the accession documents[143].

3.1.4.3.6 Amendments in Regulation 1422/2007 (P3A6) [144]

As the previous regulation, this regulation again lowered the thresholds for procurement procedures, so as to ensure alignment with the WTO procurement thresholds.

3.1.4.3.7 Amendments in Regulation 213/2008 (P3A7) [145]

This amendment served the double function of revising the previous regulation 2195/2002 (P2X2) on the CPV, and replacing also the annexes concerned in directives 2004/17 (U3)[146] and 2004/18 (C3)[147]. However, the definition of works remains based on NACE[148].

A reference to the CPV had already from the outset been included directly in the text of the third generation directives[149].

3.1.4.3.8 Amendments in Decision 2008/963 (P3A8) [150]

This amendment incorporated the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic into the annexes of directives 2004/17 (U3) and 2004/18 (C3)[151]. The amendment was carried out in the second generation directives by the 2003 accession act (P2A3), but was not carried forward into third generation directives.

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[142] Documents concerning the accession of the Republic of Bulgaria and Romania to the European Union, OJ 2005, L 157, p. 1
[143] See article 4.3 of the accession treaty and article 56 of the accession treaty
[144] Commission Regulation 1422/2007 of 4 December 2007 amending Directives 2004/17 and 2004/18 of the European Parliament and of the Council in respect of their application thresholds for the procedures for the award of contracts, OJ 2007, L 317, p. 34-35
[145] Commission Regulation 213/2008 of 28 November 2007 amending Regulation 2195/2002 of the European Parliament and of the Council on the Common Procurement Vocabulary (CPV) and Directives 2004/17 and 2004/18 of the European Parliament and of the Council on public procurement procedures, as regards the revision of the CPV, OJ 2008, L 74, p. 1-375
[146] See annex XII, XVIIA and XVIIB as amended of directive 2004/17 (U3)
[147] See annex I, IIA and IIB as amended of directive 2004/18 (C3)
[148] See annex V as amended of directive 2004/18 (C3) and above in section 3.1.3.6.4
[149] See article 1.14 of directive 2004/18 (C3) and article 1.17 of directive 2004/17 (U3)
[150] Commission Decision 2008/93 of 9 December 2008 amending the Annexes to Directives 2004/17/EC and 2004/18/EC of the European Parliament and of the Council on public procurement procedures, as regards their lists of contracting entities and contracting authorities, OJ 2008, L 349, p. 1
[151] For a discussion of the economic impact of EU public procurement in the new member states, see Mardas (1) and Trybus (1). For a comment on the amended lists, se Williams (1)

As set out above[152], the consequences for the annexes of Bulgarian and Romanian accession were dealt with in a separate directive 2006/97 (P3A5). The present amendment also reflects changes in various member state administrations.

3.1.4.4 Third generation dates for implementation and application

The dates for implementation and application of the third generation provisions on EU public procurement may be summarized as follows:

Table 8: Third generation of EU procurement

Legal Act	Notation	Date of effect
Directive 2004/18	C3	2006-01-31 (DK voluntary: 2005-01-01)
Directive 2005/75	C3A1	2006-01-31
Directive 2004/17	U3	2006-01-31 (DK voluntary: 2005-01-01)
Decision 15/2005	U3A1	2005-11-01
Regulation 1874/2004	P3A1	2004-11-01
Regulation 1564/2005	P3A2	2005-10-21
Directive 2005/51	P3A3	2005-10-21
Regulation 2083/2005	P3A4	2006-01-01
Directive 2006/97	P3A5	2007-01-01
Regulation 1422/2007	P3A6	2008-01-01
Regulation 213/2008	P3A7	2008-09-15
Decision 2008/963	P3A8	2009-01-01

3.2 EU remedies system[153]

3.2.1 First generation

3.2.1.1 Directive 89/665 on the classic sector (RC1)[154]

3.2.1.1.1 Original directive

This constitutes the current directive on remedies in the classical field, and was also the first such harmonising measure within EU public procurement.

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[152] See above in section 3.1.4.3.5

[153] An introduction to the EU remedies system may be found in Trepte (1), p. 543-600, which includes consideration of the proposals for the second generation remedies system. For a discussion on the conditions for bringing claims against EU institutions, see Braun (4). For a discussion on obligations on the European Commission when bringing cases against member states, see Brown (8), and for a discussion on sanctions against member states for non-respect for the decisions of the European Court of Justice, based on case 70/06, see McGowan (5). For a discussion on the special powers of the European Commission under the remedies directives, based on case C-94/02, Greece, see Henty (2) For a discussion on limitation periods in national procedures, based on case C-241/06, Lämmerzahl, see Dischendorfer (1). For a discussion on the burden of proof in interim measures, see Varga (1). For a United Kingdom perspective on remedies, see Zar (1)

[154] Council Directive 89/665 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, OJ 1989, L 395, p. 33-35

It contains two main parts, one concerning the remedies to be made available at the national level[155], and the other concerning an additional legal basis for the Commission to take action against member states[156].

3.2.1.1.2 Amendments in Directive 92/50 (RC1A1) [157]

This directive introduced the regulation of services, and in relation to directive 89/665 (RC1) simply added directive 92/50 (S2) to the scope of the remedies directive[158].

3.2.1.2 Directive 92/13 on the utilities sector (RU1) [159]

3.2.1.2.1 Original directive[160]

This directive, adopted two years after the directive for the classic field, contained similar provisions, but also added a new conciliation procedure[161], which has not been subject to jurisprudence, and which is removed in the second generation directive 2007/66[162]. It also introduced a new attestation system, which likewise has not been the subject of jurisprudence[163].

3.2.1.2.2 Amendments in Accession Act 1994 (RU1A1) [164]

The 1994 accession act added institutions from Austria, Finland, Norway and Sweden to the annex related to conciliation in directive 92/13 (RU1). References to Norway were subsequently removed[165].

3.2.1.2.3 Amendments in Accession Act 2003 (RU1A2) [166]

In a similar manner, the 2003 accession act added institutions from Cyprus, Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovakia and Slovenia to the annex related to conciliation in directive 92/13.

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[155] See article 1-2
[156] See article 3
[157] See above in footnote 97
[158] See article 1 as amended of directive 89/665
[159] Council Directive 92/13 of 25 February 1992 coordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors, OJ 1992, L 76, p. 14-20
[160] For a discussion of the Danish implementation, see Larsen (2)
[161] See article 9-11
[162] See below in footnote 168
[163] See article 3-7
[164] See above in footnote 111
[165] See above in footnote 113

3.2.1.2.4 Amendments in Directive 2006/97 (RU1A2) [167]

As set out above, the consequences for the procurement directives of the Bulgarian and Romanian accession were not regulated in the accession act, but instead by this directive.

3.2.2 Second generation

3.2.2.1 Directive 2007/66 on the classic and utilities sectors (R2) [168]

As set out above[169], this directive does not from a formal point of view constitute a new generation., as it has been drafted as an amendment of the two existing directives 89/665 (RC1) and 92/13 (RU1).

However, the amendments are so substantial that arguments may be put forward for regarding it as a new generation in spite of this technical issue. In any case, the date for implementation expires only on 20 December 2009, and thus no jurisprudence exists for consideration in the present report.

The major focus of the amendments is to codify respect for the Alcatel principle[170], whereby a certain stand still period must apply between contract award and contract signing, and to draw the consequences for contracts signed in violation of this principle[171]. The principle is further dealt with separately[172].

3.2.3 Remedies dates for implementation and application

The dates for implementation and application of the provisions on remedies in EU public procurement may be summarized as follows:

Table 9: First generation of EU remedies

Legal Act	Notation	Date of effect
Directive 89/665	RC1	1991-12-01
Directive 92/50	RC1A1	1993-07-01
Directive 92/13	RU1	1993-01-01
Accession Act 1994	RU1A1	1995-01-01
Accession Act 2003	RU1A2	2004-05-01
Directive 2006/97	RU1A3	2007-01-01

[166] See above in footnote 116
[167] See above in footnote 116
[168] Directive 2007/66 of the European Parliament and of the Council of 11 December 2007 amending Council Directives 89/665/EEC and 92/13/EEC with regard to improving the effectiveness of review procedures concerning the award of public contracts, OJ 2007, L335, p. 31
[169] See above in section 2.5
[170] Case C-81/98, Alcatel
[171] For an early comment on the Alcatel principle, see Nielsen (4), and for a review of the implementation in the United Kingdom, see Arrowsmith (2). For a discussion of the new instrument of ineffectiveness, see Clifton (1) and Golding (1), as well as the discussion on case C-444/06, Spain, in Oder (1)
[172] This will be dealt with in the following part of the project

Legal Act	Notation	Date of effect
Directive 2007/66	RM2	2009-12-20

3.3 Community procurement system[173]

3.3.1 First generation

3.3.1.1 Financial Regulation 68/313 (Q1)[174]

This was the first financial regulation, not only to cover the period coinciding with the EU public procurement directives, but also the first generation of financial regulations as such. However, this regulation predated the directives and accordingly does not refer to them.

It did hold the main constituent parts of a public procurement system[175], but there is no jurisprudence that interprets this financial regulation.

3.3.1.2 Amendments in Financial Regulation 70/555 (Q1A1)[176]

The financial regulation 313/68 (Q1) was intended to have a validity of 2 years, lasting until 31 December 1969[177], but this financial regulation prolonged the validity for a further 2 years, until 31 December 1971.

3.3.1.3 Amendments in Financial Regulation 72/19 (Q1A2)[178]

Similar to the preceding regulation, this regulation prolonged the validity of financial regulation 313/68 (Q1) for a further year, until 31 December 1972.

3.3.1.4 Amendments in Financial Regulation 72/450 (Q1A3)[179]

Again, this regulation prolonged the validity of financial regulation 313/68 (Q1) for a further year, until 31 December 1973.

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[173] An introduction to the internal procedures of Community procurement may be found in Trepte (1), p. 601-671
[174] Règlement financier 313/68 du 30 juillet 1968 relatif à l'établissement et à l'exécution du budget des Communautés européennes et à la responsabilité des ordonnateurs et comptables, OJ 1968, L 199, p. 1
[175] See articles 52-58
[176] Règlement financier 555/70 du 28 décembre 1970 portant reconduction du règlement financier du 30 juillet 1968 relatif à l'établissement et à l'exécution du budget des Communautés européennes et à la responsabilité des ordonnateurs et des comptables, OJ 1970, L 285, p. 74
[177] See article 71
[178] Règlement financier 19/72 du 20 décembre 1971 portant reconduction du règlement financier, du 30 juillet 1968, relatif à l'établissement et à l'exécution du budget des Communautés européennes et à la responsabilité des ordonnateurs et des comptables, OJ 1972, L 4, p. 21
[179] Financial Regulation 72/450 of 28 December 1972 prolonging the Financial Regulation of 30 July 1968 on the establishment and implementation of the Budget of the European Communities and on the responsibility of authorising officers and accounting officers, OJ 1972, L 298, p. 56

3.3.1.5 First generation dates for application

The dates for application of the first generation provisions on Community procurement may be summarized as follows:

Table 10: First generation of Community procurement

Legal Act	Notation	Date of effect
Financial Regulation 313/1968	Q1	1968-01-01
Financial Regulation 555/70	Q1A1	1970-01-01
Financial Regulation 19/72	Q1A2	1972-01-01
Financial Regulation 450/72	Q1A3	1973-01-01

3.3.2 Second generation

3.3.2.1 Financial Regulation 73/91 (Q2) [180]

3.3.2.1.1 Original regulation

Like its predecessor, financial regulation 68/313 (Q1), this second generation financial regulation held the main constituent parts of a public procurement system[181]. To this it added an obligation to comply with measures adopted within the EU public procurement system in relation to public works[182], which at the time was the only field covered[183].

The financial regulation would continue to regulate procurement that was not covered by the works directive. For procurement above 5,000 units of account, the predecessor of the Euro, the institutions had to enable suppliers to compete as far as possible[184], which effectively meant some form of advertising would have to be undertaken[185]. For smaller amounts and under special conditions, direct agreement was permitted, without any definition of this concept[186], which however must be taken to mean more that just ordering, since purchase against an invoice was permitted only for minute amounts below 200 units of account[187].

As opposed to its predecessor, no time limit was set for the validity of this financial regulation. However, there is no jurisprudence concerning its application.

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[180] Règlement financier 91/73 du 25 avril 1973 applicable au budget général des Communautés européennes, OJ 1973, L 116, p. 73
[181] See articles 58-65
[182] See article 66
[183] See directive 71/305 (W1)
[184] See article 60.a
[185] See article 58.1.1
[186] See article 58.1.2
[187] See article 65

3.3.2.1.2 Amendments

Although four amendments were adopted for regulation 73/91 (Q2), during its time of application, none of those concern procurement.

3.3.2.2 Implementation provisions in Regulation 375/75 (M2)[188]

According to article 118 of the financial regulation 73/91 (Q2), the European Commission was entrusted with adopting implementing measures for the application of the financial regulation. The present regulation 375/75 (M2), as well as those of the following generations, included measures related to the issue of procurement procedures[189]. These measures add detail to the procedure to be followed outside the field of application of the EU public procurement directives, as set out above.

3.3.2.3 Second generation dates for application

The dates for application of the second generation provisions on Community procurement may be summarized as follows:

Table 11: Second generation of Community procurement

Legal Act	Notation	Date of effect
Financial Regulation 73/91	Q2	1973-05-01
Regulation 375/75	M2	1975-05-01

3.3.3 Third generation

3.3.3.1 Financial Regulation 77/1231 (Q3)[190]

3.3.3.1.1 Original regulation

This financial regulation followed the outline of its predecessor, financial regulation 73/91 (Q2), by setting up the main constituent parts of a public procurement system[191], and adding an obligation to observe the EU public procurement provisions on works[192].

This limitation to works was slightly surprising, since the first generation directive on supplies had been adopted at the time[193], although the deadline for implementation had not yet expired.

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[188] Commission Regulation 75/375 of 30 June 1975 on measures of implementation of certain provisions of the Financial Regulation of 25 April 1973, OJ 1975, L 170, p. 1-14
[189] See articles 55-71
[190] Financial Regulation 1231/77 of 21 December 1977 applicable to the general budget of the European Communities, OJ 1977, L 356, p. 1-30
[191] See articles 50-57
[192] See directive 71/305 (W1)
[193] See directive 77/62 (G1)

3.3.3.1.2 Amendments in Financial Regulation 90/610 (Q3A5) [194]

Out of a total of thirteen amendments to the financial regulation 77/1231 (Q3), only three of those concerned procurement. This fifth amendment moved the regulation of thresholds to the implementing measures to be adopted by the Commission[195]. In addition, respect for the EU public procurement directives on supplies was now also indicated[196].

3.3.3.1.3 Amendments in Financial Regulation 95/2333 (Q3A7) [197]

This seventh amendment made the obligation in relation to the EU public procurement directives more specific, as each EU institution was to comply with the obligations in these directives in the same manner public bodies in the member states[198].

3.3.3.1.4 Amendments in Financial Regulation 98/2548 (Q3A11) [199]

This eleventh amendment only regulated a specific issue concerning the requirement for a bid to be complete at the time of submission[200], corresponding to one of the aspects of equal treatment in the EU public procurements directives, as is further dealt with below.

3.3.3.2 Implementation provisions in Regulation 610/86 (M31) [201]

This regulation added substantially to the procedural rules to be followed outside the scope of the EU public procurement directives, which may be seen as a step in the continuing development towards the separation between Community procurement procedures and the EU public procurement system in the fourth generation, as set out below[202].

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[194] Council Regulation 610/90 of 13 March 1990 amending the Financial Regulation of 21 December 1977 applicable to the general budget of the European Communities, OJ 1990, L 70, P. 1-27
[195] See article 58 as amended in financial regulation 77/1231 (Q3)
[196] See article 64 as amended in financial regulation 77/1231 (Q3)
[197] Council Regulation 2333/95 of 18 September 1995 amending the Financial Regulation of 21 December 1977 applicable to the general budget of the European Communities, OJ 1995, p. 1-8
[198] See article 56 as amended in financial regulation 77/1231 (Q3)
[199] Council Regulation 2548/98 of 23 November 1998 amending the Financial Regulation of 21 December 1977 applicable to the general budget of the European Communities, OJ 1998, L 320, p. 1-5
[200] See article 58.3 as amended in financial regulation 77/1231 (Q3)
[201] Commission Regulation 86/610 of 11 December 1986 laying down detailed rules for the implementation of certain provisions of the financial regulation, OJ 1986, L 360, p. 1
of 21 December 1977
[202] See articles 60-72

3.3.3.3 Implementation provisions in Regulation 3418/93(M32) [203]

3.3.3.3.1 Original regulation

With the delegation of power to European Commission to regulate the thresholds for procurement, outside the EU public procurement directives, a new implementing regulation was issued instead of an amendment of its predecessor. The section on procurement[204] included substantial increases to the internal thresholds for Community procurement.

3.3.3.3.2 Amendments in Regulation 1687/2001 (M32A1) [205]

Out of a total of six amendments to the implementing regulation 3418/92, only the fifth concerned public procurement, adding a number of changes to Community procedures applicable outside the scope of the EU public procurement directives[206].

3.3.3.4 Third generation dates for application

The dates for application of the third generation provisions on Community procurement may be summarized as follows:

Table 12: Third generation of Community procurement

Legal Act	Notation	Date of effect
Financial Regulation 77/1231	Q3	1978-01-01
Financial Regulation 90/610	Q3A5	1990-03-19
Financial Regulation 95/2333	Q3A7	1995-10-10
Financial Regulation 98/2548	Q3A11	1998-12-05
Regulation 610/86	M31	1987-01-01
Regulation 3418/93	M32	1994-01-01
Regulation 1687/2001	M32A1	2001-08-31

3.3.4 Fourth generation

3.3.4.1 Financial Regulation 2002/1605 (Q4) [207]

3.3.4.1.1 Original regulation

This is the current version of the financial regulation, which marked a radical departure from the second and third generations. The link to the EU public procurement

[203] Commission Regulation 3418/93 laying down detailed rules for the implementation of certain provisions of the Financial Regulation of 21 December 1977, OJ 1993, L 315, p. 1-24
[204] See articles 97-129
[205] Commission Regulation 1687/2001 of 21 August 2001 amending Regulation 3418/93 laying down detailed rules for the implementation of certain provisions of the Financial Regulation of 21 December 1977, OJ 2001, p. 8-16
[206] See article 1.31-47
[207] Council Regulation 1605/2002 of 25 June 2002 on the Financial Regulation applicable to the general budget of the European Communities, OJ 2002, L 248, p. 1-48

directives was now limited to the threshold values[208], and the procedural rules to be followed by institutions were exclusively regulated in the financial regulation and the implementing provisions.

Thus, instead of the previous unified approach, in the second and third generation of the financial regulations, the Community institutions and the member states now had to apply separate, although similar rules. It is interesting to notice, that out of the total of 49 cases heard by the Court of First Instance concerning Community procurement[209], 35 concern the fourth generation financial regulation and the implementing provisions.

3.3.4.1.2 Amendments in Financial Regulation 2006/1995 (Q4A1) [210]

This regulation introduced a number of adjustments to the procedures to be followed in Community procurement, effectively aligning the procedures with the similar procedures in the new third generation directives of the EU public procurement system, directives 2004/17 (U3) and 2004/18 (C3).

3.3.4.2 Implementation provisions in Regulation 2342/2002 (M4) [211]

3.3.4.2.1 Original regulation

In accordance with the move in the fourth generation financial regulation 2002/1605 (Q4), separating the procedures for Community procurement from those of the EU public procurement system, the implementing regulation presented almost a complete procurement system[212].

3.3.4.2.2 Corrigendum 2 (M4C2) [213]

Out of a total of five corrigenda to the implementing regulation, two concerned public procurement. This second corrigendum corrected a misprint that could lead to interpretation

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[208] See article 90.1, referring to article 105 for purchasing on the own account of an institution and 167 on contracts for external actions, while article 90.2 underlines that the procurement rules do not apply to the award of grants

[209] See above in section **Error! Reference source not found.**

[210] Council Regulation 1995/2006 of 13 December 2006 amending Regulation 1605/2002 on the Financial Regulation applicable to the general budget of the European Communities, OJ 2006, L 390, p. 1-26

[211] Commission Regulation 2342/2002 of 23 December 2002 laying down detailed rules for the implementation of Council Regulation 1605/2002 on the Financial Regulation applicable to the general budget of the European Communities, OJ 2002, L 357, p. 1-71

[212] See articles 116-159

[213] Second corrigendum to Commission Regulation 2342/2002 of 23 December 2002 laying down detailed rules for the implementation of Council Regulation 1605/2002 on the Financial Regulation applicable to the general budget of the European Communities, OJ 2005, L 345, p. 35-36

problems, having used the term access to contracts, instead of the correct term access to markets[214].

3.3.4.2.3 Corrigendum 4 (M4C4) [215]

This fourth corrigendum apparently restated the corrigendum concerning public procurement that was also found in the second corrigendum.

3.3.4.2.4 Amendments in Regulation 1261/2005 (M4A1) [216]

This amendment introduced the mandatory use of the CPV vocabulary[217] and in general aligned the Community procurement procedure with several of the new elements found in the third generation of the EU public procurement system[218]. It also re-introduced specific thresholds for the application of procurement procedures below the thresholds set in the EU public procurement directives[219].

3.3.4.2.5 Amendments in Regulation 1248/2006 (M4A2) [220]

This regulation amended a number of technical aspects of the procurement procedure[221], and also raised the previously re-introduced internal thresholds for Community procurement procedures[222].

Instead of the general reference to EU public procurement thresholds, as in the original regulation, it introduced the specific Euro value of these thresholds into the text of the regulation[223].

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[214] See article 159 as corrected in regulation 2342/2002 (M4)
[215] Fourth corrigendum to Commission Regulation 2342/2002 of 23 December 2002 laying down detailed rules for the implementation of Council Regulation 1605/2002 on the Financial Regulation applicable to the general budget of the European Communities, OJ 2005, L 345, p. 35-38
[216] Commission Regulation 1261/2005 of 20 July 2005 amending Regulation 2342/2002 laying down detailed rules for the implementation of Council Regulation (EC, Euratom) No 1605/2002 on the Financial Regulation applicable to the general budget of the European Communities, OJ 2005, L 201, p. 3-22
[217] See article 116.5a as amended in regulation 2342/2002 (M4)
[218] See article 125a, on dynamic purchasing, and 125b, on competitive dialogue, as amended in regulation 2342/2002
[219] See article 119.1.b as amended in regulation 2342/2002 (M4)
[220] Commission Regulation 1248/2006 of 7 August 2006 amending Regulation 2342/2002 laying down detailed rules for the implementation of Council Regulation (EC, Euratom) No 1605/2002 on the Financial Regulation applicable to the general budget of the European Communities, OJ 2006, L 227, p. 3-21
[221] See article 1.29-44
[222] See article 119.1.b and 129 as amended in regulation 2342/2002 (M4)
[223] See article 158.1 as amended in regulation 2342/2002 (M4)

3.3.4.2.6 Amendments in Regulation 478/2007 (M4A3) [224]

This final amendment of the implementing regulation, within the time span covered by this project, again added detail to and modified technical aspects of the Community procurement procedure[225]. This included a codification of the Alcatel[226] principle of standstill[227], which in the EU public procurement system will be codified only with the implementation of the second generation remedies directive[228].

3.3.4.3 Fourth generation dates for application

The dates for application of the fourth generation provisions on Community procurement may be summarized as follows:

Table 13: Fourth generation of Community procurement

Legal Act	Notation	Date of effect
Financial Regulation 2002/1605	Q4	2003-01-01
Financial Regulation 2006/1995	Q4A1	2006-08-22 (Art 1.80+84-94: 2007-01-01)
Regulation 2342/2002	M4	2003-01-01
Corrigendum 2 to regulation 2342/2002	M4C2	2005-12-28
Corrigendum 4 to regulation 2342/2002	M4C4	2005-12-28
Regulation 1261/2005	M4A1	2005-08-05
Regulation 1248/2006	M4A2	2006-08-22
Regulation 478/2007	M4A3	2007-05-01 (Art 1.45.d: 2008-01-01, Art. 1.59: 2009-01-01)

3.4 Danish implementation system[229]

3.4.1 Framework legislation

3.4.1.1 Law 366/90 (DPL1)[230]

3.4.1.1.1 Original law

In Danish legislation, distinction may be made between acts referred to as law (lov), which are adopted by the parliament (folketing) as the supreme legislator under the constitution, executive orders (bekendtgørelser), which are issued by the ministers of the

[224] Commission Regulation 478/2007 of 23 April 2007 amending Regulation 2342/2002 laying down detailed rules for the implementation of Council Regulation (EC, Euratom) No 1605/2002 on the Financial Regulation applicable to the general budget of the European Communities, OJ 2007, L 111, p. 13-45
[225] See article 1.48-62
[226] Case C-81/98, Alcatel
[227] See article 158a as amended in regulation 2342/2002 (M4)
[228] See above in section 3.2.2.1
[229] An introduction to early implementation measures in Denmark may be found in Hørlyck (2), p. 1-11
[230] Lov nr. 366 af 08/06/1990 om samordning af fremgangsmåderne ved indgåelse af offentlige bygge- og anlægskontrakter og offentlige indkøb m.v., Lovtidende 09-06-1990

government, with a legal basis in provisions of the law, and circular orders (cirkulærer) as well as circular letters (cirkulæreskrivelser), which are issued by the public authorise as instructions to the entities that they control within the hierarchy of public administration.

The original view of the Danish government was that the issue of public procurement was a matter of internal instructions, as the addressees were public authorities in areas overseen by state institutions. For the field of works, it was assumed that such instructions could be issued by the ministry for housing, and for the later field of supplies, it was assumed that instructions could be issued by the finance ministry.

Accordingly, the first set of procurement directives and amendments were implemented by use of circular orders and letters, issued by the respective ministries. However, it was doubtful whether the ministers had sufficient competence to ensure nationwide implementation of the directives, as far as the placing of obligations was concerned.

In addition, the circular orders and letters posed the problem that in principle they did not create rights for individuals, although in some cases individuals might rely on them. Furthermore, there was at the time no complete publication of the circular orders and letters, as opposed to the mandatory publishing of laws in the legal gazette (lovtidende) and executive orders in the ministerial gazette (ministerialtidende). However, the main circular orders on public procurement were published in the ministerial gazette.

Thus for reasons of both legal rights and legal certainty, it was doubtful even at that time whether implementation in the form of circular orders and letters was sufficient for the implementation standards of the EU[231]. The issue become even more acute with the adoption of the negotiations for the first utilities directive 90/351 (U1), which was to obligate also private enterprises and therefore could not be implemented by circular orders or letters.

In order to maintain the flexibility of legislative amendment at the ministerial level, it was decided to introduce general framework laws that would have as their main purpose the creation of a legal basis for the adoption of executive orders by the respective ministers concerned.

The first framework law maintained the division between the ministries of housing and finance, granting each minister the separate power to issue provisions for the implementation of the EU directives on respectively works[232] and supplies and services[233]. In addition, each minister was authorised to adopt penal sanctions, thus meeting the general requirement

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[231] See acknowledgment in judgment of 14 January 1988 in case 63/86, Italy, Rec 1988, p. 29, point 4-6
[232] See article 1

established by the European Court of Justice to ensure respect for EU legislation by all means available[234].

The division of procurement responsibilities between two different ministries, and later three as set out below, did create some coordination problems for the Danish procurement policy toward the EU, as the ministries did not always have the same understanding of the obligations in the EU public procurement directives. In addition, with changing governments, the names and competences of ministries were changed, divided and merged, which also meant a change in competent authorities for public procurement.

3.4.1.1.2 Amendment in Law 377/92 (DPL1A1) [235]

The first framework law was very specific in the sense that the ministers concerned could issue rules only concerning contracts with public authorities and concession holders. Thus, although simultaneous with the first utilities directive, it could not serve the implementation of this directive.

Accordingly, the first law was amended in the sense that the competence in relation to utilities was extended also to cover private entities operating under special or exclusive rights[236]. Thus, again the framework law was drafted in a manner corresponding very narrowly to the scope of the current directives, requiring further amendment if this scope should change.

At the same time, the power to adopt rules for supplies and services was moved to the minister for industry, while the minister for finance retained competence in relation EU standards for information technology that were to be applied in public procurement[237].

3.4.1.1.3 Consolidation Law 600/92 (DPL1C1) [238]

As set out above[239], the Danish parliament re-issues legislation in a consolidated form, so as to ensure transparency, and does so in a legally binding format, so as to make the consolidated act the new point of legal reference.

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[233] See article 2
[234] See the case above in footnote 29
[235] Lov nr. 377 af 20/05/1992 om ændring af lov om samordning af fremgangsmåderne ved indgåelse af offentlige bygge- og anlægskontrakter og offentlige indkøb m.v., Lovtidende 21-05-1992
[236] See article 1 and 2.1 as amended in law 366/1980 (DPL1)
[237] See article 2.2 as amended in law 366/1980 (DPL1)
[238] Lovbekendtgørelse nr. 600 af 30/06/1992 om samordning af fremgangsmåderne ved indgåelse af bygge- og anlægskontrakter og indkøb m.v., Lovtidende 10-07-1992
[239] See above in section 2.5

Thus, the consolidated act does not in itself entail any change in the state of law, as was also clearly indicated in the opening statement of this consolidation law, which indicated that it constituted a consolidation of the 1990 law and the 1992 amendment.

3.4.1.1.4 Amendment in Law 415/00 (DL1C1A1) [240]

This constituted the final amendment of the framework law within the period covered by the present project. The change concerned the possibility to exclude entities exploitation of geographical areas for the purpose of exploring for or extracting oil, gas, coal or other solid fuels from the concept of private entities with special or exclusive rights that were found in the first and second generation utilities directives 90/531 (U1) and 93/38 (U2).

For such entities, the right to prosecute according to the penal sanctions, which could be adopted under the law as set out above, was removed from the public prosecutor, and instead placed with any private party with sufficient legal interest[241]. However, in interlinked cases involving the responsibility of both such entities and other contracting entities, the public prosecutor retained a concurrent competence to pursue the issues jointly.

This mechanism is also applied in other aspects of Danish law, such as slander, which is prosecuted not by the public prosecutor, but may be prosecuted by the private parties concerned by the alleged slander.

3.4.1.1.5 Editorial consolidation (DPL1C1S1) [242]

As opposed to the consolidated law from 1992, this was a non-binding version of the law as further consolidated after the amendment law from 2000. It was placed only as an editorial service on the web site of the competition authority, with a clear indication that it was not a legal act as such, and with a disclaimer for any errors. A similar practice has been followed on some occasions by the EU, as mentioned above[243].

3.4.1.2 Framework law dates for application

The dates for application of the framework law measures in Denmark may be summarized as follows:

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[240] See below in footnote 542
[241] See article 3.3 as amended in consolidated law 600/1992 (DPL1C1)
[242] Sammenskrevet udgave af lovbekendtgørelse nr. 600 af 30. juni 1992 som ændret ved lov nr. 415 af 31. maj 2000
[243] See above in section 2.5

Table 14: Danish framework laws

Legal Act	Notation	Date of effect
Law 366/90	DPL1	1990-06-10
Law 377/92	DPL1A1	1992-05-22
Consolidation Law 600/92	DPL1C1	1992-07-11
Law 415/00	DPL1C1A1	2000-07-01
Editorial consolidation	DPL1C1S1	(2000-07-01)

3.4.2 First generation implementation

3.4.2.1 Works

3.4.2.1.1 Circular letter 160/73 (DCW101) [244]

The first circular letter was a preliminary measure, giving guidance as to implementation of the first works directive 71/305 (W1), for which the deadline for implementation expired on 1 July 1973, as set out above, as well as the amendment in the directive standard forms 72/277 (W1A2), and the supporting measures in the directive on liberalisation 71/304[245] and the Council decision on the advisory committee 71/306[246].

3.4.2.1.2 Circular order 214/74 (DCW102) [247]

As a follow up, this more complete circular order was issued the following year, but neither the preceding circular letter nor the order undertook any formal implementation measures. However, the circular order did state that the contracting authorities were obliged to apply the procedures of the directive.

The issue of late and incomplete implementation did not lead to any case against Denmark at the ECJ. Nor was any case submitted to the ECJ concerning the use of the circular order format, which was used again on several occasions until the adoption of the first framework law[248], but also on some subsequent occasions that concern supplementary measures rather than actual implementation[249].

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[244] Cirkulæreskrivelse nr. 160 af 2. juli 1973 indeholdende foreløbige retningslinier vedrørende gennemførelsen af EF-rådets direktiver om liberalisering og samordning af fremgangsmåderne med hensyn til indgåelse af offentlige bygge- og anlægskontrakter inden for EF-området, Ministerialtidende 1973, p. 523-526

[245] See above in footnote 35

[246] See above in footnote 36

[247] Cirkulære nr. 214 af 04/10/1974 om EF-rådets direktiver vedrørende liberalisering og samordning af fremgangsmåderne med hensyn til indgåelse af offentlige bygge- og anlægskontrakter, Ministerialtidende 31-12-1974

[248] See above in section 3.4.1.1.1

[249] See below in sections 3.4.2.1.5, 3.4.2.1.7, 3.4.2.1.7, 3.4.2.1.9, 3.4.3.1.2, 3.4.3.1.3 and 3.4.3.1.5

3.4.2.1.3 Circular letter 1979-02-02 (DCW103) [250]

This circular letter openly referred to the directive as having been implemented by the 1974 circular letter 214/74 (DCW102). The letter itself concerned the implementation of the use of the European accounting unit[251].

3.4.2.1.4 Executive order 595/90 (DCW104) [252]

This was the first executive order adopted under the new framework law 366/90 (DPL1). While the preceding circular order only related the obligations in the directive, as set out above, the executive order set a direct obligation, in Danish law, for contracting authorities to apply the directive.

This constituted an example of implementation by incorporation, as opposed to incorporation by transformation. The advantage of this approach is that verification is immediate, and for the procurement environment, it makes use of experience from the EU level very easy, as the rules by definition are identical. However, it does have the drawback of introducing into national law a foreign text element, which at the practical level may be deemed difficult to apply by many practitioners, both on the part of contracting authorities and on the part of operators.

In addition, the incorporation method does not address the issue that legislation will also be needed for procurement outside the EU directives, including mainly procurement below the EU thresholds, which may be referred to as national procurement. Thus a transposition of the EU principles will in any case be necessary for establishing rules on national procurement. It may be argued, that the EU directives might better be transposed, instead of being incorporated, and that this may take place within the same act that is also to regulate national procurement. However, this obligation was introduced only later with Telaustria principle of the European Court of Justice[253].

While on the one had transposition does offer advantages, by transposing the foreign EU norms into recognisable and understandable national norms, it does also entail compliance risks. For each element of transposition, it requires the drafter of legislation to have complete understanding of the content and implications of the EU norm, so as to be able to transpose

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[250] Cirkulæreskrivelse af 2. februar 1979 om ændring af direktiv 71/305 om samordning af fremgangsmåderne med hensyn til indgåelse af offentlige bygge- og anlægskontrakter
[251] See above in section 3.1.2.1.4
[252] Bekendtgørelse nr. 595 af 14/08/1990 om samordning af fremgangsmåderne ved indgåelse af offentlige bygge- og anlægskontrakter i De Europæiske Fællesskaber, Lovtidende 28-08-1990
[253] Case C-324/98, Telaustria

this content into an adequate national norm. With complicated and detailed EU legislation, incorporation would seem to appear the safer strategy.

The remaining part of the executive orders supplemented the directives with practical details as to their application in Denmark, as well as penal sanctions for violation, and choices concerning the use of options in the directives.

3.4.2.1.5 Executive order 498/91 (DCW104A1) [254]

This amendment was issued to eliminate a conflict of law between the first generation law on national procurement 216/66 (NPL1)[255] and the first generation works directive 71/305 (W1) in relation to the issue of equal treatment. The amendments made it clear[256] that in EU procurement, the contracting authority could not reserve the right to choose freely between the bids[257], and the winning bid could not subsequently be reduced by negotiation[258].

In contrast, no action was taken against the provision in the law on national procurement[259] limiting direct bidding in works to a maximum of 2 bids. Direct bidding is not identical to, but similar to the EU negotiated procedure. As EU law required a minimum of three participants for the negotiated procedure[260], the conclusion at the ministry of housing was that the national legislation precluded the use of negotiated procedures for works, which was seen as acceptable, as it put a limit only on the contracting entities and not the bidders. This position was taken prior to the ruling of the European Court of Justice concerning national restrictions on the available EU procurement procedures[261], but did not lead to any further case law.

3.4.2.1.6 Circular order 167/90 (DCW105) [262]

This circular order concerned the obligation for municipal councils to supervise the application of procurement rules in case of works with public support that concern social housing.

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[254] Bekendtgørelse nr. 498 af 25/06/19 om ændring i bekendtgørelse om samordning af fremgangsmåderne ved indgåelse af offentlige bygge- og anlægskontrakter i De Europæiske Fællesskaber, Lovtidende 05-07-1991
[255] See below in footnote 342
[256] See article 2.5 as amended in executive order 595/90 (see footnote 252)
[257] See to the opposite article 3.2 of the law 366/90 (DPL1)
[258] See to the opposite article 3.3 of the law 366/90 (DPL1)
[259] See article 5 of the law 366/90 (DPL1)
[260] See article 22.3 of directive 71/305 (W1) as amended by directive 89/440 (W1A4)
[261] Case C-247/02, Sintesi
[262] Cirkulære nr. 167 af 05/09/1990 om kommunalt tilsyn med udbud af byggearbejder i det offentligt støttede byggeri, Ministerialtidende 13-09-1990

3.4.2.1.7 Circular letter 4065/91 (DCW105A1) [263]

This circular letter amended the above circular order on municipal supervision of works on social housing. It removed the obligation of the municipal authorities to report violations of procurement law to the housing authority, which administrated the works directive on behalf of the ministry of housing[264].

3.4.2.1.8 Circular letter 21/91 (DCW106) [265]

This circular letter concerned suspension of a paragraph in a set of guidelines distributed with the circular letter. The issue at stake was the understanding of the concept body governed by public law in the first works directive 71/305 (W1)[266].

The guidelines proposed that entities undertaking construction of housing, within the scope of general interest, as such were covered by the concept of bodies governed by public law, and as such were subject to the works directive.

The circular letter stated that this issue was being negotiated between the Danish government and the European Commission, and that the paragraph of the guidelines should not be applied until the issue had been settled.

3.4.2.1.9 Circular letter 101/93 (DCW106A1) [267]

This circular letter settled the above mentioned uncertainties in concerning the guidelines in relation to social housing. The circular letter restated the European Commission opinion that general interest societies, which undertake the construction of housing, must be regarded as bodies governed by public law in the first works directive 71/305 (W1).

3.4.2.2 Supplies

3.4.2.2.1 Circular order 101/78 (DCG101) [268]

Like the later first executive order 595/90 (DCW104) [269] on the works directive 71/305 (W1), this circular order did set a specific obligation to follow the rules of the first supplies directive 77/62 (G1).

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[263] Cirkulæreskrivelse nr. 4065 af 03/12/1991 om ophævelse af cirkulærer og cirkulæreskrivelser for det støttede boligbyggeri efter boligbyggeriloven, Ministerialtidende 24-09-1997
[264] See the deleted article 5.3-4 of the circular order 167/90 (DCW105)
[265] Cirkulæreskrivelse nr. 21 af 29/01/1991 om Bygge- og Boligstyrelsens vejledning om EF's regler for udbud af offentlige bygge- og anlægsarbejder, Ministerialtidende 07-03-1991
[266] See article 1.b.2 of the directive, as amended by directive 89/440 (W1A4)
[267] Cirkulæreskrivelse nr. 101 af 22/06/1993 om, at de almennyttige boligselskaber fremover er omfattet af EF-udbudsdirektiverne, Ministerialtidende 01-07-1993

Likewise, the directives were reproduced in the ministerial gazette along with the circular order, as was the case with the executive order, and as apposed to the first circular order on works 214/74 (DCW102), which, although published in the ministerial gazette, only referred to the availability of the directives concerned in the Official Journal of the EU.

However, in spite of the move forward in the actual content of the circular order, the issue of legislative format did present a problem also in this case, as set out above[270].

3.4.2.2.2 Circular order 219/80 (DCG102) [271]

This circular order concerned the obligations of Denmark under the GPA-agreement, resulting from the MTN-negotiations 1973-1979, which were implemented into the first generation supplies directive 77/62 (G1) by means of directive 80/767 (G1A1)[272].

The main character of the circular order was more that of a set of guidelines to the agreement and its implementation, as opposed to a legislative act of implementation.

3.4.2.2.3 Circular order 177/89 (DCG103) [273]

This circular order concerned the amendment to the first generation supplies directive 77/62 (G1) by means of directive 88/295 (G1A2)[274]. Like the preceding circular order, it has more the character of a set of guidelines to the amendment.

3.4.2.2.4 Executive order 826/90 (DCG104) [275]

This executive order was issued shortly after the first executive order on works 595/90 (DCW104), and undertook a general implementation of the supplies directive 77/62 (G1) and its amendments (G1A1-2), replacing the previous circular orders.

It followed the same main approach as the executive order on works, incorporating the directives into Danish law, but in addition it restated some of the amended provisions of the

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[268] Cirkulære 101 af 19. juni 1978 om EF-rådsdirektiv om samordning af fremgangsmåderne ved offentlige indkøb, Ministerialtidende 1978, p. 340
[269] See above in section 3.4.2.1.4
[270] See above in section 3.4.1.1.1
[271] Cirkulære nr. 219 af 18/12/1980 om fremgangsmåderne ved statslige indkøb, Ministerialtidende 31-03-1981
[272] See above in section 3.1.2.2.2
[273] Cirkulære nr. 177 af 13/11/1989 om ændring af EF-rådsdirektiver om samordning af fremgangsmåderne ved offentlige indkøb, Ministerialtidende 09-01-1990
[274] See above in section 3.1.2.2.3
[275] Bekendtgørelse nr. 826 af 07/12/1990 om samordning af fremgangsmåderne ved indgåelse af kontrakter om offentlige indkøb i De Europæiske Fællesskaber, Lovtidende 21-12-1990

supplies directive, thus combining incorporation and transposition[276]. The difference in style may be seen as an example of the consequences of dividing the public procurement legislative competences between different authorities[277], with the ministry for industry (industriministeriet) now having responsibility for supplies and services.

The mix of incorporation and transposition could have created an issue of enforcement, as to whether contracting authorities were bound primarily by the directive or the executive order. However, the Danish complaint board, in its case law has referred exclusively to the directive provisions.

3.4.2.2.5 Executive order 810/91 (DCG105) [278]

This executive order was, like its predecessor, drafted as a general implementation of the first generation supply directive 77/62 (G1) and its amendments (G1A1-2), although no new amendments had been adopted for the directive at this time.

However, the executive order introduced the same limitation on the first national procurement law 216/66 (NPL1) as the executive order on works 498/91 (DCW104A1)[279], in order to avoid a conflict between the law and the directive. This was relevant also for the supplies directive, as the law covered both works contracts and also supplies for works, which might not be covered by the works directive.

Like its predecessor, the executive order constituted a mix of incorporation and transposition.

3.4.2.3 Classic (Common)

3.4.2.3.1 Regulating order 114/92 (DCC101) [280]

This regulating order informed the contracting authorities about an informal complaint that the European Commission had made to the member states in general, and not specifically Denmark, about lacking observation of the deadlines for procurement and lack of response, when the Office for Publications of the EU pointed out incorrect deadlines in the notices submitted for publication in the Official Journal of the EU.

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[276] See above in section 3.4.2.1.4
[277] See above in section 3.4.1.1.1
[278] Bekendtgørelse nr. 810 af 10/12/1991 om samordning af fremgangsmåderne ved indgåelse af kontrakter om offentlige indkøb i De Europæiske Fællesskaber, Lovtidende 20-12-1991
[279] See above in section 3.4.2.1.5
[280] Regulativ nr. 114 af 02/07/1992 EF-reglerne vedrørende offentliggørelse af udbud, Retsinformation 23-07-1992

On this background, the authorities, respectively for construction and housing (bygge- og boligstyrelsen) and for industry and trade (industri- og handelsstyrelsen), jointly reminded the contracting authorities of their obligations under the directives. The format chosen, a regulating order is normally used for practical rules at the non-legislative level.

3.4.2.4 Utilities (Works)

3.4.2.4.1 Executive order 740/92 (DUW101) [281]

This executive order on works was issued by the building and housing authority simultaneously with the executive order on supplies and services 741/92 (DUG101), issued by the industry and trade authority, which is dealt with below. The simultaneous issuing of executive orders was maintained for the amendments issued in 1993[282].

Like in the classic field, the building and housing authority chose pure incorporation, whereas the ministry for industry as set out below chose a combination of incorporation and transposition[283]. The ministry for housing chose also to refer back to the old liberalisation directive for works 71/304[284].

3.4.2.5 Utilities (Supplies and Services)

3.4.2.5.1 Executive order 741/92 (DUG101) [285]

As set out above, this executive order constituted a mix of incorporation and transposition, which however is not reflected in the case law of the Danish complaint board.

3.4.2.5.2 Executive order 298/93 (DUG101A1) [286]

The executive order corrected an error of terminology, as the preceding executive order had carried over the term “authority” had from the classic field, and not replaced it with the term “entity” in order to be able to refer also to private enterprises in the field of utilities.

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[281] Bekendtgørelse nr. 740 af 27/08/1992 om udbud af bygge- og anlægsarbejder inden for vand-, og energiforsyning samt transport og telekommunikation i De Europæiske Fællesskaber, Lovtidende 08-09-1992
[282] See below in sections 3.4.2.5.2 and 3.4.2.6.1
[283] See above in section 3.4.2.2.4
[284] See above in footnote 35
[285] Bekendtgørelse nr. 741 af 27/08/1992 om udbud af indkøb inden for vand- og energiforsyning samt transport og telekommunikation i De Europæiske Fællesskaber, Lovtidende 08-09-1992
[286] Bekendtgørelse nr. 298 af 05/05/1993 om ændring af bekendtgørelse om udbud af indkøb inden for vand- og energiforsyning samt transport og telekommunikation i De Europæiske Fællesskaber, Lovtidende 18-05-1993

3.4.2.6 Common (Classic and Utilities)

3.4.2.6.1 Executive order 297/93 (DPC101) [287]

This executive order contained the same correction of terminology, for the field of works in utilities, from authority to entity, as set out above.

In addition, for works in the classic field, it incorporated the latest amendment directive 93/4 (W1A7) by simple reference.

3.4.2.7 First generation dates for application

The dates for application of the first generation of implementation measures in Denmark may be summarized as follows:

Table 15: First generation of Danish implementation

Legal Act	Notation	Date of effect
Circular letter 160/73	DCW101	(1973-07-02)
Circular order 214/74	DCW102	(1974-10-04)
Circular letter 1979-02-02	DCW103	(1979-02-02)
Executive order 595/90	DCW104	1990-08-29
Executive order 498/91	DCW104A1	1991-07-15
Circular order 167/90	DCW105	1990-10-01
Circular letter 4065/91	DCW105A1	1992-01-01
Circular letter 21/91	DCW106	(1991-01-29)
Circular letter 101/93	DCW106A1	(1993-06-22)
Circular order 101/78	DCG101	(1978-06-19)
Circular order 219/80	DCG102	(1980-12-18)
Circular order 177/89	DCG103	1989-11-13
Executive order 826/90	DCG104	1991-01-01
Executive order 810/91	DCG105	1991-12-21
Regulating order 114/92	DCC101	(1992-07-02)
Executive order 740/92	DUW101	1993-01-01
Executive order 741/92	DUG101	1993-01-01
Executive order 298/93	DUG101A1	1993-05-19
Executive order 297/93	DPC101	1993-05-19

3.4.3 Second generation implementation

3.4.3.1 Works

3.4.3.1.1 Executive order 201/95 (DCW201) [288]

This executive order implemented the second generation directive on works 93/37 (W2). It changed the form from the pure incorporation model used in the first generation for

[287] Bekendtgørelse nr. 297 af 05/05/1993 om ændring af bekendtgørelser om udbud af bygge- og anlægsarbejder i De Europæiske Fællesskaber, Lovtidende 18-05-1993

[288] Bekendtgørelse nr. 201 af 27/03/1995 om samordning af fremgangsmåderne ved indgåelse af offentlige bygge- og anlægskontrakter i Det Europæiske Fællesskab, Lovtidende 04-04-1995

works, and uses the mixed model, adding transposition to the incorporation, as applied in first generation field of supplies and services[289].

It also codified the opinion of the ministry of housing[290], that the use of the negotiated procedure was not available for works covered by the first generation Danish law on national procurement 216/66 (NPL1)[291].

In relation to restricted procedures, the executive order illustrated the danger of transposition, indicating that contracting authorities must contact companies in other member states[292], in the manner set out in the second generation directive[293]. In fact, the provision concerned did not institute an obligation to contact such enterprises, but only to observe non-discrimination when doing so. The wording of the executive order might be interpreted to cover only this, but it would not be the immediate and natural reading.

3.4.3.1.2 Circular letter 56/95 (DCW202) [294]

The circular only served as a notification of the fact that the second generation works directive had been implemented by the above mentioned executive order, and a statement that in fact the directive constituted only a codification of the various changes to the first generation directive.

3.4.3.1.3 Circular order 152/96 (DCW203) [295]

This circular order replaced the first generation circular order 167/90 (DCW105), as amended[296], on municipal supervision of construction of social housing, when public support was granted for the construction.

3.4.3.1.4 Executive order 799/98 (DCW204) [297]

This executive order replaced the previous executive order 201/95 (DCW201). As a new element, it included the CPV vocabulary, with a reference to the European Commission

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[289] See above in section 3.4.2.2.4
[290] See above in section 3.4.2.1.5
[291] See article 4.1 of the executive order
[292] See article 5 of the executive order
[293] See article 22.4 of the directive 93/37 (W2)
[294] Cirkulæreskrivelse nr. 56 af 24/04/1995 om samordning af fremgangsmåderne ved indgåelse af offentlige bygge- og anlægskontrakter i det europæiske fællesskab, Ministerialtidende 04-05-1995
[295] Cirkulære nr. 152 af 07/10/1996 om kommunalt og amtskommunalt tilsyn med udbud af byggearbejder i det offentligt støttede byggeri, Ministerialtidende 17-10-1996
[296] See above in section 3.4.2.1.7
[297] Bekendtgørelse 799/1998 om samordning af fremgangsmåderne ved indgåelse af offentlige bygge- og anlægskontrakter i Den Europæiske Union, Lovtidende 20-11-1998

recommendation 96/527 (P2X1) concerning its use. However, the executive order did not explicitly prescribe any use of the CPV.

3.4.3.1.5 Executive order 649/02 (DCW205) [298]

This executive order replaced the above mentioned executive order. As new elements, it implemented the European Commission directive on standard forms 2001/78 (P2A2) and the change from ECU to Euro at the rate of 1 to 1 for the calculation of thresholds[299].

3.4.3.2 Supplies

3.4.3.2.1 Executive order 510/94 (DCG201) [300]

This executive order implemented the second generation directive on supplies 93/36 (G2). Different from it predecessor, executive order 810/91 (DCG105)[301], it did not place any limitation on the use of the negotiated procedure.

3.4.3.2.2 Executive order 788/98 (DCG202) [302]

This executive order replaced its predecessor and implemented the amendment directive 97/52 (C2A1) for the classical sector.

3.4.3.2.3 Executive order 650/02 (DCG203) [303]

This executive order replaced its predecessor and implemented the directive 2001/78 (P2A2) on standard forms.

3.4.3.3 Services

3.4.3.3.1 Executive order 415/93 (DCS201) [304]

This executive order implemented the second generation directive on services 92/50 (S2), continuing the mixed use of incorporation and transposition[305].

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[298] Bekendtgørelse nr. 649 af 30/07/2002 om fremgangsmåderne ved indgåelse af offentlige bygge- og anlægskontrakter i Den Europæiske Union, Lovtidende 16-08-2002
[299] See article 9 of the executive order
[300] Bekendtgørelse nr. 510 af 16/06/1994 om fremgangsmåderne ved offentlige indkøb, Lovtidende 24-06-1994
[301] See above in section 3.4.2.2.5
[302] Bekendtgørelse nr. 788 af 05/11/1998 om fremgangsmåderne ved offentlige indkøb af varer i Den Europæiske Union, Lovtidende 13-11-1998
[303] Bekendtgørelse nr. 650 af 30/07/2002 om fremgangsmåderne ved offentlige indkøb af varer i Den Europæiske Union, Lovtidende 16-08-2002
[304] Bekendtgørelse nr. 415 af 22/06/1993 om samordning af fremgangsmåderne ved indgåelse af kontrakter om offentlige indkøb af tjenesteydelser i De Europæiske Fællesskaber, Lovtidende 30-06-1993

3.4.3.3.2 Executive order 789/98 (DCS202) [306]

This executive order replaced its predecessor and implemented the amendment directive 97/52 (C2A1) for the classical sector.

3.4.3.3.3 Executive order 651/02 (DCS203) [307]

This executive order replaced its predecessor and implemented the directive 2001/78 (P2A2) on standard forms.

3.4.3.4 Utilities (Works)

3.4.3.4.1 Executive order 558/94 (DUW201) [308]

This executive order implemented the second generation directive on utilities 93/38 (U2) in the relation to works, continuing the mixed use of incorporation and transposition[309].

3.4.3.4.2 Executive order 2/99 (DUW202) [310]

This executive order replaced its predecessor and implemented the amendment directive 98/4 (U2A1). As a new element, it included the CPV vocabulary, with a reference to the European Commission recommendation 96/527 (P2X1) concerning its use. However, the executive order did not explicitly prescribe any use of the CPV.

3.4.3.5 Utilities (Supplies and Services)

3.4.3.5.1 Executive order 557/94 (DUG201) [311]

This executive order implemented the second generation directive on utilities 93/38 (U2) in the relation to supplies and services, continuing the mixed use of incorporation and transposition[312].

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[305] See above in section 3.4.2.2.4
[306] Bekendtgørelse nr. 789 af 05/11/1998 om fremgangsmåderne ved offentlige indkøb af tjenesteydelser i Den Europæiske Union, Lovtidende 13-11-1998
[307] Bekendtgørelse nr. 651 af 30/07/2002 om fremgangsmåderne ved indgåelse af offentlige tjenesteydelsesaftaler i Den Europæiske Union, Lovtidende 16-08-2002
[308] Bekendtgørelse nr. 558 af 24/06/1994 om udbud af bygge- og anlægsarbejder inden for vand- og energiforsyning samt transport og telekommunikation i Det Europæiske Fællesskab, Lovtidende 30-06-1994
[309] See above in section 3.4.2.2.4
[310] Bekendtgørelse nr. 2 af 04/01/1999 om udbud af bygge- og anlægsarbejder inden for vand- og energiforsyning samt transport og telekommunikation i Den Europæiske Union, Lovtidende 12-01-1999
[311] Bekendtgørelse nr. 557 af 24/06/1994 om udbud af indkøb inden for vand- og energiforsyning samt transport og telekommunikation i Det Europæiske Fællesskab, Lovtidende 30-06-1994
[312] See above in section 3.4.2.2.4

3.4.3.5.2 Executive order 787/98 (DUG202) [313]

This executive order replaced its predecessor and implemented the directive 98/4 (U2A1). Different from the similar executive order 2/99 (DUW202), it did not refer to the European Commission recommendation 96/527 (P2X1) on use of the CPV. However, it did refer to the change from ECU to Euro at the rate of 1 to 1 for the calculation of thresholds[314], as did also the executive order 789/98 (DCS202) for classic works.

3.4.3.5.3 Executive order 652/02 (DUC201) [315]

This executive order replaced its predecessor and implemented the directive 2001/78 (P2A2) on standard forms.

3.4.3.6 Second generation dates for application

The dates for application of the second generation of implementation measures in Denmark may be summarized as follows:

Table 16: Second generation of Danish implementation

Legal Act	Notation	Date of effect
Executive order 201/95	DCW201	1995-05-01
Circular letter 56/95	DCW202	(1995-05-01)
Circular order 152/96	DCW203	1997-01-01
Executive order 799/98	DCW204	1998-11-20
Executive order 649/02	DCW205	2002-09-01
Executive order 510/94	DCG201	1994-06-24
Executive order 788/98	DCG202	1998-11-14
Executive order 650/02	DCG203	2002-09-01
Executive order 415/93	DCS201	1993-07-01
Executive order 789/98	DCS202	1998-11-14
Executive order 651/02	DCS203	2002-09-01
Executive order 558/94	DUW201	1994-07-01
Executive order 2/99	DUW202	1999-02-16
Executive order 557/94	DUD201	1994-07-01
Executive order 787/98	DUD202	1999-02-16
Executive order 652/02	DUC201	2002-09-01

[313] Bekendtgørelse nr. 787 af 05/11/1998 om udbud af indkøb inden for vand- og energiforsyning samt transport og telekommunikation i Den Europæiske Union, Lovtidende 13-11-1998
[314] See article 9 of the executive order
[315] Bekendtgørelse nr. 652 af 30/07/2002 om udbud af indkøb inden for vand- og energiforsyning samt transport og telekommunikation i Den Europæiske Union, Lovtidende 16-08-2002

3.4.4 Third generation implementation

3.4.4.1 Classic

3.4.4.1.1 Executive order 937/04 (DCC301) [316]

3.4.4.1.1.1 Original order

This executive order implemented the third generation directive for the classic field 2004/18 (C3). The Danish Government made it a priority to undertake early implementation of the third generation directives, which took place on 1 January 2005, thus well ahead of the formal deadline set for 1 February 2006 in the directives.

The executive order reduced the trend of mixed incorporation and transposition[317], and returned to mainly incorporation, supplemented by the selections made by the Danish state in relation to the options in the directive. This included central purchasing[318], reserved contracts[319], competitive dialogue[320], framework agreements[321] and dynamic purchasing[322], which were all selected for Denmark[323].

At the same time, regulatory competence for works, supplies and services in both the classic and utilities fields had been placed in the new Ministry for Trade and Industry.

3.4.4.1.1.2 Amendment in executive order 326/06 (DCC301A1) [324]

This executive order implemented the amendments in the amendment directive 2005/51 (P3A3).

3.4.4.1.1.3 Amendment in executive order 588/06 (DCC301A2) [325]

This executive order introduced an obligation to give a statement of reasons together with the first notice to the bidders about the award decision[326], thus going beyond the requirements in the third generation directive 2004/18 (C3)[327].

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[316] Bekendtgørelse nr. 937 af 16/09/2004 om fremgangsmåderne ved indgåelse af offentlige vareindkøbskontrakter, offentlige tjenesteydelseskontrakter og offentlige bygge- og anlægskontrakter, Lovtidende 24-09-2004

[317] See above in section 3.4.2.2.4

[318] See article 11 of the directive

[319] See article 19 of the directive

[320] See article 29 of the directive. For a discussion of competitive dialogue, see Treumer (9), and the later discussion in Treumer (7)

[321] See article 32 of the directive

[322] See article 33 of the directive

[323] See article 3 in the executive order

[324] Bekendtgørelse nr. 326 af 11/04/2006 om ændring af bekendtgørelse om fremgangsmåderne ved indgåelse af offentlige vareindkøbskontrakter, offentlige tjenesteydelseskontrakter og offentlige bygge- og anlægskontrakter, Lovtidende 28-04-2006

[325] Bekendtgørelse nr. 588 af 12/06/2006 om ændring af bekendtgørelse om fremgangsmåderne ved indgåelse af offentlige vareindkøbskontrakter, offentlige tjenesteydelseskontrakter og offentlige bygge- og anlægskontrakter, Lovtidende 20-06-2006

At the same time, the executive order codified respect for the Alcatel principle of the European Court of Justice concerning a stand still period between the contract award and the contract signing[328].

3.4.4.1.1.4 Amendment in executive order 597/07 (DCC301A3) [329]

This executive order implemented the directive 2006/97 (P3A5) on Bulgarian and Romanian accession in the field of public procurement.

3.4.4.2 Utilities

3.4.4.2.1 Executive order 936/04 (DUC301) [330]

3.4.4.2.1.1 Original order

This executive order implemented the third generation utilities directive 2004/17 (U3). Like the simultaneous executive order 937/04 (DCC1) for the classic field, this executive order reduced the trend of mixed incorporation and transposition[331], and returned to mainly incorporation, supplemented by the selections made by the Danish state in relation to the options in the directive.

This included dynamic purchasing[332], reserved contracts[333] and central purchasing[334], as well as electronic auctions[335], which were all selected for Denmark[336].

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[326] See article 6a in executive order 937/04 (DCC301) as amended
[327] See article 41 of the directive
[328] Case C-81/98, Alcatel
[329] Bekendtgørelse nr. 597 af 07/06/2007 om ændring af bekendtgørelse om fremgangsmåderne ved indgåelse af offentlige vareindkøbskontrakter, offentlige tjenesteydelseskontrakter og offentlige bygge- og anlægskontrakter, Lovtidende 22-06-2007
[330] Bekendtgørelse nr. 936 af 16/09/2004 om fremgangsmåderne ved indgåelse af kontrakter inden for vand- og energiforsyning, transport samt posttjenester, Lovtidende 24-09-2004
[331] See above in section 3.4.2.2.4
[332] See article 15 of the directive. For a discussion on the potential reach of dynamic purchasing see Arrowsmith (1)
[333] See article 28 of the directive
[334] See article 29 of the directive
[335] See article 56 of the directive, for which the executive order underlined the limitations following from article 1.6 of the directive. For a discussion on the use of electronic auctions, see Arrowsmith (8), as well as the later discussion in Arrowsmith (3)
[336] See article 2 in the executive order

3.4.4.2.1.2 Amendment in executive order 325/06 (DUC301A1) [337]

This executive order modified annex XX of the above executive order, which concerned supplementary instructions for the publication of procurement notices and supplementary information.

3.4.4.2.1.3 Amendment in executive order 598/06 (DUC301A2) [338]

Similar to executive order executive order 597/07 (DCC301A3), this executive order implemented the directive 2006/97 (P3A5) on Bulgarian and Romanian accession in the field of public procurement.

3.4.4.3 Common

3.4.4.3.1 Temporary standard forms (DPC301) [339]

As set out above[340], the Danish government opted for early implementation of the third generation directives, and the implementation on 1 January 2005 thus preceded the later adoption of the regulation 1564/2005 (P3A2) on new standard forms. As an interim solution, draft versions of the standard form were applied, and as they were not made available at the European Commission web site, it was accepted that they were placed on the web site of the Danish competition authority.

3.4.4.4 Third generation dates for application

The dates for application of the third generation of implementation measures in Denmark may be summarized as follows:

Table 17: Third generation of Danish implementation

Legal Act	Notation	Date of effect
Executive order 937/04	DCC301	2005-01-01
Executive order 326/06	DCC301A1	2006-05-01
Executive order 588/06	DCC301A2	2006-10-01
Executive order 597/07	DCC301A3	2007-07-01
Executive order 936/04	DUC301	2005-01-01

[337] Bekendtgørelse nr. 325 af 11/04/2006 om ændring af bekendtgørelse om fremgangsmåderne ved indgåelse af kontrakter inden for vand- og energiforsyning, transport samt posttjenester, Lovtidende 28-04-2006
[338] Bekendtgørelse nr. 598 af 07/06/2007 om ændring af bekendtgørelse om fremgangsmåderne ved indgåelse af kontrakter inden for vand- og energiforsyning, transport samt posttjenester, Lovtidende 22-06-2007
[339] Standardformularer på Konkurrencestyrelsens hjemmeside www.ks.dk: «Ved offentliggørelse af EU-udbud skal ordregivere benytte de standardformularer, som Kommissionen stiller til rådighed. Kommissionen og medlemslandene er endnu ikke færdige med udarbejdelsen og vedtagelsen af nye standardformularer, som passer til de nye direktiver. Den forordning, der skal introducere de nye formularer, ventes først offentliggjort hen mod midten af 2005. Da vi i Danmark imidlertid har gennemført de nye direktiver til ikrafttræden allerede pr. 1. januar 2005, har Kommissionen og Publikationskontoret accepteret, at danske ordregivere som en overgangsordning i praksis benytter de nye formularer, selv om de ikke formelt er vedtaget.»
[340] See above in section 3.1.4.3.2

Legal Act	Notation	Date of effect
Executive order 325/06	DUC301A1	2006-05-01
Executive order 598/06	DUC301A2	2007-07-01
Temporary standard forms	DPC301	2005-01-01

3.5 Danish national procurement system[341]

3.5.1 First generation

3.5.1.1 Law 216/66 (NPL1)[342]

3.5.1.1.1 Original law[343]

The original law on national procurement was adopted prior to the first EU directive 71/305 (W1). It mainly covered the same subject area of works, but also did cover supplies for works. It applied to all builders, both private and public.

The law defined tendering (licitation), which had two forms as respectively public and restricted tendering[344]. The concepts did not entirely correspond to EU terminology, but public tendering could be considered similar to open EU procedures, while restricted tendering was similar to restricted EU procedures, but with discretionary preselection.

In addition, the law regulated, but did not as such define direct bidding (underhåndsbud). This could be considered similar to negotiated EU procedures without a contract notice. Finally, the law did not explicitly mention direct contracting, but this would seem possible, and it might be seen as corresponding to the internal Community provisions on purchasing against an invoice[345].

This concept, of direct contracting, is not covered by the EU public procurement directives, and with the Telaustria principle[346] from the European Court of Justice, requiring transparency and equal treatment outside the EU directives[347], it is a question whether such direct contracting is at all possible. The Community provisions on invoice purchasing set a very low threshold for such purchasing, and could accordingly be regarded as a de minimis provision. However, there is no case law yet on whether such de minimis might apply to the Telaustria principle.

In any case, the law 216/66 (NPL1) did not limit direct contracting to be a de minimis option. Instead, the law regulated the possibility of using direct bidding, where only a

[341] Comments on the provisions in the Danish national procurement legislation may be found in Hørlyck (1)
[342] Lov nr. 216 af 08/06/1966 om licitation m.v. , Lovtidende 14-06-1966
[343] Considerations on the need for change in the first generation law may be found in Hansen (2)
[344] See article 2
[345] See above in section 3.3.2.1.1
[346] Case C-324/98, Telaustria
[347] This will be dealt with in the following part of the project

maximum of two operators could be asked to submit bids[348]. It thus became an issue of sound management of public funds, whether direct contracting with one operator, direct bidding with two operators, or tendering with more operators was to be used.

From a procedural point of view, the law only regulated tendering. Contract award criteria were not defined, but implicitly the use of lowest price was mandatory in restricted tendering[349]. As opposed to this, public tendering permitted the contracting entity to choose freely amongst the bids[350], and in both cases of tendering the contracting entity could freely cancel the tender.

Equal treatment was required, including limitations on contact with the tenderers[351], but only the lowering of bids that were not the lowest bids were prohibited[352]. This implied that negotiations could be held with the operator with the lowest bid, including further lowering of this bid.

Unlike the EU directives, where a right to be present at the opening of bids is only an option to be specified in the contract notice[353], the Danish law stipulated this as a definite right for the operators[354]. At the time of opening, the operators were to be informed about the price in each bid, and also about possible reservations. Without further regulation of the issue, this last element indicated a right to make reservations, which has had an impact also on the understanding of the EU directives[355].

Also more generally, the concepts of this first law became very strongly embedded amongst Danish public authorities and their advisors in the field of works. As may be seen in the case law, there are numerous examples of the concepts being re-applied in the use by Danish authorities of EU procurement, including standard phrases such as the right for the contracting authority to cancel the tender[356].

The law set penal sanctions for violations, at the level of fines or shorter imprisonment. This would apply both to individuals, and as far as fines were concerned, also the legal entities that were involved[357]. The law also prohibited bid rigging, and thus covered issues of competition law[358].

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[348] See article 5
[349] See article 3.2.2
[350] See article 3.2.1
[351] See article 4.3
[352] See article 3.3
[353] See presently the standard forms of directive 2001/78 (P2A2)
[354] See article 3.1
[355] See below in section 4.2.5.2
[356] This will be dealt with in the following part of the project
[357] See article 7
[358] See article 4

3.5.1.1.2 Amendment in law 818/89 (NPL1A1) [359]

This was a purely technical amendment, reflecting in various pieces of legislation the new of name for the Danish competition authority, which had previously been entitled the monopoly supervisory authority.

3.5.1.1.3 Supplement in letter 11400/82 (NPL1S1) [360]

This letter, issued by the ministry of justice and directed towards its institutions, including the prison authorities, sets out two requirements for works, at the request of the state auditor services.

The first concerned control bids (kontroltilbud), either from the internal services of the authority concerned, or from an operator that is not participating in the tender. Such control bids are used to gauge whether the real bids received are at an economically relevant level, and the Danish complaint board has ruled that this practice is not contrary to EU law[361].

The letter did not in itself regulate this issue, but merely required that copies of the control bids must be sent to the ministry. Furthermore, it required the use of guarantees for any works above a very low threshold of 60,000 Dkk, corresponding to approximately 8,000 Euro.

3.5.1.2 Circular order 164/70 (NPL1C1) [362]

This circular order, which applied to state and state supported works, introduced several of the concepts discussed below in relation to circular order 7/83 (NPL1C2). In relation to the obligation to use only lowest price[363], it is interesting to note that the circular order 214/74 (DCW102) concerning implementation of directive 71/305 (W1)[364], express notes that this obligation will have to waived for cases also covered by the directive.

This conclusion differed from the approach taken to negotiated procedures, the use of which were precluded in relations to works by executive order 201/95 (DCW201)[365], confirming the opinion of the ministry of housing that the access to this procedure in

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[359] Lov nr. 818 af 19/12/1989 om ændring af visse love som følge af konkurrenceloven, Lovtidende 07-06-2007
[360] Skrivelse nr. 11400 af 25/06/1982 om bygge- og anlægsarbejder, Retsinformation 25-09-1997
[361] Case N-980918, Humus
[362] Cirkulære 164 af 1. juli 1970 om udbydelse af statslige og statsstøttede bygge- og anlægsarbejder og dertil knyttede leverancer uden begrænsning af de bydendes kreds
[363] See article 3
[364] See above in section 3.4.2.1.2
[365] See above in section 3.4.3.1.1

directives could be precluded by the provision in the Danish national procurement law 216/66 (NPL1)[366].

3.5.1.3 Circular order 7/83 (NPL1C2)[367]

3.5.1.3.1 Original circular order

This circular order supplemented the law 216/66 (NPL1) by regulating the choice between tendering, direct bidding and direct contracting[368], and by continuing some of the elements introduced by the above circular order 164/70 (NPL1C1). However, it applied only to state and state supported works.

In doing so, it applied two additional concepts, open procurement (offentligt udbud) and restricted procurement (begrænset udbud)[369]. Procurement comprised tendering, according to law 216/66 (NPL1) as well as comprehensive procurement (offentligt udbud i totalentreprise), which covered the situation when the operator was obliged to take overall responsibility for the building project, including the project planning phase, and both could be either open or restricted[370].

Based on these definitions, several restrictions on choice were enacted. Direct contracting could only be applied under special circumstances[371], which were not defined in the circular order. Reference was made to a supporting circular order on price and time[372], but this also did not hold a definition[373].

Direct bidding could be used only for reasons which included some that were similar to the reasons for using negotiated procedures in EU directives on public procurement. This comprised projects that were difficult to define, projects below a threshold of 300,000 Dkk, approximately 40,000 Euro, projects that could be delivered only by one operator, and, as a rather flexible last category, when other special reasons indicated the use of a specific operator[374].

For restricted procurement, whether tendering or comprehensive, 3 to 5 operators should be invited, and they should not be from the same group of companies, the

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[366] See above in section 3.4.2.1.5
[367] Cirkulære nr. 7 af 06/01/1983 om udbud af bygge- og anlægsarbejder, Ministerialtidende 16-05-1983
[368] See article 2
[369] See article 3.1
[370] See article 3.2
[371] See article 2.2
[372] Cirkulære 191 af 11/11/1981 om pris og tid på bygge- og anlægsarbejder, Ministerialtidende 15-01-1984, currently replaced by Cirkulære 174 af 10/10/1991 om pris og tid på bygge- og anlægsarbejder m.v., Ministerialtidende 24-10-1991, as amended by Cirkulære 9784 af 28/11/2003 om ændring af cirkulære om pris og tid på bygge- og anlægsarbejder m.v., Ministerialtidende 28-11-2003
[373] See article 2.1 of circular order 191/1981

same local area, or the same at all procurements. This guided, but discretionary approach to the composition of the group of invited operators was later reflected in the Danish complaint board case law[375].

The circular order confirmed that only lowest price could be used in restricted tendering[376]. The former free choice between bids in open tendering was replaced by an obligation to accept the lowest price, but with the possibility to refuse operators, when it was deemed that they will not be able to deliver the works at the required level of quality and in time[377]. This blend of award and preselection is reflected in the Danish complaint board case law up till the time of clarification in the Lianakis case[378] from the European Court of Justice[379].

The right to cancel procedures was not restated in the circular order, and the wording of the provisions on the obligation to accept the lowest price could be read as negating this right.

Finally, the circular order introduced the concept of economically most advantageous into the Danish national procurement legislation, which applied in cases of comprehensive procurement[380]. However, no requirement was set for the defining, prioritising or weighting of sub-criteria[381], and the understanding of a liberty in this field can be traced amongst Danish authorities also in relation to EU procurement, as reflected in the case law of the Danish complaint board concerning award criteria[382].

3.5.1.3.2 Supplement in circular letter 4002/83 (NPL1C2S1) [383]

This circular letter regulated the application of the above circular order in relation to social housing, where future projects may have been agreed in with the operator as part of an ongoing project. For such situations, the circular letter allowed for the use of direct bidding until the end of 1985. However, specific conditions were set for this to apply.

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[374] See article 4
[375] Case N-960909, ELFO
[376] See article 7
[377] See article 8
[378] Case C-532/06, Lianakis. For a discussion of the case, see Kotsonis (3), Kruger (1), Treumer (1) and Treumer (2)
[379] This will be dealt with in the following part of the project
[380] See article 9
[381] For a discussion of weighting of sub-criteria in EU procurement, in relation to case C-331/04, Groupement Temporaire d'Entreprises EAC, see Dischendorfer (3)
[382] This will be dealt with in the following part of the project

3.5.1.4 Circular order 50/89 (NPL1C3)[384]

This circular order broadened the previous circular order on state and state supported works, to apply also to works with other specific public support and for such works inserted additional provisions[385].

These additional provisions dealt with very specific issues that had been discussed in the Danish procurement field. One such issue was whether a public authority could submit bids on projects where it was itself the contracting authority. This was seen as different from the use of control bids[386], which were a basis for deciding on whether to cancel the procurement.

Actual internal bids would typically involve bids from the internal department that had so far undertaken tasks that were now to be outsourced. It was seen as a violation of equal treatment, if such departments with their inside knowledge were to compete with external operators.

However, the argument seemed somewhat unfounded, as it was in any case difficult to see how a contracting authority, or private builder in the case of works with public support, would enter into a contract with an internal department. Thus, the bid from this department would in effect be a control bid, which might lead to the procurement being cancelled, if it was better that any external bid.

The relevant discussion was therefore not whether the internal bid constituted discrimination, but whether it constituted sufficient grounds for cancelling an ongoing procurement[387]. This issue could also be raised in relation to control bids.

The circular order had a further reach in relation to private builders with public support, as it precluded bids from companies related to the builder either one company owning 20% of the other company, or by being under common joint control in a corporation or foundation structure[388].

From a procurement procedure point of view, this did not change the issue. If the companies are sufficiently closely related there is not procurement, but only internal delivery

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[383] Cirkulæreskrivelse nr. 4002 af 04/03/1983 om overgangsbestemmelser m.v. vedrørende indhentning af underhåndsbud i henhold til byggestyrelsens cirkulære af 6. januar 1983 om udbud af bygge- og anlægsarbejder (Udbudscirkulæret), Ministerialtidende 24-09-1997

[384] Cirkulære nr. 50 af 14/04/1989 om udbud af bygge- og anlægsarbejder, Ministerialtidende 25-04-1989

[385] See article 1

[386] See above in section 3.5.1.1

[387] This will be dealt with in the following part of the project

[388] See article 10 and 12.2

within a group. However, it may be argued that 20% ownership in this connection is not sufficient.

The deciding issue was instead allocation of public funds. The point of view was that a builder, receiving public support, should not receive that support as own profits. Only by forcing the builder onto the external procurement market was efficient use of public funds ensured. This also explained the low threshold of 20% ownership.

Secondly, the circular order precluded any person, who had assisted with the preparation or administration of the procurement procedure, from being an operator or associated with an operator bidding on the project[389]. This very categorical approach was adopted prior to the more nuanced approach of the European Court of Justice[390].

Thirdly, the circular order precluded the setting of a fixed price in the tender[391]. There is no such specific rule in EU or Community procurement, but it may be argued that this follows from the obligation to use the either the lowest price or the economically most advantageous, which becomes impossible if the price element is locked. This relates also to the discussion of how large a part the price must be in the economically most advantageous award criteria[392].

However, from the practical point of view it may be pointed out that the price element is often effectively fixed in the Community procurements for external assistance. The tender documents specify the overall contract sum as well as the number of man-days to be performed. When the contract sum is set at a sufficiently low level, the fixed number of man-days leaves very little room for price competition, and effectively the price element is removed from the award procedure.

As a final element, the circular order underlined that it was not only important to have a balance between quality and price, but that getting the lowest possible price was important in itself. This could be seen as an example of formal budgetary prudence, but it seemed misplaced that this, in the circular order, was related to the contract award[393]. It should rather be seen as a relevant input for the setting of technical specifications, which should reflect the budget level, at which the builder and the supporting public authority would wish to define the project to be offered in procurement.

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[389] See article 12.1
[390] This will be dealt with in the following part of the project
[391] See article 13
[392] This will be dealt with in the following part of the project
[393] See article 15

3.5.1.5 First generation dates for application

The dates for application of the first generation of Danish national procurement measures may be summarized as follows:

Table 18: First generation of Danish procurement

Legal Act	Notation	Date of effect
Law 216/66	NPL1	1967-01-01
Law 818/89	NPLA1	1990-01-01
Letter 11400/82	NPL1S1	1982-06-25
Circular order 164/70	NPL1C1	1970-01-01
Circular order 7/83	NPL1C1	1983-04-01
Circular letter 4002/83	NPL1C1S1	1983-03-04
Circular order 50/89	NPL1C2	1989-06-30

3.5.2 Second generation

3.5.2.1 Law 450/01 (NPL2) [394]

As the previous law, the new law was confined to the field of works, but also explicitly covered subcontracting[395]. On the other hand, the special mention of supplies for works, found in the previous law, had been removed.

The new law also only set the rules for conduct of procurement procedures, while in relation to the use of procedures the law was limited to a general statement that the contracting entity must ensure effective competition[396]. Further regulation of the use of procedures, which had previously be regulated by circular order, as set out above[397], was now expressly delegated to minister for housing[398].

In addition, the minister for business was empowered to regulate complaints[399]. However, the law in itself gave access to the Danish complaint board[400], and in practice the same procedural provisions have been applied as also adopted for implementation of the remedies directive 89/665 (RC1)[401].

The relationship with EU law was made explicit, as the law would not apply to procurements subject to the works directive 93/37 (W2) or utilities directive 93/38 (U2)[402]. This would have solved the issue concerning limitations on the number of operators invited to submit direct bids under the old law, and the impact this had for the EU negotiated

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[394] Lov nr. 450 af 07/06/2001 om indhentning af tilbud i bygge- og anlægssektoren, Lovtidende 08-06-2001
[395] See article 1.3
[396] See article 5.1
[397] See above in sections 3.5.1.2, 3.5.1.3 and 3.5.1.4
[398] See article 3
[399] See article 2
[400] See article 13
[401] See below in section 3.6.1
[402] See article 1.1

procedure[403]. However, the issue was also solved in the manner that this limitation was not continued in the new law.

Two elements of the law did however apply also to EU procurement[404]. This included an obligation for the operator to let a bid have a validity period of at least 40 days[405], and also the right to be present at the opening of bids[406]. As this latter provision continued also to include a right to be informed about reservations, this could be seen as stating a right to accept reservations in EU procurements. As set out above, in connection with the previous law, this had an impact on the case law of the Danish complaint board.

In addition, the scope of the law was tied to EU concepts, as works was defined as that which is procured by contracting entities as defined in article 1.b in the works directive 93/37 (W2)[407]. As set out below[408], this indirect definition gave rise to uncertainty as to whether the EU concept of works should also be applied. Finally, the law set an option for voluntary application by entities not covered by the law, which also became an issue in litigation[409]. Apart from the option of voluntary application, private entities were no longer covered by the law, except for works with public support[410]

The definition of tendering was unchanged from the previous law, but the concept of direct bidding was made residual, and thus would also cover direct contracting[411]. Apart from this definition, the law did not set any rules for direct bidding. For tendering, a requirement was set for written format, but opening for electronic communication[412], and requiring reasonable, but unspecified tendering time limits[413].

As the previous law, the new law required equal treatment, and more specifically the selection of operators invited to bid was to be based on objective, relevant and non-discriminatory criteria[414]. Also continued, an even widened, was the right to negotiate with the operators. For tendering according to lowest price, negotiations could be undertaken only with the operator having submitted the lowest bid, but different previous law, the wording of the provision was no longer limited to further lowering of the price[415].

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[403] See above in section 3.5.1.1
[404] See article 1.1
[405] See article 5.3
[406] See article 7
[407] See article 1.2.p1
[408] See below in section **Error! Reference source not found.**
[409] See below in section 4.1.2
[410] See article 1.2.p2
[411] See article 4
[412] See article 4.4. For a discussion on electronic communications, see Bickerstaff (1)
[413] See article 5.2
[414] See article 6.1
[415] See article 11

For tendering according to economically most advantageous criteria, negotiations could be held with all bidders, on a non-discriminatory basis, unless this option was de-selected in the tender documentation[416]. This would seem to correspond to the new procedure of competitive dialogue in the directive 2008/18 (C3)[417], but without any limitation to cover only complex contracts.

For variants, the law aligned with the EU directives[418] in demanding that minimum requirements be set[419]. However, the setting of such requirements would in itself be sufficient to allow variants, as the law operates the reverse of the EU directives[420] in allowing variants unless this option has been deselected in the tender documentation[421].

For contract award, an alignment with the EU directives was also undertaken, introducing the concepts of lowest price and economically most advantageous as the only alternatives, and even pre-empting the third generation EU directives by codifying the Concordia principle[422] of accepting sub-criteria based on environmental concerns[423]. However, the principle of weighting was not introduced, keeping the law at the level of the EU second generation directives with only a soft request for use of a prioritised list of sub criteria[424]. The problematic possibility to refuse a bid from an operator deemed unlikely to be able to perform the contract, thus blending pore-selection and award criteria, is continued from the previous circular orders[425].

The right to cancel the procurement was no longer stated explicitly as in the previous law, and the regulation of cancellation was made implicit, as in the EU procurement directives[426], following from the obligation to inform, as quickly as possible, about the outcome of the procedure and to give reasons for cancellation, and in the case of restricted tendering also for the contract award[427]. However, the drafting of the provision on award criteria, still gives the impression of an absolute right of cancellation[428].

Different from the previous law, the new law did not contain any provision on penal sanctions. The preparatory works do not mention this issue, but the removal of penal

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[416] See article 12
[417] See article 29 of the directive
[418] See for example article 24.3 of directive 2004/18 (C3)
[419] See article 9.1
[420] See for example article 24.2 of directive 2004/18 (C3)
[421] See article 9.2
[422] Case C-513/99, Concordia
[423] See article 8.1
[424] See article 8.2
[425] See article 8.3
[426] See for example article 41.1 of directive 2004/18 (C3)
[427] See article 12
[428] See article 8

sanctions could be explained by the fact that the prohibition on bid rigging also was not continued from the old law, as the issue of bid rigging was instead moved to the competition act, where it might be argued that it more correctly belonged.

3.5.2.2 Executive order 758/01 (NPL2BK1)[429]

This executive order supplemented the law, as foreseen in the legal basis set in the law[430], but also to a certain extent restated provisions of the law, so as to provide a comprehensive regulation of national public procurement. In many aspects, it continued the principles introduced in the circular orders under the previous law[431].

Different from the above mentioned circular orders, the executive order did not have specific rules to apply only for private builders with state support. As for public entities working on a commercial basis, such entities were not covered by the executive order[432]. However, most of the rules in the executive order also covered subcontracting by operators participating in public procurement[433].

The executive order continued the permission for use of direct contracting under special circumstances, but as the previous circular orders did not define this concept[434]. Likewise, limitations on direct bidding still applied only to specific works, which however now included all public works, as well as specified supported works, including a possibility for other public entities to enact the executive order for works that they support[435].

Using direct bidding was accepted below an increased threshold of 1 million Dkk (about 133,000 Euro), with a new possibility also for use on part works up to 500,000 dkk (about 67,000 Euro) constituting less than 20% of the total works[436]. In the EU directives, part works could be exempted from the directives[437], but under the Telaustria principle[438] it could be argued that some tendering procedure would have to apply also to such part works[439]. This issue was solved in the Danish law by allowing the direct bidding, which could be applied under circumstances similar to those allowing for use of negotiated procedures in the EU

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[429] Bekendtgørelse nr. 758 af 24/08/2001 om indhentning af tilbud i bygge- og anlægssektoren, Lovtidende 30-08-2001
[430] See article 3 of the law
[431] See above in sections 3.5.1.2 and 3.5.1.4
[432] See article 1.3
[433] See article 1.1-2
[434] See article 2.3
[435] Se article 13.1
[436] See article 13.2
[437] See for example article 9.5.a.3 of directive 2004/18 (C3)
[438] Case C-324/98, Telaustria

directives, as was the case in the previous circular orders. However, instead of the very open reference to other necessary reasons in the previous circular 7/83 (NPL1C2)[440], the list of reasons had now become long and definitive[441].

For restricted tendering, the minimum number of 3 invited operators was maintained, but the indicated normal range was increased to between 5 and 7[442]. A new distinction was introduced between restricted tendering with and without preselection. For procedures with preselection a rather short time limit of 15 days was set for requests for participation[443], but no time limits for bids were set in relation to any procedures. Likewise, minimum requirements for preselection are introduced[444], corresponding to the EU requirements, but no pre-defined criteria were required for selection amongst the qualified[445], except that only one operator from a group of related enterprises could be invited[446].

As in previous circular orders, the concept of related enterprises was defined by more that 20% ownership or being jointly subject to control within a company or foundation structure[447]. Likewise, this concept was still also applied to define the range of the prohibition on accepting bids from operators with a conflict of interest[448], and to the continued prohibition on internal bids[449]. However, a distinction was now made between internal and control bids, with the latter expressly permitted, when the operators were informed beforehand[450].

For the new category of restricted tendering without preselection, the executive order did not set criteria for selection, but it should be recalled that the law in any case required objective criteria[451]. In addition, the limitations from the previous circular orders were continued, so that only one operator could be invited from a group of related operators, while

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[439] For a discussion of limits to the Telaustria principle, see Linde (1), Brown (14), McGowan (4), and Williams (4). For a discussion of the interpretive communication from the European Commission, see Brown (13). For a discussion of the principle, based on case C-195/04, Ireland, see Kotsonis (4) and Kotsonis (5)
[440] See article 4 of the circular
[441] See article 13.3
[442] See article 6
[443] See article 7.1
[444] See article 7.5
[445] For a discussion of selection amongst the qualified, based on case C-360/89, Italy, and case N-960909, ELFO, see Treumer (14)
[446] See article 7.6
[447] See article 5.2
[448] See article 5.1. For a discussion of conflicts of interest in EU procurement law, see Braun (3), as well as Treumer (12), p. 85-138
[449] See article 4.1
[450] See article 4.2-3
[451] See article 6.1 of the law

one operator had to come from outside the local area, and the same group of operators could not be invited for all procurements[452].

Exclusion grounds applied in all tender procedures, corresponding to the grounds in EU procurement, but they were all optional and not mandatory[453]. This included incapacity, insolvency, penalised violations, and serious or repeated misconduct. For the latter two, the violation or misconduct had to indicate a risk related to the performance of the contract.

For negotiations with operators, the executive order expanded on the permission in the law to negotiate with all operators[454], when the criterion was the economically most advantageous bid[455]. It set conditions for the negotiation, which confirmed the above mentioned impression that the procedure more approximated competitive dialogue under the EU directives.

Finally, the executive order permitted the use of framework agreements with duration of up till 4 years[456], corresponding to the later third generation EU rules.

3.5.2.3 Executive order 595/02 (NPL2BK2)[457]

This executive order replaced the previous executive order, but largely repeated the same text. However, in relation to preselection, the specific elements of minimum requirements were replaced with a general reference to economic and technical capacity[458]. For direct bidding, the threshold was increased to 2 million Dkk (about 265,000 Euro)[459]. The obligation, to inform as quickly as possible about the outcome of the procurement, was restated from the law, but for some reason the obligation to gives reasons for cancellation was not included in this restatement.

The issue of a maximum number of direct bids, which as set out above in the first generation law had been set at 2, had not been continued in the second generation law, as it was expected to be regulated in the implementing executive order[460]. However, no such regulation was included in the first executive order, mentioned above, but in the present executive order the limitation was set at 4 direct bids[461].

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[452] See article 8.1
[453] See article 9
[454] See article 12 of the law
[455] See article 11
[456] See article 3.3-4
[457] Bekendtgørelse nr. 595 af 09/07/2002 om indhentning af tilbud i bygge- og anlægssektoren, Lovtidende 23-07-2002
[458] See article 7.3
[459] See article 13.3
[460] See page 5 in the proposal for law 450/2001
[461] See article 13.2

3.5.2.4 Second generation dates for application

The dates for application of the second generation of Danish national procurement measures may be summarized as follows:

Table 19: Second generation of Danish procurement

Legal Act	Notation	Date of effect
Law 450/01	NPL2	2001-09-01
Executive order 758/01	NPL2BK1	2001-09-01
Executive order 595/02	NPL2BK2	2002-09-01

3.5.3 Third generation

3.5.3.1 Law 338/05 (NPL3)[462]

3.5.3.1.1 Original law

This law replaced the previous law and updated the references to the third generation EU directives[463]. Some other editorial changes were made, but mainly the law restated the previous law, integrating also elements from the previous executive orders, such as the conditions for the use of direct bidding and framework agreements[464]. The above mentioned problem concerning the understanding of the concept of work was solved by a provision referring to several concepts in the EU directives[465].

Somewhat surprisingly, the issue of a maximum number of operators requested to submit direct bids, which had been increased from 2 to 4 in the previous generation, was again reduced to 3[466]. However, the principle was also continued that the law would not apply to procurement subject to the EU procurement directives, with the exception of the provisions on validity period for the bid and the right to be present at the opening, as well as the implicit right to make reservations, as set out above[467]. Thus, the limitation on numbers should not conflict with the EU provisions for the negotiated procedure, which in any case operated with a minimum of 3 operators.

The distinction between restricted procedures respectively with and without preselection was upheld, but the minister of economy and business was empowered to limit the use of restricted procedures without preselection[468]. The right to refuse bids from an

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[462] Lov nr. 338 af 18/05/2005 om indhentning af tilbud i bygge- og anlægssektoren, Lovtidende 19-05-2005
[463] See article 1.3
[464] See article 12-13
[465] See article 1.5
[466] See article 12.2
[467] Se above in section 3.5.2.1
[468] See article 6.3

operator deemed unlikely to be able to perform the contract, thus blending preselection and award criteria, was continued, both for tendering[469] and for direct bidding[470]

The provisions were slightly changed, aligning them with the EU directives, in the sense that reasons, for refusing preselection and award, were to be given only on demand. However, when negotiations were undertaken at the end of procedure based on economically most advantageous, reasons for not inviting and for award had be given immediately, as they had to be in the case of cancellation[471].

3.5.3.1.2 Amendment in law 572/07 (NPL3A1) [472]

This law implemented the Telaustria principle[473] of the European Court of Justice and inserted new provisions on supplies and services into the law, without changing the provisions on works.

The provisions explicitly referred to concepts in the EU directives[474], and applied only to contracts below the thresholds in directive 2004/18 (C3), but above a national threshold of 500,000 Dkk (about 67,000 Euro)[475]. It did not apply to contracts falling within the scope of directive 2004/17 (U2), even when below the threshold values of the directive[476].

Contracts exempted from directive 2004/18 (C3), including the 20% rule for lots, did not become subject to the law[477]. On the other hand, services under annex IIB of the directive were subject to the law, when above the national threshold[478].

The procedural obligations imposed on the contracting entity included the posting of a contract notice in a newspaper, but no restrictions were imposed on the coverage of the newspaper. As an alternative, the notice could be posted on an electronic medium[479], which would the web site of the contracting authority[480]. The minister for economy and business was empowered to prescribe the use of specific electronic medium[481].

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[469] See article 8.3
[470] See article 12.6
[471] See article 14-15
[472] Lov nr. 572 af 06/06/2007 om ændring af konkurrenceloven, retsplejeloven, lov om indhentning af tilbud i bygge- og anlægssektoren og lov om Klagenævnet for Udbud, Lovtidende 07-06-2007
[473] Case C-324/98, Telaustria
[474] See article 15b of the amended law
[475] See article 15a.1.1-2
[476] See article 15a.2 of the amended law
[477] See article 15a.3
[478] See article 15a.1.3 of the amended law
[479] Article 15c.1
[480] Betænkning over forslag L152 til lov om ændring af konkurrenceloven, retsplejeloven, lov om indhentning af tilbud i bygge- og anlægssektoren og lov om Klagenævnet for Udbud, Annex 2: Et af udvalgets spørgsmål til økonomi- og erhvervsministeren og dennes svar herpå
[481] See article 15c.3

The principle of equal treatment was also implemented for these national procedures[482], including specific mention of the selection of operators based on objective criteria, as well as the usual information obligations, with reasons in case of cancellation, and otherwise with reasons on request. No mention was made of limits to negotiation.

3.5.3.1.3 Consolidation law 1410/07 (NPL3C1) [483]

As set out above, the consolidation law is a re-issued version of the previous law, with the amendments incorporated, and no further amendments. It forms the new point of reference, also for the issuing of executive orders.

3.5.3.2 Executive order (NPL3BK1) [484]

This executive order was issued prior to the amendment and consolidation laws. It only concerned the use of direct bidding for works. It removed the maximum on number of operators requested to submit bids, as well as the threshold for use of direct bidding, in relation to bodies governed by public law[485].

However, in the case of works with public support, this applied to both bodies governed by public law and private builders, but only to the extent the public authority granting the support does not decide otherwise[486].

3.5.3.3 Third generation dates for application

The dates for application of the third generation of Danish national procurement measures may be summarized as follows:

Table 20: Third generation of Danish procurement

Legal Act	Notation	Date of effect
Law 338/05	NPL3	2005-09-01
Law 572/07	NPL3A1	2007-07-01
Consolidation law 1410/07	NPL3C1	2007-07-01
Executive order	NPL3BK1	2005-09-01

[482] See article 15d
[483] Lovbekendtgørelse nr. 1410 af 07/12/2007 om indhentning af tilbud på visse offentlige og offentligt støttede kontrakter, Lovtidende 21-12-2007
[484] Bekendtgørelse nr. 817 af 23/08/2005 om visse udbyderes anvendelse af underhåndsbud efter lov om indhentning af tilbud i bygge- og anlægssektoren, Lovtidende 30-08-2005
[485] See article 1
[486] See article 2

3.6 Danish remedies system[487]

3.6.1 First generation

3.6.1.1 Law 344/91 (KNL1)[488]

3.6.1.1.1 Original law[489]

The Danish government chose to set up a new complaint board as implementation of directive 89/665 (RC1), and subsequently also directive 92/13 (RU1). The complaint board was given competence to hear cases concerning the EU provision concerning procurement, as well as the Danish implementing measures[490]. In addition, further jurisdiction could be given in other legislation[491], as was subsequently the case with national procurement[492].

The law did not refer to the definition of concepts in the EU procurement directives, but listed the types of contracting entities, against whom cases may be brought, in a manner compatible with the EU concepts[493]. Furthermore, the law listed the type of violations that could be brought before it, covering the scope of procurement procedures in a comprehensive manner[494]. The right to bring cases was assigned to persons with legal interest, as well as such organisations and public authorities as had been authorised by the minister for industry.

The complaint board was composed of a presiding members and ordinary members, both of which were nominated for a 4 year period. The presiding members had to fulfil the criteria for becoming a judge, whilst the other members had to have knowledge of the subject areas covered by public procurement[495]. Each case was heard by a panel composed of 1 presiding member and 2 ordinary members, or 4 ordinary members if necessary. The president of the board composed the panel, according to rules adopted by the minister for industry[496].

The law did not grant any exclusive competence to the complaint board, and the applicants thus could address the ordinary courts as an alternative. The only obligation on the

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[487] An introduction to the Danish remedies system may be found in Nielsen (2), p. 321-348
[488] Lov nr. 344 af 06/06/1991 om Klagenævnet for Udbud (udbud af bygge- og anlægsarbejder og indkøb i De Europæiske Fællesskaber), Lovtidende 07-06-1991
[489] For comments on the efficiency of the first generation legislation, see Federspiel (1), and for comments on the practice of the Danish complaint board during this the period, see Groesmeyer (1), Koefoed-Johnsen (2), Koefoed-Johnsen (3), Koefoed-Johnsen (4), and Schioler Sorensen (1)
[490] See article 1.1
[491] See article 1.2
[492] See article 13 of law 450/01 (NPL2)
[493] See article 3
[494] See article 2
[495] See article 7
[496] See article 8

applicants was to inform the defendant contracting authority at the same time as a case was introduced before the complaint board[497].

The decisions of the complaint board could be appealed to the ordinary courts within a period of 8 weeks[498]. If this was not undertaken, the decision of the complaint board would become final. The Danish courts have confirmed that this precludes the courts from further review of the case if submitted after the 8 weeks[499].

The law further stipulated that there was no access to administrative appeal[500], thus implicitly establishing that the complaint body was an administrative entity, although it may be considered quasi judicial, and has been found to fulfil the criteria for use of article 234 of the EC treaty[501]. On the other hand, the complaint board has found that access to documents, during the hearing of cases, is regulated by the rules of public administration, and not those of judicial procedure[502].

The procedure before the complaint board was written, as a point of departure, but an oral hearing could be granted, and was in practice very often granted[503]. The decisions of the complaint board could be partial decisions[504], and in practice claims for damages have on a regular basis been separated for later decision[505]. However, in the original law, the complaint board did not have the power to grant damages[506].

The powers of the complaint board included the right to stop an ongoing procurement procedure, to instruct a contracting entity to legalise the procurement, and to annul award decisions. Thus the law did not take position as to competence over awarded contracts, but the complaint board has found that contract law as such falls outside the scope of competence, as defined in article 1[507]. It might be argued that the power to order the contracting entity to legalise the procurement, could be interpreted as holding also a power to order the cessation of contract implementation[508].

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[497] See article 2.2
[498] See article 6.2
[499] Case V-000314, IBF Nord
[500] See article 6.1
[501] Case C-275/98, Unitron, point 15
[502] Case N-950531, Drejer, point 1
[503] See article 9
[504] See article 5.1
[505] For a discussion on standard of proof in relation to claims for damages, see Høegh (1) and Dischendorfer (7). For a comment on claims for damages against EU institutions, see Braun (5). For a discussion of the case law of the European Court of Justice, see Treumer (5)
[506] See article 5.2
[507] Case N-020322, Johs. Sørensen & Sønner, point 3
[508] For a discussion of the implications for contractual validity of a breach of procurement law, see Offersen (1) and Dischendorfer (4)

The submission of a complaint did not entail automatic suspension of the procurement procedure, but the complaint board did have power to grant interim measures[509]. However, the complaint board has confirmed that such interim measures will have no effect on the performance of a signed contract[510].

3.6.1.1.2 Amendment in law 1006/92 (KNL1A1) [511]

This amendment redefined the scope of the law, based on the introduction of the framework laws for implementation of the EU directives[512]. However, in practice the change was only editorial.

It limited the powers of the complaint board[513] in cases related to the exploitation of geographical areas, for the purpose of exploring for, or extracting, oil, gas, coal or other solid fuels[514]. In such cases, the complaint board could only rule whether a violation had taken place, but not suspend procedures, impose legalisation or annul decisions, nor grant interim measures[515].

If the violation would have entailed fines to be imposed by the ordinary courts, the complaint board could offer the contracting entity to terminate the case based on an acknowledgement of the violation and voluntary payment of a fine indicated by the board. Acceptance of this offer would preclude further enforcement of the penal liability of the contracting entity, but could only be offered by the complaint board, if the board found that the ordinary courts would not have found grounds for imprisonment. The complaint board itself did not have competence to impose penal sanctions, aside from deciding on the agreed fine in this provision.

Finally, the amendment opened op for the possible participation of 2 presiding members in a panel hearing a case[516]. Thus the ration between presiding and other members could take many forms, including 1 to 2, 2 to 2, 1 to 4, and 2 to 4.

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[509] See article 10
[510] Correspondence relating to case N-990318, Seghers – for a discussion of the implications of the Alcatel principle in relation to validity of contracts., see Nielsen (1) and Treumer (4)
[511] Lov nr. 1006 af 19/12/1992 om ændring af lov om Klagenævnet for Udbud, Lovtidende 21-12-1992
[512] See above in section 3.4.1.1.1
[513] See article 5.2 of the law as amended
[514] See above in section 3.1.2.4.2
[515] See article 10.2 in the amended law
[516] See article 8 in the amended law

3.6.1.1.3 Amendment in law 206/95 (KNL1A2) [517]

This amendment law brought some editorial clarifications, such as the use of the concept public undertakings[518], in defining the possible defendants, which in the first law had been included under a more generic description.

The limitation in relation to the exploitation of geographical areas, for the purpose of exploring for, or extracting, oil, gas, coal or other solid fuels, set out in the preceding amendment law, was now changed to an obligation for the complaint board to refuse cases brought against contracting entities in this field[519].

On the other hand, the law introduced fines for violation of procurement procedures[520], as well as for violation of decisions of the complaint board[521], but did not grant the complaint board power to impose such fines, which instead would require the prosecution to bring cases before the ordinary courts. In cases concerning the exploitation of geographical areas, for the purpose of exploring for, or extracting, oil, gas, coal or other solid fuels, but in such cases, the fines would be subject to private prosecution[522], which would have to be brought before the Maritime and Commercial court in Copenhagen[523].

Likewise, the law implemented the remedies directive for utilities 92/13 (RU1)[524] by introducing liability in damages for the violation of procurement procedures, but only in relation to directive 93/38 (U2)[525]. It did not grant the complaint board the right to impose such damages, which remained with the ordinary courts, as also accepted in directive 92/13 (RU1)[526]. It should noted, that the European Court of Justice decision on general liability in damages for member states only came later in 1996[527], and that limiting the implementation was understandable on this background.

However, the law gave the complaint board the possibility to impose on the contracting entity to pay the legal costs of the applicant, when the applicant was successful in one or more claims[528]. The original law had been silent on this issue, and the amendment did not allow for the applicant to be ordered to pay any of the legal costs of the defendant.

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[517] Lov nr. 206 af 29/03/1995 om ændring af lov om Klagenævnet for Udbud, Lovtidende 30-03-1995
[518] See article 3.2 in the amended law
[519] See article 5.1 in the amended law
[520] See article 6.1 in the amended law
[521] See article 13b in the amended law
[522] See above in section 3.4.1.1.4
[523] See article 6.2-5 in the amended law
[524] See article 2.1.d in the directive
[525] See article 13a in the amended law
[526] See article 2.2 in the directive
[527] Judgment of 5 March 1996 in case C-46/93 and C-48/93, Brasserie du Pecheur, Rec 1996, p. i-1029
[528] See article 13c in the amended law

Finally, the amendment implemented[529] the conciliation procedure from directive 92/13 (RU1)[530], which however has never been applied.

3.6.1.2 Executive order 912/91 (KNL1BK1)[531]

This executive order set detailed rules for the procedure before the complaint board, but also restated large parts of the law, including issues relating to the competence of the board.

The executive order listed the authorities and organisations that had been given legal standing before the complaint board, without having to prove legal interest in the case[532]. This included the ministries, central authorities and major professional association, with a total of 9 such approved entities.

A right of dissenting opinions was specified for the members of the panels[533], to be published with the decision. It was left to the president to decide how the decisions of the board were to be published[534], which in practice was undertaken at the web site of the complaint board[535].

From a practical point of view, the executive order placed an important obligation on the contracting entity, who would receive a copy of the complaint from the complaint board, and who then had to submit an explanatory report on the procurement, together with the documents concerning the procurement[536].

3.6.1.3 Executive order 72/92 (KNL1BK2)[537]

This executive order was issued only 1 month after the preceding executive order. It rectified an editorial mistake, as article 15 and 16 had been placed between article 12 and 13 in the original executive order.

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[529] See article 13d in the amended law
[530] See article 9-11 in the directive
[531] Bekendtgørelse nr. 912 af 18/12/1991 om Klagenævnet for Udbud, Lovtidende 31-12-1991
[532] See article 14
[533] See article 19.2
[534] See article 3.3
[535] See www.klfu.dk
[536] See article 15
[537] Bekendtgørelse nr. 72 af 30/01/1992 om Klagenævnet for Udbud, Lovtidende 07-02-1992

3.6.1.4 Consolidation law 1166/95 (KNL1C1)[538]

As set out above, the consolidation law is a re-issued version of the previous law, with the amendments incorporated, and no further amendments. It forms the new point of reference, also for the issuing of executive orders.

3.6.1.5 Executive order 26/96 (KNL1C1BK1)[539]

This executive order, based on the consolidation law 1166/95 (KNL1C1), greatly expanded the list of entities with special legal standing[540], which now comprised 48 authorities and professional associations, including the Danish competition council, which now also had legislative responsibility for public procurement.

Apart from this, the new executive order contained some editorial changes in comparison to the previous executive order, and to some degree restated the latest amendment law 206/95 (KNL2A2).

3.6.1.6 First generation dates for application

The dates for application of the first generation of Danish remedies measures may be summarized as follows:

Table 21: First generation of Danish remedies

Legal Act	Notation	Date of effect
Law 344/91	KNL1	1992-01-01
Law 1006/92	KNL1A1	1993-01-01
Law 206/95	KNL1A2	1995-03-31
Executive order 912/91	KNL1BK1	1992-01-01
Executive order 72/92	KNL1BK2	1992-02-15
Consolidation law	KNL1C1	1995-03-31
Executive order 26/96	KNL1C1BK1	1996-02-01

3.6.2 Second generation[541]

3.6.2.1 Law 415/00 (KNL2)[542]

3.6.2.1.1 Original law

In comparison with the previous law, the new law again revised the presentation of the central concepts, but only from an editorial and drafting point of view, returning to a more generic terminology[543].

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[538] Lovbekendtgørelse nr. 1166 af 20/12/1995 om Klagenævnet for Udbud (udbud af bygge- og anlægsarbejder og indkøb i De Europæiske Fællesskaber), Lovtidende 30-12-1995
[539] Bekendtgørelse nr. 26 af 23/01/1996 om Klagenævnet for Udbud, Lovtidende 30-01-1996
[540] See the annex of the executive order
[541] For a discussion of the case law of the Danish complaint board under the second generation law, see Treumer (8)

The judicial character of the complaint board was reinforced by requiring that the presiding members not only fulfilled the conditions for becoming judges, but actually were sitting judges[544].

The special standing of the competition authority, as well as the city and housing ministry, was highlighted by stipulating their legal standing directly in law[545].

Cases concerning the exploitation of geographical areas, for the purpose of exploring for, or extracting, oil, gas, coal or other solid fuels, were still excluded from the complaint board[546], and it was now specified that such cases could not be brought before the ordinary courts, but would have to be brought before the Maritime and Commercial court in Copenhagen[547], which in the earlier amendment law 206/95 (KNL1A2) had been given sole competence to decide on fines under private prosecution in such cases[548].

While the complaint board was still not entitled to impose penal fines, it was given authority to impose daily fines on contracting entities[549] that did not submit information requested by the complaint board[550]. The fines were to be enforced by seizure according to the rules of civil procedure. Finally, the new law explicitly granted the complaint board competence to award damages[551].

3.6.2.1.2 Amendment in law 450/01 (KNL2A1)[552]

This amendment law, which was also the second generation law on national procurement 450/01 (NPL-2), expanded the competence of the complaint board to cover national procurement[553].

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[542] Lov nr. 415 af 31/05/2000 om Klagenævnet for Udbud, Lovtidende 02-06-2000, Lovtidende 02-06-2000
[543] See article 1
[544] See article 2.2
[545] See article 4.1
[546] See article 1.1
[547] See article 11.1
[548] See above in section 3.6.1.1.3
[549] See article 13
[550] See article 5.2
[551] See article 6.3. For a discussion of the proposal to grant the Danish complaint board competence to award damages, see Treumer (11), and for a discussion of the result, see Treumer (10)
[552] See above in footnote 394
[553] See article 1 in the revised law

3.6.2.1.3 Amendment in law 306/02 (KNL2A2) [554]

This amendment law reflected the change in competence, whereby the legislative responsibility for procurement of works was moved to the competition authority, which already had competence for supplies and services. The special standing of the city and housing ministry was removed from the law[555].

At the same time, the minister for economics and business, who was also the minister in charge of the competition authority, was given competence to introduce rules on electronic communication in relation to procedures before the complaint board[556].

3.6.2.1.4 Amendment in law 431/05 (KNL2A3) [557]

This amendment law added to the possibility for enforcement of daily fines, which could now also be withheld from salaries[558] according to the legislation for enforcement of tax claims.

3.6.2.1.5 Amendment in law 538/06 (KNL2A4) [559]

This amendment law introduced an editorial change, clarifying that cases concerning the exploitation of geographical areas, for the purpose of exploring for, or extracting, oil, gas, coal or other solid fuels, for which competence was reserved for the Maritime and Commercial court in Copenhagen, were civil cases[560].

3.6.2.1.6 Amendment in law 572/07 (KNL2A5) [561]

This amendment law ensured support for the implementation of the Alcatel principle[562], which had been introduced into the procurement implementation legislation by executive order 588/06 (DCC301A2).

When an applicant required interim measures, and the application was submitted within the stand still period, the complaint board would be obliged immediately to order a

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[554] Lov nr. 306 af 30/04/2003 om ændring af lov om Klagenævnet for Udbud og næringsloven, Lovtidende 01-05-2003
[555] See article 4.1 in the amended law
[556] See article 5a in the amended law
[557] Lov nr. 431 af 06/06/2005 om ændring af forskellige love (Forenkling, harmonisering og objektivering af reglerne for inddrivelse af gæld til det offentlige m.v. samt mulighed for anvendelse af digitale lønsedler), Lovtidende 07-06-2005
[558] Se article 13.2-3 in the amended law
[559] Lov nr. 538 af 08/06/2006 om ændring af retsplejeloven og forskellige andre love (Politi- og domstolsreform), Lovtidende 09-06-2006
[560] See article 11.1.1 in the amended law
[561] See above in footnote 472
[562] Case C-81/98, Alcatel

preliminary suspension of the contract signing, during the period until the board could decide on interim measures[563]. This decision would have to be made with 10 days from the day that the contracting entity had been notified of the preliminary suspension. However, no provision was made for the consequences if the complaint board was late in arriving at a decision.

The law also strengthened the supervisory powers of the competition council, as it would be entitled to require submission of all documents relevant to an evaluation of whether the procurement rules were violated. It was specified that the transfer of such documents to the competition authority would not make them public in the sense of the legislation on access to documents. Documents related to public procurement had previously to a wide extent been exempted from the rules on access to documents[564]. However, this exemption had subsequently been repealed[565].

3.6.2.2 Executive order 602/00 (KNL2BK) [566]

This executive order followed the trend of the previous executive orders in providing specialised rules on the procedure before the complaint board, and at the same time restating large parts of the law 415/00 (KNL2). The list of authorities and organisations, with special legal standing, was revised and now included 47 entities[567].

Concerning the procedure, the presumption was now reversed, so an oral hearing would be included, unless the president of the hearing should decide otherwise[568]. The use of lawyers or other representatives was permitted, but not mandatory, for the oral hearing. However, the president could prescribe representation[569].

3.6.2.3 Second generation dates for application

The dates for application of the second generation of Danish remedies measures may be summarized as follows:

Table 22: Second generation of Danish remedies

[563] See article 6a in the amended law
[564] Bekendtgørelse 4/1993 om undtagelse af dokumenter om indkøbsaftaler fra aktindsigt efter lov om offentlighed i forvaltningen, Lovtidende 15-01-1993, and Bekendtgørelse 32/1999 om undtagelse af dokumenter om kommunale myndigheders indkøbsaftaler fra aktindsigt efter lov om offentlighed i forvaltningen, Lovtidende 29-01-1999
[565] Bekendtgørelse 331/2002 om ophævelse af bekendtgørelse om undtagelse af dokumenter om indkøbsaftaler fra aktindsigt efter lov om offentlighed i forvaltningen, Lovtidende 04-06-2002, and Bekendtgørelse 336/2002 om ophævelse af bekendtgørelse om undtagelse af dokumenter om kommunale myndigheders indkøbsaftaler fra aktindsigt efter lov om offentlighed i forvaltningen, Lovtidende 04-06-2002
[566] Bekendtgørelse nr. 602 af 26/06/2000 om Klagenævnet for Udbud, Lovtidende 04-07-2000
[567] See the annex
[568] See article 8
[569] See article 17

Legal Act	Notation	Date of effect
Law 415/00	KNL2	2000-07-01
Law 450/01	KNL2A1	2001-09-01
Law 306/02	KNL2A2	2003-07-01
Law 431/05	KNL2A3	2005-11-01
Law 538/06	KNL2A4	2007-01-01
Law 572/07	KNL2A5	2007-07-01
Executive order 602/00	KNL2BK1	2000-07-05

4 ENFORCEMENT

4.1 Obligation to use procurement procedures[570]

4.1.1 General obligation

Contrary to the Danish implementing provisions[571], the EU directives do not hold a central provision obliging national authorities to apply the procurement provisions. Accordingly, case law concerning lack of respect for the procurement rules has faced the problem of legal reference, which however could be solved in cases where the issue at stake was the surpassing of threshold values[572].

However, thresholds previously were regulated in several different places in the directives [573], and are presently regulated in a delegated manner by the European Commission[574]. Thus, a central reference point has been difficult to locate, and accordingly the Danish complaint board has in some cases fallen back on referring to the transparency principle of EU public procurement law[575].

One solution in the case law of the European Court of Justice has been a reference to the provision in the EU public procurement directives[576], that provides that in awarding their public contracts, contracting authorities shall apply the national procedures adjusted for the purposes of the directive.

In a case against Belgium, the government argued the procurement in question was not subject to the EU public procurement directives, since all the participating operators were Belgian and the issue therefore was one of internal Belgium matters. The European Court of Justice refused this argument, as the scope of the obligation in the corresponding provision of the second generation service directive[577] did not depend on the nationality of the operators[578]. The argument based on internal matters, where no cross border movement was involved, was again refuted in a recent case against Greece[579], as at several other occasions[580].

In a case against Germany, the government argued that a contract in the general interest of society was not of a nature to engage the procurement obligation in the article

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[570] For discussion on exemptions from the obligation to use procurement procedure, see Brown (20)
[571] See article 1 of the consolidated framework law 937/04 (DCC301)
[572] See for example article 7 of directive 2004/18 (C3)
[573] See for example article 56 of directive 2004/18 (C3) in relation to concessions
[574] See the current regulation 1422/2007 (P3A6)
[575] See for example case N-070719, ISS Facility Services, point K3
[576] See article 28 of directive 2004/18 (C3)
[577] See article 11.1 of directive 92/50 (S2)
[578] Case C-87/94, Belgium, point 30
[579] Case C-213/07, Michaniki, point 29
[580] Case C-411/00, Swoboda, point 33

referred to above[581]. The European Court of Justice refuted the argument and stated that the purpose of a contract was not a deciding issue as to whether the obligation to undertake procurement applied. Likewise the Court refuted that the issue of whether public resources had been spent on the contract could have an impact on the obligation to procure[582].

There is no case from the Danish complaint board which explicitly refers to the above mentioned provision or its predecessors, but in a single case the applicant based its claim on the provision. However, the Complaint board found that the contracting entity had been right to expect that the value of the procurement was below the threshold value, and that also the contract in fact was below this value. Accordingly the claim was rejected[583].

The renegotiation of an existing contract may constitute an act subject to the procurement procedures when essential conditions of the contract are to be negotiated, but in cases against the member states in this domain, it is for the Commission to prove that such essential changes are included in the negotiations[584]. However, if material changes are included, the renegotiation falls under EU procurement obligations, even though this is not specified in the directives[585]. Material changes would include expanding the scope, which the European Court based on the limitations in the provisions on the use of negotiated procedures for supplemental deliveries[586].

Related to this issue is the possibility of a change of parties is undertaken, in the form that the contracting entity is substituted by a private party, not subject to the procurement directives. However, this does not draw the contract outside the scope of the directives when this transfer is made only after the commencement of the procurement procedures[587]. Likewise, a change of the operator is seen as a change to one of the essential terms of the public contract, which would therefore entail a renewed procurement obligation[588]. The only exception would if the new operator is dominated by the original operator, who still assumes overall responsibility for the contract implementation[589].

The restricted approach to transfer of contracts must be seen as based on a fear of circumvention. The ruling of the European Court of Justice concerned an awarded contract, but the same principle should apply to changes made during the procurement procedure.

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[581] For a discussion on the relations between general interests of society and the obligation to apply procurement procedures, see Bovis (4), with later comments in Bovis (2)
[582] Case C-126/03, Germany, point 13 and 20. For a discussion of the case, see Dischendorfer (5)
[583] Case N-080702, Scan-Plast Produktion, point 1
[584] Case C-337/98, France, point 46. For a discussion of the case, see Dischendorfer (6)
[585] Case C-454/06 Pressetext Nachrichtagentur, point 30. For a discussion of the case, see Brown (11)
[586] See at the time article 11.3.e-f of directive 92/50 (S2)
[587] Case C-44/96, Mannesmann, point 43
[588] Case C-454/06, Pressetext Nachrichtenagentur, point 40

However, while the limited acceptance, based on dominance, has apparently been applied by the Danish complaint board in its case law on legal standing[590], the situations appears different in relation to cases directly concerning changes to corporate identity[591].

This in turn raises the issue of changes to the substance of an awarded contract, where the European Court of Justice has accepted both an adjustment of prices, to arrive at rounded numbers after the introduction of the Euro as a new currency[592], and an increase in the size of rebates, which is to the benefit of the contracting entity[593]. The acceptance of the latter, which is effectively a lowering of the price element, is somewhat akin to the acceptance in Danish national procurement of price negotiations with the operator submitting the lowest bid[594]. It does raise the risk that, through informal contacts, operators may undertake to subsequently lower the cost of the contract, so as to influence the award procedure.

A final issue in this relation is the prolonging of contracts, which if constituting an unforeseeable necessity may engage the access to negotiated procedures[595], but which may also be indicated in the original contract, as accepted implicitly by the Danish complaint board[596]. This raises the question of whether EU law sets an overall maximum for the duration of contracts. The European Court of Justice has ruled explicitly on this issue, finding that EU law does entail any prohibition on contracts of an unlimited duration[597], which had been preceded by implicit acceptance of long term contracts[598].

This is different from the approach of the Danish complaint board, ruling on framework contracts prior to the introduction of the 4 year limitation for such contracts[599], and finding the need for an objective justification. However, the European Court of Justice does note that although unlimited contracts are not expressly prohibited, such contracts do limit potential competition amongst operators, and in the same case as mentioned above, the court refines its position by stating that unlimited contracts are not per se in violation of EU procurement law[600].

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589 Case C-454/06, Pressetext Nachrichtenagentur, point 54
590 This will be dealt with in the following part of the project
591 See below in section 4.1.5.2
592 Case C-454/06, Pressetext Nachrichtenagentur, point 61
593 Case C-454/06, Pressetext Nachrichtenagentur, point 87
594 This will be dealt with in the following part of the project
595 This will be dealt with in the following part of the project
596 Case N-081219, UAB Baltic Orthoservice, point
597 Case C-454/06, Pressetext Nachrichtenagentur, point 54
598 Case C-414/03, Germany, point 4
599 See below in section 4.1.7.4
600 Case C-454/06, Pressetext Nachrichtenagentur, point 75

This would seem to render support for the Danish requirement for object justification, which in one case even led to an intervention from the Danish competition authority, through which the contract duration was limited to 15 years. Although this took place during the procurement procedure, the Danish complaint board did not find that this modification in itself violated the requirements of equal treatment and transparency[601]. In another case, where the contract period was reduced from 3 to 2 years, by the contracting entity, during the procurement procedure, the Danish complaint board found this in principle to be in conflict with the transparency principle, as there was no objective justification, but not in the specific circumstances a violation of the equal treatment requirement[602].

Even the approach of objective justification was different from the original Danish competition authority approach, which had been to hold that EU law in general, based on the rules for calculation of a rolling total over 48 months for the value of unlimited service contracts[603], that EU law implied a general maximum duration of 4 years. This position was only reversed when it became clear that the United Kingdom apparently had obtained European Commission informal acceptance of service contracts with duration up till 30 years, when heavy infrastructure investment was involved. This would seem to explain the move to a need for objective justification as applied by the Danish complaint board, which predated the more general finding of the European Court of Justice. On balance, the need for objective reasons would seem the more justified approach. However the Danish appeal court arrived at a different solution, as set out below[604].

Somewhat surprising, the European Court of Justice even accepted that where the original contract was unlimited, but contained an unlimited right of termination, which had been set aside by a time limited waiver, the introduction of a new 3-year waiver, after the expiry of the original waiver, did not constitute a change to essential terms of the public contract. This may be contrasted with the Danish complaint board approach to a change in conditions of framework agreements, which appears stricter, but not entirely consistent[605].

4.1.2 Voluntary submission to procurement

The Danish national procurement legislation allows for voluntary submission to its provisions on works. A similar provision has not been introduced for works and services. The

[601] Case N-060707, Valle Trans-Media, point 8
[602] Case N-960607, Det Danske Handelskammer, point 4
[603] See article 9.8.b of directive 2004/18 (C3)
[604] See below in section 4.1.7.4
[605] See below in section 4.1.7.4

submission must be express, and can be either complete or partial, by referring to specific provisions[606].

In a case concerning maintenance, the contracting entity was of the opinion that this constituted works, and accordingly that the Danish national procurement provisions would apply, as the threshold value of the EU directives were not reached. Accordingly, the contracting entity placed a procurement notice as required by the legislation. However, the Danish complaint board found that the activities concerned, objectively did not constitute works, and since the case predated the extension of the national procurement rules to cover services, the case was refused as falling outside the competence of the complaint board[607].

Without explicitly stating this, this complaint board thus ruled that a voluntary application is possible only in relation to contracts that objectively concern work and that the concept of work cannot be expanded on a voluntary basis. This leaves unanswered the question of whether publication of a contract notice in itself would be sufficient to constitute an expression of voluntary submission. However, if the notice does refer to the law in its text, it should be interpreted as such a statement of submission.

This issue was raised in a case concerning a tender procedure, where a set of special conditions for the tender made a reference to the law. Reminiscent of the battle of forms in contract law, the question before the Complaint board was whether this reference in itself was an express submission. The board was divided, but the majority found it sufficient[608]. In the case, no reference was made to an earlier decision of the complaint board, which had underlines that only explicit and unconditional statements would engage voluntary submission[609].

Further, it raised the issue of whether other conditions in the tender materials, which were in conflict with the law, should be regarded as violations, or rather as limitations on the applicability of the law. The issue at stake was a reservation for the contracting entity freely to cancel the tender by refusing all bids. The dissenting judge referred to preparatory works, which supported that the provision on voluntary submission was to grant contracting entities a large margin of discretion. Accordingly, this judge saw the reservation as a limitation on the submission. However, the majority found the reservation instead to be a violation of the law.

The EU procurement directives have no provision on voluntary submission, and the European Court of Justice has in an early case found that the publication of a contract notice

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[606] See article 1.4 of consolidated law 1410/07
[607] Case N-071130, Ejnar Christensen, point 3
[608] Case N-070223, Rebo, point 1
[609] Case N-030811, Kruse & Mørk, point 2

in the Official Journal of the European Union does not in itself engage any responsibility for the contracting authority to apply the provisions of the directive concerned[610]. This case was similar to first mentioned case from the Danish complaint board, as it concerned utilities, which at the time were excluded from the EU directives, and the judgement could therefore be read as only confirming that voluntary publication cannot expand the substantive scope of the directives.

However, it may also be argued that a wider understanding of the judgement, as refusing voluntary submission, has been codified in the standard forms for EU procurement, which include a check box indication of whether publication is mandatory or voluntary. However, strictly speaking this also does not solve the issue of the possible consequences of voluntary publication, and some cases the contracting entities take the precaution of adding a specific disclaimer on the applicability of the EU directives[611].

The Danish compliant board has also dealt with the issue of voluntary submission to the EU directives, without any explicit consideration as to the reach of the European Court of Justice ruling on this matter. Complimentary to the above mentioned example, the board in a group of related cases found that voluntary publication without a disclaimer did engage the obligation of the contracting entity to respective the EU directives[612].

The case concerned interpretation services, which mainly are excluded from the EU procurement procedures[613]. However, the complaint board stressed that the contracting entity was in any case obliged to undertake some tendering under the Telaustria principle[614]. This would not in itself serve to justify a principle of voluntary submission, but the board may have remarked on this only as a support for its finding, based on the voluntary submission, of a violation of the EU procurement provisions.

Somewhat surprising, after finding a violation of the EU procurement directives, the complaint board refrained from annulling the award decision. As reasoning, a reference was made to the fact that the services were not subject to EU procurement, which would seem in conflict with the findings of the board in relation to the Telaustria principle. Likewise, the complaint board refused to oblige the contracting entity to undertake a new procurement under the EU directives. This would seem to confirm that the board did not find that Telaustria principle in itself had implications for the issue of voluntary submission.

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[610] Case 45-787, Ireland, point 8-10
[611] Document 44849-2004-EN, OJ 2004, S 52 (TED)
[612] Case N-041014, SK Tolketjeneste, point 3, as well as case N-050309, A-1 Communication, point 1, and case N-050922, Vestegnens Tolke- og Rådgivningsservice
[613] See presently annex IIB of directive 2004/18 (C3), at the time annex IB of directive 92/50 (S2)
[614] Case C-324/98, Telaustria

More directly, the complaint board found the voluntary submission based on the principle of legitimate expectations, as operators reading a contract notice in the Official Journal should be entitled to expect the application of the EU procurement provision when no disclaimer is made. The board thus did not draw any implications from the fact that operators also should know that given the subject matter of the contract notice, this could not be a mandatory publication.

In an earlier case, this was taken even further, as the complaint board found that publication of a contract notice in a local newspaper, with the indication that the procurement was subject to the EU directives, was sufficient to engage voluntary submission. The board refused to place importance on the fact that the contracting entity in its later invitation to negotiation with the selected operators explicitly referred to the provisions of the national procurement law[615]. The issue became even more confused, as the national procurement law also did not apply to the procurement, as it did not concern works.

This raises the issue of whether a voluntary submission might be recalled or modified during the procurement procedure. The alternative would be a cancellation and renewal of the procurement, which is only possible for objectively justifiable reasons[616]. This would seem to limit the possibility for retraction to equally justifiable reasons, in line with the understanding a transfer of the contract from a contracting authority to a private entity, that is not subject to the directives, which takes place during the procurement procedure, cannot lead to the discontinued application of the directives for that procedure[617]. Only if the contracting authority from the outset was acting on behalf of the private entity would the procurement fall outside the directives.

The general conclusion of the complaint board, that voluntary submission to the EU procurement directives is possible and will be binding on the contracting entity, appears reasonable in the light of the principle of legitimate expectations. However, it is not a string argument, as the legitimacy of the expectations of the operator is limited by what they should be aware of, including the status of EU law.

However, recently the complaint board established that a publication outside of the Official Journal, for a contract not subject to the EU directives, would not in itself be sufficient to engage the EU procurement obligations, apart from the Alcatel principle[618]. The

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[615] Case N-041012, Køster Entreprise, point 2, upheld in the appeal court case O-051219, Morsø Kommune
[616] Presently regulated in an implicit manner in article 41.1 of directive 2004/18 (C3). For a discussion of grounds for cancellation, in relation to case C-15/04, Koppensteiner, see Dischendorfer (8), and for a United Kingdom perspective, see McGovern (1)
[617] Case C-444/96, Mannesmann, point 43
[618] Case C-81/98, Alcatel

board was split as to whether the Alcatel principle would imply an obligation to undertake investigative measures before rejecting a bid as abnormally low[619] for contracts outside the scope of the EU directives. The majority found the Alcatel principle did not to reach this far.

As for the ruling of the European Court of Justice, which apparently is against voluntary publication as a basis for engaging submission to the EU directives, the line of jurisprudence has not yet been further developed in subsequent case law.

4.1.3 Application in Community procurement

As set out above, the second[620] and third[621] generation financial regulations introduced an obligation for Community institutions to apply the EU procurement directives, and also held internal rules for below threshold procurement, just like the first generation financial regulation had held a core of procurement provisions[622].

With the fourth generation financial regulation[623] only the link to the thresholds in the EU procurement directives was maintained, whereas the regulation of procurement both above and below the thresholds was held entirely in a set of internal provisions.

This change in approach was confirmed in a case concerning external actions implemented by an EU authority[624], which are also subject to the procurement provisions[625]. Likewise, the fact, that only the thresholds apply, was confirmed in a case concerning procurement by the European Commission[626].

In the implementing regulation for the third generation financial regulation, specific measures complemented the application of the procurement provisions in the EU directives, such as the requirement for equal treatment[627], and applicants accordingly referred to both sets of rules[628]. The applicability of the EU procurement directives was confirmed in several cases[629]. However, in one case the Court of First Instance chose a more generic approach,

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[619] See article 55.1 of directive 2004/18 (C3). Se also the discussion on abnormally low bids in Community procurement, based on case T-148/04, in Palmer (1)
[620] See above in section 3.3.2.1
[621] See above in section 3.3.3.1
[622] See above in section 3.3.1.1
[623] See above in section 3.3.4.1
[624] Case T-411/06, Sogelma, point 116. For a discussion of the case, see Piselli (1)
[625] See article 162.1 of regulation 1605/2002 (Q4) and article 74 of regulation 2342/2002 (M4)
[626] Case T-59/05, Evropaiki Dinamiki, point 46. For a discussion of the case, see Varga (2)
[627] See article 126 of regulation 3418/93 (M32)
[628] Case T-345/03, Evropaiki Dinamiki, point 65, and case T-322/03, ESN, point 69
[629] Case T-40/01, Scan Office, point 1, case T-04/01, Renco, point 2, case T-183/00, Strabag, point 2, case T-169/00, Esedra, point 4, case T-203/96, Embassy Limousines, point 39, and case T-19/95, Adia Interim, point 31

rejecting claims concerning improper award criteria, without specifying the applicable procurement provisions[630].

4.1.4 Contracting entities

4.1.4.1 Introduction

The terminology of the EU procurement directives, especially following the introduction of directives in the utilities, has been a source of much confusion, and still causes confusion for the new states gaining accession to or association with the European Union. Part of the problem in linguistic, as the word public in some East European languages, such as Ukrainian, refers only to state entities, thus giving a transliteration of the concept public authorities a different meaning than in the English language.

A similar problem concerns the terms products, which in the EU terminology refers to both goods and services, while in some East European countries, such as Lithuanian, a transliteration will refer only to goods, and no proper term exists for the combination of goods and services. It may be argued that also in English, this broad understanding of products is a strained interpretation, but it does underline the autonomous status of EU concepts[631], and the resulting need for national adaptations in order to introduce corresponding translations, if necessary by the creation of new words.

The concept of contracting entities is defined only in the utilities field[632], and it comprises contracting authorities, public undertakings and private undertakings with special or exclusive rights. As the latter two categories are not subject to the directive in the classic field, the term contracting entity is strictly speaking superfluous for the classic directive[633]. However, the word entity is in fact used also in the classic directive as a generic description of a body engaging in procurement, without indicating whether they are public or private. In this report, contracting entity is applied in the same generic manner.

Contracting authorities[634] are then a subset of contracting entities, along with public undertakings and private undertakings with special or exclusive rights. In turn, contracting authorities has several component parts, comprising on the one hand state, regional or local authorities, and on the other hand bodies governed by public law[635]. A further subset is that of

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[630] Case T-160/03 AF Con, point 64. For a comment on the case, see Kalbe (1)
[631] See case C-373/00, Truley, point 45
[632] See article 2.2 of directive 2004/17 (U3)
[633] The concept of special and exclusive rights is also defined only in the utilities directives. See presently article 2.3 of directive 2004/17 (U3). However, the classic directive also deals with special and exclusive rights, as set out in article 3 of directive 2004/18 (C3). This will be dealt with in the following part of the project
[634] See article 1.9.1 of directive 2004/18 (C3) and article 2.1.a.1 of directive 2004/17 (U3)
[635] See article 1.9.2 of directive 2004/18 (C3) and article 2.1.a.2 of directive 2004/17 (U3)

central government authorities[636], subject to the GPA agreement, but the subset has only had a brief mention in case law[637].

In the first and second utilities directives[638], the concept of public authorities is defined in the same manner as contracting authorities in the other directives. Although not defined, public authority is also used as a concept in the annexes of the directives[639], and was also used in the proposals for the latest directives[640], but in both cases presumably in a more generic manner as indicating state, regional or local authorities. This usage would then describe the first part of the definition of contracting authorities, and it is in this sense that the term is used in the present report.

The second part of the definition of contracting authorities, bodies governed by public law, might be referred to, in a shorter form, as public bodies, which is the term used in the present report. In addition, any association of authorities or bodies is also comprised. Although not defined, the same must apply to public and private undertakings, covered by the utilities directive. An interesting question is how to deal with associations of public authorities and public or private undertakings, or more precisely whether a dominance or contamination approach should be adopted[641].

The European Court of Justice has taken position of the issue of associations between public authorities, which cannot as such be considered as falling within the concept of public authority, but must be considered within the scope of public bodies[642]. The court came to the same conclusion in relation to a claim that a public authority and other entities should together be considered as a public authority, since the court stressed the fact that the entities involved each had a separate legal personality[643].

In relation to this practice, the Danish complaint board apparently arrived at opposite conclusions, as it found that an association of municipal authorities should be considered a contracting authority, without entering into any consideration of whether it might fulfil the criteria for being a public body[644].

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[636] See annex IV of directive 2004/18 (C3) as amended by decision 2008/963 (P3A8)
[637] Case 118/85, Italy, point 15
[638] See article 1.1.1 of directive 93/38 (U2) and article 1.1.1 of directive 90/531 (U1)
[639] See decision 2008/963 (P3A8) – see for example under Portugal
[640] See for example preamble 9 in Proposal for a Directive of the European Parliament and of the Council on the coordination of procedures for the award of public supply contracts, public service contracts and public works Contracts, COM/2000/0275 final - COD 2000/0115, OJ 2001, p. 11
[641] See below in section 4.1.6
[642] Case C-360/96, Gemeente Arnhem, point 26
[643] Case C-340/04, Carbotermo, point 43-44. For a discussion of the case, see Henty (4) and Kaarresalo (1)
[644] Case N-960604-2, Håndværksrådet, point 2

For public bodies, forming part of contracting authorities, there is a triple requirement[645], as they must have legal personality, be dominated by public authorities, and on the one hand serve a general need in the interest of society, while on the other hand not have a commercial character. This apparently comes very close to forming a subset of the definition of public undertakings[646], which are entities dominated by contracting authorities.

However, there are subtle differences in the elements of dominance. Common to public bodies and undertakings is a public power to nominate more than half the members of the governing boards. For public bodies, an additional form of dominance is subjection to public management. It may be argued that this coincides with the notion of domination through appointing the majority of board members.

For public undertakings, additional forms of dominance include holding the majority of the subscribed capital or the majority of the voting shares. This may for public bodies be compared with dominance in the form of being for the most part financed by the state.

If these similarities are accepted as covering more or less the same area, and legal personality is accepted as an inherent element in a public undertaking, the difference between public bodies and public undertakings comes down to whether they serve general interests in a non-commercial manner or not. Public bodies thus form a subset of public undertakings, and the reference to public bodies in the utilities directive would appear superfluous, as the relevant cases could be dealt with already under the concept of public undertakings. However, this would in turn lead to inconsistency, as public bodies form part of contracting authorities, whereas public undertakings do not. This would be inconsistent with public bodies forming a subset of public undertakings.

Interesting cases could be imagined, including the question of whether a public body could be formed as a non-profit limited liability company, where the state held the majority of voting shares, but under the share holder agreement did not appoint the majority of board members. Strictly speaking, this would not meet the criteria of dominance in relation to public bodies, unless the above view of similarities was adopted.

The case law of the European Court of Justice would seem to point in this direction. In a recent judgment the Court underlined that the concept of contracting authority, including that of public body, must be interpreted in a functional manner, so as to support the elimination of borders to free movement[647].

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[645] See article 1.9.2 of directive 2004 (C3) and article 2.1.a.2 of directive 2004/17 (U3)
[646] See article 2.1.b of directive 2004/17 (U3)

4.1.4.2 Public authorities[648]

The case law of the European Court of Justice shows that the issue of legal personality forms an important element in defining public bodies as a part of contracting authorities. In one of the leading cases, the court established that the three criteria, legal personality, dominance and general interest in a non-commercial manner, form cumulative criteria[649].

Thus, when legal personality is missing, it becomes essential to ascertain whether the entity concerned may be regarded as sufficiently integrated into the public system to form part of the concept of public authority, as otherwise it will not be subject to the directives in the classic field[650]. A list of central government authorities, which would coincide with the concept of state entities[651], is included in the EU directives[652] and regulates the application of lower thresholds, in accordance with the GPA Agreement of the WTO[653]. This is a definitive list[654], as opposed to the indicative list of public bodies[655]. On the other hand, the European Court of Justice has ruled that inclusion on the list does not impact on the understanding of concept of public authorities in other EU directives[656].

However, this may also include private bodies that are acting on behalf of the public sector, even under contract. In a case concerning France[657], the European Court accepted that such entities could be considered contracting authorities, without entering into any consideration of whether they fulfilled the cumulative criteria for public bodies, which would seem to imply that they were considered as public authorities.

Somewhat different from this conclusion, the Danish complaint board found that a private entity, contracted to administrate a public function in relation to the ear marking of pigs, could not in itself be considered, through the contract, to have become a public authority subject to the EU directives[658]. The complaint board found instead that the contract with the private entity should have been evaluated, in regard to the directive thresholds, with consideration of both the service fee for the administration of the public function, and the tags

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[647] Case C-337/06, Bayrischer Rundfunk, point 37. For a discussion of the case, see Brown (12)
[648] For a discussion on the application of procurement rules independent authorities, see Garcia-Andrade (1)
[649] Case C-44/96, Mannesmann, point 21, as confirmed in case C-237/99, France, point 40
[650] Case 31/87, Beentjes, point 12, compared with the later cases C-353/96, Ireland, point 32, and C-258/97, Hospital Ingenieure, point 27
[651] Note that it may still be argued that non-central state authorities exist
[652] See annex IV of directive 2004/18 (C3) as amended by article 1 and annex XII of directive 963/2008 (P3A8)
[653] See above in section 3.1.2.2.2
[654] See article 7.a-b of directive 2004/18 (C3)
[655] See article 1.9.3 and annex III of directive 2004/18, the annex as amended by article 1 and annex XI of directive 963/2008 (P3A8)
[656] Case 118/85, Italy, point 15
[657] Case C-264/03, France, point 41

purchased by the private entity for the earmarking. As the tags constituted the higher value, the board found that the administration contract in principle should have been tendered according to the supplies directive.

However, as the applicant had not submitted any claim on this issue, the complaint board only made the above remarks as an obiter dictum. Instead it concentrated its attention on the issue, whether the provisions on special rights might oblige the private entity to carry out procurement[659]. This question would seem in itself to answer the obiter dictum of the complaint board.

The possible concession granted to the private entity would have to be assessed in relation to the procurement directives, where service concessions are exempted[660], and would have to be assessed in its own right[661], whereas the procurement of tags should be assessed separately in relation to the special rights provision.

In answer to a preliminary reference on this issue, the European Court of Justice found the wording of the provision on special rights only obliged the contracting authority to oblige the private entity to observe non-discrimination in its procurement of tags[662]. However, corresponding to the Telaustria principle[663], the private entity must also observe transparency, so as to allow the contracting authority to verify the non-discrimination.

In practice, this must mean that the private entity was obliged to undertake some tendering measures. In its final ruling, the complaint board limited itself to finding that no instructions had been given concerning observation of the non-discrimination provision, and for the reason the contracting authority had violated the provision on special rights.

This leaves an interesting issue of jurisdiction. It was clear from the ruling of the European Court of Justice that the private entity could not be considered a public authority, nor could it presumably be considered a public body, and thus it was subject only to the obligations imposed under the special rights provision. Since the competence of the Danish complaint board only covers contracting entities[664], an applicant would therefore not be able

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[658] Case N-980122, Unitron, point 6
[659] See now article 3 of directive 2004/18 (C3), at the time article 2.2 of directive 93/36 (G2)
[660] See now article 17 of directive 2004/18 (C3)
[661] For a discussion of service concessions, see Neergaard (1) and Neergaard (2). For a discussion of the related issue of public-private partnerships, based on case C-231/03, Coname, see Kalbe (2). See also the discussion in Tvarno (1), Tvarno (2), as well as the discussion on the European Commission interpretive statement in Williams (3)
[662] Case C-275/98, Unitron, point 29-31. For a comment on the case, see Hordijk (1)
[663] Case C-324/98, Telaustria
[664] See article 1.1 in law 415/00 (KNL2)

to sue the private entity at the complaint board, and would instead have recourse only to the ordinary courts.

Alternatively, the obligation on the contracting authority would have to be interpreted in a wider sense, so as to cover not only the imposing of obligations to observe the non-discrimination principle, but also a duty to supervise compliance with this obligation. In addition, the case raises some doubt in relation to the above mentioned subsequent case concerning France, where the European Court of Justice apparently accepted that the entities concerned were to be considered contracting entities.

A similar issue would pertain in relation to the provision on subsidized contracts, where the supporting public authority is to ensure that the supported private entity observes not only the principle of non-discrimination, but the directive as such, in cases where contracting is left to the supported private entity[665]. There is not yet any case law on this issue. It should be noted that the Danish national procurement rules, in fully submitting work with public support to the procurement rules[666], from a formal point of view has a wider reach than the EU rules on subsidized contracts.

4.1.4.3 Public bodies[667]

Public bodies, or in the full text version, bodies governed by public law, form the second component, together with public authorities, of the concept of contracting authority, as set out above. Within the cumulative requirements of legal personality, dominance and general interest without commercial character, the interest in case law has been on the last element of the requirements.

It would seem clear that being a non-profit organisation would be a necessary, but insufficient, criterion for establishing whether a given entity is a public body. However, the important issue is not whether the entity actually generates profits, but whether it is the intention to do so[668]. The more complicated issue is what activities may be considered as being in the general interest and not of a commercial character.

The issue whether an entity is organised as a limited liability company would not seem to be of importance in itself[669], as the fact of organisation according to what might be deemed

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[665] See article 8 of directive 2004/18 (C3)
[666] See article 1.2.2 of consolidated law 1410/07 (NPL3C1)
[667] For a discussion of the concept of public bodies in the light of the case law of the European Court of Justice, see Hummelshøj (1)
[668] Case C-18/01, Korhonen, point 54
[669] C-18/01, Korhonen, point 34

a typical commercial company law structure does not in itself to preclude that that the entity itself may be operated on a non-commercial basis[670].

Apparently, the stage of possible competition from private suppliers is also not of interest, but it is the reasons, for which the public has decided to enter the market, that are important. Thus, the provision of heating for an urban area by means of an environmentally-friendly process is seen as constituting an aim which is undeniably in the general interest, irrespective of whether such heating could also be provided by private undertakings[671]. However, the level of competition may serve as an indicator of whether the activity is commercial[672]. However, it does not in itself constitute a barrier to considering the activities of a public body as non-commercial[673].

Thus, even the activity of acquiring design and construction services in connection with a building project office blocks and a car park, has been deemed to be non-commercial when carried out as part of a plan to give a stimulus to trade and the economic and social development of the local authority concerned[674]. The important issue was seen to be whether the entity operated in normal market conditions, aimed to make a profit, and bore the losses associated with the exercise of its activity.

The logic behind this delimitation is that if an entity is subject to such conditions, the profit motive will normally prevent it from making contract decisions on conditions that are not economically justified. Thus, from a procurement point of view, it is safe to exclude such an entity from the concept of a public body. This is also the underlying reasoning behind both the recent exclusion of telecommunications entities from both the utilities and classic directives[675], as well as for the inclusion of the purchase of telecommunications services[676].

Following this market condition approach, the European Court of Justice has ruled on the issue of who should have the competence to decide on the state of competition in a given market. It might be argued that from a transparency point of view, it would be relevant for the national regulator to undertake this assessment, so that areas exempted because of sufficient competition might be indicated in the national implementation provisions. However, the

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[670] Case C-84/03, Spain, point 29
[671] Case C-393/06, Aigner, point 41. For a discussion of the case, see Kotsonis (2)
[672] Case C-360/96, Gemeente Arnhem, point 49
[673] Case C-373/00, Truley, point 61
[674] C-18/01, Korhonen, point 45. For a discussion on social policy in EU public procurement, see Bovis (6), as well as the discussion based on the later case C-346/06, Rüffert, in Otting (1)
[675] See preamble 5 of directive 2004/17 (U3) and preamble 21 of directive 2004/18 (C3)
[676] See preamble 8 of directive 2004/17 (U3)

European Court of Justice chose instead to focus on the rights held by operators under the directives[677].

The reasoning of the court appears based on the assumption that only, if the assessment of the state of competition is assessed by the individual contracting entity, may it be challenged by the operators when applying the right to judicial procedure secured by the EU remedies directives. However, this would seem a narrow view, as it would seem to follow from fundamental EU rights that an operator must also have the power to challenge a national legislative act, which here would limit the field of procurement procedures that would be open to participation by the operator.

It may naturally be argued that such a legislative review, involving in some member states the intervention of a constitutional court, is less open to an operator than a simple review at a complaint board of the actions taken by an individual contracting entity. However, this point of view would seem to negate the impact of the Simmenthal principle[678], under which any national authority, including judicial bodies, is required to set aside as inapplicable a provision of national law that conflicts with an EU provision having direct effect.

The European Court of Justice has in general confirmed the direct effect of the EU procurement directives[679]. Accordingly, the right to set aside a legislative provision, incorrectly defining the field of activities subject to competition, could not be reserved for constitutional courts. However, while there is not jurisprudence directly on this issue by the Danish complaint board, the board has on occasion chosen a very narrow understanding of its own competence[680]. Thus, while the conclusion of the European Court of Justice may seem to disregard the formal powers of national judicial institutions, it may reflect a realistic appreciation of the actual behaviour of such institutions.

In Denmark, the assumption that a foundation promoting real estate development could be regarded as a carrying out a service in the general interest has been accepted without much reasoning by the Danish complaint board[681]. Focus was instead placed on the issue of dominance, where the public authority concerned was found not to have a majority of board members, but was found to carry the majority of financing. This called for a close evaluation of the operating costs, where the board underlined an obligation to consider both the accounts of the preceding year, as well as the budget for the current year. The direct public financing of the foundation was less than 50%, but the foundation also rented premises to the public

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[677] Case C-392/03, British Telecommunications, point 26
[678] Case 106/77, Simmenthal, point 21
[679] Case C-76/97, Tögel, point 47
[680] This will be dealt with in the following part of the project

authority. To extent that the rent was above operating costs, the profit was considered part of the public financing, thus placing it above 50%. In this connection, the element of profits was not separately considered in relation to the non-commercial requirement.

In other cases, the Danish complaint board has been rather brief in evaluating whether an entity was in fact a public body[682], assuming that this was not the case when no evidence was presented[683]. However, the Danish complaint board has taken position on a ferry company with public participation from a municipality, which required authorisation from the ministry of the interior, emphasis was placed on the one hand on the fact that a condition for approval was that the activity was non-commercial, which would point to it being a public body, but on the other hand that a further condition was that the municipality should not have dominant influence, which in lack of other elements of dominance thus precluded it from being such a public body[684].

More generally, it was from an early point made clear that a number of entities responsible for social housing in Denmark would comply with the criteria for constituting public bodies under the EU directives, and accordingly some were specified in the indicative list of public bodies in the directives[685], and special legislation adopted in this regard[686]. A special problem has in this connection been whether social housing organisations, with individual departments, should be regarded individual or collective entities in relation to the calculation of threshold values[687].

The fact that a public body carries out both activities in the general interest and other activities does not preclude it from being considered as a public body[688]. Different from the sub-criteria of exclusivity, which requires the activities to be directed mostly to the contracting entities, there is not even an obligation for its activities to be mostly within the field of general interest.

On other hand, there is also no application of the principle from the utilities directive, whereby that directive only covers procurement relative to the conduct of utilities activities[689]. In the second generation utilities directive, this was less clear, but the European Court of

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[681] Case N-061003, MT Højgaard, point 3
[682] Case N-040830, Benny Hansen, point P3
[683] Case N-030811, Kruse & Mørk, point 1
[684] Case N-950551, Drejer, point 3
[685] See annex III of directive 2004/18 (C3)
[686] See for example circular order 167/90 (DCW105)
[687] Case N-041216, Brunata, point 3, upheld in the appeal court case VK-060613 & V-070306
[688] Case C-44/96, Mannesmann, point 26
[689] See article 1.2.b of directive 2004/17 (U3)

Justice, relying on comparison with a provision in the section on design contests[690], arrived at the same conclusion[691]. For a public body, the obligation to use procurement procedures applies to its activities both within and outside the field of general interest[692]. In this connection it may be noted, that for public authorities, in general, the obligation to apply the procurement procedures applies irrespective of whether the activity concerned falls within or outside the scope of its activities as a public authority[693].

4.1.5 Operators

4.1.5.1 Introduction

The notion of operator was defined in third generation directives, together with suppliers and service providers[694], while the latter term was also defined in the second generation directives[695]. Collectively, they are defined as economic operators[696], and the Community procurement provisions define a subdivision into candidates, covering those seeking preselection, and tenderers, covering those having submitted a bid[697]. In this report, the shorter term operator is used for all economic operators.

The EU procurement directives complement the provisions of free movement of services in the EC-treaty[698], by prohibiting the contracting entity from requiring that operators take on a special legal form, as long as the form they have is legal for provision of the services concerned[699]. Although the wording of the provision refers only to any distinction between natural and legal persons, the European Court of Justice has found that it must also apply to distinctions between different forms of legal persons[700].

The second part of these provisions, as drafted in the third generation directives[701], allows for requirements to be set for the professional qualifications of staff performing services, and in doing so expressly includes works in general and installation services for supplies. This very specific drafting raises the general question of whether requirements as to legal form and professional may more generally in the field of works or supplies. There is no jurisprudence on this issue, but the expansive interpretation on different forms of legal

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690 See article 2.2.a compared with article 4.1 of directive 93/38 (U2)
691 Case C-462/03 & C463/03, Strabag, point 37
692 Case C-393/06, Ing. Aigner, point 59
693 Case C-126/03, Germany, point 18
694 See article 1.8.1 of directive 2004/18 (C3) and article 1.7.1 of directive 2004/17 (U3)
695 See article 1.c.s1 of directive 92/50 (S2) and article 1.6.p2 of directive 93/38 (U2)
696 See article 1.8.2 of directive 2004/18 /C3) and article 1.7.2 of directive 2004/17 (U3)
697 See article 116.6-7 of regulation 2342/2002 (M4)
698 See article 49 of the EC-Treaty
699 See article 4.1.1 of directive 2004/18 (C3)
700 Case C-357/06, Frigerio Luigi, point 23. For a discussion of the case, see Brown (6)

persons would seem to point in the direction that the provisions on legal forms and qualifications should be seen as applying to the entire field of public procurement.

This would seem to have some support in the fact that the equivalent provision on consortia[702], which prohibits requirements as to legal form during the procurement procedure, but allows such requirements in relation to the performance of the contract, appears to apply to the entire field of procurement. It would seem that the preceding provision on legal form, for the contract performance, and qualifications would also apply to such consortia, and that it should do so in general.

The application of both provisions, in relation to the legal form and temporary nature of consortia during the procurement procedure, has been confirmed by the European Court of Justice, but only in a case specifically concerning services[703]. However, in an earlier case concerning works[704], the court noted that while the second generation works directive also held a provision allowing temporary consortia[705], it did not regulate the composition of the consortium, which accordingly was to be regulated by national law. However, this concerned only the issue of on what conditions new members could be added to a consortium during the procurement procedure[706].

The Danish complaint board has dealt with an interesting question of whether the provisions on legal form preclude a contracting authority from specifying that it would preselect only consortia, whose members had to assume joint and direct liability, to the exclusion of operators submitting bids together with subcontractors. The complaint board did not find this to violate the EU procurement directive provisions on consortia[707]. However, it might be argued that this would constitute a discrimination of large operators, who would be forced into unnecessary consortia, when they might fulfil the contract on their own. In addition, the directive only in a limited sense allows for the prohibition of subcontracting, as dealt with below.

In a somewhat different direction, the complaint board appears to have extended the provision on temporary form for consortia also to apply for the legal form of operators. Thus, it found that the fact, that a company was under registration, could not be a basis for its

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[701] See article 4.1.2 of directive 2004/18 (C3)
[702] See article 4.2 of directive 2004/18 (C3)
[703] Case C-357/06, Frigerio Luigi, point 25 and 29
[704] Case C-57/01, Makedoniko, point 60
[705] See article 21 of directive 93/37 (W2)
[706] For a discussion on the legal standing of consortia, based on case C-129/04, Espace Trianon, see Henty (3)
[707] Case N-080115, C.F. Møller, point 1-2

participation in a procurement procedure, and that accordingly the requirements for technical and economic suitability would have to be applied in an adapted manner in relation to such companies under registration.

On the background of this expansive interpretation, it is somewhat surprising that the complaint board, in relation confidential treatment of information, ruled that its own competence was restricted[708]. The EU procurement directives grant the operator the right to indicate information that must be given confidential treatment, which must be applied in accordance with the national law of the contracting entity, but will not be prejudicial to the information obligations set in the directives. The complaint board found that the reference to national legislation on confidentiality took the issue of violations outside its field of competence.

It would have seemed more convincing for board to have undertaken a preliminary assessment of the national rules, so as to find whether their application in the specific circumstances complied with the rights for the operator held in the EU procurement directive. This would also seem to be the implication of the later ruling of the European Court of Justice on the issue[709].

*4.1.5.2 **Subcontractors***

The preamble to the third generation EU procurement directive in the classic field indicates that in order to encourage the involvement of small and medium-sized undertakings in the public contracts procurement market, it is advisable to include provisions on subcontracting[710]. However, in spite of this declared intention, the directives do not as such regulate the right to subcontract. There is special regulation on the imposing of obligations on subcontractors in relation to concessions[711], but no jurisprudence on this issue.

The main provision on subcontracting in the directives are limited to indicate that the contracting authority may, in the tender documents, require the operator to indicate the degree to which contract performance is intended to be subcontracted, and in the third generation directives also an indication of the intended subcontractors[712]. This indication may be general, or also a specific requirement in relation to preselection, where it is however limited to

[708] Case N-951025, Siemens, point 5
[709] Case C-450/06, Varec. For a discussion of the case, see Brown (7)
[710] See point 32 of the preamble of directive 2004/18 (C3)
[711] See article 60 of directive 2004/18 (C3)
[712] See article 25.1 of directive 2004/18 (C3)

information about the degree of subcontracting, and only included in the provisions on technical[713], but not economic qualifications.

The issue of a right to subcontract is however indirectly regulated by the right for an operator, in fulfilling economic and technical requirements for preselection, to rely on the resources of other entities[714]. The Danish complaint board has underlined that a contracting entity is under no obligation to inform operators that do not fulfil these requirements, about the option of relying on third parties[715].

The term preselection does in principle apply only to procedures, such as the restricted procedure, with a separate qualification stage[716]. However, in this report it is used as a more generic term for the application of qualification criteria, during any procurement procedure, and likewise qualification criteria are used as a collective term for criteria related to the issues of economic and technical suitability.

These provisions on preselection constitute a codification of the case law of the European Court of Justice on the matter. In an early case, the European Court of Justice established that a company relying on the qualifications of its own subsidiaries could not be refused preselection on the grounds that the subsidiaries constituted separate legal persons[717]. From this ruling, it was a short step to the next case, establishing that the important issue is not whether the companies are in a subsidiary relationship, as in the company group structure, but that the operator seeking preselection does have access to dispose of the resources of the other entity, whose qualifications are relied upon in relation to the preselection[718]. However, this had a specific legal basis in the second generation service directive[719], which also established that that the principle applied irrespective of the legal nature of any links between the entities, as confirmed in a later case[720].

The principle was not codified in the subsequent second generation directives on works, supplies and utilities, but the European Court of Justice established that principle did apply as a general principle[721]. This included a ruling that while a contracting entity might require the operator to undertake guarantees, it could not preclude that the instruments of

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[713] See article 48.2.i of directive 2004/18 (C3)
[714] See article 47.2-3 and 48.3-4 in directive 2004/18 (C3)
[715] Case N-080208, Haubjerg Interiør, point 1
[716] For an early analysis of the application of preselection criteria, including selection amongst the qualified candidates, see Treumer (15)
[717] Case C-5/97, Ballast Nedam, point 14
[718] Case C-176/98, Holst Italia, point 31
[719] See article 32.2.c of directive 92/50 (S2)
[720] Case C-399/98, Ordine degli Architetti, point 92
[721] Case C-220/05, Auroux, point 38, and case C-399/05, Greece, point 22. for a discussion of the former case, see Henty (1)

guarantee were issued by third parties, on whom the operator had relied[722]. The application of the provision on third parties is further dealt with separately[723].

For contracting entities that wish to submit bids to other contracting entities[724], subcontracting presents a special problem, as the bidding contracting entity may itself have to select its subcontractors by procurement. However, the European Court of Justice has found[725] that this would justify use of shortened deadlines in the procedures of that underlying procurement[726].

This line of jurisprudence could be seen as a general prohibition against restrictions on subcontracting, but the European Court of Justice established that a right to subcontract could only cover situations of which the contracting entity was aware at the stage of preselection, where the qualifications of the subcontractor could be checked[727]. In a rather generous interpretation, the court found that a prohibition on subcontracting in the specific case should not be seen not as a violation of the right to rely on the qualifications of other entities, but should instead be seen as a legitimate prohibition on introducing subcontracting at the stage of bid submission, subsequent to a stage of preselection, or at the stage of contract performance.

It might be argued that a prohibition on subcontracting in the tender conditions will appear to many operators as also precluding their right to rely on the qualifications of other entities, which could be seen as a violation of the principle of legal certainty. Especially the European Commission very often has such prohibitions in its procurements related to external actions.

This creates a difficult set of scenarios. A prohibition on subcontracting in the tender conditions does not apply at the stage of preselection, but may apply to contract performance, unless the operator has relied on the qualifications of the subcontractor for the purpose of preselection. However, this leaves open the question of what applies, if the one or both of the contracting entity and the operator are silent on the subject of subcontracting.

If the contracting entity requires information about subcontracting, this must imply that subcontracting is permitted, but this again raises the question of whether the subcontractor must be subjected to preselection, even where the operator has sufficient own qualifications not to need to rely on those of the subcontractor. The EU procurement directives are silent on this issue, but a recent amendment to the Community procurement

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[722] Case C-399/05, Greece, point 42
[723] This will be dealt with in the following part of the project
[724] See below in section 4.1.5.5
[725] Case 126/03, Germany, point 22
[726] See article 38 of directive 2004/18 (C3)
[727] Case C-314/01, Siemens, point 44

provisions allows the contracting entity to require such preselection also of the indicated subcontractors[728], including also a declaration on honour that grounds for exclusion do not apply to the subcontractor[729]. Although not specified in the EU procurement directives, it must be assumed that contracting entities also here could require such preselection steps undertaken in relation to the indicated subcontractors, which is supported by a ruling from the Danish complaint board finding that a bid should have been disqualified as noncompliant, when the operator had not documented the qualifications of subcontractors, despite a requirement to do so in the tender conditions[730].

If the contracting entity neither requires information about subcontracting, nor prohibits it in relation to contract implementation, this must imply that subcontracting is permitted. In relation to preselection of subcontractors, as dealt with above, the contracting entity must be regarded as having abstained from such measures implicitly, by not requesting information about subcontracting. Operators will be obliged to inform about subcontractors only to the extent that the wish to rely on their qualifications in relation to the main preselection procedure. Accordingly, in one case where a competitor claimed that an operator had been admitted without preselection, the Danish complaint board briefly noted that the operator concerned was in fact a subcontractor to a preselected operator, and on this basis refused to deal with the claim[731].

The board applied the same principle in reverse in a case where the preselected operator had undergone a corporate identity change, as the preselected entity was a division within one company, which had been transferred to another company. This transfer was accepted by the contracting entity, and upheld by the board. However, at the time of preselection, the operator had also presented its subcontractor, and following the corporate identity change, the contracting entity decided to award one lot of the contract to this subcontractor. The board found this to be a violation of the EU procurement procedures, as the subcontractor had neither been preselected, as such, nor submitted a bid[732].

Finally, if the contracting entity explicitly prohibits subcontracting, this places the onus on the operator, who will have to announce intended subcontractors at the stage of preselection, in order to avoid disqualification at the stage of contract award or restrictions at the time of contract implementation. However, it is important to underline that in any case,

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[728] See article 130.5 of regulation 2342/2002 (M4) as amended by article 1.55 of regulation 478/2007 (M4A3)
[729] See article 93.2.b regulation 1605/2002 (Q4) as amended by article 1.53 of regulation 1995/2006 (Q4A1), as well as 134.7 of regulation 2342/2002 (M4) as amended by article 1.58 of regulation 478/2007 (M4A3)
[730] Case N-070810, MT Højgaard, point 2
[731] Case N-000627, Deponering af Problem-affald, point 3
[732] Case N-020510, Ementor Denmark, point 9

the issue of information about subcontracting is related to preselection, and the fact of subcontracting can therefore never constitute a an award criteria, but only a ground for disqualification in case required information has not been given.

The focus in the above is on whether the contracting entity has a right to restrict subcontracting. The Danish complaint board has also dealt with the opposite question of whether the fact that an operator does not inform about subcontractors, where the contracting entity has required such information, the bid from that operator must be disqualified as noncompliant.

The complaint board found that this was not the case, and that the contracting entity was entitled to accept the bid, even though information about subcontracting was given only after the tendering deadline[733]. This conclusion seems at odds with the above mentioned case, where lacking information about subcontractor qualifications led to disqualification.

However, such information about qualifications may be regarded as more important than mere information about the use of subcontracting, and the decision thus relates to the distinction between fundamental and less important elements of noncompliance, which is applied by the Danish complaint board, as dealt with below[734]. The decision may also related to a possible distinction between a general obligation to indicate subcontracting and the more specific obligation do so in connection with preselection, as mentioned above[735].

In relation to possible complaints from other operators, it is important that the reporting requirements, for the contract award notice, include a duty to inform about subcontracting where known[736]. There is no jurisprudence on this issue.

4.1.5.3 Changes in corporate identity

As mentioned above in connection with subcontracting, the Danish complaint board has accepted changes in corporate identity, where the operator previously preselected still can be identified. Likewise, the board has accepted variations in name designation, as long as it is possible to establish that the different names refer to the same operator[737].

A different conclusion was reached in two parallel cases, where there was a breach in the alleged chain of corporate identity change. The original operator, who had been preselected, had gone bankrupt, and the contracting entity used a special provision in Danish

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[733] Case N-070903, SP Medical, point 22
[734] See below section 4.2.5
[735] See above at footnote 713
[736] See article 43.1.e.p1 of directive 2004/18 (C3), and also annex VII.A.p5 as amended by regulation 1564/2005 (P3A2)
[737] Case N-070903, SP Medical, point 1

procurement law, under wish a bid may be discarded if it is judged unlikely, at the time of bid evaluation, that the operator will be able to perform the contract[738]. The relationship between this provision and the separation of preselection and award criteria in the EU procurement directives[739] is dealt with separately[740].

However, the activities of the bankrupt operator had been continued by another operator, using the letterhead of the original operator, but with an indication that it now formed a division of the second operator and with the use of the registration number of that second operator. The bid held no reference to the alleged corporate identity change, and the Danish complaint board found that the contracting entity had been entitled to refuse the bid based on the original identity of the now bankrupt operator[741].

Contrary to this decision, the Danish complaint board has found that where a service is not covered by the EU procurement directives, because it is on the B list for services[742], the general principles, applicable under the Telaustria principle[743], do not prohibit the substitution of one preselected operator by another operator, as long as the principle of equal treatment is observed[744]. It is not clear what the last qualification entails, but it should most likely be read as a need for objective justification.

4.1.5.4 Operators and contracting entities

The main interest in defining operators has been to distinguish them from contracting entities, so as to decide whether a contract comprised in-house deliveries, exempted from procurement procedures, or whether they comprise external deliveries, which would be subject to the procurement rules. The related issue of conditions of competition between in-house and external deliveries, including the relations with affiliated undertakings, is dealt with separately[745].

The distinction between in-house and external involves consideration of the linkage requirements between two entities in order to consider them as one joint entity, so as to allow for the relations to be considered in-house. The directives do not have specific provisions on this issue, but it might have expected that the definition of public bodies would serve as a relevant point of departure, focussing on dominance as the deciding element. This would also

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[738] See article 8.3 of law 450/2001 (NPL2)
[739] See article 44.1 of directive 2004/18 (C3)
[740] This will be dealt with in the following part of the project
[741] Case N-021101, JN-Entreprise, point 1, and case N-021104, JN-Entreprise, point 1
[742] See annex II.B of directive 2004/18 (C3)
[743] Case C-324/98, Telaustria
[744] Case N-050902, Tipo Danmark, point 40
[745] This will be dealt with in the following part of the project

be compatible with the approach in competition law, where contracts between entities within a company structure are considered exempt from the cartel provisions[746].

The first approach of the European Court of Justice seemed to be compatible with the dominance criterion, as the requirement was defined such that the contracting entity should have the same control over the operator concerned, as it would have over its own departments, with the added requirement that the essential activities of the operator must be for the benefit of the contractor entity, which might be referred to as an exclusivity sub-criterion[747].

To this the court later added a contamination sub-criterion, so that any private sector involvement in the private entity, including minority shareholding, would preclude the relations from being regarded as in-house[748]. Furthermore, this contamination criterion also applies in relation to the question of procurement obligations outside the EU directives[749]. However, it is important to note that the contamination sub-criteria does not apply to minority shareholdings by other contracting entities, and that the issue of dominance is even viewed on a collective basis in this case, so that it is deemed to be satisfied also for the minority shareholders[750].

The European Court of Justice has applied the principle of piercing the corporate veil, where a contracting entity had staggered the private investment in the operator, so as to take place only after the assignment of a contract to that operator. The court found this a circumvention of the procurement rules, and accordingly denied the contract any character of in-house delivery. Accordingly, it could have been entered into only on the basis of a procurement procedure[751]. In the same line, for the contracting authority to hold all the shares in an operator does suffice to create a presumption for dominance, but the European Court of Justice furthermore requires an actual control over strategic objectives and significant decisions of the operator, which in turn may require a consideration of the competences and voting rights within the board[752].

The exclusivity sub-criterion, under which the essential part of the activities performed by the operator must be directed towards the contracting entity, is based on the argumentation

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[746] See judgment of 25 November 1971 in case 22/71, Béguelin, Rec. 1971, p. 949, point 8
[747] Case 107/98, Teckal, point 51, case C-310/01-S, point O2, and case C-371/05, Italy, point 22. For a discussion of the latter case, see Brown (3). See also the discussion, based on the later case C-324/07, in Kotsonis (1)
[748] Case 26/03, Stadt Halle, point 52. For discussions on the implications of the Stadt Halle principle, see Avarkioti (1) and Brown (18)
[749] Case C-458/03, Parking Brixen, point 61. For a discussion of the case, see Brown (16)
[750] Case C-295/05, Asemfo, point 59. For a discussion of the case, see Dischendorfer (2)
[751] Case C-29/04, Austria, point 42. For a discussion of the case, see Brown (17) and Weltzien (1)

that if the operator is free to service a majority of external clients, the dominance by the contracting entity effectively diminishes[753]. The logics of this argumentation are not apparent, as the contracting authority through its dominance would have the basis for its control over these external activities. Furthermore, since the exclusivity requirement could not apply to deliveries from an integrated internal department of contracting authority, even where this department for the major part serviced external clients. However, it may be argued that the sub-criterion is necessary to ensure against circumvention of the dominance criterion.

It may therefore be seen as compensation for the consequences of the exclusivity sub-criterion that the European Court of Justice subsequently developed an alternative to the dominance criterion, which might be referred to as the mandatory criterion. Under this criterion, a contract is exempted from procurement obligation, even without dominance, if the operator is obliged to meet orders from the contracting entity, without any influence on volume or price[754]. The notion, that the mandatory criterion constitutes an alternative to the dominance criterion, is based on the structure of the case law concerned, as the two issues are considered in separate sections with each their conclusion as to the application of procurement procedures[755]. On this background it is somewhat confusing, that in the first case referred to, the court does again mention fulfilment of the mandatory requirement when considering the dominance criterion[756]. However, this may be seen as constituting only a supporting argument.

As an alternative approach to the issue, an analogy to the regulation of special rights could be considered[757], so that even where special rights are not assigned to the operator, the contract could be drafted so as to oblige the operator to apply the EU procurement rules. It could then be argued that this transfer of procurement obligations to the operator could justify the assignment of a contract to that operator by the contracting entity without recourse to procurement procedures. However, the European Court of Justice has found that the EU directives do not hold any legal basis for this transfer principle to justify not following procurement procedures in the contract assignment[758]. In this connection it seems important

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[752] Case C-340/04, Carbotermo, point 36
[753] Case C-340/04, Carbotermo, point 61
[754] Case C-295/05, Asemfo, point 54
[755] Case C-220/96, Asociacion Profesional de Empresas, respectively point 49 to 55 and 56 to 63
[756] Case C-295/05, Asemfo, point 60
[757] See article 3 of directive 2004/18 (C3)
[758] Case C-220/05, Auroux, point 66

even the provisions on exclusive rights do in their own right exempt the primary contract from procurement obligations.

4.1.5.5 Contracts amongst contracting entities

A separate, but related issue in relation to the definition of operators is the extent to which contracting entities must be regarded as operators when servicing other contracting entities, and to which extent the authorities concerned may instead be regarded as integrated parts of the same contracting entity. To this is linked a further issue, concerning the extent to which integrated and dominated entities may participate in procurement procedures that also include external operators, which is dealt with below[759].

The utilities directives in the second and third generations[760] specify that a contracting entity may also be an operator, whereas the second service directive specifies that a public body may be so[761]. This latter should presumably not be seen as a reference to bodies governed by public law, which in this report is referred to as public bodies, but rather to the wider concept of contracting entities, covering both public authorities and the narrower understanding of public bodies.

Thus, the presumption in the directives is that contracts between contracting entities are covered by procurement obligations[762], subject to the exception for service contracts, where the performing authority holds an exclusive right to undertake the service[763]. It is a condition that the exclusive right is established in national rules, at the legislative or administrative level[764]. The European Court of Justice has implicitly refused to apply this provision by means of analogy to other fields than services, as it has pointed out in relation to the supplies directive that it does not hold any provision comparable to the exception in the service directive[765].

The Danish complaint board has reviewed the application in a single case, which amongst other issues concerned receipt of waste for incineration. The defendants claimed primarily, that the contracts concerned were concessions and not service contracts. As a second line of defence, they claimed that the operators concerned where contracting entities with exclusive rights fixed by municipal regulation. The complaint board agreed with the

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[759] This will be dealt with in the following part of the project
[760] See article 1.7.1 of directive 2004/17 (U3) and article 1.6.p2 of directive 93/38 (U2)
[761] See article 1.c.s1 of directive 92/50 (S2)
[762] Case C-26/03, Stadt Halle, point 47, and C-220/05, Auroux, point 66
[763] See article 18 of directive 2004/18 (C3)
[764] Case C-323/07, Termoraggi, point 25. fro a discussion of the case, see Brown (5)
[765] Case C-107/98, Teckal, point 43

defendants that the service directive did not apply, but did not specify on which grounds[766]. In relation to such exclusive rights, the European Court of Justice has pointed out that is pre-condition for engaging the exemption in the procurement directives, that the exclusive right itself is compatible with EU law[767].

A further provision with impact on contracts between contracting entities is the exemption for central purchasing bodies, which was introduced in the text of the directives only in the third generation[768]. At the same time framework agreements were explicitly accepted in general[769], whereas they had previously only been regulated in the utilities field[770].

This superseded a discussion between Denmark states and the European Commission concerning whether the use of central purchasing and framework agreements, such as had been the case in some member states, was in accordance with the EU procurement directives. However, the condition is now in the new directives that the central purchasing unit must have complied with procurement obligations in the first place, and in relation to framework contracts, this includes the obligation to allocate the individual contracts under the framework agreement according to the award criteria defined when setting up the framework agreement.

Thus, while the provision on central purchasing bodies does liberate further sales to contracting entities from application of the procurement procedures, this effectively applies only to the extent that the central purchasing unit undertakes the risk of stockpiling the contracted products, in which case the contracting entity may choose freely amongst the stockpiled products. In case the central purchasing unit limits itself to engaging in framework agreements, the contracting unit cannot choose freely amongst the framework products, but instead an application of the award criteria will have to be performed.

This may be contrasted with the original perception in Denmark, under which contracting entities would have free choice amongst the products that were included in a framework agreement entered into by a central purchasing body. The Danish complaint board confirmed by analogy that framework agreements were legal within the EU procurement rules, as they were specifically mentioned in the utilities directive[771]. As for the legality of

[766] Case N-981021, Farum Industrirenovantion, point 3
[767] Case C-220/06, Asociacio Profesional de Empresas. For a discussion of the case, see McGowan (2)
[768] See article 11 of directive 2004/18 (C3) and article 29 of directive 2007/17 (U3)
[769] See article 32 of directive 2004/18 (C3) and article 14.1 of directive 2004/17 (U3)
[770] See article 5.1 of directive 93/38 (U2) and article 5.1 of directive 90/531 (U1)
[771] Case N-060427, Unicomputer, point 1, upheld in the appeal court case O-071011-1, SKI

central purchasing bodies, the complaint board referred to an approval given by the European Commission, without questioning the power of the Commission to grant such approval[772].

The European Court of Justice has not yet had occasion to interpret the provisions on central purchasing bodies, apart from a brief remark that in relation to a case before the court, the provisions had not yet come into effect[773].

In relation to contracts between contracting entities, within the scope of the EU procurement directives, it is important to underline that the during the procurement procedure, the relations must be kept at the level of normal contacts between contracting entities and operators. Thus, the Danish complaint board has found that the contracting entity may not use its hierarchical position in relation to the other entity, so as require information that it could not have required from a private operator[774]. This would constitute a violation of the principle of equal treatment[775].

4.1.6 Public contracts

The EU procurement directives contain an autonomous definition of the concept public contract, which in the latest version must be a contract for pecuniary interest, concluded in writing, between on the one side one or more contracting entities, and on the other side one or more operators, concerning an issue within the substantive scope of the directives, that cover works, supplies and services[776]. With the third generation directives, it is accepted that the concept of writing also includes electronic formats[777], but this has not been the subject of jurisprudence.

The fact that a contract, by necessity, must be entered into between two separate parties gives further support to the notion that in-house deliveries, within a contracting authority, is not subject to the EU public procurement rules[778].

Apart from the issue of whether the contract could have more than one party on either side, the definition has not changed in substance throughout the generations and sector covered. A similar definition is found in the legislation on Community procurement, where the most recent main regulation referred to only one party[779], but a later amendment refers to

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[772] Case N-030929, Unicomputer, point 2, upheld in the appeal court case O-071011-2
[773] Case C-220/05, Auroux, point 61
[774] Case N-031010, Statsansattes Kartel, point 10
[775] See below in section 4.2
[776] See article 1.2.a of directive 2004/18 (C3)
[777] See article 1.12-13 of directive 2004/18 (C3) and article 1.11-12 of directive 2007/17 (U3)
[778] Case C-340/04, Carbotermo, point 32
[779] See article 88.s1.2 of regulation 1605/2002 (Q4)

multiple parties[780]. However, the issue of multiple parties have never been the subject of case law.

The requirement of being in writing must be understood in the manner that public authorities are obliged to place their contracts, which would otherwise be subject to the directives, in writing. It cannot be understood in the opposite manner, that by avoiding written contracts, a public authority could evade the directives. In dealing with Community procurement, the European Court of Justice arrived at the conclusion, that where a framework contract had not been signed, no valid contract could be assigned under the framework agreement[781]. However, in relation to national contracts, the issue, of whether a given relationship meets the conditions for constituting a contract under the EU directives, is in principle an issue of fact subject to the jurisdiction of the national courts[782].

A major issue in the delimitation of the concept of contracts is the distinction between normal contracts and concession contracts, since the latter are excluded from the EU directives in the field of services[783] and subject to limited obligations in the field of works[784]. In the field of supplies, the concept of concessions does not make immediate sense and accordingly is not regulated[785].

In relation to agents, it has been proposed that as the agent will be acting on behalf of the contracting entity, the acts of the agent may be subject to procurement procedures, but that the entering into of the agency agreement should in itself not be subject to such procedures. However, the European Court of Justice has qualified such agency agreements also service agreement, subject under normal conditions to the procurement directives[786].

Likewise, the fact that no actual payment is made, but the value of the contract is offset against other sums due, does in itself not lead the contract to fail the requirement of being of a pecuniary nature[787]. This corresponds to the approach taken in EU law to the definition of state aid[788], which may also take the form of the non-imposition of a tax[789]. A separate issue is whether a payment, that only covers costs, is of a pecuniary nature. The

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[780] See article 6.1 of regulation of 1995/2006 (Q4A1)
[781] Case T-203/96, Embassy Limousines, point 41
[782] Case C-107/98, Teckal, point 46
[783] See article 17 of directive 2004/18 (C3). For an discussion on the application of the Telaustria principle to betting concessions, see Brown (10)
[784] See article 56 of directive 2004/18 (C3). See also case C-437/07, Italy, and the discussion in Brown (2)
[785] This will be dealt with in the following part of the project
[786] Case C-264/03, France, point 58
[787] Case C-399/98, Ordine degli Architetti, point 81
[788] For a discussion of the relations between state and procurement, see Dethlefsen (2)
[789] See article 87-88 of the EC-Treaty

European Court of Justice has avoided this question by finding in the case concerned that the payment did exceed costs[790].

It would seem logical that if a contract was performed free of charge, the assignment of contract as such could not have an impact on the commercial operation of the internal market. However, the operator might be cross subsiding, in the manner of hoping to be awarded later commercial contracts in the light of the goodwill obtained by the contract performed free of charge. This would also apply to contract performed at below cost price and should support an argument that any payment suffices to constitute the pecuniary element. The only logical problem would then remain the contract performed free of charge.

Different from the situation at the European Court of Justice, the definition of public contracts have not as such been the subject of case law from the Danish complaint board.

4.1.7 Contract types

4.1.7.1 Public works

The delineation of the concept public works contracts has held major interest because of the significant difference in threshold values between on the one hand the field of works and the other hand the fields of supplies and services.[791].

The definition of works is undertaken at 2 levels. The first level concerns the activities covered, which originally were defined by reference to the liberalisation directive 71/304[792], which in article 2 held a reference to group 40 of the NICE nomenclature[793], to which the article added some exceptions. Presently, for the classic field, article 1.2.b.s1 refers to annex I of directive 2004/18 (C3), which refers to group 45 of the NACE nomenclature[794], and which was at the latest revised by regulation 213/2008 (P3A7). The annex has not been the subject of jurisprudence.

This definition, by reference to the annexes is objective, and does not depend on the intended use of the works. Thus, the possible issue of activities in the general interest, which as set out above has an implication for the definition of public bodies, is not relevant when deciding whether an activity is itself constitutes works in the meaning of the directive[795]. The definition may, however, be assisted by the listing of activities covered by the field of

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[790] Case C-119/06, Italy, point 48. For a discussion of the case, see Brown (4)
[791] See article 2 of regulation 1422/2007. The general threshold for supplies and services is presently 133,000 Euro for central government authorities and 206,000 Euro for other contracting entities, while for works the threshold is 5,150,000 Euro
[792] See article 1.a of directive 71/305 (W1), as confirmed in case C-71/92, Spain, point 30
[793] See above in footnote 57
[794] See above in footnote 120
[795] Case C-399/98, Ordine degli Architetti, point 66

services[796], as the Danish complaint board underlined in a case concerning maintenance of road surfaces and cleaning of wells, which were deemed not to be works activities, as they were listed in the services annex[797].

The second level of the definition concerns the outcome of the activities, which have relatively consistently been referred to as the outcome of building or civil engineering works taken as a whole which is sufficient of itself to fulfil an economic or technical function[798]. The reference, to being sufficient in itself, has an important link to the prohibition against artificial splitting of contracts[799]. In a case concerning different municipalities within a region, the European Court of Justice found that the electricity supply was interconnected, and should therefore be in relation to the thresholds be aggregated for the whole region, whereas street lighting was not interrelated, and accordingly the works could in relation to the thresholds be calculated separately for each municipality[800].

An argument by the French government, whereby the criteria of interconnectivity would lead to the need for a nationwide aggregation in relation to electricity works, was countered by the court by referring to the need to view each work according to its context and its particular characteristics. Thus, the timing and similarity of contract notices in the case pointed towards aggregation at the regional level for the electricity works[801].

In relation to the issue of self sufficiency, the Italian government raised the argument that the establishing of roads connecting existing motorways, operated by private concession holders, would have no function separate from the use of the existing motorways. The European Court of Justice disagreed, finding that although in revenue generation the new roads might be linked to the existing motorways, this did not prevent them from constituting works in the sense of the directives[802]. In doing so, the Court referred it definition of economic activity in relation to the imposition of value added tax[803].

On this issue of the concept of works as such, the Danish complaint board has only rendered a single decision, which concerned Danish national procurement legislation, which at the time covered only works, and not supplies or services[804]. Thus, under the national

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[796] See annex II.A of directive 2004/18 (C3) and annex XVII.A of directive 2004/17 (C3), both as amended by regulation 213/2008
[797] Case N-071130, Ejnar Kristensen, point 2
[798] See article 1.2.b.s2 of directive 2004/18 (C3)
[799] See article 9.3 of directive 2004/18 (C3)
[800] Case C-16/98, France, point 69
[801] Case C-16/98, France, point 65
[802] Cases C-187/04 & C-188/04, Italy, point 28
[803] Judgment of 12 September 1990 in case C-276/97, France, ECR 2000, p. 6251, point 32
[804] Case N-031120, Ole Holst, point 1

procurement legislation, at least prior to the application of the Alcatel principle[805], the interest would be opposite to that of situations covered by the EU directives. Classification as works would under national law entail procurement obligations, whereas classification as works under EU legislation might escape procurement obligations due to the high threshold.

Accordingly, the applicant underlined that contracting entity indicated at a meeting held with the operators that the activity constituted works, and that in case of doubt, the activity should be classified as work. The complaint board refused this, and instead found that the activity did not constitute work, as the output would not form an integrated part of the building where it was placed. Without being specific about this issue, the complaint board apparently applied the norms of Danish legislation of security, which in relation to loans with security in real property restricts that security to the integrated parts of the real property.

The Danish national procurement legislation in the second generation[806] had a somewhat imprecise definition of public works, which was defined as works procured by contracting entities, and for the definition of such entities referred to the EU directives. This raised the issue of whether the concept of works itself was also to be interpreted in accordance with the EU directives, or whether it might be interpreted by reference to Danish concepts. The complaint board established found grounds in the preparatory works for applying the EU definition[807].

*4.1.7.2 **Services***

Within the free movement provisions on the internal market in the EC-treaty, services constitute a residual concept that covers all transactions that cannot be classified under free movement of goods, persons and capital[808]. Within the EU procurement directive, the point of departure is the same, as services are transactions not covered by the concepts of work and supplies, but different from the free movement provisions, the EU procurement directives do not have a comprehensive coverage, and thus services are also limited to a number of specifically listed activities[809].

Thus the EU procurement directives distinguish between contracts fully subjected to procurement procedures[810], and services subject only to a more limited obligations[811], related

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[805] Case C-81/98, Alcatel
[806] See article 1.2.p1 in law 450/01 (NPL2)
[807] Case N-041006, Leif Jørgensen, point 3
[808] See article 49 of the EC-Treaty
[809] See article 1.2.d.1of directive 2004/18 (C3), and also below in section
[810] See article 20 of directive 2004/18 (C3), which refers to annex II.A as amended by article 2.2 and annex VI of regulation 213/2008 (P3A7)

to the drafting of technical specifications[812] and the publication of contract award notices[813]. This limited set of obligations has been confirmed by European Court of Justice[814], but to it should be added the obligations under the Telaustria principle[815], as also confirmed by the European Court of Justice[816]. However, the court has accepted the limitation that an application of this principle requires in the specific case that it is established that the contract concerned had the potential interest of other operators than those addressed[817].

The Danish complaint board has taken a more restrictive approach to the application of the Telaustria principle to what is presently annex II.B services, finding, that restricting negotiated procedures to operators with an establishment within the territory of the municipal authority concerned, was objectively justified and accordingly not contrary to the equal treatment principle[818]. The argumentation does not seem to meet the standard of the proportionality principle. However, in an earlier case the complaint board undertook a more extensive application of the Telaustria principle[819] to such annex II.B services, placing importance on the fact that publicized award criteria had been applied, although the contracting authority allowed itself more discretion than would have been possible under the EU procurement directives, including an access to negotiation, which was conducted with respect for the principle of equal treatment[820].

Apart from applying the value principle[821] in relation to mixed contracts[822], the provisions on distinguishing between the types of contract are not operative, and they thus rely entirely of the listing of service types in the annexes to which they refer. This has been confirmed by Danish complaint board[823], finding that interpretation services were not included in what is presently annex II.A, and thus finding that use of the procurement procedures was not mandatory, without any specification as to whether the interpretation services were included in annex II.B, but with a reference to the general obligations under the

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[811] See article 21 of directive 2004/18 (C3), which refers to annex II.B as amended by article 2.3 and annex VII of regulation 213/2008 (P3A7)
[812] See article 23 of directive 2004/18 (C3)
[813] See article 35.4 of directive 2004/18 (C3)
[814] Case C-507/03, Ireland, point 24. For a discussion of the case, see Brown (9)
[815] Case C-324/98, Telaustria
[816] Case C-234/03, Contse, point 49
[817] Case C-119/06, Italy, point 65
[818] Case N-051102, Klaus Trier, point 3
[819] Case C-324/98, Telaustria
[820] Case N-050902, Tipo Danmark, point 10 and 20
[821] See above in section 4.1.7.3
[822] See article 22 of directive 2004/18 (C3)
[823] Case N-050309, A-1 Communication, point 1

Telaustria principle[824]. The fact that the value principle, and not the objective principle, is to be applied has been confirmed by the European Court of Justice[825], which also found that the fact, that parts of the contract offered for procurement had different objectives, could not oblige the contracting entity to split the contract into its component parts, unless it could be established that that the joining of activities into a single contract had circumvention purposes[826].

In a case concerning incorrect classification, the Danish complaint board found it to be a fault that the contracting entity had defined the activity concerned as what is presently an annex II.B service, but as the procurement had been performed as required for annex II.A services, this violation of the procurement rules was not seen to have implications[827]. The issue of legal certainty was not raised in the connection.

In another case before the Danish complaint board[828], the double criterion for services, to be conceptually a service and to be on the list, was illustrated by the finding that the placing of advertising in news papers as a point of departure complies with the definition of services, but the issue of whether such activities are included in the mention of advertising activities in the annex, which in turn depends on the interpretation, at the time, of the CPC nomenclature. The complaint board found that the reference to the CPC nomenclature should be read as a static reference, point to the version in force at the time of adoption of the directives concerned, since a reading it as dynamic interpretation would imply a delegation powers to the United Nations to determine the scope of application of the EU public procurement directives[829].

At the time, the Commission had already recommended the use of the CPV nomenclature, which subsequently became mandatory[830]. Also, at the same time the European Court of Justice actually arrived at the opposite conclusion, finding that the CPA and CPV nomenclatures could not be used for interpreting the scope of the annexes, since the nomenclatures only concerned only concerned respectively statistical information and the drafting of notices. Instead, the court applied the CPC nomenclature in its continued

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[824] Case C-324/98, Telaustria
[825] Case C-411/00, Swoboda, point 49
[826] Case C-411/00, Swoboda, point 58
[827] Case N-080710, European Land Solutions, point 18
[828] Case N-990920, Jyllandsposten, point 1
[829] Case N-030428, Centralforeningen af Taxiforeninger i Danmark, point 2, and case N-030408, Dansk Taxi Forbund, point 2
[830] See above in section 3.1.4.3.7

reasoning[831]. The Danish complaint board did likewise, with an explicit reference to the judgement of the European Court of Justice[832].

In other cases, the complaint board has taken a more general approach, such as finding it beyond doubt that transportation and receipt of waste constituted services within the scope of the EU procurement directives[833]. Likewise, the complaint board refrained from a detailed economic analysis, finding it beyond doubt in a specific case that what is presently referred to as annex II.A activities outweighed the annex II.B activities[834]. The European Court of Justice has been more specific in it analysis of whether activities are covered by what is presently annex II.A or II.B[835], and in relation to preliminary references the issue may be argued both ways. This may either be seen as an infringement of the national courts right to establish the facts, or it may be seen as a detailed interpretation of the annexes as EU legal instruments.

Concerning the specific obligations in relation to what is presently annex II.B services, the Danish complaint board found that while contact with the potential operators, in order to establish the relevant technical criteria, could not be excluded as a possible avenue, it required strict observation of the equal treatment principle[836].

4.1.7.3 Mixed contracts

In relation to mixed contracts, the European Court of Justice has applied an object criterion, so that works that are only incidental to other activities are not sufficient to subject the mixed contract to the works provisions[837]. At the time this only had support in the preamble of the second generation service directive[838], but it has since been codified in the third generation directives for services[839]. It should be noted that this codification only concerns mixes with services subject to the directives, whereas the judgement concerned mixes with a contract outside the scope of the directives, as it concerned assignment of public property. However, use of the general principle in relation to services within the directives, has also been confirmed by European Court of Justice[840].

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[831] Case C-76/97, Tögel, point 36
[832] Case N-030428, Centralforeningen af Taxiforeninger i Danmark, point 3, and case N-030408, Dansk Taxi Forbund, point 3
[833] Case N-981021, Farum Industrirenovation, point 3
[834] Case N-030428, Centralforeningen af Taxiforeninger i Danmark, point 6, and case N-030408, Dansk Taxi Forbund, point 6
[835] Case C-258/97, Hospital Ingenieure, point 31
[836] Case N-071214, Thomas Borgå, point 3
[837] Case C-331/92, Gestion Hotelera, point 29
[838] See point 16 of the preamble to directive 92/50 (S2)
[839] See article 1.2.d.3 of directive 2004/18 (C3) and article 1.2.d.3 of directive 2004/17 (U3)
[840] Case C-20/01 & C-28/01, Germany, point 52

For the relations between services and supplies, a similar object criterion is applied, so that where installation services are incidental, the contract remains a supply contract[841]. However, for other mixes of services and supplies, a majority criterion is applied so that the deciding element is the majority value part of the contract[842].

For the mix between the supplies and works, the EU directives do not provide a regulation, apart from the obligation to include the value of supplies, made available by the contracting entity, which might be termed internal supplies, in the consideration of threshold values for works[843]. This could be seen to imply an integration criterion, so that supplies for use in the works project are subject to the works provisions, as was also stated previously, albeit in general terms, in the first generation Danish national procurement act[844].

However, the Danish complaint board came to the opposite conclusion in relation to a case concerned with bus shelters[845]. The complaint board reasoned that the provision on internal supplies indicated that materials for building projects should be considered separately as supplies, thus negating the proposed integration criterion. This does not seem convincing, as the internal supplies provision should be seen as applying to materials purchased separately without relation to the building project.

Instead, the object criterion would seem to apply, which however would require the installation of the bus shelters not to be qualified as works, but instead as installation services. It was in order to avoid taking a definitive position on this issue that the complaint board chose the double strategy of showing that both lines of analysis would lead to the same conclusion, an application of the supplies directive.

However, it would seem to have been a clearer strategy to establish that the object criterion by analogy must apply to the relation between supplies and work, in the same manner as the relationship between supplies and other installation services. This would also seem to be confirmed by subsequent case law of the European Court of Justice[846]

In cases where the object criterion was not fulfilled, then either the integration or value criterion would have to be applied, depending on whether the installation was qualified as works or services.

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[841] See article 1.2.c.2 of directive 2004/18 (C3) and article 1.2.c.2 of directive 2004/17 (U3)
[842] See article 1.2.d.2 of directive 2004/18 (C3) and article 1.2.d.2 of directive 2004/17 (U3)
[843] See article 9.4 of directive 2004/18 (C3) and article 17.4 of directive 2004/17 (U3)
[844] See above in section 3.5.1
[845] Case N-970912, Abtech, point 5
[846] Case C-412/04, Italy, point 47, and case 220/05, Auroux, point 37. For a discussion on the former case, see Knibbe (1)

This would also seem to be the approach taken by the Danish complaint board in a case decided later in the same year[847]. Here the contract had three elements, the purchase of equipment, the installation, and the operation of that equipment. In discarding application of the works directive, the complaint board did not as such apply the objective criterion, but rather an insignificance criterion, noting that installation costs were significantly below purchase costs. In a second round of analysis, the applied the value criterion, as the operating costs were above the purchase costs.

For the relationship between supplies and services, outside of installation services, the European Court of Justice has confirmed the application of the value criterion at several occasions, but without any contentious issues being involved[848]. The same applies to the Danish complaint board[849]. The similar value criterion is applied to mixed contracts for services covered by the A and B annexes[850], which, however, has not been the subject of jurisprudence.

Opposite to the above mentioned issue of artificially separated contracts, the use of mixed contracts does raise the issue of whether contracts have been artificially mixed, in order to avoid provisions only applicable to either works, supplies or services, or alternatively in order to gain access to such specific provisions. This issue has not been brought up in case law.

4.1.7.4 Framework agreements

As set out above, with the third generation directives, framework agreements were explicitly accepted in general[851], whereas they had previously only been regulated in the utilities field[852]. However, several member states had operated framework agreements also in the classic field prior to the third generation directives. The Danish complaint board had found by analogy that framework agreements were legal within the EU procurement rules, as they were specifically mentioned in the utilities directive[853].

During the period prior to the third generation directives, the legality of framework agreements as such was never contested at the European Court of Justice, and while a few cases do relate to framework agreements, the court did not find occasion to raise the issue of

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[847] Case N-991109, More Group Denmark, point 3-6
[848] Case C-107/98, Teckal, point 37, case C-310/01-S, Udine, point O1, case C-340/04, Carbotermo, point 31, and case C-323/07-S, point 15-17
[849] Case N-980122, Unitron Scandinavia, point 2, and case N-95-0623, Danske Handelskammer, point 2
[850] See article 1.2.d.3 of directive 2004/18 (C3)
[851] See article 32 of directive 2004/18 (C3) and article 14.1 of directive 2004/17 (U3)
[852] See article 5.1 of directive 93/38 (U2) and article 5.1 of directive 90/531 (U1)
[853] Case N-060427, Unicomputer, point 1, upheld in the appeal court case O-071011-1, SKI

legality ex officio. The Greek government contended that framework agreements were only a structure for the allocation of individual agreements, and that the issue threshold values should therefore be evaluated individually for each of the contracts under the agreement.

The European Court of Justice found that this would constitute a circumvention of the provisions on threshold values[854], since the framework agreement brings the individual contracts into relation with each other. It might be argued that this is similar to the logic behind the provisions on lots[855]. In addition, the Greek position appeared paradoxical from a Danish point of view, where framework agreements were applied for the express purpose of avoiding later procurement procedures for the individual contracts. However, in its twisted logic, this would also have been also the result achieved by the Greek argumentation, as long as the individual contracts were under the threshold values.

Even more surprising, the European Court recently had to repeat this argumentation in a case concerning Italy, which essentially had put forward the same structural argument as the Greek government had tried 22 years earlier. The European Court of Justice was not convinced of a need for change in its jurisprudence, and although the case was based on the second generation service directive[856], the court could substantiate its argumentation by referring to the regulation of framework agreements in the new third generation directives[857].

The Danish complaint board has had occasion to deal with the application of framework agreements in some more detail, and the board has on the one hand underlined the prohibition against discrimination and negotiation with operators[858], but on the other hand accepted that both prices and products could be adjusted during the lifetime of the framework agreement, as long as no new products or product groups were introduced[859]. In a case based on the second generation utilities directive[860], the complaint board found that a specific contract allocation was undertaken with a modification of the liability provisions that was too substantial to be covered by the framework agreement[861].

The complaint board implicitly confirmed the right of free choice amongst the framework products, by indicating that purchases were to be made as direct contracting between the contracting entity and the operator, at the prices and conditions set out in the

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[854] See at the time article 5.1.a of directive 77/62 (G1) as amended by article 6.1.a of directive 88/295 (G1A1)
[855] See articles 9.5.a.1 and 9.5.b.1 of directive 2008/18 (C3)
[856] Directive 92/50 (S2)
[857] Case C-119/06, Italy, point 42-44
[858] Case N-030929, Unicomputer, point 19, upheld in the appeal court case O-071011-2
[859] Case N-060427, Unicomputer, point 2, upheld in the appeal court case O-071011-1, SKI
[860] Directive 93/38 (U2)
[861] Case N-980702, Foreningen af Rådgivende Ingeniører, point 1

framework agreement[862]. However, the contracting entity was entitled, by not obliged, to perform a mini-procurement by asking the operators to indicate which of their products that best would best suit the current needs of the contracting entity, without any change in prices or offered products[863]. This is reminiscent of, but not identical with the mini-procurement foreseen in the present classic directive, which applies only when the framework contract is not comprehensive in setting terms[864].

Somewhat more complex was a case concerning transportation services, outside of fixed networks, where the procurement was made in the form of a framework agreement, to which all operators who complied with minimum requirements would be admitted. Each operator was granted a general contract, but the actual allocation of transportation tasks was to take place according to an allocation system that was described in the tender documents. The applicant held that the allocation system entailed a violation of the equal treatment provision.

The complaint board found that the general contract, which all operators received, constituted the allocation of contracts within the framework agreement, and that the allocation of tasks concerned contract performance, which was deemed to fall outside the competence of the board[865]. It would have seemed more logical to consider the allocation of transportation tasks as the conclusion of specific contracts within the framework agreement, and therefore to evaluate whether the allocation system fulfilled the requirement for award criteria, including the requirement of equal treatment.

With the third generation directives, the duration of framework agreements have been limited to 4 years in the classic field[866], but not in the utilities field, whereas the same 4 year limitation applies to dynamic purchasing systems in both directives[867]. Apart from these provisions, the issue of duration of contracts is not regulated in the directives, but as set out above, the European Court of Justice, different from the Danish complaint board, has explicitly accepted contracts of an unlimited duration, without any explicit requirement for objective justification[868].

Concerning the specific four year limitation for framework agreements, the Danish complaint board found a violation in contract provisions that set a 3 year duration with the option for two 1 year prolongations[869]. However, the violation was not related to the 4 year

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[862] Case N-030929, Unicomputer, point 12, upheld in the appeal court case O-071011-2
[863] Case N-030929, Unicomputer, point 14, upheld in the appeal court case O-071011-2
[864] See article 32.4.2 of directive 2004/18 (C3)
[865] Case N-070704, Dansk Taxa Råd, point 5
[866] See article 32.2.4 of directive 2004/18 (C3)
[867] See article 33.7 of directive 2004/18 (C3 and article 15.7 of directive 2004/17 (U3)
[868] See above in section 4.1.6
[869] Case N-081219, UAB Baltic Orthoservice, point 8

limitation, but instead to the fact that the option in the final contract did not hold the limitation to use within a 12 month period, which was set in the contract notice. Thus, the complaint board seemed to base its argumentation on a violation of equal treatment, but nevertheless indicated article 32 as the article violated.

In relation to framework agreements entered into prior to the introduction of the 4 year limit, the complaint board found that a that the contracting entity had not been able to substantiate the need for a framework agreement to have unlimited duration, and that contracting entity therefore had committed an unspecified a violation of the second generation supplies directive by including the clause on unlimited duration[870].

The Danish appeal court came to a different conclusion, finding that in principle unlimited framework contracts had not been prohibited under the second generation EU procurement directives[871]. However, the appeal court substantiated its finding by the fact that the framework agreements were expected to be renewed in 2-3 years, and in any case had a 6 month termination clause. With this substantiation, the appeal court might be seen to approach the same point as the complaint board, in finding the need for some justification for an unlimited contract.

The provisions on framework agreements in the classic field somewhat surprisingly demand that such agreements must be entered into either with a single operator[872], or alternatively with at least 3 operators[873]. While the minimum number of 3 corresponds to the minimum for participation in a negotiated procedure[874], it is difficult to see, when accepting the alternative of a single operator, why the option of 2 operators should be excluded.

The directives do not place any upper limited on the number of participants in framework agreement, neither amongst the operators nor the contracting entities, which is different from the earlier provisions on utilities, where only a single contracting entity could be party to a framework agreement[875].

The Danish complaint board faced the issue of whether an implicit maximum might have applied for the operators under the second utilities directive. The complaint board notes that there is great doubt about the understanding of the directive in this relation, as to whether framework agreements with multiple operators were at all possible, but surprisingly the board

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[870] Case N-060427, Unicomputer, point 5-6
[871] Case O-071011-1, SKI
[872] See article 32.3 of directive 2004/18 (C3)
[873] See article 32.4.1 of directive 2004/18 (C3)
[874] See article 44.3 of directive 2004/18 (C3)
[875] See article 1.5 of directive 93/38 (U2) and article 1.4 of directive 90/351 (U1)

refrained from using the possibility of a preliminary reference[876], and instead proceeded to arrive at its own conclusion that in the specific case there was no justification for entering into a framework contract with 15 participants[877].

However, the complaint board underlined that this should not be construed as a general ruling on whether framework agreements could be entered into with multiple operators. Indeed, when revisiting the issue in a later case, the complaint board found that a specific framework agreement with 10 participants, entered into without specific legal basis under the second generation supplies directive[878], was objectively justified.

With the third generation directives, dynamic purchasing was introduced as an electronic alternative to framework agreements[879], but they have not yet become the subject of jurisprudence. Some member states, like Latvia, operate an intermediate form, where purchases under a traditional framework agreement are handled electronically, which has the advantage of ensuring a non-biased application of the award criteria. This approaches the format of, but is not identical to, the electronic auctions that were also introduced in the third generation directive, but which also have not yet been the subject of jurisprudence[880].

4.1.8 Excluded contracts

4.1.8.1 Utilities

As set out above, the scope of the utilities directives does not directly relate to the subject matter of the procurement, but instead relates to the field of activity of the contracting entity, and to whether the procurement supports activities in this field[881].

In addition, the European Court of Justice has underlined that the exception for utilities, to be covered by its own sector directive, should be interpreted narrowly[882], as the rules of the sector directive are less restrictive on the contracting entities[883]. However, in previous case law the court had reached the opposite conclusion, finding that the concept of a transportation authority should not be interpreted narrowly[884].

In relation to more general exclusions from EU procurement procedures, the preamble of the first generation supplies directive specified that certain other activities, in addition to

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[876] See article 234 of the EC-Treaty
[877] Case N-980702, Foreningen af Rådgivende Ingeniører, point 2
[878] Directive 93/36 (G2)
[879] See article 1.6 of directive 2004/18 (C3)
[880] See article 1.7 of directive 2004/18 (C3)
[881] Se above in section 4.1.4.3
[882] Case C-393/06, Ing. Aigner, point 27
[883] Case C-462/03 & C-463/03, Strabag, point 34
[884] Case C-247/98, Portugal, point 42

utilities, might justify exclusion, but did continue to underline that such exclusion would need specific mention in the text of the directives[885]. Accordingly, in the specific case the European Court of Justice refused to expand the exemption for utilities to cover by analogy also pharmaceuticals[886].

The original case on exclusion of utilities was the Dundalk waterworks case in Ireland[887], which however may also be seen as a starting point for the later Telaustria principle[888] by underlining that exemption fro EU procurement procedures, as there was not utilities directive at the time, did not entail exemption from other provision of EU law. In a later case, the Danish complaint board extensively referred to the reasoning of the Dundalk case[889].

Concerning the application of the provision referring utilities to the sector directive, the Danish complaint board has had a flexible approach. Finding in one case that the contract on transportation of disabled persons should have been subjected to the services directive, and not the utilities directive, the board did not find this to constitute sufficient grounds for annulment of the procurement[890]. This appeared contrary to a previous case, where the complaint board did find that the incorrect application of the utilities directive instead of the supplies directive should entail annulment of the procurement, but this finding was supported by the fact that the contracting entity had also reserved a right to choose freely how to award the contract, although based on the indicated award criteria[891].

Finally, in another case the complaint board expressed reservations as to whether the utilities directive might apply, but since both the applicant and the defendant agreed on the application of this directive, the board did not find occasion to raise the issue ex offcio[892]. As dealt with separately[893], the complaint board has an extensive practice for the raising of ex officio issues, but in the present case the board justified its restraint with the reasoning that the issue had no practical impact on the outcome of the case.

The European Court of Justice has been asked to take very specific position on what activities are included in the concept of utilities. In one case, the French government raised the issue that although street lighting is an electric network, the installation of the street

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[885] See point 9 of the preamble of directive 77/62 (G1)
[886] Case C-71/92, Spain, point 10, and case C-328/92, Spain, point 14
[887] Case 45/87, Ireland, point 10
[888] Case C-324/98, Telaustria
[889] Case N-981111, Vestergaard, point 1, not dealt with in the later appeal case V-020308
[890] Case N-981110, Dansk Taxi forbund, point 1
[891] Case N-951025, Siemens, point 2
[892] Case N-970912, Abtech, point 1
[893] This will be dealt with in the following part of the project

lighting cannot be considered as involving the production, supply, transport or distribution of electricity. The refrained from answering the question, as it has already ruled that the separation of the electricity works and street light works was in any case not an artificial separation[894].

However the case does raise another issue of mixed contracts[895], as the directives does not provide any provisions on how to consider contracts that involve both utilities and other activities. It is suggested, that the object criterion must apply, but there is no case law on this issue.

In relation to postal services, which are one of the utilities activities, the European Court of Justice had occasion to rule on the interrelationship between the EU public procurement provisions and other EU legislation[896]. A separate directive on postal services[897] allowed member states to reserve some postal services for a universal postal service, which effectively meant that the services concerned were not subjected to competition. Under those circumstances, the assignment of the universal postal obligations to a private company could not be subject to procurement procedures, when the private company was entirely state owned[898].

It should be noted that the last element of the reasoning refers to the contamination criterion[899], which restricts the concept of in-house deliveries to being those from private entities that are entirely owned by public entities. However, normally the dominance criterion would also apply, requiring the contracting entity to have control of the private entity, in the same manner as it would have of its own departments. It is this dominance requirement that is here replaced by the fact that the postal directive allows for the designation of a single universal post carrier. The issue might also have been solved as relating to exclusive rights[900], as it might be argued that universal postal services are in the general interest, and the state owned private entity is thus a public body, and accordingly also a contracting entity.

It was in relation to telecommunications, which at the time was included in the field of utilities[901], but which has subsequently been removed[902], that the European Court of Justice

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[894] Case C-16/98, France, point 56
[895] See above in section 4.1.7.3
[896] For a discussion on the implementation of procurement obligations in the United Kingdom in relation to postal services, see Aspey (1)
[897] Directive 97/67 of the European Parliament and of the Council of 15 December 1997 on common rules for the development of the internal market of Community postal services and the improvement of quality of service, OJ 1998, L 15, p. 14-25, since amended
[898] Case C-220/06, Asociacion Profesional de Empresas, point 41
[899] See above in section 4.1.5.4
[900] See article 25 of directive 2004/17 (C3)
[901] See article 2.2.d of directive 90/531 (U1), and subsequently also article 2.2.d of directive 93/38 (U2)

established the Telaustria principle, which is dealt with below[903]. Concerning the field of utilities, the court found that the procurement concerned did relate to activities in the field of telecommunications, and thus would have been subject to the utilities directive, if the threshold values had been reached[904].

Different from telecommunications, broadcasting was never part of the field of utilities, but was from the beginning given a somewhat similar position within the directives in the classic field[905]. However, this position was not related in general to acquisitions necessary for activities in the broadcasting field, but was instead limited to only the acquisition of programme material. As broadcasting was not subsequently included in the field of utilities, the acquisition of broadcasting material has remained outside the scope of the EU procurement directives.

This raises the question whether such acquisition of programme material may be subject to the general procurement principles of the Telaustria principle[906], or whether the express wish of the EU Council and European Parliament to exempt them from such procedures should be respected. The European Court of Justice has taken the usual position that in the first place the exemption should be construed narrowly and be based on its core function, which is to guarantee that the public broadcasting bodies can accomplish their public service tasks with complete independence and impartiality[907].

This leads to a precision that the exemption covers only the actual acquisition of programme material, but not the acquisition of technical equipment necessary for the production of such material. While not taking position on the strength of the exemption, this need for a strict interpretation would seem to point toward a strong position of independence for the exempted field. It could be argued that this must be different from the treatment of procurement below the threshold values, as being just exempted from a practical de minimis point of view. However, as set out below[908], such interpretation would not seem supported by the case law of the European Court of Justice based on the Telaustria principle[909].

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[902] See above in section 3.1.2.4.1
[903] This will be dealt with in the following part of the project
[904] Case C-324/89, Telaustria, point 40
[905] See article 16.b of directive 2004/18 (C3) and previously article 1.a.iv of directive 92/50 (S2)
[906] Case C-324/98, Telaustria
[907] Case C-337/06, Bayrischer Rundfunk, point 63
[908] This will be dealt with in the following part of the project
[909] Case C-324/98, Telaustria

4.1.8.2 Defence and secret procurement[910]

The EC-Treaty provides that any member state may take such measures as it considers necessary for the protection of the essential interests of its security, which are connected with the production of or trade in arms, munitions and war material. However, such measures may not adversely affect the conditions of competition on the internal market in relation to products that are not intended for specifically military purposes[911].

The EU public procurement directives support this provision of the EC-Treaty by restating the principle in reverse. Accordingly, the directives do apply to defence procurement, except in the situations where the treaty exemption applies[912]. Thus, the purchase of helicopters that were primarily for private use, but which could also be used for military purposes, would be subject to procurement procedures, as confirmed by the European Court of Justice[913]. This would seem to correspond to the objective criteria, as set out above in relation to mixed contracts[914]. Without any substantive reasoning, the Danish complaint board came to the same conclusion in relation to the procurement of blood products[915].

In addition to defence procurement, the EU public procurement directives also holds exemption for contracts that are otherwise secret, or which require special security measures[916]. The text of the directives would seem to impose on the member states an unqualified right to declare contracts secret. Unsurprisingly, the European Court of Justice has arrived at another conclusion.

Thus, in relation to the above mentioned purchase of helicopters, the court found that the mere fact of stating that procurement is to be considered secret in order to protect essential interests of state security, or even that special security measures are adopted, is not in itself sufficient. It must specifically be proved the exceptional circumstances are present, which can justify the exemption from EU procurement procedures[917].

In a similar case, the Italian government stated that in supplying specifications for the helicopters, confidential information was involved, and that for this reason the contract could only be offered to national operators. Lacking arguments from the Italian government on this

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[910] For a discussion of defence procurement, see Sandler (1)
[911] See article 296 of the EC-Treaty
[912] See article 10 of directive 2004/18 (C3)
[913] Case C-157/06, Italy, point 27. For a discussion of the case, see McGowan (1)
[914] See above in section 4.1.7.3
[915] N-970314, Immuno Danmark, point 2
[916] See article 14 of directive 2004/18 (C3)
[917] Case C-157/06, Italy, point 32

point, the European Court of Justice was not convinced that the nationality of the operator was in itself a relevant issue in relation to protection of confidentiality[918].

In contrast, the Belgian government was more successful in arguing that aerial photography, by necessity, would comprise also installation for both national and international defence installations on the Belgian territory, and that for this reason only operators, that has passed special security clearance, and who would continue to be monitored during the contract performance, should be allowed to participate in the procurement procedure. The European Court of Justice accepted this line of argumentation[919].

An important element of this decision was not only the argumentation, but also the fact that it was supported both by Belgian provision of law and by established practice. In thus way it could be distinguished from another Belgian case, where the secrecy argument was submitted only late and unsupported in the judicial proceedings before the European Court of Justice[920]. In general, this confirms, corresponding to the general approach of the European Court of Justice in relation to exceptions, that the exemption for secret contracts must be interpreted in a restrictive manner[921]. The above mentioned case from the Danish complaint board[922], although not reasoned in detail, may be seen as an application of this restrictive approach.

4.1.8.3 Exemption for international agreements

In relation to other exclusions, the European Court of Justice has confirmed its general approach, that any exemption must be interpreted narrowly[923]. In relation to the more specific exemption from the procurement procedures, when the transaction concerned is covered by an international treaty between a member state and a third state[924], the court has not yet had occasion to rule. However, the Danish complaint board has denied application of this exemption.

The Nordic countries had decided to undertake a joint building project for new embassies in Berlin, with a separate embassy to be built for each of the 5 countries, on land acquired by 3 of the countries. According to a cooperation agreement amongst the countries, the project was to be subject to public procurement under the EU directives, as also

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[918] Case C-337/05, Italy, point 51. For a discussion of the case, see Heuninckx (1)
[919] Case C-252/01, Belgium, point 36. For a discussion of the implications of the case, see Bartosch (1)
[920] Case C-323/96, Belgium, point 38
[921] Case C-3245/89, Evans Medical, point 47, and case C-328/89, Spain, point 15 and 36
[922] Case N-970314, Immuno Danmark, point 2
[923] Case C-328/92, Spain, point 12, and case N-91/72, Spain, point 10 and 22
[924] See article 15.a of directive 2004/18 (C3)

implemented in the EEA countries, which included 2 of the countries. However, after receipt of bids for an architect contract, regarded as a separate service, the secretariat of the project steering committee, acting on behalf of the 5 countries, found that project conditions had changed, and the procurement was cancelled. A contract was subsequently awarded without further procurement.

The applicant sued the Danish ministry of foreign affairs concerning the building of the Danish embassy. However, the ministry denied having individual responsibility, as the steering committee acted on behalf of all the countries, and that this committee, as a representative of sovereign states, could not be sued at the Danish complaint board, as this would violate issues of state immunity, and was not required by the EU remedies directives[925]. The Danish obligation to accept the decisions of the steering committee, and its secretariat, thus was to be protected by the provision of the EU directives on exemption for international agreements[926].

Furthermore, the ministry claimed that the complaint board could have competence only in relation to activities carried out in Denmark. Finally, the ministry argued that as the European Commission would not have competence to initiate proceedings against an EEA state, and the European Court of Justice would not have competence to give preliminary rulings of the procurement obligations of EEA countries, the case should accordingly also be rejected by the complaint board.

The complaint board did not address the line of defence specifically, but ruled generally that the architect contract concerned was wholly subject to the second generation services directive. Accordingly, after cancellation of the first procurement procedure, a new procedure should have been initiated. However, the complaint board found that de facto, the ministry had no freedom of action, as it was bound to follow the cooperation within the steering committee, and on this background the board refrained from ordering the ministry to undertake a new procurement procedure in relation to the architect services.

This raises the issue, whether the decision should be seen as an application of the exemption for international treaties. The cooperation agreement did specify use of the EU and EEA procurement provisions, and the decision of the steering committee must accordingly be seen as a violation, in itself, of the cooperation agreement. The question therefore becomes, whether the exemption in a narrow sense only protects correct application of the cooperation

[925] Directive 89/665 (RC1) and directive 92/13 (RU1), as subsequently amended
[926] At the time in article 5.a of directive 92/50 (S2)

agreement, or whether in a wider sense it removes activities under the cooperation from EU procurement obligations in their entirety.

The Danish complaint board seemed to take an intermediate position on this issue, finding on the one had that a new procurement should have been held, and thus that the exemption in principle did not apply, corresponding to the narrower sense. On the other hand, it arrived at a result corresponding to the wider sense, by refusing to rule on the claim to undertake a new procurement.

Missing from the case is a ruling on the validity of the decision not to procure, which must reflect an acceptance of the ministries defence based on state immunities. The Danish complaint board could not give a ruling on the validity of a decision made by the steering committee, nor indeed annul it. However, that did not prevent a preliminary assessment, in order to arrive at the conclusion that in principle the procurement should have been renewed.

The arguments of the ministry concerning the lack of competence for the European Commission to bring cases against the EEA member states, although correct, would appear irrelevant, as the competence of the Commission is subject to special rules in the EC Treaty that cannot impose limitations on the right of private parties to bring cases in national jurisdictions.

The corresponding argument of the ministry, concerning the competence of the European Court of Justice to answer preliminary references likewise would appear both irrelevant and incorrect. The competence of the European Court is also regulated by special rules in the EC Treaty that cannot, apart from respect for the jurisdiction of the European Court, impose limitations on national jurisdictions. Furthermore, it is clear that, just like the Danish complaint board, the European Court of Justice must have competence to undertake an assessment of the compliance with obligations by EEA member states, in order to arrive at a conclusion concerning whether an EU member state, in participating in an international project, has met its own obligations under EU procurement law.

Finally, concerning the issue of territoriality, it seems clear that both the EU procurement directives, and the remedies directives, are based on the assumption that judicial bodies in a member state will have jurisdiction over procurements carried out by the contracting entities as defined under the legislation of that same member state, with respect for the definitions in the EU procurement directives. Thus, neither the place of performance of the procurement procedure, not the place of implementation of the subsequent contract would appear relevant for defining the scope of competence of the national juridical bodies, nor indeed the obligation of the contracting authorities to follow the EU procurement rules.

The only possible limitations would seem to be where a private company, under the utilities directives, might become subject to the EU procurement rules, that same company might also have unrelated activities in third countries, where it should not be subject to the EU procurement rules. However, this is exactly because for such private companies, as for public bodies, the activity undertaken is part of their definition as contracting entities. That is not the case for public authorities, nor for public undertakings, who are contracting entities because of their constitution, without any link to the activities undertaken.

In any case, it would seem clear that the fact that a contract, entered into by a public authority, like the Danish ministry of foreign affairs, is to be performed in another member state, here Germany, cannot lead to a judicial impasse. It cannot be that the Danish ministry should have immunity in the German courts, and at the same time excluded from jurisdiction in Denmark because of the place of performance of the contract.

As far as extending this principle, of not accepting a judicial impasse, support may be found in the Community procurement rules that specify that they also apply to external action, as confirmed by the European Court of Justice[927]. It could be counter argued in the Community procurement rules this is precisely an extension of competence, which is not found in the EU procurement rules. However, the Commission has indicated to member states that it would consider proceedings against them concerning procurement of services for national external actions, which in Denmark did lead to an acceptance that the EU procurement rules would apply to such national external action. Surprisingly, it also would lead to an open policy declaration that contracts would be kept below the threshold levels where possible, which would seem a clear circumvention of the EU procurement rules. However, neither this issue, nor the general issue of national external action have been the subject of jurisprudence.

4.1.8.4 Acquisition of property

In the terms of the internal market, works could be regarded as a specialised form of services, and the missing part in the field of procurement is then provisions concerning persons and capital. In the logic of the procurement directives, transactions concerning persons and capital would have to be considered as services, but would be excluded, as they are not included in the annexes.

It must therefore be seen as a measure of further support for legal certainty, that the directives, in addition to the use of the listing in the annexes, has exclusions for certain types

of services, in the residual understanding of the concept. Thus, in relation to persons, employment contracts are excluded[928], and in relation to capital, the acquisition of real property is excluded[929]. The provisions on exclusion also cover other activities, but jurisprudence has only covered the issue of real property, apart from a confirmation that the exclusion related to programmes and time for broadcasting[930] must be construed in a narrow manner, which is in conformity with the normal case law of the European Court of Justice in relation to exceptions[931].

In relation to real property, the exclusion covers not only investment, in the form of purchase, but is also extended to cover rental[932]. The direct application of this exclusion has not been the subject of jurisprudence, as the interest has been limited to the question of possible circumvention by influence from a contracting entity on the construction of real property, which is subsequently purchased or rented by the contracting entity, which may be referred to as tailor-made construction.

The European Court of Justice has not had occasion to deal directly with this issue, but has found that the fact that actual works are procured by a private owner of land, does not exclude that the relationship between a public authority and that owner is classified as a works contract, when the works form part of an infrastructure development plan, and where the value of the contract is offset against other sums due from the private owner to the public authority[933].

Likewise, the court has found that the fact that works are acquired, with a view to selling the final product to third parties, does not preclude the public authority acquiring the works from being regarded as a contracting entity[934]. In the connection, the fact that the operator will not be performing the works personally, but will using subcontractors, does not entail that the relations between the contracting entity and the operator are instead to be

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[927] Case T-411/06, Sogelma, point 116
[928] See article 16.e of directive 2004/18 (C3)
[929] See article 16.a of directive 2004/18 (C3)
[930] See article 16.b of directive 2004/18 (C3)
[931] Case C-337/06, Bayrischer Rundfunk, point 64
[932] This is a reverse image of the fact that supplies directive explicitly covers both purchase and rental , as provided in article 1.2.c.1 of directive 2004/18 (C3), which is also briefly confirmed in case N-031216, Bilhuset Randers, point 1
[933] Case C-399/98, Ordine degli Architetti, point 71
[934] Case C-220/05, Auroux, point 38-39

regarded not as a works contract, but instead as a service contract. This last point is supported by the fact that an operator may rely on the capacities of subcontractors[935].

The Danish complaint board more directly had occasion to deal with the concept of tailor-made construction, which appeared during a certain period to have been seen as an interesting market for the construction industry. The core criterion for determining the presence of tailor-made construction is whether the new construction meets specified requirements of the contracting entity, as the complaint board confirmed in a case concerning the construction of theatre facilities[936]. In an earlier case, the board had explicitly refrained from making a general ruling on whether the EU public procurement rules prevented tailor-made construction, and did not find occasion to submit a preliminary reference on this issue[937].

This earlier case concerned sale and lease-back, where the contracting entity sold real property to a developer and then leased it back. During the lease, the contracting entity was entitled to carry out works on the real property, and the operator was obliged to seek permission from the contracting entity before doing so. Furthermore, after a certain period the contracting entity could re-purchase the re-property, and in addition could also at any time reclaim the real property. The complaint board found that this sale and lease-back arrangement did not entail any sale in the normal sense of the word, and accordingly that the contracting entity should continue to be regarded as the owner of the property, when deciding on procurement obligations in relation works carried out on the real property[938].

Apart from clear cases, where the requirements have been specified in writing, the question of tailor-made construction lead to a grey area existing between construction made under informal instruction from contracting authorities, and construction undertaken by operators with an intuitive or general understanding of the needs of contracting authorities. The handling of this grey area would seem to need an approach similar to that taken in relation to concerted practices in competition law, where actions are deemed concerted if no other rationale explanation is available for fact that behaviour appears to be concerted[939].

In addition, the limitations on tailor-made construction does creates a practical problem where an operator holds a plot of land, that the operator does not wish to sell, but

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[935] Case C-389/82, Ballast Needam, point 13, and case C-176/98, Holst Italia, point, 26, which is presently codified in articles 47.2-3 and 48.3-4 of directive 2004/18 (C3)
[936] Case N-070220, Bangs Gård, point 1
[937] Case N-0230129, Økonomi- og Erhvervsministeriet, point 1
[938] Case N-0230129, Økonomi- og Erhvervsministeriet, point 5
[939] See article 81 of the EC-Treaty and judgment of 28 March 1984 in joined cases 29/83 and 30/83, Compagnie Royale Asturienne des Mines, ECR 1984, p. 1679, point 16

wishes to develop into a building project that can be either sold or rented out when completed. In this situation, it is not attractive to the operator, neither that the contracting entity purchases the land, and undertakes its own construction project, nor that the contracting authority obliges the operator to accept that the actual construction may have to be carried out by a third company, following a procurement procedure.

The fact that the landowner may wish to undertake his own construction is not sufficient to engage the possibility for a negotiated procedure without contract notice, for the reason that there is only one possible supplier[940]. Both the assignment of an exclusive right[941] and the granting of a concession would under the circumstances appear as circumvention, and in any case the granting of a works concession does in itself require a procurement procedure[942].

This would seem to leave for the property developer only the grey area, where real property is constructed according to a general understanding of the needs of potential buyers or rental clients, who are contracting entities. The same limitation applies under the Danish national procurement legislation, as it refers to the definition of works in the EU directives[943], and the Danish complaint board has confirmed the application of it to tailor-made construction[944].

In relation to such tailor-made construction, it is immaterial whether the contracting entity was in good faith, and there is accordingly no need to establish any intent to circumvent the procurement rules[945]. The procurement legislation applies on an objective basis.

4.2 Equal treatment and transparency

4.2.1 Introduction[946]

It may well be argued that the requirement of equal treatment forms the nucleus of the EU public procurement directives, and that together with the principle of transparency, it forms a fully sufficient regulation of public procurement[947]. This is also the apparent basis on which the Telaustria principle is based[948]. The actual text of the EU procurement directives

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[940] See article 31.1.b of directive 2004/18 (C3)
[941] See article 3 of directive 2004/18 (C3)
[942] See article 58 of directive 2004/18 (C3)
[943] See article 1.5.s1 of consolidation law 1410/07 (NPL3C1)
[944] Case N-060203, J. Olsen, point 3
[945] Case N-040830, Benny Hansen, point 4
[946] For an early discussion of equal treatment, see Treumer (13)
[947] For an alternative perspective, based on implied contractual relations between the contracting entity and the operators, concerning the conduct of the procurement procedure, see Arrowsmith (7)
[948] Case C-324/98, Telaustria

then merely serves the principle of legal certainty by setting out the precise implication of the principle of equal treatment and transparency.

This in turn raises two issues. The first is the outer limits to which the Telaustria principle may be taken, which is dealt with below[949], or in other words, which specific procurement steps the principle does impose on contracting entities when operating outside the scope of the EU procurement issues. The other issue is the standing of equal treatment as a general principle of EU law, or in other word, whether Telaustria breaks new ground or merely, in the field of public procurement, applies a well established recognised principle of EU law.

The fundamental principle of the internal market and the EC Treaty is that of non-discrimination, which prohibits discrimination on the specific grounds set out in the treaty text. This includes gender discrimination[950] and nationality based discrimination[951]. In the latter case, the European Court of Justice has explicitly ruled that the EU provision does not preclude reverse discrimination, and that a member state may thus treat its own nationals less favourably than incoming nationals of other member states, as the EU provision only serves to protect free movement on the internal market.

Thus, in relation to own nationals, the prohibition on nationality based discrimination would mainly apply in relation to measures concerning the right of such own nationals to apply the right of free movement in order to leave the home state. However, in such situations nationality based discrimination would in general not be a relevant mechanism, except in the specific subset of free movement relating to the right of return. There the foreigner would have a right of entry, on the basis of non-discrimination, and accordingly the returning national would also be able to claim non-discrimination in comparison with the entering foreigner[952].

However, it most practical relations, this possible extension of non-discrimination to cover also reverse discrimination would be pre-empted by another extension of the free movement provisions, which takes them from being specific instances of the non-discrimination provisions into being provisions that prohibit any hindrance to free movement[953]. It is interesting to note that in a single case, relating to public procurement, the

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[949] This will be dealt with in the following part of the project
[950] See article 141 of the EC-Treaty
[951] See article 12 of the EC-Treaty
[952] See judgment of 7 July 1992 in case C-370/90, Singh, ECR 1992, p. i-4265, point 25
[953] See judgment of 15 December 1995 in case C-415/93, Bosman, ECR 1995, p. i-4921, judgment of 30 November 1995 in case C-55/94, Gebhard, ECR 1995, p. i-4165, and judgment of 10 May 1995 in case C-384/93, Alpine Investments, ECR 1995, p. i-1141

European Court of Justice has underlined that equal treatment is a wider concept than national discrimination, and that the free movement articles of the EC Treaty do not contain an equal treatment requirement, but only a nationality discrimination prohibition[954].

Although in itself technically correct, this statement becomes deceptive, as it does not take into consideration the impact of the prohibition of hindrances, which is not identical with an equal treatment obligation, but which, it may be argued, achieved the same results in the field of free movement as the equal treatment requirement does in the field of public procurement. It might even be argued that the prohibition of hindrances is a stronger measure, which could have been applied to the case concerning CD-Rom distribution for the EU Publications office, where it was argued that the tender conditions set so short deadlines for the distribution of CD-ROMs, after award of the contract, that this made bidding for contract unattractive. As a preliminary remark, the European Court of Justice found that even if the deadline was short, it did not in any way constitute unequal treatment, or at least that the applicant had not proved this[955].

However, it should be noted that in other cases, the European Court of Justice has undertaken a wider interpretation of the notion of unequal treatment, and thus found that even direct contracting, without application of any procurement procedures in a field where they were required, constitutes not only a violation of the obligation to tender, but also inherently an unequal treatment of the operators not invited to contract[956]. This very wide understanding of equal treatment would seem to reinforce the risk of a mantra effect, as set out below.

However, in its case law the Danish complaint board has more leaned towards the above finding that when conditions are equally bad for all operators, there is no issue of discrimination, even where the conditions may be illegal under other aspects of law that remain outside of the competence of the board[957]. This has even applied, where the issue was uncertainty as to the tender conditions, which were suffered equally by the operators, but where it might have been argued that this at least violated the transparency requirement, which as set out above forms part of equal treatment[958].

In the field of gender discrimination, which in itself transcends the issue of nationality, the limitation in the EC Treaty is that the rule applies only to wage related issues. The European Court of Justice has undertaken a wide interpretation of the wage concept, such as

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[954] Case C-412/04, Italy, point 106
[955] Case T-250/05, Evropaiki Dynamiki, point 51
[956] Case C-410/04, ANAV, point 22
[957] Case N-941118, Danmarks Optikerforening, point 2
[958] Case N-950622, Kommunernes Gensidige Forsikringsselskab, point 4

to include also pension elements[959]. However, there are limits to such interpretation, and the court has confirmed that other aspects of gender discrimination are regulated only by the specific gender directives[960]. Accordingly, the application of the general principle on gender discrimination depends on either the directives having been correctly implemented or the discriminating conduct being performed by a public entity.

This limitation on the direct effect of directives has in turn led to the concept of emanation of state, so as to widen the field of direct applicability[961], and the definition of contracting entities in the EU public procurement directives may in turn be seen as a partial codification of the emanation of state concept.

In conclusion, the case law in these two fields, on nationality and gender based discrimination, confirmed that there was no general principle of equal treatment implied by the EU treaties. This was then the radical departure in the Telaustria principle[962] that the equal treatment requirement, introduced in procurement law by the EU directives, was been re-exported into the general principles of EU law. The European Court of Justice since started referring to a general principle of equal treatment also in other relations[963].

The situation in relation to procurement law had some features similar to that of human rights protection in EU law[964], where, based on the assumption by all the member states of their individual obligations towards the European Human Rights Convention, the European Court of Justice found basis for introducing the principle of that convention as a general part of EU law, as later codified in the EU Treaty[965]. The next step, somewhat similar to the Telaustria re-exportation, was the conclusion that henceforth the member states were obliged not only by the convention as such, but also by the principles as integrated into EU law, which would apply whenever the member states were applying EU law, whether directly or through national provisions[966].

The generalisation of the equal treatment principle, and its adjunct in the form of the transparency principle, has from a legal certainty point of view had a curious side effect. Equal treatment and transparency has to some degree become a mantra, and much of the reasoning of the Danish complaint board refers only to these general principles, even where more specific might be quoted. However, this is not a specific Danish issue, and the European

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[959] See judgment of 25 May 1971 in case 80/70, Defrenne, ECR 1971, p. 445, point 4
[960] See judgment of 3 December 1987 in case 192/85, Newstead, ECR 1987, p. 4753, point 28
[961] See judgment of 12 July 1990 in case 188/89, Foster, ECR 1990, p. i-3313, point 20
[962] Case C-324/98, Telaustria
[963] See judgment of 15 May 2008 in case C-276/07, Delay, ECR 2008, p. i-3635, point 19
[964] For a discussion on application of human rights in procurement law, see Arrowsmith (6)
[965] See article 6 of the EU Treaty
[966] See judgment of 15 October 1987 in case 222/86, Heylens, ECR 1987, p. 4097, point 14

Court of Justice has specifically reacted to this mantra side effect by underlining that the transparency principle should not be referred to as the basis for legal decisions when other provisions regulate the issue at hand[967].

This has also given a problem for the creation of the matrix applied in the present project, as a registration under equal treatment for all cases that referred to this principle would skew the distribution results. On the other hand, where the judicial body explicitly referred to the equal treatment provisions of the directive, it seemed incorrect to set aside this reference. The solution, which must be a compromise, was to register under equal treatment only such cases that either manifestly concerned the principle or explicitly referred to provision codifying that principle in one of the EU procurement provisions. Accordingly, cases with only a general reference to the principle were instead registered under the actual provisions that would seem to apply.

This still left a large number of cases, that would have to be registered under equal treatment, but which concerned rather different issues. For that reason, apart from a general registration for equal treatment, specialised registrations were introduced for topics such as transparent indication of tender conditions, late requests and tenders, noncompliant requests and tenders, conflict of interest, and contact and negotiation with operators. Other issues have been left under general aspects of equal treatment, such as the question of whether a change between the secretariat recommendation and the final authority decision in relation to the contract award constitutes a violation of equal treatment. The Danish complaint board found this to be the case, where no objective justification for the change was presented[968].

4.2.2 General application

4.2.2.1 Nationality discrimination

The object of equal treatment in EU public procurement is to create a level playing ground, on which competition between operators may take place on equal terms, and transparency ensures that supervision may be carried out of adherence to both the equal treatment principle, the other provisions of the EU directives and EU law in general[969].

This applies both inside the EU procurement directives, and also to contract award outside the directives, as governed by the Telaustria principle[970], where the full set of procurement provisions do not apply. However, the less transparent the contract award

[967] Case C-399/05, Greece, point 50
[968] Case N-9710129, Esbjerg Andels Renovationsselskab, point 1
[969] Case 133/80, Italy, point 2, and case C-470/99, Universale-Bau, point 89
[970] Case C-324/98, Telaustria

proceedings are, the more concern is raised about the potential breach of equal treatment and non-discrimination[971].

Especially, the formality of the procurement procedure is to ensure that contracting entities governed by public law are not, in their allocation of contracts, guided by considerations other than economic criteria[972]. This also explains the willingness to exclude sectors subject to competition, as dealt with above, as the economic pressure of competition is assumed to be sufficient to prevent the taking of such non-economic criteria, thus making procurement procedures superfluous. This would seem to be a somewhat simplistic economic assumption that might well be subject to closer inspection in the individual cases.

However, transparency also serves a more direct supporting role for the competition between competitors, as the obligation of transparency also serves to ensure that operators are given adequate information, so as to allow for an effective competition[973]. This information aspect of transparency is dealt with below[974].

The requirement of equal treatment is especially important since the EU procurement directives supposedly do not constitute total harmonisation, but only partially harmonizes procurement procedures, leaving the remaining elements to be regulated by national law[975]. However, as set out above[976], that has not been the understanding in Danish implementation legislation, which largely restrains itself to setting the EU directives into force as part of Danish law.

The clearest form of unequal treatment is naturally discrimination based on nationality, such as directly by requiring operators to have the nationality of the contracting entity, or indirectly by requiring the operators to be dominated by the state, through ownership of the share majority[977]. It may be noted that in itself the criterion of domination is a necessary, but insufficient, element in defining the contracting entity and the operator as in-house, so as to avoid any procurement obligation[978].

The extension from non-discrimination to equal treatment was not formally included in the original EU procurement directives, but was introduced only with the first generation utilities directive[979], subsequently in the first services directive, belonging to the second

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[971] Case C-20/01 & C-28/01, Germany, point 63
[972] Case C-285/99 and C-286/99, Impresa Lombardini, point 36, and case C-411/00, Swoboda, point 45
[973] Case C-513/99, Concordia, point 92
[974] See below in section 4.2.3
[975] Case 31/87, Beentjes, point 20
[976] See above in section 3.4.1
[977] Case 3/88, Italy, point 30
[978] See above in section 4.1.5.4
[979] See article 4.2 in directive 90/531 (U1)

generation[980], and only after a further five years inserted by amendment into the second generation works[981] and supplies[982] directives.

However, the development of the equal treatment in the case law of the European Court of Justice was concurrent with the formal introduction into the first generation utilities directive, and already at this time interpreted as a fundamental procurement principle applying to all the EU procurement directives. In the case concerning the Danish Great Belt Bridge, the court relied on the preamble to the first generation works directive[983] in finding that transparent competition was an important objective of the directive, and accordingly that although the directive made no express mention of the principle of equal treatment, the duty to observe that principle was fundamental to the directive[984].

Likewise, while the transparency principle was joined to the text of the equality principle only in the third generation directives[985], the European Court of Justice already concurrently with the implementation of the second generation directives established that transparency is an adjunct to equal treatment[986], and again linked this finding to the text of the preamble, in this case of the first utilities directive[987].

The wording of the second generation directives was limited to protecting the equal treatment of tenderers, who form a sub-group of operators, being those that have submitted bids, as opposed to candidates, being those have requested preselection[988]. Only with the third generation directive was the text of the equal treatment provision expanded to cover all operators. However, the European Court of Justice undertook a wide interpretation of the concept tenderer in the second generation provisions[989], so as encompass also potential tenderers, which would seem to coincide with the concept of candidate, although in some cases the focus would seem narrower[990].

4.2.2.2 Imposed structural discrimination

An interesting question in this connection is the range of the equal treatment principle of the EU procurement, especially when applied not to discriminatory procedural steps within

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[980] See article 3.2 of directive 92/50 (S2)
[981] See article 6.6 of directive 93/37 (W2) as amended by article 3.1.b of directive 97/52 (C2A1)
[982] See article 5.7 of directive 93/36 (G2) as amended by article 2.1.b of directive 97/52 (C2A1)
[983] See point 9 of the preamble to directive 71/305 (W1)
[984] Case C-243/89, Denmark, point 33, as confirmed in case C-470/99, Universale-Bau, point 92. For a discussion on the former case, see Martin (1) and Raley (1)
[985] See article 2 of directive 2004/18 (C3), and article 10 of directive 2004/17 (U3)
[986] Case C-87/94, Belgium, point 53
[987] See point 33 of the preamble to directive 90/531 (U1)
[988] See article 1.8.3 of directive 2004/18 (C3)
[989] Case C-16/98, France, point 104

the procurement procedure, but rather to discrimination following from pre-existing conditions. In a case concerning procurement by the European Parliament, it was claimed that the parliament should have taken into consideration a difference in treatment of operators in French law, which entailed that there was no equal treatment of these two groups in the parliament procurement.

The European Court of Justice refused this argument, finding that applicant had not established any manifest misunderstanding by the parliament of French law[991]. This would seem to indicate that if there had been such misunderstanding, the parliament would have to accept responsibility for any unequal treatment following from the misunderstanding. However, the continued reasoning of the court seems to negate this conclusion.

The court continues by stating that the European Parliament cannot assume responsibility for the state of French law, over which it has no influence, and accordingly that its equal treatment responsibility is limited to a non-discriminatory application of the award criteria set in the tender documentation. The Danish complaint board, it may be argued, seems in one case to have followed this same line of reasoning in finding that where discrimination by Danish authorities took place prior to the commencement of the procurement procedure, that discrimination would not be covered by the scope of the complaint board competence[992].

The reasoning of the board may be seen as purely procedural, relating to the designated competence of the Danish complaint board, but if so it would seem to indicate an unsatisfactory implementation of the remedies directive[993]. If, alternatively, the reasoning is seen as one of substance, following the reasoning of the European Court of Justice, it would also fall short, as the Danish state would have collective responsibility for both the preceding discrimination and the subsequent procurement, and the separation of competence, as between the European Parliament and the French state, would thus not be present.

Thus, in a case concerning France, the European Court of Justice carefully analysed whether the national legislation on agents in itself entailed a violation of the second generation service directive in relation to equal treatment, and the court arrived the conclusion that as the law reserved the role of agent to exhaustively listed categories of legal persons

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[990] Case C-19/00, SIAC, point 34
[991] Case T-139/99, Alsace, point 53
[992] Case N-071221, Damm, point 2
[993] This will be dealt with in the following part of the project

under French law, this did entail a violation of the equal treatment provision of the directive[994].

Even further, the argument of the European Court of Justice, concerning separation of powers, would seem flawed in this respect, as the reproach entered against the European Parliament in the abovementioned case would not be one of responsibility for the state of French legislation, but instead would be for not taking this state of law into consideration when designing the tender conditions. This issue is dealt with separately in relation to state aid[995].

Only in this limited sense could the reference to manifest errors of assessment seem relevant. If the European Parliament had assessed the state of French law, and thus found that no special consideration was necessary in designing the tender conditions, and it was subsequently found that this assessment was incorrect, it might be claimed that the parliament would escape responsibility of the error of assessment was not manifest. However, this would assume that responsibility, for EU public procurement violations, was subjective and not objective, which is the general norm for internal market violations. This subject is dealt with separately in relation to the issue of good faith[996].

It is important in this connection to distinguish between the subject of good faith, as in misunderstanding underlying facts and legal issues, and the margin of appreciation that appertains to any contracting entity when making an award decision. The European Court of Justice has confirmed, in the field of Community procurement, its general approach to administrative review, under which it will limit the test of the decisions to whether they are any manifest errors committed[997]. The use of the word manifest is thus different here, referring not to any standard of good faith, but to the outer borders of the area of appreciation that the procurement rules leave for contracting authorities.

A different perspective on this issue is offered by the relation between transfer of undertakings and public procurement. Thus, the fact that the winning operator may be obliged to take over staff from a previous contract holder, to the extent that a transfer of undertaking is deemed to take place, cannot in itself be viewed a discriminatory element in the procurement, but must be viewed as a legislative fact that the operator should take into consideration when submitting a bid, even though this will naturally be easier to do for the existing contract holder, if this operator is also submitting a bid for the new contract.

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[994] Case C-246/03, France, point 61
[995] This will be dealt with in the following part of the project
[996] This will be dealt with in the following part of the project
[997] Case T-169/00, Esedra, point 95

According to the European Court of Justice, the inequality in conditions, as compared between the existing contract holder and new operators submitting a bid, is inherent in the contractual structure. This still leaves open the question, whether the contracting entity has any obligation to take the issue into consideration when designing the tender conditions. The European Court of Justice does not explicitly address this issue, but just, somewhat lamely, notes that the difficulties for new operators may be offset by the difficulties for the existing contract holder in having to reassess operating principles when submitting a new bid[998].

More specifically, the Danish complaint board has dealt with this issue in a procurement procedure, where the tender conditions specified that the economic risk related to the level of salary, at which employees taken over from the present contract holder were to be placed, should not be held by the operators. The reasoning for this provision was a wish to avoid a competition based on salary levels, and accordingly fixed salary levels were indicated in the tender documentation. However, this mechanism would not apply to the present contract holder, if this operator should choose to bid also for the new contract, which would constitute an advantage or disadvantage, depending on whether the actual salary levels were above or below the fixed levels[999]. This was found be a violation of the equal treatment principle, and thus illustrates the obligation of the contracting entity to take structural issues into consideration, in a comprehensive manner, when planning the tender conditions[1000].

Likewise, the Danish complaint board found that tender conditions, which required contract performance 2 months after the deadline for submission of bids, constituted a violation of equal treatment, since the contracting entity should have taken into consideration that permission for the activity concerned, transportation of waste, in Germany could be submitted only on the basis of an actual contract and would take at least 1 month to process[1001]. It was not found that contracting could be expected to be completed within 1 month from the submission of bids, especially since the Christmas holidays were placed within that period.

In the relation between different parts of EU law, the European Court of Justice has not had occasion to rule on the obligation, when preparing tender conditions, to take the structural limitations imposed by other EU legislation into consideration[1002]. However, it has ruled in reverse that the obligations flowing from the EU procurement procedural provisions

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[998] Case C-172/99, Liikenne, point 24
[999] Case N-000621, Arriva Danmark, point 8, upheld in supreme court case H-070511
[1000] Case N-000621, Arriva Danmark, point 17, upheld in supreme court case H-070511
[1001] Case N-041122, Dansk Restproduktion, point 6
[1002] For a discussion of relations between procurement procedures and EU safeguard measures, see Brown (15), as well as the later discussion in Brown (1)

cannot impact on the interpretation of the scope of application for other elements of EU legislation[1003].

Somewhat parallel to this issue is the question of whether contracting entities have any obligation to ensure respect for legislation by the operators, at the time of reviewing requests or bids. The European Court of Justice has not had occasion to rule on this issue, which however has be dealt with by the Danish complaint board[1004].

4.2.2.3 Natural structural discrimination

Different from the issue of unequal conditions imposed by legislation, whether within or outside of the responsibility of the contracting entity of the member state to which it belongs, is the issue of natural advantages, which an operator may have acquired by positioning in the market. The European Court of Justice has ruled in this respect that the mere fact, that only a limited number of operators is able to meet the tender conditions is not in itself proof of any violation of the equal treatment principle[1005], and this even applies where the only company able to fulfil the conditions is one belonging to the contracting entity, which is dealt with further below[1006].

The Danish complaint board has likewise found that the fact that a specified product, to be used in a works project, was available only from one of the operators bidding for the contract, did not in itself constitute a violation of the equal treatment principle[1007]. The board placed emphasis on the fact that the product was available in general trade, and the case may thus be distinguished from a later case, where an essential facility was held by an operator, and was not available in general trade, but where the board found this issue to fall outside its competence[1008].

Likewise, the European Court of Justice has found that the advantage gained by an operator, in taking the present contract holder as a subcontractor in bidding for a new contract, does not as a point of departure constitute an element of discrimination, which the contracting entity would to some degree have to counteract in setting the tender conditions[1009]. Although the conclusion in this case was negative, it may also be seen as a confirmation that under other conditions, the contracting entity may be responsible for

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[1003] Case C-379/01, Pfeiffer, point 73
[1004] See below in section 4.2.5.3
[1005] Case C-513/99
[1006] This will be dealt with in the following part of the project
[1007] Case N-030527, M.J. Eriksson, point 8
[1008] See above at footnote 992
[1009] Case T-345/03, Evropaiki Dynamiki, point 73. For a discussion of the case, see Braun (2)

counteracting the discrimination resulting from the advantages held by certain bidders. Thus, the above finding in relation to a limited field of eligible operators must be read in the form that the limitation of the field does not, on its own, constitute a sufficient body of evidence for unequal treatment, but that it may well serve to raise suspensions, warranting further consideration of whether any discrimination has taken place.

As a special case, the Danish contracting entity undertook a survey of the Danish market for technical equipment, and apparently planned its procurement of such equipment to coincide with an advanced stage of development in Danish industry. The Danish complaint board refused an argument that by not also considering the stage of development in other member states, the contracting entity was in fact violating the prohibition on discrimination in the EU public procurement rules as well as the internal market provisions[1010].

4.2.2.4 Impact of discrimination

In relation to unequal treatment forming part of the procurement procedure, the European Court of Justice has adopted, in relation to Community institutions, a flexible approach, assessing the actual impact of the treatment on the outcome of the procurement. Thus, where operators were treated differently in relation to information about extension of the deadline for bids, the court arrived at the conclusion that the difficulties experienced by the operator, informed later that the other operators, did in fact not result from the late information, but rather from internal problems of the operator concerned[1011].

In addition, the burden of evidence would not appear to shift in such cases, as opposed to cases concerning gender treatment[1012]. Although the operator is able to establish that unequal treatment has taken place, by late distribution of information to the operator concerned, it still remains for that operator the impact that this may have had on the bidding, although it would seem to be sufficient that the operator established a case based on probability and circumstantial evidence[1013].

Thus, in a specific case the applicant applied a computer programme to demonstrate the implication of the missing information on the prices that the applicant had set in its bid, and in this manner convinced the court of its claim that the missing information had a substantial impact on the procurement procedure[1014].

[1010] Case N-080331, Cowi, point 2
[1011] Case T-169/00, Esedra, point 43
[1012] See judgment of 13 May 1986 in case 170/84, Bilka, ECR 1986, p. 1607, point 30
[1013] Case T-332/03, ESN, point 176
[1014] Case T-345/03, Evropaiki Dynamiki, point 196

In relation to compensating measures, where the contracting entity, by mistake, had indicated an extended deadline for the submission of bids in the tender documents, the Danish complaint board noted that the contracting entity had avoided a potential discrimination of those bidders, who based on the earlier deadline set contract notice had not requested the tender documents, by reverting to the original deadline in a message sent to all bidders, who had received the tender documents[1015].

This approach has also been applied to other errors in the tender documents, that would as such constitute discrimination, but which were corrected in time[1016]. In the case concerning the Danish Great Belt Bridge, the European Court of Justice found such corrections not to have been undertaken in time[1017].

4.2.2.5 Changes to tender conditions

The Danish complaint board has applied a limit for how much the tender conditions may be amended during the procurement procedure, without discrimination of potential operators taking place[1018]. The approach of applying a limit has also been adopted to prohibit changes in the composition of consortia subsequent to preselection[1019]. However, the board has also operated a de minimis or impact assessment approach, accepting that if the combined effect of changes made was not significant, then the changes did not constitute a violation of equal treatment[1020].

This analysis may be correct in the specific case, but in relation to effective enforcement of the EU procurement rules it might be seen as a dangerous avenue to open, even though the use of this avenue has since been confirmed by the European Court of Justice, both when finding an impact[1021] and when finding no actual impact[1022]. Although the specific case concerned Community procurement, this was at the time regulated by the EU procurement directives. The conclusion, based on a criterion of no substantial impact, would also seem to deviate from the norms of the internal market, where even an indirect and

[1015] Case N-961016, Danske Vognmænd, point 5
[1016] Case N-980317, Konkurrencestyrelsen, point 2
[1017] Case C-243/89, Denmark, point 26
[1018] Case N-961118, European Metro group, point 16 (upheld in the supreme court case H-050331), and case N-98-1120, Seghers, point 2
[1019] Case N-9980309, Foreningen af Rådgivende Ingeniører, point 2
[1020] Case N-981203, Højgaard & Schultz, point 5
[1021] Case T-345/03, Evropaiki Dynamiki, point 190 and 204
[1022] Case T-322/03, ESN, point 151, 156, 174 and 175

potential barrier to free movement constitutes a violation[1023], unless exempted by mandatory interests[1024].

An interesting mix of potentially illegal criteria and subsequent changes was presented in a case concerning a requirement in the tender documentation to indicate key staff to be employed in the performance of the contract, which was also made an award criterion. As set out below, this criterion may be argued to violate the Lianakis principle[1025], although it is still being applied by the European Commission[1026]. However, the Danish complaint board did not raise this issue, but instead found that the non-application of the key personnel criterion constituted a violation of equal treatment, as this amounted to a change in the tendering conditions[1027].

In relation to changes made to the tender conditions subsequent to the deadline for submitting bids, the Danish complaint board has confirmed that this would constitute a violation of equal treatment and transparency[1028]. The question of the extent, to which errors in the original tender conditions may justify cancellation of the procurement procure, is dealt with separately[1029].

This line of reasoning was also followed in a case, where the contracting entity tried to compensate for the fact that there was uncertainty as to whether bids were to be based on the specifications outlined in the tender document or on a European standard. After finding differences in the bids, the contracting authority decided on a partial cancellation of the procurement, based on certain sections of the European standard, and in addition to ask the operators for supplementary bids based on new specifications, whilst holding the operators to be bound by their bids on the parts of the procurement that were not cancelled.

As the tender conditions in general offered the operators some leeway in composing their bids, this entailed that the implications, of the partial cancellation, supplementary invitation, and upholding of the remaining part of existing bids, would affect the operators in different ways. Accordingly, the complaint board found a violation of the equal treatment requirement[1030].

The situation is somewhat different for information, which may be relevant for the procurement, but is left out of the tender documentation, although it has become available to

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[1023] See judgment of 11 July 1974 in case 8/74, Dassonville, ECR 1974, p. 837, point 5
[1024] See judgment of 20 February 1979 in case 120/78, Rewe, ECR 1979, p. 649, point 8
[1025] Case C-532/06, Lianakis
[1026] This will be dealt with in the following part of the project
[1027] For a discussion of the limits imposed by the Lianakis principle, see Frank (1)
[1028] Case N-041012, Køster Entreprise, point 13, upheld in the appeal court case O-051219
[1029] This will be dealt with in the following part of the project
[1030] Case N-060905, Joca Trading, point 29

the contracting entity shortly before publication of the contract notice. The Danish complaint board has found such an omission of information to violate the principle of equal treatment and transparency[1031].

4.2.2.6 External issues

As a mirror image of the above, concerning the possible obligation of the contracting entity to take structural issues into consideration when designing the tender conditions, the question may be raised to what extent the contracting may or must take such issues into consideration when preselecting operators or awarding contracts.

As a point of departure, this issue is regulated by the provisions on preselection and contract award, which require the criteria to be stated in the tender documentation[1032], but the issues remains whether they may or must be taken into account when evaluating the extent to which a bid meets the published criteria.

In relation to a procurement procedure for heating and water consumption measuring equipment, the tender conditions did not include communication equipment to be used in connection with the measuring equipment. However, one unsuccessful operator claimed that only more expensive communication equipment could be used with the measuring equipment of the winning operator, and that this should have been taken into account. The Danish complaint board ruled that the contracting entity was not obliged to take this issue into consideration, but did not indicate whether doing so would have been acceptable[1033].

However, in a previous case, where an operator had included in the bid an undertaking to give economic support to activities outside the scope of the current procurement, the Danish complaint board found that to take this commitment into consideration, at the stage of contract award, would constitute a violation of the equal treatment requirement[1034]. In the same line, the board found that requirements on the operators to give in their bids about discounts, which relate to products outside the scope of the current procurement, would constitute a breach of equal treatment[1035].

It seems clear that the bid of an operator cannot be made conditional on the operator subsequently being awarded other contracts, as an undertaking to this effect would constitute a breach of the procurement obligations of the contracting entity in relation to such later

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[1031] Case N-080710, European Land Solutions, point 3
[1032] See article 44.1 of directive 2004/18 (C3)
[1033] Case N-041216, Brunata, point 30, upheld in the appeal court case VK-060613 & V-070306
[1034] Case N-040506, Sereno Nordic, point 5
[1035] Case N-061214, Baxter, point 52

contracts. The issue was raised in a case before the Danish complaint board, but the argument was refused on lack of evidence[1036].

4.2.2.7 Comparable situations

When applying the principle of equal treatment, a grey border line area is inherent in the very definition of equal treatment, which requires that comparable situations must not be treated differently and different situations must not be treated in the same way[1037], unless different treatment is objectively justified[1038].

In addition to this possibility of objective justification, the field of application of the equal treatment requirement can be widened or diminished depending in the manner in which situations are deemed to be comparable or not. Thus, in a case concerning potentially late bids, where the operators whose envelopes had illegible postmarks were offered an occasion to explain their delivery, an operator whose bid was nonconforming in substance was not offered any such occasion. The court stressed that the postmarks were an external issue, that was different from the internal issue of noncompliance, and thus that the operators were not in comparable situations[1039].

In the case of a requirement to have certain public certifications, the European Court of Justice found that by definition an operator without the certifications was in a different situation than an operator with such certifications, and thus that there was no immediate discrimination in the choice on the operator with certifications[1040].

However, while there is internal logics in this conclusion, which could also be reached by regard the operator without certificate as non-conforming, there remains a questions of whether the requirement of certifications was really relevant to the procurement, and if not so, then the requirement could in itself be regarded not only as disproportionate, but also as discriminatory.

This would seem to be supported by the finding of the European Court of Justice that not only in the conduct of the procurement procedure, but also in the drafting of the tender conditions must the equal treatment requirement be respected[1041].

[1036] Case N-081016, Grønbech Construction, point 6
[1037] Case T-345/03, Evropaiki Dynamiki, point 61
[1038] Case T-125/06, Centro Studi, point 82, and case C-21/03, Fabricom, point 27. For a discussion of the latter case, see Hayken (1) and Treumer (3)
[1039] Case T-195/03, Deloitte, point 110
[1040] Case T-333/07, Entrance Services, point 133
[1041] Case C-213/07, Michaniki, point 45

4.2.2.8 Local requirements

The specific issue of discrimination, that is inherent in requirements for local establishment or other local connection, is dealt with separately in relation to the EC Treaty provisions on the internal market[1042]. However, in one case the Danish complaint board did find that a requirement for local connection with a specific municipality could only be seen as a violation of the EU procurement directive provisions on equal treatment, and not with the internal market provisions of the EC Treaty[1043].

The conclusion in these cases would not seem to be in harmony with the case law of European Court of Justice on the internal market[1044], but the conclusion was implicitly confirmed in a later decision of the board, finding that a criterion related to local area knowledge was a violation only of the EU public procurement rules[1045].

The same solution was applied even in a case requiring local establishment, thus negating services from outside the local area[1046]. In a later case, the approach taken was also only to apply the EU procurement rules against an establishment requirements[1047], but in another case the Danish complaint board has clarified its position so as to be that there is no need to consider a possible violation of the internal market rules, when a violation of the equal treatment provisions of the EU procurement directives is also substantiated[1048].

As far as justification for local requirements is concerned, the Danish complaint board has accepted that the consideration of transportation costs would permit a municipal authority to limit the procurement of medical services to operators established within the geographical area of the municipality. It was argued in the case that even application of this cost criterion would entail a need to admit also operators situated just outside the municipal area, but this argument was refused by the board[1049]. This line of reasoning does not seem to comply with the basic EU principle of proportionality.

In another case the Danish complaint board apparently found a requirement for employees of the operator to be located near the contracting entity to be unjustified, as the contract concerned was for the production of automobile license plates. However, the board did not find this requirement to invalidate the procurement, but instead effectively set aside

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[1042] This will be dealt with in the following part of the project
[1043] Case N-960123-1, Praktiserende Arkitekters Råd, point 5
[1044] See judgment of 3 December 1998 in case C-67/97, Bluhme, ECR 1998, p. i-8033, point 20
[1045] Case N-000516, Dansk Transport og Logistik, point 15
[1046] Case N-020403, Villy Antonsen, point 1
[1047] Case N-080213, Rengøringsgrossisten, point 22
[1048] Case N-021127, AON, point 8
[1049] Case N-051102, Klaus Trier, point 3

the requirement by finding that the acceptance by the contracting of a nonconforming bid not violate equal treatment[1050]. The issue of noncompliance is dealt with below[1051].

4.2.2.9 Simultaneous opening of bids

Likewise, the Danish complaint board has dealt with the specific issue of whether discrimination takes place if not all bids are opened at the same time. In Danish national procurement, the operators have a right to be present at the opening, as set out above, while in EU this is only an option, which may be indicated in the contract notice[1052]. The board found that under EU procurement procedures, when there is no contrary indication in the tender documents, it is not a violation of equal treatment that the bids are opened at different times, although the minority on the bench found this only to apply to negotiated procedures[1053].

Although the above result may be technically correct, the approach, of opening bids at different times, would seem to open a dangerous avenue, as the staggered opening would open a platform for underhand communication with operators, whose bid has not yet been opened, and thus for modification and replacement of such bids. In this relation, the minority point of view is somewhat curious, finding that staggered opening could be accepted in negotiated procedures, but the board has also in relation to non-compliancy dealt separately with negotiated procedures[1054].

In this relation it may be noted that the Danish complaint board has found that opening bids prior to the deadline would constitute a breach of equal treatment[1055]. This would seem to confirm the concern about the risk of subsequently amended bids. However, in a case involving opening a few hours prior to expiry of the deadline, the board again applied the impact criterion[1056], but did not find any possible impact[1057].

4.2.2.10 Flow of information

As dealt with below[1058], the issue of contact between contracting entities and operators during the procurement procedure raises special concerns. Where the contact is at the initiative of the operator, and concerns requests for supplementary information, it could be

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[1050] Case N-070903, SP Medical, point 9
[1051] See below section 4.2.5
[1052] See above in section 3.5.1.1
[1053] Case N-961118, European Metro Group, point 11-12, upheld in the supreme court case H-050331
[1054] See below in section 4.2.5.2.3
[1055] Case N-991215, Lifeline, point 22
[1056] See above in section 4.2.2.4
[1057] Case N-080514, Trans-Lift, point 1
[1058] This will be dealt with in the following part of the project

argued that this just reflected better bid preparation on the part of the operator concerned. However, equal treatment requirements are in this relation applied strictly. Accordingly, the Danish complaint board found that sending an operator the evaluation model to be applied in the contract award, when this model was not included in the tender documentation, would have constituted a violation of the equal treatment requirement[1059].

Likewise, the Danish complaint board has found that during the negotiated procedure, submitting information on the revised tender conditions to only some of the operators participating in a round of negotiations will constitute a violation of the EU procurement directive provisions on equal treatment[1060]. In the same manner, while insufficient transparency in the tender conditions may regarded as a violation of the transparency principle, which is dealt with below[1061], the fact, that the conditions are not transparent, does in itself create an opportunity for arbitrary discrimination, and the board has accordingly found the creation of this situation a violation of the equal treatment requirement[1062].

The EU procurement directives set requirements for communication to operators about the outcome of procurement procedures, but do not require the contracting authorities to give reasons for the award of contract[1063]. Such reasons must only be given on request from the individual operators[1064]. However, if the contracting entity should decide to include reasons already in the first communication, the Danish complaint board has found that this imposes an obligation to correctly reflect the reasons applied during the contract award[1065]. The statement of reasons in the first communication has now become mandatory in Denmark[1066].

Although the EU procurement directives set requirements for deadlines for submission of supplementary information to the operators[1067], there are no rules specifically concerning the deadline for answering questions from the operators. However, the Danish complaint board found this issue to be regulated by the equal treatment and transparency provisions, and thus found late answers to constitute a violation[1068].

In an opposite manner, the contracting entity in another case required prices to be based on catalogue values predating the launching of the procurement. The operators were

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[1059] Case N-991027, Humus, point 4, as upheld in the appeal court case V-010507
[1060] Case N-010914, Judex, point 8, and again in case N-020703, Judex, point 1, as upheld in the appeal court case V-040316, Århus Amt
[1061] See below in section 4.2.3
[1062] Case N-011124, Eiland Electric, point 4
[1063] See article 41.1 of directive 2004/18 (C3)
[1064] See article 41.2 of directive 2004/18 (C3). For a discussion on the obligation to give reasons, see Braun (1)
[1065] Case N-061026, Novartis Healthcare, point 9
[1066] See above in section 3.4.4.1.1.3
[1067] See article 39.2 of directive 2004/18 (C3)
[1068] Case N-070426, MT Højgaard, point K2

thus effectively blocked from adjusting prices to the tender conditions, which only subsequently became known, and the Danish complaint board found that this violated both the deadline provisions[1069] and the equal treatment requirements of the EU directives[1070].

4.2.2.11 Renewed procedures

A very specific aspect of the equal treatment requirement is whether it also applies in a temporal space, and thus whether in case a procurement procedure has been cancelled, and the contracting entity decides to open a new procedure, that contracting entity should be bound to reapply the same tender conditions, with exception of such that were found to be contrary to EU public procurement law in the first procedure. The Danish complaint board has found that there is no basis for a claim of unequal treatment in case the tender conditions of the renewed procurement procedure are changed in comparison with the original procedure[1071].

Differently, the Danish complaint board has found that where a restricted procedure, under national procurement legislation, is cancelled due to errors in the tender documentation, the contracting authority is obliged, as a point of departure, to re-invite the same operators, However, if new grounds for refusing preselection are discovered during the intervening period, they may be applied[1072].

4.2.2.12 Negotiated procedures

For the third generation classic field, the EU legislator decided to restate the equal treatment requirement in the provisions concerning application of the negotiated procedure[1073]. A similar provision is not found in the third generation utilities directive, which must instead rely on the general equal treatment provision. Likewise, this restatement was not found in previous generation, and even in the third generation classic directive[1074] such restatement was not undertaken for the new competitive dialogue procedure[1075].

There is no jurisprudence explicitly referring to this restatement, but the Danish complaint board has taken position on tender conditions that provided for a first round of negotiations with all operators, whose bids were deemed compliant, but only second round

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[1069] See article 38.2 of directive 2004/18 (C3)
[1070] Case N-080327, AV Form, point 1
[1071] Case N-021219, Joca Trading, point 1
[1072] Case N-050114, Bakkely, point 11
[1073] See article 30.3 of directive 2004/18 (C3)
[1074] See article 29 of directive 2004/18 (C3)
[1075] For a discussion of the conditions applicable to competitive dialogue, see Poulsen (2)

negotiations where this was deemed relevant. The fact that not all operators had a right to be invited to the second round was not seen as a violation of equal treatment[1076].

4.2.2.13 Participation costs

Neither the EU public procurement directives, nor the Community procurement regulation, nor the Danish national procurement legislation, entitle operators to compensation for the costs of submitting a bid. Only in connection with a claim for violation of the procurement rules may an operator claim damages to cover such costs, as dealt with separately[1077].

However, in case the contracting entity should decide to undertake such compensation, it follows from the equal treatment requirement that this must then apply to all operators participating in the procurement procedure, as confirmed by the Danish complaint board[1078].

4.2.3 Transparent indication of tender conditions

4.2.3.1 Functions of transparency[1079]

As also set out above, the European Court of Justice has found that transparency is an adjunct to, or even an integrated part of, the requirement of equal treatment[1080]. The primary function of transparency, apart from permitting supervision of the procurement procedure, is to allow operators a complete view of the procurement conditions, so as to ensure that effective competition may take place within the procurement procedure.

Transparency is regulated in several provisions of the EU directives, including those concerned with technical specifications[1081], selection criteria[1082], and award criteria[1083]. The application of the general equal treatment and transparency provision should therefore, in this relation, be limited to the issues not covered by the more specific provisions, as well as issues involving a more horizontal approach to the aspect of transparency. This would correspond to the relationship between the general non-discrimination provision in the EC Treaty and the more specialised free movement provisions of the internal market.

[1076] Case N-040621, Banverket, point 16
[1077] This will be dealt with in the following part of the project
[1078] Case N-060203, J. Olsen, point 5
[1079] For a discussion of application of the transparency principle outside the EU procurement directives, see Brown (21)
[1080] Case C-532/06, Lianakis, point 34
[1081] See article 23.1 of directive 2004/18 (C3)
[1082] See article 44.2 of directive 2004/18 (C3)
[1083] See article 53.1 of directive 2004/18 (C3)

As set out above, the general equal treatment provision has gained a certain mantra effect for the Danish complaint board, and accordingly a larger number of cases then necessary are lodged under this provision, instead of having reference to other more specific provisions of the EU procurement directives. However, following the general approach of the report, as few cases as possible are considered under the general provision.

The European Court of Justice has found occasion to follow up on its general interpretation of the transparency requirement, as set out above, by identifying 5 different aspects of transparency[1084]. The first is that in order to ensure equal treatment, any criterion or condition must be mentioned in the tender documentation. Secondly, this requirement of mentioning also aids enforcement by creating the basis for verification. Thirdly, the manner of drafting criteria and conditions must be so as to allow an average operator in good faith to understand them[1085]. Fourthly, the criteria and conditions must be given a consistent interpretation throughout the procurement, which corresponds somewhat to the limits set out above as to the possibilities of amending tender conditions during the procurement procedure. Fifthly, the criteria and conditions must be applied in an objective and uniform manner to all operators.

4.2.3.2 Transparency and equal treatment

In relation to equal treatment, the Danish complaint board has again addressed the problem of structural issues[1086]. As mentioned above, in relation to general equal treatment, the board has had different approaches in finding either that discrimination resulting from structural issues would have to be accepted, or alternatively would have to be compensated for in the designing of the tender conditions. However, in relation to the transparency requirement, the board has adopted a third approach, finding that the question, of whether a sufficient description of the tasks was presented in the tender documentation for an insurance procurement, would have to be judged independent of any restraints set out in the Danish insurance legislation[1087]. The board takes care to underline that the question of validity of such restraints remains a separate issue, falling outside its scope of competence. The end result thus becomes the same as in the second approach, requiring that external structural issues have to be compensated for in the designing of the tender conditions.

[1084] Case C-19/00, SIAC, point 40-44
[1085] This will be dealt with in the following part of the project
[1086] See above in section 4.2.2.2 and 4.2.2.3
[1087] Case N-021127, Aon Denmark, point 3

As set out above, in relation to external issues[1088], the Danish complaint board refrained from ruling whether discrimination had taken place, because of the winning operator having been promised subsequent additional work, as this could not be proved to the satisfaction of the board. A similar argument has been submitted in relation to transparency, based on the promise of additional work not having been specified in the tender documentation. Again the board refused the argument based on the state of evidence, without commenting on the legality such offers, as it found no grounds for substantiating that any such offer had been made[1089].

4.2.3.3 Transparency and competition

This application of transparency, independent of equal treatment, was confirmed in a case concerning production of different categories of license plates, each with different cost structures, where the number of expected plates in each category was imprecisely indicated. The Danish complaint board explicitly mentions that this problem was equal to all operators, and accordingly that the equal treatment principle has not been violated[1090]. However, the board continues by underlining that the lack of transparency in itself has a noticeable impact on the possibility for the operators to calculate a bid, and thus it constitutes a violation of the EU procurement rules[1091].

A different perspective on the issue of competition is whether the tender conditions may become so complicated as to effectively remove the basis for competition. In a case where the contracting entity had specified 10 lots, with implicit options to bid for one or more lots, with preselection of only a limited number of operators, and application of the criterion of lowest price, the Danish complaint board raised the issue of whether overall these tender conditions were so complicated as to violate the requirement of transparency. However, the board did not find grounds for taking a position on this issue[1092]. Instead the board reasoned that as bids for several lots must have been permitted, although this was not specified in the tender documents, the contracting entity would have to accept a joint bid were it was lower that the combined price of the lowest individual bids for each of the lots concerned. This issue of the lowest price criterion is further dealt with separately[1093].

[1088] See above in section 4.2.2.6
[1089] Case N-041006, Leif Jørgensen, point 15
[1090] Case N-070903, SP Medical, point 13
[1091] Case N-070903, SP Medical, point 18
[1092] Case N-080721, Palle W. Hansen, point 3
[1093] This will be dealt with in the following part of the project

4.2.3.4 Insufficient information

The Danish complaint board has in several cases found that the tender documentation did not contain a sufficient description of the task submitted for procurement. This becomes a special problem when an incumbent contract holder has already been performing this task, with insider knowledge, and thus will have an unjustified advantage over new operators, if the tender documentation is incomplete[1094].

The requirement of completeness applies both to issues of substance and to issues of procedure, such as the question of at which point in time documentation for compliance with tender conditions has to be submitted[1095]. A specific issue in this case concerned the use of the word approximately in connection with measurement requirements, where the applicant claimed that this wording prevented the contracting authority from verifying objectively whether the requirement had been complied withy. The board found that judging, whether the standard of approximation had been met, would lie within margin of appreciation held to the contracting authority[1096].

In general, the Danish complaint board has found, in line with the jurisprudence of the European Court of Justice, that an incomplete tender documentation does not constitute an appropriate vehicle for securing the economically most advantageous offer[1097]. Thus both the aspect of transparency for equal treatment and that of transparency for efficient procurement have been dealt with.

In continuation of the above mentioned case[1098], where prices were to be fixed prior to the end of the deadline for submitting bids, the contracting entity compounded the violation of the EU procurement directives by also distributing the mandatory form for submitting bids, which indicated the amounts to be procured, only after the point in time where prices had been fixed. Thus, the Danish complaint board found that any basis for competition had been removed[1099].

To the contrary, in continuation of the above mentioned case[1100], where elements of a bid relating to issues external to the procurement could not be taken into consideration, the board found that it was immaterial whether the operators had been made aware of the fact that such external elements could not be taken into consideration[1101].

[1094] Case N-991215, Lifeline, point 18
[1095] Case N080711, Labofa Munch, point 8
[1096] Case N080711, Labofa Munch, point 5
[1097] Case N-000927, Svend B. Thomsen, point 1
[1098] See above in section 4.2.2.10
[1099] Case N-080327, AV Form, point 3
[1100] See above in section 4.2.2.6
[1101] Case N-040506, Sereno Nordic, point 6

The board has indicated that the level of information required must placed in relation to the tasks to be undertaken by the operators, Thus, in a case where insufficiency of information was claimed in relation to the contract notice, the board found that the information given was sufficient for the limited task of deciding whether to seek preselection[1102]. However, while information in the subsequent tender documentation may be more expansive, it may not, as set out below, be contradictory.

This in turn calls for a difficult distinction as to whether additional information in the subsequent tender documentation, compared with the contract notice, constitutes a legitimate expansion on the tender conditions, an unwarranted contradiction, or a justified amendment. In a case where the tender documentation prescribed a cooperation obligation that was not mentioned in the contract notice, the Danish complaint board found this to be acceptable because it was available to all operators, who had requested the tender documentation[1103]. The board viewed this as a justified amendment, and implicit in this finding must be that the cooperation obligation was seen as a restriction of the tender conditions, and not as an element that could have made them more attractive to operators, who had otherwise chosen not to request the tender documentation.

However this logic is in itself strained, as the fact that the cooperation obligation was included, while possibly not attractive in itself, could have placed a large number of operators at a disadvantage, so that an operator, who had otherwise decided not to participate, because of the expected high degree of competition, would, if the cooperation obligation had been known, have decided to participate.

This raises the issue of to which degree operators are entitled to make such decisions based only on the contract notice, and thus to which degree the fact of not requesting the tender documentation, or submitting an application for preselection, presents an element of own risk, that must be borne by the operator concerned. This issue has not been dealt with in jurisprudence.

That fact that the tender documentation is insufficient may have implications for the application of other principles of EU procurement law. As also referred to above[1104], in a case concerning mine detection, where a phase 1 project had preceded a phase 2 procurement, the experience of the phase 1 project was to have been incorporated into the tender documentation, but was omitted in relation to wet sand, where dictation capabilities of

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[1102] Case N-080414, Damm Cellular system, point 15
[1103] Case N-080529, Hermedico, point 2
[1104] See above in section 4.2.2.5

standard equipment had been found to be more limited than generally appreciated in the market.

Accordingly, only the phase 1 contract holder had this special knowledge, for which that operator adjusted its bid for phase 2, while the operator, that ultimately won phase 2, operator had based its bid on standard equipment, which objectively did not comply with the tender conditions, based on the phase 1 experience with wet sand.

However, the board based itself on the fact that the relevant information, by an error, had been withheld from the tender documentation, and accordingly found that the contracting entity was not obliged to set aside the winning bid as noncompliant[1105]. The issue of noncompliant bids is dealt with further below[1106], but in the present case, the non-application of the non-compliance standard was seen to balance out the unfair information advantage on the side of the previous contract holder.

This appears different from the approach of the European Court of Justice, which found that the fact, that the European Commission had been late in sending specifications to an operator, did not allow the Commission to accept a late submission of the bid from that operator[1107]. However, there was in this case also a lack of balance, as the delay in specifications was only 1 day, whereas a request for extension of the deadline for bidding has been submitted by the operator concerned only after the expiry of the original deadline.

4.2.3.5 Incorrect information

The transparency requirement applies not only to incomplete information, but also to incorrect information, such as where the task submitted for procurement appears larger than is the case, because the description also includes elements that are to be procured not by the contracting entity, but by a private entity not subject to EU procurement directives, or at least not involved in the current procurement procedure[1108].

The claims related to incorrect information often involve a detailed analysis and assessment of facts, which is within the scope of competence of the Danish complaint board, but where its jurisprudence is often scarce in relation to setting out the reasoning underlying its assessment in the individual case. Thus, where the applicant claimed that while a general CPC category for cleaning of premises had been applied in the tender documentation, a more precise category for cleaning of schools should have been applied, the board merely notes that

[1105] Case N-080710, European Land Solutions, point 4
[1106] See below in section 4.2.5
[1107] Case T-40/01, Scan Office, point 31
[1108] Case N-040322, J.A, Mortensen, point K1

other institutions than schools were included in the procurement, and thus implicitly indicates that the general CPC term was relevant. However, the board does present any reasoning as to the issue of whether such other institutions might have been covered by the concept of schools[1109].

On the other hand, the board has taken a formal approach to incorrect legal references, finding it to be a violation of the transparency requirement that the tender documents referred to the provisions in the second generation service directive concerning exclusion grounds, when in fact the procurement was made under the third generation classical directive, and accordingly the second generation directives were no longer in force[1110].

As dealt with above, and also dealt with below in relation to transparency and award criteria[1111], the Danish complaint board has in some cases applied the transparency requirement independent of the issue of equal treatment. However, in relation to a case with a very brief indication of the procurement subject, while the board did find the description sufficient, it did further substantiate this finding by noting that in any case all operators had received only this brief description[1112].

4.2.3.6 Contradictory information

As in relation to contradictions in the tender conditions, the Danish complaint board at time operates a de minimis approach to such errors. Thus, in a case where the contract notice indicated a 3 year period to be contracted, the tender documentation indicated a period of either 1 or 3 years, the board found this difference to be entirely marginal and accordingly refused to rule on the claim that it constituted a violation of the transparency requirement[1113].

The same conclusion was reached in a case where the contract notice indicated a three year duration for a framework agreement, whereas the subsequent tender documentation indicated a two year duration with a possible extension to three years[1114].

At other times the board takes an apparently more formal approach, such as where a section on division into lots, in the standard form for contract notices, had not been filled out, but the information about lots was given only in the subsequent tender documents[1115]. However, it may be argued that even from a de minimis or impact point of view this would

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[1109] Case N-080212, Rengøringsgrossisten, point 19
[1110] Case N-080212, Rengøringsgrossisten, point K1
[1111] This will be dealt with in the following part of the project
[1112] Case N-080415, FSB Bolig, point 5
[1113] Case N-070212, Dansk Høreteknik, point 14
[1114] Case 081105, Brøndum, point K7
[1115] Case N-080214, Jysk Erhvervsbeklædning, point 7

have constituted an important breach, as it could dissuade smaller operators from participation.

The same approach was taken to a case where the option of alternative bids was not indicated in the contract notice, but this option and the required minimum requirements[1116] were set out only in the subsequent tender documentation[1117]. The argumentation, that this might have a negative impact on participation considerations, here becomes more strained, but is still possible.

In a case where the contracting entity tried to pre-empt any such internal contradictions between tender documents by a general statement that in any case the most wide ranging interpretation was to apply, the board found this general statement imprecise and in itself a violation of the transparency requirement[1118]. Likewise, a reference to general terms and conditions in the tender documentation, does not provide sufficient transparency when such general terms and conditions provide that they apply only to the extent not deviated from by contract. The Danish complaint board found this proviso to be meaningless in a procurement procedure[1119].

More generally, in other cases the board has simply ruled that a difference in terms between the contract notice and other elements of tender documentation constituted a violation[1120], and likewise where the contract notice failed to give a sufficient understanding of the scope of the intended contractual relationship, by referring only to a general framework agreement, while it was intended to enter into a license agreement and a maximum of five individual framework agreements[1121].

A special issue concerns the use of limits on the number of operators preselected[1122], where the number in the subsequent tender documentation is increased, compared to the contract notice. The Danish complaint board found this to be a violation of the transparency of the transparency requirement[1123], underlining the importance of the contract notice as the basis on which, across the EU, operators will decide on possible participation in the procurement.

[1116] See article 24.3 of directive 2004/18 (C3)
[1117] Case N-080229, Karl Jensen, point K1
[1118] Case N-060905, Joca Trading, point 36
[1119] Case N-071017, Triolab, point 20
[1120] Case N-070427, CT Renovation, point 6, and case N-070606, Rengøringsgrossisten, point K2
[1121] Case N-070713, Magnus Informatik, point K6, upheld in the appeal court case O-090305, J.H. Schultz Information
[1122] See article 44.3 of directive 2004/18 (C3)
[1123] Case N-081105, Brøndum, point 14

In the case concerned, the number of preselected was increased from 5 to 6, and it seems unlikely that this change would have any appreciable effect of any decision on whether to participate. However, it may be argued that the increase in itself should raise concerns as to whether the increase was made in order to be able to include a preferred operator, in view of the qualifications of the other interested operators.

4.2.3.7 Unclear information

Information that is unclear may be interpreted in various manners, leading to the information being regarded respectively insufficient, incorrect or contradictory. Accordingly, such cases will be placed under the above headings, except where the information is, although somewhat unclear, found to be sufficient, and thus only cases refuting a violation of the transparency requirement will be found under the present heading.

Thus, in relation to tender conditions concerning dates of approval for delivery in stages and found that one interpretation, which would point to a delivery date prior to the deadline for submission of bids, was so obviously inapplicable that the argument of lack of clarity, based on that possible interpretation, was to be refuted[1124].

4.2.3.8 Transparency and award criteria

In relation to award criteria, the Danish complaint board has applied what appears to be a reverse impact criterion, noting that the fact, that a sub-criterion such as quality was weighted substantially less that price, entailed that the requirement for a transparent definition became all the more important[1125]. The logics of this reverse application are not apparent.

The link to the creation of an adequate competition environment was illustrated by a case where the contracting entity included some options, which the operators might include in their bids, but did not indicate how the use of options would influence the bid evaluations, and where subsequently the contracting entity decided to place importance only on one specific option. Thus, the operators were denied a basis for designing an optimal bid, and even though this disadvantage applied equally to all operators, it was in itself found to be a violation of the transparency requirement[1126].

In a case concerning a document with amendments to the tender conditions, which also included amendments to the award criteria, the Danish complaint board found that both the status and content of the document concerned was unclear. While on closer inspection the

[1124] Case N-080331, Cowi, point 10
[1125] Case N-070212, Dansk Høreteknik, point 11

board found that the revised award criteria had been correctly applied, it also did uphold that the lack of clarity as to the status and content of the document did in itself constitute a violation of the transparency requirement[1127].

4.2.4 Late requests and bids

4.2.4.1 Bids

The internal rules of the EU for procurement by Community institutions hold a special provision under which all bids must be opened, but only if they comply with the rules concerning means of communication, including use of a double and sealed envelope, as well as deadlines for submission[1128]. The clear implication of this provision is that bids not complying with these requirements, and thus also late bids, are not to be opened, but are to be discarded.

There is no provision on this issue in the EU procurement directives, and instead the application of such a principle had to be developed within the scope of the principle of equal treatment. It would also seem obvious, that allowing de facto for an extended deadline for some, but not all operators, would constitute a difference in treatment that would be able to have a substantial impact on the procurement.

This would relate to both the actual time for preparation of bids, as well as for the risks of bid modification based on information gained after the expiry of the deadline. In this manner, the issue of late submission relates also to the issue of simultaneous opening of bids, as dealt with above[1129].

From this point of view, it is interesting to note that the issue of late bids has not been raised in a single case against a member state, nor in a single case referred to the European Court of Justice for preliminary ruling. Even the provision on Community procurement has only been interpreted on a single occasion by the court.

It may be argued that this merely illustrates the clarity of the principle, but other principles of equal clarity have been the subject of much litigation, and indeed at the national level, the issue of late bids has been raised in several cases.

In this connection it is also interesting to note that the above mentioned single case from the European Court of Justice does in fact not confirm the proposition that equal

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[1126] Case N-070829, Sectra, point 13
[1127] Case N-080429, Funder Ådalskonsortiet, point 6-7
[1128] See article 145.1 of regulation 2342/2002 (M4), as amended by article 1.28.a of regulation 1261/2005 (M4A1)

treatment would require the discarding of late bids. Instead the case has focus only on the issue that based on the provision on Community procurement, although it does not specify any sanction to be imposed on late bids, the European Commission was entitled to discard such bids[1130].

The language of the ruling is difficult, but does have focus on the entitlement, and not the obligation, of the Commission to refuse late bids. However, an inserted phrase refers to equal treatment and legal certainty, but does so without being explicit in whether it refers to rights of the operator with the late bid or the other operators. The conclusion of the reasoning is equally open, finding only that discarding the late bid would not constitute a manifest error.

This would seem to open for a discussion of whether other measures might be adopted by the contracting entity, such as the imposition of deductions in an award system based on points, which in turn would raise the issue of whether such compensating measures would have to have been set out in the tender documentation.

The argument in favour of accepting such compensating measures would be proportionality, as it might be argued that being a little late should not have such categorical consequences as refusal of the bid. However, this argumentation would only move the problem to one of how late is too late. It is proposed that the categorical principle, that any lateness is too late, in the long term serves the procurement system better.

This has also been the apparent basis for the Danish complaint board, which in a case referred to the fact that the EU procurement rules require the contracting entity to define both a deadline for submission and a time for opening of bids[1131]. The case concerned a bid, that arrived after the opening of other bids, but were the operator concerned claimed that it had been posted in due time. The post office could not confirm when the letter had been received for postal service, but did confirm that if it had been posted on the date claimed, it should under normal circumstances have been delivered in time.

The board placed emphasis on whether the bid was present at the address indicated as the place for opening of bids, at the time indicated for such opening, and finding this objectively not to be the case, the board ruled that the bid should have been refused. This would seem to leave open 2 issues. Firstly, it did not deal with whether the principle of force majeure would apply, which in turn would have raised the issue of whether any possible error committed by the postal services might be considered an external factor, or whether the

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[1129] Se above in section 4.2.2.9
[1130] Case T-202/08-R, Centre de langues, point 45

choice by the operator of use transmission by the postal service made any error committed by that service an internal error, for which the operator could not claim force majeure. In the present case there would in any case have been an issue with proof of submission to the postal authorities, as set out above.

Secondly, the decision did not take position on whether submission after the deadline, but prior to the opening of the bids would be acceptable. The wording of the ruling would point in this direction, as it clearly pointed to presence of the bid at the place of opening, at the time of opening, as the deciding factor. The issue of equal treatment in relation to other operators, with bids submitted within the deadline, was not referred to at all.

*4.2.4.2 **Extension***

As far as changing the deadline is concerned, the Danish complaint board has ruled that unilateral action by an operator is unacceptable. Thus, a reservation in a bid, by which final project materials would be submitted only 2-3 months after the deadline not only entitled, but also required the contracting entity to discard the bid, however without any indication of the legal basis for this conclusion[1132].

In the same line of reasoning, the board found that a request from a single operator, for an extension of the deadline for submission of bids, did not constitute sufficient grounds for granting such extension, even where it was applied to all operators. The reasoning of the board referred exclusively to the provision on opening of bids in the national law on procurement, and did not mention the principle of equal treatment[1133].

The first reference to equal treatment came in a later case the same year, where an extension of 15 minutes was granted 2 minutes after expiry of the deadline in the contract notice, and where only the bid of the winning operator was received during that extended time. In its reasoning the Danish complaint board underlines that this constituted discrimination of both the other operators, who had submitted bids in time, and other operators, who had chosen, maybe because of the set deadline, not to submit bids, although the main legal reference was to the national procurement law provision on deadlines, with the equal treatment provision referred to only as an adjunct[1134].

[1131] Case N-960221, IBF Nord, point 1
[1132] Case N-960426, E. Pihl & Søn, point
[1133] Case N-030527, M.J. Eriksson, point K1
[1134] Case N-031121, Harry Andersen & Søn, point 2, as upheld in the appeal court case VK-050228

In practice it would seem difficult to argue that the 15 minute extension could in itself be seen to have any discriminatory impact, and the case thus would seem justified instead on the assumption that the winning bidder from the outset had been the preferred bidder, and the extension was introduced only to allow for selection of this bidder.

In a similar case, where the again the extension granted was 15 minutes, the concern was that 3 out of 5 operators, due to an error on their side, would not be able to submit their bids in time, although the decision to extend this time was made shortly prior to the original deadline and not subsequent to it. The Danish complaint board ruled explicitly, and only on the basis of the equal treatment provision in the national procurement law, that this extension in itself constituted unequal treatment, but has the 3 operators concerned had in fact submitted their bids prior to the original deadline, no consequences were drawn from the violation in relation to the extension of the deadline.

In its ruling, the board explicitly underlined that while the concern about possibly missing bids from 3 bidders could not justify an extension of the deadline for submission, the board did not take position on whether such concern could have justified cancelling the procurement. In a later case, where several operators had made calculation errors in the underlying forms, which led to the final bid price, the board found that this could not serve a justification for a cancellation, as the operators would in any case have been bound by the final price. Instead the contracting entity should have inspected whether the errors would have lead to any of the bids having to be refused. This issue of cancellation is further dealt with separately[1135].

In spite of the above very formal approach to the deadlines, the Danish complaint board has accepted that the contracting entity may allow for operators to supplement their bid subsequent to the deadline for submission, and that this issue is not regulated or prohibited by the EU procurement directives[1136].

In a similar manner, the board found that an oral agreement on supplementary transport services, following a main procurement for ad hoc transport services, could not be seen as part of the original procurement, and that the agreement accordingly could not be claimed to be based on a late bid[1137]. The additional services were apparently regarded as a lot, falling below the special threshold for servicer lots[1138], without any consideration of whether such lots may be defined after the main procurement, or whether the rules on

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[1135] This will be dealt with in the following part of the project
[1136] Case N-060706, Logstor, point 15
[1137] Case N-070821, Centralforeningen af Taxiforeninger i Danmark, point 1
[1138] See article 17.6.a.2 of directive 2004/17 (U3)

unforeseen additional needs should rather apply[1139], nor indeed of whether the utilities directive might apply to ad hoc transportation, that would not seem to form part of a network[1140].

*4.2.4.3 **Requests***

The application of deadlines applies not only to bids, but also to requests for preselection. In a factually complicated case, a first procurement an operator sought preselection, but the procurement was cancelled, and in the letter announcing the cancellation, the operator was informed that documentation submitted for preselection would be returned. However, this was an error, as it was not the intention to return such documentation. As it was not returned, despite the indication in the letter, the operator assumed that it was being kept for the re-launch of the procurement, which had in the meanwhile be commenced, and this understanding was seemingly confirmed by subsequent telephonic enquiries from the contracting entity as to the company law status of the operator.

The operator replied in writing to these enquiries, which, on the date of expiry of the deadline for requests, prompted the contracting entity to remind the operator by email that no renewed request for preselection had been received, but to add to the confusion the reminder again incorrectly referred to the original material as having been returned. Apparently unrelated to this exchange, the applicant had the day before made a formal request for preselection, referring to the previously submitted materials, but sent by ordinary mail, so that it arrived only the day after the expiry of the deadline.

Finally, to compound the confusion, the operator had been under the impression that the deadline for request had expired at the beginning of the day concerned, and not as in fact at the end of that day, and that accordingly the email from the contracting entity had been sent after expiry of the deadline. It is not clear how the operator intended to rely on this misunderstanding, but it may have been offered as an explanation as to why, on the last day of the deadline, no further efforts were made to get the request delivered in time.

Based on this set of facts, the Danish complaint board found that contacts between the contracting entity and the operator, as well as the possible content of these contacts, were immaterial in relation to the question of whether the request was late[1141]. On the facts, the answer appears correct, but the categorical reasoning would seem to evade the question of any

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[1139] See article 40.3.f of directive 2004/17 (U3)
[1140] See article 5.1 of directive 2004/17 (U3)
[1141] Case N-070919, Råstof og Genanvendelses Selskabet af 1990, point 1

possible responsibility for the contracting entity in giving the operator an understanding that a request was deemed already to have been received.

As a separate issue, the misunderstanding as to the time of expiry of the deadline for reasoning had been based on information form a service bureau, which the operator used to follow tenders. The board found that this was an issue internal to the operator, and not an external issue that could be relied on, apparently as an element of force majeure, as the operator could instead have consulted the Official Journal of the EU. However, as set out above, an argument based on this error would anyway seem to have had limited reach in the case considered.

It seems interesting that the Danish complaint board chose not at all to address the issue of whether the reminder sent by the contracting entity, just prior to the expiry of the deadline, in itself constituted preferential treatment i violation of the equal treatment principle. However, it may be argued that the possible misunderstanding as to the status of an implicit request, based on the exchange of information about company law issues, might have warranted such a clarification.

4.2.5 Noncompliant requests and bids

4.2.5.1 Introduction

The entitlement, and possible obligation, to discard noncompliant requests and bids has be the subject of much case law at the Danish complaint board. In comparison, the practice of the European Court of Justice in this field is more limited, focussing mainly on the Community procurement procedures. As for late requests and bids, dealt with above, it may seem surprising that the definition, implications and reach of non-compliancy has not been the subject of preliminary references.

The EU directives on public do not contain provisions on compliancy, but as for late requests and bids, the issue is to some degree regulated in the provisions of Community procurement, which provide that requests and bid that do not satisfy all the essential requirements set out in the tender documentation shall be eliminated[1142]. Thus, rejection of such requests and bids is not just permissible, but mandatory.

However, this position is modified by the fact that in relation to requests, the contracting entity may allow for submission of additional documentation[1143]. This provision is

[1142] See article 146.3.1 of regulation 2342/2002 (M4)
[1143] See article 146.3.2 of regulation 2342/2002 (M4)

also found in the EU procurement directives[1144], and may thus be seen as an implicit confirmation that rejection of noncompliant requests is also mandatory in this field, unless the provision is applied.

However, the standing of noncompliant bids is regulated only by case law, both in relation to missing documentation and in relation to the issue of reservations, which have taken up much space in the jurisprudence of the European Court of Justice. In general, it may be argued, that the system of the EU procurement directives, requiring specification of selection and award criteria, as well as special indication of the acceptance of variants, implicitly makes it clear that noncompliant request and bids must be rejected[1145].

This understanding was confirmed in the leading case concerning the Great Belt Bridge in Denmark, where the European Court of Justice underlined that compliancy is a core element of equal treatment, and accordingly that operators must comply with the tender conditions[1146]. Accordingly, the degree to which deviations may be accepted will depend on an autonomous interpretation of EU law, and not on the procurement traditions of the member states. As set out below, this perspective has not always been adopted by the Danish complaint board.

It should be noted that compliancy applies not only to the operators, but also to the contracting entity, both during the procurement procedure, where tender conditions may be amended only to a limited degree, as set out above[1147], and also in relation to the subsequent contract, which must also be in accordance with the tender conditions. Thus, even a change in the payment conditions, where payment was to be made in kind, by the supply of apples and oranges, was deemed to violate the compliancy requirements, as it was changed to a supply of peaches[1148].

An additional issue that is not regulated in the EU public procurement directives, and also not in the Danish national procurement legislation, is whether an operator may submit more than one bid, or alternatively retract a submitted bid, prior to the deadline for submission and replace it with another bid. The Danish complaint board has taken position on this issue only in a case, where the tender conditions expressly limited the right of operators to submit a single bid. Consequently, subsequent bids from the same operator had to be considered noncompliant[1149].

[1144] See article 51 of directive 2004/18 (C3)
[1145] Case C-87/94, Belgium, point 88-89
[1146] Case C-243/89, Denmark, point 39
[1147] See above in section 4.2.2.5
[1148] Case C-T-191/96 & T-106/97, Succhi di Frutta, point 77
[1149] Case N-060706, Logstor, point 13-14

4.2.5.2 Reservations

4.2.5.2.1 Introduction

The issue of reservations has, surprisingly, only been dealt with by the European Court of Justice in the Danish Great Belt case, as set out above[1150]. The court openly denied a right for reservations by operators to be accepted, except where the tender conditions might provide for this. In this connection, the issue, that such a right might exist in general in national law, was implicitly refused any implication for the interpretation of the EU procurement directives.

In fact, the Danish national procurement legislation has never been specific as to the right for contracting entities to accept reservations made by operators, and the understanding of any such right has accordingly been developed in the practice of procurement and in the ensuing case law. The government argumentation in the Danish Great Belt case, that such a right was deemed to exist, would at the time have seemed justified.

In the subsequent case law of the Danish complaint board, the standing of reservations may be presented as varied, and certainly not as one living up to the categorical refusal of any such right, without specification in the tender notice, as set out in the Danish Great Belt case. In this connection, it is interesting to note that there is no jurisprudence on how wide a right of reservation the tender conditions might offer, without as a result coming into conflict with other norms, such as transparency and legal certainty, as well as the rules relating to variants, which are dealt with separately[1151].

4.2.5.2.2 Risks

From an early stage, the Danish complaint board established that responsibility for the possible impact on compliancy, ensuing from a unilateral reservation, must rest with the operator[1152]. Thus, without going into details, the Danish complaint board accepted the view of a contracting entity, whereby a reservation, in relation to one point of the tender conditions, was in fact also a reservation in relation to another point, which in turn had been defined, in a third point of the tender conditions, as being an essential requirement[1153].

The contracting entity might chose to clarify the extent of a reservation, without this being seen as negotiations with the operator[1154], and this issue is further dealt with

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[1150] See above in section 4.2.5.1
[1151] This will be dealt with in the following part of the project
[1152] Case N-950518, Henning Larsen, point 2, and case N-041126, E. Pihl & Søn, point 2
[1153] Case N-080918, XO Care, point 1
[1154] Case N960131, Jørgensen & Mecklenborg, point 1

separately[1155]. However, if various possible readings of the reservation all point in the direction of a substantial reservation, Danish complaint board found that the contracting entity may not rely on subsequent explanations from the operator, that present a more limited understanding of the reservation[1156]. In a subsequent appeal, the Danish appeal court gave a preliminary indication, on the basis of which the case was settled. In the indication, the court found that the statement from the operator did not amount to a reservation[1157].

Thus, the language of the bid in itself becomes an important element, and if sections of the bid have titles including the word reservation, or include text on the reservation of certain rights, the Danish complaint board has placed emphasis on the natural reading of such text, which only with difficulty could be explained not to entail a reservation in the public procurement sense of that word[1158].

Likewise, where an operator has included standard business conditions with the bid, this obliges the contracting entity to review these conditions and react to elements that may constitute reservations in relation to the tender conditions. Where this relates to essential requirements, the bid must be refused[1159].

At the other extreme, the majority of the Danish complaint board found no reservation in a case where an operator had made a handwritten annotation at the line in the bid concerning wooden floors. The annotation could be read as an indication of the use of laminated floors, as opposed to the required wooden floors, which was the finding of the minority of the board. However, the majority found the annotation to be a fragment without independent meaning and thus not a reservation[1160].

It should be noted that the contracting entity cannot only rely on the formal usage of the heading reservation in a bid to justify that the contents of the paragraph concerned do constitute a reservation in the public procurement sense. In a case concerning requirements for sewage pumps, the operator had included in the bid a section entitled reservation, where a limit was set for the dry matter content. The limit corresponded to the summer weather capacity of the existing system, to which a reference in general was made in the tender documents. However, no requirements for summer weather capacity in relation to dry matter formed part of the tender conditions, which instead required a test to be performed under winter weather conditions, with a higher moisture level. Accordingly, the contracting entity

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[1155] This will be dealt with in the following part of the project
[1156] Case N-970819, Poul Hansen Entreprenører, point 5
[1157] Case VT-010928, Poul Hansen Entreprenører
[1158] Case N-990610, Højgaard og Schultz, point 1
[1159] Case N-060706, Logstor, point 3
[1160] Case N-050131, HP Gruppen, point 17-18

had not been entitled to price factor the remarks on dry matter content, as they could not be regarded as a reservation[1161].

It could be argued, that the remarks should be regarded as reservations, as also clearly indicated in the bid, but as they concerned non-mandatory or even external elements, since summer weather capabilities were not specified in the tender conditions, the reservation could not be the basis for refusal or price factoring.

4.2.5.2.3 Categories

Based on the above, it may be argued that the Danish complaint board operates with three categories of requirements in the tender conditions. This first concerns non-mandatory requirements, where reservations may freely be made. The second concerns mandatory, but non-essential requirements, where the contracting entity may, but is not obliged to refuse bids with reservations. The third concerns essential requirements, where the contracting is obliged to refuse bids with reservations.

The group of non-mandatory requirements is conceptually difficult, but there are examples of its application[1162]. However, such requirements are most often referred to as insignificant elements, and the application of this category thus approaches an impact criterion[1163].

As an example of non-mandatory, and consequently non-essential, requirements the Danish complaint board in one case dealt with demolition, where the contracting entity had not specified the methods to be used, Accordingly, a reservation made by an operator as to noise levels was not in itself noncompliant, in such a manner that it could or should entail refusal of the bid, but on the other hand the reservation was an element that did have an impact on the economic value of the bid, and for which a price factor should be calculated[1164].

Thus, price factoring seems also to applicable non-mandatory requirements, even though, according to the system of categories, such reservations could not lead to a refusal of the bid

Where an operator made a reservation on the size of daily fines for surpassing of deadlines, the Danish complaint board found this reservation to have important economic impact, but apparently not in a manner essential to the procurement. Accordingly, the board

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[1161] Case N-030206, Hedeselskabet, point 2
[1162] Case N-041216, Brunata, point 40, upheld in the appeal court case VK-060613 & V-070306
[1163] Case N-041126, E. Pihl & Søn, point 10, case N-060125, Sjælsø Entreprise, point 40, and case N-080416, Boligkontoret Danmark, point 8

clearly indicated a right for the contracting entity, in the case of such a violation of a mandatory requirement, either to refuse the bid or to undertake price factoring. However, to accept the bid without price factoring would constitute a violation of the equal treatment principle[1165].

In case of uncertainty as to the scope of the reservation, the contracting authority is obliged to be interpreted in the widest manner possible, thus possibly reaching the core of essential requirements, with the required refusal of the bid as a result[1166]. In this connection, the field of essential requirements appear to be the dominating field, and it will be the burden of the operator, or the contracting entity wishing not to refuse, to argue that a reservation concerns non-essential issues[1167]. Accordingly, where the scope of a reservation appears to be general and undefined, the bid must be refused as noncompliant[1168].

Although the above mentioned categories have analytical clarity, their application in practice appears to be somewhat inconsistent. In a case where the tender conditions required all weather precautions to be included in the bids, an operator had apparently entered a reservation. The Danish complaint board found this to breach a fundamental requirement of the tender conditions, which would normally be understood also as being an essential requirement, leading directly to a refusal of the bid.

However, the board continued to notice that the reservation could not be price factored in any meaningful way, and for this reason the bid should have been refused[1169]. This would seem to open for price factoring even of essential requirements, but should rather be seen as a superfluous statement.

In a later cases the board confirmed that reservations in relation to essential requirements must lead to refusal[1170], and also found that reservations in relation to weather precautions should not be considered to concern essential requirements, but may be price factored[1171], or in another case, that they even be disregarded as having no relevance for the specific project[1172].

[1164] Case N-970522, Højgaard & Schultz, point 3
[1165] Case N-011024, Eiland Electric, point 12-13
[1166] Case N-060426, E. Pihl & Søn, point 1
[1167] Case N-961118, European Metro Group, point 17, upheld in the supreme court case H-050331
[1168] Case N-970522, Højgaard & Schultz, point 1
[1169] Case N-040826, Per Aarsleff, point 5
[1170] Case N-040830, Benny Hansen, point 5, and case N-041126, E. Pihl & Søn, point 9
[1171] Case N-050131, HP Gruppen, point 3
[1172] Case N-060116 MT Højgaard, point 9

On the substance, in the above mentioned first case on weather precautions, as to whether the reservation could have been price factored, the Danish appeal court came to the opposite conclusion, and thus overruled the complaint board, finding also that the requirement was not mandatory[1173].

Likewise, in the above mentioned ruling, the board at a later point in the decisions found that a reservation on fixed prices was to be regarded as non-fundamental, and that the bid was for this reason open to either refusal or price factoring, at the discretion of the contracting entity[1174].

Finally, the ruling underlined that possibility that the contracting entity may stipulate in the tender conditions that reservations will automatically lead to refusal of the bid also in relation to non-mandatory and mandatory requirements. However, the board imposed an obligation on the contracting entity, based on the EU principles of equal treatment and transparency, to specify which requirements are covered by this automatic refusal, which will then be binding also on the contracting entity[1175].

An example of such stipulations was found in a later case, where the tender conditions confirmed that all reservations in relation to essential requirements would lead to refusal of the bid, whereas other reservations would be subject to price factoring, and only where this was not possible, would the bids then be refused. The Danish complaint board found that in this manner, the contracting entity had given up the right to refuse bids that held reservations in relation to mandatory requirements, except where price factoring was not possible[1176].

A different approach was taken, where the contracting entity required all reservations to be indicated in a special field of the standard form to be used for bids. It must be assumed that such listed reservations were accepted, but it did raise a question as to the status of reservations entered elsewhere in the text of the bid. The majority of Danish complaint board found that such other reservations were to be dealt with in the normal manner, by price factoring and possible refusal of the bid[1177].

In a later case, the contracting entity had specifically underlined that reservations not included in the special field of the standard form would have no binding effect. This would seem to remove the possibility of price factoring or refusal of the bid because of such reservations[1178].

[1173] Case O-080205, Per Aarsleff
[1174] Case N-040826, Per Aarsleff, point 16, upheld in the appeal court case O-080205
[1175] Case N-040826, Per Aarsleff, point 13-14, upheld in the appeal court case O-080205
[1176] Case N.041126, E. Pihl & Søn, point 13
[1177] Case N-050131, HP Gruppen, point 16
[1178] Case N-050311, MT Højgaard, point 20

Even more openly, a contracting entity in one case stipulated that all reservations could be made, except for reservations concerning a listed number of points in the tender conditions. The Danish complaint board found that this did not violate the EU procurement directives[1179]. However the board did add that the contracting entity would be obliged to refuse any reservations that related to essential requirements or could not be price factored. If taken at face value, this statement would seem to negate the permission to make reservations, as set out in the tender conditions. Instead it must be read as relating only to the listed number of points, for which reservations could not be made. However, as set out above, the statement that reservations could not be made for these points, would point to an obligation to refuse bids with reservations on these points, and not to apply price factoring. It is difficult to make the statement fit both of these demands, unless the listed points by definition are regarded as essential

In any case, according to the Danish complaint board, the right to refuse a noncompliant bid, that does not violate essential requirements, must be exercised at the time for application of the award criteria, but cannot be raised once this stage has been passed[1180]. Somewhat confusingly, the board refers to the fact that it may not be raised when the contracting entity has decided to open negotiations with the operator.

This would seem to relate to the option in Danish procurement law to negotiate with the lowest bidder or all bidders, depending on whether lowest price or economically most advantageous is the award criteria. It seems that in the case, the contracting entity called two of the operators to individual meetings in order to discuss their bids and issues of noncompliance. This would in itself seem to be a step close to violation of the EU restrictions on contact with operators, but that issue was not raised by the board.

In effect, the finding of the Danish complaint board thus becomes very limited, as there should be no negotiations after the opening of bids, outside the negotiated procedure and competitive dialogue, and the finding would thus only relate to the very limited discussions possible in connection with the contract signing[1181]. The board has confirmed that an operator may not be invited to negotiations with the purpose of assisting in the price factoring of reservations[1182].

[1179] Case N-060905, Joca Trading, point 32
[1180] Case N-041122, Dansk Restproduktion, point 12, and case N-041130, Finn F. Hansen, point 5
[1181] This will be dealt with in the following part of the project. For an early comment on the issue, see Poulsen (3), as well as the thorough analysis in (Treumer 14), p. 139-221
[1182] Case N-041216, Brunata, point 26, upheld in the appeal court case VK-060613 & V-070306

It should be underlined, that consideration of the reservations during the application of the award criteria does not constitute an option to price factoring[1183]. The only option is to price factor the reservations, and henceforth to consider the bid as compliant when applying the award criteria.

On the other hand, the Danish complaint board has accepted that carrying out price factoring does not in itself invalidate a previous decision to refuse the bid, when this price factoring is undertaken just to prove that the bid concerned would not in any case have been the winning bid[1184].

In relation to time plans, the Danish complaint board has held that reservation constitutes a violation of essential requirements, and that bids with such reservations must be refused[1185]. However, in another case, where the reservation was more lightly framed, the board apparently found it to be a violation only of a mandatory requirement, but also one that could not be price factored, which entailed that the bid had to be refused[1186].

It may be argued that rather than illustrating differences in application, these two cases illustrate a certain variation in the use of the concept of essential requirements. The issue of time plans is also dealt with below in relation to over-implementation[1187].

4.2.5.2.4 Application of price factoring

The application of price factoring is frequently dealt with by the Danish complaint board. Again, it is the operator who must bear the risk of whether it is in practice possible to calculate a price factor for the given reservation. If this is not possible, the contracting entity will become obliged to refuse the bid as noncompliant[1188].

The control of calculations can be quite thorough, especially where documentation for the calculations is missing, and in one case the Danish complaint board found from the available information that VAT had not been added to the price factoring, which it apparently had been in other aspects of the procurement procedure[1189]. In this connection it should be noted that both the EU procurement directives[1190] and the Danish national procurement legislation[1191] require that threshold values are reviewed without VAT, but no other

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[1183] Case N-050607, Bladt Industries, point 9
[1184] Case N-070416, STB Byg, point 9
[1185] Case N-081002, Bruun Entreprise, point 5
[1186] Case N-081216, Elindco Byggefirma, point 1
[1187] See below in section 4.2.5.3.7
[1188] Case N-970522, Højgaard & Schultz, point 2
[1189] Case N-030630, Skanska Danmark, point 7
[1190] See article 7 of directive 2004/18 (C3)
[1191] See article 12.3 of consolidated law 1410/2007 (NPL3C1)

provisions preclude bid evaluation to include VAT. This could, however, become an equal treatment issue in relation to cross border services.

More generally, the Danish complaint board has established that price factoring must be based on the tender conditions, and cannot be based on additional information, such as a change in priorities as to the issues covered by the reservation[1192]. The board does not comment on how such a change of priorities in itself could comply with procurement law. Secondly, the price factoring must be definitive, and if it is not possible to reach any definitive price factoring[1193], the bid must be refused, as the objective of the price factoring is to ensure equal treatment when the bid with reservations is compared to other bids without such reservations[1194]. This would seem not to apply in case of reservations on non-mandatory elements, or in case of the application of other norms, such as impact assessment.

In the above mentioned case concerning weather precautions, the contracting entity had undertaking a price factoring of the reservation, but the Danish complaint board found that the tender conditions did not allow for a sufficiently certain calculation of the price factoring, and that accordingly the bid had to be refused[1195], but this finding was subsequently overruled by the Danish appeal court[1196]. In other cases, the board has found the price factoring of weather precautions to be insufficient, and even laid down its own corrected version of the price factoring[1197].

It is without any reference of preliminary questions to the European Court of Justice, that the Danish complaint board has found that EU public procurement law accepts the imposition of such price factoring for reservations, where the option to refuse the bid is not exercised[1198]. The question may well be raised whether the European Court of Justice, based on the Danish Great Belt case would not rather have upheld the categorical approach, with refusal of all bids with reservations. At least, it may be argued that the court should have had occasion to rule on this issue.

An interesting element in this connection is whether the indication in tender conditions of budgetary limits, would entail that any bid, surpassing such limits, should be regarded as noncompliant in relation to an essential requirement, and accordingly would have to be refused. This would seem a convincing conclusion, but there is no jurisprudence on this issue.

[1192] Case N-030812, Skanska, point 7
[1193] Case N-030812, Skanska, point 6
[1194] Case N-050607, Bladt Industries, point 2
[1195] Case N-040826, Per Aarsleff, point 10
[1196] Case O-080205, Per Aarsleff
[1197] Case N-050131, HP Gruppen, point 13-14
[1198] Case N-001108, Friedmann og Søn, point 1, and case N-041126, E. Pihl & Søn, point 10

As dealt with separately[1199], if all bids are above such budget limits, this is accepted as a basis for either cancelling the procurement or proceeding to a negotiated procedure.

In this connection the Danish complaint board has underlined the link between essential requirements and the right of proceeding to a negotiated procedure. Thus, only if all bids violate essential requirements is this right activated[1200]. If, on the other hand, one or more bids only violate mandatory requirements, the contracting entity must apply either price factoring or refusal of the bids. If the latter route is chosen for all bids concerned, this must implicitly lead to cancellation of the procurement.

This leaves open the question of whether the situations where price factoring is not possible, the result must also be cancellation of the procurement, or whether this may be assimilated to a breach of essential requirements, so as to activate the right to continue in a negotiated procedure. There is no jurisprudence on this issue.

A parallel to price factoring could be due consideration of the impact during contract award, where points might by be deducted for both reservations and deviations, if the award criteria relate to these issues.

As an example, the Danish complaint board found a bid for building works to deviate from the tender conditions on a number of points but, but neither individually nor collectively were they seen to oblige the contracting entity to refuse the bid. Also price factoring was not mentioned, but instead the contracting entity was obliged to give the issues due consideration in the contract award[1201].

This also would seem to be the implicit solution in a case where the contracting had stated a wish, but not a specific requirement to have a minimum number of housing units constructed. The Danish complaint board found that bids based on a lower number could not be refused as noncompliant, as the wished for number was not a mandatory or essential requirement[1202]. This would seem to leave the option that the wish might have been reflected in the award criteria and left for application at that stage.

The question may be raised whether the case law referred to above[1203], according to which refusal of bids must be raised at the latest at the time of contract award, does in fact preclude this transfer of compliancy issues into the contract award procedure[1204]. The

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[1199] This will be dealt with in the following part of the project
[1200] Case N-041216, Brunata, point 14, , upheld in the appeal court case VK-060613 & V-070306
[1201] Case N-030808, Euro-Dan Huse Vest, point 5-11
[1202] N-080229 Karl Jensen Murer- og Entreprenørfirma, point 9
[1203] See above in section 4.2.5.2.3
[1204] For a discussion of the options available for dealing with reservations, see Christensen (2), with comments in Dethlefsen (1) and a reply in Christensen (1)

proposition does seem to be supported by another case from Danish complaint board, which more broadly refers instead to an obligation to decide on non-compliancy issues at the time of expiry of the deadline for submission of bids[1205].

Even more specifically, the Danish complaint board in a later case found that since bids violating mandatory requirements must be refused, when price factoring is not possible, bids violating mandatory requirements can reach the award stage only after price factoring. Accordingly, it will not be possible to use reservations or deviations as an issue for contract award, nor indeed to specify it is an award criterion[1206], as was further confirmed in a later case[1207].

A not uncommon practice by contracting entities is to register reservations, but to price factor them at zero value[1208]. This may naturally be justified, especially if the requirements concerned are non-mandatory, but Danish complaint board will review such price factoring. In a case where an operator had entered reservations on parts of a building project, the contracting entity had found the reservations not to concern essential requirements and had price factored them at the zero value. The board disagreed and set the price factor at the equivalent of 70,000 Euro[1209]. However, the zero value price factoring for other reservations was upheld.

An interesting variation on price factoring was introduced in the standard conditions of a contracting entity, which allowed reservations, but required that the operator should price factor such reservations and include the factoring in the price of the bid. From a practical point of view, this might appear an attractive solution, but the Danish complaint board found that price factoring was a task to be undertaken by the contracting entities and not one that could be delegated to the operators concerned[1210].

4.2.5.2.5 Vagueness in tender conditions

The fact, that standards referred to in the tender documents are not definitive or final as such, has no implication for their standing as mandatory or essential requirements once they have been internalised as part of the tender conditions[1211]. More generally, the fact that tender conditions appear vague or imprecise is an issue which the operator must raise with the

[1205] Case N-080331, Cowi, point 4
[1206] Case N-080416, Boligkontoret Danmark, point 10
[1207] Case N-080514, Trans-Lift, point 18
[1208] Case N-041216, Brunata, point 40, upheld in the appeal court case VK-060613 & V-070306
[1209] Case N-040113, Pihl & Søn, point K3
[1210] Case N-071017, Triolab, point 17
[1211] Case N-969694-1, Dansk Industri, point 3

contracting entity, in the form of questions, prior to submission of the bid. The vagueness or imprecision cannot in itself justify reservations[1212].

This conclusion would seem to go against common business sense, which might suggest avoidance of a conflict with the contracting entity about the understanding entity, and instead application of safeguard measures in the form of relevant reservations. In some cases, the Danish complaint board has allowed for this application of business sense, finding that reservations should not be price factored, nor lead to exclusion, in situations where the reservation was a natural reaction to vagueness in technical details of the tender conditions, and thus could be regarded as a technical note instead of a reservation as such[1213].

This issue of whether to complain or make reservations relates also to the issue of access to remedies, as dealt with separately[1214], where many operators appear to feel, with or without justification, that use of remedies in present procurement procedures may endanger their standing in future procurement procedures. In the above mentioned case on technical details, the Danish complaint board underlined that minor technical details could be dealt with by means of technical notes, whereas more important elements of vagueness would have to be addressed by questions from the operators[1215].

On the other hand, the Danish complaint board also has placed a responsibility on the contracting entity to indicate in the tender conditions the parts that constituted mandatory requirements, as only reservations concerning such parts would justify refusal of the bid[1216]. As set out above, only reservations against a further subset, comprising essential requirements, would oblige the contracting to refuse the bid, without the option of price factoring[1217].

Where issues are not dealt with in the tender conditions, a reservation on such issues must be regarded as relating to non-mandatory elements, and accordingly it cannot lead to the refusal of the bid. This was illustrated in a case where the operator placed a reservation on the contract commencement date, but where no mention of the commencement date was to be found in the tender conditions. Accordingly, the Danish complaint board found that no compliance issues were raised by this reservation[1218].

[1212] Case N-980114, Xyanide Company, point 14
[1213] Case N-981123, Marius Hansen, point 12, and case N-050131, HP Gruppen, point 20
[1214] This will be dealt with in the following part of the project
[1215] Case N-981123, Marius Hansen, point 6
[1216] Case N-950531, Foreningen af Rådgivende Ingeniører, point 1
[1217] Case N-060426, E. Pihl & Søn, point 1
[1218] Case N-061214, Baxter, point 48

Likewise, as mentioned above[1219], a situation where the contracting entity has special new information, gained from a first stage of the project now submitted for procurement, such as the capability of mine searching equipment to operate in relation to wet sand, and this information is not included in the tender documentation, the contracting entity cannot find that assumptions by operators, based on general current knowledge in the market, should be considered to constitute reservations in relation to essential requirements[1220].

A special issue in relation to the drafting of tender conditions concerns the situations where the conditions objectively cannot be fulfilled. In a case before the Danish complaint board, the contracting entity had required a maximum glass thickness of 37 mm, but the tender conditions were otherwise vague as to the type of glass required. The operator understood the required type to be laminated glass, and could only offer a thickness of 40 mm with such glass and submitted a reservation on this issue.

The majority of the board found that the tender conditions did not require laminated glass and that the submitted bid thus was noncompliant and could be refused. However, the minority found that it was the vagueness of the tender conditions had led the operator to assume that laminated glass was required, and accordingly that responsibility for the vagueness removed from the contracting entity the right to refuse the bid, thus obliging the contracting entity instead to apply price factoring[1221]. This minority view has not been substantiated in later case law.

4.2.5.2.6 Standard reservations

An intermediate position on reservations is found in the agreed standard conditions for works in Denmark[1222], which may be accepted for a given project, and which allows for certain standard reservations. In a specific case, the Danish complaint board found that the contracting entity, in the tender conditions, had allowed only such standard reservations, but that the reservation made by the operator, for work to be carried out within normal working ours, went beyond this standard[1223]. Additionally, the board found the reservation to reach the mandatory level, but not the essential level, and the contracting entity was thus entitled to, but not obliged to, refuse the bid.

In one case the, the contracting entity found that two such standard reservations were acceptable, with the exclusion of one point in one of the sets, and added that bids with other

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[1219] See above in section 4.2.3.4
[1220] Case N-080710, European Land Solutions, point 4
[1221] Case N-070416, STB Byg, point 6-7
[1222] For a consideration of cross border implications of such standard conditions, see Hansen (2)

reservations would be regarded as noncompliant. Somewhat surprising, the Danish complaint board found this to be a non-transparent statement, and that the contracting entity instead should have specified which reservations would be accepted, or that other reservations would not be accepted[1224]. It would seem that the fact, in the latter case, that such bids, according to the original clause, were to be regarded as noncompliant, should have been a sufficient indication.

Even where such standard reservations have not been permitted in the tender conditions, the Danish complaint board has found that they may be acceptable and in doing so has opened another avenue of assessment, in the form of a substantial impact analysis[1225]. Thus finding that the reservations made by an operator could have no substantive impact on the economic evaluation of the project, the board found that the contracting entity had not been obliged to refuse the bid. Furthermore, as the impact had been found marginal, the board also accepted that the contracting entity had reached a zero value for the economic factoring of the reservation.

As a special form of the impact analysis, the Danish complaint board has gone through the text of a bid and found that, in spite of a standard reservation having been made, the clauses of the bid in substance counteracted the reservation. Accordingly, the board found that the bid could not be refused[1226].

The Danish complaint board has used the issue of standard reservations to distinguish between conditions applying to national and EU procurements. Operators, who had taken standard reservations, claimed that there was a binding practice in the field of procurement for such reservations to be cancelled at the time of contract signing. The board refrained from ruling on whether such a practice existed, and on whether it had gained the force of law as claimed by the operators, and instead ruled that it could in any case not be applied to EU procurement, where the objective was to ensure competition across the borders[1227].

The positive statement about securing equal treatment across borders appears to be misleading. If there was in Danish law a binding norm, under which standard reservations were discarded at the time of contract signing, the effect of such reservations would have be neutralised, and the contracting entity could evaluate the bids from operators subject to Danish law without consideration of the reservations.

[1223] Case N-980126, Albertsen & Holm, point 2
[1224] Case N-990907, Håndværksrådet, point 2
[1225] Case N-981123, Marius Hansen, point 6
[1226] Case N-030603, Skanska Danmark, point 5

This would not have any negative impact on the evaluation of bids from other operators, not subject to Danish law, where any reservations would have to be evaluated in the light of whatever law applied. The EU norm of equal treatment only applies to comparable situations, as also set out above[1228].

As for other reservations, it is the operator who must bear the risk of the standard reservations leading to refusal of the bid or price factoring. Thus the Danish complaint board did not accept an explanation that it was due to a typing error that a bid referred to a different set of standard reservations, ABT 93, than those accepted in the tender conditions, AB 92. In addition, the board applied the mass criterion, finding that as the differences between two sets were so many, the reservation would have had to be refused as relating to essential requirements[1229].

4.2.5.2.7 External factors

Reservations concerning external factors, on which the operator has no influence, are not seen as reservations that may lead to refusal or even economic factoring. Thus, when an operator reserved a right not to provide new buses at the start of a transport contract, as otherwise required by the tender conditions, the Danish complaint board accepted this only to be a remark on the state of supply in the new bus vehicle market at the time[1230].

This would seem to be a generous interpretation, given the normal principle of placing the risk for the interpretation of reservations with the operator. Also, it opens tricky questions as to what constitutes an external factor, and thus for example whether unavailability of new buses in Denmark would be sufficient, or whether the unavailability would have to be pan-European or even global.

4.2.5.2.8 Reservations and negotiation

As also for deviations, the issue of reservations has an interface with the issue of negotiations, which is dealt with further below[1231]. Thus, the drafting of bids may lead to uncertainty, as to whether the bids are deviant or contain reservations. A natural action for the contracting entity, where it wishes to consider the bid concerned, would be to seek clarification of the issue of possible deviation or reservation.

[1227] Case N-040609, Per Aarsleff, point 1
[1228] See above in section 4.2.1
[1229] Case 070426, MT Højgaard, point 13
[1230] Case N-980703, Nybus, point 4

However, it may be argued that this would allow for a lucky shot approach, where an operator might submit a deviant bid or a bid with reservation, in a slightly veiled format, relying on the fact that it was otherwise an interesting bid, and that if necessary, the offending elements could later be removed, under the heading of a clarification.

Thus, it may be argued that a strict approach would be needed in relation to the extent of such clarifications, and in a case concerning one of the above mentioned standard reservations, this is also the approach taken by the Danish complaint board. The operator had included a separate sheet with the standard reservation in the envelope with the bid, without making any reference to it in the text of the bid. The contracting entity called for a meeting with the operator, where the outcome was that the operator would not rely on the reservation.

The board found in principle that the inclusion of the standard reservation text in the bid envelope did constitute the taking of a reservation that did in the specific case concern essential requirements. Accordingly, the contracting entity should have refused the bid, and the meeting held was a violation of the prohibition on negotiations[1232]. However, the board did not rule so, as it also found that the applicant was abusing its procedural rights, as dealt with separately[1233].

In a subsequent appeal, the Danish appeal court found that the applicant had been entitled to bring a case before the Danish complaint board, and that the conclusion as to the meeting held was incorrect, as the contract had been awarded before it became known that also all the other operators had included the same standard reservation[1234]. The reasoning is thus an example of impact assessment, although the line of reasoning in not very convincing.

A special perspective on negotiation was taken in a case, where the tender conditions specified the location of heating pipes, but the operator in the bid indicated that the offered price was based on the economically most advantageous location. This would in itself have been a reservation, but the Danish complaint board found the effect of the reservation to be negated by the addition in the bid of the clause that final location of the pipes would be agreed with the contracting entity[1235].

Thus by this reservation within a reservation, the operator was able to submit a competitive price and leave open the question of final location of the pipes, although a fixed

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[1231] See below in section 4.2.2.7
[1232] Case N-001207, Foreningen af Rådgivende Ingeniører, point 1
[1233] This will be dealt with in the following part of the project
[1234] Case O-021007, Foreningen af Rådgivende Ingeniører
[1235] Case N-040513, Bravida Danmark, point 5

location was indicated in the tender conditions. The result would seem to lead toward a possible violation of the procurement rules in the final contract discussions[1236].

The approach taken by the contracting authority, to price factor the reservation, would seem more correct. This approach was also approved in relation to another reservation by the operator, relating to the manner in which drilling, for the heating pipes, was to take place[1237].

In a later case, the Danish complaint board did not accept the negation effect on a reservation from an offer to negotiate a final solution. The operator had noted in the bid that regulations in the contract price could become necessary if there were major changes in the market prices. The board found this to be a reservation in relation to an essential requirement, and that the bid had to be refused. The fact that the operator had added a clause, whereby possible increases were to be negotiated with the contracting entity, was not sufficient to negate the reservation[1238].

4.2.5.3 Deviations

4.2.5.3.1 Introduction

The question of deviations has a link with the issue of transparency, since the less clear the tender conditions are, the more scope that is for variation of amongst the bids, but at the same time, the tender conditions will be less able to transmit the preferences held by the contracting entity.

Thus in a case where the Danish complaint board found the tender conditions too imprecise to establish that the bid from an operator was deviant, the board also found, on the same basis, that the vagueness of the tender conditions in itself constituted a violation of the transparency principle[1239].

It might have been expected that the European Court of Justice would also deal with this issue by accepting that where the tender conditions are less precise, due consideration should be taken of whether the interpretation undertaken by the operator would be reasonably possible within the scope of those conditions. However, in requests for interim measures[1240], the court has reasoned in the opposite manner and found that given the lack of transparency, it could not be excluded that a bid should have been rejected as noncompliant[1241].

[1236] This will be dealt with in the following part of the project
[1237] Case N-040513, Bravida Danmark, point 8
[1238] Case N-080118, Eurofins Miljø, point 2
[1239] Case N-011024, Eiland Electric, point 4
[1240] For a discussion on interim measures against EU institutions, see Braun (6)
[1241] Case T-447/04-R, Capgemini, point 87, and case T-114/06-R, Globe SA, point 86

An interesting aspect of deviations concern the situation where competitors subsequently find that the products delivered, under the winning bid, do not in fact comply with the tender conditions. The Danish complaint board has skirted this issue by finding that contract implementation falls outside its scope of competence[1242].

It might be argued that the claim in such a case is not about contract implementation, but about the use of facts from contract implementation as evidence for procurement violations. The issue of the scope of competence of the Danish complaint board is further dealt with separately[1243].

4.2.5.3.2 Categories

In order to clarify tender conditions, the use of separate indication of what constitutes mandatory elements in the tender specifications may be a useful element, but not necessarily a definitive settlement of the issue. In cases concerning Community procurement, the European Court of Justice has gone deeply into what actually constitutes a mandatory element of the tender specifications, as in a case concerning the specification of tables to be procured, and especially the issue of which measurements were to be seen as indicative ranges, and which were absolute values[1244].

In doing so, the court has adopted a flexible and pragmatic approach, as in a case where discrepancies were found between the technical and financial parts of a bid for a services contract, which appeared to be a deviation from the tender conditions. As the reasons for this were explained in footnotes to the bid, the court found that the apparent discrepancies were purely formal, and that the European Commission had acted correctly in not rejecting the bid[1245].

As set out above, in relation to reservations[1246], the Danish complaint board apparently operates a three-way distinction between non-mandatory, mandatory, and essential requirements. The distinction between the categories may be difficult, especially since the board in some cases also seems to apply a mass criterion, so that deviation from a number on lower category requirements might collectively be regarded as a violation of an essential requirement, thus leading to an obligation for the contracting entity to refuse the bid[1247].

[1242] Case N-080514, Translift, point 11
[1243] This will be dealt with in the following part of the project
[1244] Case T-40/01, Scan Office, point 90
[1245] Case T-160/03, AFCon, point 52
[1246] See below in section 4.2.5.2
[1247] Case N-000808, Visma Logistics, point 25 and 30

In a single case, the Danish complaint board has used a different terminology, by referring to minimum requirements, the deviation from which would entitle the contracting entity to refuse the bid. It must be assumed that minimum requirements correspond to mandatory requirements[1248].

The practical difficulty in distinguishing between mandatory and essential requirements may be illustrated by a case, where the operator had failed to submit certain planning drawings and also to submit open cost calculations. Without any detailed reasoning, the Danish complaint board arrived at the conclusion that the former constituted an essential requirement, whereas the latter constituted only a mandatory requirement[1249].

Also in relation to negotiated procedures, the Danish complaint board introduced a slightly different understanding of the categories. According to this understanding, the important issue is not whether requirements are deemed mandatory or essential, but whether the tender conditions explicitly state that requirements are essential, and that deviation will lead to refusal of the bids. In all other cases, under the negotiated procedure, deviation from both mandatory and essential requirements cannot lead to refusal of the bid, as it only serves to open negotiations[1250].

Somewhat surprising, the decision of the board is different in relation to reservations, which are dealt with the usual manner. The reservations taken in the case are seen to concern essential requirements, and the board notes that the contracting entity did not violate the EU procurement directives by refusing the bids[1251]. Equally surprising, there is no mention of the obligation to do so, when the reservations concern essential requirements.

The issue of accepting deviations in negotiated procedures has not been dealt with specifically in the jurisprudence of the European Court of Justice, but the result would not seem supported by the categorical approach in the Danish Great Belt case, as mentioned above[1252].

4.2.5.3.3 Price factoring and refusal

It is difficult to find examples of deviations that are considered non-mandatory, as most cases where deviations are found appear at least to justify the contracting entity to impose price factoring, which could cover both mandatory and non-mandatory deviations.

[1248] Case N-060124, Jan Houlberg Instrumentering, point 1
[1249] Case N-060630, Raunstrup Gruppen, point 1-2
[1250] Case N-031104, Bombardier, point 3
[1251] Case N-031104, Bombardier, point 1-2
[1252] See above in section 4.2.5.2.1

However, in a case with an unclear point in the tender conditions, resulting in all bids having to be considered compliant despite deviations on this point, the Danish complaint board did also rule that the point concerned was of a secondary nature, and that a deviation accordingly could not have entitled a refusal of the bid[1253].

Likewise, in a procurement procedure with variants, the bids were supposed to be accompanied by certain annexes. However, an operator chose to submit only one set of annexes, common to all the variants. The Danish complaint board found that this omission of including annexes with each bid did not make the bids noncompliant[1254].

As for reservations, there seems to be a tendency towards understanding non-mandatory requirements as insignificant requirements, thus approaching an impact assessment. As an example, the tender conditions in a case required tubes with a 77 mm diameter, whereas an operator included tubes with a 75 mm diameter in the bid. The Danish complaint board accepted an explanation that the difference only concerned the thickness of isolation materials, and that the issue was without importance. Accordingly, the deviation could, and presumably should, be disregarded by the contracting authority[1255].

As a possible example of the second category, mandatory but not essential requirements, the Danish complaint board found that an operator had violated the tender conditions by not using a specific form, supplied in the tender documentation, for submission of the bid. The board notes that this did not constitute a violation of essential requirements, and that the contracting entity thus was not obliged to refuse the bid[1256].

However, the board is not explicit as to whether this violation might have entitled the contracting entity to do so, but later cases did arrive at this conclusion. The operator had omitted pricing of certain required elements of the procurement, and on this basis the board found that the contracting entity could have refused the bid, but as the missing pricing did not play a part in contract award evaluation of any of bids, the board found that the contracting entity had been entitled to accept also the bid missing this pricing[1257].

It may be argued that this does not as such confirm a right for contracting entities to accept bids that deviate from mandatory, but not essential, requirements, but that it should rather be seen as an application of the impact criterion, as dealt with under reservations[1258].

[1253] Case N-031106, Hedeselskabet, point 2
[1254] Case N-080108, WAP Wöhr, point 16
[1255] Case N-060706, Logstor, point 12
[1256] Case N-980831, Miri Stål, point 7
[1257] Case N-990716, Holst Sørensen, point 5
[1258] See above in section 4.2.5.2

Later case the Danish complaint board ruled expressly that deviation from requirements that are not essential, may be accepted only when a pricing calculation is undertaken[1259].

As also for reservations, the Danish complaint board closely scrutinizes deviations and the application of price factoring. In a case, where a special brand had been used as the specification indicator[1260], the contracting entity found a bid, based on other brands, to be deviant from the required specifications and accordingly had applied price factoring. The board overruled a number of instances of this finding of deviancy, but upheld a sufficient number, where the price factoring was also accepted, so that the bid remained not the lowest[1261].

The price factoring must be sufficient to offset any unfair competitive advantage that the operator would otherwise have gained from submitting a deviant bid. The burden of proof is upon the contracting entity, who must demonstrate that the price factoring is sufficient in this regard[1262].

When price factoring is not possible, the only option left for the contracting entity is to refuse the bid, as was underlined by the Danish complaint board in a case concerning missing indication of project planning costs[1263]. In other cases, the reference to price factoring is only implicit. Thus where a bid should have included a description of the indoor climate, with underlying calculations, the board noted that the non-submission of this information made the bid noncompliant, and that accordingly it had to be refused, irrespective of whether the requirement was or was not essential[1264].

Implicit in this decision must be an evaluation that price factoring was not possible. However, this assumption becomes strained in relation to other parts of the decision, where the board finds that the fact, that 1 of 2 required parking places for the disabled is missing, must lead to refusal, irrespective of whether the requirement is deemed essential or not[1265]. In the latter case, the creation of an additional parking space would seem an obvious target for price factoring.

The fact that requirements are essential is not always explicit in the reasoning of the cases from the Danish complaint board. Accordingly, it is open to speculation whether findings, that a contracting entity was not entitled to consider a bid, cover the fact that the bid

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[1259] Case N-000808, Visma Logistics, point 3, and case N-060125, Sjælsø Entreprise, point 2
[1260] For a discussion on the use of brand names, see Poulsen (1), with comments in Christensen (3)
[1261] Case N-030815, Bravida Danmark, point 25
[1262] Case N-081126, NCC Roads, point 5
[1263] Case N-050302, Pumpex, point 19
[1264] Case N-060125, Sjælsø Entreprise, point 38
[1265] Case N-060125, Sjælsø Entreprise, point 28

should have been refused because of violating such essential requirements, or whether it reflects that the contracting entity should have applied price factoring in order to be able to consider the bid.

An example is a case, where the tender conditions required parts to be made in non-corroding metal. The Danish complaint board noted that in both general and technical language, non-corroding metal is different from corrosion protected metal. As a bid was based on the latter solution, the board found that the bid should have been refused[1266]. It is not possible to see whether or how the board arrived at a conclusion that this was an essential requirement.

More clearly, in a case where upper body garments were to halve half or quarter length sleeves, the board found it a violation of essential requirements that an operator proposed vests without sleeves[1267]. Even if the requirement had been classified only as mandatory, it is difficult to see how price factoring could have been applied, and the bid would thus in any case have had to be refused.

The contracting entity may violate the EU transparency principle by setting tender conditions that cannot serve adequately for a decision on whether a bid is compliant. In one case, the contracting entity had indicated that its own standard conditions would apply to the procurement, but as these standard conditions held a clause under which they only applied to the extent not otherwise agreed between the parties, the standard conditions became inoperable in relation to reservations and deviations[1268].

In a second case, the Danish complaint board was split on how to understand the tender conditions, which required tiles to be delivered in both a light and a dark colour, without any further technical specification of the colours requires. However, the tender documentation did also indicate the availability of samples in respectively the light and dark colour, which the operators could inspect at the site of the contracting entity.

The majority found that the missing specifications as to colour gave the operators a margin of discretion as to the light and dark colours offered, and accordingly found that no importance could be placed on the availability of the samples[1269]. The argumentation of the minority would seem more convincing, to the effect that the missing specifications were

[1266] Case N-040220, Miri Stål, point 1, upheld in the appeal court case V-060331, Esbjerg Kommune
[1267] Case N-080214, Jysk Erhvervsbeklædning, point 1
[1268] Case N.061214, Baxter, point 22
[1269] Case N-080910, LK Gruppen, point 4

compensated by the samples, and that together these elements gave a sufficient basis for refusing bids with tiles that deviated in colour from the samples[1270].

4.2.5.3.4 Missing information

As a point of departure, missing parts in bids are viewed as a violation of essential requirements. Thus, where a special form was required for the bid, and certain works included on the form were not included in the bid of an operator, the Danish complaint board found that the contracting entity had been obliged to refuse the bid[1271].

Likewise, where an ice-skating rink was required to have alternative configurations, long or broad, and the bid of an operator only specified the long configuration, this was seen as a deviation of an essential requirement, and the contracting entity was required to refuse the bid[1272]. The contracting entity had argued that the bid in fact also fulfilled the broad configuration, but had not been able to convince the board that it had objective grounds in the bid for this opinion.

For procurement under Danish national provisions, the right to be present at the opening of the bids is a central element, and in the connection there is also a right to be informed about the price of the respective bids[1273]. Thus where the overall price of a bid cannot easily be calculated from the text of the bid, this in itself constitutes an essential missing part, leading to the refusal of the bid[1274].

From a very formal point of view, a contracting entity in one case noted that an operator had not filled out a section of the standard form to be used for the bids, in which the operator was to confirm receipt of a corrigendum to the tender conditions. Accordingly, the contracting entity found that the operator had placed a reservation in relation to the corrigendum. However, the Danish complaint board found that other parts of the text of the bid implicitly confirmed that the operator had accepted the corrigendum, which precluded the contracting entity from price factoring the alleged reservation[1275].

Related to missing parts in bids is the issue of errors in bids, which in the case of missing decimals could lead to bids being considered abnormally low, for which the EU directives have a procedure of verification[1276]. However, the Danish complaint board has also

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[1270] Case N-080910, LK Gruppen, point 9
[1271] Case N-040324, M.J. Eriksson, point 1
[1272] Case N-041008, Virklund Sport, point 2
[1273] See article 7.s2 in codification law 1410/07 (NPL3C1)
[1274] Case N-041029, Flemming Dalgaard, point 8, upheld in the appeal court case V-060411, Helle Kommune
[1275] Case N-050131, HP Gruppen, point 22
[1276] See article 55.1-2 of directive 2004/18 (C3)

accepted that the contracting entity may use the procedure of price factoring to correct such errors in the form of lower prices[1277].

The board underlined that this ruling only concerned the procurement procedure, whereas it would have to be decided under contract law, outside the scope of board competence, whether the contracting entity could have insisted on the lower, erroneous price[1278]. The ruling also does not take a position on whether a similar procedure might be adopted in relation to prices that have an extra decimal and thus have become erroneously high.

The issue of missing information also has links to the application of award criteria[1279], as the Danish complaint board has found that where a bid does not include sufficient information to allow for the application of the award criteria, this in itself makes the bid noncompliant[1280].

In this connection it there is a difficult borderline between information that is missing, so as to make the bid noncompliant, and information that is missing so as to constitute a disadvantage in the contract award procedure. This is illustrated by a case, where the contracting entity wanted a technical proposal with a description of the contract implementation plan.

The Danish complaint board found that if such an implementation plan was missing altogether, this might be considered a deviation, which then presumably would be in violation of an essential requirement, so as to cause the bid to be refused. However, if only elements of the implementation plan were missing, this should rather be considered as defects, which should be considered during the contract award procedure[1281].

The possibility of refusing bids with incomplete information also applies where the operator has decided to give information in a summary format, such as joining individual points in the standard form for bids. The choice to do so constitutes as risk, for which the operator must bear responsibility, and which, apart for non-mandatory or marginal elements, will entitle the contracting entity to refuse the bid[1282].

[1277] Case N-050418, Løgten murer- og entreprenørforretning, point 11
[1278] Case N-050418, Løgten murer- og entreprenørforretning, point 12
[1279] See article 53.1 of directive 2004/18 (C3)
[1280] Case N051025, Hoffmann, point 19
[1281] Case 061113, Cowi, point 2
[1282] Case N-070319, STB Byg, point 4

4.2.5.3.5 Deviations and reservations

The Danish complaint board has underlined that deviations and reservations should be dealt with by the same standards[1283]. Furthermore, adding to the possible confusion in terminology, the board has proposed that all cases of deviation, where price factoring may be applied, should be referred to as reservations[1284].

This terminology was applied in a case, where the operator had omitted prices for certain of services required in the tender conditions, which the Danish complaint board found to be a deviation of a mandatory, but not essential requirement. Accordingly, the contracting entity had been entitled to refuse the bid, but the board explicitly refrained from taking up the issue of whether the deviation should be considered a reservation for which price factoring could have applied[1285].

However, a previous case prescribed the application of price factoring to deviations, noting that it is immaterial whether the deviation is entitled a reservation or not. The case also states that any deviation from the tender conditions, whether price factoring could be applied or not, will entail a right for the contracting authority to refuse the bid[1286]. However, this should be seen as a restatement of the core application of equal treatment, and not necessarily a refutation of the modifications implied by concepts such an impact assessment and non-mandatory requirements.

It will often be a borderline issue, whether the contents of a bid are to be regarded as being deviant, as being based on variants, or as holding reservations. As an example, Danish complaint board dealt with a case where the contracting entity had required manning of the project office on full time during the project period. The bid from one operator specified manning of the project office as required and sufficient for project implementation. The board did not regard this as an incomplete bid, but rather as one holding a reservation. Furthermore, as the full time requirement had been specified in a corrigendum, this requirement was deemed essential, and the contracting entity had thus been obliged to refuse the bid[1287].

[1283] Case N-000808, Visma Logistics, point 1
[1284] Case N-030812, Skanska, point 3
[1285] Case N-040607, Analycen, point 4
[1286] Case N-030429, Lindpro, point 1, as upheld in the appeal court case O-041207
[1287] Case N-990308, Foreningen af Rådgivende Ingeniører, point 6

4.2.5.3.6 Risk

It is normally the operator who must bear the risk of submitting a deviant bid, just as the case is for reservations. However, it is for the contracting entity to demonstrate in which manner the bid is found to be deviating[1288].

Where the contract conditions are imprecise, the right of a contracting authority to consider a bid deviant is restricted. The point of view is that the vagueness should not entail an expanded right for the contracting entity subsequently to decide which bids should be considered noncompliant[1289]. On the other hand, if the contracting entity invites the operators to undertake visits of inspection and interviews with present staff performing the tasks to be procured, this will to a certain degree shift the burden of proof, for a correct understanding of the tender conditions, onto the operator[1290].

In this connection, traditional understandings of production methods cannot automatically be assumed to apply. Thus, where a contracting entity did not specify production methods in relation to orthopaedic shoes, the fact, that such shoes are traditionally made by hand, could not in itself be relied on to find that a bid based on machine production was deviant[1291].

Likewise, where a illegal requirement of a specific brand has been made[1292], the contracting entity cannot as a point of departure consider bids based on alternative brands as noncompliant, unless the contracting entity has included in the tender conditions a specification of the characteristics of the indicated brand that were to be regarded as mandatory tender conditions[1293]. This will most often not be the case, as one of the reasons, for using specific brand indications, is to avoid the need for such specification of characteristics.

Where a specific brand is not required, but only used as a reference product, it becomes a matter of evaluation whether other products comply with the requirements deemed essential or mandatory in the reference product. The Danish complaint board has gone into the detail of such evaluations, overruling the decisions of contracting entities as to compliance[1294]. In the case concerned, the board also found the use of reference products contrary to the EU directives as technical specifications could have been established[1295].

[1288] Case N-050302, Pumpex, point 13
[1289] Case N-990391, Enemærke & Petersen, point 4
[1290] Case N-990318, Seghers, point 3
[1291] Case N-060906, Sahva, point 19
[1292] See article 23.8 of directive 2004/18 (C3)
[1293] Case N-990391, Enemærke & Petersen, point 3
[1294] Case N-050412, Mariendal Elektronik, point 13, upheld in appeal court case V-070228, Nordjyllands Amt
[1295] See article 23,8 of directive 2004/18 (C3)

Likewise, where a contracting entity wishes to purchase a system compatible with an existing system, but does not specify this in the tender conditions, it cannot subsequently consider incompatible systems as deviant. In a case where the system offered by an operator was incompatible, the contracting entity had applied price factoring. As there was no deviancy, because of the missing indication of the compatibility requirement in the tender conditions, the board overruled the price factoring, even though it could be argued that the compatibility requirement was implicit in the tender conditions[1296].

However, the Danish complaint board has shown some leniency towards contracting entities, finding in one case that the fact, that certain requirements had been listed under the misleading title of fundamental requirements, did not entitle the operators to presume that these were essential, or even mandatory, requirements. Instead, the requirements were to be seen as open requirements that could be fulfilled in several ways. The fact that one operator saw only one possible standard of material, as fulfilling the requirement that the waste container concerned should be secure against rats, did not entail that the contracting entity would have to adopt the same view and refuse other solutions adopted to keep rats out of the containers[1297].

Likewise in a case concerning transportation of disabled persons, a competitor had the understanding that this required special busses with lifts. Accordingly, the competitor claimed a violation of procurement law as the contract had been awarded to an operator without such special busses. However, the Danish complaint board found no requirement for such special buses in the tender conditions, and accordingly found it sufficient that operators have access to lift equipment when needed[1298].

In a case where the tender conditions were unclear as to whether the prices submitted should be those for sale to or from wholesalers, as they only required that prices should be official prices, a competitor complained that a natural understanding of the tender conditions would point to prices for sale from wholesalers. Accordingly, the competitor claimed for the winning bid, based on prices for sale to wholesalers, to be declared noncompliant. The Danish complaint board found the reference to official prices without meaning, and lacking other indication, there was no basis for any bid to be declared noncompliant[1299].

[1296] Case N-030815, Bravida Danmark, point 28
[1297] Case N-991027, Humus, point 1, as upheld in the appeal court case V-010507
[1298] Case N-020321, Holsted Minibus, point 1
[1299] Case N-040506, Sereno Nordic, point 2

Somewhat surprising, the board also refused the alternative plea from the competitor, that the contracting entity had violated the EU procurement directives by setting non-transparent tender conditions.

Based on the above, it might be claimed that in case of unclear tender conditions, the better tactics for an operator would be to submit a bid that could be claimed to fall within the unclear conditions. The lack of clarity would force the contracting entity to accept such a bid, even if it was not compliant with the original intentions of the contracting entity. To submit questions would entail the risk of a clarification of the tender conditions in a manner unsatisfactory to the operator, whereas taking a reservation as to the understanding of the conditions would place the risk of noncompliance on the operator[1300]. If this summary is correct, then the finding of the Danish complaint board, as set out above, that deviations and reservations should be dealt with in the same manner, would not reflect reality.

However, as a caveat to this conclusion, it should be noted that the Danish complaint board reached the opposite conclusion in a case concerning computer licensing, where the contracting entity had specified the number of work stations, but not the necessary number of licences for simultaneous use. The operator made an estimate and proposed 2 licences for the 90 work places. The Danish complaint board accepted the right of the contracting entity to subsequently find this number insufficient and to refuse the bid as noncompliant[1301].

In some cases, the Danish complaint board does accept very formal approaches, such as the lack of indicating key personnel and their qualifications, as required in the tender conditions, being regarded as a breach of essential requirements and thus obliging the contracting entity to refuse a bid, where it had not wished to do so[1302]. The issue of missing documentation is dealt with further below[1303].

4.2.5.3.7 Over-implementation

Most often the issue of deviations relates to incomplete requests and bid. However, the Danish complaint board has also dealt with over-implementation. In the case, the contraction entity had specified the approximate size of extension to existing buildings, but the bid from one operator included 170% of the requested extension. Under normal conditions, such over-implementation should not be able to be competitive on price, but nevertheless the contracting entity found this bid to be the economically most advantageous. The issue of application of

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[1300] See above in section 4.2.5.2.5
[1301] Case 070829, Sectra, point 1
[1302] Case N-000209, Praktiserende Arkitekters Råd, point K2
[1303] See below in section 4.2.5.4

the award criteria was dealt with separately by the board, but already in relation to compliancy the minority of the board found a deviation by 70% to go beyond the acceptable, even for over-implementation[1304].

However, the majority of the board found that over-implementation might not comply with the tender conditions, but did not in itself require the bid to be refused as noncompliant. The reasoning must be understood as one placing the extension size, understood as a maximum, outside the field of essential requirements, without taking position on whether it was a mandatory requirement. The majority also placed emphasis on the fact that no budgetary requirements had been given in the tender conditions, which could otherwise have served as a limitation on over-implementation[1305]. As set out above, if budgetary limits are placed in the tender conditions, the contracting entity is obliged to refuse bids beyond the limits as violating essential requirements[1306].

Somewhat related to over-implementation is a special case where the contracting entity had set a page limit on the bids. The Danish complaint board found this to be an objective and justified criterion, related to the use of resources on tender evaluation. Somewhat surprising, the board notes that there is no obligation on the contracting entity to decide whether a surplus number of bid pages constitute a breach of a mandatory or essential requirement, and that the contracting entity was in the specific case obliged to refuse bids with more than the specified number of pages[1307].

This could, at face value, be read as a refutation of the entire distinction between mandatory and essential deviations, but if this was correct, it would also seem negate the entire practice of the board on price factoring of reservations. Instead, the ruling must be read as finding, by definition, that the setting of a specific page number constitutes an essential requirement. However, it could be argued that a price factoring system would have been more reasonable, but this would of course only further have increased the resources to be spent on the procurement procedure.

Another case of over-implementation concerned the offer of completion of works prior to the deadline set in the tender conditions. The contracting entity price factored the savings gained from the earlier completion, but the Danish complaint board found this to be a violation of the award procedure, since early completion was not an award criterion[1308]. As set out above, the board has in other cases refused a link between price factoring and the

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[1304] Case N-990611, Hoffmann og Sønner, point 8
[1305] Case N-990611, Hoffmann og Sønner, point 5
[1306] Case N-080627, Danske Arkitektvirksomheder, point 10
[1307] Case N-010806, Oxford Research, point 2-3

application of award criteria. On this background, the ruling may instead have to be seen as a more general exclusion of the possibility of positive price factoring.

Instead the contracting entity should first have considered whether early completion breached an essential requirement, thus leading to refusal of the bid, and if not, whether it had any negative price impact that could be price factored. A positive outcome of price factoring is thus excluded. The fact that even completion ahead of time may be deemed noncompliant has later been confirmed by the Danish complaint board[1309].

In other cases, where products offered capabilities additional to those required by the tender conditions, the Danish complaint board complaint board did not find this to constitute a deviation that could render the bid noncompliant[1310].

Also somewhat related to the issue of over-implementation is the issue of rebates offered for award of multiple lots. Somewhat surprising, the Danish complaint board found the offer of such rebates to constitute variants, and as this kind of variant had not been specified in the tender conditions, the offer of rebates could not be accepted, as other bidders had not been given the opportunity of offering similar rebates[1311]. This would seem to be an unnecessary restriction on price competition, as it should be possible to incorporate the effect of rebates into the contract award considerations, which in any case are somewhat complex when several lots are involved.

However, the approach has been confirmed in a later case, where the Danish complaint board found that although the tender conditions did allow for a rebate to be offered, on condition of winning all of 3 lots, the offer of a rebate for the winning of 2 lots was noncompliant, as this option had not been indicated in the tender conditions, although it could have been[1312].

In addition, the contracting entity applied the indicated rebate to each of the 2 lots concerned. This must have been accepted by the operator, who thereby won the procurement. However, a competitor complained, and the Danish complaint board found that the text of the bid did not support such multiple application of the rebate[1313].

In another case, where the tender conditions required rebate information on a percentage basis, and the operator instead had submitted a lump sum rebate, the Danish

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[1308] Case N-040513, Bravida Danmark, point 3
[1309] Case N-070319, STB Byg, point 2, and case N-071203, Stina System Inventar, point 1
[1310] Case N-080917, Bien-Air dental, point 3
[1311] Case N-030527, M.J. Eriksson, point 5
[1312] Case N-031219, Nibe Entreprenør og Transport, point 4
[1313] Case N-031219, Nibe Entreprenør og Transport, point 5

complaint board found this to be a violation of an essential requirement, and that the bid had to be refused[1314].

4.2.5.3.8 Legality

As a separate issue, the Danish complaint board has dealt with the question of whether the contracting entity, at the time of reviewing requests or bids, have any obligation to assess whether operators are complying with the law.

In the case, the operator was reviewing a bid from an operator, in relation to which the contracting entity also held supervisory powers. The contracting entity found that the operator, in its bid, violated competition norms that the contracting entity had set specifically for this operator. Accordingly, it could have ordered the operator to recall the bid, based on the supervisory powers, but instead it chose to declare the bid noncompliant.

The fact that the contracting entity chose to apply a procurement measure, the refusal of a noncompliant bid, did not for the board change the fact, that the decision had its basis in the supervisory powers. Accordingly, any review of the decision was found to fall outside the scope of competence of the Danish complaint board, which is further dealt with separately[1315].

However, the board found occasion to establish in an obiter dictum that without such supervisory relationships, a contracting entity is not in general obliged to undertake a review of the legality of a bid. On the other hand, if it is apparent from the bid, or other known facts connected to the procurement procedure, that the bid is based on an illegality, the contracting entity may in certain circumstances be obliged to set aside the bid as noncompliant[1316].

The board did not develop the criterion of certain circumstances, but only added that the obligation was based on the objectives of the EU public procurement directives, which must be understood as the expression of a principle that equal treatment requires that operators do not gain unfair advantages based on illegalities.

If this understanding is correct, it the limitation to certain circumstances should be read as a somewhat misleading restatement of the impact assessment criterion, so that a contracting entity might not deal with illegalities that cannot have any substantive effect on the procurement procedure. The question of whether the illegalities, as such, fall inside the scope of competence of the contracting entity can have importance only in the sense, that from an administrative law it would be difficult to see how the contracting in such conditions could avoid reacting to the illegality, which is also confirmed by the Danish complaint board

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[1314] Case N-040607, Analycen, point 3
[1315] This will be dealt with in the following part of the project

in the case[1317]. Accordingly, even where the illegalities fall outside the competence of the contracting entity, it must be bound to react by refusing the bid, at least where the impact assessment criterion does not otherwise allow.

This is implicitly illustrated by a case, where the issue at stake was whether an operator had sufficient authorisation to carry out transportation of doctors making house calls. The contracting entity argued that this issue fell outside the scope of competence of the board. However, the board claimed the right to undertake preliminary assessments, with a view to findings related to procurement law[1318]. This may be contrasted with the attitude of the board towards contracts, as set out above. The issue of the scope of competence for the board is further dealt with separately[1319]. On the substance of the case, the board found that sufficient documentation had been presented to the contracting entity for it to adopt the view that the operator had the required authorisations[1320].

In another case, the Danish complaint board dealt with the issue of whether a contracting entity is obliged to ensure that an operator has all required authorisations for contract implementation, and whether this must be documented at the time of bid evaluation. The board found this not to be a requirement, to the extent that the authorisations concerned fell outside the scope of competence of the contracting entity[1321]. The situation may be different where the contracting entity in the tender conditions has required documentation of such authorisations[1322].

An interesting issue in this relation is that of compliance in national procurement law with the general principles of EU procurement law, as required by the Telaustria principle[1323]. The Danish national procurement law does not hold any explicit limitation on the use of specific brand names in tender conditions, although this is regulated both in the text of the EU directives[1324] and the case law of the European Court of Justice[1325]. In an appeal case heard by the Danish appeal court[1326], a preliminary reference was made to the European Court of Justice on this issue, and the court confirmed, by means of a reasoned order, that the

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[1316] Case N-021004, Statsansattes Kartel, point 7
[1317] Case N-021004, Statsansattes Kartel, point 8
[1318] Case N-081106, Dansk Taxa Råd, point 2
[1319] This will be dealt with in the following part of the project
[1320] Case N-081106, Dansk Taxa Råd, point 5
[1321] Case N-040923, Sammenslutningen af Glatførebekæmpende vognmænd i Nordjyllands Amt, point 10
[1322] See below in section 4.2.5.4
[1323] Case C-324/98, Telaustria
[1324] See article 23.8 of directive 2004/18 (C3)
[1325] Case C-359/83, Netherlands, point 25
[1326] Case V-020308, Vestergaard

limitation on use of specific brand names, as found in the EU procurement directives, also applies in sub-threshold procurement[1327].

It is therefore somewhat surprising that in case mentioned above[1328], concerning a noncompliant bid, where the contracting entity had specified specific brands, and the operator had offered different brands, the Danish complaint board found it a violation of the equal treatment requirement that the noncompliant bid was accepted[1329]. The board did not raise the issue of any limitation on the use of brand names, and even refused to consider an argument that the offered brands were of a similar quality. This applied to wooden floors, but surprisingly, in the same ruling, in relation to linoleum floors, the board did accept that argument of similar quality, and thus that the bid with different brands should not in this relation be seen as noncompliant.

This issue of legal and illegal bids has elements in common with the question of structural discrimination, as considered above[1330], and also has links to the question to proof in connection with the application of preselection and award criteria, which will be dealt with separately[1331].

4.2.5.3.9 Verification

A special concern in relation to deviations is the question of whether the contracting entity has an obligation to verify whether information in the requests or bids is true. In general, the Danish complaint board has adopted a categorical view, allowing the contracting entity to rely on the information submitted to it.

Thus, in a case concerning laptop computers, where the height of the computer was an essential requirement, the contracting entity refused some bids, because it was clear from the submitted specifications that the computers were too high. The tender conditions were not precise on the issue, but the Danish complaint board agreed that the height requirement was not a maximum value for the average height, as claimed by an operator and indicated in the specifications submitted by that operator, but instead was a maximum applying to any point on the computer.

In turn, the deselected operator pointed out that several other computers also did not meet this interpretation of maximum height, although the submitted specifications did not show this. Surprisingly, the board found that even with this additional information, the

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[1327] Case C-59/00, Vestergaard, point 24
[1328] See above in section 4.2.5.3.3
[1329] Case N-030603, Haderslev Tæppelager, point 5
[1330] See above in section 4.2.2.2

contracting entity had no obligation to verify the correctness of the height indications given in the specifications[1332]. The same approach was adopted in relation to other specifications, such as computing power and battery life[1333].

A different approach was taken in the previously mentioned case concerning an ice-skating rink, which required operation of the rink during 4 month period, where a competitor complained that the winning bid was based on insufficient technology. The board found that this should have been verified by the authority, and furthermore found that technology was openly insufficient, and that the contracting entity should have refused the bid[1334].

The possibility that the contracting entity may under certain circumstances be obliged to verify the correctness of the information in the bids, as a basis for deciding on compliancy, was also confirmed in a later case. However, in this case the Danish complaint board did not find sufficient grounds for this obligation to have been activated[1335].

The same conclusion was reached in a later case concerning delivery of a boat, where a competitor claimed that the machines on the boat could not be approved, or alternatively that delivery could not take place within the required time. The Danish complaint board did not find that the contracting entity had any occasion to investigate these claims[1336]. The issue of verification of request and bids is further dealt with in connection with preselection and award procedures[1337].

Likewise, in a case where the contracting entity has required all products to be of the same make, a competitor complained that the winning operator could not ensure this, as that operator did not have produce such products itself. The Danish complaint board did not find that this fact could have entailed an obligation for the contracting entity to undertake further investigations[1338].

4.2.5.4 Missing documentation

In general, the above mentioned stricter approach has been applied in most cases concerning preselection, where lack of documentation for not being subject to exclusion

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[1331] This will be dealt with in the following part of the project
[1332] Case N-070328, Siemens Fujitsu, point 10
[1333] Case N-070328, Siemens Fujitsu, point 13-14
[1334] Case N-041008, Virklund Sport, point 1
[1335] Case N-071107, SJ, point 2. For a discussion of the concurrent Swedish cases, see Busch (1)
[1336] Case N-080911, Pro-safe Reflection, point 7
[1337] This will be dealt with in the following part of the project
[1338] Case N-080917, Bien-Air Dental, point 1

grounds has led to the request being refused as noncompliant[1339]. Accordingly, the Danish complaint board has found that the possibility in the EU directives to require additional information[1340] only applies to new information, that the contracting entity finds relevant, and that it cannot be used as a platform to invite submission of missing information[1341]. The issue of additional information will be dealt with separately[1342].

However, again the Danish complaint board has taken a pragmatic approach, and in a case where the contracting entity had required documentation for the qualification of involved personnel as chartered accountants, the board found it sufficient that the documentation concerning non-applicability of exclusion grounds clearly indicated that the operator as such was a company of chartered accountants[1343].

Likewise, in another case, the board found that the obligation, to submit a declaration concerning the turnover during the last 3 years, had in fact been met through the submission by the operator of a yearly report in which the relevant information could be found[1344].

In the case concerning accountants, the board made an interesting obiter dictum, indicating that it could not beforehand be known which staff members would in fact be employed on the task under procurements, and that documentation for individual staff members thus would be irrelevant.

It may be argued, that it is clear that when procuring auditing services, the client is normally buying these based on the brand name of the company, and not the identity of the individual auditor. Thus, the Danish complaint board may be seen as showing more regard for the apparent practical realities of commercial life than for the need to build up consistent principles of procurement law.

However, in other cases the board has accepted that the names and professional credentials of leading may form an essential criterion for preselection, and accordingly that the contracting entity was obliged to refuse request missing this information and documentation[1345].

The are other examples of the practical approach, such as where the board found, in the audit case mentioned above, that a requirement to document the insurance coverage of the company could not only be fulfilled by submitting the individual policies, but could also have

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[1339] Case N-000516, Dansk Transport og Logistik, point 22-23,case N-010223, Kæmpes Taxi og Nordfyns Busser, point 15, and case N-070427, CT renovation, point 1
[1340] See article 39. 2of directive 2004/18 (C3)
[1341] Case N-040216, Eurofins, point 1
[1342] This will be dealt with in the following part of the project
[1343] Case N-000606, Ernest og Young, point 1
[1344] Case N- 070427, CT Renovation, point 2
[1345] Case N-001009, DAPA, point 5

been fulfilled by a general statement from the company issuing the insurance policies of the company[1346]. Having failed to produce even this, the operator was deemed to be rightfully excluded.

However, also in this field the Danish complaint board at times applies leniency towards contracting entities, even without going into any analysis of whether there has been a substantial impact on the procurement procedure. Thus, the board noted that it was an error that an operator had been preselected without having submitted the required documentation for company accounts. The board notes that this constituted an error, but was not the result of unequal treatment or any other violation of the EU procurement directives[1347], which is somewhat surprising as the requirement to submit accounts is normally applied in a strict manner[1348], as are other documentation requirements[1349].

In addition, the above mentioned leniency would appear to be based on a good faith argument, extended to cover excusable error, when no ulterior motive may be found. This would not seem to be a general standard of EU internal market and public procurement law. In other cases, the reasoning of the Danish complaint board is so brief, in finding that sufficient documentation has been submitted, that no conclusions can be drawn as to the legal standards applied[1350].

In relation to documentation for non-applicability of the exclusion provisions[1351], the Danish complaint board has adopted a strict approach[1352], as also dealt with in relation to the late submission of requests[1353].

The issue of missing documentation also raises the question whether an operator may be required to ensure all authorisations prior to submitting a request or bid, if such authorisations are relevant only for the party winning the contract. The issue is dealt with separately in connection with the proportionality principle[1354]. It also has relations with the issue of legality, as dealt with above[1355].

However, in one case the contracting entity had found a balanced solution as the operators were required to submit authorisations together with the bid, and if they did not hold authorisations, then a time plan for how they intended to obtain authorisation prior to

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[1346] Case N-000606, Ernest og Young, point 2
[1347] Case N-970228, Kiras Kolding, point 1
[1348] Case N-080530, Serviceselskabet for vagtlæger i Region Midt, point 1
[1349] Case N-080711, Labofa Munch, point 3
[1350] Case N-030319, Forlev Vognmandsforretning, point 3 and 8
[1351] See article 45 of directive 2004/18 (C3)
[1352] Case N-040217, Analycen, point 1, and case N-040308, Eurofins, point 1
[1353] See above in section 4.2.4
[1354] This will be dealt with in the following part of the project

commencement of the contract. As the operator concerned had submitted neither authorisations nor the time plan, the Danish complaint board agreed that the bid had to be refused[1356].

In the same case, the board confirmed that were the tender conditions require information about the use and identity of subcontractors[1357], and this information is not submitted, the bid must be refused[1358].

In a special case concerning glass fibre containers, the contracting entity had required documentation for compliance with certain standards, which however concerned containers in plastic. None of the bids submitted thus had the required documentation, but instead of refusing the bids, the contracting entity changed the documentation requirements to standards relevant for glass fibre. The Danish complaint board agreed that the contracting entity was not obligated to refuse the bids, and did not raise the issue if whether the procurement should instead have been cancelled[1359].

Furthermore, the board accepted that based on a preliminary assessment of the bids, one operator had been deselected, and for this reason not requested to submit the documentation on glass fibre containers[1360]. It does not seem likely that the European Court of Justice would have arrived at a similar result.

A special case of missing documentation relates to guarantees, which a contracting entity may oblige an operator to submit. The Danish complaint board has rules that such guarantees should not be seen as related to preselection, and that they may accordingly be required as part of the bid, which means that bids, without such guarantees, may be considered deviant[1361]. In the present case, the bid concerned was refused.

Related to missing documentation is the issue of authorisation to sign on behalf of an operator. In a case, the contracting entity had specified that the contract would have to be signed by one of the persons authorised in the company registry to sign for the operator concerned. A competitor claimed that this must also apply to the bids, and that the winning bid for this reason should have been rejected as noncompliant.

[1355] See above in section 4.2.5.3.8
[1356] Case N-040607, Analycen, point 1
[1357] See above in section 4.1.5.2
[1358] Case N-040607, Analycen, point 2
[1359] Case N-040902, BN Produkter, point 2
[1360] Case N-040902, BN Produkter, point 3
[1361] Case N-060707, Raunstrup Gruppen, point 3

The Danish complaint board instead found that the tender condition only regulated the contract signing, and not the bid signing, which would instead be subject to normal considerations of power of representation. In the specific case, the board found that the person, having signed the winning bid, had been so empowered by his position[1362].

Where documentation requirements are unrelated to operative parts of the tender conditions, they may be regarded as non-mandatory, and accordingly deviations cannot lead to refusal of the bid and most likely also not to price factoring. In one case, the Danish complaint board found that there was no basis for assuming that business locations was a either preselection or award criteria under the tender conditions. Accordingly, the requirement to submit pictures of such locations, together with the bid, was a meaningless requirement, and failure to comply with this requirement could not render the bids noncompliant[1363].

For consortia seeking preselection, the Danish complaint board has found it self evident, even where this is not specified in the tender conditions, that documentation requirements must apply to all members of the consortium, and that submission of documentation by one consortium member cannot suffice[1364]. This can only relate to formal documentation requirements and cannot be seen to impact on the right of an operator to rely on the resources of other parties, including consortium members[1365].

[1362] Case N-060508, Pankas, point 4
[1363] Case N-060906, Sahva, point 6
[1364] Case N-080915, Totalrådgivergruppen
[1365] See article 47.2-3 and 48.3-4 of directive 2004/18 (C3)

5 CONCLUSIONS

5.1 Research

The creation of the matrix system required a combination of complicated legal analysis and hard manual work in establishing the links between legislation and case law. As registration of case elements grew, it became necessary to divide some of the fundamental articles in an artificial manner, so as to create sub-groups that allowed for an overview of the case material to be maintained.

This especially involved the fundamental provision on equal treatment and transparency, which was divided into sections covering amongst other general equal treatment and non-compliancy. These two sub-groups were selected, together with provisions relating to definitions, to form the basis of the comparative analysis of enforcement.

A special problem concerned the alignment of the principles and provisions of general EU law, which could have been slotted into the matrix positions for equivalent EU procurement directive provisions, as was done with the provisions of internal Community procurement and national Danish procurement. However, during the analysis it was felt more appropriate to segregate the general EU elements under their own matrix headings.

The website structure allowed for cross-referencing between segments of jurisprudence that covered more than one legislative provision. However, since all provisions were indexed with their original designation, use of the cross-references required recourse to the general legislative matrix. Based on problems with this two-step procedure, it is the intention to upgrade the website reference to hyperlinks, so as to offer direct links.

The use of generational identifiers created an artificial interface, which had to become familiar in use before being of value, but once this stage had been passed, the generational identifiers functioned in a very satisfactory manner so as to give immediate understanding of the relations between various parts of the legislation. It also assisted in making a proper indexing of the report possible.

5.2 Application of EU procurement

The three generations of EU public procurement directives have shown a surprisingly slow development towards unification of the different sectors, covering respectively in one dimension the classic and utilities fields, and in another dimension works, supplies and services.

Even with the third generation directives, the difficulties in comparing the classic and utilities fields do not seem to reflect any deep legislative needs, and appear rather to be the

result of legislative lethargy. The question may well be asked, whether the next development should not be a single, unified EU instrument for public procurement.

The European Court of Justice has, as in other parts of EU law, been a driving element behind development of the EU procurement directives, However, also as in other parts of EU law, the legislator has only in part responded by codifying the principles established by the court. Thus, many aspects of EU public procurement are still covered only by common understanding of the case law, which from a legal certainty point of view is an unsatisfactory state.

This becomes all the more important, since public procurement law, like elements of private international law, does not have a built in social dimension that would serve to give users a feeling of justice and reasonableness. It is naturally possible to explain the underlying reasons, but the relations between the individual procedural steps and the underlying protection of the internal market is not obvious. As a result, many users perceive the public procurement system as complicated and distracting.

As a result, many procurement procedures are not carried out according to the formal rules, but by applying measures of expediency, which in turn leads to the high number of cases with surprisingly banal infractions of the EU procurement provisions.

A basic problem is that the underlying argument, that procurement procedures ensure better value, is convincing only in the long run and at an aggregated level. In the short run, procurement procedures appear time consuming, while at the same time presenting a risk of having to contract with counterparts that would not be the preferred choice.

Again, it is possible to explain that this is just a structural issue, since public procurement basically calls on the contracting entities to make clear their purchasing requirements and preferences prior to entering the market. Thus, the formality of the procedures ensure a better qualified choice at the final moment of contracting.

However, as the deciding of priorities and transferring these priorities into award criteria is a complicated matter, the advantages for the individual procurement officer are not immediate. The question may well be asked, whether the intention of safeguarding the internal market might not be better served by a less complicated set of rules.

The internal Community procurement provisions seem to reflect this wish in principle, but not in a way that in practice provides for less complicated rules. In fact, by adding detail upon detail, the internal Community system would appear today to be more complicated than the general EU procurement system. However, the feeling of a need to separate from the general EU system seems to have been clear.

Originally, the internal Community provisions held only the core of a procurement system. Then, for two generations, it relied on the direct application of the EU procurement rules, except for sub-threshold procurements. With the fourth generation, this direct connection became instead a case of parallel worlds, where it is possible to follow similar developments, including codification of the jurisprudence of the European Court of Justice.

Sub-threshold procurement was originally thought to be excluded from EU procurement norms. However, with Telaustria principle it was made clear that a large segment of the norms also apply below thresholds. Accordingly, countries like Denmark, that previously had only a limited set of national procurement provisions, have had to develop a new system of national procurement legislation.

In doing so, one possible solution would have been to expand the application of the EU procurement directives to cover also sub-threshold procurement. In Denmark, a similar solution was adopted in the field of competition, where the EU block exemptions, apart from being applied for cases with EU dimensions, were implemented as part of Danish law so as to be applied as part of the national competition law.

However, this strategy was not chosen for procurement law, where instead the more open norms of pre-existing Danish procurement legislation were continued, allowing for a high degree of negotiation and contact between contracting entities and operators. It is interesting to note that issue of whether these national norms satisfy the Telaustria requirements have not yet been raised in jurisprudence.

At the level of enforcement, the Danish complaint board has been a success, offering a speedy and economic solution to procurement disputes, with the added safeguard that the operator cannot become liable for the legal costs of the contracting entity. However, as set out below, the jurisprudence of the complaint board does at several points seem to deviate from the norms established by European Court of Justice.

5.3 Enforcement of EU procurement

The total of 632 cases considered in the matrix research lead to the registration of 2994 hits, understood as occasions where a judicial decision touched upon a segment of procurement law, either by directly referring to it or by deciding an issue covered by the segment concerned.

Based on this registration of case law segments, it was possible to establish distributive statistics, which should however be viewed with some reservation, as the inclusion of implicit references does on the one hand compensate for error in the judicial

reasoning, but on the other hand also may introduce statistical noise, since the implicit references have been entered at the sole discretion of the researcher.

If the statistic were to be given a more direct role in the research, this would require a stricter system of registration criteria, so as to ensure a consistent registration. At the present level, the statistics can therefore only serve to give an indicative picture.

At the aggregate level, the distribution of cases between the EU and Danish jurisdictions is at a 1:2 level, with 227 cases from the European Court of Justice and 406 cases from the Danish jurisdictions. To this could be added the many decisions of interim measures that are not published separately by the Danish complaint board.

This difference might have been expected to be even greater, but the fact that the European Court of Justice is not only the venue for preliminary references and claims against member states, but also the exclusive jurisdiction for internal Community procurement, does have an impact on the statistics. Out of the total number of 227 cases, 49 of these come from the European Court of First Instance, which hears the internal Community procurement cases.

An advantage from this additional jurisdiction of the European Court of Justice, is that it offers the court an occasion to directly apply the procurement norms, as opposed to the more general interpretative issues that are often raised in the direct cases against member states and in the preliminary references. Thus, this has filled out the statistics in some places where national jurisprudence would otherwise have been dominant.

However it is still possible to note a difference, even in relation to the fundamental principles dealt with in the comparative analysis. Thus, for the European Court of Justice a total of 9.7% percentage of hits are registered in the field of definitions, covering article 1.1 to 1.15 of directive 2004/18 (C3). As opposed to this, only 2.6% of the hits in the Danish jurisdictions fall in this area.

The results are reversed when the fundamental principles, including equal treatment and transparency, are considered. A total of 7.4% of the hits in jurisprudence from the European Court of Justice falls in this area, while 19.7% of the hits in Danish jurisprudence does so. To some extent this is coloured by the mantra effect, under which the Danish complaint board has a tendency to refer a great number of cases to issues of equal treatment and transparency. However, the registration system has to some extent countered this mantra effect.

The difference is less dramatic in the general field of equal treatment and transparency, where the European Court of Justice has 4.0% of hits located, whereas the Danish jurisdictions have 4.9%. However, in the special area of non-compliance, considered

in the comparative analysis, the difference becomes overwhelming with 0.8% at the European Court of Justice and 7.2% at the Danish jurisdictions.

This also confirms a general impression from the reading of cases, that it is one of the most frequent claims in cases before the Danish complaint board that a bid from a competitor should not have been admitted, because the bid was noncompliant. At the same time, non-compliancy is one of the areas, where the jurisprudence of the European Court of Justice has had the least impact on legislative drafting.

The EU procurement directives are silent on the issue of how to deal with non-compliant bids, and neither the Danish complaint board nor other national jurisdictions have to any great measure raised this issue in preliminary references. Instead the Danish complaint board has developed its own norm of price factoring, which, however, has also not been codified in the national Danish procurement legislation.

The overall impression is that in order to ensure a trans-European development of common procurement norms, an institution such as the Danish complaint board might well make a more active use the preliminary reference system in the EC-Treaty. The high level of activity in this field from Austrian jurisdictions has led to the development of important principles, such as the cornerstone principle of Telaustria in the field of sub-threshold procurement.

However, an increased use of the preliminary reference system faces two major obstacles. One is an ingrown attitude in the Danish judicial administration that problems should rather be solved locally and quietly, as opposed to calling on the intervention of the European Court of Justice, which might well lead to results unsatisfactory for the state of Denmark. The view of the European Court of Justice as a cooperation partner would appear still not to be fully accepted in the Danish judicial administration.

Some measure of responsibility must in this connection be borne by the European Court of Justice, where the slide from an original 6-month case handling period to the present period of about 24-months, makes the preliminary reference mechanism difficult to integrate into a system such as the Danish complaint board, which was meant to be a fast track system.

There are various arguments, including language and translation problems that are offered as an explanation for the long case handling time at the European Court of Justice. However, despite the possible validity of such arguments, the fact remains that once the 6-month period was discarded, the preliminary reference stopped having the image of being an instrument of assistance in an ongoing national procedure.

Instead it became an alternative procedure, which was reinforced by the expansive interpretations of the European Court of Justice, often going into the details of the matters that were in reality to be decided subsequently by the national judges. This applies not only in the field of public procurement, but also more general as to the relations between the European Court of Justice and the national jurisdictions.

However, the European Court of Justice has provided very important guiding principles in its jurisprudence, and the task on practitioners is to achieve application of these principles in national jurisdictions. It is the hope, that the present report, and the underlying matrix results, may assist in shedding light on the points were there is still not coherence between the solutions adopted at the European Court of Justice and the national jurisdictions, such as the Danish complaint board.

6 ANNEXES

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6.2 Names of procurement cases from the European Court of Justice

Name	Number
Agence	56/77
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Alcatel Austria	C-81/98
ANAS	C-192/98
ANAV	C-410/04
ARGE	C-94/99
Asemfo	C-295/05
Asociacion Profesional de Empresas	C-220/06
ATI EAC	C-331/04
Auroux	C-220/05
Austria	C-328/96
Austria	C-212-/02
Austria	C-29/04
Ballast Nedam	C-389/92
Ballast Nedam	C-5/97
Bayerischer Rundfunk	C-337/06
Beentjes	31/87
Belgium	C-87/94-R
Belgium	C-87/94
Belgium	C-323/96
Belgium	C-252/01
British Telecommunications	C-392/93
Buchhändler	C-358/00-S
Carbotermo	C-340/04
Cascina	C-226/04 & C-228/04
CC Communications	C-424/01-S
CEI	27/86
CMC	118/83-R
CMC	118/83
Coditel Brabant	C-324/07
Coname	C-231/03

Name	Number
Concondia	C-513/99
Connemara	C-306/97
Consorzio Elisoccorso	C-492/06-S
Constanzo	103/88
Contse	C-234/03
Denmark	C-243/89
Diy-Mar Insaat Sanayi	C-163/07-PA
Dorsch Consult	C-54/96
Du Pont de Nemours	21/88
Espace Trianon	C-129/04
Evans Medival	C-324/93
EVN & Wienstrom	C-448/01
EvoBus	C-111/97
Fabricom	C-21/03 & C-34/03
Falciola	C-286/88-A
Finland	C-195/04
France	C-234/95
France	C-311/96
France	C-312/96
France	C-225/97
France	C-16/98
France	C-225/98
France	C-337/98
France	C-237/99
France	C-97/00
France	C-439/00
France	C-340/02
France	C-264/03
Frigerio Luigi	C-357/06
Fritsch	C-410/01
Furlanis	C-143/94
GAT	C-315/01
Gemeente Arnhem	C-360/96
Germany	C-433/93
Germany	C-318/94
Germany	C-253/95
Germany	C-341/96
Germany	C-20/01 & C-28/01
Germany	C-125/03
Germany	C-126/03
Germany	C-414/03
Germany	C-503/04
Gestion Hotelera	C-331/92
Greece	C-79/94
Greece	C-236/95
Greece	C-311/95
Greece	C-394/02
Greece	C-237/05
Greece	C-399/05
Greece	C-481/06
Grossmann	C-230/02
Hackermüller	C-249/01
Hera	C-304/96
Holst Italia	C-176/98
Hospital	C-92/00
Hospital Ingenieure	C-258/97
Impresa Donà	C-295/89
Impresa Lombardini	C-285/99 & C-286/99

Name	Number
Ing. Aigner	C-393/06
Ireland	45/87-R1
Ireland	45/87-R2
Ireland	45/87
Ireland	C-353/96
Ireland	C-507/03
Italy	10/76
Italy	133/80
Italy	274/83
Italy	118/85
Italy	199/85
Italy	263/85
Italy	3/88
Italy	194/88-R
Italy	C-360/89
Italy	C-362/90
Italy	C-272/91-R
Italy	C-272/91
Italy	C-107/92
Italy	C-296/92
Italy	C-57/94
Italy	C-43/97
Italy	C-385/02
Italy	C-525/03
Italy	C-187/04 & C-188/04
Italy	C-260/04
Italy	C-412/04
Italy	C-337/05
Italy	C-371/05
Italy	C-119/06
Italy	C-157/06
Italy	C-217/06
Italy	C-437/07
Kauppatalo	C-244/02-S
Köllensperger	C-103/97
Koppensteiner	C-15/04
Korhonen	C-18/01
Lämmerzahl	C-241/06
Lianakis	C-532/06
Liikenne	C-172/99
Makedoniko	C-57/01
Mannesmann	C-44/96
Medipac-Kazantzidis	C-6/05
Metalmeccanica	C-27/98
Michaniki	C-363/04-AC, C-364/04-AC, C-365/04-AC
Michaniki	C-213/07
Netherlands	C-359/93
Ordine degli Architetti	C-399/98
Parking Brixen	C-458/03
Pfeiffer	C-397/01
Portugal	C-247/89
Portugal	C-275/03
Portugal	C-70/06
Pressetext Nachrichtenagentur	C-454/06
RISAN	C-108/98
Rüffert	C-346/06
Santex	C-327/00

Name	Number
Sateba	C-422/97-PA
SECAP	C-147/06 & C-148/06
SIAC	C-19/00
Siemens	C-314/01
Sintesi	C-247/02
Spain	C-24/91
Spain	C-71/92
Spain	C-328/92
Spain	C-214/00
Spain	C-283/00
Spain	C-84/03
Spain	C-444/06
Stadt Halle	C-26/03
Strabag	C-462/03 & C-463/03
Swoboda	C-411/00
TEA-CEGOS	C-189/06-PA
Teckal	C-107/98
Telaustria	C-324/98
Termoraggi	C-323/07-S
Tögel	C-76/97
Transporoute	76/81
Traunfellner	C-421/01
Truley	C-373/00
Udine	C-310/01-S
Unitron	C-275/98
Universale-Bau	C-470/99
University of Cambridge	C-380/98
Varec	C-450/06
Vestergaard	C-59/00-S

6.3 Names of procurement cases from the European Court of First Instance

Name	Number
Adia Interim	T-19/95
Adviesbureau Ehcon	T-140/04-A
AFCon	T-160/03
Alsace	T-139/99
Antwerpse Bouwwerken	T-195/08-R
Belfass	T-495/04
Bouwnijverheid	T-29/92
Brink's Security	T-437/05-R
Capgemini	T-447/04-R
Centre de langues	T-202/08-R
Centro Studi Antonio Manieri	T-125/06
Cyprus	T-54/08-R, T-87/08-R, T-88/08-R, T91/08-R, T-92/08-R, T-93/08-R
Cyprus	T-119/08-R
Cyprus	T-122/08
DC-Hadler Networks	T-264/06
Deloitte	T-195/05-R
Deloitte	T-195/05
Dimosthenis Balatsoukas	T-395/07-A
Diy-Mar Insaat Sanayi	T-129/06-A
Ecord	T-60/98-R
Embassy Limousines	T-203/96
Entrance Services	T-333/07
Esedra	T-169/00-R
Esedra	T-169/00

Name	Number
ESN	T-332/03
European Dynamics	T-303/04-R1
European Dynamics	T-303/04-R2
Evropaïki Dinamiki	T-465/04
Evropaïki Dinamiki	T-59/05
Evropaïki Dinamiki	T-106/05-A
Evropaïki Dinamiki	T-272/06
Evropaïki Dinamiki	T-406/06
Evropaiki Dynamiki	T-345/03
Evropaïki Dynamiki	T-250/05
Globe SA	T-114/06-R
International	T-175/94
Makedoniko	T-202/02-A
Renco	T-04/01
Sateba	T-83/97-A
Scan Office	T-40/01
Sogelma	T-411/06
Strabag	T-183/00
Succhi di Frutta	T-191/96 & T-106/97
TEA-CEGOS	T-376/05 & T-383/05
Theofilopoulos	T-91/06-A
TQ3 Travel Solutions	T-148/04-R
TQ3 Travel Solutions	T-148/04
Umwelt- und Ingenieurtechnik	T-125/05-R
Unity	T-511/08-R
Vakakis International	T-41/08-R
VDH	T-185/08-R
VDH	T-185/08-A

6.4 Names of procurement cases from the Danish complaint board

Name	Number
A-1 Communication	N-050309
Abtech	N-970912
Acer	N-990604-1
AC-Trafik	N-020103
Adelholm VVS	N-051220
Adelholm VVS	N-060428
Air Liquide Danmark	N-051215
Air Liquide Danmark	N-060426
Albertsen & Holm	N-980126
Alliance Clean & Care	N-060830
Analycen	N-040217
Analycen	N-040607
Aon Denmark	N-021127
Arbejdsgiverforeningen for Handel, Transport og Service	N-971017
Arkitektgruppen i Aarhus	N-971009
Arriva Danmark	N-000529
Arriva Danmark	N-000621
Audio-Visuelt Centrum	N-940617
AV Form	N-080327
Bakkely	N-050114
Bakkely	N-060120
Bandagist-Centret	N-081217
Bangs Gård	N-070220
Banverket	N-040621
Banverket	N-041202

Name	Number
Baxter	N-061214
BCP	N-990604-2
Benny Hansens Tømrer- og Snedkerforretning	N-040830
Bent Vangsøe Natursten	N -070502
Bien-Air Dental	N-080917
Bilhuset Randers	N-031216
Bilhuset Ringsted	N-030528
Bjarne Larsen	N-081028
Bladt Industries	N-050607
Blue Line/Herlufsholm Minibus	N-051111
BN Produkter Danmark	N-040902
BN Produkter Danmark	N-050301
Boligkontoret Danmark	N-080416
Bombardier Transportation Denmark	N-031104
Bravida Danmark	N-030815
Bravida Danmark	N-040513
Brdr. Thybo	N-040310
Brdr. Thybo	N-040913
Brunata	N-041216
Brunata	N-050707
Brøndum	N-081105
Buus Totalbyg	N-060504
C.C. Brun Entreprise	N-081002
C.F. Møller	N-080115
C.F. Møllers Tegnestue	N-980701
Centralforeningen af Taxiforeninger i Danmark	N-030428
Centralforeningen af Taxiforeninger i Danmark	N-070821
Colas Danmark	N-040930
Cowi	N-061113
Cowi	N-070404
Cowi	N-080331
Creative Company	N-081003
Crocus	N-970423
CT Renovation	N-070427
Dafeta Trans	N-970210
Damm Cellular Systems	N-071221
Damm Cellular Systems	N-080414
Danmarks Automobilforhandlerforening	N-970827
Danmarks Optikerforening	N-941118
Dansk Byggeri	N-040929
Dansk Byggeri	N-050907
Dansk Fjernvarmes Decentrale	N-990917
Dansk Høreteknik	N-070212
Dansk Høreteknik	N-070712
Dansk Industri	N-960604-1
Dansk Industri	N-070820
Dansk Restprodukthåndtering	N-041122
Dansk Taxi Forbund	N-981110
Dansk Taxi Forbund	N-030408
Dansk Taxi Råd	N-070704
Dansk Taxi Råd	N-081106
Dansk Transport og Logistik	N-000516
Dansk Transport og Logistik	N-010130
Dansk Transport og Logistik	N-010427
Danske Arkitektvirksomheder	N-050408
Danske Arkitektvirksomheder	N-060502
Danske Arkitektvirksomheder	N-080627
Danske Handelskammer	N-950623

Name	Number
Danske Vognmænd	N-961016
DAPA	N-001009
Deponering af Problem-affald	N-000627
Det Danske Handelskammer	N-960607
Det Danske Handelskammer	N-970108
Det Danske Handelskammer	N-980427
Det Danske Handelskammer	N-980914
Drejer	N-950531
E. Pihl & Søn	N-960426
E. Pihl & Søn	N-040113
E. Pihl & Søn	N-041126
Eiland Electric	N-011024
Ejnar Kristensen	N-071130
ELFO	N-960909
Elindco Byggefirma	N-081216
Ementor	N-030407
Ementor Denmark	N-020510
Enemærke & Petersen	N-990301
Entreprenørforeningens Miljøsektion	N-961212
Ernst og Young	N-000606
Esbjerg Andels Renovationsselskab	N-971029
Esbjerg Oilfield Services	N-960402
Eterra	N-011026
Eurodan-Huse vest	N-030808
Eurofins	N-040216
Eurofins	N-040308
Eurofins Miljø	N-080118
European Land Solutions	N-080710
European Metro Group	N-961118
Fagligt Fælles Forbund	N-060310
Farum Industrirenovation	N-981021
Farum Industrirenovation	N-020325
Farum Menighedsråd	N-990608
Finn F. Hansen	N-041130
Flemming Damgaard	N-041029
Flemming Damgaard	N-050307
Foreningen af Rådgivende Ingeniører	N-950608
Foreningen af Rådgivende Ingeniører	N-960613
Foreningen af Rådgivende Ingeniører	N-970107
Foreningen af Rådgivende Ingeniører	N-980309
Foreningen af Rådgivende Ingeniører	N-980702
Foreningen af Rådgivende Ingeniører	N-990308
Foreningen af Rådgivende Ingeniører	N-990906
Foreningen af Rådgivende Ingeniører	N-001207
Forlaget Magnus	N-010502
Forlaget Magnus	N-011122
Forlev Vognmandsforretning	N-030319
FSBbolig	N-080415
Fujitsu Siemens Computers	N-070328
Funder Ådalkonsortiet	N-080429
Georg Berg	N-030805
Georg Berg	N-040309
Gladsaxe Kommune	N-050617
Grønbech Construction	N-070227
Grønbech Construction	N-071022
Grønbech Construction	N-081016
H. Friedmann og Søn	N-001108
H. Hoffmann og Sønner	N-990611

Name	Number
H.C. Svendsen	N-960123-2
H.O. Service	N-040709
H.O. Service	N-041101
Haderslev Tæppelager	N -030603
Harry Andersen & Søn	N-031121
Haubjerg Interiør	N-060213
Haubjerg Interiør	N-080208
Hedeselskabet Miljø og Energi	N-031106
Hedeselskabet Miljø og Energi	N-060823
Hedeselskabet Miljø og Energi A/S	N-030206
Heine Pedersen	N-060714
Helsingør Kommune	N-031117
Henning Larsen	N-950308
Henning Larsen	N-950518
Hermedico	N-080529
Herning Bladet	N-991210
HIQ Wise	N-071219
Hoffmann	N-051025
Hoffmann	N-060223
Holst Sørensen	N-990716
Holstebro Brandvæsens Brandkorpsforening af 1906	N-080923
Holsted Minibus	N-020321
HP Gruppen	N-0501031
HP Gruppen	N-050614
Humus	N-980918
Humus	N-981204
Humus	N-990609
Humus	N-991027
Højgaard og Schultz	N-970522
Højgaard og Schultz	N-970619
Højgaard og Schultz	N-981203
Højgaard og Schultz	N-990610
Håndværksrådet	N-960604-2
Håndværksrådet	N-990907
IBF Nord	N-960221
Immuno Danmark	N-970314
Informationsteknik Scandinavia	N-021014
Informi GIS	N-080709
ISS Danmark	N-020402
ISS Facility Services	N-070719
Iver C. Weilbach & Co.	N-041011
Iver Pedersen	N-960530
J. A. Mortensen Inventar og Bygning	N-040322
J. A. Mortensen Inventar og Bygning	N-050704
J. Olsen A/S Entreprenør- & nedrivningsfirmaet	N-060203
Jan Houlberg Instrumentering	N-051211
Jan Houlberg Instrumentering	N-060124
JN-Entreprise	N-021101
JN-Entreprise	N-021104
Joca Trading	N-021219
Joca Trading	N-060905
Joca Trading	N-070921
Johs. Sørensen & Sønner	N-020322
Judex	N-010914
Judex	N-020703
Jyllands-Posten	N-990920
Jysk Erhvervsbeklædning	N-080214
Jørgensen & Meklenborg	N-960131

Name	Number
Karl Jensen Murer- og Entreprenørfirma	N-080229
KAS Transport	N-030807
KAS Transport	N-040429
Kiras Kolding	N-970228
Kirkebjerg	N-000811
Kirkebjerg	N-051219
Kirudan	N-060313
Klaus Trier	N-051102
Kommune og Amts Revision	N-010622
Kommunernes Gensidige Forsikringsselskab	N-950622
Kommunernes Revision	N-020809
Konkurrencestyrelsen	N-980225
Konkurrencestyrelsen	N-980317
Konkurrencestyrelsen	N-070424
KPC Byg	N-070618
Kruse & Mørk	N-030811
Kuwait Petroleum	N-071016
Kæmpes Taxi og Nordfyns Busser	N-010223
Køster Entreprise	N-041012
L.R. Service	N-970501
L.R. Service	N-980608
L.R. Service	N-990121
L.R. Service	N-030502
L.R. Service (Bramsnæs)	N-990528-2
L.R. Service (Ramsø)	N-990528-3
L.R. Service (Ringsted)	N-990528-1
Labofa Munch	N-080711
Leif Jørgensen	N-041006
Lifeline	N-991215
Lindpro	N-030429
LK Gruppen	N-080910
Logstor	N-060706
LSI Metro Gruppen	N-070824
LSI Metro Gruppen	N-080114
Lyngby-Taarbæk Kommune	N-020717
Løgten murer- og entreprenørforretning	N-050418
Løgten murer- og entreprenørforretning	N-050930
M.J. Eriksson	N-030527
M.J. Eriksson	N-040324
Madsen & LO	N-961011
Magnus Informatik	N-070713
Magnus Informatik	N-071204
Malby	N-950823
Mangor og Nagel	N-981022
Mariendal El-Teknik	N-050412
Marius Hansen	N-981123
Master Data	N-080912
Milana	N-020812
Miljøforeningen	N-980115
Miri Stål	N-980831
Miri Stål	N-040220
Miri Stål	N-040820
MMM Danmark	N-940120
More Group Danmark	N-991109
MT Højgaard	N-050311
MT Højgaard	N-060116
MT Højgaard	N-061003
MT Højgaard	N-070221

Name	Number
MT Højgaard	N-070426
MT Højgaard	N-070810
MT Højgaard	N-080410
MT Højgaard	N-081001
Navigent	N-050913
NCC Roads	N-081126
Nethleas	N-061208
Nibe Entreprenør og Transport	N-031219
Nibe Entreprenør og Transport	N-040414
Niels Fryland	N-920812
Nordjysk Kloak- og Industriservice	N-081210
Novartis Healthcare	N-061026
Nybus	N-980703
Ole Holst	N-031120
Oxford Research	N-010806
P. Jensen og Sønner Outrup	N-070119
P. Kortegaards Planteskole	N-090718
Palle W. Hansen	N-080721
Pankas	N060508
Paranova	N-940118
Per Aarsleff	N-040609
Per Aarsleff	N-040826
Per Aarsleff	N-050308
PlantWare Holding	N-070213
Platach Arkitekter	N-070222
Poul Hansen Entreprenører	N-970819
Praktiserende Arkitekters Råd	N-960123-1
Praktiserende Arkitekters Råd	N-970303
Praktiserende Arkitekters Råd	N-971008
Praktiserende Arkitekters Råd	N-000209
Praktiserende Arkitekters Råd	N-010712
Pro-Safe Reflection	N-080911
Pumpex	N-050302
Raunstrup Gruppen	N-060630
Raunstrup Gruppen	N-060707
Rebo	N-070223
Rengøringsgrossisten	N-070606
Rengøringsgrossisten	N-080212
Renoflex	N-991217
Renoflex	N-001214
Råstof og Genanvendelse Selskabet af 1990	N-070919
Sahva	N-060906
Sammenslutningen af Glatførebekæmpende vognmænd i Nordjyllands Amt	N-040923
Sammenslutningen af Glatførebekæmpende Vognmænd i Nordjyllands Amt	N-050203
Sammenslutningen Nabofronten mod Biogasanlæg	N-050714
SCA Hygiene Products	N-080430
Scandlines Sydfynske	N-030205
Scan-Plast Produktion	N-071207
Scan-Plast Produktion	N-080702
S-Card	N-060228
Sectra	N-070829
Seghers	N-981120
Seghers	N-990318
Sejlstrup Entreprenørforretning	N-071123
Semco Energi	N-950921
Semco Energi	N-961031

Name	Number
Sereno Nordic	N-040506
Serviceselskabet for vagtlæger i Region Midt	N-080530
Siemens	N-951025
SJ	N-071107
Sjælsø Entreprise	N-050923
Sjælsø Entreprise	N-060125
SK Tolkeservice	N-041014
SK Tolkeservice	N-050406
Skanska	N-030812
Skanska Danmark	N-030630
Skjortegrossisten	N-991228
Skousen Husholdningsmaskiner	N-021125
Sonne	N-941103
SP Medical	N-070903
Statsansattes Kartel	N-021004
Statsansattes Kartel	N-031010
STB Byg	N-070319
STB Byg	N-070416
Stina System Inventar	N-071203
Stürup	N-070815
Svend Andresen	N-061110
Svend B. Thomsen	N-000927
Svend B. Thomsen	N-010820
Sømændenes Forbund	N-010405
TagVision	N-081020
Taxa Stig	N-050503
Technicomm	N-990309
Thomas Borgå	N-071214
Thomas Borgå	N-080714
Thorup Gruppen	N-061106
Thorup Gruppen	N-080109
Tilsynsrådet Statsamtet Storstrøm	N-031105
Tipo Danmark	N-050902
Tolkeservice	N-040323
Totalrådgivergruppen	N-080915
Trans-Lift	N-080514
Triolab	N-071017
Turistvognmændenes Landsforening	N-981127
UAB Baltic Orthoservice	N-080626
UAB Baltic Orthoservice	N-081219
Unicomputer	N-030929
Unicomputer	N-060427
Uniqsoft	N-000502
Unitron	N-000314
Unitron Scandinavia	N-980122
Valle Trans-Media	N-950707
Vestegnens Tolke- og Rådgivningsservice	N-050922
Vestergaard	N-981111
Villy Antonsen	N-020403
Villy Antonsen	N-030324
Vindtek Ventilation	N-020227
Vindtek Ventilation	N-021018
Virklund Sport	N-041008
Visborg Entreprenørfirma	N-060307
Visma Logistics	N-000808
Vognmand Bomholt	N-970709
WAP Wöhr Automatikparksysteme	N-080108
Willis	N-080218

Name	Number
XO Care	N-080918
Xyanide Company	N-980114
Zealand Care	N-010219
Økonomi- og Erhvervsministeriet	N-020129
Økonomi- og Erhvervsministeriet	N-020718

6.5 Names of procurement cases from the Danish courts

Name	Number
Arriva Skandinavien	H-070511
Bent Mousten	V-020308
Brunata	VK-060613
Brunata	V-070306
Enemærke og Petersen	HK-010810
Esbjerg Kommune	V-060331
European Metro Group	H-050331
Foreningen af Rådgivende Ingeniører	O-021007
H.O. Service	B-070430
Handelshøjskolen	O-000816
Harry Andersen	VK-050228
Helle Kommune	V-060411
Humus Genplast	V-010503
Humus Genplast	V-010507
Humus Genplast	V-030917
IBF Nord	V-000314
J.H. Schultz Information	O-090305
Lindpro	O-041207
Morsø Kommune	O-051219
Nordjyllands Amt	V-070228
Per Aarsleff	HK-050316
Per Aarsleff	O-080205
Poul Hansen	VT-010928
Praktiserende Arkitekters Råd	O-020503
Praktiserende Arkitekters Råd	H-040928
SKI	O-071011-1
Skjortegrossisten	H-040210
Unicomputer	O-071011-2
Århus Amt	V-040316

6.6 Titles of EU procurement legislation

Legal Act	Notation	Date of effect
Accession Act 1972	W1A1	1973-07-01
Accession Act 1979	C1A1	1981-01-01
Accession Act 1985	C1A2	1986-01-01
Accession Act 1994	P2A1	1995-01-01
Accession Act 1994	RU1A1	1995-01-01
Accession Act 2003	P2A3	2004-05-01
Accession Act 2003	RU1A2	2004-05-01
Corrigendum 2 to regulation 2342/2002	M4C2	2005-12-28
Corrigendum 4 to regulation 2342/2002	M4C4	2005-12-28
Corrigendum to directive 2001/78	P2A2C1	Not specified (post 2002-08-09)
Decision 15/2005	U3A1	2005-11-01
Decision 2008/963	P3A8	2009-01-01
Decision 90/380	W1A5	1990-07-19
Decision 92/456	W1A6	1992-08-04

Legal Act	Notation	Date of effect
Directive 2001/78	P2A2	2002-05-01
Directive 2004/17	U3	2006-01-31 (DK voluntary: 2005-01-01)
Directive 2004/18	C3	2006-01-31 (DK voluntary: 2005-01-01)
Directive 2005/51	P3A3	2005-10-21
Directive 2005/75	C3A1	2006-01-31
Directive 2006/97	P3A5	2007-01-01
Directive 2006/97	RU1A3	2007-01-01
Directive 2007/66	RM2	2009-12-20
Directive 71/305	W1	1972-07-30
Directive 72/277	W1A2	Not specified (Post 1972-07-28)
Directive 77/62	G1	1978-06-24
Directive 78/669	W1A3	1979-02-03
Directive 80/767	G1A1	1981-01-01
Directive 88/295	G1A2	1989-01-01
Directive 89/440	W1A4	1990-07-19 (ES, GR, PT: 1992-03-01)
Directive 89/665	RC1	1991-12-01
Directive 90/531	C1A3	1993-01-01
Directive 90/531	U1	1993-01-01
Directive 92/13	RU1	1993-01-01
Directive 92/50	C1A4	1993-07-01
Directive 92/50	S2	1993-07-01
Directive 92/50	RC1A1	1993-07-01
Directive 93/36	G2	1994-06-14
Directive 93/37	W2	Not specified (post 1993-07-05)
Directive 93/38	C1A5	1994-01-01 (ES: 1997-01-01, GR, PT: 1998-01-01)
Directive 93/38	U2	1994-01-01 (ES: 1997-01-01, GR, PT: 1998-01-01)
Directive 93/4	W1A7	1993-07-01
Directive 94/22	U1A1	1995-07-01
Directive 97/52	C2A1	1998-10-13
Directive 98/4	U2A1	1999-02-16
Financial Regulation 19/72	Q1A2	1972-01-01
Financial Regulation 2002/1605	Q4	2003-01-01
Financial Regulation 2006/1995	Q4A1	2006-08-22 (Art 1.80+84-94: 2007-01-01)
Financial Regulation 313/1968	Q1	1968-01-01
Financial Regulation 450/72	Q1A3	1973-01-01
Financial Regulation 555/70	Q1A1	1970-01-01
Financial Regulation 73/91	Q2	1973-05-01
Financial Regulation 77/1231	Q3	1978-01-01
Financial Regulation 90/610	Q3A5	1990-03-19
Financial Regulation 95/2333	Q3A7	1995-10-10
Financial Regulation 98/2548	Q3A11	1998-12-05
Recommendation 91/561	C1X1	1992-01-01 (invitation to implement)
Recommendation 96/527	P2X1	1996-08-01

Legal Act	Notation	Date of effect
Regulation 1248/2006	M4A2	2006-08-22
Regulation 1261/2005	M4A1	2005-08-05
Regulation 1422/2007	P3A6	2008-01-01
Regulation 1564/2005	P3A2	2005-10-21
Regulation 1687/2001	M32A1	2001-08-31
Regulation 1874/2004	P3A1	2004-11-01
Regulation 2083/2005	P3A4	2006-01-01
Regulation 213/2008	P3A7	2008-09-15
Regulation 2151/2003	P2X3	2004-01-06
Regulation 2195/2002	P2X2	2003-12-16
Regulation 2342/2002	M4	2003-01-01
Regulation 3418/93	M32	1994-01-01
Regulation 375/75	M2	1975-05-01
Regulation 478/2007	M4A3	2007-05-01 (Art 1.45.d: 2008-01-01, Art. 1.59: 2009-01-01)
Regulation 610/86	M31	1987-01-01
Statement 430/94	W2A1	Not specified (post 1994-04-30)

6.7 Titles of Danish procurement legislation

Legal Act	Notation	Date of effect
Circular letter 101/93	DCW106A1	(1993-06-22)
Circular letter 160/73	DCW101	(1973-07-02)
Circular letter 1979-02-02	DCW103	(1979-02-02)
Circular letter 21/91	DCW106	(1991-01-29)
Circular letter 4002/83	NPL1C1S1	1983-03-04
Circular letter 4065/91	DCW105A1	1992-01-01
Circular letter 56/95	DCW202	(1995-05-01)
Circular order 101/78	DCG101	(1978-06-19)
Circular order 152/96	DCW203	1997-01-01
Circular order 164/70	NPL1C1	1970-01-01
Circular order 167/90	DCW105	1990-10-01
Circular order 177/89	DCG103	1989-11-13
Circular order 214/74	DCW102	(1974-10-04)
Circular order 219/80	DCG102	(1980-12-18)
Circular order 50/89	NPL1C2	1989-06-30
Circular order 7/83	NPL1C1	1983-04-01
Consolidation law 1166/95	KNL1C1	1995-03-31
Consolidation law 1410/07	NPL3C1	2007-07-01
Consolidation law 600/92	DPL1C1	1992-07-11
Editorial consolidation without number	DPL1C1S1	(2000-07-01)
Executive order 817/05	NPL3BK1	2005-09-01
Executive order 2/99	DUW202	1999-02-16
Executive order 201/95	DCW201	1995-05-01
Executive order 26/96	KNL1C1BK1	1996-02-01
Executive order 297/93	DPC101	1993-05-19
Executive order 298/93	DUG101A1	1993-05-19
Executive order 325/06	DUC301A1	2006-05-01
Executive order 326/06	DCC301A1	2006-05-01
Executive order 415/93	DCS201	1993-07-01
Executive order 498/91	DCW104A1	1991-07-15
Executive order 510/94	DCG201	1994-06-24
Executive order 557/94	DUD201	1994-07-01
Executive order 558/94	DUW201	1994-07-01

Legal Act	Notation	Date of effect
Executive order 588/06	DCC301A2	2006-10-01
Executive order 595/02	NPL2BK2	2002-09-01
Executive order 595/90	DCW104	1990-08-29
Executive order 597/07	DCC301A3	2007-07-01
Executive order 598/06	DUC301A2	2007-07-01
Executive order 602/00	KNL2BK1	2000-07-05
Executive order 649/02	DCW205	2002-09-01
Executive order 650/02	DCG203	2002-09-01
Executive order 651/02	DCS203	2002-09-01
Executive order 652/02	DUC201	2002-09-01
Executive order 72/92	KNL1BK2	1992-02-15
Executive order 740/92	DUW101	1993-01-01
Executive order 741/92	DUG101	1993-01-01
Executive order 758/01	NPL2BK1	2001-09-01
Executive order 787/98	DUD202	1999-02-16
Executive order 788/98	DCG202	1998-11-14
Executive order 789/98	DCS202	1998-11-14
Executive order 799/98	DCW204	1998-11-20
Executive order 810/91	DCG105	1991-12-21
Executive order 826/90	DCG104	1991-01-01
Executive order 912/91	KNL1BK1	1992-01-01
Executive order 936/04	DUC301	2005-01-01
Executive order 937/04	DCC301	2005-01-01
Law 1006/92	KNL1A1	1993-01-01
Law 206/95	KNL1A2	1995-03-31
Law 216/66	NPL1	1967-01-01
Law 306/02	KNL2A2	2003-07-01
Law 338/05	NPL3	2005-09-01
Law 344/91	KNL1	1992-01-01
Law 366/90	DPL1	1990-06-10
Law 377/92	DPL1A1	1992-05-22
Law 415/00	DPL1C1A1	2000-07-01
Law 415/00	KNL2	2000-07-01
Law 431/05	KNL2A3	2005-11-01
Law 450/01	NPL2	2001-09-01
Law 450/01	KNL2A1	2001-09-01
Law 538/06	KNL2A4	2007-01-01
Law 572/07	NPL3A1	2007-07-01
Law 572/07	KNL2A5	2007-07-01
Law 818/89	NPLA1	1990-01-01
Letter 11400/82	NPL1S1	1982-06-25
Regulating order 114/92	DCC101	(1992-07-02)
Temporary standard forms	DPC301	2005-01-01

6.8 Case statistics

See next page

CASE STATISTICS FOR PUBLIC PROCUREMENT JURISPRUDENCE

EU and DK Cases (see coulour codes below)

Procurement Classic	Utilities	Other		EU+DK 1976-2008 Summary by title		EU+DK 1976-2008 Cases 533		EU 1976-2008 Cases 227 ECJ 178 CFI 49		EU 1976-1991 Cases 28 ECJ 28 CFI 6		EU 1992-1999 Cases 67 ECJ 61 CFI 6		EU 2000-2008 Cases 132 ECJ 89 CFI 43		DK 1992-2008 Cases 406 Board 377 Courts 29		DK 1992-1999 Cases 100 Board 100 Courts		DK 2000-2008 Cases 306 Board 277 Courts 29	
32004L0018	*32004L0017*	*Reference*	*Title*	*Hits*	*Per cent*	*Hits*	*Per cent*	*Hits*	*Per cent*	*Hits*	*Per cent*	*Hits*	*Per cent*	*Hits*	*Per cent*	*Hits*	*Per cent*	*Hits*	*Per cent*	*Hits*	*Per cent*
TITLE I	**TITLE I**		**DEFINITIONS AND GENERAL PRINCIPLES**	***615***	***20.5%***																
	CHAPTER I					***89***	***3.0%***	***63***	***6.3%***			***22***	***7.4%***	***41***	***6.9%***	***26***	***1.3%***	***13***	***2.8%***	***13***	***0.8%***
1	1		Definitions																		
1.1	1.1	-	*Shall apply*																		
1.2.a	1.2.a	-	*Public contracts*			18	0.6%	18	1.8%			9	3.0%	9	1.5%						
1.2.b.s1	1.2.b.s1	-	*Public works contracts*			15	0.5%	6	0.6%			4	1.4%	2	0.3%	9	0.5%	1	0.2%	8	0.5%
1.2.b.s2	1.2.b.s2	-	*Work*			3	0.1%	2	0.2%			1	0.3%	1	0.2%	1	0.1%			1	0.1%
1.2.c.1	1.2.c.1	-	*Public supply contracts*			2	0.1%									2	0.1%	1	0.2%	1	0.1%
1.2.c.2	1.2.c.2	-	*Siting and installation*			1	0.0%									1	0.1%	1	0.2%		
1.2.d.1	1.2.d.1	-	*Public service contracts*			2	0.1%									2	0.1%	2	0.4%		
1.2.d.2	1.2.d.2	-	*Products and services*			7	0.2%	4	0.4%			1	0.3%	3	0.5%	3	0.2%	3	0.7%		
1.2.d.3	1.2.d.3	-	*Covering Annex II and I*																		
1.3	1.3.a	-	*Public works concession*			2	0.1%	2	0.2%					2	0.3%						
1.4	1.3.b	-	*Service concession*			8	0.3%	7	0.7%			1	0.3%	6	1.0%	1	0.1%	1	0.2%		
1.5	1.4	-	*Framework agreement*			5	0.2%	2	0.2%			1	0.3%	1	0.2%	3	0.2%	2	0.4%	1	0.1%
1.6	1.5	-	*Dynamic purchasing system*																		
1.7	1.6	-	*Electronic auction*																		
1.8.1	1.7.1	-	*Contractor, supplier, service provider*			25	0.8%	21	2.1%			4	1.4%	17	2.8%	4	0.2%	2	0.4%	2	0.1%
1.8.2	1.7.2	-	*Economic operator*																		
1.8.3	1.7.3	-	*Tenderer & candidate*			1	0.0%	1	0.1%			1	0.3%								
-	**CHAPTER II**		**Definition of the activities and entities covered**																		
-	**Section 1**		**Entities**			***59***	***2.0%***	***34***	***3.4%***	***1***	***1.0%***	***18***	***6.1%***	***15***	***2.5%***	***25***	***1.3%***	***13***	***2.8%***	***12***	***0.8%***
-	2		Definition of the activities and entities covered																		
1.9.1	2.1.a.1	-	*Contracting authorities*			17	0.6%	12	1.2%	1	1.0%	6	2.0%	5	0.8%	5	0.3%	3	0.7%	2	0.1%
1.9.2	2.1.a.2	-	*Body governed by public law*			25	0.8%	17	1.7%			9	3.0%	8	1.3%	8	0.4%	3	0.7%	5	0.3%
1.9.3	-	-	*Non-exhaustive lists*			2	0.1%	2	0.2%			2	0.7%								
-	2.1.b	-	*Public undertaking*																		
-	2.2	-	*Apply to contracting entities*			3	0.1%	2	0.2%					2	0.3%	1	0.1%	1	0.2%		
-	-	NPL3C1-1.2.2	*Entities with public support*			1										1	0.1%			1	0.1%
-	-	NPL3C1-1.2.3	*Contractors when sub-contracting*																		
1.10	1.8	-	*Central purchasing body*																		
1.11.a	1.9.a	-	*Open procedures*																		
1.11.b	1.9.b	-	*Restricted procedures*			1	0.0%									1	0.1%	1	0.2%		
1.11.c	-	-	*Competitive dialogue*			1	0.0%									1	0.1%			1	0.1%
1.11.d	1.9.c	-	*Negotiated procedures*			5	0.2%									5	0.3%	4	0.9%	1	0.1%
1.11.e	1.1	-	*Design contests*			3	0.1%									3	0.2%	1	0.2%	2	0.1%
1.12	1.11	-	*Written, in writing*																		
1.13	1.12	-	*Electronic means*																		
1.14	1.13	-	*Common Procurement Vocabulary, CPV*			1	0.0%	1	0.1%			1	0.3%								
1.15	-	-	*Telecommunications*																		
-	2.3	-	*Special or exclusive rights*																		
-	**CHAPTER III**		**General principles**			***467***	***15.6%***	***74***	***7.4%***	***7***	***6.7%***	***15***	***5.1%***	***52***	***8.7%***	***393***	***19.7%***	***86***	***18.8%***	***307***	***19.9%***
2	10	Q4-89.1	Principles of awarding contracts: equal treatment ar			138	4.6%	40	4.0%	5	4.8%	9	3.0%	26	4.4%	98	4.9%	25	5.5%	73	4.7%
2.late	*10.late*	M4-145.1	Late requests and tenders			11	0.4%									11	0.6%	3	0.7%	8	0.5%
2.noncom	*10.noncom*	M4-146.3.1+3	Non-conforming requests and tenders			152	5.1%	8	0.8%	1	1.0%	2	0.7%	5	0.8%	144	7.2%	26	5.7%	118	7.7%
2.confint	*10.confint*	Q4-89.1.confint	Conflict of interest			30	1.0%	7	0.7%					7	1.2%	23	1.2%	8	1.8%	15	1.0%
2.contact	*10.contact*	Q4-99	Contact and negotiation with tenderers			79	2.6%	6	0.6%			1	0.3%	5	0.8%	73	3.7%	21	4.6%	52	3.4%
2.transp	*10.transp*	-	Transparent indication of procurement conditions			32	1.1%									32	1.6%	1	0.2%	31	2.0%
3	-	-	Granting of special or exclusive rights: non-discrimi			4	0.1%	1	0.1%			1	0.3%			3	0.2%	2	0.4%	1	0.1%
-	-	Q4-105	Application of directives in Community procurement			11	0.4%	11	1.1%			2	0.7%	9	1.5%						
-	-	NPL3C1-1.4	Voluntary application			10	0.3%	1	0.1%	1	1.0%					9	0.5%			9	0.6%
TITLE II	**TITLE II**		**RULES ON PUBLIC CONTRACTS**	***1002***	***33.5%***																
CHAPTER I	**CHAPTER I**		**General provisions**			***7***	***0.2%***	***4***	***0.4%***					***4***	***0.7%***	***3***	***0.2%***	***1***	***0.2%***	***2***	***0.1%***
4	11		Economic operators																		
4.1.1	11.1.1	-	*Candidates, tenderers*			1	0.0%	1	0.1%					1	0.2%						
4.1.2	11.1.2	-	*Siting and installation operations*																		
4.2	11.2	-	*Groups of economic operators*			4	0.1%	2	0.2%					2	0.3%	2	0.1%			2	0.1%
5	12	-	Conditions relating to agreements concluded within																		
-	13		Confidentiality																		
-	13.1	-	*Protecting the confidential nature*																		
6	13.2	-	*Confidentiality*			2	0.1%	1	0.1%					1	0.2%	1	0.1%	1	0.2%		
CHAPTER II	**CHAPTER II**		**Scope**																		
Section 1	**Section 1**		**Thresholds**			***70***	***2.3%***	***18***	***1.8%***			***8***	***2.7%***	***10***	***1.7%***	***52***	***2.6%***	***18***	***3.9%***	***34***	***2.2%***
7	16		Threshold amounts for public contracts																		

Procurement				EU+DK	1976-2008	EU+DK	1976-2008	EU	1976-2008	EU	1976-1991	EU	1992-1999	EU	2000-2008	DK	1992-2008	DK	1992-1999	DK	2000-2008
Classic	**Utilities**	**Other**		Summary by title		Cases	533	Cases	227	Cases	28	Cases	67	Cases	132	Cases	406	Cases	100	Cases	306
								ECJ	*178*	*ECJ*	*28*	*ECJ*	*61*	*ECJ*	*89*	*Board*	377	*Board*	100	*Board*	277
								CFI	*49*	*CFI*		*CFI*	*6*	*CFI*	*43*	*Courts*	29	*Courts*		*Courts*	29
32004L0018	*32004L0017*	*Reference*	*Title*	*Hits*	*Per cent*	*Hits*	*Per cent*	*Hits*	*Per cent*	*Hits*	*Per cent*	*Hits*	*Per cent*	*Hits*	*Per cent*	*Hits*	*Per cent*	*Hits*	*Per cent*	*Hits*	*Per cent*
7.a-b	16.a	-	*Supply, service*			7	0.2%	3	0.3%			1	0.3%	2	0.3%	4	0.2%	1	0.2%	3	0.2%
7.c	16.b	-	*Works*			7	0.2%	3	0.3%			2	0.7%	1	0.2%	4	0.2%	1	0.2%	3	0.2%
8	-	-	Contracts subsidised by more than 50 % by contrac			2	0.1%	2	0.2%			1	0.3%	1	0.2%						
9	17		Methods for calculating the estimated value of publi																		
9.1.1	17.1.1	-	*Total amount*			10	0.3%	2	0.2%			1	0.3%	1	0.2%	8	0.4%	2	0.4%	6	0.4%
9.1.2	17.1.2	-	*Prizes, payments*			1	0.0%									1	0.1%			1	0.1%
9.2	-	-	*Moment*			1	0.0%									1	0.1%			1	0.1%
9.3	17.2	-	*May not be subdivided*			11	0.4%	3	0.3%			1	0.3%	2	0.3%	8	0.4%	5	1.1%	3	0.2%
9.4	17.4	-	*Placed at disposal*			2	0.1%									2	0.1%	2	0.4%		
-	17.5	-	*Supplies or services which are not necessary*																		
9.5.a.1	17.6.a.1	-	*Works or services - total value of lots*			13	0.4%	1	0.1%					1	0.2%	12	0.6%	5	1.1%	7	0.5%
9.5.a.2	17.6.a.2	-	*Apply to all the lots*			4	0.1%	1	0.1%			1	0.3%			3	0.2%			3	0.2%
9.5.a.3	17.6.a.3	-	*Not exceed 20 %*			1	0.0%									1	0.1%			1	0.1%
9.5.b.1	17.6.b.1	-	*Supplies - total value of lots*			4	0.1%									4	0.2%	1	0.2%	3	0.2%
9.5.b.2	17.6.b.2	-	*Apply to all the lots*																		
9.5.b.3	17.6.b.3	-	*Not exceed 20 %*																		
-	17.8	-	*Including both supplies and services*																		
9.6	17.9	-	*Leasing, hire, rental or hire purchase of products*			1	0.0%									1	0.1%			1	0.1%
9.7.1.a	17.7.a	-	*Regular in nature or intended to be renewed - previ*			1	0.0%									1	0.1%			1	0.1%
9.7.1.b	17.7.b	-	*Regular in nature or intended to be renewed - comi*			1	0.0%									1	0.1%			1	0.1%
9.7.2	-	-	*Not excluding*			1	0.0%	1	0.1%					1	0.2%						
9.8.a	17.10	-	*Estimated contract value of service contracts*																		
9.8.b	17.11	-	*Services, not indicate a total price*			2	0.1%	1	0.1%					1	0.2%	1	0.1%	1	0.2%		
9.9	17.3	-	*Framework, dynamic*			1	0.0%	1	0.1%			1	0.3%								
-	-	Q3-54	*Advisory committee*																		
Section 2	**-**		***Specific situations***			***5***	***0.2%***	***2***	***0.2%***					***2***	***0.3%***	***3***	***0.2%***	***1***	***0.2%***	***2***	***0.1%***
10	-	-	Defence procurement			2	0.1%	1	0.1%					1	0.2%	1	0.1%	1	0.2%		
11	29	-	Public contracts and framework agreements award			3	0.1%	1	0.1%					1	0.2%	2	0.1%			2	0.1%
Section 3	**Section 2**		**Excluded contracts**			***37***	***1.2%***	***29***	***2.9%***	***3***	***2.9%***	***14***	***4.7%***	***12***	***2.0%***	***8***	***0.4%***	***8***	***1.8%***		
12	20	-	Contracts in the water, energy, transport and postal			13	0.4%	8	0.8%	3	2.9%	2	0.7%	3	0.5%	5	0.3%	5	1.1%		
13	-	-	Specific exclusions in the field of telecommunicatio																		
-	3		Gas, heat and electricity																		
-	3.1	-	*Gas and heat activities*			1	0.0%	1	0.1%					1	0.2%						
-	3.2	-	*Gas or heat to networks*																		
-	3.3	-	*Electricity activities*			2	0.1%	2	0.2%			1	0.3%	1	0.2%						
-	3.4	-	*Electricity to networks*																		
-	4		Water																		
-	4.1	-	*Activities*			1	0.0%	1	0.1%					1	0.2%						
-	4.2	-	*Also apply to contracts or design contests*																		
-	4.3	-	*Drinking water to networks*																		
-	5		Transport services																		
-	5.1	-	*Apply to activities*			2	0.1%	1	0.1%					1	0.2%	1	0.1%	1	0.2%		
-	5.2	-	*Excluded from the scope of Directive 93/38/EEC*																		
-	6	-	Postal services			1	0.0%	1	0.1%					1	0.2%						
-	7	-	Exploration for, or extraction of, oil, gas, coal or oth			1	0.0%	1	0.1%					1	0.2%						
-	-	U2-2.2.d	Telecommunications			2	0.1%	2	0.2%			1	0.3%	1	0.2%						
-	8	-	Lists of contracting entities																		
-	9	-	Contracts covering several activities																		
14	21	-	Contracts which are secret or require special securi			7	0.2%	6	0.6%			4	1.4%	2	0.3%	1	0.1%	1	0.2%		
15	22		Contracts awarded pursuant to international rules																		
15.a	22.a	-	*Treaty between a Member State and one or more tl*			3	0.1%	2	0.2%			2	0.7%			1	0.1%	1	0.2%		
15.b	22.b	-	*Stationing of troops*			2	0.1%	2	0.2%			2	0.7%								
15.c	22.c	-	*Procedure of an international organisation*			2	0.1%	2	0.2%			2	0.7%								
-	**Section 3**		**Tenders comprising products originating in thir**																		
-	58		Tenders comprising products originating in third cou																		
-	58.1-2	-	*Products originating in third countries*																		
-	58.3	-	*Preference*																		
-	58.4-5	-	*Proportion & annual report*																		
-	59		Relations with third countries as regards works, sup																		
-	59.1-2	-	*General difficulties*																		
-	59.3	-	*Not grant Community undertakings*																		
-	59.4	-	*International labour law provisions listed in Annex X*																		
-	59.5	-	*Suspend or restrict*																		
-	59.6	-	*International agreements*																		
	Subsection 3		**Exclusions applicable to all contracting entities**			***4***	***0.1%***	***1***	***0.1%***					***1***	***0.2%***	***3***	***0.2%***			***3***	***0.2%***
16	24		Service exclusions																		

Procurement				EU+DK	1976-2008	EU+DK	1976-2008	EU	1976-2008	EU	1976-1991	EU	1992-1999	EU	2000-2008	DK	1992-2008	DK	1992-1999	DK	2000-2008
Classic	Utilities	Other		Summary by title		Cases	533	Cases	227	Cases	28	Cases	67	Cases	132	Cases	406	Cases	100	Cases	306
								ECJ	*178*	*ECJ*	*28*	*ECJ*	*61*	*ECJ*	*89*	*Board*	377	*Board*	100	*Board*	277
								CFI	*49*	*CFI*		*CFI*	*6*	*CFI*	*43*	*Courts*	29	*Courts*		*Courts*	29
32004L0018	*32004L0017*	*Reference*	*Title*	*Hits*	*Per cent*	*Hits*	*Per cent*	*Hits*	*Per cent*	*Hits*	*Per cent*	*Hits*	*Per cent*	*Hits*	*Per cent*	*Hits*	*Per cent*	*Hits*	*Per cent*	*Hits*	*Per cent*
16.a	24.a	-	*Existing buildings or other immovable property*			3	0.1%									3	0.2%			3	0.2%
16.b	-	-	*Broadcasting*			1	0.0%	1	0.1%					1	0.2%						
16.c	24.b	-	*Arbitration and conciliation services*																		
16.d	24.c	-	*Securities or other financial instruments*																		
16.e	24.d	-	*Employment contracts*																		
16.f	24.e	-	*Research and development services*																		
-	-	S2-1.a.v	Voice telephony																		
-	**Section 2**		**Contracts and concessions and contracts subje**																		
	Subsection 1		**Concessions and exclusive rights**			***19***	***0.6%***	***16***	***1.6%***			***4***	***1.4%***	***12***	***2.0%***	***3***	***0.2%***	***3***	***0.7%***		
17	18	-	Service concessions			12	0.4%	10	1.0%			3	1.0%	7	1.2%	2	0.1%	2	0.4%		
18	25	-	Service contracts awarded on the basis of an exclu			7	0.2%	6	0.6%			1	0.3%	5	0.8%	1	0.1%	1	0.2%		
Section 4	**Subsection 5**		**Special arrangement**																		
19	28	-	Reserved contracts																		
-	-	U2-3.1	Exploitation																		
-	27	-	Contracts subject to special arrangements																		
-	-	U2-3.3-4	Prior concessions																		
	Subsection 2					***2***	***0.1%***	***2***	***0.2%***					***2***	***0.3%***						
-	19	-	Contracts awarded for purposes of resale or lease t			1	0.0%	1	0.1%					1	0.2%						
-	23		Contracts awarded to an affiliated undertaking, to a																		
-	23.1	-	*Affiliated undertaking*																		
-	23.2	-	*Not apply to contracts*			1	0.0%	1	0.1%					1	0.2%						
-	23.3.1.a	-	*Service contracts provided that at least 80 %*																		
-	23.3.1.b-c	-	*Supplies and works contracts provided that at least*																		
-	23.3.2	-	*Turnover is not available for the preceding three ye*																		
-	23.3.3	-	*More than one undertaking affiliated with the contra*																		
-	23.4.a	-	*Awarded by a joint venture*																		
-	23.4.b	-	*Awarded to a joint venture*																		
-	23.5	-	*Notify to the Commission*																		
-	**Subsection 4**		**Exclusions applicable to certain contracting ent**			***1***	***0.0%***	***1***	***0.1%***			***1***	***0.3%***								
-	26		Contracts awarded by certain contracting entities fo																		
-	26.a	-	*Purchase of water*																		
-	26.b	-	*Supply of energy or of fuels for the production of en*																		
-	-	U2-9.2	Re-examine																		
-	30	-	Procedure for establishing whether a given activity			1	0.0%	1	0.1%			1	0.3%								
CHAPTER III	**CHAPTER III**		**Arrangements for public service contracts**			***25***	***0.8%***	***10***	***1.0%***			***1***	***0.3%***	***9***	***1.5%***	***15***	***0.8%***	***2***	***0.4%***	***13***	***0.8%***
20	31	-	Service contracts listed in Annex II A			7	0.2%	4	0.4%					4	0.7%	3	0.2%	1	0.2%	2	0.1%
21	32	-	Service contracts listed in Annex II B			12	0.4%	3	0.3%					3	0.5%	9	0.5%	1	0.2%	8	0.5%
22	33	-	Mixed contracts including services listed in Annex I			6	0.2%	3	0.3%			1	0.3%	2	0.3%	3	0.2%			3	0.2%
CHAPTER IV	**CHAPTER IV**		**Specific rules governing specifications and con**			***116***	***3.9%***	***5***	***0.5%***	***1***	***1.0%***	***1***	***0.3%***	***3***	***0.5%***	***111***	***5.6%***	***29***	***6.3%***	***82***	***5.3%***
23	34		Technical specifications																		
23.1	34.1	-	*Setting out technical specifications*			39	1.3%									39	2.0%	12	2.6%	27	1.8%
23.2	34.2	-	*May not create obstacles*			1	0.0%									1	0.1%			1	0.1%
23.3	34.3	-	*Formulation of technical specifications*			5	0.2%	1	0.1%					1	0.2%	4	0.2%	1	0.2%	3	0.2%
23.4	34.4	-	*Equivalent*																		
23.5	34.5	-	*Standards in functional requirements*			1	0.0%									1	0.1%			1	0.1%
23.6	34.6	-	*Environment*																		
23.7	34.7	-	*Recognised bodies*																		
23.8	34.8	-	*Specific make*			17	0.6%									17	0.9%	6	1.3%	11	0.7%
-	35	-	Communication of technical specifications																		
24	36		Variants																		
24.1	36.1.1.p1	-	*May authorise variants*			19	0.6%	1	0.1%			1	0.3%			18	0.9%	1	0.2%	17	1.1%
24.2	36.1.2.p1	-	*Must indicate if variants authorised*			8	0.3%									8	0.4%	4	0.9%	4	0.3%
24.3	36.1.2.p2	-	*Must indicate requirements*			19	0.6%	1	0.1%					1	0.2%	18	0.9%	4	0.9%	14	0.9%
24.4.1	36.1.1.p2	-	*Must meet requirements*			2	0.1%									2	0.1%	1	0.2%	1	0.1%
24.4.2	36.2	-	*Supply or service*																		
-	-	W2-19.3	*Specifications in variants*			1	0.0%	1	0.1%	1	1.0%										
25	37		Subcontracting																		
25.1	37.s1	-	*Indicate*			3	0.1%	1	0.1%					1	0.2%	2	0.1%			2	0.1%
25.2	37.s2	-	*Without prejudice*																		
26	38	-	Conditions for performance of contracts			1	0.0%									1	0.1%			1	0.1%
27	39		Obligations relating to taxes, environmental protecti																		
27.1	39.1	-	*Obtain the appropriate information*																		
27.2	39.2	-	*Indicate*																		
CHAPTER V	**CHAPTER V**		**Procedures**			***126***	***4.2%***	***61***	***6.1%***	***8***	***7.6%***	***27***	***9.1%***	***26***	***4.4%***	***65***	***3.3%***	***26***	***5.7%***	***39***	***2.5%***
28	40		Use of open, restricted and negotiated procedures a																		
28.1	40.1	-	*National procedures & obligation to tender*			41	1.4%	9	0.9%	3	2.9%	2	0.7%	4	0.7%	32	1.6%	18	3.9%	14	0.9%

Procurement				EU+DK	1976-2008	EU+DK	1976-2008	EU	1976-2008	EU	1976-1991	EU	1992-1999	EU	2000-2008	DK	1992-2008	DK	1992-1999	DK	2000-2008
Classic	Utilities	Other		Summary by title		Cases	533	Cases	227	Cases	28	Cases	67	Cases	132	Cases	406	Cases	100	Cases	306
								ECJ	*178*	*ECJ*	*28*	*ECJ*	*61*	*ECJ*	*89*	*Board*	377	*Board*	100	*Board*	277
								CFI	*49*	*CFI*		*CFI*	*6*	*CFI*	*43*	*Courts*	29	*Courts*		*Courts*	29
32004L0018	*32004L0017*	*Reference*	*Title*	*Hits*	*Per cent*	*Hits*	*Per cent*	*Hits*	*Per cent*	*Hits*	*Per cent*	*Hits*	*Per cent*	*Hits*	*Per cent*	*Hits*	*Per cent*	*Hits*	*Per cent*	*Hits*	*Per cent*
28.2	40.2	-	*Open, restricted, dialogue, negotiated*			2	0.1%	1	0.1%			1	0.3%			1	0.1%	1	0.2%		
		U1-15.stm	Statement			1	0.0%	1	0.1%			1	0.3%								
29	-	-	Competitive dialogue																		
30	-		Cases justifying use of the negotiated procedure wi																		
30.1.s1	-	-	*Negotiated procedure with prior publication of a cor*			2	0.1%	2	0.2%					2	0.3%						
30.1.a	-	-	*Irregular, unacceptable tenders - under national law*			10	0.3%	1	0.1%			1	0.3%			9	0.5%	1	0.2%	8	0.5%
30.1.b	-	-	*Not permit prior overall pricing*			1	0.0%	1	0.1%			1	0.3%								
30.1.c	-	-	*Not sufficient precision*			1	0.0%									1	0.1%			1	0.1%
30.1.d	-	-	*Research, testing, development*																		
-	-	NPL3C1-12.3.2.	*Other reasons*																		
30.2-4	-	-	*Negotiations*			2	0.1%									2	0.1%			2	0.1%
-	-	NPL2BK1-2.3	*Direct contracting*																		
31	40.3		Cases justifying use of the negotiated procedure wi																		
31.s1	40.3.s1	-	*Negotiated procedure without publication of a contr*			4	0.1%	4	0.4%					4	0.7%						
31.1.a	40.3.a	-	*No tenders, no suitable tenders*			9	0.3%	5	0.5%			2	0.7%	3	0.5%	4	0.2%	1	0.2%	3	0.2%
31.1.b	40.3.c	-	*Technical, artistic, exclusive rights*			11	0.4%	11	1.1%	1	1.0%	6	2.0%	4	0.7%						
31.1.c	40.3.d	-	*Extreme urgency*			13	0.4%	12	1.2%	4	3.8%	4	1.4%	4	0.7%	1	0.1%			1	0.1%
31.2.a	40.3.b	-	*Research, experimentation, study*			2	0.1%	2	0.2%			2	0.7%								
31.2.b	40.3.e	-	*Additional deliveries*			3	0.1%	3	0.3%			2	0.7%	1	0.2%						
31.2.c	40.3.h	-	*Commodity market*			2	0.1%	2	0.2%			2	0.7%								
31.2.d	40.3.k	-	*Particularly advantageous terms*																		
31.3	40.3.l	-	*Design contest*			3	0.1%									3	0.2%	1	0.2%	2	0.1%
31.4.a	40.3.f	-	*Unforeseen circumstances*			3	0.1%	2	0.2%					2	0.3%	1	0.1%			1	0.1%
31.4.b	40.3.g	-	*Repetition*			5	0.2%	3	0.3%			1	0.3%	2	0.3%	2	0.1%	1	0.2%	1	0.1%
-	40.3.i	-	*Framework agreements*			1	0.0%									1	0.1%	1	0.2%		
-	40.3.j	-	*Bargains*																		
-	-	G1-6.1.h	Data processing			2	0.1%	2	0.2%			2	0.7%								
-	-	W1-9.2	Report																		
32	14		Framework agreements																		
32.1	14.1	-	*May authorise*			2	0.1%									2	0.1%			2	0.1%
32.2.1	-	-	*Framework procedure*			1	0.0%									1	0.1%			1	0.1%
32.2.2.s1	14.2-3	-	*Contracts*			1	0.0%									1	0.1%	1	0.2%		
32.2.2.s2	-	-	*Original parties*																		
32.2.3	-	-	*Amendments*																		
32.2.4	-	-	*Four years*			2	0.1%									2	0.1%			2	0.1%
32.2.5	14.4	-	*Distort competition*																		
32.3	-	-	*Single operator*																		
32.4.1	-	-	*Several operators*			2	0.1%									2	0.1%	1	0.2%	1	0.1%
32.4.2	-	-	*Contract procedure*																		
33	15		Dynamic purchasing systems																		
33.1	15.1	-	*May authorise*																		
33.2	15.2	-	*Admission*																		
33.3	15.3	-	*Notice*																		
33.4	15.4	-	*Indicative tender*																		
33.5	15.5	-	*Contract*																		
33.6	15.6	-	*Tender*																		
33.7	15.7	-	*Four years*																		
34	-		Public works contracts: particular rules on subsidise																		
34.1-2	-	-	*Special award procedure*																		
34.3	-	-	*Shall apply*																		
CHAPTER VI	**CHAPTER VI**		**Rules on advertising and transparency**																		
Section 1	**Section 1**		**Publication of notices**			***34***	***1.1%***	***23***	***2.3%***	***5***	***4.8%***	***11***	***3.7%***	***7***	***1.2%***	***11***	***0.6%***	***4***	***0.9%***	***7***	***0.5%***
35	41		Notices																		
35.1.1.a.1	41.1.1.a.1	-	*Supplies*			1	0.0%	1	0.1%	1	1.0%										
35.1.1.a.2	41.1.1.a.2	-	*CPV*																		
35.1.1.b	41.1.1.b	-	*Services*																		
35.1.1.c	41.1.1.c	-	*Works*			1	0.0%	1	0.1%			1	0.3%								
35.1.2	41.1.2	-	*Beginning of the budgetary year*																		
35.1.3	41.1.3	-	*Sent to the Commission or published*																		
35.1.4-6	41.1.4-6	-	*Shortening the time limits*																		
-	41.2	-	*Major projects*																		
-	41.3	-	*Qualification system*																		
-	42		Notices used as a means of calling for competition																		
35.2	42.1	-	*Public contract, framework agreement*			7	0.2%	6	0.6%	1	1.0%	3	1.0%	2	0.3%	1	0.1%			1	0.1%
35.3	42.2	-	*Dynamic purchasing system*																		
-	42.3.b [42.2.b]	-	*Periodic indicative notice*																		

Procurement Classic	Utilities	Other		EU+DK	1976-2008	EU+DK	1976-2008	EU	1976-2008	EU	1976-1991	EU	1992-1999	EU	2000-2008	DK	1992-2008	DK	1992-1999	DK	2000-2008
				Summary by title		Cases	533	Cases	227	Cases	28	Cases	67	Cases	132	Cases	406	Cases	100	Cases	306
								ECJ	*178*	*ECJ*	*28*	*ECJ*	*61*	*ECJ*	*89*	*Board*	377	*Board*	100	*Board*	277
								CFI	*49*	*CFI*		*CFI*	*6*	*CFI*	*43*	*Courts*	29	*Courts*		*Courts*	29
32004L0018	*32004L0017*	*Reference*	*Title*	*Hits*	*Per cent*	*Hits*	*Per cent*	*Hits*	*Per cent*	*Hits*	*Per cent*	*Hits*	*Per cent*	*Hits*	*Per cent*	*Hits*	*Per cent*	*Hits*	*Per cent*	*Hits*	*Per cent*
-	42.3.c.s1]	-	*Not more than 12 months prior*																		
-	42.3.c.s2	-	*Time limits laid down in article 45*																		
	43		Contract award notices																		
35.4.1	43.1.1	-	*Award - public contract, framework agreement*			7	0.2%	4	0.4%			2	0.7%	2	0.3%	3	0.2%	1	0.2%	2	0.1%
35.4.2-3	43.1.2-3	-	*Award - framework, dynamic*																		
35.4.4	43.4	-	*Annex II B*			1	0.0%	1	0.1%					1	0.2%						
35.4.5	43.2	-	*Withheld*			1	0.0%	1	0.1%			1	0.3%								
-	43.3	-	*Research-and-development service contract*																		
-	43.5	-	*Simplified form*																		
36	44		Form and manner of publication of notices																		
36.1	44.1	-	*Include the information*			10	0.3%	3	0.3%			1	0.3%	2	0.3%	7	0.4%	3	0.7%	4	0.3%
-	-	U2-25.3.s3	Model notice																		
36.2.1	44.2.1	-	*Sending*			1	0.0%	1	0.1%	1	1.0%										
36.2.2	44.2.2	-	*Publication*																		
36.3.1	44.3.1	-	*Electronic*																		
36.3.2	44.3.2.s1+s2	-	*Non-electronic*																		
36.4.1	44.4.1	-	*Official language*			3	0.1%	3	0.3%	2	1.9%	1	0.3%								
36.4.2	44.4.2	-	*Costs of publication*																		
36.5	44.5	-	*Published at national level*			1	0.0%	1	0.1%			1	0.3%								
36.6	-	-	*Limited*																		
36.7	44.6	-	*Proof of the dates*			1	0.0%	1	0.1%			1	0.3%								
36.8	44.7	-	*Confirmation*																		
37	44.8	-	Non-mandatory publication																		
Section 2	**Section 2**		**Time limits**			***15***	***0.5%***	***5***	***0.5%***	***4***	***3.8%***			***1***	***0.2%***	***10***	***0.5%***	***3***	***0.7%***	***7***	***0.5%***
38	45		Time limits for receipt of requests to participate and																		
38.1	45.1	-	*Complexity of the contract*																		
38.2	45.2	-	*Open procedures*			1	0.0%									1	0.1%			1	0.1%
38.3	45.3	-	*Restricted, negotiated, competitive*			5	0.2%	2	0.2%	2	1.9%					3	0.2%	1	0.2%	2	0.1%
38.4	45.4	-	*Prior information notice*																		
38.5-6	45.5-8	-	*Electronic means*																		
38.7	45.9	-	*Extended*																		
38.8	-	-	*Urgency*			5	0.2%	3	0.3%	2	1.9%			1	0.2%	2	0.1%	1	0.2%	1	0.1%
-	45.1	-	*Summary table*																		
39	46		Open procedures: Specifications, additional docum																		
39.1	46.1	-	*Specifications and any supporting documents*			1	0.0%									1	0.1%			1	0.1%
39.2	46.2	-	*Additional information*			3	0.1%									3	0.2%	1	0.2%	2	0.1%
Section 3	**-**		**Information content and means of transmission**			***106***	***3.5%***	***21***	***2.1%***			***3***	***1.0%***	***18***	***3.0%***	***85***	***4.3%***	***11***	***2.4%***	***74***	***4.8%***
40	47		Invitations to submit a tender, participate in the dial																		
40.1	47.1.first senten	-	*Simultaneously and in writing*																		
40.2	47.1.second ser	-	*Specifications and any supporting documents*			1	0.0%									1	0.1%			1	0.1%
40.3	47.2 + 47.4.a	-	*Held by an entity other than the contracting entity*																		
40.4	47.3	-	*Additional information*																		
40.5.1.a	47.4.c	-	*Notice*																		
40.5.1.b	47.4.b	-	*Deadline*																		
40.5.1.c	-	-	*Consultation*																		
40.5.1.d	47.4.d	-	*Adjoining*																		
-	47.4.e	-	*Criteria for the award*																		
-	-	-	*Other information*																		
40.5.1.e	47.4.f	-	*Relative weighting*																		
-	-	W1-18.a.p3	Other special condition																		
40.5.2	-	-	*Dialogue*																		
-	47.5.a-h	-	*Periodic indicative notice*																		
-	47.5.i	-	*Contract award criteria and their weighting*																		
41	49		Informing candidates and tenderers																		
41.1	49.1	-	*Decisions reached and reasons for not contracting*			65	2.2%	4	0.4%			2	0.7%	2	0.3%	61	3.1%	7	1.5%	54	3.5%
41.2	49.2.1-2	-	*Reasons for rejecting and relative advantages*			39	1.3%	16	1.6%			1	0.3%	15	2.5%	23	1.2%	4	0.9%	19	1.2%
41.3	49.2.3	-	*Withhold certain information*			1	0.0%	1	0.1%					1	0.2%						
-	49.3	-	*Decision as to qualification*																		
-	49.4	-	*Reasons based on the criteria for qualification*																		
-	49.5	-	*Bring the qualification to an end*																		
Section 4	**Section 3**		**Communication**																		
42	48		Rules applicable to communication																		
42.1	48.1	-	*By post, by fax, by electronic means*																		
42.2	48.2	-	*Generally available*																		
42.3	48.3	-	*Integrity of data*																		
42.4	48.4	-	*Electronic means*																		

Procurement Classic	Utilities	Other		EU+DK	1976-2008	EU+DK	1976-2008	EU	1976-2008	EU	1976-1991	EU	1992-1999	EU	2000-2008	DK	1992-2008	DK	1992-1999	DK	2000-2008
				Summary by title		Cases	533	Cases	227	Cases	28	Cases	67	Cases	132	Cases	406	Cases	100	Cases	306
								ECJ	*178*	*ECJ*	*28*	*ECJ*	*61*	*ECJ*	*89*	*Board*	377	*Board*	100	*Board*	277
								CFI	*49*	*CFI*		*CFI*	*6*	*CFI*	*43*	*Courts*	29	*Courts*		*Courts*	29
32004L0018	*32004L0017*	*Reference*	*Title*	*Hits*	*Per cent*	*Hits*	*Per cent*	*Hits*	*Per cent*	*Hits*	*Per cent*	*Hits*	*Per cent*	*Hits*	*Per cent*	*Hits*	*Per cent*	*Hits*	*Per cent*	*Hits*	*Per cent*
42.5	48.5	-	*Electronic transmission and receipt*																		
42.6	48.6	-	*Transmission of requests to participate*																		
Section 5	**-**		**Reports**			***3***	***0.1%***	***2***	***0.2%***			***1***	***0.3%***	***1***	***0.2%***	***1***	***0.1%***	***1***	***0.2%***		
43	50		Content of reports																		
43.1.s1	50.1.1.s1	-	*Include at least*			2	0.1%	1	0.1%					1	0.2%	1	0.1%	1	0.2%		
43.1.a	-	-	*Contracting authority*																		
43.1.b-c	50.1.1.a.p1	-	*Candidates and tenderers*																		
43.1.d	-	-	*Abnormally low*																		
43.1.e.p1	50.1.1.a.p2	-	*Successful tenderer*																		
43.1.e.p2	-	-	*Subcontract*																		
43.1.f	50.1.1.b	-	*Negotiated procedures*																		
43.1.g	-	-	*Competitive dialgue*																		
43.1.h	-	-	*Framework and dynamic purchasing*																		
-	50.1.1.c	-	*Derogations*																		
-	-	U2-41.1.b	European specifications																		
43.2	50.1.2	-	*Electronic means*																		
-	50.2.p1	-	*Kept for at least four years*																		
43.3	50.2.p2	-	*Communicate to the Commission*			1	0.0%	1	0.1%			1	0.3%								
CHAPTER VII	**CHAPTER VII**		**Conduct of the procedure**																		
Section 1			**General provisions**			***91***	***3.0%***	***25***	***2.5%***	***7***	***6.7%***	***7***	***2.4%***	***11***	***1.8%***	***66***	***3.3%***	***17***	***3.7%***	***49***	***3.2%***
-	51	-	General provisions																		
44	54		Verification of the suitability and choice of participar																		
44.1	51.1.a-b+2-3	-	*Separation and publication of criteria for award and*			60	2.0%	18	1.8%	5	4.8%	4	1.4%	9	1.5%	42	2.1%	8	1.8%	34	2.2%
44.2	54.1-2	-	*Criteria for selection*			18	0.6%	4	0.4%	2	1.9%			2	0.3%	14	0.7%	6	1.3%	8	0.5%
44.3	51.1.c	-	*Limit the number of suitable candidates*			11	0.4%	3	0.3%			3	1.0%			8	0.4%	1	0.2%	7	0.5%
44.4	54.3	-	*Reducing the number of solutions*			2	0.1%									2	0.1%	2	0.4%		
Section 2	**-**		**Criteria for qualitative selection**			***82***	***2.7%***	***58***	***5.8%***	***22***	***21.0%***	***15***	***5.1%***	***21***	***3.5%***	***24***	***1.2%***	***10***	***2.2%***	***14***	***0.9%***
45	-		Personal situation of the candidate or tenderer																		
45.1	54.4	-	*Shall be excluded*			2	0.1%	1	0.1%					1	0.2%	1	0.1%	1	0.2%		
45.2.1	see 54.4	-	*May be excluded*			13	0.4%	8	0.8%			1	0.3%	7	1.2%	5	0.3%	3	0.7%	2	0.1%
45.2.2	see 54.4	-	*Implementing conditions*																		
45.3	see 54.4	-	*Sufficient evidence*			3	0.1%									3	0.2%			3	0.2%
45.4	see 54.4	-	*Designate the authorities, bodies*																		
46	-		Suitability to pursue the professional activity																		
46.1	-	-	*Registers, declaration, certificate*			2	0.1%	2	0.2%	2	1.9%										
46.2	-	-	*Authorisation, membership*																		
47	-		Economic and financial standing																		
47.1.a-b	-	-	*Banks, insurance, balance sheets*			7	0.2%	7	0.7%	5	4.8%	1	0.3%	1	0.2%						
47.1.c	-	-	*Turnover*			6	0.2%	6	0.6%	5	4.8%	1	0.3%								
47.2-3	54.5	-	*Other entities*			9	0.3%	5	0.5%			4	1.4%	1	0.2%	4	0.2%			4	0.3%
47.4-5	-	-	*Specify, may prove*			3	0.1%	2	0.2%			1	0.3%	1	0.2%	1	0.1%			1	0.1%
48	-		Technical and/or professional ability																		
48.1-2.a-e	-	-	*Means and criteria*			8	0.3%	7	0.7%	4	3.8%	1	0.3%	2	0.3%	1	0.1%	1	0.2%		
48.2.f	-	-	*Environmental management measures*																		
48.2.g-j	-	-	*Further means and criteria*			8	0.3%	8	0.8%	4	3.8%	2	0.7%	2	0.3%						
48.3-4	54.6	-	*Other entities*			8	0.3%	6	0.6%			4	1.4%	2	0.3%	2	0.1%			2	0.1%
48.5	-	-	*Skills, efficiency, experience, reliability*			1	0.0%									1	0.1%	1	0.2%		
48.6	-	-	*Specify*			3	0.1%	2	0.2%	1	1.0%			1	0.2%	1	0.1%			1	0.1%
49	52.2	-	Quality assurance standards																		
50	52.3	-	Environmental management standards																		
51	-	-	Additional documentation and information			9	0.3%	4	0.4%	1	1.0%			3	0.5%	5	0.3%	4	0.9%	1	0.1%
-	Section 1		**Qualification and qualitative selection**			***5***	***0.2%***	***2***	***0.2%***			***1***	***0.3%***	***1***	***0.2%***	***3***	***0.2%***			***3***	***0.2%***
-	52		Mutual recognition concerning administrative, techn																		
-	52.1	-	*Not be imposed on others & duplicate objective evi*			1	0.0%									1	0.1%			1	0.1%
52	-	-	Official lists of approved economic operators and ce																		
-	53		Qualification systems																		
-	53.1	-	*May establish and operate*			3	0.1%	1	0.1%					1	0.2%	2	0.1%			2	0.1%
-	53.2	-	*May involve different qualification stages*																		
-	53.3	-	*Exclusion criteria listed in 45 of Directive 2004/18/E*																		
-	53.4	-	*Economic and financial capacity*																		
-	53.5	-	*Technical and/or professional abilities*																		
-	53.6	-	*Made available*																		
-	53.7	-	*Written record*																		
-	53.8	-	*Notices*																		
-	53.9	-	*Selected from the qualified candidates*																		
-	-	U2-21.5	Published			1	0.0%	1	0.1%			1	0.3%								

Procurement Classic	Utilities	Other		EU+DK	1976-2008	EU+DK	1976-2008	EU	1976-2008	EU	1976-1991	EU	1992-1999	EU	2000-2008	DK	1992-2008	DK	1992-1999	DK	2000-2008
				Summary by title		Cases	533	Cases	227	Cases	28	Cases	67	Cases	132	Cases	406	Cases	100	Cases	306
								ECJ	*178*	*ECJ*	*28*	*ECJ*	*61*	*ECJ*	*89*	*Board*	377	*Board*	100	*Board*	277
												CFI	*6*	*CFI*	*43*	*Courts*	29	*Courts*		*Courts*	29
32004L0018	*32004L0017*	*Reference*	*Title*	*Hits*	*Per cent*	*Hits*	*Per cent*	*Hits*	*Per cent*	*Hits*	*Per cent*	*Hits*	*Per cent*	*Hits*	*Per cent*	*Hits*	*Per cent*	*Hits*	*Per cent*	*Hits*	*Per cent*
Section 3	**Section 2**		**Award of the contract**	***254***	***8.5%***	***52***	***5.2%***	***15***	***14.3%***	***13***	***4.4%***	***24***	***4.0%***	***202***	***10.1%***	***40***	***8.8%***	***162***	***10.5%***
53	55		Contract award criteria																		
53.1	55.1	-	*Criteria*			156	5.2%	19	1.9%	3	2.9%	3	1.0%	13	2.2%	137	6.9%	29	6.3%	108	7.0%
53.2	55.2	-	*Specify and publish relative weighting*			69	2.3%	12	1.2%	1	1.0%	5	1.7%	6	1.0%	57	2.9%	10	2.2%	47	3.1%
-	-	M4-138.2	Best-value-for money definition			2	0.1%	2	0.2%					2	0.3%						
-	-	W1-29.3	Price envelopes			3	0.1%	3	0.3%	3	2.9%										
-	-	U2-35	Other criteria			1	0.0%	1	0.1%	1	1.0%										
54	56	-	Use of electronic auctions																		
55	57		Abnormally low tenders																		
55.1-2	57.1-2	-	*Before it may reject, verify*			15	0.5%	8	0.8%	3	2.9%	2	0.7%	3	0.5%	7	0.4%	1	0.2%	6	0.4%
55.3	57.3	-	*State aid*			5	0.2%	4	0.4%	4	3.8%					1	0.1%			1	0.1%
-	-	W2-30.4.4	Reject without procedure			2	0.1%	2	0.2%			2	0.7%								
-	-	W2-31	Regional disparities			1	0.0%	1	0.1%			1	0.3%								
-	-	W2-32	Inform the Commission																		
-	-	M4-146.1-2	Evaluation committee																		
TITLE III	**-**		**RULES ON PUBLIC WORKS CONCESSIONS**	***3***	***0.1%***																
CHAPTER I	**-**		**Rules governing public works concessions**			***2***	***0.1%***	***2***	***0.2%***					***2***	***0.3%***						
56	-	-	Scope			2	0.1%	2	0.2%					2	0.3%						
57	-	-	Exclusions from the scope																		
58	-	-	Publication of the notice concerning public works cc																		
59	-	-	Time limit																		
60	-	-	Subcontracting																		
61	-	-	Awarding of additional works to the concessionaire																		
CHAPTER II	**-**		**Rules on contracts awarded by concessionaires**																		
62	-	-	Applicable rules																		
CHAPTER III	**-**		**Rules applicable to contracts awarded by conce**			***1***	***0.0%***	***1***	***0.1%***			***1***	***0.3%***								
63	-	-	Advertising rules: threshold and exceptions			1	0.0%	1	0.1%			1	0.3%								
64	-	-	Publication of the notice																		
65	-	-	Time limit for the receipt of requests to participate a																		
TITLE IV	**TITLE III**		**RULES GOVERNING DESIGN CONTESTS**	***11***	***0.4%***	***11***	***0.4%***									***11***	***0.6%***	***5***	***1.1%***	***6***	***0.4%***
66	60		General provisions																		
66.1	60.1	-	*Organisation of a design contest*																		
66.2	60.2	-	*Admission of participants*																		
67	61		Scope																		
67.1	61.1	-	*Organised by*			2	0.1%									2	0.1%	1	0.2%	1	0.1%
67.2	61.2	-	*Apply to*																		
68	62	-	Exclusions from the scope																		
69	63		Notices																		
69.1	63.1.1	-	*Contest notice*			2	0.1%									2	0.1%	1	0.2%	1	0.1%
69.2.1	63.1.2	-	*Notice of the results*																		
69.2.2+69.3	-	-	*Release of information*																		
70	63.2	-	Form and manner of publication of notices of conte			2	0.1%									2	0.1%			2	0.1%
71	64	-	Means of communication																		
-	65		Rules on the organisation of design contests, the se																		
-	65.1	-	*Apply procedures*																		
72	65.2	-	Selection of competitors																		
73	65.3	-	Composition of the jury			2	0.1%									2	0.1%	2	0.4%		
74	66	-	Decisions of the jury			3	0.1%									3	0.2%	1	0.2%	2	0.1%
TITLE V	**TITLE IV**		**STATISTICAL OBLIGATIONS, EXECUTORY POV**	***40***	***1.3%***	***40***	***1.3%***	***37***	***3.7%***	***6***	***5.7%***	***22***	***7.4%***	***9***	***1.5%***	***3***	***0.2%***	***2***	***0.4%***	***1***	***0.1%***
-	-	G1-26	Exemption			2	0.1%	2	0.2%	2	1.9%										
-	-	G1-27	Inform the Commission																		
-	-	W2-33	Time calculation																		
75	67.1-2	-	Statistical obligations																		
76	67.3	-	Content of statistical report																		
-		S2-39.2.d.2	Shall not concern																		
77	68		Advisory Committee																		
77.1	68.1	-	*Assisted by*																		
77.2	68.2	-	*Decision 1999/468/EC*																		
77.3	68.3	-	*Rules of procedure*																		
-	-	U2-39	Telecommunications																		
78	69		Revision of the thresholds																		
78.1.1	69.1.1	-	*Verify, align*																		
78.1.2	69.1.2	-	*Calculation of the value*																		
78.2	69.2.1	-	*Additional alignment*																		
78.3	69.2.2	-	*National currencies*																		
78.4	69.3	-	*Shall be published*																		

Procurement				**EU+DK**	**1976-2008**	**EU+DK**	**1976-2008**	**EU**	**1976-2008**	**EU**	**1976-1991**	**EU**	**1992-1999**	**EU**	**2000-2008**	**DK**	**1992-2008**	**DK**	**1992-1999**	**DK**	**2000-2008**
Classic	**Utilities**	**Other**		Summary by title		Cases	533	Cases	227	Cases	28	Cases	67	Cases	132	Cases	406	Cases	100	Cases	306
								ECJ	*178*	*ECJ*	*28*	*ECJ*	*61*	*ECJ*	*89*	*Board*	377	*Board*	100	*Board*	277
										CFI	*49*	*CFI*		*CFI*	*6*	*CFI*	*43*	*Courts*	29	*Courts*	29
32004L0018	*32004L0017*	*Reference*	*Title*	*Hits*	*Per cent*	*Hits*	*Per cent*	*Hits*	*Per cent*	*Hits*	*Per cent*	*Hits*	*Per cent*	*Hits*	*Per cent*	*Hits*	*Per cent*	*Hits*	*Per cent*	*Hits*	*Per cent*
79	70		Amendments																		
79.a	70.1.j	-	*Calculation methods*																		
79.b	70.1.b+i	-	*Notices, statistical reports*																		
79.c	70.1.c	-	*Reference to CPV*																		
79.d	70.1.a	-	*Lists of bodies*																		
79.e	see 70.1.a	-	*Lists of central government authorities*																		
79.f	70.1.d	-	*Reference numbers, Annex I*																		
79.g	70.1.e	-	*Reference numbers, Annex II*																		
-	-	G1A1-8.1.p2+8..	Proposals																		
-	-	G1A2-1	Amendments in general																		
-	70.1.f	-	*Annex XI*																		
79.h-i	70.1.g-h	-	*Sending, publishing, receipt*																		
-	-	U2-40.4	Published																		
-	-	S2-43	Revision																		
80	71	-	Implementation			25	0.8%	23	2.3%	4	3.8%	12	4.1%	7	1.2%	2	0.1%	2	0.4%		
-	-	U2A-2.2	Transitory provisions			1	0.0%	1	0.1%			1	0.3%								
81	72	-	Monitoring mechanisms																		
82	73	-	Repeals			3	0.1%	3	0.3%			2	0.7%	1	0.2%						
-	-	S2-41	Amends			4	0.1%	4	0.4%			4	1.4%								
83	74	-	Entry into force																		
-	-	M4A1-2	Intertemporary application			1	0.0%	1	0.1%					1	0.2%						
84	75	-	Addressees			4	0.1%	3	0.3%			3	1.0%			1	0.1%			1	0.1%
ANNEXES	**ANNEXES**			***48***	***1.6%***	***48***	***1.6%***	***14***	***1.4%***	***4***	***3.8%***	***7***	***2.4%***	***3***	***0.5%***	***34***	***1.7%***	***4***	***0.9%***	***30***	***1.9%***
I	XII	-	List of the activities referred to in 1(2), point (B)(1)																		
II	XVII		Services																		
II.A	XVII.A	-	*Services referred to in 1(2)(d), full application*			8	0.3%	3	0.3%			2	0.7%	1	0.2%	5	0.3%	1	0.2%	4	0.3%
II.B	XVII.B	-	*Services referred to in 1(2)(d), limited application*			12	0.4%	2	0.2%			1	0.3%	1	0.2%	10	0.5%			10	0.6%
-	-	P2X2-I	Common Procurement Vocabulary (CPV)			1	0.0%	1	0.1%			1	0.3%								
III	-	-	List of bodies and categories of bodies governed by			2	0.1%	2	0.2%			2	0.7%								
IV	-	-	Central government authorities			1	0.0%	1	0.1%	1	1.0%										
V	-	-	List of products referred to in 7 with regard to contra																		
-	I	-	Contracting entities in the sectors of transport or dis																		
-	II	-	Contracting entities in the sectors of production, tra																		
-	III	-	Contracting entities in the sectors of production, tra																		
-	IV	-	Contracting entities in the field of rail services																		
-	V	-	Contracting entities in the field of urban railway, trar																		
-	VI	-	Contracting entities in the postal services sector																		
-	VII	-	Contracting entities in the sectors of exploration for																		
-	VIII	-	Contracting entities in the sectors of exploration for																		
-	IX	-	Contracting entities in the field of maritime or inland																		
-	X	-	Contracting entities in the field of airport installation																		
-	-	U2-X	Telecommunications																		
-	XI	-	List of Community legislation referred to in 30(3)																		
VI	XXI		Definition of certain technical specifications																		
VI.1	XXI.1	-	*Technical specification*			1	0.0%									1	0.1%			1	0.1%
VI.2.s1	XXI.2.s1	-	*Standard*																		
VI.2.i1	XXI.2.i1	-	*International standard*																		
VI.2.i2	XXI.2.i2	-	*European standard*																		
VI.2.i3	XXI.2.i3	-	*National standard*																		
VI.3	XXI.3	-	*European technical approval*																		
VI.4	XXI.4	-	*Common technical specifications*																		
VI.5	XXI.5	-	*Technical reference*																		
-	-	U2-1.13	European specification																		
-	-	W2-III.6	Essential requirements																		
VII	XV		Information which must appear																		
VII.A.p1	XV.B	-	*Buyer profile*																		
VII.A.p2	XV.A	-	*Prior information notice*																		
VII.A.p3	XIII.C	-	*Open procedures, restricted procedures & negotiate*			20	0.7%	5	0.5%	3	2.9%	1	0.3%	1	0.2%	15	0.8%	2	0.4%	13	0.8%
VII.A.p4	XIII.D	-	*Simplified contract notice for use in a dynamic purc*																		
VII.A.p5	XVI	-	*Contract award notices*																		
VII.B	-	-	*Public works concession notices*			1	0.0%									1	0.1%	1	0.2%		
VII.C	-	-	*Contract notices of concessionnaires*																		
VII.D.p1	XVIII	-	*Design contest notices*			2	0.1%									2	0.1%			2	0.1%
VII.D.p2	XIX	-	*Design result notices*																		
-	XIV	-	*Qualification system - existence*																		
VIII	XX		Features concerning publication																		

Procurement				EU+DK	1976-2008	EU+DK	1976-2008	EU	1976-2008	EU	1976-1991	EU	1992-1999	EU	2000-2008	DK	1992-2008	DK	1992-1999	DK	2000-2008
Classic	Utilities	Other		Summary by title		Cases	533	Cases	227	Cases	28	Cases	67	Cases	132	Cases	406	Cases	100	Cases	306
								ECJ	*178*	*ECJ*	*28*	*ECJ*	*61*	*ECJ*	*89*	*Board*	377	*Board*	100	*Board*	277
								CFI	*49*	*CFI*		*CFI*	*6*	*CFI*	*43*	*Courts*	29	*Courts*		*Courts*	29
32004L0018	*32004L0017*	*Reference*	*Title*	*Hits*	*Per cent*	*Hits*	*Per cent*	*Hits*	*Per cent*	*Hits*	*Per cent*	*Hits*	*Per cent*	*Hits*	*Per cent*	*Hits*	*Per cent*	*Hits*	*Per cent*	*Hits*	*Per cent*
VIII.1.a	XX.1.a	-	*Sent by the contracting entities*																		
VIII.1.b	XX.1.b	-	*Published by the Office for Official Publications*																		
VIII.1.c	XX.1.c	-	*Confirmation*																		
VIII.2-3	XX.2-3	-	*Additional information & electronic transmission*																		
IX	-		Registers																		
IX.A	-	-	*Public works contracts*																		
IX.B	-	-	*Public supply contracts*																		
IX.C	-	-	*Public service contracts*																		
-	XXII	-	Summary table of the time-limits laid down in 45																		
-	XXIII	-	International labour law provisions within the meani																		
X	XXIV	-	Requirements relating to devices for the electronic																		
XI	XXV	-	Deadlines for transposition and application																		
XII	XXVI	-	Correlation table																		
General EU law																					
European Community Treaty				*361*	*12.1%*																
Provisions						***284***	***9.5%***	***252***	***25.3%***	***18***	***17.1%***	***55***	***18.6%***	***179***	***30.0%***	***32***	***1.6%***	***12***	***2.6%***	***20***	***1.3%***
ECT-2	-	ex 2	Task			2	0.1%	2	0.2%					2	0.3%						
ECT-5	-	ex 3b	Legality and proportionality			1	0.0%	1	0.1%					1	0.2%						
ECT-10	-	ex 5	Loyalty			11	0.4%	10	1.0%	1	1.0%	7	2.4%	2	0.3%	1	0.1%			1	0.1%
ECT-12	-	ex 6 (ex 7)	Discrimination			8	0.3%	5	0.5%			1	0.3%	4	0.7%	3	0.2%	2	0.4%	1	0.1%
ECT-28	-	ex 30	Free movement of goods			17	0.6%	8	0.8%	2	1.9%	2	0.7%	4	0.7%	9	0.5%	2	0.4%	7	0.5%
ECT-30	-	ex 36	Restrictions on goods			2	0.1%									2	0.1%	1	0.2%	1	0.1%
ECT-43	-	ex 52	Freedom of establishment			14	0.5%	14	1.4%	1	1.0%			13	2.2%						
ECT-45	-	ex 55	Exercise of official authority			4	0.1%	4	0.4%	1	1.0%	1	0.3%	2	0.3%						
ECT-46	-	ex 56	Public policy, public security or public health			1	0.0%	1	0.1%					1	0.2%						
ECT-49	-	ex 59	Freedom to provide services			30	1.0%	23	2.3%	1	1.0%	4	1.4%	18	3.0%	7	0.4%	1	0.2%	6	0.4%
ECT-50	-	ex 60	Definition of services and discrimination			1	0.0%	1	0.1%					1	0.2%						
ECT-55	-	ex 66	Cross reference to establishment provisions			1	0.0%	1	0.1%					1	0.2%						
ECT-81	-	ex 85	Agreements, decisions and concerted practices			1	0.0%	1	0.1%					1	0.2%						
ECT-82	-	ex 86	Abuse of dominant position			1	0.0%									1	0.1%	1	0.2%		
ECT-86	-	ex 90	Public undertakings and exclusive rights			5	0.2%	5	0.5%			1	0.3%	4	0.7%						
ECT-87-88	-	ex 92-93	State aid			4	0.1%	1	0.1%			1	0.3%			3	0.2%	1	0.2%	2	0.1%
ECT-90	-	ex 95	Internal taxation			1	0.0%	1	0.1%	1	1.0%										
ECT-195	-	ex 138e	Ombudsman			1	0.0%	1	0.1%					1	0.2%						
ECT-225	-	ex 168a	Jurisdiction of the CFI			3	0.1%	3	0.3%					3	0.5%						
ECT-226	-	ex 169	Cases against member states			33	1.1%	33	3.3%	1	1.0%	8	2.7%	24	4.0%						
ECT-228+233	-	ex 171+176	Necessary measures to comply			8	0.3%	8	0.8%					8	1.3%						
ECT-229	-	ex 172	Reasons			1	0.0%	1	0.1%			1	0.3%								
ECT-230	-	ex 173	Annulment cases			26	0.9%	26	2.6%	2	1.9%	4	1.4%	20	3.4%						
ECT-232	-	ex 175	Inactivity cases			1	0.0%	1	0.1%					1	0.2%						
ECT-234	-	ex 177	Preliminary references			50	1.7%	45	4.5%	2	1.9%	14	4.7%	29	4.9%	5	0.3%	3	0.7%	2	0.1%
ECT-238	-	ex 181	Arbitration on contracts			2	0.1%	2	0.2%			1	0.3%	1	0.2%						
ECT-240	-	ex 183	Jurisdiction of national courts			1	0.0%	1	0.1%					1	0.2%						
ECT-242-243	-	ex 185-186	Interim measures			15	0.5%	15	1.5%	4	3.8%	2	0.7%	9	1.5%						
ECT-249	-	ex 189	Legislative acts			14	0.5%	13	1.3%	1	1.0%	6	2.0%	6	1.0%	1	0.1%	1	0.2%		
ECT-253	-	ex 190	Reasons [see also C3-41.2]			11	0.4%	11	1.1%					11	1.8%						
ECT-288+235	-	ex 215+178	Liability in damages			11	0.4%	11	1.1%	1	1.0%	2	0.7%	8	1.3%						
ECT-295	-	ex 222	System of property ownership			1	0.0%	1	0.1%					1	0.2%						
ECT-296	-	ex 223	Essential interests of security			2	0.1%	2	0.2%					2	0.3%						
Principles						***77***	***2.6%***	***44***	***4.4%***	***1***	***1.0%***	***9***	***3.0%***	***34***	***5.7%***	***33***	***1.7%***	***5***	***1.1%***	***28***	***1.8%***
ECT-AbuPow	-	-	Abuse of powers			1	0.0%	1	0.1%					1	0.2%						
ECT-ConfInt	-	-	Conforming interpretation			1	0.0%									1	0.1%	1	0.2%		
ECT-EffUtil	-	-	Effet utile			13	0.4%	6	0.6%	1	1.0%	2	0.7%	3	0.5%	7	0.4%	1	0.2%	6	0.4%
ECT-EquTran	-	-	Outside directives: Equal treatment and transparen			33	1.1%	15	1.5%			2	0.7%	13	2.2%	18	0.9%	2	0.4%	16	1.0%
ECT-GoodAdm	-	-	Good aministration			6	0.2%	5	0.5%			1	0.3%	4	0.7%	1	0.1%			1	0.1%
ECT-GoodFai	-	-	Good faith and excusable errors			6	0.2%	1	0.1%					1	0.2%	5	0.3%	1	0.2%	4	0.3%
ECT-LegCert	-	-	Legal certainty			7	0.2%	7	0.7%			2	0.7%	5	0.8%						
ECT-LegExp	-	-	Legitimate expectations			5	0.2%	5	0.5%			2	0.7%	3	0.5%						
ECT-NonExi	-	-	Non-existence of acts - nullity			1	0.0%	1	0.1%					1	0.2%						
ECT-Proport	-	-	Proportionality			3	0.1%	2	0.2%					2	0.3%	1	0.1%			1	0.1%
ECT-RigHea	-	-	Right to be heard			1	0.0%	1	0.1%					1	0.2%						
European Court of Justice				*65*	*2.2%*																
Statutes						***7***	***0.2%***	***7***	***0.7%***			***1***	***0.3%***	***6***	***1.0%***						
ECS-19	-	-	Representation																		
ECS-21	-	-	Written application			3	0.1%	3	0.3%					3	0.5%						
ECS-45	-	-	Grace period and force majeure			1	0.0%	1	0.1%					1	0.2%						

Procurement				**EU+DK**	**1976-2008**	**EU+DK**	**1976-2008**	**EU**	**1976-2008**	**EU**	**1976-1991**	**EU**	**1992-1999**	**EU**	**2000-2008**	**DK**	**1992-2008**	**DK**	**1992-1999**	**DK**	**2000-2008**
Classic	**Utilities**	**Other**		Summary by title		Cases	533	Cases	227	Cases	28	Cases	67	Cases	132	Cases	406	Cases	100	Cases	306
								ECJ	*178*	*ECJ*	*28*	*ECJ*	*61*	*ECJ*	*89*	*Board*	377	*Board*	100	*Board*	277
								CFI	*49*	*CFI*		*CFI*	*6*	*CFI*	*43*	*Courts*	29	*Courts*		*Courts*	29
32004L0018	*32004L0017*	*Reference*	*Title*	*Hits*	*Per cent*	*Hits*	*Per cent*	*Hits*	*Per cent*	*Hits*	*Per cent*	*Hits*	*Per cent*	*Hits*	*Per cent*	*Hits*	*Per cent*	*Hits*	*Per cent*	*Hits*	*Per cent*
ECS-46	-	-	Period of limitation			1	0.0%	1	0.1%					1	0.2%						
ECS-58	-	-	Grounds for appeal			2	0.1%	2	0.2%			1	0.3%	1	0.2%						
ECJ Rules of procedure						***21***	***0.7%***	***21***	***2.1%***	***3***	***2.9%***	***1***	***0.3%***	***17***	***2.8%***						
ECJR-38	-	-	Application			2	0.1%	2	0.2%					2	0.3%						
ECJR-61	-	-	Reopening of oral procedure			2	0.1%	2	0.2%					2	0.3%						
ECJR-83	-	-	Interim measures			3	0.1%	3	0.3%	2	1.9%	1	0.3%								
ECJR-84	-	-	Temporary interim measures			1	0.0%	1	0.1%	1	1.0%										
ECJR-92	-	-	Clearly inadmissible			1	0.0%	1	0.1%					1	0.2%						
ECJR-104	-	-	Preliminary reference procedure			9	0.3%	9	0.9%					9	1.5%						
ECJR-104a	-	-	Accelerated procedure			1	0.0%	1	0.1%					1	0.2%						
ECJR-119	-	-	Manifestly unfounded			2	0.1%	2	0.2%					2	0.3%						
CFI Rules of procedure						***36***	***1.2%***	***36***	***3.6%***			***4***	***1.4%***	***32***	***5.4%***						
CFIR-43	-	-	Written procedure			2	0.1%	2	0.2%					2	0.3%						
CFIR-44	-	-	Application			4	0.1%	4	0.4%			1	0.3%	3	0.5%						
CFIR-45	-	-	Grace period and force majeure			1	0.0%	1	0.1%					1	0.2%						
CFIR-47	-	-	Reply and rejoinder																		
CFIR-48	-	-	Further evidence and new plea			5	0.2%	5	0.5%			2	0.7%	3	0.5%						
CFIR-50	-	-	Joining of cases																		
CFIR-64	-	-	Measures of organisation of procedure			5	0.2%	5	0.5%					5	0.8%						
CFIR-65	-	-	Measures of inquiry			2	0.1%	2	0.2%					2	0.3%						
CFIR-68	-	-	Witness and expert procedure			1	0.0%	1	0.1%					1	0.2%						
CFIR-76a	-	-	Expedited procedure			1	0.0%	1	0.1%					1	0.2%						
CFIR-104	-	-	Application for interim measures			7	0.2%	7	0.7%			1	0.3%	6	1.0%						
CFIR-105	-	-	Procedure for interim measures			4	0.1%	4	0.4%					4	0.7%						
CFIR-108	-	-	Varied or cancelled			1	0.0%	1	0.1%					1	0.2%						
CFIR-109	-	-	Further application			1	0.0%	1	0.1%					1	0.2%						
CFIR-111	-	-	Manifestly inadmissible			2	0.1%	2	0.2%					2	0.3%						
CFIR-114	-	-	Decision on admissibility																		
CFIR-116	-	-	Decision on intervention																		
Decisions						***1***	***0.0%***	***1***	***0.1%***			***1***	***0.3%***								
D88.591-genere	-	-	Decision on the Court of First Instance			1	0.0%	1	0.1%			1	0.3%								
EU Legislation				***4***	***0.1%***																
Directives						***3***	***0.1%***	***3***	***0.3%***			***3***	***1.0%***								
L71.304	-	-	Abolition of restrictions on works contracts			2	0.1%	2	0.2%			2	0.7%								
L77.187	-	-	Safeguarding of employees' rights in the event of tr			1	0.0%	1	0.1%			1	0.3%								
Regulations						***1***	***0.0%***	***1***	***0.1%***			***1***	***0.3%***								
R93.2081-7.1	-	-	Projects financed by EU			1	0.0%	1	0.1%			1	0.3%								
Other				***1***	***0.0%***	***1***	***0.0%***									***1***	***0.1%***	***1***	***0.2%***		
EC-Statement	-	-	Statement by the European Commissior			1	0.0%									1	0.1%	1	0.2%		
Remedies																					
Classic	**Utilities**																				
31989L0665	*31992L0013*		*Title*	***789***	***26.4%***																
	CHAPTER I		**Remedies at national level**			***780***	***26.1%***	***62***	***6.2%***			***23***	***7.8%***	***39***	***6.5%***	***718***	***36.0%***	***129***	***28.2%***	***589***	***38.3%***
1	1		Take measures																		
1.1	1.1	-	*Reviewed effectively - competence*			126	4.2%	25	2.5%			8	2.7%	17	2.8%	101	5.1%	29	6.3%	72	4.7%
-	-	KNL-doc	*Access to documents*			25	0.8%	1	0.1%					1	0.2%	24	1.2%	8	1.8%	16	1.0%
-	-	KNL-post	*Postponed claims and decisions*			164	5.5%									164	8.2%	2	0.4%	162	10.5%
-	-	KNL-exof	*Ex-officio questions*			67	2.2%									67	3.4%	12	2.6%	55	3.6%
1.2	1.2	-	*No discrimination*			1	0.0%	1	0.1%			1	0.3%								
1.3.s1	1.3.s1	-	*Review procedures available to*			44	1.5%	7	0.7%					7	1.2%	37	1.9%	20	4.4%	17	1.1%
1.3.s2	1.3.s2	-	*Notified contracting entity*																		
2	2		Powers																		
2.1.a	2.1.1.a	-	*Interim measures and stand still*			115	3.8%	8	0.8%			4	1.4%	4	0.7%	107	5.4%	25	5.5%	82	5.3%
2.1.b	2.1.1.b	-	*Setting aside decisions*			143	4.8%	6	0.6%			2	0.7%	4	0.7%	137	6.9%	22	4.8%	115	7.5%
-	2.1.1.c.p1	-	*Other measures*			24	0.8%	1	0.1%			1	0.3%			23	1.2%	7	1.5%	16	1.0%
-	2.1.1.c.p2	-	*Payment of sum*			2	0.1%	2	0.2%			2	0.7%								
-	2.1.2.s1	-	*All or categories of authorities*			1	0.0%	1	0.1%			1	0.3%								
2.1.c	2.1.2.d	-	*Award damages*			52	1.7%	2	0.2%			1	0.3%	1	0.2%	50	2.5%	2	0.4%	48	3.1%
2.2	2.2	-	*Separate bodies*																		
2.3	2.3	-	*No automatic suspensive effect*																		
2.4	2.4	-	*Probable consequences*			1	0.0%	1	0.1%					1	0.2%						
-	2.5	-	*Level high enough*																		
2.5	2.1.3	-	*First be set aside*																		
2.6.1	2.6.s1	-	*Effects of exercise*			1	0.0%									1	0.1%			1	0.1%
2.6.2	2.6.s2	-	*May be limited*			9	0.3%	4	0.4%			1	0.3%	3	0.5%	5	0.3%	1	0.2%	4	0.3%
-	2.7	-	*Required only to prove*																		

Procurement				EU+DK	1976-2008	EU+DK	1976-2008	EU	1976-2008	EU	1976-1991	EU	1992-1999	EU	2000-2008	DK	1992-2008	DK	1992-1999	DK	2000-2008
Classic	Utilities	Other		Summary by title		Cases	533	Cases	227	Cases	28	Cases	67	Cases	132	Cases	406	Cases	100	Cases	306
								ECJ	*178*	*ECJ*	*28*	*ECJ*	*61*	*ECJ*	*89*	*Board*	*377*	*Board*	*100*	*Board*	*277*
												CFI	*6*	*CFI*	*43*	*Courts*	29	*Courts*		*Courts*	29
32004L0018	*32004L0017*	*Reference*	*Title*	*Hits*	*Per cent*	*Hits*	*Per cent*	*Hits*	*Per cent*	*Hits*	*Per cent*	*Hits*	*Per cent*	*Hits*	*Per cent*	*Hits*	*Per cent*	*Hits*	*Per cent*	*Hits*	*Per cent*
2.7	2.8	-	*Effectively enforced*			2	0.1%	1	0.1%					1	0.2%	1	0.1%			1	0.1%
2.8.1.s1	2.9.1.s1	-	*Written reasons*																		
2.8.1.s2	2.9.1.s2	-	*Review body*			3	0.1%	2	0.2%			2	0.7%			1	0.1%	1	0.2%		
2.8.2.s1-2	2.9.2.s1-2	-	*As members of the judiciary*																		
2.8.2.s3	2.9.2.s3	-	*Both side are heard*																		
	CHAPTER 2		**Attestation**																		
-	3	-	*Attestation system*																		
-	4	-	*Examined periodically*																		
-	5		Procedure																		
-	5.1	-	*Examination*																		
-	5.2	-	*May include statement*																		
-	6		Attestors																		
-	6.1	-	*Independent*																		
-	6.2	-	*Identify any persons*																		
-	7	-	Essential requirements																		
	CHAPTER 3		**Corrective mechanism**			***7***	***0.2%***	***7***	***0.7%***			***5***	***1.7%***	***2***	***0.3%***						
3	8		Commision procedure																		
3.1	8.1	-	*May invoke*			5	0.2%	5	0.5%			3	1.0%	2	0.3%						
3.2	8.2	-	*Notify members states*																		
3.3	8.3	-	*Communicate to the Commission*			1	0.0%	1	0.1%			1	0.3%								
3.4	8.4	-	*Reasoned submission*			1	0.0%	1	0.1%			1	0.3%								
3.5	8.5	-	*Notify the Commission*																		
	CHAPTER 4		**Conciliation**																		
-	9		Request																		
-	9.1	-	*Interest in obtaining*																		
-	9.2	-	*Addressed*																		
-	10		Procedure																		
-	10.1	-	*Ask if willing*																		
-	10.2	-	*Propose concilliators*																		
-	10.3	-	*Make representations*																		
-	10.4	-	*Quickly as possible*																		
-	10.5	-	*Report to Commission*																		
-	10.6	-	*Right to terminate*																		
-	10.7	-	*Own costs*																		
	11		Concurrant procedures																		
-	11.1	-	*Inform the concilliators*																		
-	11.2	-	*Without prejudice*																		
	CHAPTER 5		**Final provisions**			***2***	***0.1%***	***2***	***0.2%***			***1***	***0.3%***	***1***	***0.2%***						
	12		Review																		
4.1	12.1	-	*Commission review*																		
4.2	12.2	-	*National review*																		
-	12.3	-	*Telecommunications*																		
	13		Implementation																		
5.s1	13.1.1.s1	-	*Shall take before*			2	0.1%	2	0.2%			1	0.3%	1	0.2%						
-	13.1.1.s2-4	-	*Transitory measures*																		
-	13.1.2	-	*Reference*																		
-	13.2	-	*Same date*																		
5.s2	13.3	-	*Communicate*																		
6	14	-	Addressed																		
-	Annex	-	Requests for concilliation																		
Appeal				***55***	***1.8%***	***55***	***1.8%***									***55***	***2.8%***	***13***	***2.8%***	***42***	***2.7%***
-	-	-	EU and National Procedures			55	1.8%									55	2.8%	13	2.8%	42	2.7%
				Hits	2994	*Hits*	2994	*Hits*	998	*Hits*	105	*Hits*	296	*Hits*	597	*Hits*	1996	*Hits*	457	*Hits*	1539

7 INDEXES

7.1 Procurement cases from the European Court of Justice

7.2 Procurement cases from the European Court of First Instance

7.3 Procurement cases from the Danish Courts

7.4 Procurement cases from the Danish Complaint Board

7.5 EU procurement legislation

7.6 Danish procurement legislation