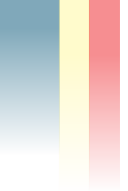




THE NATIONAL COUNCIL
FOR SOLVING COMPLAINTS

ACTIVITY REPORT 2016





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FOREWORD



May 2016 will be henceforth a benchmark in the domestic public procurements field because, at the time, went into effect the new public procurement legislation, respectively Law no. 98/2016 on Public Procurement, Law. 99/2016 on the sectorial procurements, Law no. 100/2016 on concessions for works and concessions for services, and Law no. 101/2016 regarding the remedies and complaints concerning the award of public procurement contracts, of the sectorial contracts, and works concession and service concession contracts, as well as for the organizing and functioning of the National Council for Solving Complaints. Subsequently, for the first three laws, the Government Decisions approving the Implementing Rules, have also been adopted.

Changing the framework - regulations in the public procurement field has arisen as a result of the obligation to transpose the EU rules into national law (Directives 2014/23/EU - on the award of concession contracts, 2014/24 / EU - on public procurement and repealing Directive 2004/18/EC, 2014/25 / EU -on the procurements made by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC).

The promotion, distinctly in the legislative package, of a law on the regulation of a system of remedies can be found in the National Strategy for Public Procurement (S.N.D.A.P.), as it was approved by Government Decision no. 901/2015, aimed primarily for a stable legal framework, under the circumstances in which the former law in the field, G.E.O. no. 34/2006 has undergone numerous changes since its entry into force and until repealed, aspect likely to affect both the transparency and the consistency of the public procurement system.



SILVIU-CRISTIAN POPA
N.C.S.C. President

In support of the above mentioned, are included the decisions issued by the High Court of Cassation and Justice, according to which „there is a direct relationship between the legislative and the judicial activity, meaning that, on the one hand, the case law results from the enforcement of the law, and on the other hand, the law is constructed also under the influence of jurisprudence”. Also by reference to the principle of legal certainty, E.C.H.R. stated one of the case law landmarks, as follows: „for the law to satisfy the requirement of foreseeability it must indicate with sufficient clarity the scope and manner of exercise of discretion by the authorities in the field, taking into account the legitimate aim pursued, to give the individual adequate protection against the arbitrary”.

In other words, compliance with the imperative „lex certa” means that „the party must be able to foresee, to a reasonable extent, to circumstances, the consequences which could result from a given action”.

Regarding the National Council for Solving Complaints in the new paradigm key, Law no. 101/2016 specifies that the adopted decisions should be reasoned clearly, unequivocally, showing the reasons that led to the admission or removal of the request of the parties, namely, for the admission of the complaint, what is right for the objector, and what the contracting authority is required to do.

Also, by law, monthly plenary meetings will be held at N.C.S.C., during which it will be discussed legal issues that led to the delivery of different solutions in similar cases. Currently, this issue is regulated, at operational level, by Order no. 6/2017 issued by the Chairman of the Council according to which „each panel will monitor for potential law problems and uneven practice of law for a period of one month ,’, and at the end of the allocated period will prepare a report on the identified issues.

The internal mechanism currently existing at N.C.S.C. is the fruit of both the monthly plenary meetings, and of the other two organized in the second half of 2016.

Thus, pursuant to Article 62 paragraph (3) of Law no. 101/2016, the Council, in collaboration with the National Public Procurement Authority, organized a seminary on „Discrepancies and controversy in the public procurement legislation published between May to December 2016 ,. The event benefited from a diverse attendance, starting with the advisers responsible for reviewing public procurement complaints, and of the N.C.S.C. specialists, the representatives of A.N.A.P., Bucharest Court of Appeal, Ministry of European Funds, and of the Management Authorities, the Court of Auditors, respectively the Audit Authority. The topics discussed were diverse, ranging from presenting the draft instruction issued in application of Article 179 letter g) and Article 187 paragraph 8) letter a) of Law no. 98/2016 on public procurement, and continuing with debates on complaints covering issues related to the verification stage of the European single procurement document (D.U.A.E.).

On the same note, the Council in collaboration with the Bucharest Court of Appeal, with the support of the National Institute of Magistracy, in order to unify the administrative - judicial practice, was organized the pilot seminary on „Case law problems in the public procurement field”.

This event also benefited from an interinstitutional approach, as follows: the advisors solving the complaints in the public procurement field, and the technical staff involved in the activity attached to the complaints solving panels – N.C.S.C., the judges from the departments of Administrative and Fiscal Divisions of the Bucharest Court of Appeal and the Bucharest Tribunal, as well as guests from the National Institute of Magistracy, the Ministry of European Funds, the National Public Procurement Authority, the Audit Authority, the Court of Auditors, the Prosecutor’s Office attached High Court of Cassation and Justice, the European Commission Representation in Bucharest.

In terms of importance, in the joint effort to prevent fraud in the field of public procurement, this event has also been reflected in the technical report accompanying the European Commission report to the European Parliament and the Council on Romania’s progress within the Mechanism of cooperation and Verification. In this regard, the document mentions, on the one hand, that the respective seminary was attended by representatives of the key institutions in the field, and on the other hand, stresses the efforts of the Council, as an independent institution with administrative - jurisdictional activity, made over the last three years, to develop a tool which at the moment is considered an universally useful one to the public procurement practitioners, namely the N.C.S.C. portal (<http://portal.cnsc.ro>).

The usefulness of this tool porting the Council in the third millennium is also confirmed by the geographic coverage

area, meaning that it was accessed to date, not only from locations in our country, but also in France, UK, USA, Germany, Italy, Spain, Norway, Austria, Poland, Hungary, Singapore, Bulgaria, Greece, Thailand, Czech Republic, Netherlands, Russia, Brazil, Argentina, Canada, China, Japan, Republic of Moldova, Sweden, South Africa, Australia, Switzerland, Hong Kong or Qatar.

However, the judicial mechanism provided by the Council is not limited here, according to Law no. 101/2016, it being a very complex one. By way of example, we can recall the circumstance in which the Council can notify A.N.A.P. on legislative deficiencies leading to divergent interpretations and uneven practice, accompanied by proposals to improve the legislation. Also, in case of different approaches that may arise in similar cases in the decisions of the courts of appeal, the Council will be able to notify Bucharest Court of Appeal with the respective decisions for subsequent notifications of the H.C.C.J., and in the case the contradictory decisions belong to the same court, the Council may request a view on the predictability of the interpretation of the legal provisions by the respective court.

Remaining in the same area, during 2016 the Council concluded a cooperation protocol with the National Institute of Magistracy, a tool enabling the provision and exploitation of quality training for the advisors responsible for reviewing public procurement complaints, and of the magistrates, in the public procurement field, as well as to unify the judicial - administrative and the judicial practice in the field.

Not lastly, 2016 was an anniversary year for the Council - 10 years since the establishment of this independent institution with an administrative jurisdictional activity, which has proved year after year that the existence of an effective system of remedies, which guarantees the compliance with the legal provisions for awarding the contract financed from public funds, encourages the competition between the economic operators, aspect which should help the contracting authorities in applying a classical concept of the market economy, namely „value for money”.

A similar view is also outlined in the report conducted by the European Commission which was published in early 2017. According to this document, the application of the remedies directives (Directive 92/13/EEC, Directive 89/665 / EEC, Directive 2007/66 /EEC), helped create, within the EU, public procurements that are fair, transparent, open, and effective, essential aspects for building trust in the public administration.

Also, according to the same document, the importance of the remedies directives (and by default, of the related remedies institutions) is supported by the fact that the traders use the related provisions to challenge the deviations from the rules in the public procurement field.

In light of the ongoing events at the time of drafting this activity report, it can be said that 2017 will be a year for challenges. The public procurement field will not be an exception, the complaints remaining a real barometer of the confidence the traders have in the functioning of the administrative jurisdiction. Therefore, the Council will also be present in the coming year, and will do everything possible at institutional level in order to increase the quality of the act of solving the complaints, as well as for the collaboration with other institutions in the public procurement field.

1. OVERVIEW

1.1. THE ROLE AND MISSION OF N.C.S.C.

In May of 2016, Law no. 101/2016 regarding remedies and appeals concerning the award of public procurement contracts, the sectorial contracts, and works concession contracts, as well as service concession contracts, and on the organization of the NATIONAL COUNCIL FOR SOLVING COMPLAINTS (N.C.S.C.) came into force.

Having regard to Directive 2007/66 / EC amending Council Directives 89/665/EEC and 92/13/EEC on improving the effectiveness of the review procedures concerning the award of public contracts, Article 37 paragraph (1) of this regulation, the Council is defined as an independent body with a specific jurisdiction (in the public procurement field), created in order to respect a fundamental condition of the Directive cited above, according to which “In compliance with ECJ case law, the Member States should ensure the existence of effective and rapid remedies against the decisions taken by the contracting authorities and the contracting entities (...)”.

Thus, the Council is an administrative body, with jurisdictional attributions, of public law which benefits from the independence required to implement the jurisdictional administrative act, not being subordinated any authority or public institution and which complies with the constitutional provisions regulated by the Article 21 par. (4).

Although the activity that it performs (resolving complaints submitted by the economic operators within the awarding procedures of the public procurement contract) leads towards the area of the judicial power, wherein, it cannot, however, be integrated due to its nature – this body is part of the executive – administrative power area. In support of this assertion are the very first provisions of Law no. 101/2016, Article 1 paragraph (1) and (2) according to which the normative act „regulates the remedies, appeals, and procedures to solve them, by administrative - legal or judicial means(...) shall also apply to applications having as object the granting of compensation for damages caused in the award procedure, as well as those on the execution, cancellation, termination, termination, or unilateral termination of contracts”.

According to the legal provisions, the Council has a number of 36 members, among which at least half are bachelors of law. Also, the members the Council are civil servants with special status, appointed through the prime minister's decision, at the proposal of the Council's president, after promoting a competition.

The Council has jurisdiction to hear complaints concerning the procedures for awarding contracts, through panels formed by three members of the Council, of which one has the quality of the panel's president.

In addition, the current law clearly states that if the complaints lodged

are outside the settlement competence of the Council, they are declined by decision by a competent court or another body with judicial activity.

Also, as a novelty of the current law, according to Article 6 paragraph (1), prior notification has become a condition of admissibility of the complaint, unlike previous ones, according to which notifying the contracting authority was optional.

Under the legislation, N.C.S.C. operates on the basis of its own rules of organization and functioning, approved by an absolute majority by decision of the plenary of the Council, published in the Official Gazette. Pending its entry into force, insofar as they do not contravene the provisions of Law no. 101/2016, remain applicable the provisions of its own Rules of organization and operation approved by Government Decision no. 1037/2011¹.

In its activity, N.C.S.C. shall be subject only to the law; in exercising its attributions the Council, through panels for settlement of complaints, adopts decisions and conclusions, and in carrying out its activity, it ensures consistent application of the law, according to the principles of law expressly regulated²: legality, celerity, contradictory, ensuring the right to defense, impartiality, and independence of the administrative - jurisdictional activity.

According to Article 14 paragraph (1) of Law no. 101/2016, the complaints lodged by economic operators to N.C.S.C. are distributed randomly, electronically, for settlement to a panel of three (3) members of the Council, one as acting as the president of the panel. Within each panel, at least its president or a member must be licensed in law.

For the proper functioning of the institution and to resolve expeditiously the complaints lodged by economic operators, each panel for settling the complaints is assigned administrative and technical staff with the status of contract staff with legal, economic or technical higher education.

The President of the Council, elected from among its members, for a period of 3 years³, by secret vote by an absolute majority⁴, must be licensed in Law⁵ and acts as chief credit authority⁶.



The volume of activity within N.C.S.C. is reflected mainly in the number of complaints registered with the Council, through the number of decisions issued, respectively the number of solved cases, while the effects/outcomes of its activity is reflected in the number of decisions appealed in the Courts of appeal (in the whose jurisdiction the contracting authority is located), and the number of complaints admitted.

- One aspect that must be emphasized is that, in addition to the activity in the field of public procurement under Law no. 101/2016, the provisions of this regulation shall apply accordingly in terms of the public - private partnership, as set out in Law no. 233/2016⁷.
- The Council also has jurisdiction to hear complaints by administrative-judicial procedure, lodged by any person who considers is an injured party in a right or a legitimate interest by an act of the contracting authority, in violation of the law in the matter of public procurement contracts, including sectorial contracts and framework agreements awarded in the fields of defense and security⁸; in this regard, the counsel settling the complaints are authorized by the provisions of Law no. 182/2002 on protection of classified information⁹;

Thus, the exercise the competences regulated by G.E.O. no. 114/2011, effective as of October 1-st, 2012, the NA-

TIONAL COUNCIL FOR SOLVING COMPLAINTS became «Unit holding classified information», and therefore the following actions were taken:

- the relational system with the Designated Security Authority – SDA (Romanian Intelligence Service specialized unit) has been established;
- the legal procedures within the National Registry Office for Classified Information (NROCI) for initiating and performing the verification procedures were executed in order to issue the security certificates/access authorizations to state classified information;
- security certificates and classified information access authorizations have been issued;
- measures concerning the physical protections against unauthorized access to classified information, personnel protection, and information generating sources have been initiated;
- the onset accreditation process for the information security system has been approved;
- the Accreditation Security Strategy of the computer system has been issued;
- the process of security system accreditation has been initiated.

Considering the provisions of G.D. no. 583/2016 approving the National Anticorruption Strategy for 2016-2020, the sets of performance indicators, the risks associated with the objectives and measures from the strategy, and sources of verification, the inventory of the measures of institutional transparency and prevention of corruption, indicators of evaluation and standards for publishing public interest information, the Council adhered to the fundamental values, principles, objectives, and monitoring mechanism of the National Anticorruption Strategy 2016-2020, supporting the fight against corruption and promoting the fundamental values regarding: integrity, public interest priority, transparency of the decision making process, and ensuring free access to public information and adopted the Integrity Plan in which identified their own institutional vulnerabilities and risks associated to the key work processes, as well as the consolidating measures to strengthen the existing preventive mechanisms.

At Council level, by Order of the President no. 210 of 28.11.2016, in the effective implementation of the provisions of the internal rules, approved by Order no. 51/03.07.2013, for ethical counseling and monitoring the compliance with the rules of conduct of civil servants and contract staff within the Council were nominated two persons from among the councilors responsible for settling the complaints in the field of public procurement, namely from the technical administrative contract staff.

Not lastly, we must mention the active participation of the Council, throughout 2016, at all the meetings, working groups, meetings, etc. organized by various public institutions (Parliament of Romania, NAPA, ANI, the Competition Council, Court of Appeal, etc.) in order to adopt the current package of laws on public procurement, respectively on the interpretation thereof, as well as creating a common practice regarding the approach to the related legislation.

1.2. MANAGEMENT, HUMAN RESOURCES, AND ORGANIZATIONAL STRUCTURE OF N.C.S.C.

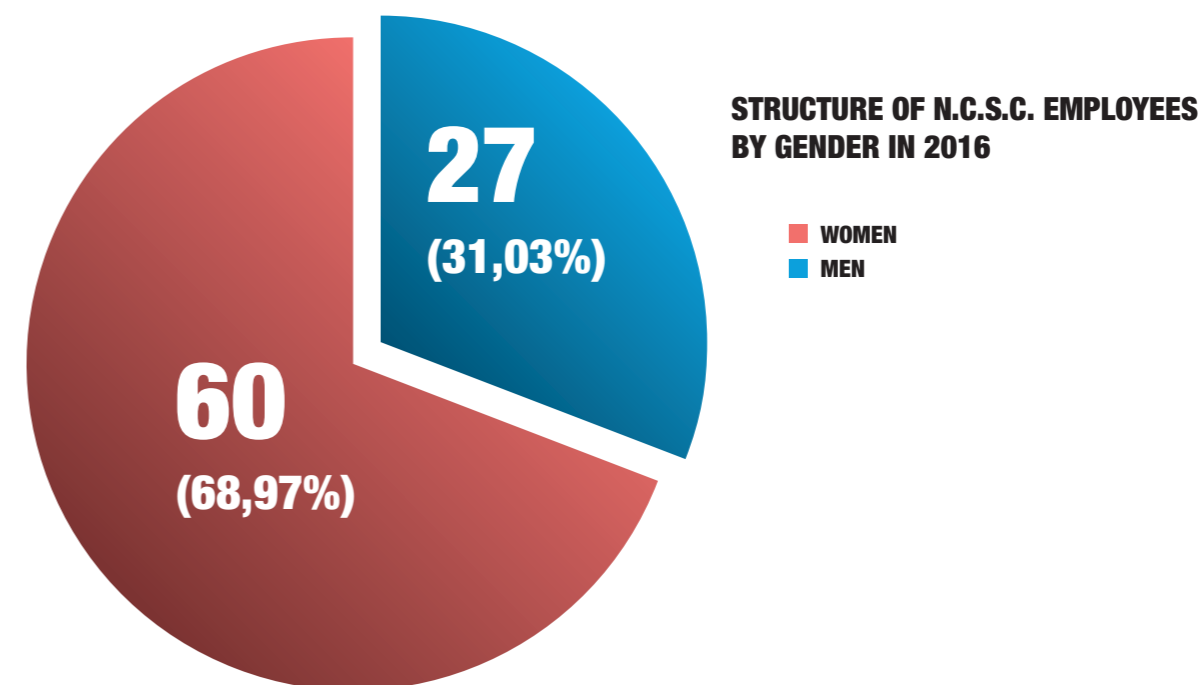
As an organizational structure, the Council operated in 2016 with a number of 32 resolution counselors in the field of public procurement, under the G.D. no. 1037/2011, organized in 11 complaints resolution panels in the field of public procurements.

The organigram of the Council also includes 55 people with the status of technical and administrative staff (through G.D. no. 1037/2011 for the approval of the Regulation of the organizational and functioning of N.C.S.C. provides a total of 64 positions for the technical administrative staff).

The management of the NATIONAL COUNCIL FOR SOLVING COMPLAINTS is provided by Mr. Silviu – Cristian POPA, on his first term.

In exercising his attributions, the president of the NATIONAL COUNCIL FOR SOLVING COMPLAINTS is helped by a board composed of three members (Lehel - Lorand BOGDAN, Cristian COSTACHE, Dumitru Viorel PÂRVU), elected by secret vote, with absolute majority, among the counselors for solving complaints in the fields of public procurements.

In terms of gender structure at the end of last year 60 of Council employees were females (68,97%) and only 27 men (31,03%). It should be noted that the share of females in the total number of employees of N.C.S.C. remains high among both counselors for solving complaints in public procurement (62,5%), and in the contractual staff (72,73%).

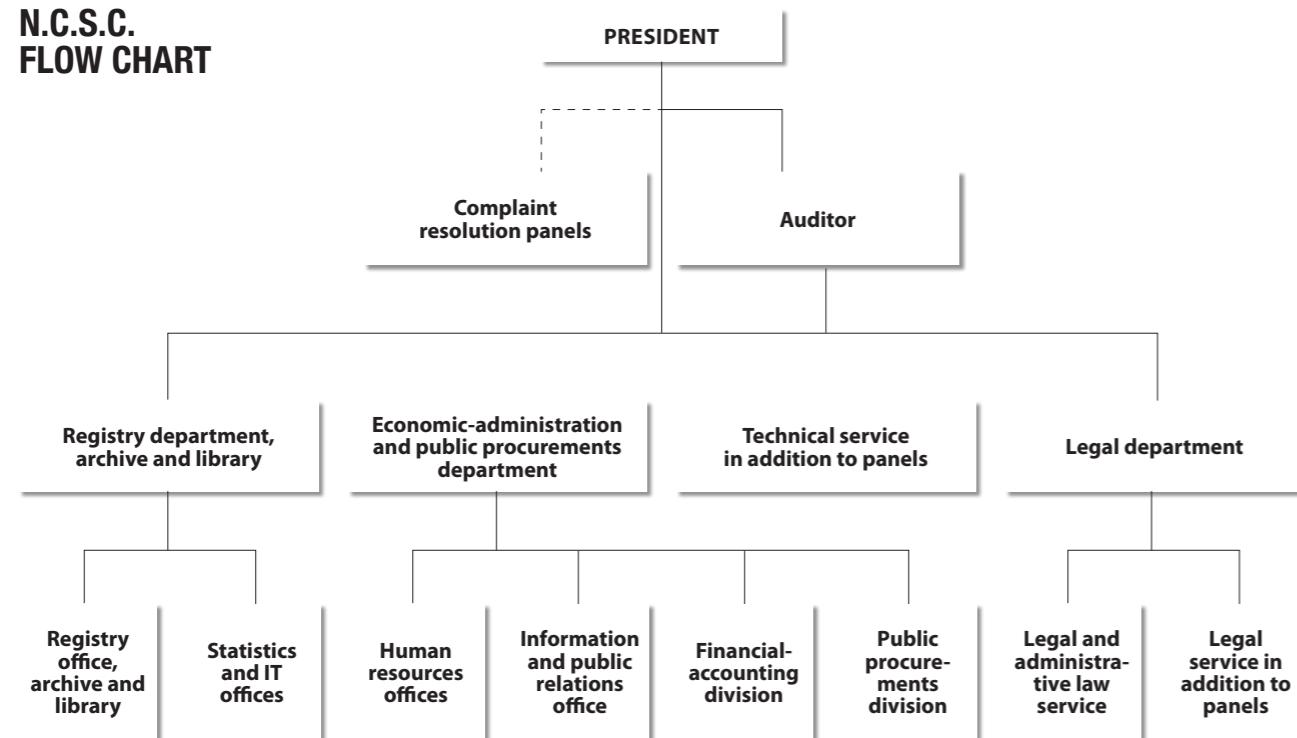




In terms of the average age of the employees of N.C.S.C., this was of 45 years at institution level. According to the Regulation of organization and functioning of the Council¹⁰ the administrative and technical staff is working under the following structures:

- ✓ The Registry, Archives, and Library Department, which includes:
 - The registry, archive, and library office;
 - Statistics and IT office
- ✓ The economic and administrative, and public procurement, which includes:
 - The Human Resources Office;
 - The information and public relations office;
 - The financial and accounting division;
 - The public procurement division;
- ✓ The technical service attached to the panels;
- ✓ The Legal Department, which includes:
 - The Legal, and administrative Law Service;
 - The legal service attached to the complaints resolution panels;
- ✓ The internal audit department

N.C.S.C. FLOW CHART



2. THE ACTIVITY PERFORMED BY N.C.S.C. DURING 1 JANUARY – 31 DECEMBER 2016

2.1. COMPLAINTS LODGED BY ECONOMIC OPERATORS

The number of complaints lodged (submitted) by the economic operators, their evolution, the object of complaints, their complexity, as well as the resolution manner, represents important indicators that can be used in the analysis of the activity performed by the National Council for Solving Complaints.



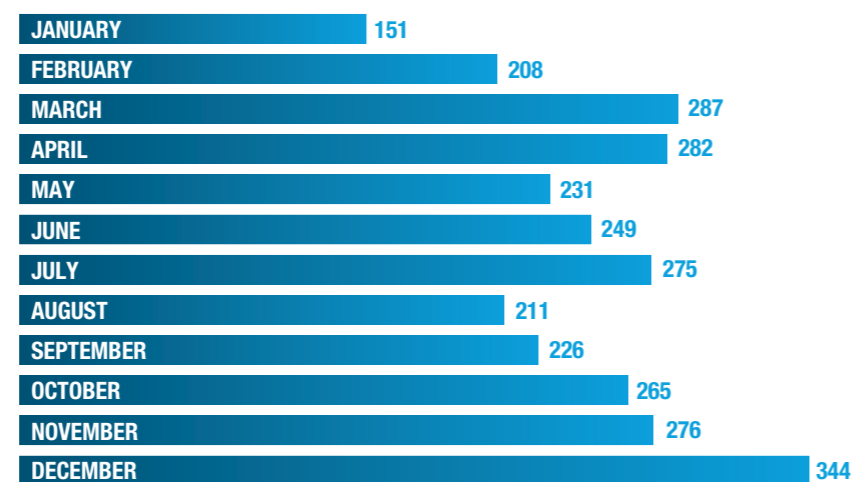
2.1.1. EVOLUTION OF THE COMPLAINTS LODGED BY ECONOMIC OPERATORS

During 1 January – 31 December 2016, the number of complaints (case files) submitted by the economic operators and registered with N.C.S.C. reached the figure 3.005, but a number of 15 pending cases were removed because under the current legislation the Council declined its legal competence to solve them..

During the twelve months of 2016, the number of complaints lodged by economic operators and registered with the N.C.S.C. evolved as follows:

JANUARY	151
FEBRUARY	208
MARCH	287
APRIL	282
MAY	231
JUNE	249
JULY	275
AUGUST	211
SEPTEMBER	226
OCTOBER	265
NOVEMBER	276
DECEMBER	344

EVOLUTION OF THE COMPLAINTS LODGED BY ECONOMIC OPERATORS WITH C.N.S.C. IN 2016



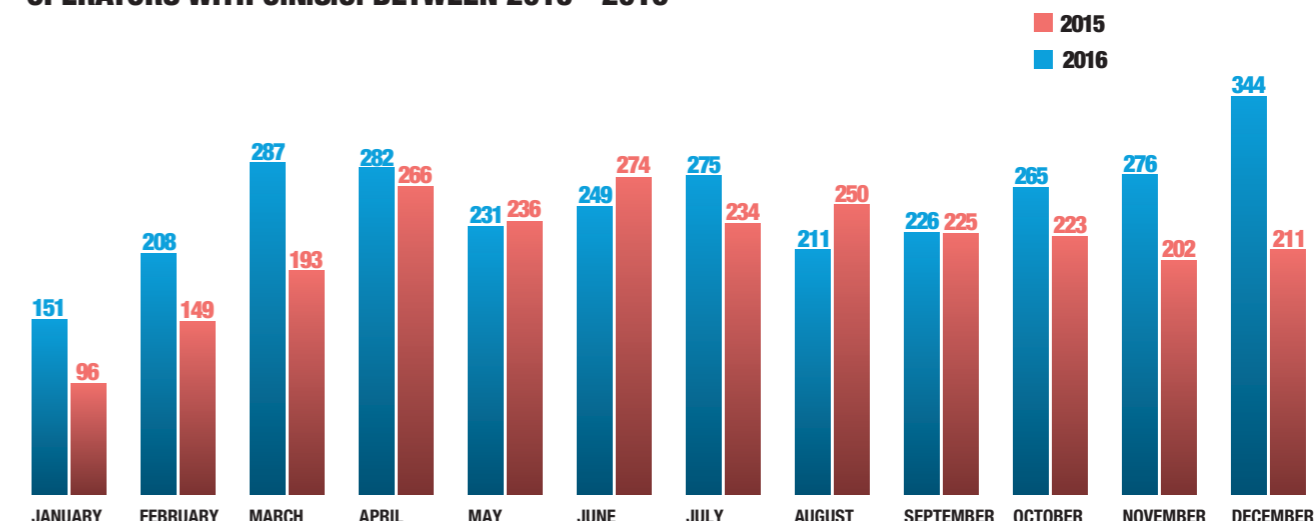
Out of the 2.990 effectively submitted complaints pending resolving, in 172 cases the economic operators withdrawn the complaints, which represented 5,72% (in 2015, out of the 2.559 complaints submitted by economic operators, in 168 cases – a percentage of 6,57% of the total number of complaints – recorded withdrawals).

Analyzing the number of complaints (cases) lodged by the economic operators and registered with N.C.S.C. during the years 2015 and 2016 it was found that in 2016 the number of complaints increased by 14,84% (446 complaints) compared to the previous year.

Comparing the biannual evolution of the complaints lodged by operators and solved by N.C.S.C. in 2015 and 2016, it is noted that over the last year, their number was higher compared to the previous year in both the first and in the second semester. Thus, in the first half of 2016 the number of complaints increased by 15,98% (194 complaints) compared to the previous year, while in the second semester their number increased by 18,74% (252 complaints).

Interestingly, the increase in the number of complaints lodged (submitted) by economic operators to the Council during 2016 compared to the previous year occurred amid a decrease by 14,16% in the number of procedures initiated in the Electronic System of Public Procurement (SEAP) in 2016, and of the package of legislative changes initiated since the end of 2010, which decreased the 'momentum' of economic operators to lodge complaints. The effect of these legislative measures, undertaken since 2011, continued in 2016 and consisted mainly in introducing in the legislation (Article 6 paragraph 1 of Law no. 101/2016) the condition of admissibility of the complaint, which requires prior notification (prior to the appearance of the regulation

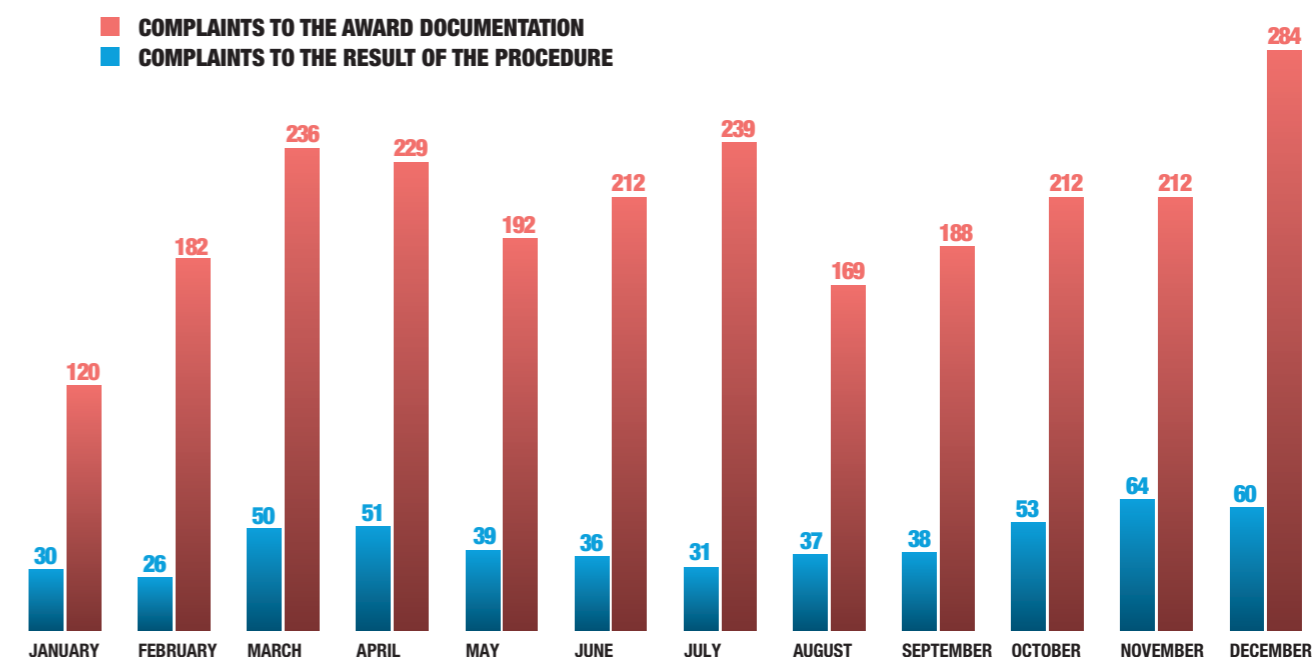
EVOLUTION OF THE COMPLAINTS LODGED BY ECONOMIC OPERATORS WITH C.N.S.C. BETWEEN 2015 - 2016



the prior notification was optional), and the removal of binding the economic operator to provide a guarantee of good conduct if it wanted to challenge an act of the contracting authority issued in violation of the law on public procurement.

However, compared to 2015, 2016 recorded an increase in the number complaints submitted with the Council by economic operators against both the tender documentation (+ 20,04%) and the number of complaints lodged against the result (+16,20%).

MONTHLY SITUATION OF THE COMPLAINTS LODGED AGAINST THE AWARD DOCUMENTATION COMPARED TO THOSE LODGED AGAINST THE RESULT OF THE PROCEDURE IN 2016

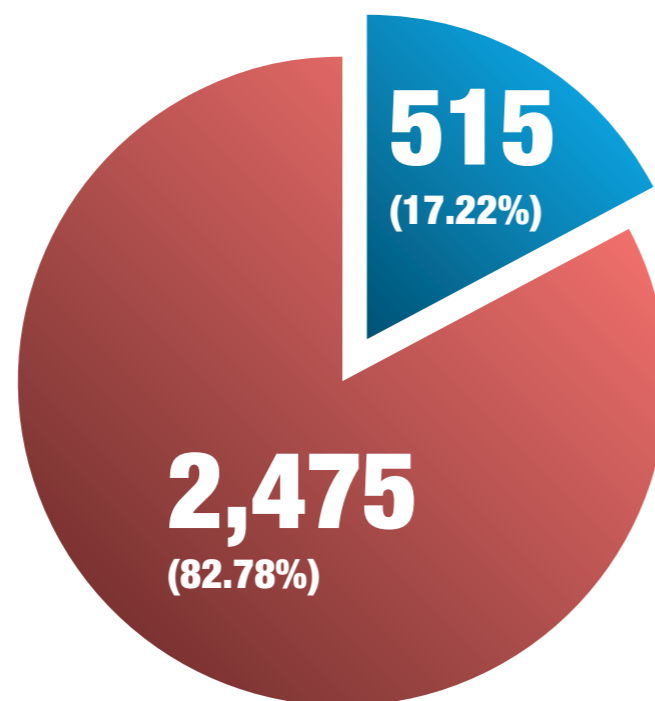


EVOLUTION OF THE COMPLAINTS LODGED BY ECONOMIC OPERATORS

**SITUATION OF THE COMPLAINTS LODGED AGAINST THE AWARD DOCUMENTATION
COMPARED TO THOSE LODGED AGAINST THE RESULT OF THE PROCEDURE IN 2016**

■ COMPLAINTS TO THE RESULT OF THE PROCEDURE
■ COMPLAINTS TO THE AWARD DOCUMENTATION

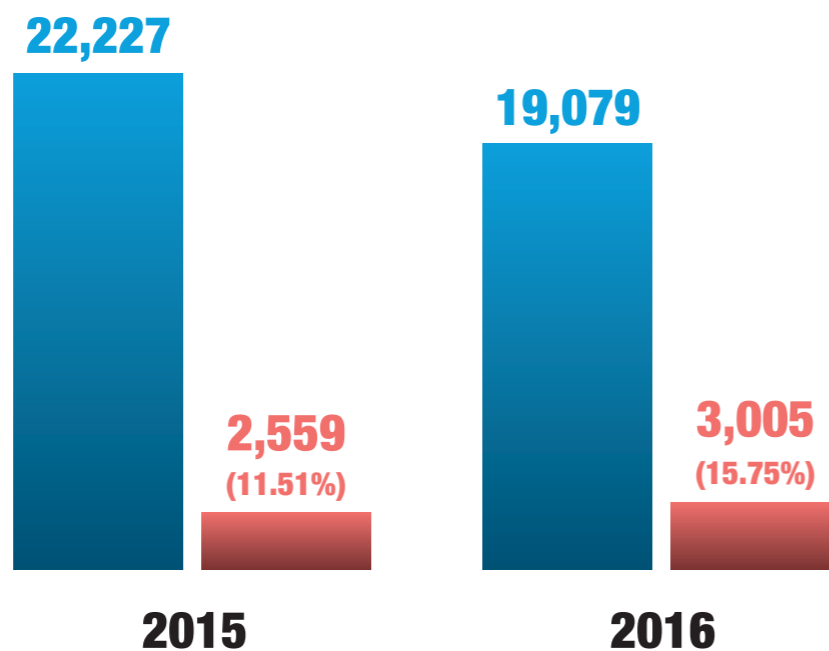
Regarding the complaints lodged with N.C.S.C. by economic operators should be noted that in 2016 a percentage of 17,22% (515 complaints) were directed against the tender documentation and 82,78% (2,475 complaints) were lodged against the result of the awarding procedure.



**SITUATION OF THE COMPLAINTS LODGED WITH C.N.S.C. COMPARED WITH
THE PROCEDURES INITIATED IN S.E.A.P. BETWEEN 2015 - 2016**

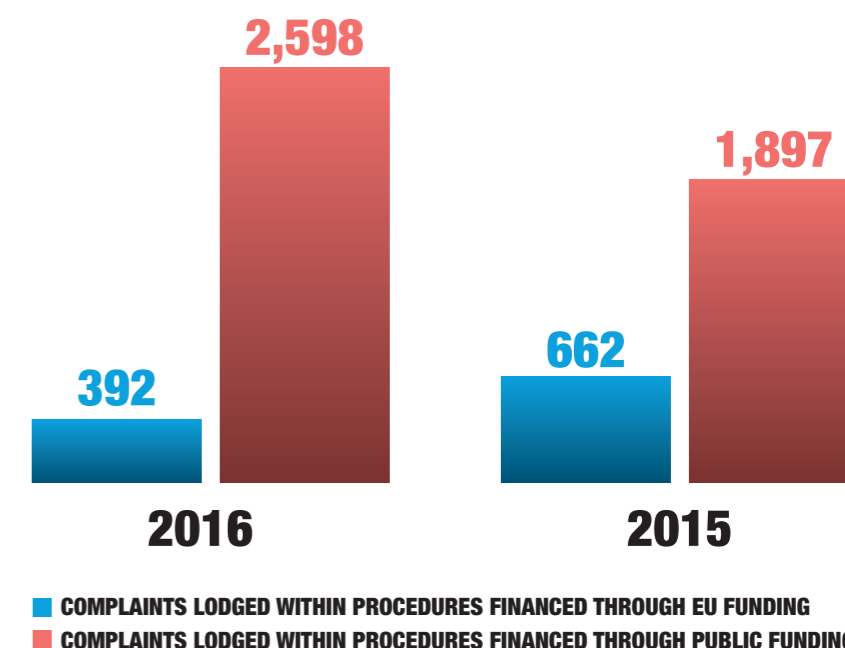
■ PROCEDURES INITIATED IN S.E.A.P.
■ COMPLAINTS LODGED WITH C.N.S.C.

Reporting the number of complaints lodged with N.C.S.C. to the procedures initiated in S.E.A.P. in 2016, and comparing this evolution with the previous year, it shows that in 2015, amid a decrease by 14,16% (3,148 procedures initiated) in the number of procedures initiated on the electronic platform of public procurements, however, compared to 2015, we have witnessed an increase in the number of complaints lodged with the Council by 17,43% (446 complaints), as can be seen in the chart below.



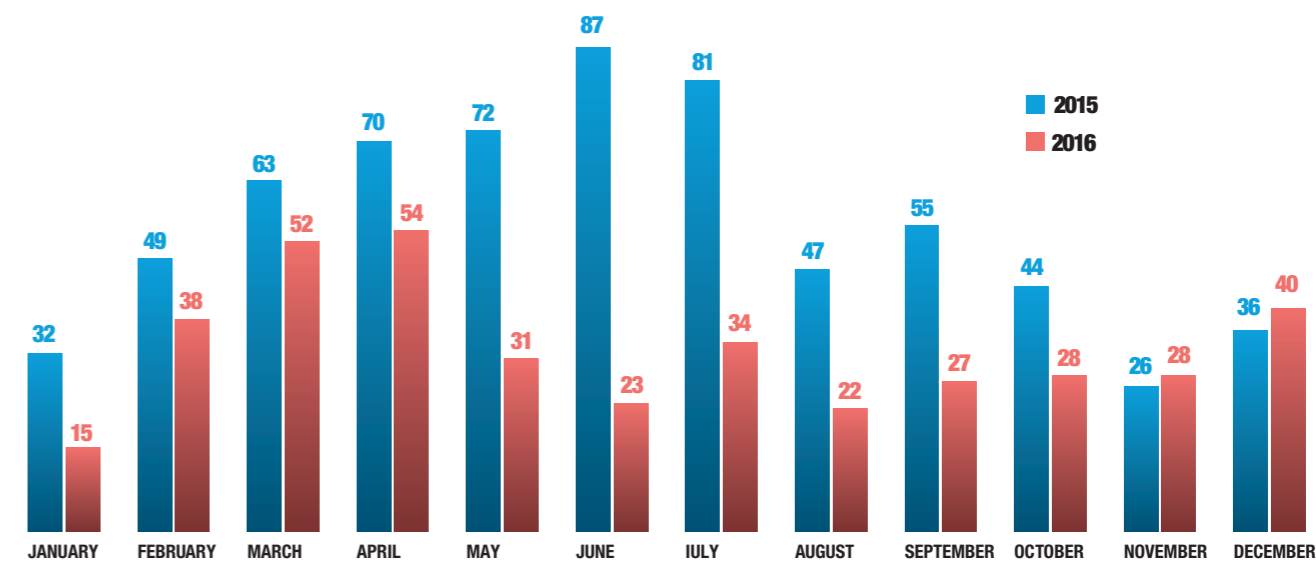
Regarding the number of complaints made in 2016 by economic operators in the procedures for the award of public procurement contracts financed through European funds, we must emphasize that they were a number of 392, representing a percentage of 13,11% of the number of complaints lodged with the Council, while a number of 2,598 complaints made, meaning 86,89% of the total number of complaints lodged by the economic operators with N.C.S.C., targeted procedures for the award of public procurement contracts funded from national funds.

**SITUATION OF COMPLAINTS LODGED IN 2016 WITH C.N.S.C.
BY THE ECONOMIC OPERATORS BY ORIGIN OF FUNDS WHICH
FUNDED THE AWARD PROCEDURES COMPARED TO 2015**



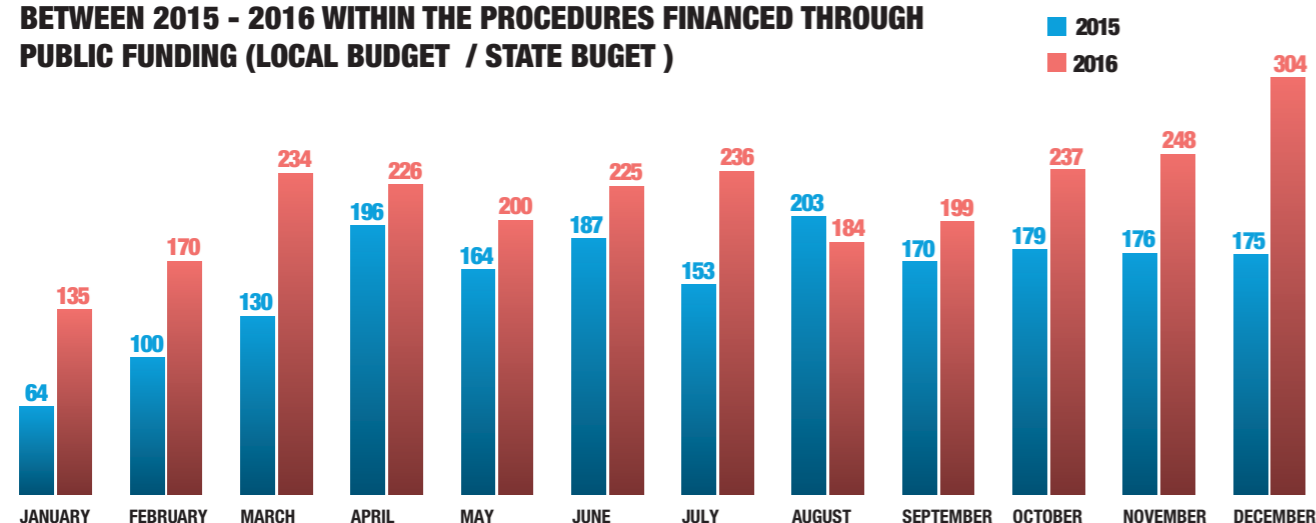
From the previous chart we can see that the number of complaints submitted under the award procedures financed from European funds significantly decreased in 2016 compared to the previous year, respectively by 40,79% (270 complaints), while the number of complaints lodged under the award procedures financed from domestic public funds recorded last year an increase by 36,95% (701 complaints).

**COMPARATIVE SITUATION OF THE COMPLAINTS LODGED WITH C.N.S.C. BETWEEN 2015 - 2016
WITHIN THE PROCEDURES FINANCED THROUGH EU FUND**



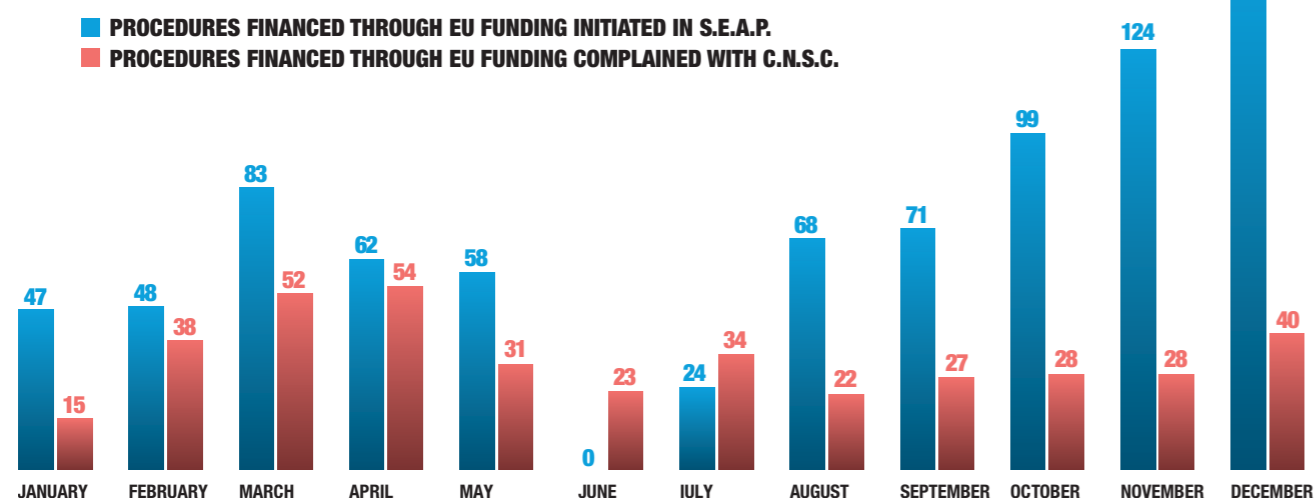
EVOLUTION OF THE COMPLAINTS LODGED BY ECONOMIC OPERATORS

**COMPARATIVE SITUATION OF THE COMPLAINTS LODGED WITH C.N.S.C.
BETWEEN 2015 - 2016 WITHIN THE PROCEDURES FINANCED THROUGH
PUBLIC FUNDING (LOCAL BUDGET / STATE BUDGET)**

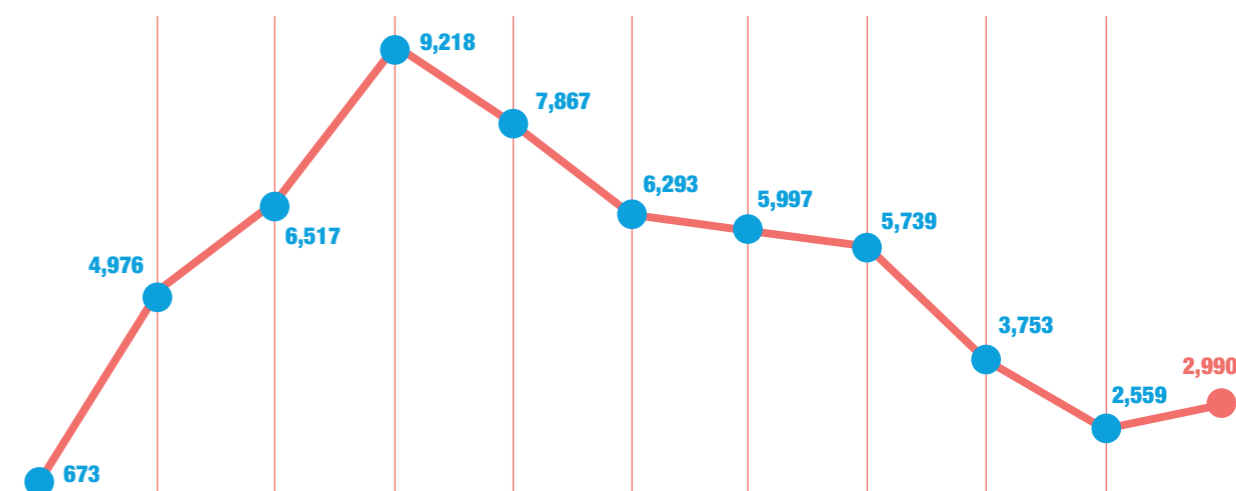


We point out that the decrease in the number of complaints within the procedures financed from European funds in 2016 compared to the previous year was not based on a decrease in the number of irregularities recorded in the respective kind of procedures, but the low level of absorption of European funds which had repercussion in the decrease of the number of procedures funded from this source. Thus, it is important to point out that although the number of public procurement procedures financed from European funds initiated in S.E.A.P. decreased by 76,28% in 2016 compared to the previous year (2015-3512 procedures; 2016-833 procedures), however the number of complaints lodged in 2016 with N.C.S.C. by economic operators within procedures financed from European funds remained at a very high level, representing 47.06% of the total procedures financed from European funds initiated in S.E.A.P. (833 procedures initiated in S.E.A.P. from European funds; 392 complaints lodged with N.C.S.C. within procedures financed from European funds).

**COMPARATIVE SITUATION BETWEEN THE NUMBER OF COMPLAINTS LODGED IN 2016
WITH C.N.S.C. IN PROCEEDINGS FINANCED THROUGH EU FUNDING AND THE NUMBER
OF PROCEDURES FINANCED THROUGH EU FUNDING INITIATED IN S.E.A.P.**



Overall, however, the official statistics presented in the chart below reveals that in recent years, due to legislative measures adopted domestically, but also due to the steady decrease in the number of procedures initiated S.E.A.P. the number of complaints lodged with N.C.S.C. by the economic operators has decreased every year since 2009 except for 2016, when an increase was recorded, compared to the previous year.

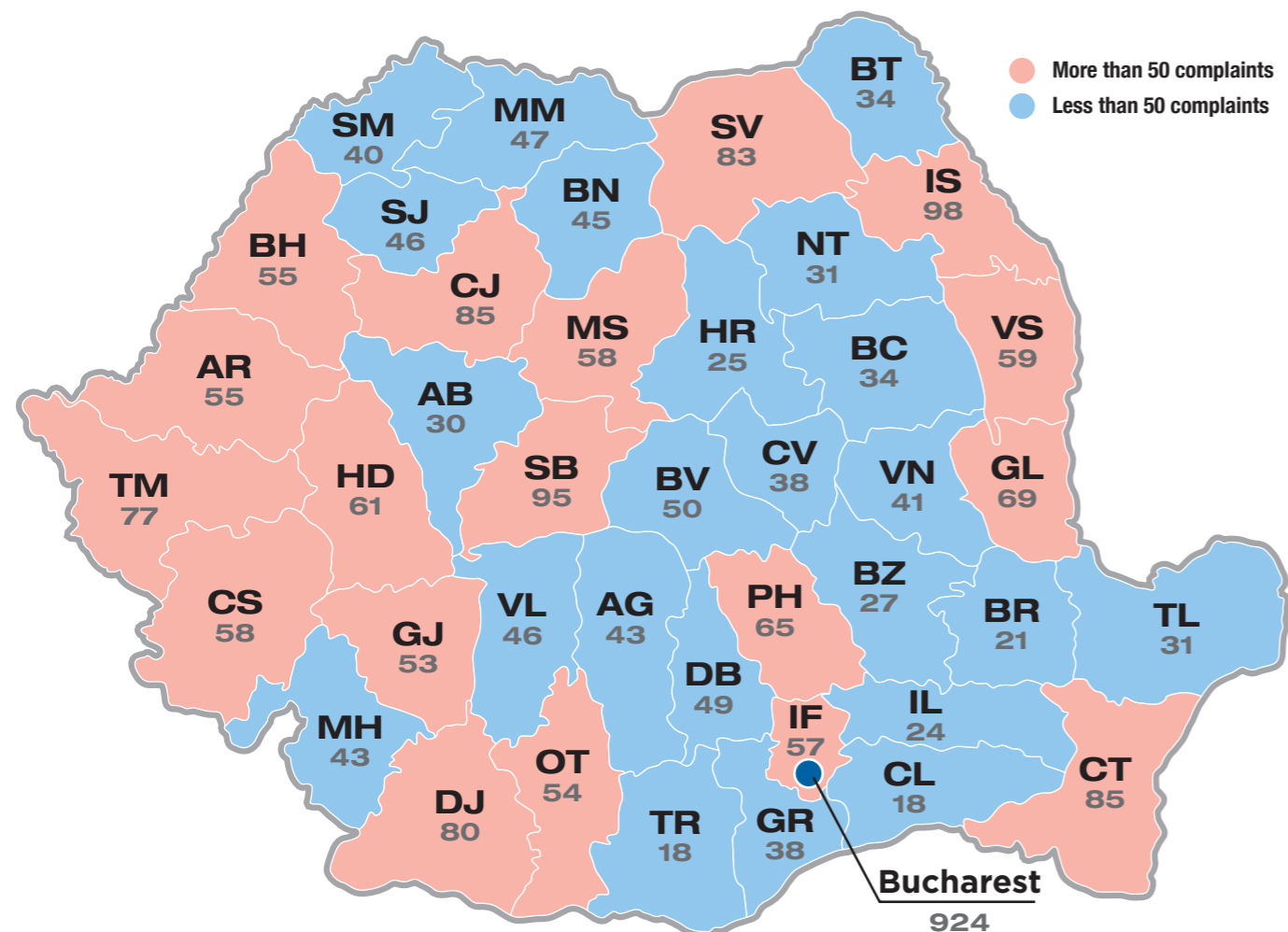


The fact that N.C.S.C. did not constitute an obstacle to European funds absorption, on the contrary, is an efficient filter to prevent a significant number of irregularities in the procurement procedures, both in the case of projects financed from domestic and European funds, it is abundantly clear, also from the comparative evolution between the complaints lodged with NCSC in 2015 and 2016 in procedures financed from European funds, and the number of award procedures financed from European funds initiated in S.E.A.P., situation analyzed in Chapter 2.4.2 of this report.



EVOLUTION OF THE COMPLAINTS LODGED BY ECONOMIC OPERATORS

In terms of the distribution on administrative territorial units (ATU), the number of complaints lodged by the economic operators in 2016 has evolved as follows:



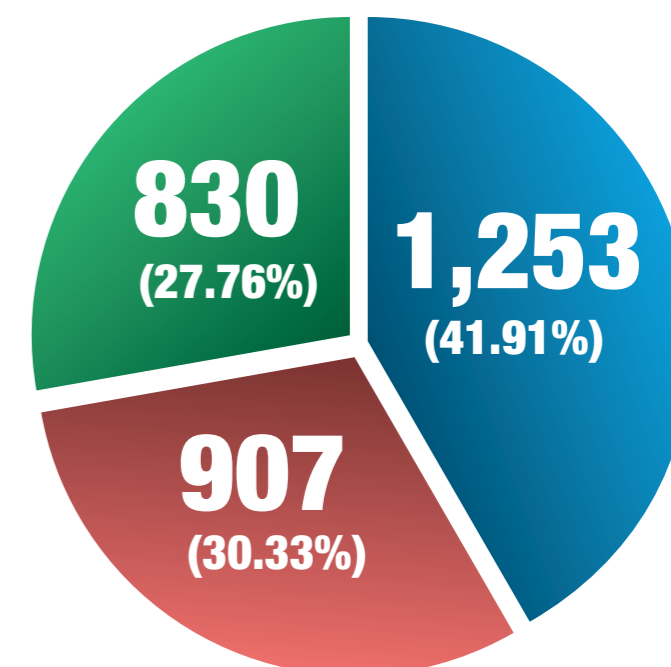
COUNTY	COMPLAINTS	COUNTY	COMPLAINTS	COUNTY	COMPLAINTS
BUCHAREST	924	ILFOV	57	SATU MARE	40
IASI	98	ARAD	55	COVASNA	38
SIBIU	95	BIHOR	55	GIURGIU	38
CLUJ	85	OLT	54	BACAU	34
CONSTANTA	85	GORJ	53	BOTOSANI	34
SUCEAVA	83	BRASOV	50	NEAMT	31
DOLJ	80	DAMBOVITA	49	TULCEA	31
TIMIS	77	MARAMURES	47	ALBA	30
GALATI	69	SALAJ	46	BUZAU	27
PRAHOVA	65	VALCEA	46	HARGHITA	25
HUNEDOARA	61	BISTRITA-NASAUD	45	IALOMITA	24
VASLUI	59	ARGES	43	BRAILA	21
CARAS-SEVERIN	58	MEHEDINTI	43	CALARASI	18
MURES	58	VRANCEA	41	TELEORMAN	18

As for the complaints lodged by economic operators in procurement procedures, they can be classified according to the subject of the public contract, a situation which in 2016 was presented as follows:

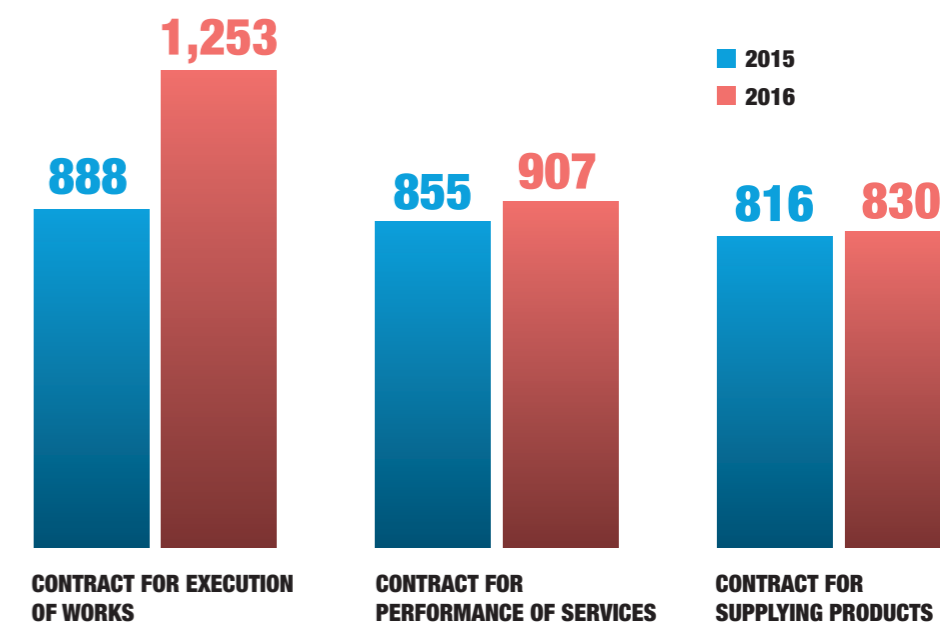
- Procedures for the award of public procurement contracts having as object the execution of works – 1.253 (41,91%);
- Procedures for the award of public procurement contracts having as object the provision of services - 907 (30,33%).
- Procedures for the award of public procurement contracts having as object the supply of products – 830 (27,76%).

**SITUATION OF THE COMPLAINTS
LODGED WITH C.N.S.C.
IN 2016 BY THE ECONOMIC OPERATORS
BY TYPE OF CONTRA**

- CONTRACT FOR PERFORMANCE OF SERVICES
- CONTRACT FOR EXECUTION OF WORKS
- CONTRACT FOR SUPPLYING PRODUCTS



**SITUATION
OF THE
COMPLAINTS
LODGED WITH
C.N.S.C. IN 2016
BY THE ECONOMIC
OPERATORS
BY TYPE OF
CONTRACT
COMPARED
TO 2015**



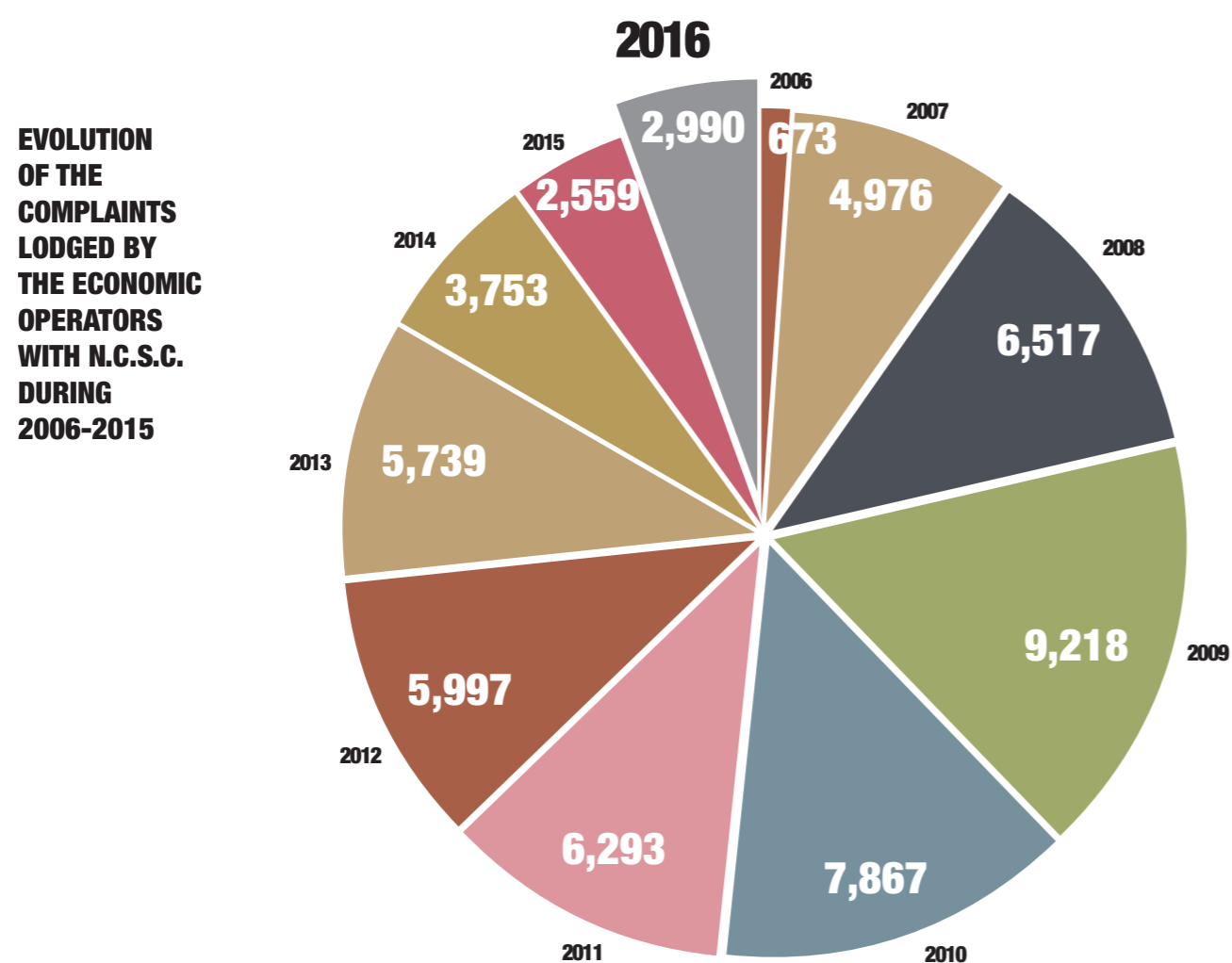
EVOLUTION OF THE COMPLAINTS LODGED BY ECONOMIC OPERATORS

Analyzing the chart above, on complaints lodged in 2016 with N.C.S.C. by the economic operators depending on the type / object of the procurement contract, we can see that the highest increase compared to the previous year was recorded in complaints made in the procedures for awarding public procurement contracts having as object the execution of works (-41,10%).

Throughout 2016, the 11 panels for Solving Complaints were assigned randomly, electronically, to resolve on average, 273 complaints / files, which meant a monthly load of about 23 cases / month, which meant an increase of about 4 cases/month compared to 2015.

Although the number of complaints lodged with the Council in 2016 by the economic operators increased compared to the previous year, and the complexity of cases was a vast one, the 11 panels for solving complaints within the institution has complied with the deadlines for solving the complaints provided for by Article 24, paragraph (1) of Law no. 101/2016 regarding remedies and appeals concerning the award of public procurement contracts, the sectorial contracts, and the execution of works and service concession contracts, as well for the organization and functioning of the NATIONAL COUNCIL FOR SOLVING COMPLAINTS¹¹. Regarding the term for solving the complaints it must be emphasized that it is among the shortest in the European Union, Romania ranking ahead of Germany and Austria.

It is important to underline that, since its establishment and until December 31, 2016, a number of 56.582 complaints have been recorded with N.C.S.C. lodged by the economic operators.



2.1.2. OBJECT OF THE COMPLAINTS LODGED BY ECONOMIC OPERATORS

Regardless of the object of the subjective right (benefit, abstention), the complaint lodged within an award procedure has always aimed at protecting this right, but there may be situations where the object can also be the protection of certain interests.

At the time of lodging an appeal, this will be individualized, thus becoming a lawsuit / litigation, and its object is made up of what the parties agree to submit for settlement, what they will ask the counselors to verify, to appreciate, to held, to resolve. Thus results that „ipso facto” the action to solve the complaint brings into question both a matter of fact, and a matter of law, that the counselors for solving complaints are called to solve by Council decision, in order to protect the subjective right.

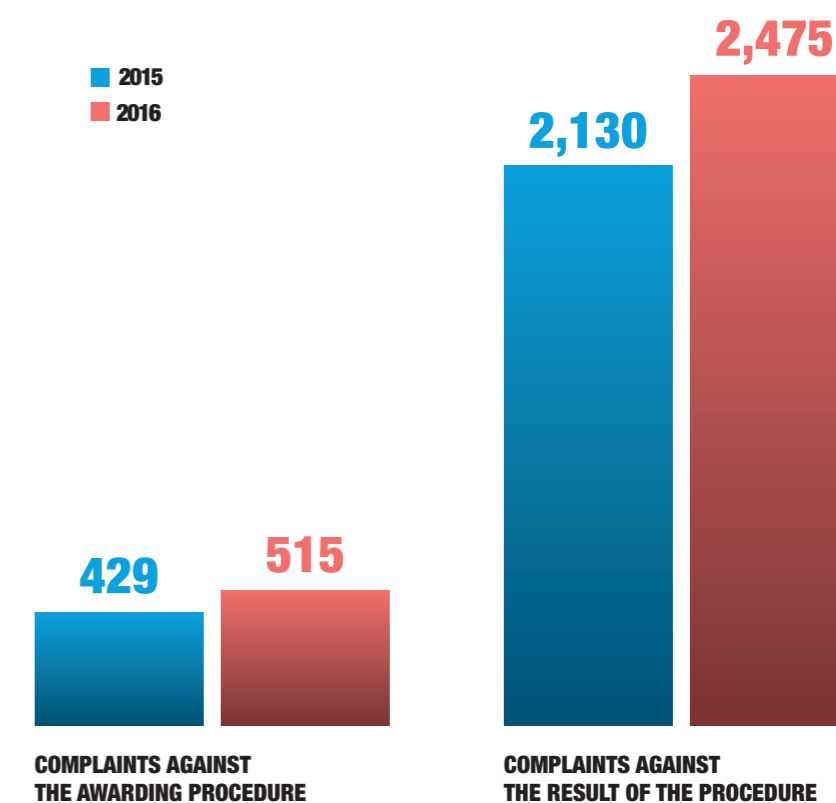
The object of the complaint may be total or partial cancellation of an administrative act or obligating a contracting authority (in the meaning of Law no. 101/2016) which refuses to issue an act or perform a certain operation.

As was noted previously, following the analysis of the object of the 2.990 complaints submitted by the economic operators to the Council in 2016 showed that 515 complaints targeted the awarding documentation (17,22%), and 2.475 the result of the procedure (82,78%).

Analyzing the object of the complaints lodged against the requirements in the awarding documentation has been observed that most often complaints are against:

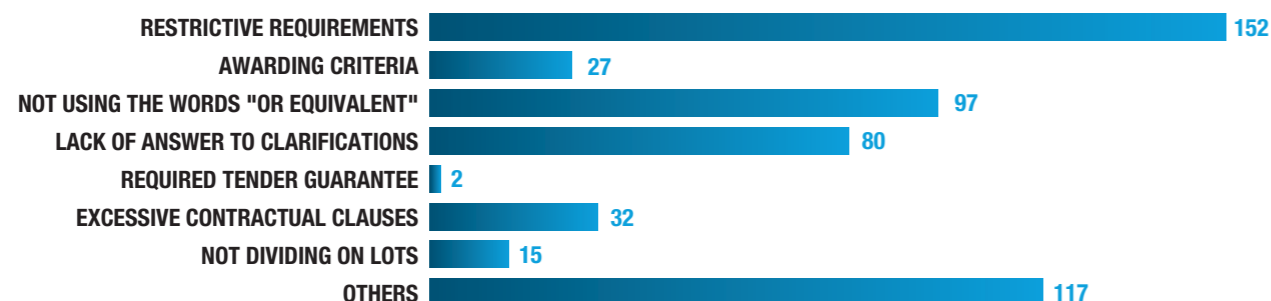
- restrictive requirements regarding similar experience, qualification requirements, technical specifications;
- award criteria and evaluation factors without calculation algorithm, with non-transparent or subjective calculation algorithm;
- indication in the award documentation of names of technologies, products, brands, manufacturers, without using the words „or equivalent”;
- lack of a clear, complete, unambiguous answer from the contracting authority, to the requests for clarifications regarding the provisions of the awarding documentation;
- form of establishing the required tender guarantee;
- imposing unfair or excessive contractual clauses;
- not dividing the procurement on lots in the case of similar products / works;

SITUATION OF THE COMPLAINTS LODGED BY ECONOMIC OPERATORS AGAINST THE AWARDED DOCUMENTATION AND THE RESULT OF THE PROCEDURE BETWEEN 2015-2016



OBJECT OF THE COMPLAINTS LODGED BY ECONOMIC OPERATORS

**SITUATION OF THE COMPLAINTS LODGED BY ECONOMIC OPERATORS WITH N.C. S.C.
IN RELATION WITH CRITICISM AGAINST THE AWARDED DOCUMENTATION IN 2016**



To understand these issues, we present below a few cases:

**EXCESSIVELY IMPOSED QUALIFICATION CRITERIA;
REVISED DUAE**

Regarding...the qualification and selection criteria required by the Council finds that the contracting authority has opted to organize a simplified procedure, procedure for which are applicable the provisions of Article 113 paragraph (11) of Law no. 98/2016: „(11) If the contracting authority decides to request qualification and selection criteria, it may only have requirements regarding: a) grounds for exclusion in accordance with Chapter IV, Section 6, paragraph 2; b) the ability to exercise its professional activity, in accordance with Article 173; c) similar experience, in accordance with Article 179 letter a) and b)“.

Thus, choosing the option of a simplified procedure, the contracting authority is no longer entitled to require the fulfillment of criteria of qualification and selection other than those described in Chapter IV, Section 6, paragraph 2, Article 173, respectively Article 179 letter a) and b) of the Law. Consequently, the Council finds that from it must be eliminated from the data sheet of the requirements for personnel involved in the execution of works, i.e. ,requirements for technical and professional capacity which are necessary and appropriate to ensure that the economic operators have the human and technical resources and experience necessary to execute the public contract „.

Regarding the notification of the complainant on certain differences between the content of the data sheet and the attached DUAE form, the Council noted that, in this respect, the legal provisions are clear and explicit. In accordance with Article 20 paragraph (5), (6), (7) of G.D. no. 395/2016: „(4) The contracting authority is required to generate the electronic DUAE filled in with the information request in relation with the criteria of qualification and selection established by the tender documentation, marking the fields in the form for which references must be submitted by economic operators, corresponding to the respective requirements, and to

attach it in SEAP along with other documents of purchase. (5) The contracting authority must ensure that the correlation between the information requested in the data sheet of the procurement and those marked in DUAE for completion by the interested economic operators, mentioning the in the procurement data sheet the way they can access the DUAE so as to be filled in by the interested economic operators. (6) If there are discrepancies between the information provided in DUAE those provided in the data sheet the ones in the data sheet prevail, DUAE is to be revised accordingly „.

Therefore, after changing procurement data sheet according to the above presented, the proper revision of DUAE is required.



**PRIOR NOTIFICATION OF THE COMPLAINT.
THE PLEA OF ADMISSIBILITY / INADMISSIBILITY**

Having to rule on the plea of inadmissibility of the complaint relied upon by the contracting authority in the point of view (which was also released to the complainant) the Council notes that, in this case, the following legal provisions Law no. 101/2016, Article 6 paragraph (1), (2) and (10) are incident:

“(1) Under penalty of rejection of the appeal as inadmissible, which can be invoked ex officio, before addressing the Council or the competent court of law, the person who considers is injured shall notify the Contracting Authority on the request to remedy (...);

(2) The prior notification shall be given in writing and contains at least the identification data of the person considering himself injured, the irregularities noticed and the remedial measures he deems necessary to be taken, if any.”

(10) The Council's or the court's referral, as the case may be, can only be made after fulfilling the previous notice procedure.

[...]

Of the evidence administered in case by the parties concerned, result that S.C. __ S.R.L. submitted the contracting authority the address called „request“, claiming that the request for clarifications regarding the price offered (address no. __ / 2016) is not clear, precise and does not define explicitly and with sufficient detail what it is about. At the same time, the author the complaint requested the contracting authority submitting a further clarification on the price, covering, in detail, the aspects which the contracting authority wishes to have clarified.

Furthermore, the Council noted that the contracting authority has complied with that request of the complainant reformulating the indicated request for clarification (address no. __/2016).

Considering that this last request is not clear and detailed enough, SC __ SRL has notified the Council, demanding cancellation of the two addresses, and ordering the contracting authority to issue a detailed and relevant address.

In these circumstances, the Council finds, contrary to the contracting authority that SC __ SRL went through the mandatory stages pre lodging an objection against its acts no. __ / 2016 and no. __ / 2016), first notifying the contracting authority of the act which it considers illegal and which considers that needs to be addressed and then the administrative judicial institution.

Thus, the Council noted that the complainant's act named „request“ takes the form of prior notification, as defined in Article 3 paragraph (1) letter. e) of Law no. 101/2016 („the application requiring the contracting authority to reexamine an act of the contracting authority for the purposes of its revocation or amendment“) containing the specific elements of such an approach, as reflected in the provisions of Article 6 paragraph (2) of the Law cited above. As regards to complaining directly with the Council by address no. __ / 09.11.2016, representing the remedy adopted by the

authority following the receipt of prior notification, The Council notes that it is carried out pursuant to Article 6 paragraph providing (11) of the Law, provision enabling the remedial action taken by the contracting authority following the receipt of prior notification to be contested before the Council or the court without fulfilling the prior notice procedure.

Therefore, the Council will reject the plea of inadmissibility of the complaint for annulment of the contested addresses.

Similarly, following the same reasoning on the identification of the stages prior to filing the complaint by SC __ SRL, the Council notes that its requests on the annulment of the proceedings report and all subsequent acts and reevaluation of tenders, and designation of the winning tender was made only before the Council, through the complaint.

Whereas the heads of claim targeting the results of the procedure have not been the object of a prior notice, the complainant has risked the sanction laid down by the legislator in such a situation, respectively rejecting it as inadmissible (Article 6 paragraph (1) of the initial thesis Law no. 101/2016).

Accordingly, taking into account the aforementioned, pursuant to Article 26 paragraph (1) and (6) of Law no. 101/2016, the Council will reject as inadmissible the heads of claim of the objection raised by SC __ SRL concerning the cancellation of the report of the procedure and all subsequent acts, and reevaluation of tenders, and designating the successful tender.

OBJECT OF THE COMPLAINTS LODGED BY ECONOMIC OPERATORS

**THE UNJUSTIFIED REFUSAL OF THE AWARDING
THE PROCUREMENT ON BATCHES**

The criticism of the objection lodged by SC __ SRL that the contracting authority artificially set the object of contract as a batch consisting of a radiotherapy system, when in reality the specifications provided an extra equipment that is not related to the system of radiotherapy, respectively the tomography computer, will be considered by reference to the following legal provisions in force, incidents of the facts of this procedure, as follows: Law no. 98/2016: - Article 141 (1) „the Contracting authority is entitled to resort to awarding public procurement contracts and framework agreement on batches, and in this case, to determine the size and scope of the batches, subject to the inclusion of this information in the procurement documents. (2) For the purposes of paragraph (1), the contracting authority shall determine the object of each batch, on quantitative bases, adapting the size of each individual contracts to better match [...] (3) If the contracting authority does not resort to awarding the contract on batches, it has the obligation to justify the decision not to award the contract o batches [...].

; The methodological norms approved by G.D. no. 395/2016 - Article 9 paragraph (3) letter f) - „(3) Through the contracting strategy are documented the decisions from the planning stage / preparation of purchase in relation to: f) justifications for the choice of the award procedure in the cases laid down in Article 69 paragraph (2) - (5) of the Law and, where applicable, the decision to reduce the term under the law, the decision not to use split into batches...”.

Analyzing the documents of the case, the Council notes that in the explanatory note no. __ / 28.07.2016 on the contracting authority's decision to refrain from awarding the contract on batches, the contracting authority justified by the fact that radiotherapy system functions as a whole, thus requiring the full compatibility between its components. In the radiotherapy clinics there are no specialist on the technical component to assume separate purchase and proper functioning of this of this very complicated equipment complex. Also, for the award of the purchase on batches there is a risk of partial awarding of the batches, situation that would lead to the impossibility of obtaining the operating opinion of CNCAN, opinion to be issued for the entire radiotherapy system...”.

In the contracting strategy no. __ / 23.08.2016, Chapter 3.2 Choice and justification of the award procedure, is found the following mention: „In the case is decided the purchase of appliances in separate batches, each component can be fully functional by itself and, however there is a risk of being unable to function as a whole which would lead to the impossibility of performing radiotherapy and not having the opinion of CNCAN, for which I do not take responsibility. Also, in the case of awarding of the tender on batches there is the risk of partial award of the batches, a situation that would lead to the impossibility of obtaining the operating opinion of CNCAN, opinion to be issued for the entire radiotherapy system.”

From the legal provisions cited above, it appears that splitting the public procurement contracts into batches becomes the rule for the contracting authorities, which are obligated to justify the decision not to award the contract on batches.

Therefore, for the present procedure, the contracting authority decided to award the contract to one tenderer, the capacity criteria being set accordingly by reference to the estimated value of the contract. [...] The Council considers that the contracting authority clearly violates the legal principles of non-discrimination, equal treatment, and proportionality, governing the award of any public contract. Related to the allegation of the contracting authority that the radiotherapy system works as a whole, thus requiring full compatibility between its components, the Council considers that it cannot retain an interdependence between the radiotherapy system, respectively the high-energy accelerator type system, with all the adjacent accessories, and the simulation tomography computer of 16 slices. Thus, the radiotherapy accelerator type system has a different clinical purpose, namely to treat patients, as opposed to the tomography computer used in the diagnosis of cancer patients. [...]

Contrary to the arguments of the contracting authority, the different operating systems is not a justification for the decision not to split the purchase into two batches (motivated by the fact that does not guarantee inter-compatibility of the systems),



given that the different operating systems exist whether the equipment are purchased on batch or by unit. The Council will also hold and that from the information available on the website [...] it can be seen that there is no similarity between the producers of radiotherapy systems and those of CT systems. Under these circumstances, one cannot impose the economic operator to expand its object or to associate only in order to participate in the auction.

... Dividing the procurement in two batches is all the more justified from the perspective of the contracting authority as it is of no relevance the number of contracts to be concluded as long as the ultimate goal of the procedure is to purchase the required products, and not the one to conclude a single contract with a single operator for a considerable value. [...]

The Council also draws the attention to another aspect that concerns the fact that by remaining grouped, it is possible that the authorities may not acquire any of the equipment, as a mere non-compliance, to any of those devices, leads to rejection of the tender for all the devices. In other words, if they divide the contract into batches, the chances of the authority to award the contract for each equipment would increase. The Council also notes that the contracting authority itself claims in the contracting strategy, that if it is decided to purchase the equipment in separate batches, each component can be fully functional by itself, so also in the view of the contracting authority these systems are seen as distinct.

Regarding the argument [...] that there is a risk of partial award of the batches, a situation that would lead to the impossibility of CNCAN' opinion, opinion which is issued for the entire radiotherapy system, the Council will not withhold it for settlement as being judicious in justifying the decision not to divide the procurement. According to information available on the website of the National Commission for Nuclear Activities Control (CNCAN), “The practices involving the use of radiological installations and / or the radiation sources are permitted on realization phases, as appropriate, namely: a) location; b) construction including installation; c) operation - use including maintenance; d) conservation; e) decommissioning. Authorization on phases of implementation

is mandatory for the following practices: a) medical radioscopia and radiography, except Dental; b) industrial radiography; c) radiotherapy; d) nuclear medicine - in vivo and therapy; e) practices involving the use of open sources of radiation whose activity exceeds at least 1,000 times the limit for exemption from Table 2-B, Annex no. 2 of the Fundamental Norms on radiological safety; f) practices that involve use of the facilities equipped with sealed sources of gamma radiation with activity greater than 37 GBq or neutron sources used for activation; g) practices involving the use of accelerators.”

Thus, from the information presented it does not result that the authorization of CNCAN depends on the equipment in question functioning as an assembly.

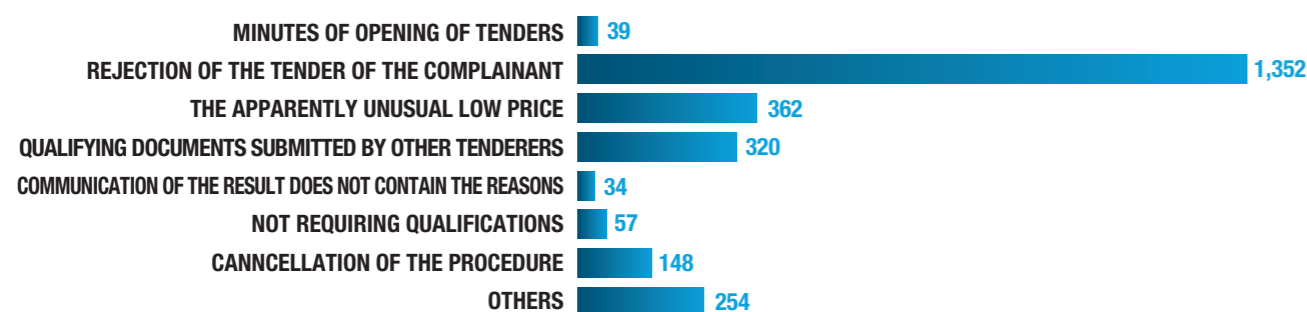
In the circumstances, the lack of compelling justifications from the contracting authority, both in relation to the content of the documents of the public procurement file, and in the light of the allegations of the authority made in the context of this complaint, it concludes that the contracting authority cannot correctly justify its decision to establish the object of the purchase contract in a single batch, by not providing any clinical, technical and / or economic argument. The Council establishes that the redistribution procurement is required, so that the complaining party is able to participate in the proceedings, without subcontracting or association for that category of goods that they do not sell.

OBJECT OF THE COMPLAINTS LODGED BY ECONOMIC OPERATORS

Under the complaints against the result of the procedure it was observed that the most often challenged/ criticized are:

- the minutes of the meeting for opening the tenders (not considering the tender guarantee, the conduct of the meeting for opening the tenders);
- rejection of the offer of the complainant as non-compliant or unacceptable;
- the unusually low price of the tenders of other participants in the awarding procedure;
- qualification documents submitted by other tenderers participants or the scoring / evaluation method thereof by the contracting authority;
- the fact that the contracting authority did not specify the reasons for rejecting the tender in the communication address of the result of the procedure;
- rejection of the tender without the contracting authority seeking clarification on the technical proposal / price offered, or incorrect assessment of the answers to clarifications;
- cancellation without any legal basis of the tender procedure by the contracting authority;

SITUATION OF THE COMPLAINTS LODGED BY ECONOMIC OPERATORS WITH N.C. S.C. IN RELATION WITH CRITICISM AGAINST THE RESULT OF THE PROCEDURE IN 2016



To understand these issues, we present below a few cases:

CONFLICT OF INTERESTS: Participation in dual quality - of supporting party and subcontractor - in two individual tenders, at the procedure conducted by ATU city, of the company - provider of public and public utility services of local interest in the nature of a company governed by Law No. 31/1990, established by decision of the deliberative authority of the contracting authority, the company's shares being integrally owned by the CITY - contracting authority, as the sole shareholder.

SITUATION OF EXCLUSION FROM THE PROCEEDINGS: individual tenders - in which S.C. __ S.R.L. established by decision of the deliberative authority of the contracting authority participated as a supportive party and subcontractor - provides sufficient reasonable indications resulting in the existence of agreements aimed at distorting competition in the award procedure.

"By complaint no. __ / 2016 lodged by S.C. X S.R.L., against the result of the award procedure, communicated with address no. __ / 2016 by Y CITY (Local Council), as contracting authority, in the award procedure, through offline request for tendering, of the public procurement contract for execution of works having as object (...), seeking annulment of communication no. (...) and ordering the contracting authority to re-evaluate the tender submitted by S.C. Z S.A.

Through the request for intervention registered with N.C.S.C. under no. __ / 2016, S.C. Z S.A., requested to admit the application to intervene, to reject the complaint lodged by S.C. X S.R.L., and to maintain the documents issued by the contracting authority, as good and legal.

Based on the documents submitted by the parties, N.C.S.C. decides:

Admits the complaint lodged by SC X S.R.L., in contradiction with the contracting authority Y CITY (LOCAL COUNCIL).

Cancels the award procedure report no. __ in the parts regarding the evaluation of the tenders of S.C. Z S.A. and S.C. Q S.R.L., and application of the award criterion and chapter 3 - „conclusions (...)”, as well as the subsequent documents of the cancelled parts in the report.

Orders the contracting authority, within 12 days of receipt of the decision to revalue the tenders submitted by the tenderers as economic operators involved in the procedure, in compliance with legal provisions on public procurement, the rules of the award documentation and by applying the reasoning thereto.

Rejects as unfounded the application for accessory intervention in the interest of the contracting authority, lodged by S.C. Z S.A.

Orders to proceed with the award procedure.

Mandatory.

Can file a complaint against the decision within 10 days of communication. In making the decision, we have considered the following: (...)

From the documents in the case file, the Council retains the following facts:

The CITY Y through the LOCAL COUNCIL, acting as the contracting authority, initiated the award procedure by offline tender request, for the public procurement contract for execution of works (...) by publishing in SEAP, of the participation invitation no. __ / 2016, attached to which was also published the award documentation in the form of data files.

According to the invitation and the data sheet, the estimated value excluding VAT, of the contract for execution of is 2.335.550 lei, and the contract award criteria - „the lowest price”.

According to the procedure report no. __, all 4 tenders submitted were declared admissible, and after applying the awarding criterion, the successful tender was the one submitted by S.C. Z S.A., with a financial proposal of 1.637.285,00 lei, without VAT., the tender submitted by the complainant S.C. X S.R.L. ranking second with 1.713.815,43 lei, without VAT.

The result of the award procedure thus established was communicated to the complainant S.C. X S.R.L. with address no. __ being appealed by it within the legal terms, through the complaint which constitutes the object of the current analysis.

With regard to the submissions of the parties, the rules of evidence, and the applicable statutory provisions, the Council notes:

The main criticism made by S.C. X S.R.L. through the complaint, detailed in the „standpoint” lodged with the Council subsequently to studying the case file, seeks an alleged anti-competitive type agreement, but also a possible incompatibility, due to participation in the procedure, as described below, of the companies:

- S.C. Z S.A., tenderer participating in the procedure with an individual offer, supported by the third party S.C. ZZ S.A., which simultaneously was declared subcontractor for works that constitute 80% of the contract;

- S.C. Q S.R.L., tenderer participant in the proceedings also with an individual tender, supported by the same third party - S.C. ZZ S.A., which in the said tender was also declared subcontractor, but for which constitutes 40% of the contract works.

Thus the petitioner argues that, in fact, the subcontractor S.C. ZZ S.A. participated in the proceeding with two tenders because that company „was aware of both tenders in which it participated” tenders from S.C. Q S.R.L. and S.C. Z S.A. being, according to the petitioner, „the result of an agreement on prices”.

Checking the evoked the situation of companies in the public information and the documents on file, the Council retains the following issues:

S.C. Z S.A. is a nominal shares company subscribed by the County Council Y, as sole shareholder and is founded by CC Decision no. __, through reorganization of RA __ by Y.

S.C. ZZ S.A. Y was established by Decision no. __ LC of Y by dividing (...), the Local Council of Y being the sole shareholder of the company.

Currently, S.C. ZZ S.A. is insolvent under the civil judgment no. __ pronounced in __, by the P Court, in Case no. __.

It is thus retained that the relations between the contracting authority -Y and S.C. ZZ S.A.,

OBJECT OF THE COMPLAINTS LODGED BY ECONOMIC OPERATORS

company in insolvency, are those established by the Local Public Administration Law no. 215/2001, under the provisions of:

- Article 1 paragraph (2) letter d)-g);
- Article 17;
- Article 21 paragraph (1) – (2);
- Article 37;
- Article 61 paragraph (1) and (5);
- Article 62 paragraph (1);
- Article 63 paragraph (5) letter a) and e);
- Article 74 paragraph (1)".

It thus appears that S.C. ZZ S.A. is a public and public utility service provider of local interest in the nature of a company governed by Law no. 31/1990, established by decision of the deliberative authority of the contracting authority, the company's shares being entirely owned by the Y city, as a sole shareholder.

It also finds that, by resolution no. __ delivered by Court P on ____, in Case no. __, concerning „the debtor's request - Law 85/2006 Article 27 paragraph 5" on bankruptcy, the bankruptcy judge ordered to admit the application filed by S.C. ZZ S.A., as DEBTOR, and appointed a provisional legal administrator CASA DE INSOLVENTA __ SPRL, BRANCH D. In that case were joined successively new cases, to case no. / 2015 with hearing on __.

In the situation described, the Council takes into account the provisions of Article 69 index 1 of G.E.O. no. 34/2006, according to which „the tenderer / candidate / associate tenderer / subcontractor / supporting party who (...) has shareholders or associates (...) persons in decision-making positions within the contracting authority are excluded from the award procedure" being the nature of the evidence thus that S.C. ZZ S.A. is simulta-

neously the subcontractor and the supporting party for S.C. Z S.A. and S.C. Q S.R.L., is subject to the legal requirements specified, because shareholder and sole shareholder of that third party and subcontractor is the contracting authority itself, through its legal representatives (persons holding decision-making positions within the contracting authority).

In relation to the express and imperative regulation of Article 69 index 1 of G.E.O. no. 34/2006, the provisions of Article 77 paragraph (6) of Law no. 85/2014 on procedures to prevent insolvency, and insolvency procedures, respectively, Article 85 paragraph (1) of the same law, put forward by the contracting authority in the standpoint, is irrelevant in the case, the respective provisions and legal rules not having the quality to exonerate the debtor S.C. ZZ S.A., as a company of LC Y, institution which, the procedure is the contracting authority itself.

In analyzing the complainant's S.C. X S.R.L. claim, according to which the competing tenderers S.C. Y S.A. and S.C. Q S.R.L. participated in the procedure with rigged tenders, developed by noncompetitive agreement between them, the Council shall consider the following aspects:

(...)

To the rules of the tender documentation, the principles underlying the award of public procurement contracts and the requirements imposed by the Order of A.N.R.M.A.P. President no. 314/2010 on the implementation of the certificate to tender with independent offer, the Council notes that in the documents of

the tenders submitted by the SC Y S.A. and S.C. Q S.R.L. the following identical aspects can be found:

- in the technical proposals of the two offers are identically listed the repealed standards SR 1848-7 / 2004 and SR ENV 13459-2, without respecting the clarification published in S.E.A.P. under no. __/2016;

- to the requests for clarification on those two standards, submitted S.C. Y S.A. and, respectively, S.C. Q S.R.L., under the same registration number, respectively, no. __ / 2016, the two companies have submitted the replies:

- S.C. Y S.A., through address no. __, with the content: „We note that the reference in the technical proposal to the normative acts SR 1848-7 / 2004 and SR ENV 13459-2 is an error of form, the general conditions of the respective SRs being taken completely from the new regulations that we understand to full comply with. The company's commitment to respect the STAS in force also results from the statement made at the beginning of page 1 of the technical proposal: S.C. Y S.A. undertakes to execute road marking works in the city Y in accordance with the technical documentation, with the specifications provided by the contracting authority, in compliance with road traffic legislation and the standards in force relating to road signs".

- S.C. Q S.R.L., through address no. __, with the content: „We note that the reference in the technical proposal to the normative acts SR 1848-7 / 2004 and SR ENV 13459-2 within the technical proposal is an error of form, the general conditions of the respective SRs being taken completely from the new regulations that we understand to full comply with. The company's commitment to respect the STAS in force also results from the statement made at the beginning of page 3 of the technical proposal: S.C. Q S.R.L. will adopt the technological and organizational measures that lead to compliance with the specifications and the laws and regulations in force";

- both tenderers have submitted price offers for road marking paints issued by the supplier S.C. __ S.R.L., and for the price justification used identical prices for the beads, paint, paint hardener, and also for the machine registers, specialized vehicles and mechanical brush, being differentiated only by indirect costs, namely: - 10% Q and 3% Z; profit: - 6% Q S.R.L. and 2% Z S.A.

To those retained the Council notes that the factual situation in the procedure contains substantial elements of similarity with the case solved by the Competition Council by Decision no. 82/2012 thus the issues manifested in the case of the tenders submitted by S.C. Z S.A. and S.C. Q S.R.L. could not be found in the two offers than as a result of collaboration between the two companies, which during the course of the public procurement procedure they have not expressed independently, coordinating their actions, which made that the respective tender are not the expression of genuine competition, thus becoming more apparent that the use, by both companies, of SC ZZ S.A. in the double capacity of subcontractor and supporting party, was carried out in order to manipulate the result of the award procedure (...)".

PRICES FROM THE FINANCIAL PROPOSAL WHICH CANNOT BE JUSTIFIED: Tariffs on labor below the price paid for the minimum gross salary guaranteed, there are prices in the offer that cannot be justified. Invoking the coverage of the differences in labor rates by reducing the level of profit or of other categories of prices / tariffs represent impermissible modification of the financial proposal.

"Through the complaint registered with the Council with no. __ / 2016 lodged by S.C. X S.A., against address no. __ / 2016 representing the communication of the result on the procedure on batch no. 1 „Modernization of communal road (...)", issued by Y, as contracting authority, in the award procedure by online tender request, organized on batches, to award a public purchase contract for works having as object „Modernization of municipal road (...)", CPV code 452331206-6 road construction works (Rev. 2) have requested the following: "cancellation of the address and all the subsequent acts; ordering the contracting authority to resume stage of evaluating the tenders, to reevaluate the tender of the undersigned S.C. X S.A. as well as of the tenderers __ in compliance with legal provisions on public procurement and the proper application of the criteria set out in the data sheet, the successful tender will be designated from the admissible tenders by respecting the awarding criterion „the lowest price"".



“Through the complaint registered with the Council with no. __ / 2016 lodged by S.C. X S.A., against address no. __ / 2016 representing the communication of the result on the procedure on batch no. 2 “Modernizing of local roads, (...)”, issued by Y, in the same award procedure the following were requested: „removing the address and all its subsequent acts; ordering the contracting authority to resume stage of evaluating the tenders, to reevaluate the tender of the undersigned S.C. X S.A. as well as of the tenderers __ in compliance with legal provisions on public procurement and the proper application of the criteria set out in the data sheet, the successful tender will be designated from the admissible tenders by respecting the awarding criterion „the lowest price”.

(...)

By request for voluntary intervention no. __, SC Z S.R.L. request the dismiss of the appeal lodged by S.C. X S.A. concerning batch no. 1 „Modernization of communal road (...)”, the award procedure, by way of exception, as inadmissible and in substance, as ungrounded.

By request for voluntary intervention no. __, S.C. Z S.R.L. request the dismiss of the appeal lodged by S.C. X S.A. concerning batch no. 2 (...), by way of exception, as inadmissible and in substance, as ungrounded.

Applying the provisions of Article 17 paragraph (2) of Law no. 101/2016, to deliver a unified solution, the Council joins the four complaints.

In deciding the case, N.C.S.C. retains the following:

(...)

From the documents in the case file, the Council retains the following factual situation:

Y, as contracting authority, initiated the award procedure by tender request conducted entirely by electronic means (S.E.A.P. - ONLINE), to award the public procurement contract for execution of works for the investment objective of „MODERNIZING COMMUNAL ROAD (...) Within the integrated project „Modernization of local roads, extending the water supply, sewerage, establishing and equipping of public services, rehabilitation, modernization and equipping cultural establishments”, financed by the European Agricultural Fund for Rural Development, through publication in S.E.A.P. of invitation no. __ / 2016, attached to which was made available to the interested parties the tender documentation in the form of electronic data files.

The purchase has been divided into two batches as follows:

(...)

The criterion for awarding the contract, specified in the invitation was „the lowest price”.

According to the documents of the public procurement file, on the proceedings have been submitted:

- 12 tenders for batch no. 1;
- 9 tenders for batch no. 2.

The complainant in question, S.C. X S.A., submitted tenders for both batches, tenders which, according to the letter informing the result of the procedure no. __ / 2016 were rejected as non-compliant for use in the es-

timation-offer of a price for labor costs of 6,5 lei / hour, lower than the rate of 7.382 lei/hour, covered by G.D. no. 1017/2015 for setting the minimum guaranteed gross salary at country level.

The result of the procedure thus communicated, was appealed with the Council by S.C. X S.A., thus:

(...)

Consequence of the standpoint of the contracting authority no. 310/15.07.2016, through which Y raised the plea of inadmissibility of the complaints no. __ / 2016 and __ / 2016, on the grounds that the petitioner did not fulfill the prior notification procedure of the contracting authority upon the alleged breach of the legislation by address no. __ and respectively, no. __ / 2016, the Council required the complainant a standpoint on the respective plea, and additionally, ex officio, questioned the plea of prematurity of the two complaints.

(...)

The reason why the tenders submitted by S.C. X S.A. for the batches no. 1 and no. 2 of the procedure organized by Y were rejected as non-compliant was established by the fact that, within the estimate-offer, the petitioner used an hourly rate to for labor costs of 6,5 lei / hour, lower than the rate of 7.382 lei / hour, covered by GD no. 1017/2015 for setting the minimum gross salary guaranteed at country level.

The criticism of the complaining company according to which the contracting authority's decision to reject its tender for the reason mentioned was un-



grounded and unlawful, constituted by arguments according to which:

- changes imposed by G. D. no. 1.017/2015 entered into force on 05.01. 2016, fall under Article 6 of the New Civil Code, meaning that the civil law is applicable while it is in force, without having retroactive powers;
- its tender „could be at the most cataloged through the provisions of Article 79 paragraph (2) and Article 80 paragraph (1) and (2) of G. D. no. 925/2006, according to which the legislator recognizes that the tenders may contain errors that can be corrected even by the contracting authority”;
- the differences in value resulting from the legal modification of the minimum gross salary guaranteed at country level will be borne by diminishing the profits, without adjustment, in any way, of the tendered price;
- “N.A.P.A. is in error in estimating that the decrease of the profit would change the financial offer, whereas the text of the law to which the institution refers to, aims expressly the tendered price, fact unquestionably inapplicable in this case and communicated concisely, even though the document registered under no. 3429/10.06.2016”;
- According to the address of response to the requests for clarification during the evaluation of tenders no. __ / 2016, the petitioner argues that the difference in value resulting from the legislative modification of the guaranteed gross minimum wage, which occurred after the deadline for submission of tenders will be borne by SC X S.A. by diminishing the profit share from 5% to 3.25%, shall be analyzed by reference to the following aspects:
 - as is clear from the offer, and the petitioner acknowledges, upon drawing up the tender, S.C. X S.A. used the hourly rate to 6,5 lei / hour;
 - the award procedure was initiated on __ 2016 when the invitation no. __ was published in S.E.A.P., and the deadline for submission of tenders has been established in __ 2016;
 - the duration of the contract provided in the awarding documentation was „10 months from the date of awarding the contract”;
 - the establishment of the winning tenderer of the contract was to be performed after the evaluation of tenders, communication of the outcome of the procedure, exhaustion of the waiting periods and the settlement of the possible remedies / appeals, actions whose terms under Article 200, Article 205 of G.E.O. no. 34/2006 surpassed 30 days in an optimistic

scenario, the contract going to be signed during the month of June 2016;

- G.D. no. 1.017/2015 establishing the guaranteed minimum gross salary at country level, effective from 31.12.2015 through Article 1 stated that „Starting with 1 May 2016, the minimum guaranteed gross salary at country level for a full working schedule of 169.333 hours on a monthly average in 2016, representing 7.382 lei / hour”.

Therefore, the petitioner's claims that „the changes introduced by G. D. no. 1.017/2015, which came into force on 01.05.2016, fall under Article 6 of the New Civil Code, meaning that the civil law is applicable while it is in force, without having retroactive powers” are flawed, the legislative act at issue being in effect since 31.12.2015, the employers being obligated, as of 01.05.2016, to ensure the guaranteed minimum gross salary at country level of 7.382 lei / hour so that the normative act that establishing guaranteed minimum gross salary at country level of 7.382 lei / hour, was in force prior to the initiation of the procedure, and starting with 05.01.2016 it was mandatory to ensure the respective minimum wage level.

Thus, substantiating the financial proposal by using an hourly rate for labor costs of 6,5 lei/hour, level prohibited by law, being under the regulated minimum in force, the petitioner has used in its financial proposal a price that could not be justified, the tender thus developed and sub-

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stantiated entering the category of those defined by Article 36 paragraph (2) of GD no. 925/2006 as being non-compliant.

The complainant's allegations that its tender „may be the more cataloged through the provisions of could be at the most cataloged through the provisions of Article 79 paragraph (2) and Article 80 paragraph (1) and (2) of G. D. no. 925/2006, according to which the legislator recognizes that the tenders may contain errors that can be corrected even by the contracting authority”, meaning that the differences in value resulting from the legal modification of the minimum gross salary guaranteed at country level will be borne by diminishing the profits will be analyzed by reference to the applicable statutory provisions, established by Article 79 paragraph (3) of G.D. no. 925/2006 – “If the tenderer amends, through the replies submitted, the price / prices provided in the financial proposal, its tender will be considered non-compliant, except as provided in Article 80 paragraph (2) „and of Article 80 paragraph (2) of the same law - „in case of arithmetical errors that can be clarified under Article 2 paragraph (2) of the emergency ordinance, the elements of the financial proposal will be corrected and hence the total price of the tender, by recalculating, based on data / information that are known by all participants, as provided in the applicable law, the awarding documentation, and / or other documents submitted by the tenderer”, noting that through its reply to the clarifications requested by the evaluation commission during the evaluation of tenders, the complainant has modified one of the prices of financial proposal, namely the price of labor costs by changing the hourly rate.

Paragraph (2) of Article 79 of G.D. no. 925/2006, invoked by the petitioner regulates in relation to the technical proposal and any accepted amendment thereto, and not in the financial proposal, defined by letter t) of Article 3 of G.E.O. no. 34/2006 as being a „financial proposal - part of the tender which contains information about the price, tariff, other financial and commercial conditions appropriate to satisfy the requirements requested in the tender documentation” the labor costs thus being an element of the financial proposal, modifying it through clarifications issued during evaluation is not an arithmetical error, nor a formal vice that can be corrected within the meaning of Article 80 of GD no. 925/2006.

Whereas in the original tender, S.C. X S.A. used a labor costs price below the legal minimum requirement, price which cannot be justified, such tender being the kind covered by Article 36 paragraph (2) letter c) of G. D. no. 925/2006, and in the reply to clarifications, the petitioner modified the said price / tariff, circumstance incidental to the provisions of Article 79 paragraph (3) of the same law, the contracting authority duly applied the aforementioned legal provisions, the non-compliant character of the complainant's tender being impossible to remove by changing the structure of the financial proposal after the submission of tenders, a change that practically resulted in a new offer, with a new financial proposal, in which the following have changed: the hourly rate on labor costs, value of the labor costs, the values relating to amounts

owed by the employer to the budgets of the consolidated state budget, but also the profit initially declared in the tender.

The fact that such a modification of the tender is illegal and impermissible was also held by the ECJ decision (First Chamber) of 07.04.2016 in Case C-324/14, paragraphs 63-65, according to which:

“63. The Court has stated that Article 2 of Directive 2004/18 does not prevent the tender data to be corrected or completed on point, especially since it obviously requires a simple clarification, or to remove obvious clerical errors (Decision of 10.10.2013 Manova, C 336/12, EU: C: 2013: 647 pt. 32 and the quoted case law).

64. To this end, it is the contracting authority's obligation to ensure, among other things, that the request for clarification of a tender does not lead to the presentation by the tenderer concerned of what in reality would be a new tender (in this regard, see Decision of 10.10.2013, Manova, C 336/12, EU: C: 2013: 647 pt. 36).

65. In addition, in the exercise of discretion as regards the possibility to require candidates to clarify their tender, the contracting authority must treat the candidates equally and loyal, so as not be determined, at the conclusion of selection of tenders, and in relation to its result, that the request for clarification unduly favored or disfavored the candidate or candidates to whom it was addressed (Decision of 10.10.2013, Manova, C 336/12, EU:C:2013:647, pt. 37)”.

In the circumstances in which the tenders of the complainant S.C. X S.A. have been legally rejected as non-compliant, the objections raised by it regarding the competing tenders submitted by (...) lack interest and will not be reviewed by the Council.

Considering the above established, under the provisions of Article 26 paragraph (6) of Law no. 101/2016, dismisses the complaint __, on the result of the proceedings related to batch no. 1 and, respectively, the complaint no. __ on the result of the procedure for batch no. 2, both lodged by S.C. X S.A., contradictory to Y, thus:

- as unfounded, the complaints regarding „Cancellation of the address and all its subsequent acts, and ordering the contracting authority to resume the stage of evaluation of the tenders, to reassess the tender of the undersigned X S.A.”;
- as uninteresting, the complaint of „requiring the contracting authority to resume the stage of evaluation of the tenders (...).

Consequence of rejecting the complaints, the voluntary intervention applications will be allowed no. __/2016 and no. __/2016, lodged by S.C. __ S.R.L.

The decision is binding, as provided by Article 28 paragraph (1) of the law”.

Note: N.C.S.C. decision has become final and is maintained by the Decision of the Craiova Court of Appeal, the Administrative and Fiscal Division.

UNLAWFULNESS OF THE DECISION TO REJECT A TENDER BY INVOCATION, AT TENDER EVALUATION STAGE, OF REQUIREMENTS, CRITERIA, RULES ETC. NOT STATED CORRECTLY, EXPLICITLY, AND COMPLETELY IN THE TENDER DOCUMENTATION.

„By complaint. __/2016 registered with N.C.S.C. with no. __/2016 filed by S.C. X S.R.L., against the result of the award procedure, communicated with address no. __/2016 by Y, as contracting authority, in the award procedure by online tender request, divided into batches, to award the public procurement contract having as object „Repair, construction, and installation works,” code CPV 45000000 - construction works (Rev. 2), seeking annulment of the contested act, ordering the contracting authority to reevaluate the tender submitted by S.C. X S.R.L., taking into account those put forward in the complaint. However, the complainant requested access to the documents of the procurement file submitted by the contracting authority with the Council.

In their decision N.C.S.C. retains the following: (...)

Compared to the documents in the case file, the Council retains the following facts:

Y has initiated, as a contracting authority, an award procedure by online tender request, organized in batches, to award the public procurement contract having as object „Repair, construction and installation works”, CPV code 45000000 – construction works (Rev.2), by publishing, in SEAP, the participation invitation no. __.

According to the invitation and the award documents, the contract award criterion is „the lowest price” and the estimated value of the works is 657.053,32 lei, without VAT.

According to the minutes of opening tenders no. __/2016, in the tender procedure 9 economic operators submitted tenders for batch no. 1 - Installation of sanitary equipment works, and construction of bathrooms in pavilion D4, and 8 economic operators for Batch no. 2 - Renovation works for weathered buildings at the O2 pavilion.

According to the interim report of the proceedings recorded in the procedure no. __/2016 S.C. X S.R.L. submitted all the qualification documents required by the award documentation but has not submitted DUAE, which is why the evaluation committee, invoking Article 137 paragraph (2) letter b) and Article 60 paragraph (1) of G. D. no. 395/2016, rejected that offer as unacceptable, result the complainant communicated by address no. __/2016.

With prior notification no. __/2016 S.C. X S.R.L. required the contracting authority to remedy the outcome of the procedure, communicating reply no. __/2016 which listed 7 considerations, in the end of the reply asking the petitioner to state its standpoint on these considerations.

Returning to the prior notification by address no. __/2016 the complainant invoked compliance with the provisions of the award docu-

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mentation, considering that „the contracting authority, to avoid an excessive formalism liable to harm the interests of X, can file request for clarification by which to receive DUAE (sole European Purchase Document)”.

On __, S.C. X S.R.L. filed within the legal term, the complaint object of the present analysis.

With regard to the submissions of the parties, the evidence in the case file and the applicable statutory provisions, the Council notes:

From the address communicating the result of the award procedure no. __/2016 results that the tender of the petitioner S.C. X S.R.L. was rejected on the following ground: „(...) Your tender has been declared unacceptable under the provisions of Article 137 paragraph (2) letter b) of G. D. no. 395/2016, because you have not submitted the DUAE form as provided by Article 104 paragraph (3) on Article 60 paragraph (1) of G. D. 395/2016. In addition, the S.E.A.P. system forces us

to evaluate your DUAE. Because you have not submitted the DUAE, the contracting authority is unable to evaluate you”.

As the complainant sustains, and the contracting authority does not deny, the complainant submitted with the tender, all the qualification documents, as recorded in the minutes of the meeting for opening the tenders no. __/2016.

The petitioner claims that it has not submitted the DUAE, which consists of a „sworn statement of the economic operator with respect to the qualifying and selection criteria” [Article 3 letter s) of Law no. 98/2016] because the award documentation did not regulate such an obligation, but offered only an alternative option for the tenderers.

In report to the provisions of letter z) of Article 3 of Law no. 98/2016, defining the award documentation as being the „award documentation - document of the procurement consisting of the requirements, criteria, rules, and other information necessary to provide the economic operators a complete, accurate and explicit information about the requirements or elements of the purchase, the object of the contract and the development manner of the award procedure, including the technical specifications or the descriptive document, the proposed conditions of contract, the formats for the presentation of documents by the candidates / tenderers, the information on the general applicable obligations” and the provisions of

Article 154 of the same law – “The contracting authority has the obligation to draw up the award documentation which contains all the information necessary to provide the economic operators a complete, correct, and precise on the requirements of the purchase, the contract and the conduct of the award procedure” the Council notes that, in the invitation - „procedure details [RFQ0080821]”, about DUAE were stated the follows: „Under the provisions of Article 193 of Law no. 98/2016, the contracting authority will accept, within the DUAE tenders, instead of the documents requested in order to demonstrate the qualification requirements, including the ability to exercise that preliminary evidence. DUAE can be downloaded for filling in and submission of at <https://ec.europa.eu/growth/tools-databases/espd/filter> (instructions on completing DUAE are available at www.e-licitatie.ro). Before awarding the contract, the contracting authority will require the tenderer ranked first after applying the award criteria, to submit updated supporting documents to demonstrate compliance with all qualification criteria, according to the information contained in DUAE. DUAE will be submitted, if any, also by the supporting party”.

The same wording - „(...) the contracting authority will accept within the DUAE tender, instead of the documents requested for demonstrating the qualification requirements, as preliminary evidence” is found in several sections of the data sheet.

It is true that the wording of the text is taken from Article 193 paragraph (1) of Law no. 98/2016, but the text of the law provides guidance for applying one of the versions, as a recommendation being the initial acceptance of DUAE, but the obligation to „ensure the economic operators a complete, correct and precise information on the requirements of the purchase and the conduct of the award procedure”, through the provisions of Article 154 of the law, rests with the contracting authority.

Therefore, without specifying completely, accurately and precisely the mandatory requirement of initial presentation by the tenderers, of the DUAE, the rule of the documentation was in that the tenderers can submit DUAE, as preliminary evidence, without having been excluded /prohibited the opportunity to submit in the initial stage, the qualification documents.

Thus, the complainant developed and presented the tender in consideration of the provisions of Article 75 of Law no. 98/2016 - „The tenderer submits the tender prepared in accordance with the information and the requirements of the procurement documents, accompanied by the documents or the Sole European purchase document in accordance with Article 193-197, as appropriate, demonstrating the qualifying criteria set by the contracting authority” and those of Article 123 of the methodological norms approved by G.D. no. 395/2016 – “The tenderer prepares the tender in accordance with award documentation (...)” and the rejection of the tender of the petitioner for the mentioned reason, consisting of presenting the qualification documents, without resorting to the presentation, as optional preliminary

evidence of DUAE (the contracting authority shall accept and not impose the firm obligation for the tenderers), was decided against the rules of the award documentation, the conditions of Article 215 paragraph (4) of the Law not being met so as the tender of the complainant to be declared unacceptable.

The fact that the S.E.A.P. system, through the technical facilities, required to enter the DUAE evaluation result, does not prevent the contracting authority to introduce at that stage, the evaluation result of the qualification documents, the role of DEAU provided by pt. 84 supporting Directive 2014/24 / EU is to limit the requirements to encourage competition and not to artificially reprimand / restrict it through interpretation similar to the one relied upon by the contracting authority.

Whereas the petitioner’s criticisms are well founded, pursuant to Article 26 paragraph (2) and (5) of Law no. 101/2016, the Council will admit the complaint lodged by S.C. X S.R.L. in contradiction with Y, will cancel the interim report in the part regarding the decision to reject the complainant’s tender, and orders to continue the proceedings within 10 days of receipt of the decision, with reassessing the complainant’s tender within the meaning held in the grounds at hand, in compliance with statutory provisions and the rules of the award documentation.

The decision shall be binding, in accordance with Article 28 paragraph (1) of the Law”.

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BY INVOKING THE SUPPORT OF A THIRD PARTY WHOSE RESOURCES ARE UNDER PRECAUTIONARY ATTACHMENT, THUS BEING UNAVAILABLE, THE TENDERER DOES NOT FULFILL ITS OBLIGATION TO PROVE TO THE CONTRACTING AUTHORITY THAT IT HAS TAKEN ALL MEASURES TO HAVE ANYTIME ACCESS TO THE NECESSARY RESOURCES FOR THE CONTRACT, THE PRECAUTIONARY ATTACHMENT CAN BE TRANSFORMED AT ANY TIME IN A DEFINITIVE ONE. Changing the technical proposal on the obligation to indicate of „the manner to ensure the material resources (...) necessary for the execution of works, the technical specifications of major equipment indicating the suppliers” the stage of justifying the apparently unusually low price of the tender leads to the inadmissibility of the tender.

„By appeal no. __/2016 registered with N.C.S.C. with no. __/2016 S.C. X S.R.L., as leader of the association S.C. X S.R.L. - S.C. XX SRL, criticizes the report of the award procedure regarding the decision to reject its tender as non-compliant, and the decision to award the winning tender, issued by Y, as contracting authority, in the restricted procedure, organized to conclude the framework agreement having as object „road repair works related to the road network from __”, CPV code 45233142-6 road repair works (Rev.2), 71322000-1 engineering design services for the construction of public works (Rev. 2), asking: „cancellation of the report of the procedure both in terms the decision to reject or tender as non-compliant, and the decision appointing the winning tender; cancellation, accordingly, of the subsequent acts that concern these parts of the procedure report; ordering the contracting authority to reevaluate the tender submitted by S.C. X S.R.L. - S.C. XX S.R.L. and issuing a new procedure report containing a legal and thorough evaluation of our tender, as well as a new result of the award procedure considering the admissible character of our tender”.

Through the complaint registered with N.C.S.C. with no. __/2016 lodged by S.C. Z S.R.L., against the decision through which its tender, although admissible, was declared unsuccessful, communicated by address no. __/2016 and address no. __/2016 in response to the prior notification and the report of the procedure issued by Y, within the same award procedure, is requested:

“(i) annulment of the decision of the contracting authority through which the association tender was declared admissible, but unsuccessful in the award procedure, communicated to the undersigned by address no. __/08.07.2016 on the same date and address no. __/2016 in reply to the prior notification communicated to the undersigned at the same date, of the report of the award procedure, and any previous internal acts and / or subsequent and associated to them, issued by the contracting authority in the award procedure”;

(ii) Annulment of the decisions of the contracting authority des-

ignating the winning tenders submitted by (i) S.C. V S.R.L. - S.C. VV S.R.L. and the Q S.A. association.

(iii) ordering the contracting authority to continue the awarding procedure for the purpose of resuming it by reconsidering and reassessing the tenders in compliance with the legislation on public procurement, with the consequence of determining the winning tender from the tenders declared admissible under the award criteria set by the award documentation and under the provisions of the decision issued by the Council in this case”.

Also, the petitioner seeks to order the contracting authority to pay the costs incurred for solving the complaint.

Through the complaint without a registration number at the issuer, registered at N.C.S.C. under no. __/2016 lodged by SC Q S.A., headquartered __, as leader of the association S.C. Q S.A. __ against address no. __/2016 concerning the communication of the result of the procedure and the procedure report issued by the same contracting authority, in the restricted procedure, requested „cancellation of address no. __/2016 concerning the communication of the result of the procedure; cancellation of the procedure report no. __/2016 and of the documents issued by the contracting authority on declaring the tender of the association S.C. V SRL - S.C. VV S.R.L. as admissible and winning, as well as of all the subsequent acts, with the consequence of

rejecting as non-compliant, of the aforementioned tender because the offered price is unusually low and the tender failed to justify in economic terms, the price offered; ordering the contracting authority to continue the award procedure by reevaluating the tenders and determining the winning tenders from the admissible tenders, under the law on public procurement”.

At the same time, the petitioner requested the appointment of an independent expert or specialist in constructions / accounting to verify the issues raised in the contents of the complaint on the non-compliances in the tender of the association S.C. V SRL - S.C. VV S.R.L., and hearing the parties in the case.

Through the address registered at N.C.S.C. under no. __/2016, S.C. VV S.R.L., as leader of the association S.C. V S.R.L. - S.C. VV S.R.L., filed an application to intervene, asking to reject the complaint lodged by SC X S.R.L., as leader of the association S.C. X S.R.L. - SC XX S.R.L. as unfounded, and maintaining the procedure report and the subsequent and related acts.

Through the intervention application registered at the Council un-

der no. __/2016 SC VV S.R.L., leader of the association S.C. VV S.R.L. - SC V S.R.L., association declared the winner of the award procedure, should be dismissed as unfounded, of the complaint lodged by S.C. Q S.A. and maintaining the procedure report, and the subsequent acts and related to it, and by specification no. __/2016 registered with the Council under no. __/2016, SC VV S.R.L. requested to have dismissed as unfounded the complaints formulated by: the association S.C. Z S.R.L. __; the association S.C. Q __S.A., and the association S.C. X S.R.L. - S.C. XX S.R.L., and maintaining the procedure report and the subsequent and connected acts, as good and legal.

Applying the provisions of Article 17 paragraph (2) of Law no. 101/2016, the Council joins the three cases.

In taking the decision, N.C.S.C. holds the following: (...)

As regards the documents in the case file, the Council retains the following factual situation:

Y, as contracting authority, initiated the award procedure by restricted tender, carried out OFFLINE, for the framework agreement for the design and execution of „Road repair works associated to the road network in __” CPV code 45233142-6 - Road repair works (Rev. 2), and 71322000-1 - engineering design services for the construction of public works (Rev. 2), by publishing in S.E.A.P., of the notice no. __/2015 the award documentation being attached to the notice.



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The estimated value excluding VAT, of the framework agreement has been specified in the notice to the total amount of 39.903.317,50 lei, the framework agreement was going to be concluded for a period of 48 months, with a maximum of three economic operators. The award criteria of the framework agreement was „the lowest price”.

According to the report procedure no. __/2016 to the second stage of the restricted procedure, have been submitted 10 tenders, of which 6 were declared admissible, and after applying the award criterion, the three operators to conclude the framework agreement with were designated as follows:

- 1st place – the association S.C. V S.R.L. & S.C. VV S.R.L., with the tender price of 7.913,93 lei;
- 2nd place – the association S.C. __, with the price of 10.744,32 lei;
- 3rd place – the association S.C. Q S, with the price of 17.966,56 lei.

The tender submitted by the association S.C. X S.R.L. & SC XX S.R.L. was rejected as non-compliant, and the tender submitted by the association S.C. Z S.R.L. was declared admissible, but not winner, ranking 5 in the top of admissible tenders, drawn up in the increasing order of the prices tendered.

The result of the procedure thus established was communicated to the 3 companies complaining in the case, as follows:

- the association S.C. X S.R.L. & S.C. XX S.R.L., with address no. __/2016;
- the association S.C. Z S.R.L., with address no. __/2016;
- The association S.C. Q S.A., with address no. __/2016.

The three associations carried out the prior notification procedure of the contracting authority regulated by Article 6 of Law no. 101/2016, as follows:

(...)

Dissatisfied with the result of the procedure and Contracting Authority's replies to the prior notifications, the associations mentioned in the preceding formulated and submitted within the legal term the complaints object of the present analysis.

(...)

I. Regarding the complaint lodged by the association S.C. X S.R.L. & S.C. XX S.R.L., the Council notes that the reason for rejection as non-compliant, of the tender of the respective complainant was not mentioned in the procedure report no. __/2016 and address to communicate the result of the procedure no. __/2016 as follows: « (...) At the request of the evaluation committee on the economic substantiation of the pricing (address registered under no. __/2016 Question 4), were not submitted the required information (i.e. justification of the offered unit prices), but were brought new elements according to which the direct supplier is „S.C. _ - in insolvency „although in the technical offer, the technical specifications of the major equipment (certifications, agreements) correspond to other suppliers, as follows: (...) As stated

in the awarding documentation: „The tenders will submit technical comments that include, mandatory, the manner of ensuring the human and material resources required to carry out the works, the technical specifications of the main material indicating the suppliers”.

However, the information supplied by the applicant cannot justify the apparently unusually low price because no information is provided on the manner (commercial relationships with producers, existing stocks, etc.) in which S.C. _ - in insolvency can ensure the product deliveries and can guarantee the price during the contract provided that S.C. __ in insolvency is distributor (...).

In checking the validity of the plea raised by the contracting authority according to those stated, the Council considers that the complainant's tender was of the kind covered by Article 202 a tender with a apparently unusual low price in relation to the which the contracting authority had „an obligation to ask the tenderer in writing before taking a decision of rejecting that tender, details and explanations that considered significant for the tender, and to verify the replies that justify that price”.

Is retained thus that by the request for clarification made through address no. __/2016, question no. 4, the contracting authority requested: “

Question 4: Taking into account the unit prices (mentioned in the unit price schedule), the maximum quantities by type

of work and maximum estimated value of the framework agreement, the total price offered by your company is 29,728,997.50 lei, without VAT, value representing 74.50% of the estimated value of procedure.

Under Article 202 of G.E.O. no. 34/2006, we ask you to argue and justify the economic substantiation of the unit prices offered by reference to the requirements of Specification, referring to:

- prices from the suppliers for the main raw materials used and materials, respectively (concrete BA 16, binder BAD25, concrete B250, concrete B300, ballast, gravel, pavers, natural stone, crushed stone, geogrid, geo-composite, geotextile, the 4 types of curbs stipulated in the price description, BA8 concrete, mortar M100, self-locking pavers, flagstones, manholes, drains, BCR 3,5);
- the stocks of raw materials and materials respectively (concrete BA 16, binder BAD25, concrete B250, concrete B300, ballast, gravel, pavers natural stone, crushed stone, Geogrid, geo-composite, geotextile, 4 types of curbs stipulated in the price description, BA8 concrete, mortar M 1 00, self-locking pavers, flagstones, manholes, drains, BCR 3,5);
- the organization and methods used in the work process;
- the wage level;
- any other element with significant impact on the prices tendered.

Such justifications will be presented separately for each unit price (P1 - P35).

These clarifications are required because your tender is less than 80% of the estimated value of the framework agreement to be awarded”, and the reply of the petitioner S.C. X S.R.L., filed as follows:

“Reply to Question 4:

Economic substantiation of pricing.

Please find enclosed the supplier's prices for the main materials.

Regarding the stocks of raw materials and materials we inform you that our company does not hold stocks.

In developing the financial proposal was envisaged the implementation of methods of execution of works subject to this tender procedure exactly observing the requirements specified in the tender documents.

The technical solutions envisaged in developing the financial proposal are consistent with the technical solutions established by the beneficiary through the Awarding Documentation.

Please note that these technical solutions, and organization, and also the methods used during the working process have been described in the technical proposal submitted at tendering.

Also, we mention that on substantiation of the prices contained in the financial proposal were considered the provisions for protection of work and working conditions applicable for the execution of work covered by this tender procedure.

Wage level. The execution personnel that will be used for this work will be made available by S.C. X S.R.L. and S.C. __ S.R.L. - in insolvency, and where it will not be enough, additional workers will be hired in compliance with the wage level stated in the tender.

Regarding the wage level of the workforce tendered we inform you know that we fit in the minimum wage in force. Gross wages in the pay scale complies with coefficients of hierarchy imposed by legislation. In determining individual pay levels were taken into account the employee performance, the position in the organization, and the impact of the indicators on the labor market.

We specify that duties of the management, technical, economic, administrative, maintenance and security staff are included in the indirect costs - under P91/2002.

The average gross salary for the working personnel (without taxes paid by the employer to the state budget) is 1.445 lei / 170 hours = 8,5 lei / hour. This charge is reflected in all statements of labor costs (C7”).

Attached to the reply, the complainant filed Forms C6 - „The list of consumption of material resources”; Forms C7 - „The list of costs for labor”; Forms C8 - „The list of consumption for operating hours for the construction machinery”; Forms C9 - „The list of consumption on transport” for each „CATEGORIES OF REPAIR WORKS” - as they were defined in the award documentation, coded under the name P1 to P35, meaning:

(...)

By verifying at random the detailing of the unit prices resulting from summing the values in the C6-C9 forms attached to each category of works results that:

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- for the P1 category - „Repair works for roadway with asphalt mixture BA 16 in thickness of 5 cm. including Milling”: material resources, 39,95 lei / sqm; labor cost = 5,27 lei / sqm; machinery = 16,53 lei / sqm; transport = 1,54 lei / sqm; Total price / sqm works = 63,29 lei / sqm.

To the direct costs detailed above were added the amounts owed by the employer to budgets component of the state consolidated budget, amounting to 1,19 lei, as well as: 10% indirect expenses (6.45 lei), profit 5% (3,72 lei), design 5% (3,72 lei), resulting in total unit rate of 78,20 lei / sqm „Repair works for roadway with asphalt mixture BA 16 in thickness of 5 cm including milling” unit rate identical to the one annexed to the tender form.

- Was proceeded similarly for all the other works (P2 – P35).

At the end of the reply, to justify the prices for all the categories of materials required to carry out the works, the complainant S.C. X S.R.L. filed the document entitled „Price offer for road repair materials _” issued by S.C. _ S.R.L. - in insolvency.

Analyzing the complainant's

reply in relation to the contracting authority's request, the Council retained:

- The forms C6-C9 attached to each category of works were of no relevance to the request of the contracting authority to justify the tender price apparently unusually low because those forms were mandatory introduced, the standard forms contained in the „Forms” of the award documentation, as annexes to the tender form, which was contained in a form relatively similar to the tender originally submitted, resuming their calculations in a form slightly different from the original one not justifying the formation of prices included in tariff for the works code P1 – P35;

- the only document that may be relevant for the request of the contracting authority for presenting the „prices from the suppliers for the main raw materials and materials” respectively „any item with significant impact on the prices tendered,” was the document entitled „Price offer for road repair materials _”, from S.C. _ S.R.L. - in insolvency.

The complainant's claim according to which any specialized professional can be the a building materials supplier is true, but in drafting the tender for the procedures for the award of public procurement contracts is subject to the rules imposed by the provisions of Article 170-171 of G.E.O. no. 34/2006, according to which: “The tenderer prepares the offer in accordance with the provisions of the award documentation (...). The tender is mandatory, from the standpoint of content, throughout the period of validity established by the contracting authority”.

The rules relating to the award documentation on indicating SUPPLIERS of the tenders, they have been specified by point IV.4.1) “The technical proposal presentation manner „in the data sheet, as follows:” The tenderers will submit technical comments containing necessarily the manner to ensure the human and material resources required to carry out the works, the technical specifications of the main materials by indicating the suppliers”.

For the requirement thus imposed, through its technical proposal, the complainant S.C. X S.R.L. stated that the suppliers of materials in the procedure, are:

- S.C. _ S.R.L. – for asphalt mixtures, concrete, aggregates, materials for which it submitted certificates of conformity and the factory production control;
- S.C. _ S.R.L. – for concrete aggregates;
- S.C. _ S.R.L. – which it submitted declarations of conformity for the product „tiles”;
- S.C. _ S.A. – for which it has submitted declaration of performance for the products pavers and curbs.

Nowhere in the technical proposal was a reference to S.C. _ S.R.L. - in insolvency as a provider of any type of material to the complainant S.C. X S.R.L. under the framework agreement, nor for the fact that that company be a third party interposed between the companies listed in the preceding, invoked through the complaint as being

producers (different from the technical proposal), and the complainant - eventually performer of the works within the scope of the framework agreement, the beneficiary of any supplies of materials from the third party S.C. _ S.R.L. - in insolvency.

Thus, the modification of the technical proposal on the requirement specifying the „the manner to ensure material resources (...) necessary to perform the works, the technical specifications of the main materials by indicating the suppliers” falls within the provisions of Article 79 paragraph (2) of G. D. no. 925/2006 according to which “If the tenderer amends through the replies offered, the contents of the technical proposal, its tender will be considered non-compliant” and the fact that the tenderer has not been able, on justifying the apparently unusually low price of the render, to maintain its technical proposal in the form in which it was presented, by amending it, the provisions of paragraph (4) of Article 36 index 1 of G.D. no. 925/2006 became incident- “If the tenderer does not submit the requested information or these information that cannot justify the apparently unusually low price, the tender falls under Article 36 paragraph (1) letter f)” in this respect, and the tender being also unacceptable.

In addition to the legal situation of the complaint's tender, resulting from the aforementioned, the document presented as the emanation of S.C. _ S.R.L. - in insolvency invoked post factum as sole supplier



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of the complainant, document illegibly signed, without registration number and without mentioning clearly the name and quality of the signatory person, cannot be an accompanying document, to prove the prices used in the substantiation calculations of the complainant's financial proposal, conditions under which the public information available on the website of the courts and the public ministry press releases, that invoked provider is administered by a special administrator and managed by a trustee, who are the only entitled to manage the activity, and to engage the debtor S.C. __ S.R.L. - in insolvency, the more it is in the special position of a defendant company being prosecuted on charges of serious crimes, on the assets belonging to S.C. __ S.R.L. - in insolvency, with the measure of seizure established.

Therefore, the special situation of the supplier invoked required increased diligence on behalf of the petitioner in to constitute clear evidence of sustainability of the tender submitted and its prices, in the meaning to have specified the providers in the technical proposal as required by the award documentation, and subsequently to have maintained the content of the technical proposal in the reply to justify the price offer, by presenting justifications on the real possibilities of fulfillment of the contractual commitments through a potential involvement of the invoked company in insolven-

cy, post factum and pro causa, as the supplier of all the construction materials necessary to carry out the framework agreement during the 4 years period.

In the same meaning of those retained is the control court practice over the legality of the decision of the Council, relevant being Civil Decision no. 5.369/2014 issued by CAB, Decision VIII of the Administrative and Fiscal – "(...) the Council correctly noted that the replies submitted by the tenderer are not edifying, as the tenderer, in an attempt to justify the apparently unusually low price, it did not take into account those indicated in its technical offer. (...) The Council noted correctly that the risk of preparing the tenders lies with the economic operator, it cannot invoke its own fault as reason for indication and submittal of tenders from particular suppliers, and later, due to requests for clarification, to change them, given that it was aware of the contracting authority's request imposed on the modality to prepare the technical offer (...)" ; Civil judgment no. 4.254/2014, delivered by Timișoara Court of Appeal, Administrative and Fiscal Division– "(...) the Court, like the Council notes as correct the solution of the contracting authority, in relation to the requirements of the Procurement Data Sheet.

Thus, the court finds that the requirement of the award documentation is clear and binding on all tenderers, meaning that the economic operators are obligated to submit the list of main materials by indicating the provider.

Since through the tender submitted, the complainant mentioned as supplier S.C. M S.A., the information becomes integral part of the technical proposal and cannot be modified by a subsequent comeback of the tenderer. (...) This standpoint is supported by the provisions of Article 171 of the Ordinance, which states that the tender is binding in terms of content, throughout the period of validity established by the contracting authority.

Therefore, any change of the tender detail components by removing the original supplier and introducing a new supplier for some of the material is a modification of the technical proposal, which justifies the solution to reject the tender as non-compliant „, Judgment no. __/2013, delivered by Oradea Court of Appeal– "(...) The Council considered justified that by switching the supplier, it amended its initial financial offer, being applicable the provisions of Article 3 letter of G.E.O. no. 34/2006 (...) of Article 171 of G.E.O. no. 34/2006 and of Article 79 of G.D. no. 925/2006 (...)" .

Holding that petitioner forces a superficial and formalistic interpretation of the law on public procurement, and the contracting authority rejected thoroughly and legally the tender submitted by S.C. X S.R.L., the exact reason for rejection being expressly stated in the communication address of the result of the procedure, the Council under the provisions of Article 26 paragraph (6) of Law no. 101/2016, will reject as unfounded the complaint of the petitioner, made contradictory with Y (...)" .

THE NON-COMPLIANCE DUE TO THE ABSENCE OF SPECIFIC INFORMATION OF A SIGNIFICANT PART OF THE TECHNICAL PROPOSAL – PCCVI

Moving on to solve on merits the complaint brought by S.C. __ S.R.L., leader of the association S.C. __ SRL - S.C. __ S.R.L., against the result of the procedure, namely against the rejection of its tender as non-compliant, under Article 36 paragraph (2) letter a) and 79 paragraph (1) of GD no. 925/2006, the Council notes that, by address no. __/2016 including the result of the procedure was communicated reason for rejection to the tenderer: «... You have submitted a document PCCVI for the work pages 468-469 but it does not contain any element of a plan of quality control, checks and tests according to the quality manual and your procedures especially since in the procedures you have attached to the technical proposal you refer to the tests and checks specified in PCCVI, to the minutes prepared in accordance with PCCVI". [...] PCCVI is an internal document which is endorsed by the contractor's responsible personnel for quality and is different from control program in crucial phases of execution. [...] By analyzing the reply given in the documents in the technical documentation, the evaluation committee considered that the answer is inconclusive because the tenderer did not present the tender submitted in the Plan for

Quality Control ,Testing and Verifications (PCCVI) as was requested through the date sheet, nor did he sought clarification from the previous period for submission of tenders... In accordance with Article 201 of GEO no. 34/2016: (1) During the award procedure, the contracting authority has the right to ask for clarifications and, if necessary, supplements to the documents submitted by the tenderers/candidates to demonstrate the fulfillment of requirements set out through the criteria for qualification and selection, or to demonstrate compliance of the tender with the requirements requested. (2) The contracting authority is not entitled that by the clarifications/completions required to determine the appearance of an obvious advantage in favor of a candidate/tenderer. By way of example, to demonstrate both what must a Plan of Quality Control, Verifications and tests contain, and to demonstrate the quality of the works performed, and the importance of monitoring by both the executor and the beneficiary during the performance of works, we will attach an extract from AND 530/2012, The Plan for Quality Control, Testing and Verification of the execution of the embankments (PCCVI) [...].

Both from the document submitted in the technical proposal and the response sent to the request for clarifications it is abundantly clear that in the technical proposal was submitted the Control program in critical execution phases instead of Program for Control, Testing and Verifications (PCCVI). Thus, the evaluation committee appreciates that you did not prove the fulfillment of the minimum requirements of the specifications on the technical proposal and the procurement data sheet, as was required by the awarding documentation...».

The Council also noted that, through the procurement data sheet, Chapter IV.4.1) „Presentation of technical proposal" was required from the economic operators:" 5. Quality Plan proposed for the implementation of this work, including the technical execution procedures lists of the main categories of works, plan for quality control, verification and testing, the laboratories used and authorized to a degree appropriate for the works". Given this requirement, within the technical proposal, i.e. in the plan for assurance of the quality of works, S.C. __ S.R.L. presented PCCVI for the work (pages 468-469), showing the following information:

[...] In reference to the same requirement, by address no. __/2016, the contracting authority has asked the tenderer following clarification: „4. Through the data sheet was required the plan for quality control, verifications and tests. You have you filed a document „PCCVI for work" pp. 468-469 but it does not contain any element of a quality control plan, We ask you to clarify! „, For this request for clarification, the challenging company has submitted the following reply: „4. In the data sheet we have the following requirement: "pt. IV.4.1 Presentation of the technical proposal: The technical offers will comply with all the requirements of the specification. The tenderer shall submit the following technical aspects that will be needed to evaluate offers: ... 5. The Quality program proposed for implementation of this work, inclu-

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ding lists, technical procedures for implementing the main categories of works, plan for quality control, verifications and tests, laboratories used and authorized with a degree appropriate for the works...”.

In the technical proposal submitted by the association S.C. __ S.R.L. & S.C. __ S.R.L. is found at pp. 427-428 - the work quality assurance program that meets all of the data sheet. We mention that the quality assurance program, including the structure, its componence, presentation manner, is specific to each tenderer, and there is no certain type required. The designer determines in the specifications the requirements regarding the test for each kind of work. On the other hand, the provisions of Article 2, Article 6, Article 7, Article 9, Article 10, Article 12, etc. of the procedure for conducting the procedure on state control in critical execution phases for mechanical resistance and stability of buildings - indicative PCF 002 of 2014, specifies that the control program becomes mandatory by acquiring of the respective program by the beneficiary, the designer, and the performer. The final drafting of the program is made by the designer (who also studies the proposed by the implementer. Implementer means the winning tenderer of the procurement). The designer transmits the final control plan which is endorsed by the beneficiary and the implementer, which is then transmitted to the State Building Inspection, which makes the changes, and after approval will become a final official document to verify the works. Thus, through the technical proposal ... the association S.C. __ S.R.L. & SC __ SRL must demonstrate the capability to achieve the quality level required by the project through its own quality system through proprietary technology ».

In terms of the retained, given the requirement of the award documentation for presentation in the technical proposal of the Plan of quality control, verifications and tests (PCCVI), and the document presented by the challenging company called „PCCVI for work” reveals that it does not meet the requirement imposed. The document called „PCCVI for work”, presented by the challenging company refers to „physical stage, critical phase, hidden parts, control phase” and highlights the participants (B- beneficiary, P- designer, ISC – State Building Inspection, E- Implementer) thereof and the documents to be drawn up (PVLA, PV, PVR), without meeting the requirement in question. As long as the requirement that led to the rejection of the tenderer concerned the submittal of a plan of quality control, verifications, and tests, it would have been required the submission of a document highlighting the verifications and tests planned for the main categories of works that will be performed in accordance with the requirements of the specification. Given that, through the specifications have been included information in reference to verification and tests needing to be performed for the work to be executed, it required the tenderer to submit the plan for quality control in question in relation to those elements (verifications and tests). In this respect, the PCCVI model was also for exemplification, according to AND Instruction no. 530/2012, presented by the contracting authority in the address to communi-

cate the result of the procedure no. __/2016, as was noted in the pages above. The recalled model includes the categories of works, verifications, and inspections; the manner to carry out verifications and inspections; who perform inspection / verification; the documents produced; place to keep them. It is true that the respective model is for execution of earthworks, as the challenging company claims, but according to Article 1.3 „Use” of the AND Instruction no. 530/2012 these instructions apply to the quality control for the executed earthworks for national roads and highways. The field of use can be extended to other roads categories, as the contracting authority revealed.

Therefore, one cannot conclude that the model presented by the contracting authority in the communication of the result was wrong. It is true that through the award documentation did not set a specific model for drawing up PCCVI's, but as long as the control plan required is for quality, verifications, and tests, such considerations had to be revealed by the contracting company to fulfill the requirement of having view of those contained in the specifications, in this respect. The mere reference in the document entitled „PCCVI for work” presented by the author of the complaint, to „physical stage, critical phase, hidden parts, control phase” participants (B- beneficiary, P- designer, ISC – State Building Inspection, E- Implementer) for

these, as well as documents to be drawn up (PVLA, PV, PVR), cannot be considered sufficient to meet the requirement in question. As the challenging company has shown, the program for quality assurance, including the structure, its composition, its presentation, is specific to each tenderer and there is no certain type imposed by an official act in force, but as long as the requirement at issue concerns the presentation a plan of quality control, verifications, and tests, was requires the disclosure of such information, verifications, and tests for the main categories of works that will be performed, and not for the „physical stage, critical phase, hidden parts, control phase,” as the challenging company has considered.

On the other hand, a request for completing the document in the sense of detailing the tests and verifications required by the specification and the manner to achieve them, respectively the category of work, methods of testing/verification, papers prepared, the persons conducting them, place of keeping etc. is not possible, such an approach drawing the modification of the technical proposal and rejection of the tender. The fact that the contracting authority made reference to the quality manual in address no. __/2016 through which was asked for clarification, although the tenderer did not submit the quality manual, it cannot be considered wrong, as claimed by the compla-

inant. Sending the contracting authority to the quality manual was made in the context in which this document is of reference, any other documents related or complementary, as well as the quality program for the work, the plan for quality control, verifications and tests; (PCCVI), must be made taking into account its information or starting from these information. It should also be noted that, although the challenging company claimed that it presented through the technical proposal both the approach related to works, work methodology, and the monitoring and measurement activities, the type of checks, the minimum frequen-



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cy of checks, the conditions of eligibility, the limit of deviations permissible for categories of works related to the present award procedure, it did not indicate, in particular, where one can find this information, to be considered for the main categories of works. Or, as long did not indicate in concrete this information, the contracting authority had no way to request and accept PCCVI's amendment, by classifying those omissions in the category vices of form, according to Article 80 paragraph (3) of G.D. no. 925/2006. Being an explicit requirement to be met, the complainant company had the opportunity to seek clarification on it or even to challenge it, in the absence of such steps the appropriating the requirement.

Moreover, according to Article 170 of GEO no. 34/2006, the offer shall be made in accordance with the requirements the award documentation, presentation of the quality control plan, checks and tests (PCCVI), being such a requirement that was not complied with. By failing to comply with this requirement, the tenderer has assumed the risk that its tender be rejected as non-compliant.

Is determined in these conditions that offer the association S.C. __ S.R.L. - S.C. __ S.R.L. was correctly rejected as non-compliant for failing to fulfill the requirement of submission of the plan for quality control, checks and tests (PCCVI), the complainant's criticism of this standpoint being considered unfounded.

Regarding the second reason for rejection the Council notes that in Part IV: Selection Criteria, in the DUAE, Section α: Global indication for all the selection criteria, was checked by the contracting authority this option, which did not allow checking and detailing by the economic operators of the requirements of the following sections. That is, by selecting this option it is understood that the contracting authority requires only a global statement that the respective criteria are met.

If they wouldn't have checked that option, it would have been understood that the contracting authority asks for detailed information for the respective requirements. This aspect also results from the Annex to the Implementing Regulation (EU) 2016/7 of the Commission of January 5, 2016.

Regarding the fact that S.C. __ S.R.L. checked „with markers” this box, posting in S.E.A.P. the DUAE form under an electronic signature, it showed that it assumed the fulfillment of the selection criteria imposed by the data sheet of the procurement at this stage of the awarding procedure.

In light of the above mentioned, by comparing the requests of the contracting authority in its own DUAE form, with the information submitted by the complaint in the form submitted in S.E.A.P., the Council notes that the reasons given by the contracting authority, in justification for rejecting the tender from S.C. __ S.R.L., are unfounded, the more so since it did not indicate certain criteria for filling in the DUAE in accordance with its responsibility in this regard.

Thus are the relevant provisions of pt. 3 of the Implementing Regulation (EU) 2016/7 of the Commission establishing the standard format for the single European purchase document, according to which: “To avoid administrative tasks for the contracting authorities and contracting entities, and possibly, the conflicting indications in the various documents of the procurement, the information that the economic operators must submit in DUAE should be clearly defined in advance by the contracting authorities and the contracting entities in the call for competition tendering procedure or by reference to other parts of the procurement documents, which the economic operators must, in any case, examine carefully for their participation and eventual submission of tenders”, and also the provisions of Article 20 paragraph (5) and (6) of G.D. no. 395/2016, which stipulates that: „(5) The contracting authority is required to generate DUAE electronically filled in with the information requested in relation to the qualification and selection criteria established through the tender documentation, marking the fields in the form for which references must be submitted by the economic operators, corresponding to the respective requirements, and attach it in SEAP along with other documents of procurement.

(6) The contracting authority must ensure the correlation between the information requested in the data sheet of the procurement and those

marked in DUAE to be filled in by the interested economic operators, mentioning the in the data sheet of the procurement how the DUAE can be accesses in order to be filled in by the interested economic operators.”

Therefore, the complainant party cannot be penalized for any deviation from the manner of filling in the DUAE „in accordance to the criteria set by the contracting authority” as long as no modality of filling in the DUAE nor any criteria have been previously established and presented to the tenderers in the form from the award documentation, in terms of the degree of detail of the information required by the contracting authority.

Given the above, the Council notes that the measure of rejection, as unacceptable, of the

tender of the complainant, based on the reason stated, is excessive, in relation to the principle of proportionality set out in Article 2 paragraph. (2) of Law no. 98/2016.

Therefore the rejection of the offer as unacceptable in this case is contrary to provisions of both Article 215 paragraph. (5) of Law no. 98/2016 (“The tender is unacceptable if it doesn't satisfy the form conditions relating to preparation and presentation, as well as the requirements on the qualification and selection criteria set out in the procurement documents”) and of Article 123 of G.D. no. 395/2016 (“The tenderer drafts the offer in accordance with the provisions of the tender documentation...”), and the purpose of DUAE, which, according to NAPA Guide, „is a solemn declaration by the economic operator, that it ... meets the qualification and selection criteria specified by the contracting authority / entity ...” which is a document facilitating the economic operators' participation to the procedures for awarding public procurement contracts, and not a means of containment in this regard.

It is not without interest to also retain that, according to Article 209 paragraph. (1) of Law no. 98/2016, “If the information or documents submitted by the economic operators are incomplete or incorrect, or if some documents are missing, the contracting authority is entitled to request within a certain period, tenderers / candidates for clarification and, where appropriate, additions to the documents submitted by them within the tenders or requests to participate, by respecting the principles of equal treatment and transparency”.



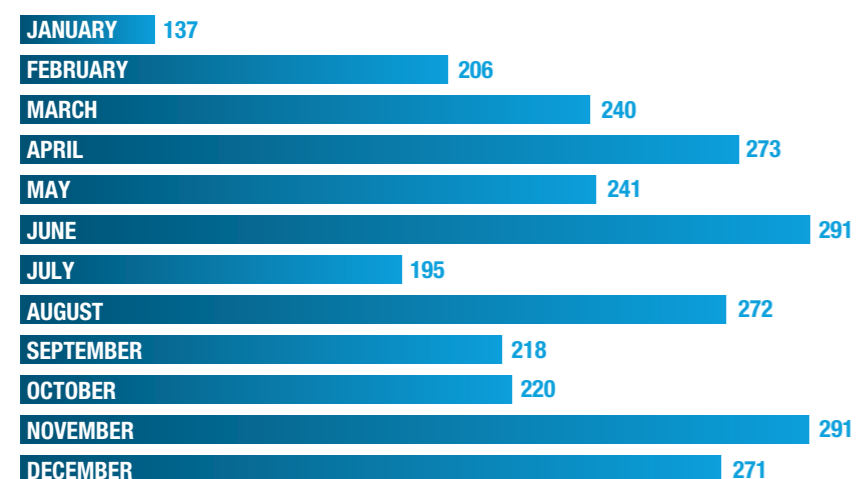
2.2. FILES SOLVED BY N.C.S.C.

2.2.1. EVOLUTION OF FILES SOLVED BY N.C.S.C.

During 2016, the solving complaints panels within N.C.S.C. issued 2,348 decisions, meaning the solving of a number of 2,885 files.

The annual evolution of the case files solved by the 11 solving complaints panels within the Council is as it follows:

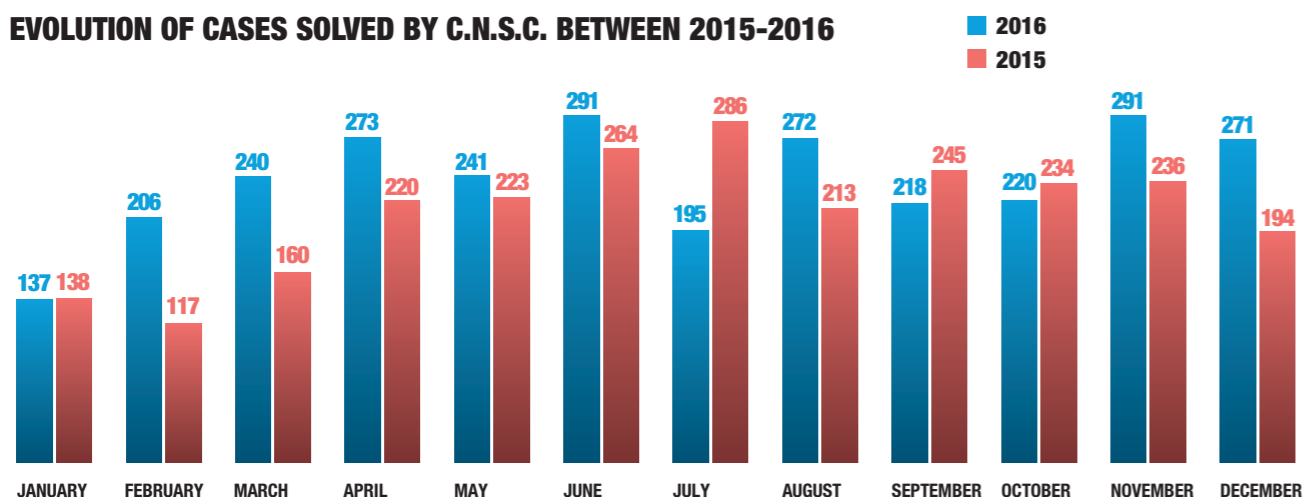
EVOLUTION OF CASES SOLVED BY N.C.S.C. IN 2016



JANUARY	137
FEBRUARY	206
MARCH	240
APRIL	273
MAY	241
JUNE	291
JULY	195
AUGUST	272
SEPTEMBER	218
OCTOBER	220
NOVEMBER	291
DECEMBER	271

Comparing the number of cases resolved by N.C.S.C. during 2015 and 2016 we note that last year the Council has solved 325 files more compared to the previous year, which meant an increase of 12,84%, which is apparent from the chart below.

EVOLUTION OF CASES SOLVED BY C.N.S.C. BETWEEN 2015-2016



It should be stressed that since the establishment of the Council until 31 December 2016, the total number of cases solved by the panels of solving complaints within the institution has reached 56,702.

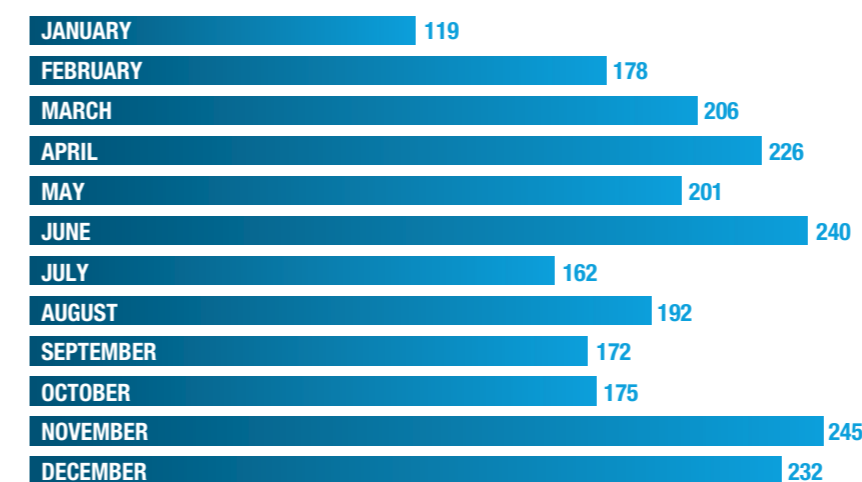
2.3. DECISION TAKEN BY N.C.S.C.

2.3.1. EVOLUTION OF THE NUMBER OF DECISIONS ISSUED BY N.C.S.C.

During 1 January - 31 December 2016, the 11 panels for solving complaints within N.C.S.C. issued a number of 2,348 decisions.

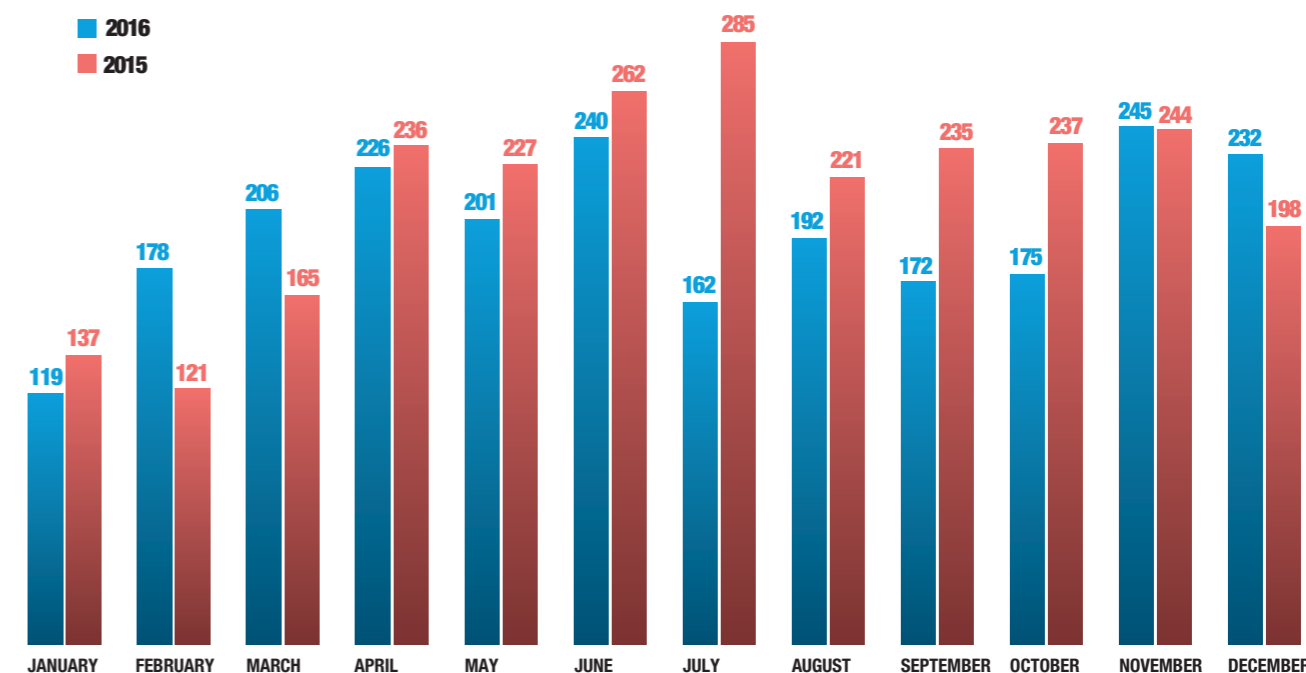
Broken down by months, in 2016, the situation of the decisions issued has evolved as follows:

EVOLUTION OF THE DECISIONS ISSUED BY N.C.S.C. IN 2016



JANUARY	119
FEBRUARY	178
MARCH	206
APRIL	226
MAY	201
JUNE	240
JULY	162
AUGUST	192
SEPTEMBER	172
OCTOBER	175
NOVEMBER	245
DECEMBER	232

EVOLUTION OF THE DECISIONS ISSUED BY N.C.S.C. BETWEEN 2015 - 2016

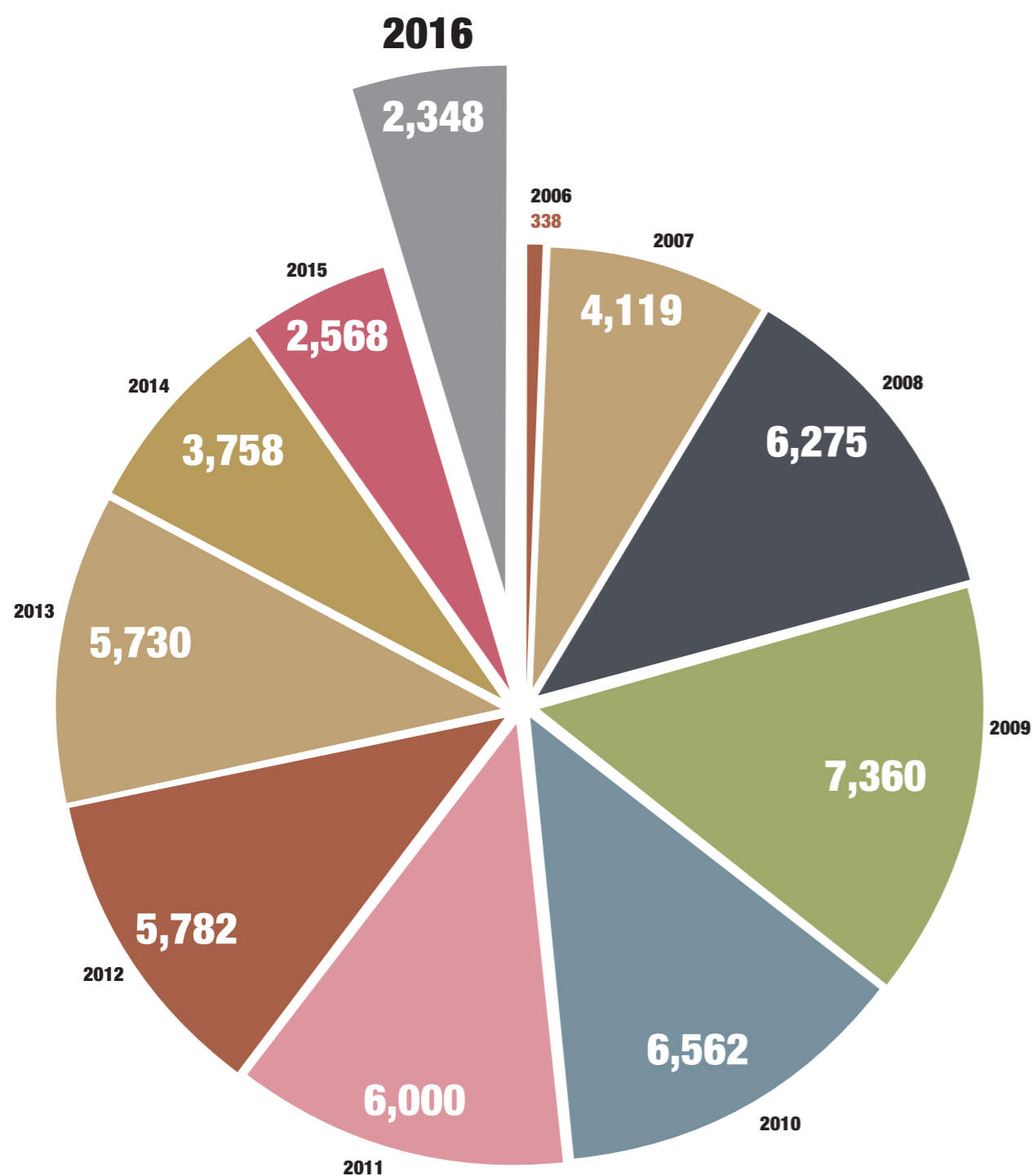


EVOLUTION OF THE NUMBER OF DECISIONS ISSUED BY N.C.S.C.

In 2016 the number of decisions issued by N.C.S.C. decreased by 8,57% compared to the previous year (220 decisions).

Overall, since the establishment of the Council until 31 December 2015 the total number of decisions issued by the institution was of 50.840.

SITUATION OF THE DECISIONS ISSUED BY NCSC BETWEEN 2006-2016



**2.3.2. SITUATION OF THE COMPLAINTS
LODGED WITH N.C.S.C.**

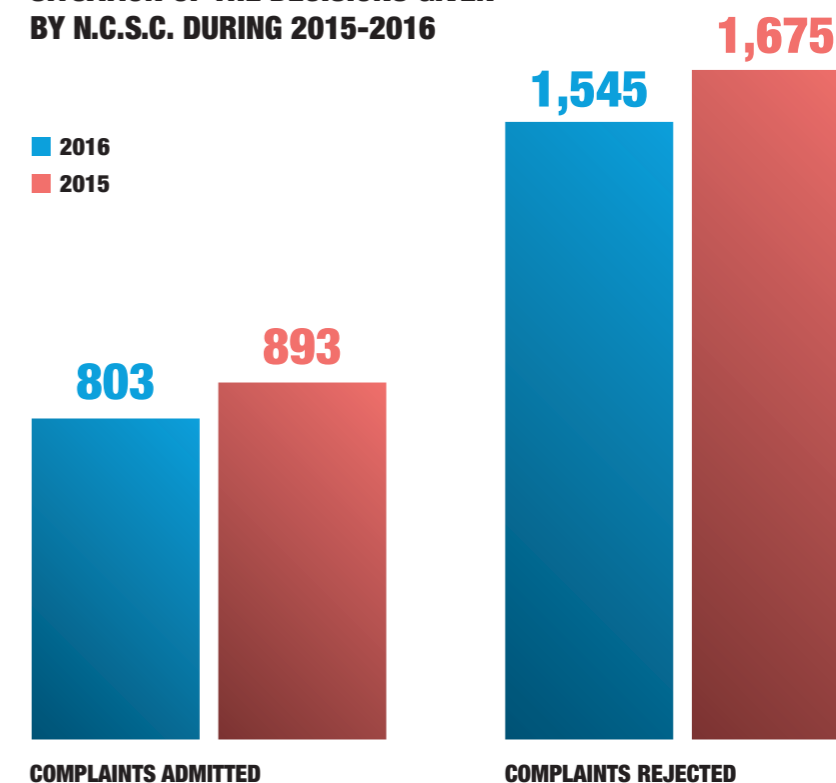
As previously specified, between January 1-st and December 31-st, the total number of decisions issued by the 11 panels for solving complaints within N.C.S.C. was of 2.348.

As a result of solving the complaints lodged by economic operators, the Council delivered:

- ✓ 803 decisions for which it ordered to admit the complaints formulated by the economic operators. For these cases, it was considered, regarding the contents of the legal contentious report formulated for settlement, giving favor to the complainant. The solution requested by the complainant and adopted during the deliberations by the settlement panel, is in line with the administrative - legal defense necessity of the subjective right violated or unrecognized and reconsidering it as to provide for its holder the advantages acknowledged by the law.
- ✓ 1.545 decisions ordering the denial of the complaints lodged by the economic operators because:
 - Council was forced to „be silent”, motivated by the fact that it was invoked by the parties or ex officio a plea on the merits or a procedural plea (the complaint was late introduced, it was unnecessary, was inadmissible, without purpose, without interest, was introduced by people without quality, etc.);
 - The Council appreciated, regarding the content of the resolved complaint, to give in favor of the contracting authority, because the litigious substance of the complaint submitted by an economic operator proved to be groundless/ill founded;
 - The complainant used its right to waive the complaint raised, thus ending his contentious action. Thus the mere request for waiver of the objection raised by the initiator of the litigious approach results in immediate closure of the file.

Analyzing the chart above, results that the percentage of the decisions issued by the Council which admitted the complaints, and the decisions which rejected the complaints in 2016 have not undergone major changes compared to 2015. Thus the percentage of admitted complaints remained in 2016 at a similar percentage (65%) with last year, while the percentage of rejected complaints also remained constant (34%).

**SITUATION OF THE DECISIONS GIVEN
BY N.C.S.C. DURING 2015-2016**

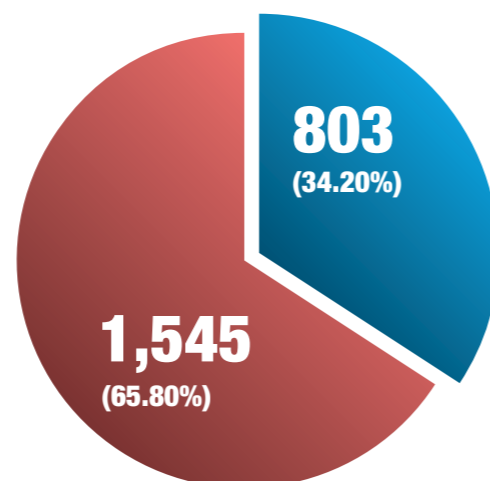


SITUATION OF THE COMPLAINTS LODGED WITH N.C.S.C.

The chart above shows that following the resolving of the complaints lodged by the economic operators, for 34,20% of the decisions issued by N.C.S.C. during 2016 was ordered the admission of the complaints, while for 65,80% of the decisions issued by N.C.S.C. was ordered rejection of the complaints and the continuation of the award procedures.

**SITUATION
OF THE DECISIONS
GIVEN BY N.C.S.C.
IN 2016**

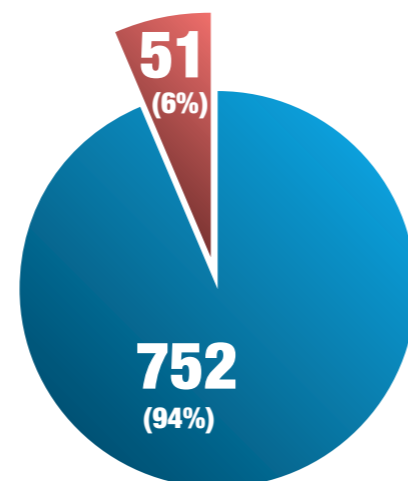
■ COMPLAINTS ADMITTED
■ COMPLAINTS REJECTED



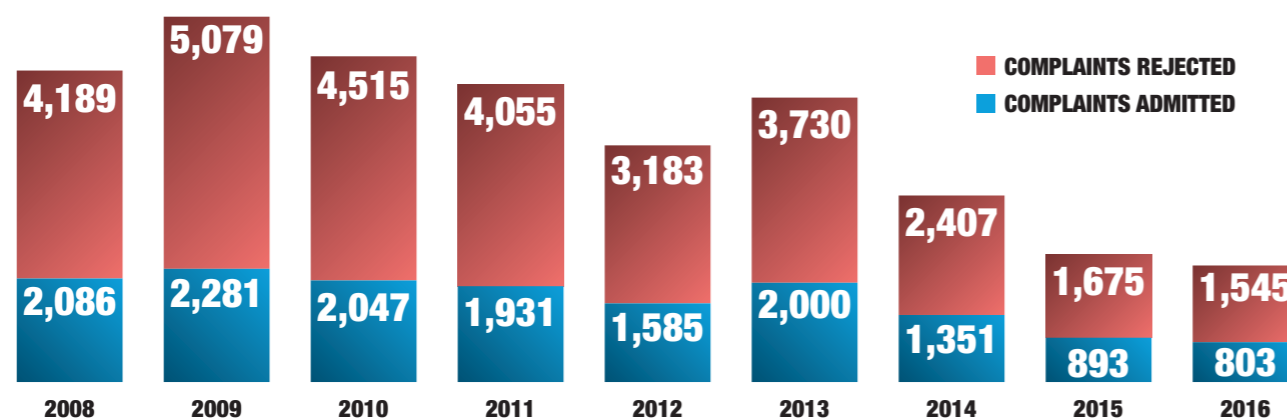
Regarding the admission decision (803 decisions issued by the Council), of the existing data can be seen that in the case of 51 decisions (6,35%), was ordered cancellation of the award procedure, in 752 decisions (93,65%) the Council ordered remediation of the awarding procedures - so they can continue by respecting the legal provisions.

**MEASURES ORDERED
BY N.C.S.C. AFTER
THE ADMISSION
OF COMPLAINTS IN 2016**

■ DECISIONS GIVEN BY N.C.S.C.
ORDERING ADMISSION OF THE
COMPLAINTS AND REMEDY
OF THE PROCEEDINGS
■ DECISIONS GIVEN BY N.C.S.C.
ORDERING ADMISSION OF THE
COMPLAINTS AND CANCELLATION
OF THE PROCEEDINGS



COMPARATIVE SITUATION OF THE DECISIONS GIVEN BY N.C.S.C. DURING 2008- 2016



Looking at the figures above, we can notice that due to the settlement of the complaints lodged by the economic operators, the percentage of admissions solutions to challenge the complaints made by economic operators to the decisions of the N.C.S.C. since its establishment to date is constant, at approximately 34%, while in the case of 64% of the decisions issued by N.C.S.C in the same time interval, it was decided rejection of the complaints lodged by the economic operators and the continuation of the procurement procedures.

2.4. N.C.S.C. ACTIVITY REPORTED TO THE ESTIMATE VALUE OF THE AWARDING PROCEDURES

2.4.1. ESTIMATED VALUE OF THE AWARDING PROCEDURES IN WHICH N.C.S.C. ISSUED DECISIONS

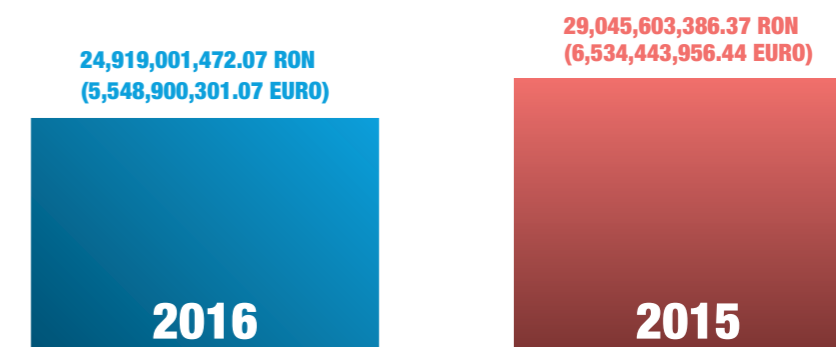
In 2016, N.C.S.C. issued decisions within certain public procurement procedures with an estimate value of 24.919.001.472,07 RON, equivalent to 5.548.900.301,07 EURO¹², thus resulting a value with 14,21 % less than in 2015.

In terms of value, in 2016 the estimated total value of the awarding procedures for which N.C.S.C. gave decisions to admit the complaints lodged by the economic operators was of 8.897.203.673,05 RON, equivalent to 1.981.206.839,10 EURO¹³.

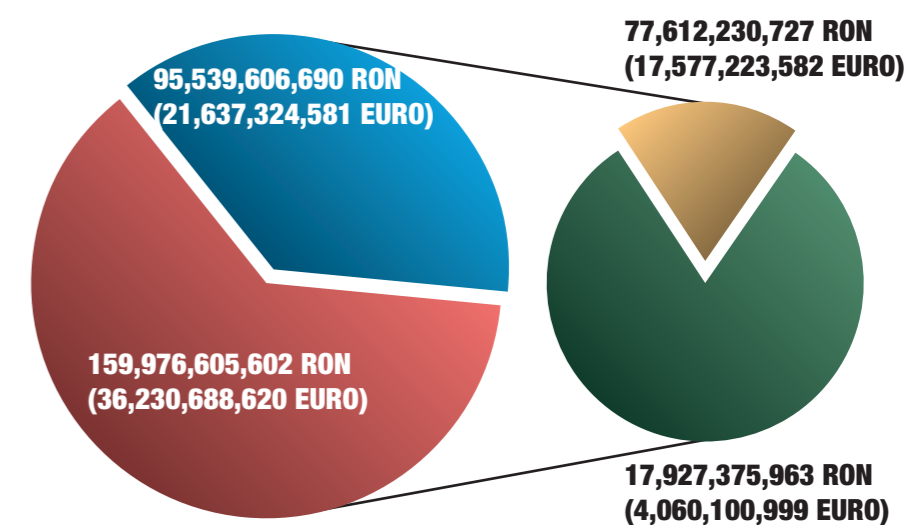
Also throughout 2016 the estimated total value of the awarding procedures for which N.C.S.C. gave decisions of rejecting the complaints lodged by the economic operators was of 16.021.797.799,02 RON, equivalent to 3.567.693.461,97 EURO¹⁴.

Of the total value of procedures for which decisions have been issued for admitting the complaints in 2016, the estimated total value of the awarding procedures for which the Council ordered annulment was of 2.131.618.231,57 RON, equivalent to 474.663.363,22 EURO¹⁵, and the one of award procedures that were ordered remedial measures amounted to 6.765.585.441,48 RON, equivalent to 1.506.543.475,88 EURO¹⁶.

EVOLUTION OF THE DECISIONS GIVEN BY N.C.S.C. IN RELATION TO THE ESTIMATED VALUE BETWEEN 2015 - 2016



TOTAL ESTIMATED VALUE OF THE AWARD PROCEDURES IN WHICH N.C.S.C. ISSUED DECISIONS BETWEEN 2011 - 2016



■ ESTIMATED VALUE OF THE PROCEDURES IN WHICH N.C.S.C. REJECTED THE COMPLAINTS
■ ESTIMATED VALUE OF THE PROCEDURES IN WHICH N.C.S.C. ADMITTED THE COMPLAINTS
■ ESTIMATED VALUE OF THE PROCEDURES IN WHICH N.C.S.C. ADMITTED THE COMPLAINTS AND ORDERED CANCELLATION OF THE PROCEDURE
■ ESTIMATED VALUE OF THE PROCEDURES IN WHICH N.C.S.C. ADMITTED THE COMPLAINTS AND ORDERED REMEDY MEASURES FOR THE PROCEDURE

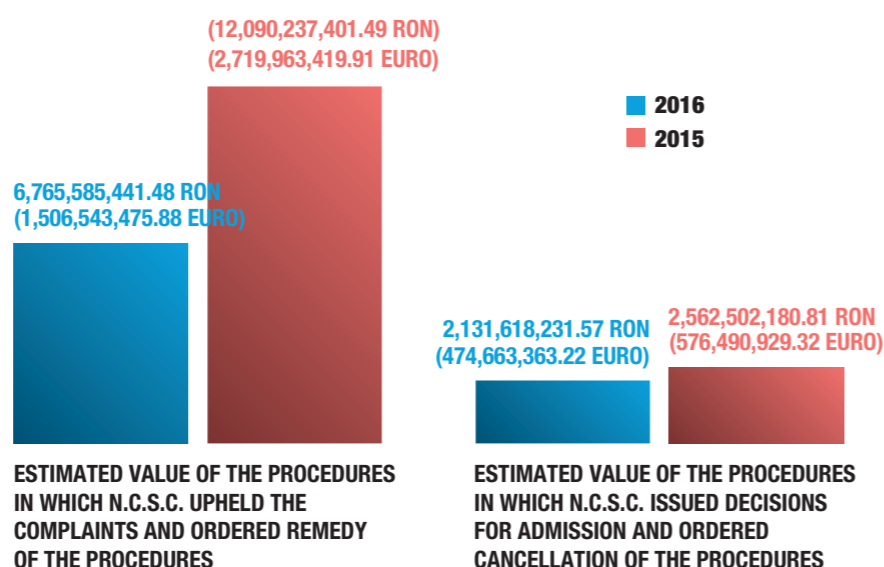
Analyzing this chart it can be seen that in 2016 the total estimated value of award procedures for which N.C.S.C. gave decisions for admitting the complaints lodged by the economic operators (8.897.203.673,05 RON) represented 35,70% of the total value of procedures in which N.C.S.C. has decided (24.919.001.472,07 RON), while the value of the procedures in which the Council issued decisions rejecting the complaints lodged by the economic operators (16.021.797.799,02 RON), represented 64,30% of the total value of procedures in which N.C.S.C. has decided.

As can be seen, compared with 2015, in 2016, the estimated value of the awarding procedures in which the Council admitted the complaints and cancelled procedures decreased by 16.82% compared to the previous year, while the estimated value of procedures in which N.C.S.C. admitted the complaints and ordered remediation of the procedures decreased by 44.04%.

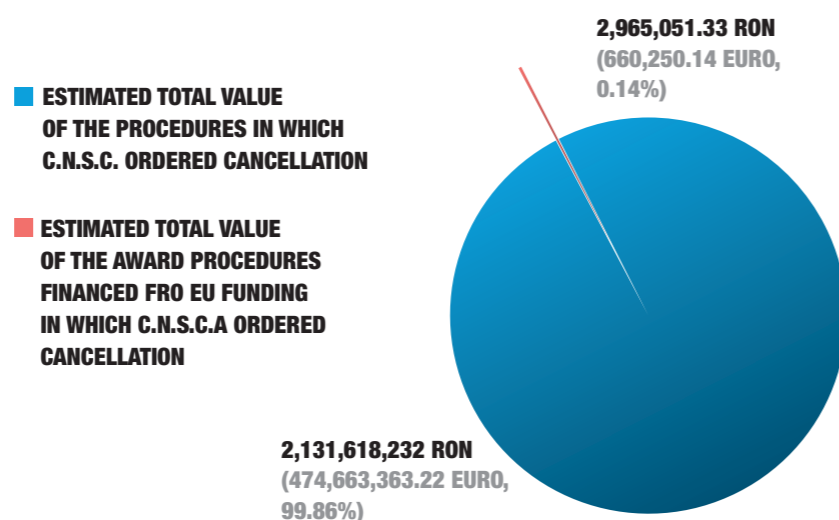
Analyzing the chart above we can see that although both the estimated value of the awarding procedures in which N.C.S.C. gave decisions which admitted the complaints and ordered the cancellation of the procedure, and the estimated value of the procedures in which the Council gave decisions which admitted the complaints and ordered remediation of the procedures, decreased, however, it must be emphasized that the Council once again demonstrated its role of effective filter to prevent irregularities in public procurements, given the significant amount of the estimated value of the awarding procedures in which N.C.S.C. gave decisions that admitted the complaints, and ordered the cancellation of the procedure (2.131.618.231,57 RON, equivalent to 474.663.363,22 EURO¹⁷).

Of the estimated value of 2.131.618.231,57 RON, equivalent to 474.663.363,22 EURO of the awarding procedures in which the Council ordered cancellation, the value of 2.965.051.33 RON, equivalent to 660.250,14 EURO represents the award procedures financed from European funds, meaning 0,14% of the total value of the award procedures in which cancellation was ordered.

ESTIMATED VALUE OF THE AWARD PROCEDURES IN WHICH C.N.S.C. ISSUED DECISIONS BETWEEN 2015 - 2016



ESTIMATED TOTAL VALUE OF THE AWARD PROCEDURES FINANCED FRO EU FUNDING IN WHICH C.N.S.C.A ORDERED CANCELLATION IN RELATION TO ESTIMATED TOTAL VALUE OF THE PROCEDURES IN WHICH C.N.S.C. ORDERED CANCELLATION



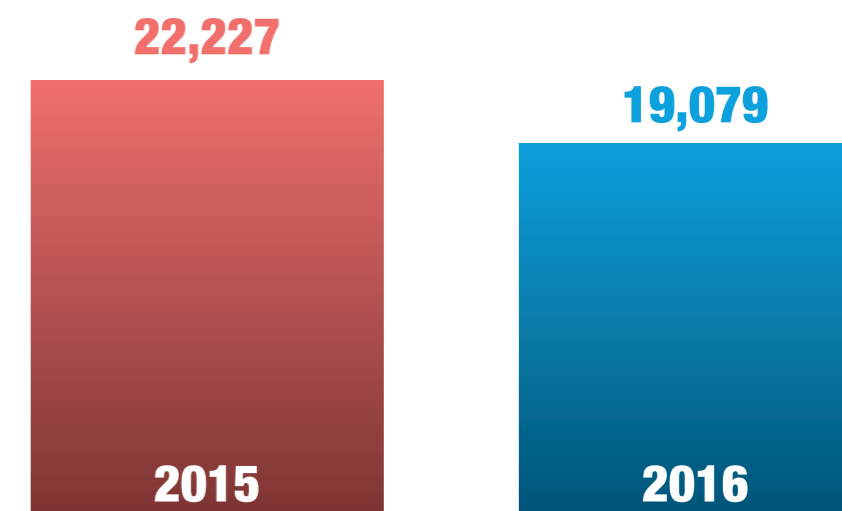
2.4.2. THE ESTIMATED VALUE OF PROCEDURES FOR WHICH N.C.S.C. ISSUED DECISIONS TO ADMIT THE COMPLAINT, COMPARED TO THAT OF PROCEDURES INITIATED IN S.E.A.P.

The official data provided by the Romanian Agency for Digital Agenda indicates that in 2016, within the communication platform used in the awarding process of the public procurement contracts (the Electronic System for Public Acquisitions - S.E.A.P.) were initiate a number of 19.079 award procedures, with a total estimated value of 61.285.374.141,01 RON, equivalent to 13.646.872.303,60 EURO¹⁸.

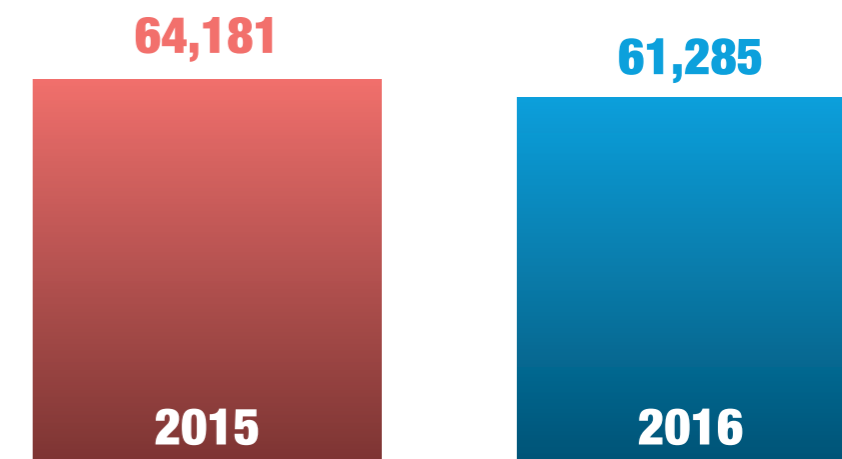
Compared to 2015 when in S.E.A.P. were initiated a number of 22.227 procedures for awarding public procurement contracts, with a total estimated value of 64.180.914.485,74 RON (14.523.854.828,18 EURO¹⁹), we can observe that in 2016, the number of award procedures of the initiated public procurement contracts decreased in terms of quantity by 3.148 procedures (-14,16%), and in terms of value the decrease was of 2.895.540.344,73 RON (-4,51%)

According to official data provided by A.A.D.R., in terms of quantity, in 2015 in S.E.A.P.

TOTAL NUMBER OF PARTICIPATION NOTICES INITIATED IN S.E.A.P. BETWEEN 2015 - 2016



TOTAL ESTIMATED VALUE OF THE AWARD PROCEDURES FOR THE PUBLIC PROCUREMENT CONTRACTS INITIATED IN S.E.A.P. BETWEEN 2015 - 2016 (million RON)



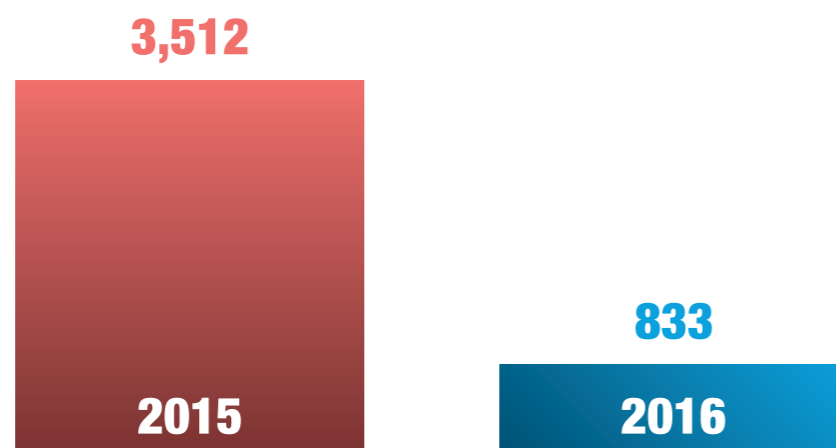
**THE ESTIMATED VALUE OF PROCEDURES FOR WHICH N.C.S.C. ISSUED DECISIONS TO
ADMIT THE COMPLAINT, COMPARED TO THAT OF PROCEDURES INITIATED IN S.E.A.P.**

were initiated a number of 3,512 procedures financed from European funds, while in 2016 their number was reduced to 833, which meant a decrease by 76,28% (2.769 procedures).

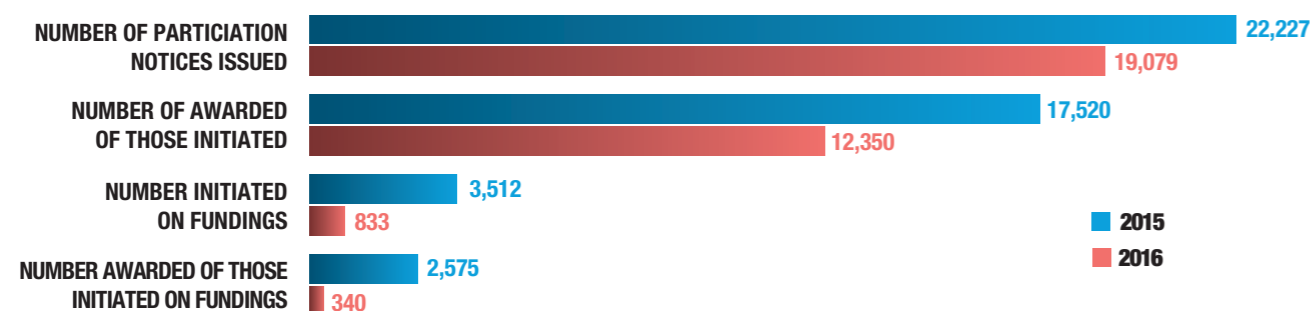
In terms of value, in 2015 in S.E.A.P. were initiated procedures financed from European funds with a total estimated value of 10.331.328.556,28 RON (equivalent to 2.337.933.594,99 EURO²⁰), while in 2016 their value decreased by 17,7% reaching the amount of 8.502.976.886,03 RON (equivalent to 1.893.421.414 EURO²¹)

Referring to funding procedures with European funds should be noted that in 2015 from the 3.512 procedures initiated in S.E.A.P. were awarded a total of 2,575 procedures worth 7.267.317.012,79 RON (equivalent to 1.644.561.442,13 EURO²²), while in 2016, of the 833 procedures initiated only 340 procedures were awarded amounting 1.001.827.919,27 RON (equivalent to 223.084.510,39 EURO²³).

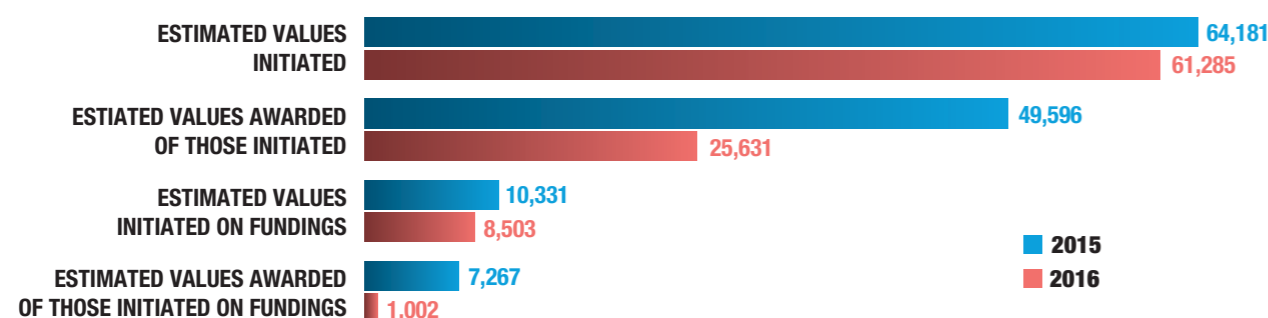
**NUMĂRUL TOTAL DE PROCEDURI ÎNȚIATE ÎN S.E.A.P.
DIN FONDURI EUROPENE ÎN PERIOADA 2015 – 2016**



**NUMBER OF PROCEDURES INITIATED AND AWARDED IN S.E.A.P.
THROUGH PARTICIPATION NOTICES AND INVITATIONS DURING 2015-2016**



**VALUE OF THE PROCEDURES INITIATED AND AWARDED IN S.E.A.P.
THROUGH PARTICIPATION NOTICES AND INVITATIONS BETWEEN 2015-2016 (million RON)**



It is therefore apparent that between 2015-2016 we have witness a decrease in the number of procedures awarded and financed by European funds through S.E.A.P. with 86,80%.

In terms of value, over the same period, we have witnessed a decrease in the number of procedures awarded and financed by European funds through S.E.A.P. by 86.21%.

In this context, it is worth mentioning that in June 2016, in S.E.A.P., no procedure financed under EU funds has been initiated.

Another important aspect that emerges from the official data provided by A.A.D.R. is that while the number of procedures initiated and awarded in S.E.A.P. decreased in 2016 compared to the previous year both in terms of numbers and in terms of value, however, the direct purchases by various public authorities (central and local) recorded a significant growth both in terms of quantity, and value. Thus, if in 2015 were initiated a number of 1,597,398 direct purchases, in 2016 their number reached 2,597,512 which meant an increase of 62.6%. In terms of total estimated value, the direct purchases initiated in 2015 had an estimated total value of 20.110.532.534,21 RON (equivalent to 4.550.923.859,29 EURO²⁴), while 2016 they reached a record of 657.164.938.820,61 RON (equivalent to 146.335.828.542,93 EURO²⁵).

2015	Number of initiated direct purchases	Estimated values initiated (RON)	Number of awarded direct purchases	Awarded values (RON)
JANUARY	83.433	226.037.485,04	77.936	151.829.588,12
FEBRUARY	108.894	2.259.638.840,89	102.271	2.144.374.199,03
MARCH	134.245	990.284.418,49	126.367	241.260.885,04
APRIL	124.596	735.424.868,66	116.147	407.302.356,69
MAY	138.687	3.535.478.221,20	129.925	578.931.688,70
JUNE	131.247	3.408.056.856,15	123.203	330.996.929,70
JULY	119.005	1.805.190.561,58	110.429	655.931.833,93
AUGUST	99.261	278.512.933,57	91.781	210.228.769,54
SEPTEMBER	140.398	1.339.696.198,24	131.533	536.079.598,86
OCTOBER	160.644	1.269.934.112,20	150.285	714.570.156,14
NOVEMBER	175.056	535.248.663,45	163.198	414.128.418,47
DECEMBER	181.932	3.727.029.374,73	171.784	492.509.209,99
TOTAL	1.597.398	20.110.532.534,21	1.494.859	6.878.143.634,20

2016	Number of initiated direct purchases	Estimated values initiated (RON)	Number of awarded direct purchases	Awarded values (RON)
JANUARY	83.193	308.979.588,75	77.526	165.866.482,64
FEBRUARY	125.414	2.824.689.880,91	117.672	2.696.476.841,44
MARCH	162.400	1.274.936.066,59	152.562	399.522.138,62
APRIL	164.066	5.214.745.263,66	153.831	1.392.476.169,75
MAY	163.411	5.104.451.275,50	154.186	2.894.188.826,16
JUNE	156.780	569.578.077,73	145.756	329.281.860,74
JULY	168.799	2.672.298.670,02	155.797	2.207.522.331,38
AUGUST	187.343	22.158.383.501,51	172.902	2.377.923.458,91
SEPTEMBER	263.529	548.056.845.591,71	243.529	546.606.687.335,39
OCTOBER	315.952	9.357.441.889,61	294.845	4.250.797.549,66
NOVEMBER	408.585	32.570.897.456,22	377.655	3.556.023.857,68
DECEMBER	398.040	27.051.691.558,40	373.633	19.075.619.726,13
TOTAL	2.597.512	657.164.938.820,61	2.419.894	585.952.386.578,51

**THE ESTIMATED VALUE OF PROCEDURES FOR WHICH N.C.S.C. ISSUED DECISIONS TO
ADMIT THE COMPLAINT, COMPARED TO THAT OF PROCEDURES INITIATED IN S.E.A.P.**

Comparing the total estimated annual value of the procedures initiated in 2016 in S.E.A.P. (61.285.374.141,01 RON, equivalent to 13.646.872.303,60 EURO) and the estimated total one of the procedures in which N.C.S.C. gave decisions (24.919.001.472,07 RON, equivalent to 5.548.900.301,07 EURO), results that the latter represented 59.34% of the total value of the procedures initiated in S.E.A.P.

But if we compare the total estimated annual value of the procedures initiated in 2016 in S.E.A.P. (61.285.374.141,01 RON) with the total value of the procedures in which N.C.S.C. upheld the appeals lodged by the operators and ordered remedial procedures/cancellation of the procedures (14.652.739.582,30 RON), results that the latter represented 23.90% of the total value of the procedures initiated in S.E.A.P.

At the same time, if we compare the total estimated annual value of the procedures initiated in 2016 in S.E.A.P. (61.285.374.141,01 RON) with the total value of the procedures in which N.C.S.C. issued decisions upholding the complaints lodged by economic operators and ordered certain measures we can observe the following:

- the estimated value of the procedures in which N.C.S.C. upheld the complaints and ordered remedial action was of 6.765.585.441,48 RON (11,04% of the total value of the procedures initiated in S.E.A.P.);
- the estimated value of the procedures in which N.C.S.C. upheld the complaints and ordered cancellation of the procedures was of de 2.131.618.231,57 RON (3,48% of the total value of the procedures initiated in S.E.A.P.).

61,285,374,141.01 RON



**ESTIMATED VALUE
OF THE PROCEDURES INITIATED
IN S.E.A.P. IN 2016**

**SITUATION OF THE ESTIMATED VALUE
OF THE PROCEDURES INITIATED IN S.E.A.P.
AND THE PROCEDURES IN WHICH THE COUNCIL
UPHOLD THE COMPLAINTS AND ORDERED
REMEDIAL MEASURES AND WILLING
OR CANCELLATION OF THE PROCEDURES**

6,765,585,441.48 RON



**ESTIMATED VALUE
OF THE PROCEDURES IN WHICH
N. C.S.C. UPHELD THE COMPLAINTS
AND ORDERED REMEDIAL PROCEDURES**

2,131,618,231.57 RON



**ESTIMATED VALUE OF THE
PROCEDURES IN WHICH N.C.S.C.
UPHELD THE COMPLAINTS
AND ORDERED CANCELLATION
OF THE PROCEDURES**

Comparing the values of the procurement procedures initiated in SEAP in 2016 (61.285.374.141,01 RON) with the previous years, respectively 2015 (64.180.914.485,74 RON) and 2014 (77.401.933.025,29 RON), we find that in 2016 the estimated value of the awarding procedures initiated by S.E.A.P. decreased by 4.51% compared to 2015 and with 20.82% compared to 2014.

Comparing the estimated value of the award procedures in which N.C.S.C. ordered the cancellation with the estimated value of the award procedures initiated in S.E.A.P. (3.47% - in 2016, and 3.99% - 2015), and taking into account that the total estimated value of the procedures initiated in S.E.A.P. in 2016 decreased by 4.51% compared to 2015, we have further proof that the N.C.S.C. is an efficient filter to prevent a significant number of irregularities in the public procurement procedures.

3. THE QUALITY OF THE N.C.S.C ACTIVITY CONDUCTED BETWEEN 1 JANUARY 2016 – 31 DECEMBER 2016

3.1. SITUATION OF DECISIONS GIVEN BY N.C.S.C. AND CHANGED BY THE COURTS OF APPEAL FOLLOWING THE COMPLAINTS MADE

3.1.1. SITUATION OF DECISIONS GIVEN BY N.C.S.C. ON THE MERITS OF THE COMPLAINTS CHANGED BY THE COURTS OF APPEAL FOLLOWING THE COMPLAINTS MADE

Respecting the constitutional principle of access to justice, the legislator has determined that it is necessary that the decision given by the Council after solving the complaint by administrative - legal proceeding to be „controlled” by a higher court of law, so as to allow correction of errors committed in the first settlement.

Therefore also in the case of administrative judicial decisions given by the Council, these are „verified” by a higher authority, respectively the courts of appeal in the area where the contracting authority operates, or the Bucharest Court of Appeal in the case of complaints against the decisions of N.C.S.C. given for public procurement contracts, including sectorial contracts and framework agreements in the fields of defense and security

The existence of such control is a guarantee for the parties concerned in the sense that any injustice can be removed / repaired, and for the counselors for solving complaints is an incentive for fulfilling their duties with the utmost rigor and ambition, knowing that their decision could be controlled by a higher court.

As a result of the solving by the Council of the complaints lodged by economic operators in accordance with Article 29, paragraph (1) of Law no. 101/2016, the decisions of the Council regarding the solution to the complaint can be challenged by a complaint within 10 days of communication, both on grounds of illegality and of groundlessness, to the court referred to by Article 32 paragraph (1) and (2) of the same law.

**SITUATION OF DECISIONS GIVEN BY N.C.S.C. ON THE MERITS OF THE COMPLAINTS
CHANGED BY THE COURTS OF APPEAL FOLLOWING THE COMPLAINTS MADE**

Under the legislation, the complaint against the decisions of N.C.S.C. can be initiated either by the contracting authority or by one or more economic operators involved in the procedure, or by the contracting authority with one or more economic operators involved in a public procurement procedure.

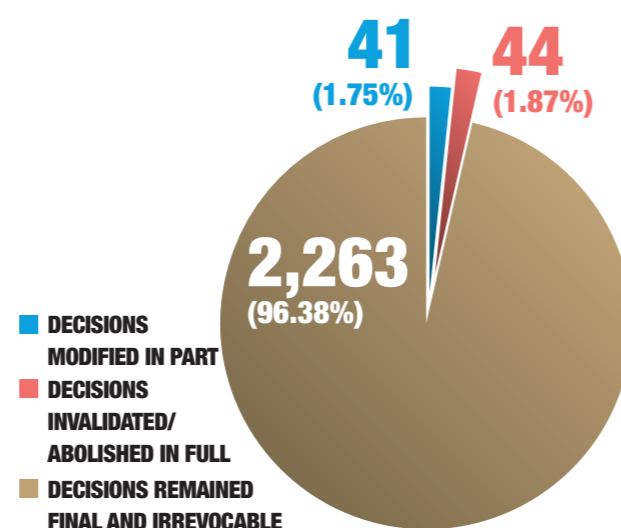
For this reason, against a decision issued by N.C.S.C. are often recorded more complaints lodged with the courts of law, respectively the competent Courts of appeal in whose jurisdiction the contracting authority is registered or the Bucharest Court of Appeal - administrative and fiscal department for solving complaints against the decisions of the Council on procedures for awarding services and / or works related to the transport infrastructure of national interest.

During 2016, of the total of 2.348 decisions issued by the panels for solving complaints within N.C.S.C. a number of 524 (22,32%) decisions were appealed in competent Courts of appeal.

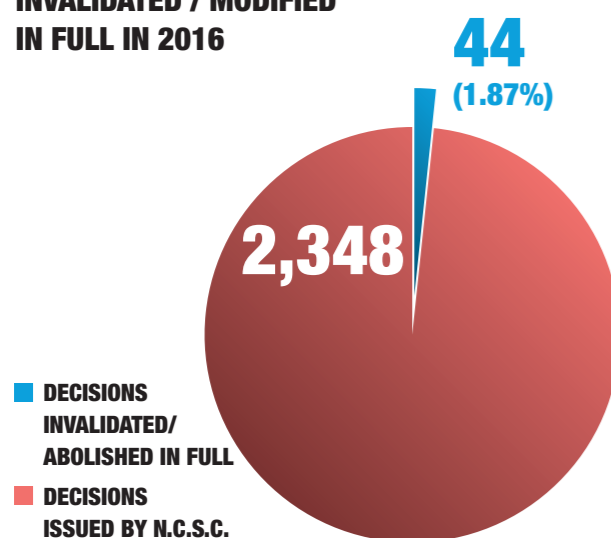
Thus, following the resolution of the complaints lodged with the competent Courts of Appeal²⁶, at the end of 2016 only 44 decisions issued by N.C.S.C. were invalidated / abolished in all by the courts (1,87% of the total decisions issued by the Council) and only 41 were modified in part (1,75% of the total decisions issued by the Council).

Results that during 2016, a number of 2.263 decisions issued by the Council (96,38% of all the decisions issued during 2015) remained final and irrevocable in the form issued by our institution, which maintains its high credibility and confidence.

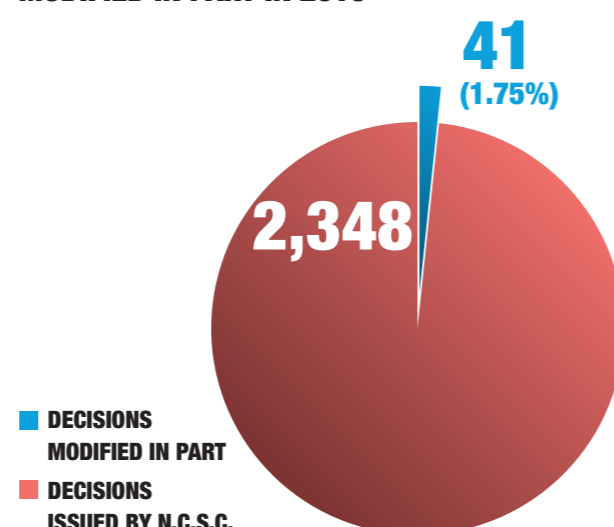
**SITUATION OF THE COMPLAINTS LODGED AGAINST
THE DECISIONS ISSUED BY N.C.S.C. IN 2016**



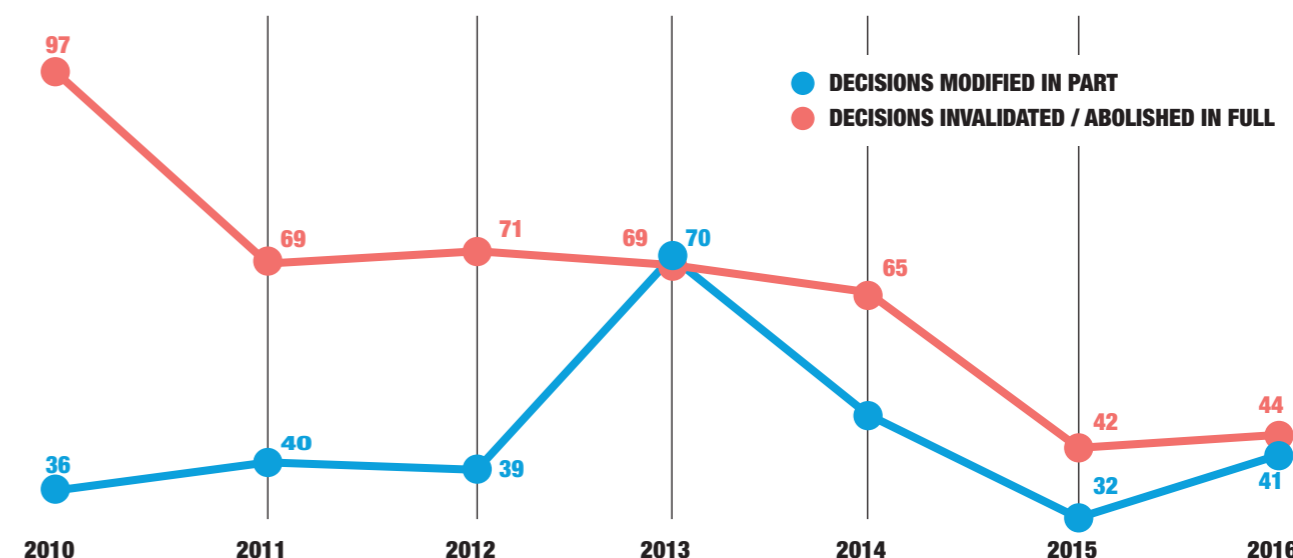
**NUMBER OF DECISIONS ISSUED BY N.C.S.C
COMPARED TO THE NUMBER OF DECISIONS
INVALIDATED / MODIFIED
IN FULL IN 2016**



**NUMBER OF DECISIONS ISSUED BY N.C.S.C.
COMPARED TO THE NUMBER OF DECISIONS
MODIFIED IN PART IN 2016**



**EVOLUTION OF THE COMPLAINTS LODGED
AGAINST THE DECISIONS ISSUED BY N.C.S.C. BETWEEN 2010-2016**



From the statistical evidence it can be concluded that the percentage of decisions allowed by the Courts of Appeal since the establishment of the Council until the end of 2016 is constant and also very low compared to the percentage of decisions issued by it that remained final and irrevocable.

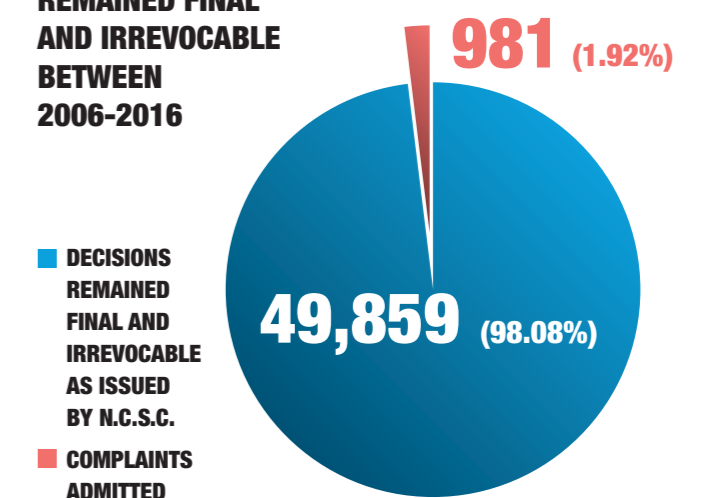
If we sum up the decisions issued by N.C.S.C. since the establishment until the end of 2015, it results that our institution has issued a number of 50.840 decisions.

By comparison, between September 2006 – 31 December 2016, decisions invalidated / modified in full by the competent Courts of Appeal as a result of the complaints lodged by the economic operators/ contracting authorities (981 decisions), with the number of decisions issued by the Council it can be observed that a number of 49.859 decisions issued by our institution (98,07%) remained final and irrevocable.

As can be seen from the chart above, the percentage of credibility of the Council is still high in 2016, at a level of 98,07%, same as 2015 (98,15%) and 2014 (98,14%).

Thanks to the total independence enjoyed by the Council, but also the profile and expertise of its employees, in 2017 also, the quality of our institution and celerity of solving the complaints lodged by economic operators (note - inside the time limit of 20 days stipulated by Law no. 101 / 2016) will constitute the fundamental elements of the performance of N.C.S.C.

**SITUATION OF THE COMPLAINTS ADMITTED
BY THE COURTS OF LAW COMPARED WITH
THE NUMBER OF DECISIONS ISSUED BY N.C.S.C.
REMAINED FINAL
AND IRREVOCABLE
BETWEEN
2006-2016**



4. INSTITUTIONAL TRANSPARENCY AND TRAINING OF STAFF

4.1. INSTITUTIONAL TRANSPARENCY

During 2016, the NATIONAL COUNCIL FOR SOLVING COMPLAINTS (N.C.S.C.) was continually concerned with the increase of the institutional transparency, of the competitiveness and the efficiency of the public procurement market by promoting the best practices at European level, and by dissemination of their experience in the field to institutional partners. In this context one of the priorities has been to train its own staff, along with the prevention and deterrence of anti-competitive practices in the public procurement field.

Interested in the stability and coherent functioning of the domestic public procurement system and European funds absorption, N.C.S.C. has given special importance to institutional cooperation with bodies responsible in this segment (Competition Council, National Agency for Public Procurement - NAPA, Unit for Coordination and Verification of Public Procurement - UCVAP, National Integrity Agency - ANI, Courts of Appeal, Bucharest Court, Prosecutor's Office attached to the High Court of Cassation and Justice, National Institute of Magistracy, the Ministry of European Funds, the Audit Authority, the Court of Auditors, the European Commission Representation in Bucharest).

The Council also continued to submit weekly to N.A.P.A. - based on the protocols signed with the respective institution - official statements on periods of assessment registered by the contracting authorities in various ongoing projects, the decisions issued by the Council, and the remedial measures ordered in proceedings challenged by economic operators.

4.2. PROJECTS OF N.C.S.C. FOR VOCATIONAL TRAINING AND TO ENSURE A UNITARY PRACTICE AT ADMINISTRATIVE - JUDICIAL LEVEL

According to Law no. 188/1999²⁷ the vocational training and professional development is both a right and an obligation of the civil servants, taking into account that the principles of good governance in the public sector requires a good knowledge of the administrative system and, in particular, the public procurement system, as well as the requirements and demands imposed by it. Given that in this context, the vocational training and professional development represent a priority at national level, supporting this process is the responsibility of each central and local authority and institution.

According to the regulations in force, in order to strengthen the institutional capacity, the Council has full competence in planning the training, in purchasing training services, and in monitoring and evaluating the training of the advisors responsible for settling public procurement complaints, in their capacity of public officials with special status, in vocational training / professional development areas and topics that reflect the real need of the public procurement system and of the public sector.

Providing vocational training and professional development service at quality standard appropriate to the requirements of an always changing, modern public administration, is a key element of the overall process of ensuring quality training for the public administration staff. The ongoing reform of the civil service in the context of a broad reform of the administration as a whole, can be stimulated by the existence of a skilled, motivated, efficient, competitive and professionally well-trained staff.

Maintenance and further growth / development of the professional performances at Council level is inextricably linked to the need of ongoing training of its staff.

**PROJECTS OF N.C.S.C. FOR VOCATIONAL TRAINING AND TO ENSURE
A UNITARY PRACTICE AT ADMINISTRATIVE - JUDICIAL LEVEL**

Thus, given the requirement to continuously improve the skills and vocational training²⁸ and being interested in the continuous improvement of the staff, the members of the Council took part in 2016 in a series of two seminars and a vocational training course.

The first event organized by N.C.S.C. in 2016 was a program called **“Ethics and integrity in the exercise of public functions”**, conducted over three days **(5 to 7 October 2016)** destined for the vocational training for a number of 60 employees of the Council.

The seminary, aiming the knowledge, application, and verification of the compliance with the rules of conduct and ethical standards in the public procurement activity conducted by the employees of N.C.S.C. had as trainers the representatives of the Romanian Association for Transparency (Transparency International Romania) - NACS accredited organization, with over 15 years of experience in developing public policy/studies/guides/law draft having as thematic the ethics, integrity, and decisional transparency.

The courses included in the mentioned seminary were developed so as to contribute to the fulfillment of strategic objectives of the public administration:

- preventing and fighting corruption;
- transparency of the decision making acts;
- strategic planning and good governance;
- organizational management and inter-institutional communication;
- development of public policies.

Starting from the concepts mentioned above, the seminary endorsed by Mr. Victor Alistar (attorney of the Bucharest Bar, associate professor in N.S.P.S.P.A., executive director of Transparency International Romania), and by Mrs. Iulia Coșpănar (deputy director of Transparency International Romania, graduate of the Law Faculty of the Bucharest University and a Master of Public Policy, trainer with 12 years of experience) was completed with an assessment test and had the following topics:

- The Ethics framework established by the Code of Conduct for public servants;
- Accountability and public integrity;
- The decisional transparency role in ensuring public integrity;
- Conflicts of interest and incompatibilities, prohibitions;
- Corruption deeds and corruption costs;
- The integrity whistleblower;
- Institutional framework for action;
- Institutional models to ensure post-training ethics and professional integrity

It should be noted that the interest in the issues addressed at the event was marked by the participation, as guests, of some representatives of the National Integrity Agency – A.N.I. (Mr. Mihai Fentzel – head of department / inspector integrity) and the National Agency of Civil Servants – A.N.F.P. (Mrs. Rodica Maria Picu – Director of the Coordination of Regional Centers, Evaluation, and Professional Development).



In November 2016, N.C.S.C. conducted during two days **(22-23 November)** another seminar on the topic **“Jurisprudential issues in the public procurement field”**, organized in collaboration with the Bucharest Court of Appeal and with the support of the National Institute of Magistracy (I.N.M.). Please note that participation of I.N.M. in this event was based on the Cooperation Protocol signed in September 2016 by the Council with this institution, a document that aims „to establish, under the law, a framework for collaboration between the parties, to ensure quality vocational training for the judges, prosecutors and counselors responsible for settling the complaints in the field of public procurement, as well as to unify the judicial, administrative jurisdictional practice in this field”.

The event, moderated by Mr. Bogdan Cristea – Bucharest Court of Appeal judge and Mr. Horațiu Pătrașcu – Bucharest Court of Appeal judge / I.N.M. trainer, aimed at identifying and clarifying the inconsistencies occurred in the settlement of disputes on public procurement, in order to ensure uniform practices at administrative-jurisdictional level.

The seminar was attended by over 80 representatives of public institutions involved in the monitoring and tracking of projects financed from structural funds, among which we mention the counselors for solving public procurement complaints within the Council, 25 judges from Bucharest Court of Appeal and the the Bucharest City Court, the representatives of P.I.C.C.J., of the European Commission, N.A.P.A., Court of Auditors, the National Institute of Magistracy, the Ministry of European Funds, and the Audit Authority.

The topics addressed at the seminar included theoretical lectures, exercises and presentations of practical circumstances encountered in the administrative-jurisdictional practice, and included:

Effects of Law no. 101/2016 as regards the procedural framework specific to the complaint and limiting the administration of evidence in its course;

- Judicial tax related to the complaint;
- Suspending the award procedure and/or the execution of the contract;
- The admissibility limits of the analysis under complaint or grievance when they contain additional reasons to the development for prior notification or, where appropriate, complaint; The lack of concrete reasoning in the prior notification - consequences - inadmissibility of the complaint;
- Nature of the intervention made by other economic operators in the complaint proceedings or Main / accessory / sui generis voluntary intervention;
- Forced execution of the decisions of N.C.S.C. ; Other procedural issues in the law suits regarding public procurement;
- Cancellation causes and/or nullity causes of the public procurement contract/framework agreement;
- Reasons for exclusion of the candidate/tenderer in the procedure for awarding the public procurement contract/framework agreement;
- The applicability of Article 11 paragraph (2) of Law no. 101/2016 on Concessions below the threshold of 23,227,215 lei, while the implementing rules of the law have not yet been approved;
- The manner to resolve disputes in proceedings held under Law no. 100/2016, which have the value below the thresholds referred to above; competence in direct purchases;
- Limits of revocation by the contracting authority of administrative acts issued under a tendering procedure;
- The lack of electronic signature of DUAE may be a form inadvertence, so as to require requests for clarification from the contracting authority?;
- Applying a condition for the admissibility of the offer provided by Article 137, paragraph (2) of G.D. no.



**PROJECTS OF N.C.S.C. FOR VOCATIONAL TRAINING AND TO ENSURE
A UNITARY PRACTICE AT ADMINISTRATIVE - JUDICIAL LEVEL**

395/2016; Sanction for not filling in the DUAE in accordance with the criteria set by the contracting authority;

- The legal nature of the Notification concerning the use of DUAE of 01/09/2016; inadvertences of form and substance;
- To what extent is the accessory intervener entitled to receive costs? Analysis of the Decision of Suceava Court of Appeal no. 861/2016;
- The way of interpreting the provisions of Article 134, paragraph (10) of the Rules approved by G.D. no. 395/2016;
- Analysis of N.C.S.C. Decision no. 1629/2016;

The last project developed in 2016 by the Council was the seminary called **“Inconsistencies and controversies in the public procurement legislation during May to December 2016”**, attended by over 100 representatives of institutions involved in the implementation and follow-up of the projects financed from structural funds (N.C.S.C., A.N.A.P., Bucharest Court of Appeal - Section VIII Administrative and Fiscal Division, Competition Council, the Managing Authority of the Operational Program for Administrative Capacity, Ministry of European Funds, DMP, POR, POIM, the Audit Authority, the Court of Auditors, M.A.D.R.).

Organized in accordance with Article 62, paragraph (3) of Law no. 101/2016 and implemented on December 21, 2016 in collaboration with the National Public Procurement Agency (A.N.A.P.), the seminar aimed to clarify certain inconsistencies emerged in solving case-studies on public procurement, in order to ensure uniform practices at administrative-judicial level. Thus, at the seminar whose moderators were Bogdan Pușcaș – president of A.N.A.P., Horațiu Pătrașcu – Bucharest Court of Appeal judge (trainer at I.N.M.), Silviu – Cristian Popa – president of N.C.S.C., broad topics were discussed, such as:

- The complaints covering issues regarding the verification step of the DUAE
 - lack of electronic signature of DUAE may be a form inadvertence, so as to require requests for clarification from the contracting authority?
 - Applying a condition for the admissibility of the offer provided by Article 137, paragraph (2) of G.D. no. 395/2016; Sanction for not filling in the DUAE in accordance with the criteria set by the contracting authority can be applied automatically or after verification?
 - The legal nature of the Notification concerning the use of DUAE of 01/09/2016; inadvertences of form and substance;
- Hearing the complaints at the end of the evaluation of tenders, respectively after the report of the procedure approval and transmission of the final outcome of the procedure, and not after each partial notification submitted in compliance with cu Article 65, paragraph (3) of G.D. no. 395/2016, respectively Article 72, paragraph (3) of G.D. no. 394/2016 the outcome of each phase of the verification provided for by Article 65, paragraph (1) and (2) of G.D. no. 395/2016, respectively Article 72, paragraph (1) and (2) of G.D. no. 394/2016, because if each phase of the evaluation is trialed separately (DUAE, technical, financial) an artificial disturbance of the activity N.C.S.C. will be created, but more importantly a reaction of fear of the contracting authority regarding the consequences of each decision, which is in the nature of the leading to suspension of the proceedings. Jurisdiction to solve the cases relating to irregularities in the direct procurements;



- The interpretation of the provisions of Article 134, paragraph (10) of the Rules approved by G.D. no. 395/2016;
- Reasons for exclusion of the candidate / tenderer in the procedure for awarding the public procurement contract / framework agreement;
- The interpretation of the fulfillment of the requirements regarding similar experience is not always in line with the thinking set out in A.N.A.P. Instruction no. 2/2016 issued pursuant to the provisions of Article 188 paragraph (1), letter (a), paragraph (2), letter (a) and paragraph (3), letter (a) of G.E.D. no. 34/2006 which is perfectly valid as this requirement is identical in the current legislation). An example in this regard is the approach according to which the presentation of a report of reception given in the reference interval (3 years for goods / services, and 5-year works), is not considered sufficient to meet the requirement, requesting presenting the work actually made in the last 3/5 years, which is a faulty practice in all cases where the contract objects representing similar experience is a whole (for example, for a contract for a technical project which has been received in the last 3 years, but started outside the interval, you cannot separate the activities developed before the period of three years up to the submission of tenders, being inextricably linked to the outcome the contract in question - a technical project).

In parallel, the management of N.C.S.C., throughout 2016, provided special attention in promoting the IT platform and the „Guidelines for Good Practice” developed by the institution as tools to educate and inform the public, but especially to unify the administrative - judicial practice among magistrates.

4.3. CONCLUSIONS OF THE SEMINARY “JURISPRUDENTIAL ISSUES IN THE PUBLIC PROCUREMENT FIELD”²⁹

PARTICIPANTS

Judges of the Administrative and Fiscal Division of the Bucharest Court and Bucharest Court of Appeal.

Counselors for Solving Complaints in the public procurement field, and technical staff involved in the activity attached to the panels of solving complaints – N.C.S.C..

Guests present: National Institute of Magistracy, the Ministry of European Funds, the National Public Procurement Authority, the Audit Authority, the Court of Auditors, Prosecutor’s Office attached to the High Court of Cassation and Justice, the European Commission Representation in Bucharest.

THEMES / CONCLUSIONS³⁰

1. Limits the admissibility of the analysis in the administrative judicial appeal or complaint stage against the decision of N.C.S.C., as appropriate, of the additional grounds to those indicated in the prior notice or, where appropriate, in the complaint. The lack of concrete reasoning in the prior notification of the appeal may result in the rejection of the complaint (even if it includes concrete motivation) as inadmissible?

1.1. Based on the combined provisions of Article 6 paragraph (1) and (2) with those of Article 8 paragraph (1) of Law no. 101/2016 is inferred that the object of the complaint should be consistent with the object of the notification (submittal of subsequent requests, by default, only in the complaint is not excluded), for the purpose of effective exercise of the right to a fast and efficient remedy against that injurious act for who notified/appeals. However, the additional reasons, targeting the same finality of the case with the investiture of N.C.S.C./court should not be removed from the analysis.

1.2. Depending on the complexity of the case, the lack of explicit/detailed motivation of the prior notification may result in rejection of the complaint, as long as, the latter contains all the elements required in Article 10 and Article 50 of Law no. 101/2016 the analysis will be performed specifically, from case to case.

**CONCLUSIONS OF THE SEMINARY “JURISPRUDENTIAL ISSUES
IN THE PUBLIC PROCUREMENT FIELD”**

2. Limits of revocation by the contracting authority of the administrative acts issued under a tendering procedure.

N.C.S.C./The court of law delivers under the limits of its investiture. The contracting authority obliged to cancel a document, in part, can appreciate on the need to revoke / cancel it in full, and on the cancellation of some subsequent acts, or not, but which are affected by the same or by other conditions of illegality which determined the cancellation ordered by the court/the Council pursuant to equal treatment of tenderers in similar situations. In this situation, the contracting authority has the burden of proving the merits of its approach, where rights allegedly acquired by other operators involved in the procedure are opposable to it. Designating the successful tenderer, communication thereto in any way permitted by law, is not a law/act „entered in the civil circuit”.

3. Effects of Law no. 101/2016 as regards the specific procedural framework for the complaint and the limits for administering evidence on its duration. The nature of the intervention made by other economic operators in the complaint proceedings, respectively main / accessory / sui generis voluntary intervention.

3.1 The court decides within the limits of its investiture, through the complaint in relation to the provisions of Article 29 and following of Law no. 101/2016, which provides access to a judicial remedy to any of the parties of the case resolved by the N.C.S.C.. The complainant who was not party to the dispute before the Council is at risk of its complaint being dismissed for lack of locus standi, also motivated by the fact that by Article 16 paragraph 2 of the Law is ensured complete information on the existence and content of the complaint that might affect its interests.

3.2 In the light of Article 17 paragraph 3 of Law no. 101/2016, the request for intervention submitted to N.C.S.C. can be considered, where appropriate, an application for principal voluntary intervention, an application for accessory voluntary intervention, or an application for action sui - generis intervention, specific to the administrative judicial procedure. In the first two cases, the distinction may be given by the time and / or wording of courtship applications submitted, and the interest of the author in the case, while the specificity of the application (the third scenario) results from the specific rules for submitting, as opposed to those of the Code of civil procedure (e.g. the exercise within 10 days; notification to parties with at submittal with N.C.S.C.). Of interest in question is the admissibility of a complaint lodged by the accessory intervener, something that seems to be considered by the above-mentioned provisions of Article 29 of the Law, which extends the possibility of addressing the complaint „by any of the parties to the case”.

4. To what extent is entitled to costs the accessory intervener? Analysis of the Suceava Court of Appeal Decision no. 861/2016 / 13.09.2016, delivered in case no. 659/39/2016, which rejected the request for costs.

As the accessory intervener, in disputes the field, supports, almost unanimously, the procedural position of the contracting authority, it seems that it cannot successfully claim costs, submitted voluntarily by the losing party. Meanwhile, the quality of party in a litigation / trial may represent the main reason for claiming costs advanced in support of finding the truth.

5. Forced execution of the decisions of N.C.S.C.

There is no specific legal mechanism and expressly regulated for the forced execution N.C.S.C. decision. In relation to the provision of Article 68 of Law no. 101/2016, can be analyzed as appropriate, in the event of an alleged omission of compliance of the contracting authority to the proposed solution, the existence of a judicial remedy emerged from the corroboration of Directive 89/665 / EEC with the provisions of Article 24 et seq. of Law no. 554/2004, namely Article 635 and Article 906 of Law no. 134/2010, republished, the instrument of forced execution must be available to the party who obtained in the procedure complaint / appeal a favorable solution for the purpose of remedying the contracting authority acts.

6. Causes for cancellation and / or causes of nullity of a public procurement contract.

6.1 There is a mismatch of the texts of interest of Law no. 101/2016 on jurisdiction, in the first instance, in cases of cancellation / annulment of the public procurement contract, with Article 53 paragraph (1) and Article 58 paragraph (2) of the Law.

6.2 The enumeration of cases in which could be declared the total / partial invalidity of the contract on paragraph (2) of Article 58 of Law no. 101/2016, appears to be exhaustive in the case of the applications introduced by third parties to the contract dispute, the action brought by parties to the contract being likely to fall under Article 53 et seq. of the same law.

7. Judicial tax related to the complaint.

In relation to Article 36 and Article 56 of Law no. 101/2016, and the reasons of decision no. 2/2015 of the High Court of Cassation and Justice - the competent panel to hear the appeal on points of law, judicial tax related complaint appears to be in the amount of 225 lei, that action being one of non-monetary nature, stressing that once with the submittal of the complaint against the decision of the National Council for Solving Complaints, the party also claims the contracts under the scope of the Law, pursuant to Article 34 paragraph (1) of Government Emergency Ordinance no. 80/2013, the judicial tax is determined in percentage to the value.

8. The lack of DUAE electronic signature may be a form inadvertence, so as to require requests for clarification from the contracting authority? Application of the condition for the admissibility of the offer referred to in Article 137 paragraph 2 letter b of G.D. 395/2016; the sanction for of filling in the DUAE in accordance with the criteria set by the contracting authority. Legal nature of the Notice on the use of DUAE of 01.09.2016; inaccuracies of form and substance.

8.1 The use of DUAE is an obligation for any award procedure for which a participation notice is published, according to Laws. 98 and 99 of 2016;

8.2 Regulation 2016/7/EC requires the use DUAE starting with 18.04.2016, and in Romania even its electronic format is mandatory;

8.3 The electronic signature on DUAE is an obligation for any tenderer, but its absence should be analyzed case by case, depending on the complexity of the procedure/offer and the actual capability of those involved (contracting authorities, economic operators), at least for the immediate period. The automatic rejection of such an offer may be considered overly formal;

8.4 Possibility of asking for clarifications about the lack of information in DUAE must not be ruled out in principle, but must be considered in relation to the principle of proportionality;

8.5 The text from Article 137 paragraph 2 letter b) of GD no. 395/2016 (“was submitted by a tenderer who does not comply with one or more of the qualification criteria established in the awarding documentation, or has not filled in the DUAE in accordance with the criteria set by the contracting authority”) must be understood in that it regulates, exclusively, the event of a failure to comply with the qualification criteria, by not filling it in, and not the drafting errors/omissions in filling in the information;

8.6 Notification on the of use DUAE of 01/09/2016 issued by the ANAP cannot bring additional rules or superior rules to those found in GD no. 395/2016, which shall be applied with priority.

8.7 The future case law will clarify all the various possible approaches of the legal regime applicable to DUAE, including the effects of its use in procedures.



9. The interpretation of the provisions of Article 134 paragraph (10) of the Rules approved by Government Decision no. 395 of 2016. Analysis of Decision No. 1629/C6/1878 of 21.09.2016.

The possibility of correcting arithmetic errors, i.e. “aspects that can be clarified using the principles set out in Article 2 paragraph (2) of the Law, the elements of the financial proposal to be corrected, by default along with the total price of the tender, by restoring the related calculations, based on the data / information that is known by all the participants, as provided in the applicable law, the awarding documentation, and/or other documents submitted by the tenderer”, must be used solely for the purposes of analyzing objectively the possibility of correcting the price, without accepting amendments expressly prohibited by law (technical proposal or tender ranking), or violating the principles in the field.

4.4. RELATIONSHIP WITH THE MEDIA AND THE GENERAL PUBLIC

In terms of relationship with the media and the general public, the activity developed by N.C.S.C. in 2016 materialized, same as in other years, through an interactive approach that ensures institutional transparency.

Thus, for the purpose of correct information of the public opinion, next to the replies provided daily to media representatives following the requests made under Law 544/2001 on free access to public information, the journalist accredited by the institution were sent periodically - via e-mail, information on the activity of N.C.S.C.

In parallel, the Information and Public Relations Office, in collaboration with the Statistics and IT Office within N.C.S.C. were concerned about the organization and management of the website of the institution, including the publication of the Official Bulletin of the National Council for Solving Complaints, so any individual or entity would have access to the decisions of the Council.

In terms of the number of punctual requests arrived during 2016, the Information and Public Relations Office within N.C.S.C. received about 200 requests made in writing or verbally, by accredited journalists or by various individuals/entities under Law no. 544/2001 on free access to public information. Also, the activity of the Office of Information and Public Relations also effected in the development and transmission of press releases and the activity report for 2015 to a number of over 350 media outlets, news portals, freelance journalists, central or local public administration institutions (Presidency, Government, Parliament, county councils, county capitals mayors, county councils, prefectures, etc.), or NGOs.

It should be noted that in order to ensure full transparency in the activity of N.C.S.C., the management of the institution granted specific importance to developing the statistical and IT office created in 2011, and continued the undertaking to improve the integrated IT system, so as to ensure at any time to the interested economic operators, the general public, and the media, official data on complaints lodged in the award procedures and decisions issued by the Council. A particular importance was given to centralization and data processing of cases solved by the N.C.S.C. to develop by any interested person of diagnosis analysis on public procurement issues encountered by the contracting authorities and economic operators.

Not least in the relationship with its institutional partners, the media and the general public the Council has paid particular importance to the continuing development of its IT platform so as to be allowed the unhindered access by any persons interested in the status their own cases, the court cases under the settlement, and any other relevant information useful for the prevention of irregularities in public procurement.

5. THE BUDGET OF N.C.S.C.

The Budget of N.C.S.C. for 2016, amounted 11.297 thousands RON and was distributed as follows:

- Budgetary provision for Current expenditures: 10.774 thousands RON of which:
 - Staff expenditure: 9.253 thousands RON.
 - Goods and services: 1.521 thousands RON.
- Budgetary provision for Capital expenditures: 523 thousands RON.

N.C.S.C. budget, detailed on titles and budget chapters shown in the table below.

THOUSANDS RON

CHAPTER	SUBCHAPTER	SECTION	GROUP/TITLE	DENUMIRE	PROGRAM ACTUALIZAT 21.12.2016	TRIM I	TRIM II	TRIM III	TRIM IV
5000				TOTAL BUDGET	11.297	2.681	2.674	2.852	3.090
			01	CURRENT EXPENDITURES	10.774	2.662	2.661	2.661	2.790
			10	TITLE I STAFF EXPENDITURE	9.253	2.289	2.288	2.288	2.388
			20	TITLE II GOODS AND SERVICES	1.521	373	373	373	402
			70	CAPITAL EXPENDITURE	523	19	13	191	300
			71	TITLE XII NON-FINANCIAL ASSETS	523	19	13	191	300
5001				EXPENDITURE - STATE BUDGET	11.297	2.681	2.674	2.852	3.090
			01	CURRENT EXPENDITURE	10.774	2.662	2.661	2.661	2.790
			10	TITLE I STAFF EXPENDITURE	9.253	2.289	2.288	2.288	2.388
			20	TITLE II GOODS AND SERVICES	1.521	373	373	373	402
			70	CAPITAL EXPENDITURE	523	19	13	191	300
			71	TITLE XII NON-FINANCIAL ASSETS	523	19	13	191	300
5101				PUBLIC AUTHORITIES AND EXTERNAL ACTIONS	11.297	2.681	2.674	2.852	3.090
			01	CURRENT EXPENDITURE	10.774	2.662	2.661	2.661	2.790
			10	TITLE I STAFF EXPENDITURE	9.253	2.289	2.288	2.288	2.388
			20	TITLE II GOODS AND SERVICES	1.521	373	373	373	402
			70	CAPITAL EXPENDITURE	523	19	13	191	300
			71	TITLE XII NON-FINANCIAL ASSETS	523	19	13	191	300
	01			Legislative and executive authorities	11.297	2.681	2.674	2.852	3.090
		03		Executive authorities	11.297	2.681	2.674	2.852	3.090



CONCLUSIONS AND FORECAST

The National Council for Solving Complaints, an independent institution with administrative-jurisdictional activity, which is not subject to any authority or public institution and that, in its activity, is subject only to the law, competent to solve complaints regarding the procedures for awarding public procurement contracts promoted by any person who has or has had any legitimate interest in obtaining a particular contract and who consider themselves injured, harmed, or risks being harmed by an alleged infringement on public procurement field caused by administrative regulations and / or remediation thereof adopted by the contracting authorities, was established and is functioning according to the hypothesis referred to in art. 2 paragraph (9) of Directive 2007/66 / EC of the European Parliament and of the Council amending Council Directives 89/665 / EEC and 92/13 / EEC with regard to improving the effectiveness of review procedures concerning the award of public procurement contracts, the powers, duties, responsibilities, and the conduct of proceedings before the Council being governed by Law no. 101/2016 regarding remedies and appeals concerning the award of public procurement contracts, sectorial contracts, and works concession contracts and service concession contracts, and for the organization and functioning of the National Council for Solving Complaints.

The Council is part of the national public procurement system, through which are ensured effective and rapid remedies, as imposed by the Community acquis, against the decisions taken by the contracting authorities and the contracting entities in the process of developing the award procedures, the decision acts of that judicial administrative institution being subject to legal review by the courts with the rank of court of appeal.

Through its activity carried during the 10 years of existence, the Council succeeded in proving that the European „experiment” of applying the procedures on the remedies against the award of public procurement contracts through organizations of non-judicial nature can be a successful one, the conclusions of the Final research report on the internal diagnostic analysis, developed within the project financed by structural funds having as object “Improving the management at the National Council for Solving Complaints level, related to specific competences, connected to successful implementation of projects supported by the structural instruments, based on streamlining the public procurement process” (SMIS code 48792)”, indicating a considerable degree of trust of the claimants and of the contracting authorities in choosing the administrative judicial remedy, conducted before the Council.

Realizing that the purpose of its business must be a real guarantee that the decisions taken by the contracting authorities, suspected of non-compliance with the Community legislation on public procurement or national

rules transposing thereof, are subject to effective remedies, and especially, fast and efficient over the years, the Council has acted for the continuous improvement of its own activity, while being open and an being actively and effectively involved in the joint actions of the institutions component of the national public procurement system, in the inter-ministerial Committee for public procurement.

After the entry into force in May 2016, of Law no. 101/2016 regarding remedies and appeals regarding the award of public procurement contracts, sectorial contracts, and works concession contracts and service concession contracts, and for the organization and functioning of the National Council for Solving Complaints the institution drafted its own map for optimizing and improving their activities, respect in which measures, mechanisms and concrete actions have been imposed, the most relevant aiming at:

1. Increase of the decision-making predictability at Council level, a field in which was acted towards the improvement of the decision making act for solving the cases to be decided by the judicial administrative body through:

- including in its decisions, of clear guidance on how to address / correct the acts of the contracting authority from the awarding documentation, as well as the modality carry out the revaluation of tenders, especially with reflecting issues that must differ from the initial assessment thereto, found to be erroneous;
- conducting the monthly plenary sessions analysis of the legal issues that led to issuing various solutions in similar cases, finalized with the adoption of binding decisions of the Plenum for unification of the case law;
- notifying NAPA on legislative deficiencies that lead to divergent interpretations and inconsistent practices, with proposals to improve the legislation;
- referral to the Court of Appeal with the decisions containing provisions ad divergent approaches, delivered by different courts of appeal, in bringing them before the HCCJ according to Law no.134/2010 (Code of Civil Procedure);
- request for points of view on the predictability of the interpretation from the courts for judicial review of the legality of the decisions of the Council where in the same court are pronounced conflicting decisions in similar cases.

2. Increased transparency on the activity of the Council, and ensuring easy access to its case-law, by implementing the portal type database through which it ensures:

- transparency of the Council's decision making process, starting with the distribution, in real time and randomly, of the cases for settlement by Panels, and the development of the procedure of solving the cases pending delivery of the decision;
- easy access to the Council's and courts' for judicial review jurisprudence;
- upgrading the database of the Council to interconnect it with databases belonging to the institutions in the national system of public procurement, and to other public institutions holding information of interest for the public procurement process.

3. Organizing biannual seminars for the unification of administrative and judicial practice with attendance of judges in courts of law, SCM, and specialists from the NAPA, as well as other groups of experts from the national and European institutions, carried out with the support and direct intercession of the National Institute of Magistracy.

4. Active participation of the Council on the structured dialogue with the representatives of the European Commission through DG Regio and DG Grow in the action „Monitoring mission of EU Commission DG GROW and DG Regio. Implementation of the National Public Procurement Strategy and Action Plan”.

In its future work, the Council remains an open institution promoting cooperation and exchange of best practices with all the national and European institutions with responsibilities in the field, knowing that making the practices in the procedures for awarding public procurement contracts transparent, interinstitutional cooperation, and professional improvement of the staff involved in the public procurement process are elements that will lead to more efficient use of public money.

Although, in time, some moderation appears in the phenomena of corruption and favoritism in the public procurement process, serious risks remain, in the management of which has its own role, the Council will continue to refine the specific professional training and the development of appropriate action mechanisms.



NOTE

1. published in the Official Gazette, Part I no. 775 of 2 November 2011, which repealed G.D. no. 782/2006
2. art. 15 paragraph 1 of Law no. 101/2016
3. And one possible renewal of the term of office
4. Article 38 paragraph (2) of Law no. 101/2016
5. According to Article 44 paragraph (3) of Law no. 101/2016
6. according to Article 40 paragraph (1) of Law no. 101/2016
7. Article 29 of Law no. 233/2016 on the public-private partnership
8. Article 188 GEO no. 114/2011 on awarding certain public contracts in the fields of defense and security, published in the Official Gazette. No. 932/29.12.2011
9. Article 13 paragraph (3) of Law no. 101/2016
10. Approved by G.D. no. 1037/2011
11. The Council has the obligation to solve the complaint on the merits within 20 days of receipt of the case of public procurement, the sectorial procurement, or concession from the contracting authority, respectively within 10 days in the case of an exception that prevents the examination of the complaint on the merits under Article 24 paragraph (1). In duly justified cases, the deadline for solving the complaint may be extended by 10 days, the extension being communicated to the contracting authority, in accordance with Article 24, paragraph (2).
12. the amount has been calculated at annual average exchange rate communicated by B.N.R. of 4,4908 RON/EURO
13. the amount has been calculated at annual average exchange rate communicated by B.N.R. of 4,4908 RON/EURO
14. the amount has been calculated at annual average exchange rate communicated by B.N.R. of 4,4908 RON/EURO
15. the amount has been calculated at annual average exchange rate communicated by B.N.R. of 4,4908 RON/EURO
16. the amount has been calculated at annual average exchange rate communicated by B.N.R. of 4,4155 RON/EURO
17. the amount has been calculated at annual average exchange rate communicated by B.N.R. of 4,4908 RON/EURO
18. the amount has been calculated at annual average exchange rate communicated by B.N.R. of 4,4908 RON/EURO
19. the amount has been calculated at annual average exchange rate communicated by B.N.R. of 4,4190 RON/EURO
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22. the amount has been calculated at annual average exchange rate communicated by B.N.R. of 4,4190 RON/EURO
23. the amount has been calculated at annual average exchange rate communicated by B.N.R. of 4,4908 RON/EURO
24. the amount has been calculated at annual average exchange rate communicated by B.N.R. of 4,4190 RON/EURO
25. the amount has been calculated at annual average exchange rate communicated by B.N.R. of 4,4908 RON/EURO
26. Article 32 paragraph (1) and paragraph (2) of Law no. 101/2016
27. on the status of civil servants, republished, as amended and supplemented
28. Article 50 of Law no. 188/199 as amended and supplemented
29. organised between 22.11.2016 – 23.11.2016
30. the conclusions reflect the majority view of those who debated the issue, according to its individual characteristics