THE NATIONAL COUNCIL FOR SOLVING COMPLAINTS

ROMÂNIA
1918-2018 | SĂRBĂTORIM ÎMPREUNĂ

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NATIONAL COUNCIL
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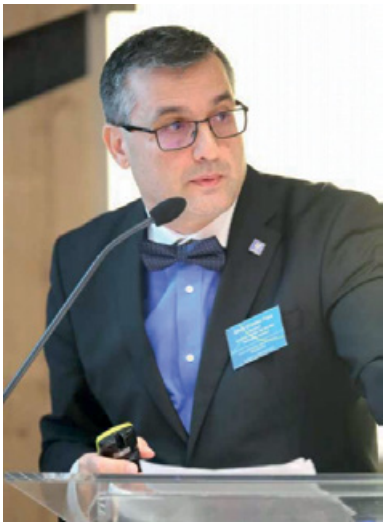


SILVIU-CRISTIAN POPA
N.C.S.C. President

The National Council for Solving Complaints aims to mark the Union's Centenary through a series of specific events, one of which will be the launch of the activity report for 2017.

Going back in time, I recall that in 2015, through Government Decision no. 901/2015 regarding the National Strategy for Public Procurement, it was stated that "public procurement is appraising good governance, as it regulates the way in which public money is spent and it has to ensure unrestricted access for economic operators".

During the elaboration of legislation, according to an administrative culture consolidated through time, it is not surprising that the tendency for overregulation exists, by setting forth some specific aspects. Consequently, the attention is focused on the conformity with legal aspects to the detriment of substantial features of the procurement process, reason for which the legislation in this field is not interpreted unitarily by the key institutions of the public procurement system, neither by the contracting authorities. Furthermore, at that moment, there were no well documented guides, approached unitarily, to which contracting authorities and economic operators could refer to, as countless guidelines were published without any added value for the users, without a practical, operational approach, being just a mere review of effective legal stipulations.

Concerning those aspects, the respective strategy made note of the fact that "there was no systematic analysis of the cases and decisions of the Court of Justice of the European Union in order to substantiate several solutions with impact on the interpretation of national legislation, no unitarily interpretation/jurisprudence in the case of N.C.S.C., amongst and between the Courts of Appeal, which represents a major factor generating unpredictability in the whole system".

We must also keep in mind that, after more than nine years from its foundation, a unanimous opinion took shape, according to which the activity of the National Council for Solving Complaints should be performed on clear, stable and predictable coordinates, which were supposed to guarantee the stability, the professionalism and the independence of this institution. In this regard, the Council had already made an important step in 2015 by issuing a Guide to good practices

(Collection of case-studies) in the field of public procurement pertaining to the projects financed by Structural Instruments, elaborated within the project "Improving the management at the National Council for Solving Complaints to specific skills related to successful implementation of Structural Instruments projects, based on streamlining the public procurement process" (SMIS code 48792), project financed inside the Administrative Capacity Development Operational Programme, Priority Axis 1 "Support to the implementation and the coordination of structural instruments", major field of intervention 1.1 "Improving decision-making process at political-administrative" operation "Support for the management and implementation of Structural Instruments", project co-financed by the European Regional Development Fund and the state budget.

As an active member of the team coordinated by the Ministry of European Funds, which aimed for preparing the public procurement package of laws, one of the major contributions brought by the National Council for Solving Complaints to the elaboration of the aforementioned normative acts consisted in promoting several mechanisms for practice unification in the field of public procurement.

This desideratum has materialized through the enunciation in the body of 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, of some specific norms which can be found in Chapter VII – Special directives (Article 62, paragraph (1) At the Council's level, meetings of the members will be organized monthly, during which law issues will be discussed, which have led to the pronouncing of different solutions in similar causes. Furthermore, the application and the interpretation of new regulations may be discussed; paragraph (2) The law issues mentioned in paragraph (1) are previously analyzed by one or more members of the Council designated by its president, who will present a study concerning these issues, with references in the practise of the Council, the national and European jurisprudence, in which he/they will compulsory include his/their motivated opinion, a study which will be debated by all the members; paragraph (3) In order to unify the administrative-jurisdictional practice, the Council organizes biannual seminars with court judges and ANAP specialists, as well as with other categories of experts; Article 63, paragraph (1) The president of the Council or the college, ex oficio or at the request of any member of the Council, may call the plenum of the Council for releasing a decision for the unification of its administrative-jurisdictional practice; paragraph (2) The provision of Article 62, par. (2), applies accordingly, the president designating one or more rapporteurs, who make a report including the solution proposed for the respective issue and the project of the directive of the Council's plenum; paragraph (3) The plenary meeting of the Council is convoked by its president, at least 3 days before it takes place. At the same time with the convocation, each member receives a copy of the report; paragraph (4) The decisions of the Council's plenum are adopted by vote with the absolute majority of its members and are mandatory, any infringements being regarded as disciplinary deviation; paragraph (5) The decision is drafted and communicated in writing to the members of the Council, for an unitarily approach of the matter which served as the object of the debate; paragraph (6) The unitary application of the dispositions regarding public procurement, sectorial procurements or concessions constitutes an evaluation criterion for the individual professional performances of the Council's members; paragraph (7) The decision adopted in the terms of par. (1) - (5) are published on the webpage of the Council; Article 64. - At the proposal of the Council's president, its plenum may appoint, through a decision adopted by the absolute majority of its members, additional mechanisms in order to ensure the unitary practise at the level of the Council; Article 65, paragraph (1) ANAP informs the Council, respectively the courts, in every case it ascertains the existence of uneven solutions in its/their practice regarding public procurement, sectorial procurements or work and service concessions; paragraph (2) The Council notifies ANAP every time it ascertains legislation deficiencies generating divergent interpretations and uneven practice regarding public procurement, sectorial procurements or work and service concessions, formulating proposals for their improvement; Article 66, paragraph (1) When

the Council ascertains different approaches in the definitive court decisions in similar cases regarding public procurement, sectorial procurements or concessions, it will apprise and send to the Bucharest Court of Appeal the respective court decisions, in copy, in order to begin, at the High Court of Cassation and Justice, the pronouncement procedure on law issues that were differently solved by the courts, according to the dispositions of Law no. 134/2010, republished, as amended; paragraph (2) If the divergent decisions pertain to the same court, the Council may request a standpoint on the predictability of interpreting the legal provisions by the respective court; paragraph (3) The provisions of par. (1) and (2) may be applied by ANAP as well)"

Since last year, as mentioned in the activity report 2016, concerning the application of the juridical norms mentioned above, through Order no. 6/2017, issued by the President of the Council, it was ruled that "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".

By the time I am writing these lines, each panel has already completed a study of this kind, the respective event being actually transformed in an internal mechanism for the real time regular quality adjustment of the decisions that have been issued and for minimizing non-compliance risks.

The two seminars for unifying the administrative-jurisdictional practice organized by the National Council for Solving Complaints in 2017 are circumscribed under the aegis of the aforementioned legal framework, too. The first was housed by the municipality of Târgu Mureș, in partnership with the National Institute of Magistracy and with the support of Târgu Mureș Court of Appeal. The other seminar took place in the town of Predeal, in partnership with the Ministry of Public Finances - the National Agency for Public Procurement, the Agency for the Digital Agenda of Romania, the Competition Council, and with the support of the Bucharest Court of Appeal.

The respective actions were attended by counsellors for solving complaints in the field of public procurement, magistrates, experts from A.N.A.P., Romania's Court of Auditors, the Audit Authority, the Ministry of European Funds, and Management Authorities. They became events of high professional rank, their quality being observed not only by Romanian institutions, but by the European Commission as well, which, referring to a similar event organized in 2016, states that "at the end of November, the Council and the Bucharest Court of Appeal have organized seminar for the unification of the administrative-jurisdictional practice in the field of public procurement, which placed together counsellors for solving complaints in the field of public procurement, judges, representatives of the Public Ministry, as well as other officials of key institutions in the field of public procurement (European Commission - Commission working document - Romania - Technical report accompanying the Commission's report to the European Parliament and the Council, on the progress made by Romania under the Cooperation and Verification Mechanism - Brussels, 25.001.2017 - SWD (2017) 25 final). Also, in the same document, the portal of the Council is mentioned as a useful instrument for professionals in the field of public procurement.

The methodology employed for organizing the aforementioned two seminars can be found, as an example of good practices, in the final documents of the high level conference which took place in last year's December at Brussels (Building an architecture for the professionalization of public procurement - Library of good practices and tools accompanying the European Commission Recommendation – Case 28 - Romania).

Supplementary, I would like to add that the Council's effort was directed also towards the simplification, clarification and correlation of certain provisions from the field of public procurement, for the fluidization of the attribution of the public contracts process, in transparent conditions. In this respect, the Council has organized at the end of last year two debates which were attended by the president of A.N.A.P.

In the following year, the Council will continue to enforce its administrative capacity, with emphasis on the available human resources. And because 2018 is a special year for all the public institutions in Romania, hence for the Council as well, I would like to join the ones who are wishing, on the occasion of the Great Union's centenary - **Happy Birthday, Romania!**

1. OVERVIEW

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

The NATIONAL COUNCIL FOR SOLVING COMPLAINTS (N.C.S.C.) operates on the basis of 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 N.C.S.C., regulation which came into force in May 2016.

The Council is defined, 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, 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 to any authority or public institution, and which complies with the constitutional provisions regulated by the Article 21 par. (4)[1].

Although the activity that is performed by the Council (the institution has been invested with solving complaints submitted by the economic operators within the awarding procedures of the public procurement contract) leads towards the area of the judicial power, wherein, however, it cannot be integrated due to its nature, this body is part of the executive – administrative power area[2].

According to the legal provisions[3], the Council has a number of 36 members, among which at least half are bachelors of law[4]. Also, the members of the Council are civil servants with special status[5], appointed through the prime minister's decision, at the proposal of the Council's president, after promoting a competition[6].

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[7].

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[8].

In this context, it should be mentioned that, according to the provisions of Article 6, paragraph (1), prior notification has become a condition of ad-missibility of the complaint[9], 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[10]. Pending its entry into force, insofar as they do not contravene the provisions of Law no. 101/2016, the provisions of its own Rules of organization and operation, approved by Government Decision no. 1037/2011, remain applicable[11].

In its activity, N.C.S.C. shall be subject only to the law[12]; in exercising its attributions, through panels for settlement of complaints, the Council adopts decisions and conclusions[13], and, in carrying out its activity, it ensures the consistent application of the law, according to the principles of law expressly regulated: legality, celerity, contradictory, ensuring the right to defense, impartiality, and independence of the administrative - jurisdictional activity[14].

The complaints lodged by economic operators to N.C.S.C. are distributed randomly, electronically[15], for settlement to a panel of three (3) members of the Council, one acting as the president of the panel[16]. Within each panel, at least its president or a member must be licensed in law[17].

For the proper functioning of the institution and in order to expeditiously resolve the complaints lodged by economic operators, each panel for settling the complaints is assigned with administrative and technical staff having the status of contract staff, with legal, economic or technical higher education[18].

The President of the Council, elected from among its members for

a period of 3 years[19], by secret vote and by an absolute majority[20], must be licensed in Law, with at least 9 years of experience in the juridical field[21], and acts as chief credit authority[22].

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 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. 233/2016[23].

The Council also has jurisdiction to hear complaints by administrative-jurisdictional 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 security[24]; in this regard, the counsels settling the complaints are authorized by the provisions of Law no. 182/2002 on protection of classified information[25];

For that reason, the exercise of the competences regulated by G.E.O. no. 114/2011, on awarding certain public contracts in the fields of defense and security, effective as of October 1st, 2012, the Council 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 physical protection 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;

In addition, it is important to note that 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 In-tegrity 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 counselling 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 councillors responsible for settling the complaints in the field of public procurement, namely from the technical administrative contract staff.

Taking into consideration the legal provisions, the role and the mission of the Council, it must be highlighted that throughout 2017 the Council has actively participated at all the meetings, working groups, sessions, etc. organized by various public institutions (the Parliament of Romania, NAPA, ANI, the Competition Council, Courts of Appeal, etc.), in order to adopt and consolidate the legislation, respectively its interpretation, as well as to create a common practice regarding a unitary approach to the provisions concerning the field of public procurement.

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

As an organizational structure, N.C.S.C. operated in 2017 with a number of 34 resolution counsellors in the field of public procurement, under G.D. no. 1.037/2011, organized in 11 complaints resolution panels in the field of public procurements.

The organigram of the Council also includes 54 people with the status of technical and administrative staff, although 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 Council was provided in 2017 by Mr. Silviu – Cristian POPA, on his first term as president of the institution. In exercising his attributions, according to the legislation, the president of the National Council for Solving Complaints is helped by a board[26] composed of three members (Mr. Lehel - Lorand BOGDAN, Mr. Cristian COSTACHE, Mr. Dumitru Viorel PÂRVU), elected by secret vote, with absolute majority, from the counsellors for solving complaints in the field of public procurements.

In terms of gender structure, at the end of last year 61 of the Council's employees were women (69.32 %) and only[27] were men (30.68 %) **(Fig. 1)**. It should be noted that the share of women in the total number of employees of N.C.S.C. remains high among both counsellors for solving complaints in public procurement (61.76 %), and in the contractual staff (74.07 %).

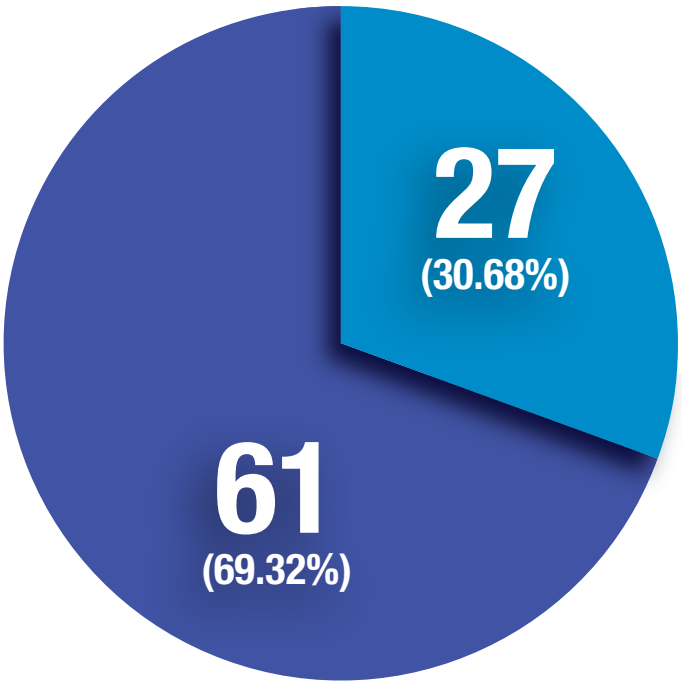


FIGURE 1 **STRUCTURE OF N.C.S.C. EMPLOYEES BY GENDER IN 2016**

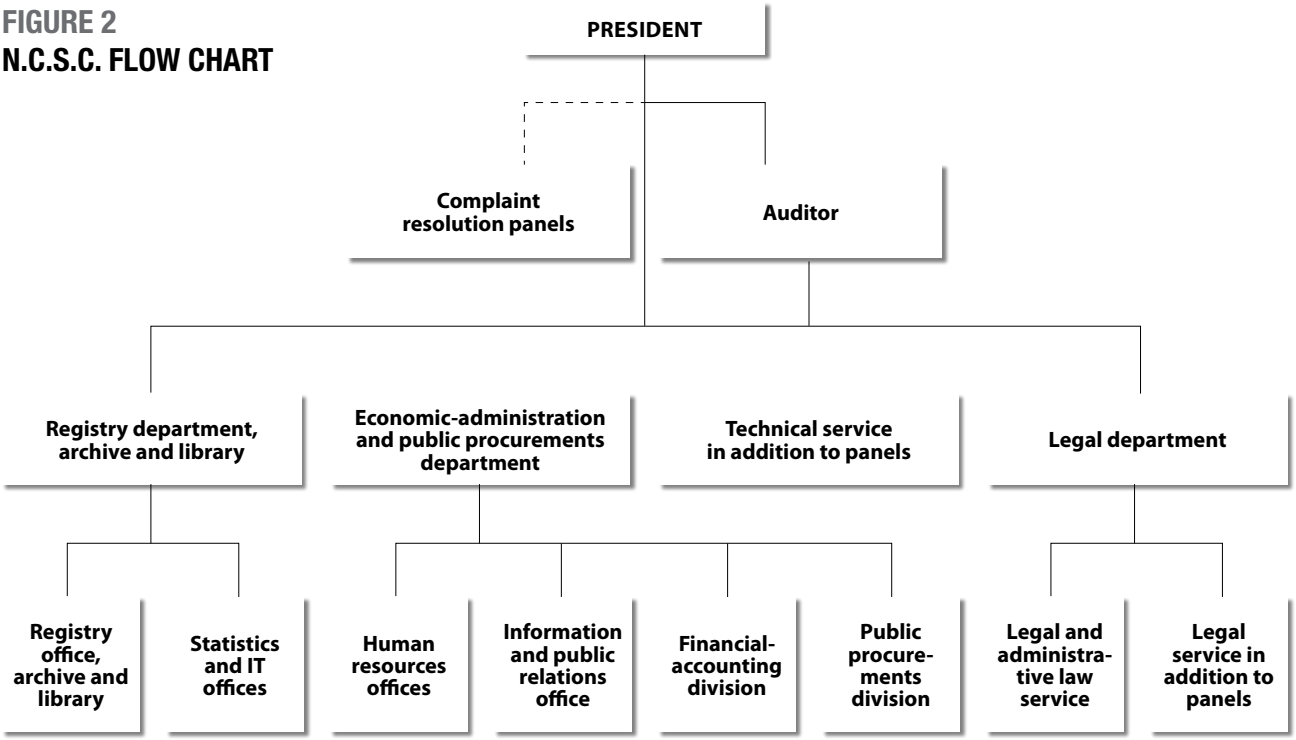
- **Women**
- **Men**

In terms of the average age of the employees of N.C.S.C., this was of 46 years at institution level.

According to the Regulation of organization and functioning of the Council27, the administrative and technical staff is working under the following structures **(Fig. 2)**:

- ✔ The Registry, Archives, and Library Department, which includes:
  - The registry, archive, and library office;
  - Statistics and IT office;
- ✔ The economic-administrative and public procurement service, which includes:
  - The Human Resources office;
  - The information and public relation 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.

FIGURE 2
N.C.S.C. FLOW CHART



2. THE ACTIVITY PERFORMED BY N.C.S.C. IN 2017

2.1. COMPLAINTS LODGED BY ECONOMIC OPERATORS

The number of complaints lodged in by the economic operators at N.C.S.C., their annual evolution, the object of submitted complaints and their complexity, the resolution manner, as well as the number of complaints which remained definitive after solving the complaints formulated against the decisions issued by the Council, represent the most important indicators that can be used in the analysis of the activity performed by the institution. From the beginning, it must be noted that an objective analysis of the activity of N.C.S.C., based on official numbers, **demonstrates that our institution did not stay in the way of the absorption of European funds, but, on the contrary, it represented an efficient filter for preventing a significant number of irregularities in the public procurement procedures that have been performed throughout the year 2017, both in the case of projects financed from national funds and from European funds.**

This aspect clearly results from the analysis of the main indicators which mirror the activity of the Council:

- the number of complaints lodged in 2016-2017 in some procedures financed from European funds;
- the number/value of the procedures financed from European/national funds initiated in S.E.P.A., for which the Council issued remedy/cancellation decisions;
- the number/value of the procedures financed from European/national funds attributed by the contracting authorities after the lodged complaints were solved by the Council;
- the number of complaints which remained definitive in the form issued by the Council after solving the complaints formulated against the decisions issued by the Council, after they were contested by complaint/complaints before the administrative law courts from the area of the contracting authorities, etc.

2.1.1. EVOLUTION OF THE COMPLAINTS LODGED BY ECONOMIC OPERATORS

During 1 January – 31 December 2017, the number of complaints (case files) submitted by the economic operators and registered with N.C.S.C. reached the figure 4.782, but a number of 8 (eight) pending cases were re-moved because the Council declined its legal competence to solve them under the current legislation.

Therefore, on the course of the twelve months of 2017, the number of complaints lodged by economic operators and registered with the N.C.S.C. evolved as follows **(Fig. 3)**:

FIGURE 3

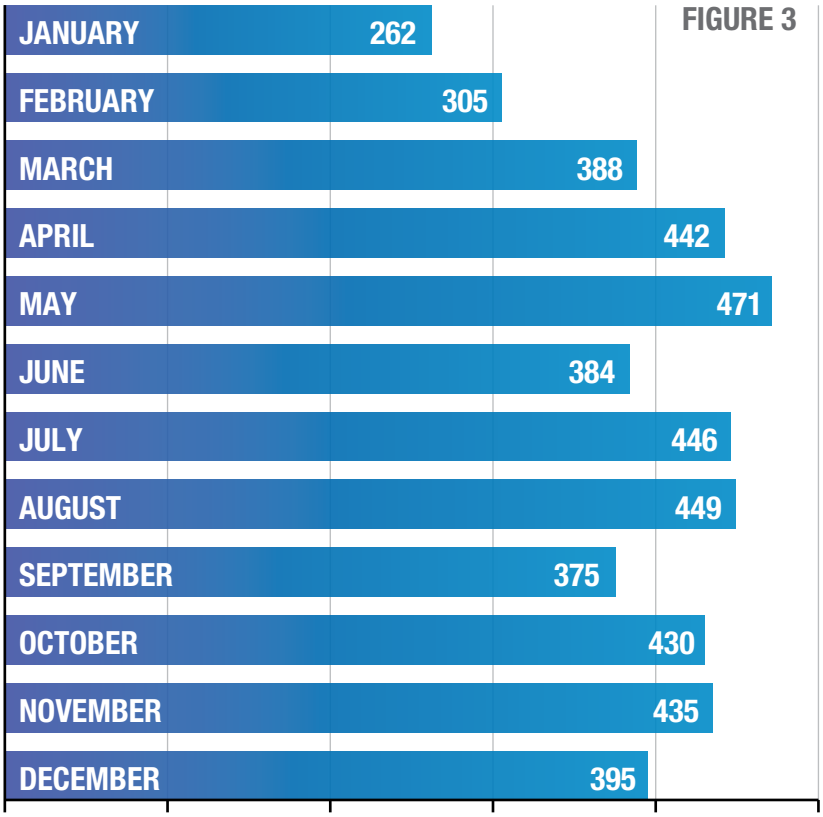
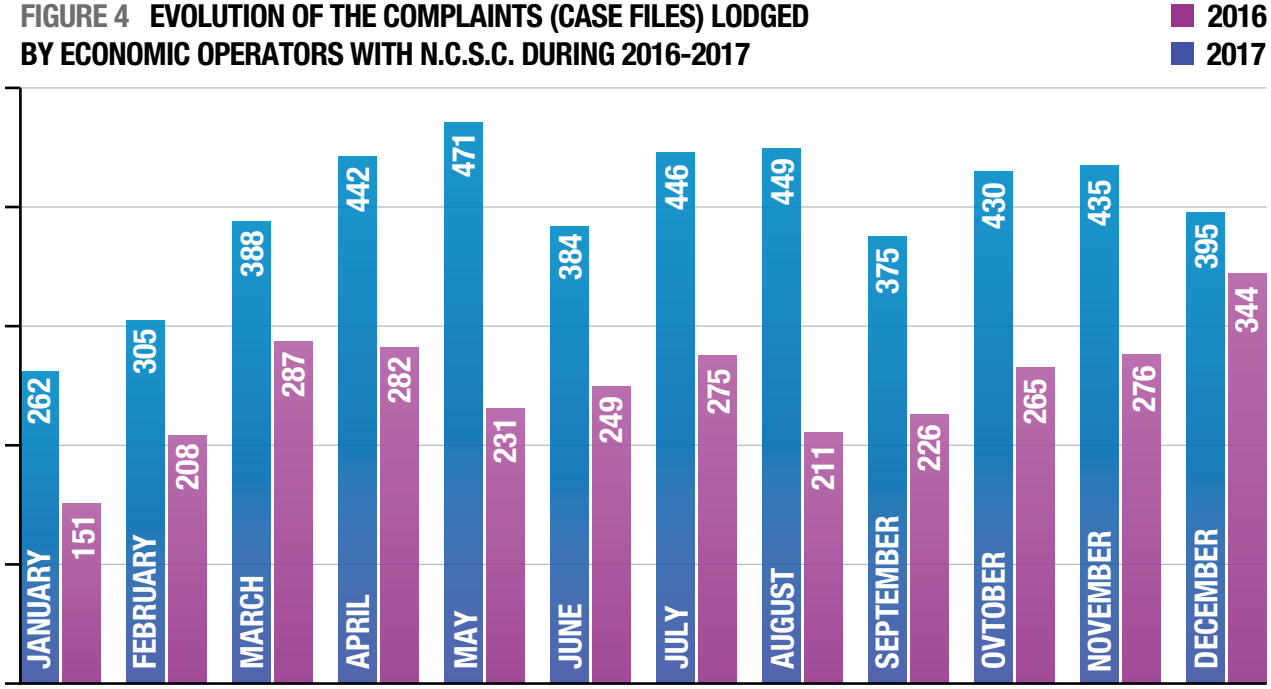


FIGURE 4 **EVOLUTION OF THE COMPLAINTS (CASE FILES) LODGED BY ECONOMIC OPERATORS WITH N.C.S.C. DURING 2016-2017**



Out of the 4.774 effectively submitted complaints pending resolving, in 245 cases the economic operators withdrawn the complaints, which represented 5,13 % (in 2016, out of the 2.990 complaints submitted by economic operators, 172 cases of withdrawals were recorded– a percentage of 5,72 % of the total number of complaints lodged with the Council by the economic operators).

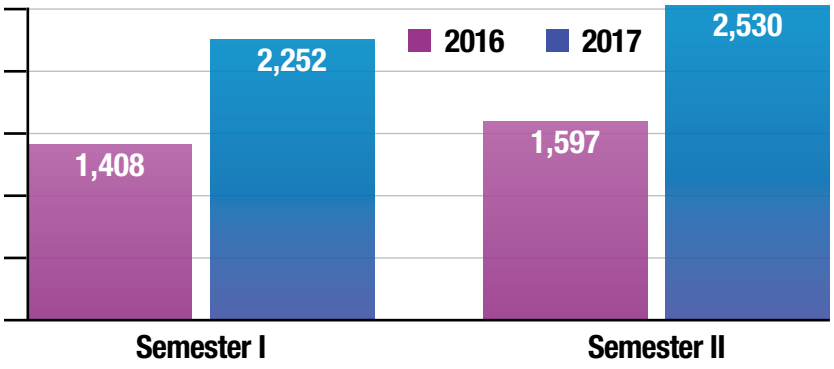
Analyzing the evolution of the complaints lodged by the economic operators with N.C.S.C. in it was found that **in 2017** (4.782) with the situation from 2016 (3.005 lodged complaints), it may be obsreved that **during 2017 the number of complaints increased by 59.13 % (+1.777 complaints) compared to the previous year (Fig. 4).**

Comparing the biannual evolution of the complaints lodged by economic operators and solved by N.C.S.C. in the period 2016-2017, it is noted that over the last year, their number was higher compared to the previous year in the first and in the second semester, too **(Fig. 5)**.

Thus, **in the first half of 2017 the number of complaints increased by 59.94 % (+844 complaints) compared to the previous year, while in the second semester their number increased by 58.42 % (+933 complaints).**

It must be highlighted that the increase in the number of complaints lodged (submitted) with N.C.S.C. during 2017 compared to the previous year occurred amid an increase by

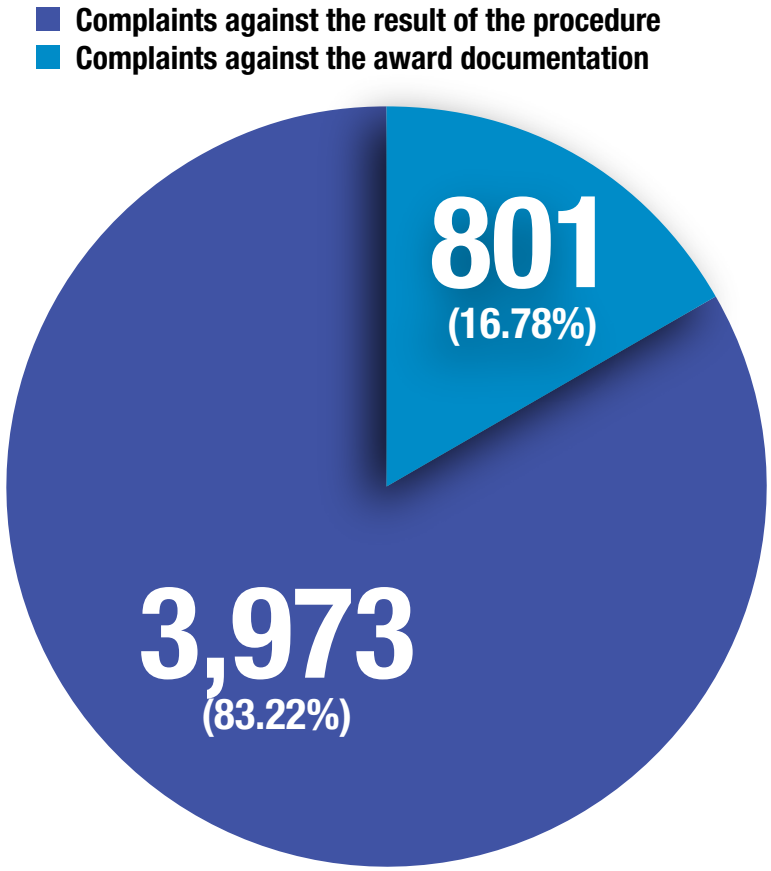
FIGURE 5 BIANNUAL EVOLUTION OF THE COMPLAINTS LODGED BY ECONOMIC OPERATORS WITH N.C.S.C. DURING 2016-2017



47.62 % (+9.086) in the number of procedures initiated in the Electronic System of Public Procurement (S.E.P.A.).

Concerning the complaints lodged by the economic operators with N.C.S.C., we should mention that in 2017 a number of 801 (16.78 %) complaints were submitted against the award documentation (+20.04%), while 3.973 complaints (83.22 %) were lodged against the result of the awarding procedure **(Fig. 6)**.

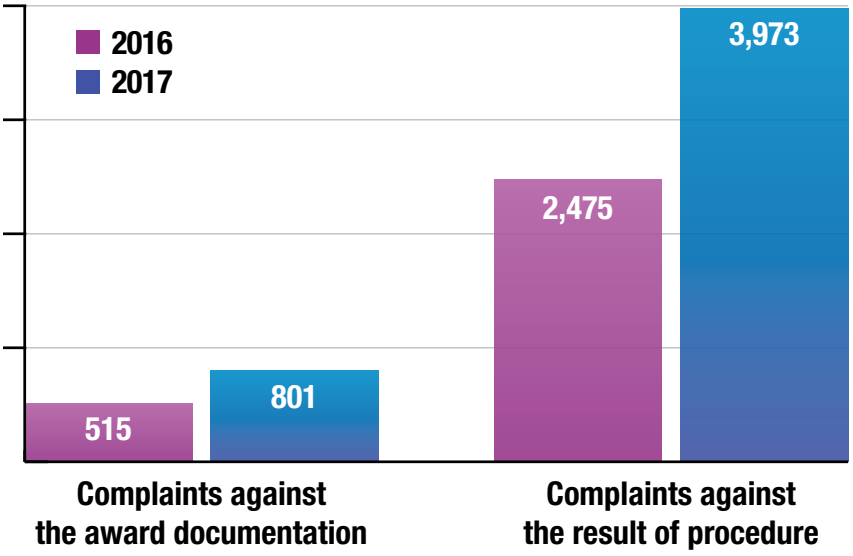
FIGURE 6 SITUATION OF THE COMPLAINTS LODGED AGAINST THE AWARD DOCUMENTATION AND THE RESULT OF THE PROCEDURE IN 2017



Taking into consideration the annual evolution of the complaints lodged by the economic operators with N.C.S.C., the official data show that important increases were recorded in 2017, compared to the previous year, regarding both the number of complaints lodged against the tender documentation and the number of complaints submitted against the result of the procedure. Consequently, it may be observed that, in comparison to the previous year, **there was an increase in 2017 of the number of complaints lodged against the award documentation (+55.53 %) and against the result of the procedure (+62.30 %) (Fig. 7).**

For a more accurate view on the evolution of the complaints lodged against the award documentation and the result of the awarding procedure, we will present in the following two charts, separately, the situation for the period January-December 2017,

FIGURE 7 SITUATION OF THE COMPLAINTS LODGED WITH N.C.S.C. AGAINST THE AWARD DOCUMENTATION AND THE RESULT OF THE PROCEDURE DURING 2016-2017



compared to the similar time span from the previous year **(Fig. 8, Fig. 9)**.

We mentioned above the fact that the significant increase of the number of complaints lodged with N.C.S.C. by economic operators in 2017, compared with the previous year (+59.13 %), was generated amid the growth (+47.62 %) of the number of procedures initiated in the Electronic System of Public Procurement (S.E.P.A.).

Therefore, **on the course of 2017, the share of complaints lodged with N.C.S.C. from the total of public procurement procedures initiated in S.E.P.A. was 16.98 %, higher in comparison with the previous year (Fig. 10).**

FIGURE 8 EVOLUTION OF THE COMPLAINTS LODGED IN 2017 AGAINST THE AWARD DOCUMENTATION IN COMPARISON WITH 2016

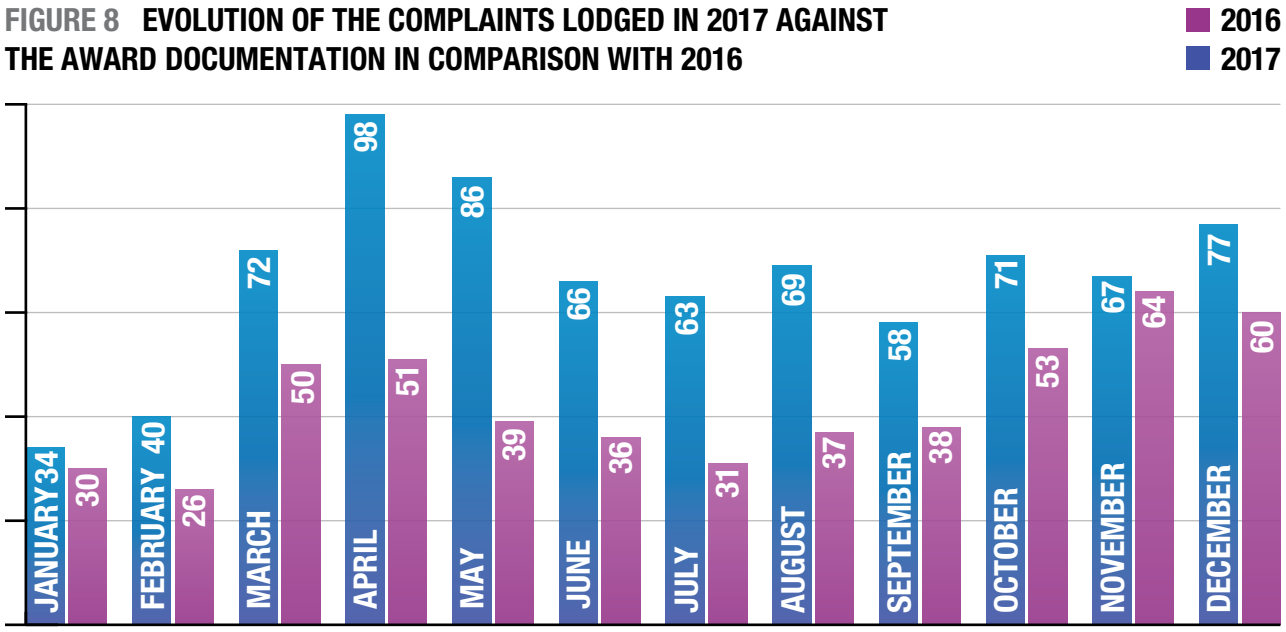
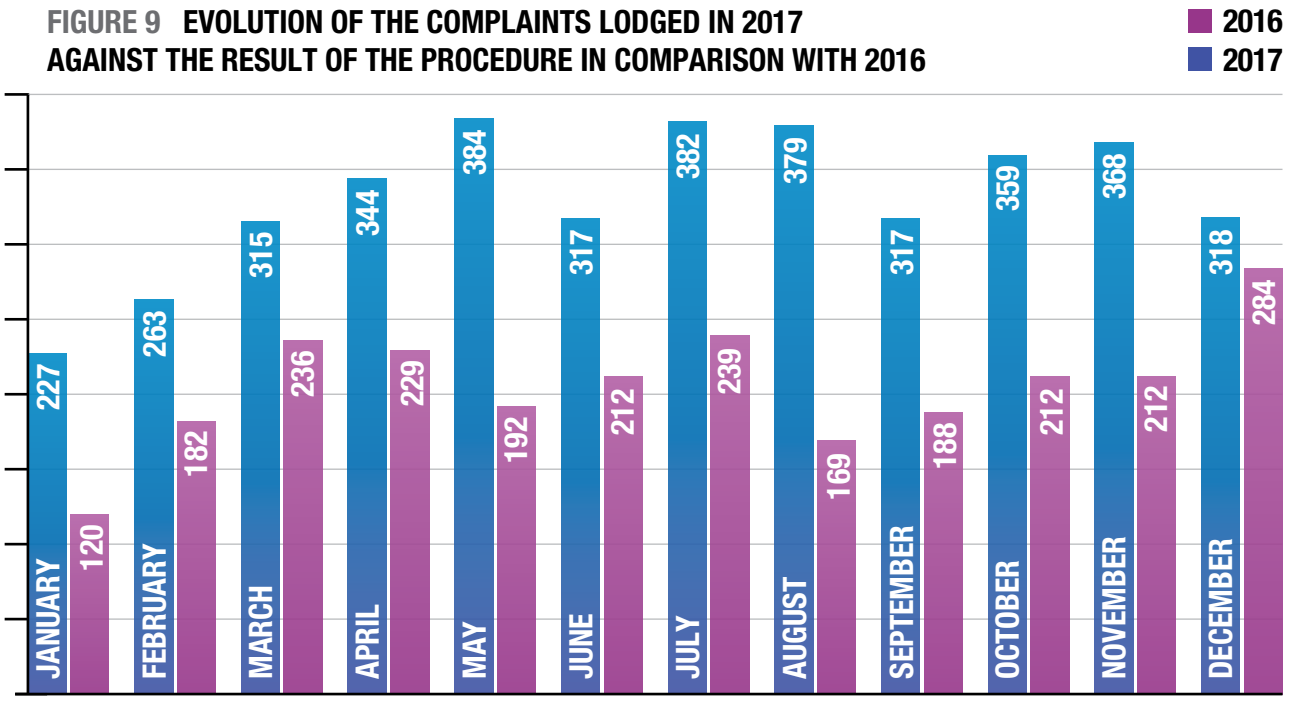


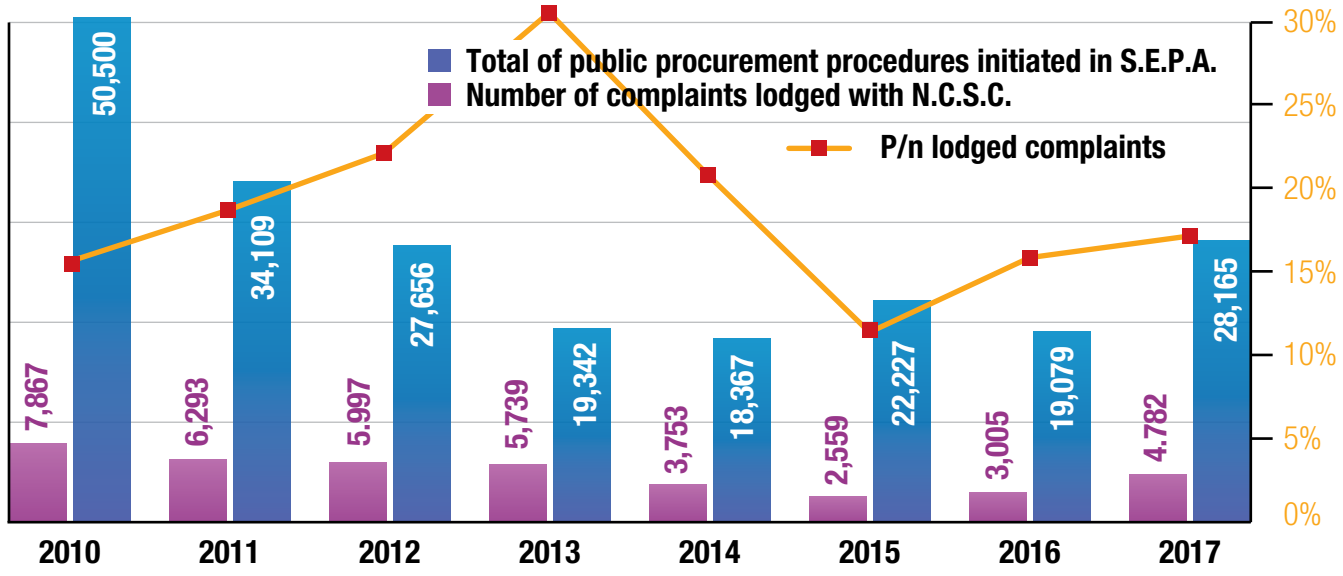
FIGURE 9 EVOLUTION OF THE COMPLAINTS LODGED IN 2017 AGAINST THE RESULT OF THE PROCEDURE IN COMPARISON WITH 2016



$$\text{P/n lodged complaints} = \frac{\text{number of complaints lodged with N.C.S.C.}}{\text{total of public procurement procedures initiated in S.E.P.A.}} \times 100$$

	2010	2011	2012	2013	2014	2015	2016	2017
Number of complaints lodged with N.C.S.C.	7,867	6,293	5,997	5,739	3,753	2,559	3,005	4,782
Total of public procurement procedures initiated in S.E.P.A.	50,500	34,109	27,656	19,342	18,367	22,227	19,079	28,165
P/n lodged complaints	15.58%	18.45%	21.68%	29.67%	20.43%	11.51%	15.75%	16.98%

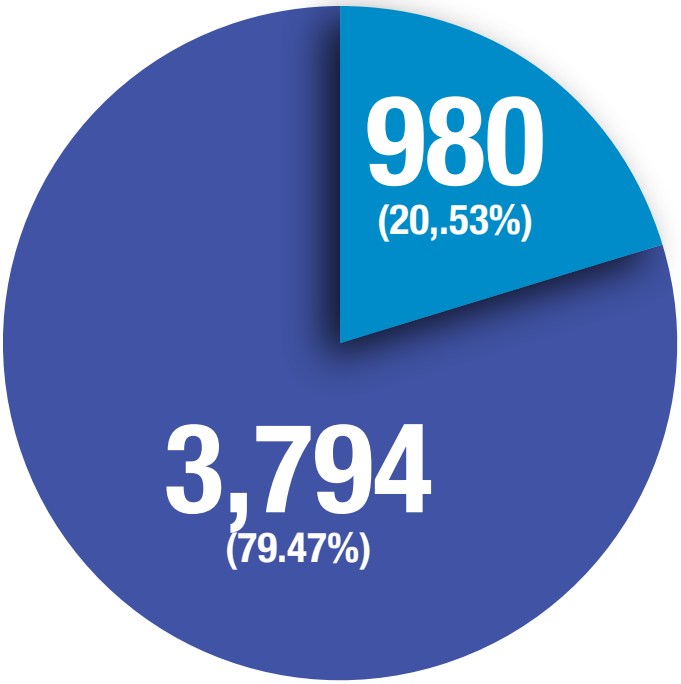
FIGURE 10 SHARE OF COMPLAINTS LODGED WITH N.C.S.C. DURING 2010-2017 FROM THE TOTAL OF PUBLIC PROCUREMENT PROCEDURES INITIATED IN S.E.P.A.



Keeping in mind the source of the funds (European/national) from which the award procedures of the public procurement contracts were financed, the official data reveal that in 2017 a number of 980 complaints were lodged under procedures financed from European funds, while the rest of 3.794 targeted procedures financed from national public funds.

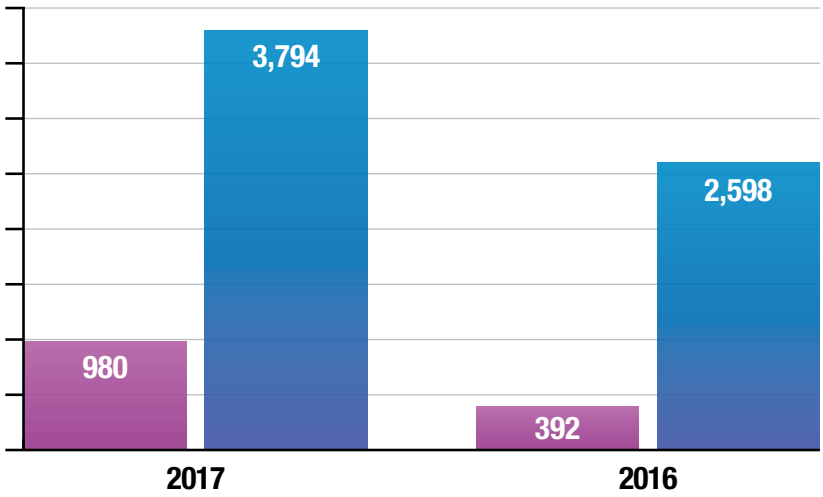
Complaints lodged under procedures financed from public funds
Complaints lodged under procedures financed from european funds

FIGURE 11 COMPLAINTS LODGED WITH N.C.S.C. IN 2017 BY SOURCE OF THE FUNDS FROM WHICH THE AWARD PROCEDURES OF THE PUBLIC PROCUREMENT CONTRACTS WERE FINANCED



An analysis of the number of complaints lodged with N.C.S.C., by source of the funds from which the award procedures for the public procurement contracts were financed, shows that in 2017 the number of procedures financed from European funds increased with 150 % (588 complaints), compared with the previous year, while the number of complaints lodged under procedures financed from national public funds recorded a 46/04 % growth (1.196 complaints) (Fig. 12).

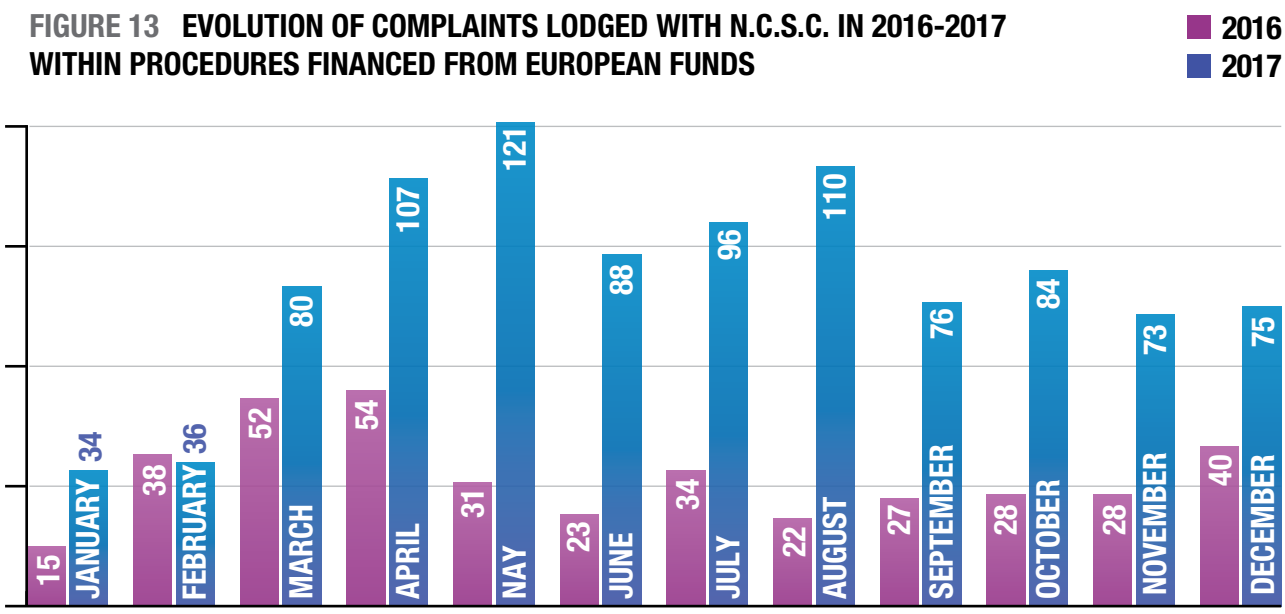
FIGURE 12 EVOLUTION OF COMPLAINTS LODGED WITH N.C.S.C. IN 2016-2017, BY SOURCE OF THE FUNDS FROM WHICH THE AWARD PROCEDURES OF PUBLIC PROCUREMENT CONTRACTS WERE FINANCED



Complaints lodged under procedures financed from national public funds
Contestații formulate în cadrul unor proceduri finanțate din fonduri europene

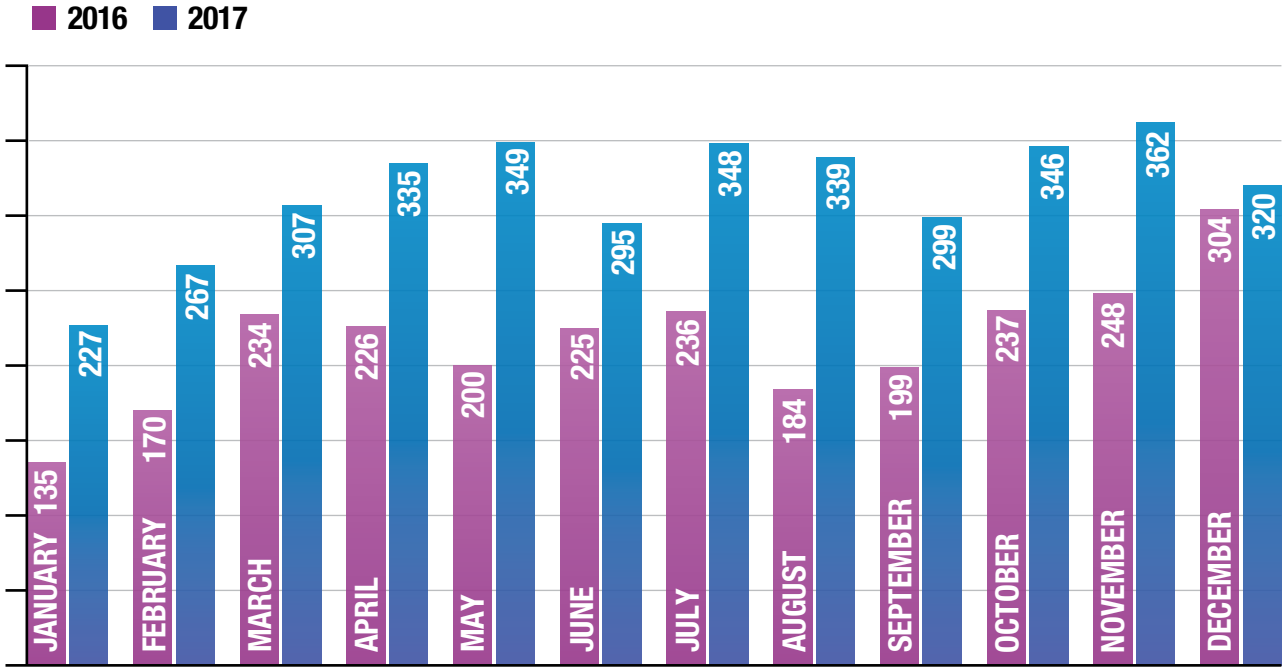
Concerning the monthly evolution, the number of complaints lodged with N.C.S.C. within award procedures for public procurement contracts financed from European funds has evolved during 2017, in comparison with the previous year, as follows **(Fig. 13)**:

FIGURE 13 EVOLUTION OF COMPLAINTS LODGED WITH N.C.S.C. IN 2016-2017 WITHIN PROCEDURES FINANCED FROM EUROPEAN FUNDS



Similarly, the number of complaints lodged with N.C.S.C. within award procedures for public procurement contracts financed from national funds (local budget/state budget) has evolved during 2017, in comparison with the previous year, as follows **(Fig. 14)**:

FIGURE 14 EVOLUTION OF COMPLAINTS LODGED WITH N.C.S.C. IN 2016-2017 WITHIN PROCEDURES FINANCED FROM NATIONAL FUNDS (LOCAL BUDGET/STATE BUDGET)



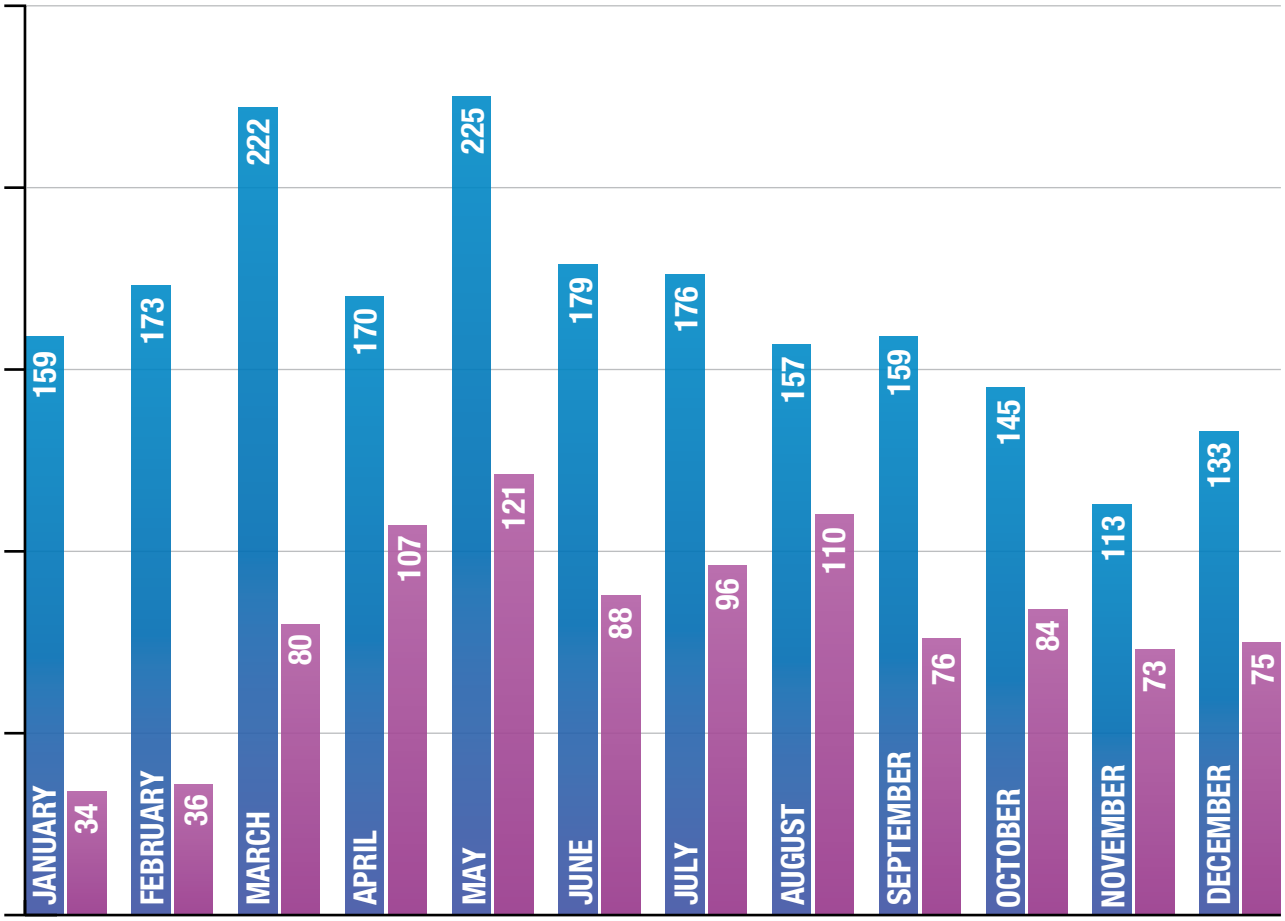
Interestingly, it must be determined for 2017 the share of complaints lodged with N.C.S.C. within public procurement procedures financed from European funds from the total of procedures initiated in S.E.P.A. from European funds. In this regard, we shall employ the following calculation formula:

$$\text{P/n lodged complaints} = \frac{\text{number of complaints lodged with N.C.S.C. within procedures financed from European funds } \textbf{(980 complaints)}}{\text{total of public procurement procedures initiated in S.E.P.A. from European funds } \textbf{(2.011 procedures)}} \text{ X } 100$$

Therefore, it results that **on the course of 2017 the share of complaints with N.C.S.C. under public procurement procedures financed from European funds, out of the total of procedures initiated in S.E.P.A. from European funds, was 48.73% (Fig. 15).**

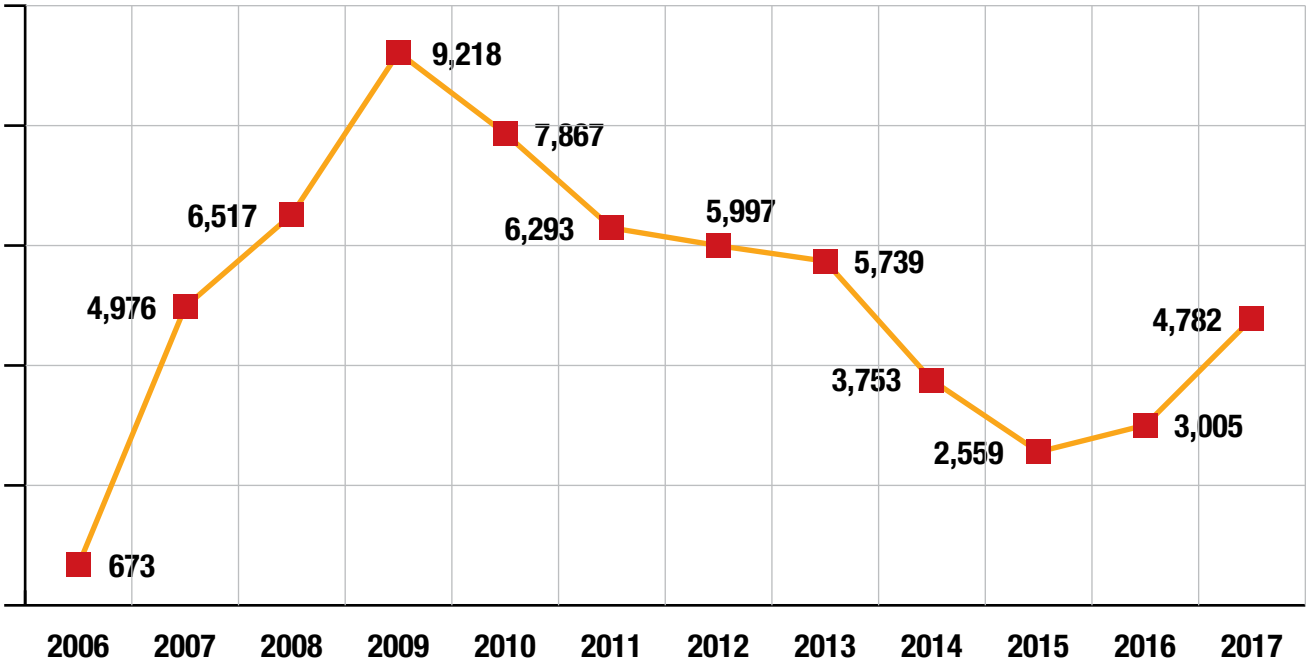
The monthly evolution during 2017 may be more easily observed in the table below, comprising the complaints lodged with N.C.S.C. under procedures financed from European funds in comparison with the procedures initiated in S.E.P.A. and financed from European funds.

FIGURE 15 EVOLUTION OF COMPLAINTS LODGED IN 2017 WITH N.C.S.C. WITHIN PROCEDURES FINANCED FROM EUROPEAN FUNDS, COMPARED TO THE NUMBER OF PROCEDURES INITIATED IN S.E.P.A. AND FINANCED FROM EUROPEAN FUNDS



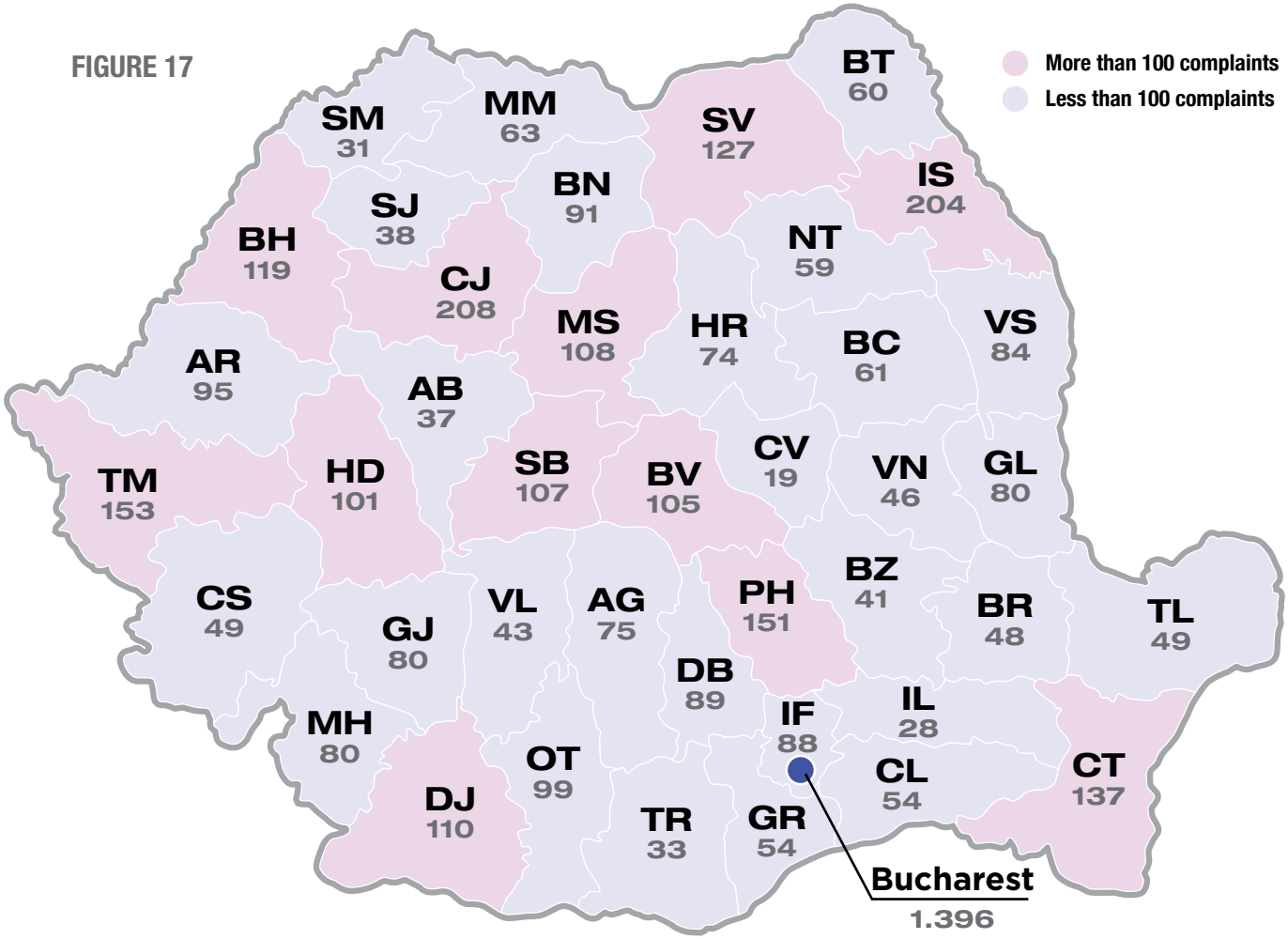
It is important to emphasize that a number of 61.379 complaints were lodged by economic operators with N.C.S.C., since its foundation and until 31 December 2017 (Fig. 16) .

FIGURE 16 EVOLUTION OF COMPLAINTS LODGED BY ECONOMIC OPERATORS WITH N.C.S.C. DURING 2006-2017



In terms of the distribution on administrative territorial units (ATU), the number of complaints lodged by the economic operators in 2017 has evolved as follows **(Fig. 17)**:

FIGURE 17



ATU	COMPLAINTS	ATU	COMPLAINTS	ATU	COMPLAINTS
BUCHAREST	1.396	ARAD	95	CĂLĂRAŞI	54
CLUJ	208	BISTRIȚA NĂSĂUD	91	GIURGIU	54
IAŞI	204	DÂMBOVIȚA	89	CARAŞ SEVERIN	49
TIMIŞ	153	ILFOV	88	TULCEA	49
PRAHOVA	151	VASLUI	84	BRĂILA	48
CONSTANȚA	137	GALAȚI	80	VRANCEA	46
SUCEAVA	127	GORJ	80	VÂLCEA	43
BIHOR	119	MEHEDINȚI	80	BUZĂU	41
DOLJ	110	ARGEŞ	75	SĂLAJ	38
MUREŞ	108	HARGHITA	74	ALBA	37
SIBIU	107	MARAMUREŞ	63	TELORMAN	33
BRAŞOV	105	BACĂU	61	SATU MARE	31
HUNEDOARA	101	BOTOŞANI	60	IALOMIȚA	28
OLT	99	NEAMȚ	59	COVASNA	19

A brief comparative analysis of the distribution of the complaints lodged with N.C.S.C. on Administrative Territorial Units for the period 2016-2017 offers relevant information regarding the number of public procurement procedures developed by an ATU, the funds allocated for the development of public procurement procedures for each ATU, and, last but not least, the equity of the procedures developed by the contracting authorities from each ATU.

Taking strictly into account only the number of complaints with N.C.S.C. for each ATU separately and by corroborating the official statistic data recorder for the period January 2016 – December 2017, the following may be noted:

- **Bucharest –** remains in first place regarding the number of lodged complaints, their increase with 51.08 % being observed (2016 - 924 complaints, 2017 - 1.396 complaints);
- **Cluj –** reached 4th place in 2016, 2nd place in 2017, after the number of lodged complaints within public procurement procedures developed by ATU registered a growth of 144.7 % (2016 - 85 complaints, 2017 - 208 complaints);
- **Iasi –** came down from the 2nd place in 2016 to the 3rd place in 2017, although the number of lodged complaints under public procurement procedures developed by ATU recorded an increase of 108.16 % (2016 - 98 complaints, 2017 - 204 complaints);
- **Covasna –** goes down from place 30 in 2016 to the last spot (42) in the 2017 list, after the number of lodged complaints within public procurement procedures developed by ATU registered a significant decrease of 50% (2016 - 38 complaints, 2017 - 19 complaints);
- **Teleorman –** goes up from the last place (42) occupied in 2016 onto place 39 in 2017, after the number of lodged complaints within public procurement procedures developed by ATU registered an increase of 83,33% (2016 - 18 complaints, 2017 - 33 complaints)
- **Calarasi –** goes up from the second last place (41) occupied in 2016 onto the 29th spot in 2017, after the number of lodged complaints within public procurement procedures developed by ATU recorded an increase of 200% (2016 – 18 complaints, 2017 – 54 complaints).

The object of the contract represents an extremely important element in the analysis of the complaints lodged by economic operators within award procedures for the public procurement contracts.

The official data show that, in the period January – December 2017 the number of complaints lodged by economic operators, depending on the object of the public procurement contract, had the following evolution **(Fig. 18)**:

- procedures for the award of public procurement contracts having as object the **execution of works – 2,143 (44.89%);**
- procedures for the award of public procurement contracts having as object the **provision of services – 1,530 (32.05%);**
- procedures for the award of public procurement contracts having as object the **supply of products – 1,101 (23.06%).**

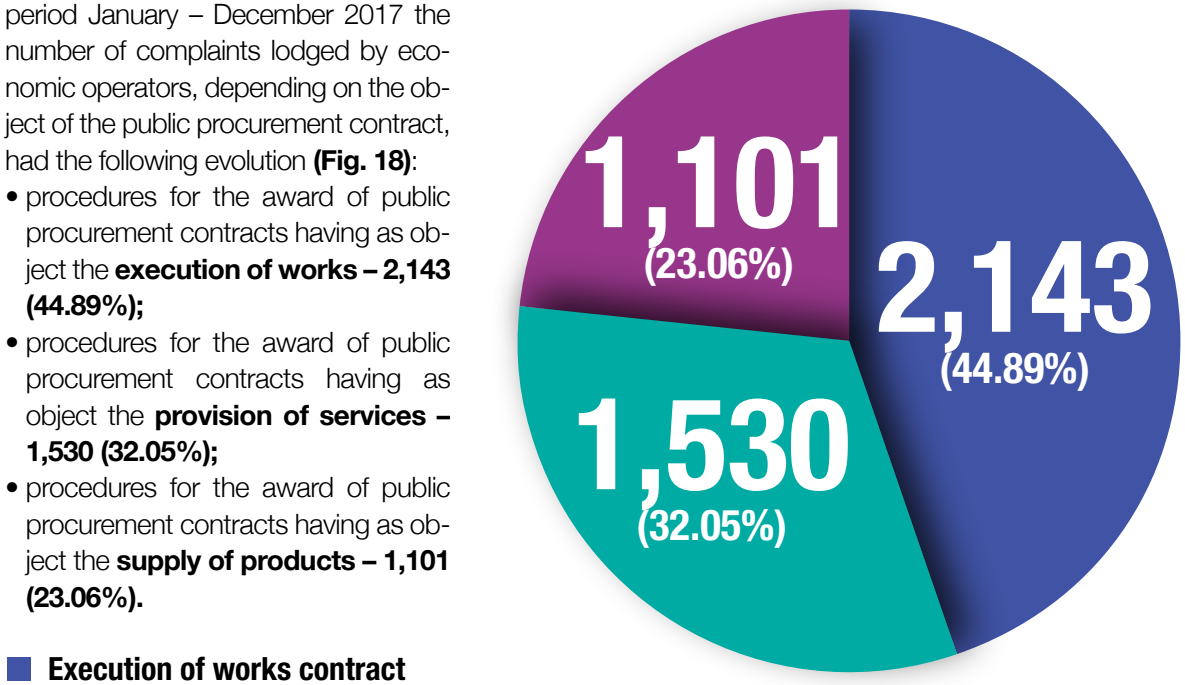


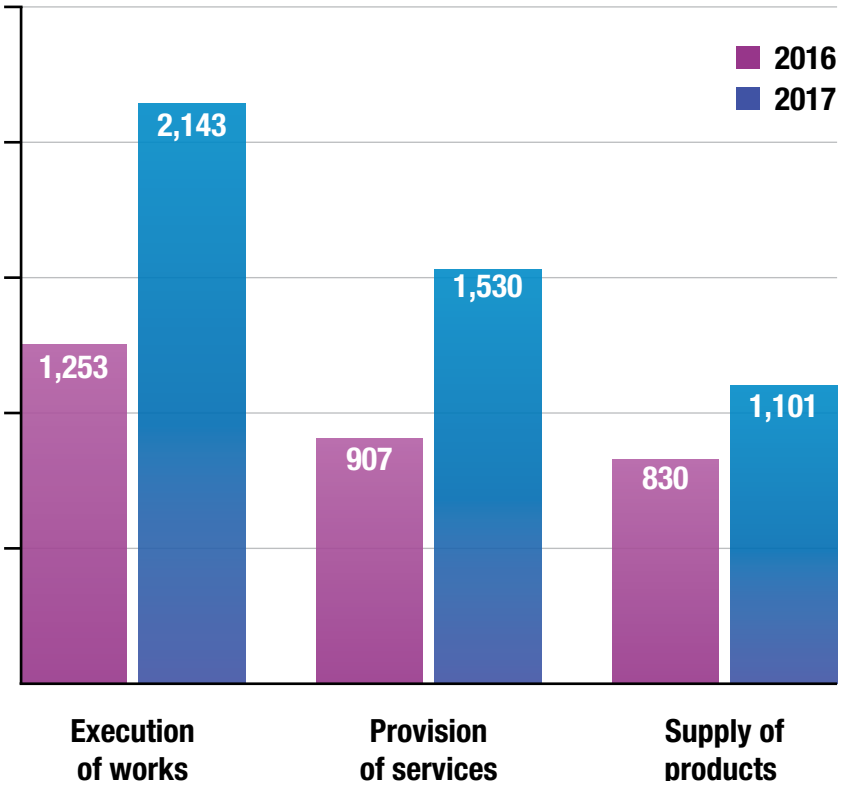
FIGURE 18 SITUATION OF COMPLAINTS LODGED BY ECONOMIC OPERATORS IN 2017 BY TYPE OF CONTRACT

Compared to 2016, the most important complaints growth in 2017 was recorded for the award procedures of public procurement contracts having as object the execution of works (+71.03 %), while an increase of 68.69 % was observed in the case of the public procurement contracts having as object the provision of services **(Fig. 19)**.

Throughout 2017, each of the 11 panels for solving complaints were assigned, randomly and electronically, to resolve approximately 435 complaints/files, which meant a monthly load of about 23 cases.

In the context in which the number of personnel did not benefit of any supplementation, it practically results that in 2017 the annual average number of complaints/files randomly assigned for solving to each panel has grown with 162 complaints/files compared to the previous year (+59%), meaning an overload of each solving complaints panel within the Council with approximately 13 files/month.

FIGURE 19 SITUATION OF COMPLAINTS LODGED WITH N.C.S.C. IN 2016-2017 BY TYPE OF OBJECT OF THE PUBLIC PROCUREMENT CONTRACT



Although the number of complaints lodged in 2017 with N.C.S.C. has increased in a spectacular manner in comparison with the previous year, and the complexity of the complaints/files that were submitted for solving was remarkable, the 11 solving complaints panels within the institution have respected to the letter the solving terms set out in Law no. 101/2016[28].

Virtually, on the course of 2017, the medium solving term for of the complaints was about 15 days, thus being one of the shortest solving terms for lodged complaints within the similar institutions from the European Union.

2.1.2. OBJECT OF THE COMPLAINTS LODGED BY ECONOMIC OPERATORS

Regardless of the subjective right's object (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.

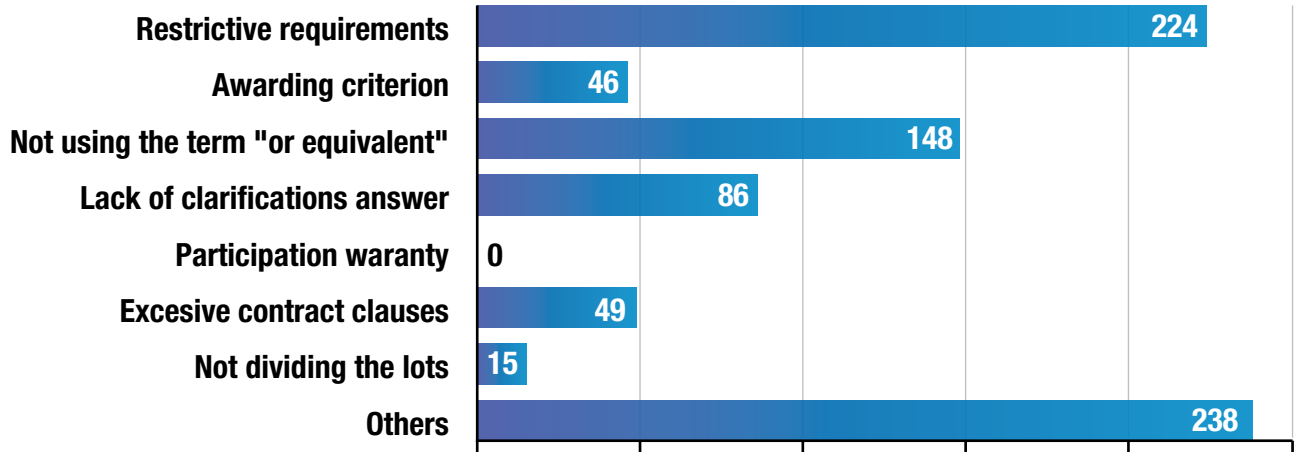
At the time of lodging an appeal, this will be individualized, thus becoming a lawsuit/litigation, and its object is made up of what the parties agree to submit for settlement, what they will ask the counsellors to verify, to appreciate, to held, to resolve. It results ipso facto that the complaint solving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

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

As previously noted, following the object analysis of the 4.774 complaints submitted by the economic operators with the Council in 2017, it resulted that 801 complaints targeted the awarding documentation (16.78%) and 3.973 targeted the result of the procedure (83.22%). **Analyzing the object of the complaints lodged in 2017 by the economic operators against the requirements in the awarding documentation, it has been observed that the most contested aspects were (Fig 20):**

- restrictive requirements regarding similar experience, qualification criteria, technical specifications (224 complaints);
- indication in the award documentation of names of technologies, products, brands, manufacturers, without using the term "or equivalent" (148 complaints);
- lack of a clear, complete and unambiguous answer from the contracting authority to the requests for clarifications regarding the provisions of the awarding documentation (86 complaints);
- imposing inequitable or excessive contractual clauses (49 complaints);
- award criteria and evaluation factors without calculation algorithm or with non-transparent or subjective calculation algorithm (46 complaints);
- not dividing the procurement on lots, in the case of similar products/works (15 complaints);
- others (238 complaints)

FIGURE 20 CRITIQUES FORMULATED AGAINST THE AWARD DOCUMENTATION IN 2017



For a better understanding of these aspects, we shall present below a few cases:

ANALYSIS OF OBJECTIVE CONTRACTUAL CLAUSES. OWNERSHIP OF A LABORATORY FOR TESTING.

The Council notes that the parties are in dispute regarding a series of provisions which infringe the applicable legal regulations – especially Law no. 98/2016, Law no. 101/2016, G.D. 1.405/2010 and Order no. 146/2011 (as the complainant claims), namely on some of the contractual clauses attached to the award documentation (see Article 3, par. (1), letter z, and Article 154 from Law no. 98/2016). Preliminary, the Council notes that CA[29] understood to use, as part of the awarding documentation, the contractual conditions which are found in Annex 2 of G.D. no. 1.405/2010 on approving the use of some contractual conditions of the International Federation of Consulting Engineers in the Field of Constructions (FIDIC) for investment objectives in the field of national interest transport infrastructure, financed from public funds.

Against some clauses (from the Contractual Agreement; regarding penalties; sub-clauses from the Contract Special Conditions; Annex of a Form, corroborated with a contractual sub-clause), but also against the request in the procurement's data card regarding the need that the entrepreneur should have available at least a level II authorized laboratory, S.C. ... Ltd submitted a notification prior to the complaint, through which it requested remedy measures. Afterwards, S.C. ... Ltd lodged a complaint, although CA had modified a part of the contested requirements, but without giving full efficiency to the rule of measure communication, set out in Article 6, par. (6), from Law no. 101/2016, in the sense that it did not notify the interested economic operator.

The Council found that CA had published in SEPA some remedy measures, the revised contractual Agreement and the Annex to the revised Offer, endeavour to which S.C. ... Ltd pointed out (address no. 3840/13.09.2017) that it did not maintain anymore the requests from the complaint regarding the decrease of the penalties set out in the Annex to Offer, related to two sub-clauses, and reducing the minimum value of the Interim Payment Certificates, set out in the Annex to Offer, concerning a sub-clause. At the same time, S.C. ... Ltd mentioned that it holds the other critiques, reason for which the Council will proceed to their analysis.

Observing the complainant's critiques related to the provisions of Article 8 from the contractual Agreement, respectively the apparent cancellation of the role of the Dispute Adjudication Board (DAB), simultaneously with investing the engineer with the attributions of this committee, the Council notes their groundlessness.

The Council finds that the author of the critiques acknowledged the remedy measures adopted by CA, regarding the disputes' solving terms and alternative right, of investing the court or the Arbitration Court, accepting the former.

Yet, through the clarifications to the complaint, its author maintains, in all, the initial critiques concerning the elimination of DAB, and, in part, the critiques regarding the onward involvement of the Engineer, the existence of some lapse terms for the right to lodge some claims, aspects which would represent a containment of its rights.

Contrary to the aforementioned claims, in synthesis, the Council finds that by interpreting the sub-clauses "Arbitration" and following, from G.D. no. 1405/2011, relied upon even by the complainant, investing the Arbitration Court is not conditioned by the existence of a decision of DAB or by the mandatory browsing of a preliminary stage before this commission. As a matter of fact, there is a reference even to the possible inexistence of DAB in the already mentioned sub-clauses.

In addition, the Council finds that CA, at the same time with the involvement of the divergence solving engineer (as well as DAB, he can be a witness before the Arbitration Court), mentioned terms for his involvement that were equal to the terms attributed to the activity of DAB, as stated in G.D. no. 1405/2011, which reveals that their length could not harm a right related to the complainant.

Concerning the alternative investing mode for solving a dispute, the Council notes that CA mentioned, amongst others: "(...) The dissatisfied party shall address the Romanian court of administrative and fiscal law or the Court of International Commercial Arbitration, in conformity with GEO no. 92/1997, as

amended and supplemented". But, according to Article 11 from GEO no. 92/1997 on stimulating direct investments, the litigations between foreign investors and the Romanian state, regarding the right and obligations resulting from the provisions of Chapters II and III, as well as from Chapter V, shall be solved, at the investor's request, according to the procedure set out by:

a) Law of administrative law no. 29/1990 and Law no. 105/1992 on the settlement of the international private law relationships;

b) Convention on the settlement of investment disputes between States and nationals of other States, signed at Washington on 18 March 1965 and ratified by Romania through the State Council Decree no. 62/1975: "(...) when the foreign investor is citizen of a state party to the convention and the dispute is solved by conciliation and/or by arbitration. In such cases, a Romanian society wherein foreign investors – according to Romanian law – hold a control position, this shall be considered, in compliance with Article 25, par. (2) of the convention, as having the nationality of the foreign investors (...)".

Furthermore, the Council also takes into account the provisions of Article 57 of Law no. 101/2016, according to which: "Parties may agree that the litigations regarding the interpretation, closing, execution, modification, and termination of contracts will be solved by arbitration". The Council notes that the author of the critiques is preventing to these laws the provisions of G.D. no. 1.405/2011 and of Order no. 146/2011, normative acts with inferior judicial power.

In these conditions, CA has respected the current legal provisions, as they were mentioned above, the Council concluding that there is no exclusive investing right just for the arbitration court in solving disputes, Article 553 of C.p.c. ("Closing the arbitration convention, for the litigation that represents its object, excludes the competence of courts of law") stating the contrary to the complainant's claims.

Consequently, the Council shall reject, as unfounded, the head of claim regarding the elimination of Article 8 of the contractual Agreement, based on Article 26, par. (6) of Law no. 101/2016. Implicitly, using the same judicial argument, the Council will also reject as unfound the head of claim regarding the elimination of Articles 23 and 24 of the contractual Agreement.

Regarding the complainant's claims related to the alleged necessity to eliminate Article 16 of the contractual Agreement, through which sub-clause 11.9 (Report of final reception), from the Special Conditions of the contract, would have been incorrectly modified, the Council notes their validity.

Therefore, it must be mentioned that, in compliance to the relating text of the contractual Agreement, as part of the award documentation, CA has set out that: "Issuing the Report of Final Reception is conditioned by the issuing of the Report of final reception for the works that made the object of contract no. ..../20.11.2013". Yet, conditioning the signing of the Report of final reception for the works executed within the works contract, which would be attributed through the current procedure, of compliant conclusion of another works contract, performed with another entrepreneur, having a different object, appears in contradiction with the regulations in the field. Even if the object of the two contracts refers to associated construction works, their execution shall be ensured by different entrepreneurs, and their execution periods are different in time. Thus, following their result is not totally interdependent. The Council takes also into account that the Rules of reception for construction works, approved by G.D. no. 273/1994, state that the final reception is organized after the warranty period has expired (Article 24), being exclusively finished in relation to the

observations of the reception committee, included in the Report, being at the contractor's disposal (inclusively after the remedy of any flaws/vices of the construction), after the proprietor's acquirement (Articles 31-32). In this context, the Council notes the requirement to eliminate the conditioning of the Final Reception Report for the works that represent the object of the current contract, in discussion, by the issuing of the Final Reception Report for the works that represent the object of contract no. .../20.11.2013. Consequently, the Council will admit the head of claim regarding the elimination of Article 15 (ex 16) from the Contractual Agreement, based on the regulations of Article 26, par. (2) and (5) of Law no. 101/2016. As a consequence, the contracting authority will inform in maximum 11 days the future contractors of the current modification.

Regarding the alleged establishment of a payment mechanism contrary with the provisions of Law no. 72/2013 and Order no. 146/2011, by conditioning the payment in maximum 60 days after the approval of the payment certificate associated with the invoice, the Council notes that, in fact, CA undertook remedy measures for the regulations of the Contractual Agreement, but has maintained the 60 days payment term, from the date of the approval of the payment Certificate (Article 20 has become Article 19). Yet, under the regulations of Article 19.1, CA specifies that the associated sub-clauses of the Contract Special Conditions (including 14.7), regarding payments, issuing payment and refund certificates, are applicable subject to honouring Law no. 72/2013. In addition, Article 19.2 mentions (motivates) the necessity of using a payment term of maximum 60 days by the complexity of the contract and the large volume of documents. The Council notes that, on one side, the CA's reference to the prevalence of the provisions of Law no. 72/2013 does not represent a clause with precise, correct and complete content, as requested by the regulations of Article 154 from Law no. 98/2016.

On the other side, Law no. 72/2013 imposes CA (through Article 6) a payment term of maximum 30 days since receiving the invoice, while a larger contractual term is allowed only in exceptional cases, objectively motivated (according Article 7).

In the current situation, all the more so it is necessary to obtain the approval of the payment certificate, with which occasion the checking of the documents associated with the payment is performed, there is no reasonable motivation for prolonging this payment term at 60 days after the approval of the certificate. The respective works did not have a complex technical character which would require the checking of the supporting documents on the course of such a long period, and the FIDIC regulations establish reimbursement rules adequate for the type of contract chosen by the contracting authority. For these reasons, the Council considers that the critiques of the complainant are motivated. Thus, based on the provisions of Article 26, par. (2) and (5) of Law no. 101/2016, the Council will partially admit the associated head of claim and will compel CA to modify the article concerning the maximum payment term, in the sense of correlating it with the applicable legal regulations, mentioned above. The measure of modification the clauses shall be ensured by CA in maximum 11 days since receiving the decision.

Regarding the alleged unilateral termination right, from the beneficiary, in the case of ceasing the allocation of financial resources, which it would not be set out in G.D. no. 1405/2010 or in Order no. 146/2011, concerning clause 14 from the FIDIC contractual conditions, which would be affected by Article 28.2 from the Contractual Agreement, the Council notes the groundlessness of the claims.

The Council notes that, in fact, the initial form of Article 28.2 of the Contractual Agreement has been modified, by remedy disposed by the contracting authority and acknowledged by the complainant. According to the new format, the contract termination for lack of funds represents a clause with objective character, because its content should be understood in the context in which the lack of budgetary allocation does not represent the result of CA's behaviour. Thus, in order for this liability exoneration to operate, the ceasing of allocation must not be imputable to it. At the same time, the Council notes that there are clauses which ensure, for both parties, similar rights to the aforementioned termination, contrary to the complainant's claims, who pretends that there is not any such possibility in the case of the ongoing of a FIDIC contract (see clauses 15.2 and 16.2).

Furthermore, in cause, the ceasing of allocation must be definitive, not being suscepti-

ble of confusion with the situation of payment delay or postponement, which for example may lead to suspending the works' execution, according to clause 16.1 from the same Contract Special Conditions.

Therefore, the Council considers that CA gave practical efficiency to the interdiction from Article 14, par. (3) of Law no. 500/2002, and will reject, as unfounded, the head of claim regarding Article 28.2, based on the provisions of Article 26, par. (6) of Law no. 101/2016.

Concerning the alleged excessive level of the penalties, associated to sub-clauses 4.17, 4.23, the Council shows that the critiques' author does not indicate for these an acceptable level, in order for the opportunity of the requested depletion to be analyzed. Furthermore, after the remedy measures adopted by CA, the delay penalties associated to a sub-clause have disappeared. From the same reason, the Council notes that, at this moment, the request for modifying the penalties has remained without object.

As for the complainant's claims regarding the alleged illegality of the demand "Technical and/or professional capacity" from the data card of the procurement ("The tenderer should demonstrate that disposes/ has access to the following machinery, installations and technical equipments for the works' execution: a) Authorized minimum second degree laboratory according to the Order of Ministry for Development and Tourism no. 1.497/2011"), the Council notes their groundlessness.

Hence, the Council notes that, according to the respective data card of the procurement, CA has mentioned which is the Modality for accomplishing the request. The Council preliminary notes that the request concerning the proof of holding, in any form, of an authorized Laboratory of minimum second degree, according to Order no. 1.497/2011, must be fulfilled by the tenderer designated as winner, regardless the presentation form of the offer (individual or in a group: association or having the support of a third party). The complainant claims that the request in cause would be discriminatory for smaller tenderers or tenderers who are not residents in Romania.

Although the complainant does not bring in discussion the utility of the request, only the alleged discrimination of a certain type of tenders to which it belongs, the Council takes into account that, no matter the form of their organization, according to the regulation of Law no. 10/1995, the works' contractors have the obligations to ensure their adequate quality level (Article 14, par. 2), but also the obligation to manage the use evidence of certain agrément/compliant products or imposed by project (Article 23, letter f). Yet, by Order no. 1.497/2011 of MDT, it is not asserted that the Laboratory must belong to an economic operator which has civil constructions as its activity object. In these conditions, as it is not necessary for the contractor to have its own Laboratory, the Council notes that the contested request, imposed by CA, respects the legal regulations applicable in the field of public procurement, thus the head of claim associated with the aforementioned critiques shall be rejected as unfounded, based on the provisions of Article. 26, par. (6) of Law no. 101/2016.

Regarding the alleged discriminatory character of the maximum term (365 days since the signing of the contract) in which the order for beginning the works could be issued, the Council notes that a sub-clause from the Contract Special Clauses reproduces the text of the Order no. 146/2011 on the approval of special contractual conditions. Consequently, any depletion of this term would be considered as harming the rights of any other participant at the awarding procedure, who would oppose exactly the text of the normative act to an endeavour of the contracting authorities.

Taking into consideration the aforementioned aspects, based on the provisions of Article 26, par. (2) and (5) of Law no. 101/2016, the Council will admit the complaint lodged by S.C. ...Ltd, for the part concerning the elimination of the regulations of Article 15 (ex 16) from the "Contractual agreement – Works execution contract", but also for the modification of Article 19 "Payments" (ex 20.2), regarding the 60 days payment term. At the same time, the Council orders the elimination of the regulations of Article 1 from the "Contractual agreement", but also the modification of the payment term, in compliance with the applicable legal provisions, in term of 11 days since receiving the decision, measures which will be published in SEPA. In addition, based on Article 26, par. (6) of the law, the Council will reject as unfounded the other demands for the modification of the awarding documentation.

MEASURES TO REMEDIATE THE AWARD DOCUMENTATION. TECHNICAL AND PROFESSIONAL CAPACITY.

The first critique refers to the remedy measures mentioned at point 3 of the prior notification and is considering the following request mentioned in the Data card of the procurement at point III.2.3. a) Technical and /or professional capacity: "Declaration on the machinery and installations at the disposal of the economic operator. Tenderers shall prove that they possess the minimum facility: 3 vans; 6 pulverisators; 3 atomizers; a vehicle with ULV installation/provision of services contract with the Utilitarian aviation".

Concerning this request, in the Prior notification and in the complaint, SC...SRL demanded the following: "Modifying the provisions of point III.2.3. a) Technical and /or professional capacity from the data card of the procurement and the ones of the task book, respectively recalculating the technical-material and staff facilities (in the sense of their increment), in strict correlation with the real quantity of services to be executed, related to the surfaces and the execution frequency established by Order ANR-SCUP no. 82/2015".

In the response for the Prior notification, CA mentioned the following: "Regarding Section III.2.3. a) Technical and /or professional capacity from the data card of the procurement, we are inform you that the number of machinery requested in the awarding documentation was taken from G.D. no. 745/2007, Annex 10, on approving the rules for according licences in the field of public utility communitary services and it is equal to the minimum number of trucks and specific machinery, which is necessary for an operator in order to obtain a class 2 licence, associated with disinfection, extermination and deratization activities. According to Article 10, the class 2 licence may be obtained, for a number of 50.000 – 300.000 served inhabitants, the Municipality of... having a number of ... inhabitants. Concerning the ULV installation vehicle or provision of services contract with the utilitarian aviation, these were demanded for the increase of efficiency/effectiveness of the soil disinfection activity.

We are mentioning that, in compliance with point. 3), Section III.2.3 a) from the Data card of the procurement, the requested number of machinery represents «the minimum facility at the disposal of a tenderer».

According to response at point 2, «ULV installation vehicle or provision of services contract with the utilitarian aviation» will be modified as «ULV installation vehicle and provision of services contract with the utilitarian aviation»".

In the Contracting Strategy, CA mentioned that the number of vans, pulverisators and atomizers was established according to the prescription for Class 2 licence – Annex 10 of G.D. no. 745/2007 on approving the rules for according licences in the field of public utility communitary services and it represents the minimum number of trucks/machinery for granting the licence for undertaking the activity of disinfection, extermination and deratization.

Analyzing the critique of the complaint's author, the Council notes that this is motivated only in reference to the machinery "3 vans, 6 pulverisators, 3 atomizers", reason for which the Council will examine only these aspects.

According to Article 109, par. (2) from the Regulation Framework of the sanitation service of the localities, approved by Order A.N.R.S.C. no. 82/2015, "The operations of disinfection, extermination and deratization are performed only by the operator licensed by A.N.R.S.C., to which the activity was attributed in direct inventory or by delegation of the Administrative Territorial Unit, under the law".

According to the Regulations on granting licences in the field of public utilities communitary services, approved by G.D. no. 745/2007, Article 10, the A.N.R.S.C. licences "are attributed, on three classes, to the applicants which do not provide any service/public utilities activity in the regulation field of A.N.R.S.C., but have this capacity, as well as to the providers/contractors which ensure the service or one or more specific activities, depending on the number of served inhabitants, as following: class 1 – for a number bigger or equal to 300.000 inhabitants; class 2 – for a number between 50.000 and 300.000 inhabitants; class 3 – for a number smaller or equal to 50.000 inhabitants". By interpreting the respective normative acts, by relating to the population of the Municipality of... (... inhabitants), it results that for providing the DED service, following

its attribution, the selected economic operator should possess a class 2 type licence from A.N.R.S.C.

In the Task Book, at Article 19, CA made the following clarifications regarding the A.N.R.S.C. licence: "In compliance with Article 49, par. (3) of Law no. 51/2006, republished, «The operators have the obligation to request and to obtain the issue of the licence in term of 90 days from the date of the approval of the administration granting decision or, if any, since the date of signing the inventory assignment contract». Because Article 30, par. (1), letter c of Law no. 101/2006, republished, stats that: «Are considered contraventions and are sanctioned with a fine between 30.000-50.000 lei the following deeds, others from the ones set out in Law no. 51/2006, republished: c) closing inventory delegation contracts by the mayor, for one of the localities' sanitation activities mentioned at Article 2, par. (3), with an operator that does not possess a licence», we mention that in the situation in which the operator with whom the delegation contract is signed does not obtain the licence in the set out term, the contract is terminated by law".

According to Annex 10 – "The minimum necessary of trucks and machinery specific for granting the licences associated with localities' public sanitation service" to the regulations of G.D. no. 745/2007, the following types and quantities of machinery are set out for a class 2 licence: Pulveriser – 6 pieces; Atomizer – 3 pieces; Means of transportation = 3 pieces.

Related to the analyzed critique, the Council notes the incidence of the following legal regulations:

- Article 178 of Law no. 98/2016:

"(1) The contracting authority has the right to establish in the awarding documentation requirements regarding the technical and professional capacity which are necessary and adequate in order to ensure that the economic operators possess the mandatory human and technical resources and experience for executing the public procurement contract/ framework-agreement at a compliant quality standard.

(3) In the case of awarding procedures for public procurement contracts/ framework-agreements of services or works or for public procurement contracts/ framework-agreements of products which necessitate works or placement or installation operations, the professional capacity

of the economic operators to perform the services or to execute the construction or the installation operations may be evaluated depending on their abilities, competences, efficiency, experience, and potential".

• Article 179 of Law no. 98/2016:

"The economic operator makes proof of carrying out the requests regarding the technical and professional capacity by presenting, if any, one or more of the following information and documents:

j) a declaration concerning the machinery, installations and technical equipments at the disposal of the economic operator, which performs services or executes works by executing the contract".

• Articles 1 and 2 of ANAP Instruction no. 2/2017 from 19 April 2017 issued for the application of the provisions of Articles 178 and 179, letters a) and b) of Law no. 98/2016 on public procurement, as amended, respectively the provisions of Articles and 192, letters a) and b) of Law no. 99/2016 on sectorial procurement, respectively:

"Article 1 – The contracting authority/entity has the right to demand, through the participation/simplified participation advertisement, as well as through the awarding documentation, the economic operator participating at the awarding procedure for the public procurement contract/sectorial procurement/framework-agreement to prove its technical and professional capacity related to the experience in implementing a/some similar contract/contracts, both in type and complexity, as well as from the point of view of the result/functionality aimed through the public procurement contract/sectorial procurement/framework-agreement, attributed in the respective procedure.

Article 2 – (1) The contracting authority/entity establishes the minimal qualification and selection requests set out in Article 1, in correlation with the principle of proportionality, aiming to obtain the confirmation that the economic operators, which demonstrate the fulfilment of the respective demands, have the necessary experience and capacity to manage and accomplish, in the performance conditions set put in the task book, the public procurement contract/sectorial procurement/framework-agreement which is about to be attributed.

(2) For establishing the minimal qualification and selection requirements, the contracting authorities/entities will take into account aspects such as: complexity, volume, duration, value and nature of the public procurement contract/sectorial procurement/framework-agreement which will be closed, without imposing the fulfilment of some conditions which are not relevant or are disproportionate in relation with the goal mentioned in par. (1)".

After analyzing the contested requirement, the Council notes that this is permissive, without limiting the access of the interested economic operators to the procedure, thus it is not meant to restrain competition and to limit their participation to the procedure.

Annex 9 of G.D. no. 745/2007 does not expressively mention the verification formulas for the technical capacity of the applicant and for the disinfection, extermination and deratization services.

In the development of the contract, the tenderer will establish on its own the necessary machinery and staff, in correlation with the requirements of the task book and relating to its own gained experience.

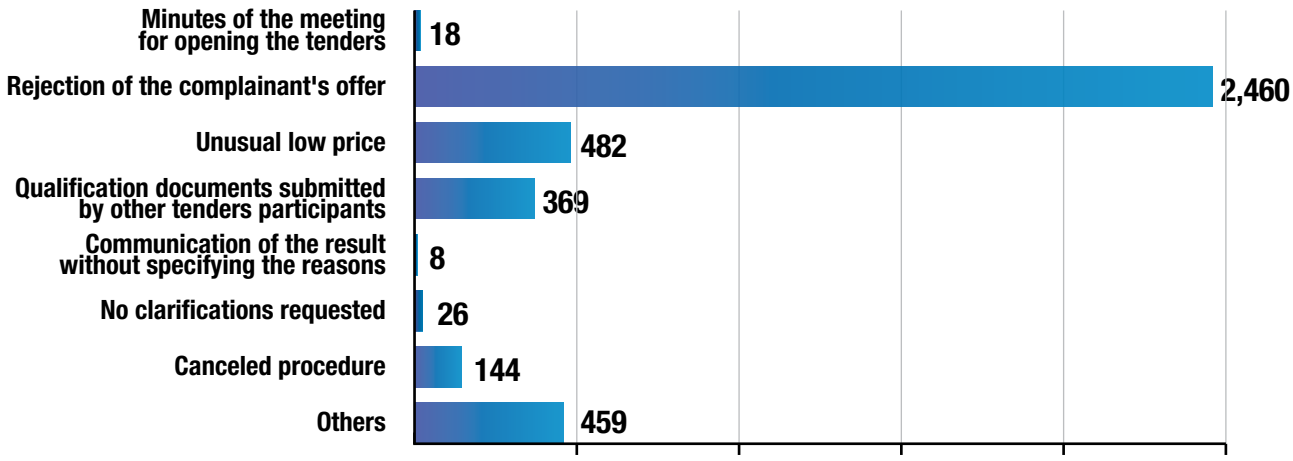
The aim of the public procurement legislation is to ensure the access of as many economic operators as possible to the awarding procedures, competition promoting procedures between them and procedures for guaranteeing an equal and undiscriminating treatment, while the goal of the qualification requirements is not to make difficult the participation of the economic operators to the procedure.

Noting that, in relation to the current legal regulations, the contracting authority has the right to "establish in the procurement awarding documentation requirements regarding the technical and professional capacity which are necessary and adequate in order to ensure that the economic operators possess the mandatory human and technical resources and experience for executing the public procurement contract/ framework-agreement at a compliant quality standard", and in the virtue of the principle of liability assuming set out in Article 2, par. (2) of Law no. 98/2016, it has understood to make a permissive documentation which encourages the purchase participation of as many tenderers as possible, understanding to demand that the participant economic operators would make proof of the minimal facilities set out in Annex 10 of the rules from G.D. no. 745/2007 for class 2 licence, the Council will reject this complaint as unfounded.

Under the complaints against the result of the procedure it was observed that the most often challenged/ criticized are **(Fig. 21)**:

- Rejection of the offer of the complainant as non-compliant or unacceptable (2.460 complaints);
- The unusually low price of the tenders of other participants in the awarding procedure (482 complaints);
- Qualification documents submitted by other tenders participants or the scoring / evaluation method thereof by the contracting authority (369 complaints);
- Cancellation without any legal basis of the tender procedure by the contracting authority (144 complaints);
- Rejection of the tender without the contracting authority seeking clarification on the technical proposal / price offered, or incorrect assessment of the answers to clarifications (26 complaints);
- The minutes of the meeting for opening the tenders (not considering the tender guarantee, the conduct of the meeting for opening the tenders) (18 complaints);
- 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 (8 complaints);
- Others (459 complaints).

FIGURE 21 CRITIQUES LODGED AGAINST THE RESULT OF THE PROCEDURE IN 2017



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

ELECTRONIC SIGNATURE / D.U.A.E.

The Council notes that CA did not take into account the fact that, by opening the documents submitted by the tenderer, the existence of the extended electronic signature is revealed, its application method being allowed theoretically and practically by the legal regulations applicable to the electronic signature, but also by the technical gadgets at the disposal of this economic operator. From the correspondence issue by A.A.D.R. (S.E.P.A. administrator), the Council takes note of the documents uploaded by S.C. ... S.R.L. (for two lots), in conformity with the ones on the CD support associated with the address registered at N.C.S.C. with no. .../18.08.2017, containing the electronic signature of the type alleged by the complainant, meaning a signature incorporated in the document. Taking into account that the provisions of Article 5 of law no. 455/2001 on the electronic signature ensure an equal judicial status to the documents with an incorporated electronic signature to the ones with an added electronic signature, the CA claims, implicitly of the intervenient, regarding the lack of the .p7s or .p7m type extension, are considered by the Council as unfounded.

Consequently, the Council considers that the tenders of S.C. ...S.R.L. (for two lots) were incorrectly excluded from the competition, for the alleged lack on one of the documents (economic operators association contract, associates D.A.U.E., warranty of participation) of the extended .p7s electronic signature, reason for which it will admit the requirements of the economic operator to cancel the exclusion decision and to resume the competition from the moment of analyzing the content of the qualification/technical proposal documents. (...)

The Council takes into account that S.C. ... S.R.L. lodged with N.C.S.C. two complaints regarding the rejection of its tenders for three lots. Concerning the rejection reason of the tenders (the same for the mentioned lots), the Council notes that CA performed a strictly formal appraisal, contrary to the provisions of Article 209 of Law no. 98/2016, and the ones from Article 134, par. (1) and (2) of Law Applications Norm approved by G.D. no. 395/2016. In compliance with the legal regulations, CA may request clarification information or completing the documents presented by the tenderers, which represents more than a confirmation endeavour of a formal aspect regarding o pat of the offer, like the alleged lack of the electronic signature (Article 209, par. 1, 2).

For that matter, the application norm states a diligence obligation for CA in the stage of tenders' analysis, exactly for setting out, without equivoque, after requesting the clarification information, if a tender has or not an admissible character, especially in the case in which it would be affected by breaking certain formal requirements or by the imprecise content of some information (Article 134, par. 1, 2). In this cause, the lack of electronic signature only for a part of the documents which compose the technical proposal may not be considered, implicitly, definitive rejection reason of the tender, in the conditions in which this lack may be seen as tenderer's omission, whose confirmation to be able to resubmitting the same documents, with applied electronic signature, could not gain him any incorrect advantage in relation to the other competitors. Besides the express regulation of the provisions in Article 137, par. (2), letter j) from the Application Norm of Law no. 98/2016, which state on the unacceptability of the tender when, in its whole, would not be signed electronically (the tender and associated documents are not signed with extended electronic signature, based on a valid certificate, issued by a certified provider of certification services), the Council takes into account as well the fact that on the application rules for the elec-

tronic signature have been communicated to CA, prior to the tender, clarification questions concerning the awarding documentation. From the corroborated content of the procurement data card, the task book and the clarification answers, it results that the tenderers had the possibility to forwarding the offer (its components) either by attaching the electronic signature to a file (.zip type) containing several documents, either by attaching this signature to each of the couponing documents of the technical or financial proposal and the associated documents. (...)

For those preceding, the Council considers that the automatic exclusion of the tender submitted by S.C. ... S.R.L., apparently affected by a formal vice (partial lack of the electronic signature) is not just contrary to the aforementioned provisions of Article 209 from Law no. 98/2016, but even disproportionate to the interest of CA to promote competition. Yet, this formal vice may be corrected, according to the provisions of Article 135 from the Application Norm approved by G.D. no. 395/2016.

Thus, it was mandatory for CA to request reliability information from the tenderer regarding the electronic signature for those parts from the technical proposal that did not present the respective signature, during the initial analysis, respectively their resending with the extended electronic signature, in compliance with the obligation from the awarding documentation, before taking the contested measure of exclusion. (...) The Council takes into consideration that S.C. ...S.R.L. lodged two complaints against the measure of rejecting its offers for two lots. In the first complaint, S.C. ...S.R.L. requests the Council the cancellations of two addresses and another twp subsequent ones, the obligation for the contracting authority to revaluate its tenders for two lots and to establish their acceptability (...) The Council notes that the rejection reason of the complainant's tenders is the lack of the electronic signature on a part of the technical proposal: "the digital sample of the technical offer [...] is not signed with .p7s extended electronic signature".

In relation with this actual motivation for rejecting the offers (common for the mentioned lots), the Council notes that CA performed a strictly formal appraisal, contrary to the provisions of Article 209 of Law no. 98/2016, and the ones from Article 134, par. (1) and (2) of Law Applications Norm approved by G.D. no. 395/2016, which allow CA to request clarification information or completing the documents presented by the tenderers, which represents more than a confirmation endeavour of a formal aspect regarding o pat of the offer, like the alleged lack of the electronic signature.

In cause, the lack of the electronic signature on one part of the technical proposal cannot be interpreted, as CA shows in its point of view, as a violation of the provisions of Article 137, par. 2, letter j) from the Application Norm of Law no. 98/2016 or the ones from Article 4, point 4 of Law no. 445/2001 on the electronic signature. According to the text of Article 137, par. 2, letter j) from the Application Norm of Law no. 98/2016, approved by G.D. no. 395/2016, the unacceptability of the tender intervenes when this, in its whole, were not signed electronically, situation which was not observed for the tender of the complainant. In addition,

the mentioned Article 4 of Law no. 445/2001 on the electronic signature presents the validity conditions of the electronic signature in relation to its user and does not refer to the validity of the document on which it had been applied, as was appreciated by the contracting authority.

As it has stated in the precedent cause, the Council considers that signing the whole tender/tender sections (by archiving several documents) or the individual signing of the component documents was an acceptable alternative possibility, resulting from the content of the awarding documentation and the later clarifications (including the clarifications from 06.06.2017 – question/answer). Thus, the lack of the electronic signature on a part of the technical proposal represented a formal vice easy to eliminate in relation to the provisions of Articel 135 from the Application norm of Law no. 98/2016. Yet, excluding the tenders for this reason, without a minimal clarification endeavour is contrary to the provisions of Article 209 of Law no. 98/2016, but also disproportionate to the interest of the contracting authority of promoting competition. Thus, it was mandatory for the contracting authority to request reliability information from the tenderer regarding the electronic signature for those parts from the technical proposal that did not present the respective signature, during the initial analysis, respectively their resending with the extended electronic signature, in compliance with the obligation from the awarding documentation, before taking the contested measure of exclusion.

For that matter, in the practice of the Council and the courts, the solution of requesting clarification has been consecrated, prior to the direct rejection of the tenders, when they are found in such instances (affected by some formal or imprecise/ambiguous requirements), in accordance with the constant practice of the communitary courts, in cases concerning the attribution of public procurement contracts.

In this regard, it may recalled

the note of the First Instance Court from Luxembourg in its decision from 10.12.2009, cause no. T-195/08, Antwerpse Bouwwerken NV against EC, paragraphs 56 and 57:

- Par. 56 - That is the position, inter alia, where a tender has been drafted in ambiguous terms and the circumstances of the case, of which the Commission is aware, suggest that the ambiguity probably has a simple explanation and is capable of being easily resolved. In principle, it would be contrary to the requirements of sound administration for the Commission to reject the tender in such circumstances without exercising its power to seek clarification. It would be contrary to the principle of equal treatment to accept that, in such circumstances, the Commission enjoys an unfettered discretion (see, to that effect, Case T-211/02 Tideland Signal v Commission [2002] ECR II-3781, paragraphs 37 and 38).
- Par. 57 - In addition, the principle of proportionality requires that measures adopted by the institutions do not exceed the limits of what is appropriate and necessary in order to attain the objectives legitimately pursued, it being understood that, where there is a choice between several appropriate measures, recourse must be had to the least onerous and that the disadvantages caused must not be disproportionate to the aims pursued (Case C-157/96 National Farmers' Union and Others [1998] ECR I-2211, paragraph 60). That principle requires that, when the contracting authority is faced with an ambiguous tender and a request for clarification of the terms of the tender would be capable of ensuring legal certainty in the same way as the immediate rejection of that tender, the contracting authority must seek clarification from the tenderer concerned rather than opt purely and simply to reject the tender (see, to that effect, Tideland Signal v Commission, paragraph 56 above, paragraph 43).

Consequently, the complainant's critiques against the direct rejection of its tenders from the competition for the two lots are valid, the acts issued with this finality following to be cancelled. (...)

Against the exclusion from the competition for inaccurate completion of D.A.U.E., S.C. ...S.R.L. requests the Council the cancelling, in part, of the minutes of the tenders' evaluation meeting no. .../28.06.2017. It also requests the obligation of the contracting authority to evaluate its offer for one lot, considering that the contracting authority should have requested clarifications prior to taking the measure of rejecting the tender.

In support of its requirements, the complainant pretends that the lack of any clarification request, concerning the reasons for which it did not completed D.A.U.E., proves the violation of law by the contracting authority.

Analyzing the contested minutes, the Council notes that CA did not mention which requirements from the awarding documentation (the procurement data card), regarding the obligation of completing D.A.U.E., were not accomplished by the complainant.

Furthermore, after analyzing the D.A.U.E. content completed by the complainant, as it was sent to the contracting authority, the Council notes that there are not any evident clues of breaking the rules of its completion. As a matter of fact, neither the point of view concerning the complaint of the economic operator, nor the answer to the prior notification do not clarify which would be the violated completion requirements, as the contracting authority did not mention any of those.

In addition, the Council notes that the legal basis of rejecting the tender, recalled in address no. .../30.06.2017, does not apply in this case, not being opposable to the complainant, because Article 65, par. (3) from the Application Norm of Law no. 98/2016 establishes on behalf of the contracting authority the obligation of communicating the result of the intermediary evaluation of the tenders.

Accordingly, because there is no clue in the file of the cause that the tender of S.C. ... S.R.L. can be framed within the express provisions of Article 137, par. (2), letter b) from the Application Norm of Law no. 98/2016, which set out the unacceptability of such a situation (it was submitted by a tenderer which does not fulfil the one or more of the qualification criteria set out in the awarding documentation or did not complete D.A.U.E. in conformity with the criteria established by the contracting authority), the Council finds that the rejection was incorrectly disposed.

ANALYSIS OF THE IMPLEMENTATION OF A QUALITY SYSTEM. I.S.O. CERTIFICATION REQUIREMENT

In a complaint lodged with N.C.S.C. by S.C. ...S.R.L. (leader of Association 1) against the result of the public procurement procedure communicated by the contracting authority within an open purchase procedure organized for awarding an execution of woks contract, the economic operator requested the Council to cancel the communication of the procedure's result, as well as the subsequent acts, and, in subsidiary, the obligation for the contracting authority to resume the awarding procedure by including its tender in the category of acceptable and compliant offers.

During the same public procurement procedure, another complaint was lodged by S.C. ...S.R.L. (leader of Association 2) against the procedure's result communicated by the contracting authority, through which the economic operator requested N.C.S.C. to cancel the communication of the procedure's result through which its tender was rejected as inacceptable and incompliant, the obligation for the contracting authority to revaluate the tender from the stage of checking its admissibility, and to cancel the report of the procedure.

In addition, in the same procurement procedure, the intervention request lodged by S.C. ...S.R.L. was registered with N.C.S.C., through which the Council was requested to dispose: based on Article 64, par. (2) of N.c.p.c., the admission in principal of the intervention request, based on Article 26, par. (6) of Law no. 101/2016, the rejection of the complaints submitted by Associations 1 and 2 as unfounded and, consequently, resuming the public procurement procedure in conformity with the procedure's report, which forms the basis of the communication addresses of the procedure's result.

In order to ensure the delivery of a unitary solution, the Council proceeded to the connection of complaints lodged within the same procurement procedure, according to Article 17, par. (1) of Law no. 101/2016.

Through the lodged complaint, S.C. ...S.R.L. (leader of Association 1) requested the Council to dispose those mentioned in the introductive part and contests the reasons to reject its tender, as unacceptable and incompliant, based on the provisions of Article 36, par. (1), letter b) and par. (2), letter a), corroborated with Article 79, par. (1) of G.D. no. 925/2006.

Through the lodged complaint, S.C. ...S.R.L. (leader of Association 2) requested the Council to dispose those mentioned in the introductive part and appreciates that the decision of rejecting its tender by the contracting authority as being illegal.

Following the lodged complaints, the contracting authority has send the Council both the required documents and a point of view.

The Council has qualified the voluntary intervention request lodged by S.C. ...S.R.L. as being an accessory intervention one, according to Article 63 from C.p.c. noting that the requirements set out by Article 61, par. (1) and (3) from C.p.c. were accomplished, the Council admitted the accessory intervention request lodged in support of the contracting authority, based on Article 63 and 64, par. (2) from C.p.c.

By examining the administrated evidence material, found in the case file, the Council noted that in its quality of participant at the current procurement procedure, Association 1 received an address from the contracting authority, in which it is stated that the tender of this association was rejected as inacceptable and incompliant, based on the provisions of Article 36, par. (1), letter

b) and par. (2), letter a), corroborated with Article 79, par. (1) of G.D. no. 925/2006, as amended and supplemented, motivated by the following: "You have not presented for associate S.C. ...S.R.L. the ISO 9001 certificate. (...) you have answered that S.C. ...S.R.L. does not perform any part of the contract (does not execute activities and does not make available design or execution personnel). (...) you have sent supplementary clarifications from which it is revealed that S.C. ...S.R.L. joined Association 1 so that the latter would fulfil request no. 1 regarding the similar experience that a tenderer needs to have regarding the provision of design services, respectively 1.700.000 lei in the last 3 years.

Corroborating the answer sent regarding the default of presenting the ISO 9001 and ISO 14001 certificates for associate S.C. ...S.R.L., respectively your specification that this «does not perform any part of the contract, respectively does not execute activities and does not make available design or execution personnel», with the presented Association Agreement, where for this associate the percentage of implementing the contract was inscribed as 5 % design, a discrepancy was noted.

The evaluation commission considered the sent answer as dishonest in relation to the documents initially remitted and to the provisions of the data card: «If a group of economic operators submits a common tender, the requirement is demonstrated individually and separately by each member, for the contract part that it performs» (...)".

The data card, part of the awarding documentation elaborated by the contracting authority for the development of the public procurement procedure in cause, comprised, among others, the following requirements: "The implementation of the Quality Management

Standard in conformity with ISO 9001 or equivalent (for the design and execution activities). (...) Edifying certificates/documents will be presented to prove/confirm the fulfilment of the requirement, namely – Certificate/s issued by independent organisms which certify the respect of quality insurance standards in activities that represent the object of the contract, respectively ISO 9001 or other equivalent documents (for example, quality procedures/manual, etc., similar to the ones seen as a condition for obtaining a SR EN ISO 9001 certification), in legalized copy/legible copy with the mention «in conformity with the original». If a group of economic operators submits a common tender, the requirement is demonstrated individually and separately by each member, for the contract part that it performs. The requested documents must be valid at the deadline for submitting the tenders. The requirement regarding ISO 9001 certification or equivalent cannot be accomplished by means of another person (third supporting party)".

The council notes that in the case file, among the qualification documents submitted by Association 1, one may find the Association Agreement between the leader, associate 1 and associate 2. According to Article 6 from the Association Agreement, closed in conformity with Article 44 of GEO no. 34/2006, in the case of adjudication, the associates have agreed on the participation percentages within the association (design-execution): leader of the association – 85 %, associate 1 – 10 %, associate 2 – 5 %. From the same Association Agreement it results that, according to Article 10, the physical, valorised and percentual repartition of the procurement contract, undertaken by each associate for the object under purchase, is similar to the participation percentages.

In order to prove the accomplishment of the ISO 9001 requirement, guaranteed by the member S.C. ...S.R.L.,, Association 1 could not present any document.

Analysing the cause subject to solving, the Council notes that the contracting authority has requested Association 1 the following: "within the presented documents, we did not find the ISO 9001 certificate for S.C. ...S.R.L. according to the data card, if a group of economic operators submits a common tender, the requirement is demonstrated individually and separately by each member, for the contract part that it performs. Please present a clarification in this respect".

Association 1 answers the contracting authority, showing that "S.C. ...S.R.L. does not perform any part of the contract (it does not execute activities and does not make available design or execution personnel)".

The council notes that Association 1 does not prove the fulfilment of the requirement concerning the implementation of the quality management standard in conformity with ISO 9001. In other words, on one side, Association 1 shows that S.C. ...S.R.L. will participate with 5 % to the public procurement contract concerning the activities for design and execution, while on the other side it considers that it is not necessary to present such a certificate, because the latter will not participate to the completion of the contract, without presenting serious reasons from which we would see the necessity of this modification.

Therefore, the Council states that the contracting authority has correctly rejected as inacceptable the tender submitted by Association 1, in compliance with the provisions of Article 36, par. (1), letter b) and par. (2), letter a), corroborated with Article 79, par. (1), letter b) of G.D. no. 925/2006. Summing up the data set out by the Council concerning the tender submitted by Association 1, it is futile to re-examine the other reason for rejecting this offer, its inacceptable character being irremovable.

Taking into consideration the mentioned aspects of fact and of law, based on Article 26, par. (6) of Law no. 101/2016, the Council will reject, as unfounded, the complaint lodged by Association 1 in contradiction with the contracting authority.

As against the facts established before, during the solving of the complaint lodged by S.C. ...S.R.L., the Council will admit the accessory intervention request in support of the contracting authority.

Regarding the complaint lodged by Association2, the Council notes the following: Association 2, as participant at the current awarding procedure, received an address from the contracting authority, which states that the tender was rejected as inacceptable and incompliant, based on the provisions of Article 36, par. (1), letter b), corroborated with Article 79,

par. (1) of G.D. no. 925/2006, as amended and supplemented, motivated by the fact that one of the associates did not meet the requirement of ISO 9001 certificate or equivalent (for the design activity).

In order to prove the fulfilment of the requirement regarding the ISO 9001 certification endured by the member of Association 2, the latter presented a copy of the SR EN ISO 9001:2008 certificate (ISO 9001:2008), with the mention "according to the original", for "design, execution, technical consulting and assistance for all types of civil constructions, industrial, roads, ski tracks, bridges, urbanistic works for interior and exterior electric installations (including aerial and subterranean branches, of any type and at 0.4-20 Kv voltage), gas installations and networks, public illumination, hydro-technical constructions, platforms, airport tracks and paths, undertaking topographic and geotechnical studies".

Analyzing the solving submitted cause, the Council notes that Association 2 proves the fulfilment of the requirement concerning the implementation of the quality management standard in conformity with ISO 9001, and it corresponds to the object of the public procurement contract. Thus, in this respect, there is no reason to reject the tender of Association 2.

Although it was indicated in the data card that the works that would be undertaken focus on a historical monument, no reference for this type of works (historical monuments) was made for the ISO 9001 certification, being easy to allege that, for this procedure, the contracting authority accepts ISO 9001 design certifications for all types of constructions that are not historical monuments, reason for which the respective certification was presented in consequence. Therefore, the Council decides that the contracting authority was wrong to reject the tender submitted by Association 2 as inacceptable and incompliant.

Taking into consideration the mentioned aspects of fact and of law, based on Article 26, par. (2) of Law no. 101/2016, the Council will admit the complaint lodged by Association 2 and will cancel the report of the public procurement procedure, in the part dedicated to the tender submitted by Association 2 and the address for communicating the result of the public procurement procedure, as subsequent act of the procedure's report.

Based on Article 26, par. (2) and (5) of Law no. 101/2016, the Council will compel the contracting authority, in 10 days after receiving the Council's decision, to re-examine the tender submitted by Association 2, under the legal regulations and the ones recalled in the considerations above.

Facing those set out above on the occasion of solving the complaint lodged by S.C. ...S.R.L., as leader of Association 2, the Council will reject the accessory intervention request, lodged by S.C. ...S.R.L. in support of the contracting authority.

DETERMINATION OF THE ROYALTY FEE BY AC

Extract from Decision no. 2.974/2017 of N.C.S.C., remained definitive by Decision no. 324/2018 of Court of Appeal Alba (file no. 781/57/2017)

Regarding the illegality of the administration tax set out by CA in its favour, in conformity with the awarding documentation, according to which the C will be compelled to pay a royalty to the component ATUs[30], of 5 % from the business figure obtained on the territory of those ATUs, and an administrative tax of 0.75 % from the business figure, which will be paid to ADI, the complainant considers that the respective tax has no legal basis and implies an additional expense of the contract, without any additional counter performance from the contracting entity, thus leading to the growth of the fares, which will be finally supported by the users. In this respect, the complainant evokes Article 12, par. (1) of Law no. 215/2001 and Article 46 of G.O. no. 26/2000 on associations and foundations, concerning the revenue of associations and foundations, while Law no. 51/2006, Law no. 101/2006, Law no. 100/2016 and G.D. no. 867/2016 do not state the right of CA to collect an administration tax in exchange for delegating the contract, the only assignment that could be imposed to the associations and foundations by CA being the royalty.

The Council appreciates also the respective critique as unfounded. As claimed even by the complainant, in the answer to the prior notification, CA has indicated the existence of a GAA decision based on decisions of each Local Council. By an e-mail registered with the Council, CA has sent the respective decision, alongside other decisions of the Local Councils (...) All the submitted decisions establish the royalty of 5 % from the business figure obtained on the territory of those ATUs and the administrative tax of 0.75 % from the business figure, which will be paid to ADI.

In order for some local public services to function, created in the interest of individuals and entities, as well as for the touristic promotion of the locality, the Local Councils, County

Councils and GCMB, if any, may adopt special taxes in the fields such as local public services, according to Article 484 of the Fiscal Code and to Article 30 of Law no. 273/2006 on local public finances, as amended and supplemented.

Consequently, the respective tax was established by the Local Councils, nominated on the basis of local autonomy, the Council having no competence in disposing its cancellation. The legislation evoked by the complainant does not forbid the establishment of local taxes, or, as already seen, the administration tax has legal basis. (...)

Regarding the critiques related to the illegality of the prevision and attribution mode for certain contract risks, the complainant showing for example that concerning Article 167 from the Task Book – "Risk no. 1 – Activity authorization delays", it is regulated in an incomplete manner, because it does not comprise the characteristics of the collection points (including the moment of their handover to the operator), while risk management does not include the right of the operator to request the modification of the fare, showing that, in the conditions in which the operator will perform maintenance, current and accidental repairing of the return goods, costs that cannot be appraised at the date of submitting the tender, but their integrity and conformity represent a condition of the authorization procedure in the respect of environment protection, the operator is enabled to recuperate the supported additional costs, because the conformity of the retour goods must be ensured by the grantor. Thus, the complainant request the modification of this risk, so that it makes reference to household points too, and the risk remedy should comprise the obligation of the delegator to ensure the immediate transfer of the household points to the new operator and the right of the delegated operator to request and obtain the retrieval of the advanced costs by bringing the retour goods to a level in compliance with the authorization. The risk should be attributed 50 % - 50 % to both contractual parties.

Therefore, the complainant wishes to divide this risk with CA. In the way CA set out Risk 1, this is described as follows: "The waste collecting activity requires an authorization at least associated with the environment protection. The particularities of the establishment set out in order to build a logistic base determine a certain schedule of the authorization procedure. In some cases, delays may appear in authorizing the activity and also additional costs (imposed by the competent authorities), which were not taken into consideration when the tender was made". As far as the definition of the risk goes, this refers to the possibility that the authorization of the delegate's specific activity could encounter delays and additional expenses. It is absolutely logic and perfectly equitable that the operator to support himself the necessary costs for authorizing its own activity, thus being no argument that they should be 50 % supported by the authority, as the complainant requests. Consequently, the Council notes that the respective is unfounded. (...)

Regarding "Risk 11 – the quantity of collected waste is smaller than the expected one", the complainant claims that it does not regulate the situation in which the total quantity of collected waste, in conformity, is under the one expected by the contracting authority at the moment of the contract awarding, considering that the completion of the risk matrix with an additional risk is required, respectively in the situation in which the quantity of collected waste is under the one expected due to the waste production at a much smaller level than estimated in the awarding documentation, thus the allocation of the risk should be in proportion of 50 %, for both contracting authority and delegate.

Risk management should state the right of the delegate to request the modification of the fare in the situation in which the real generated quantities would be with at least 20 % smaller than estimated, showing that the technical and financial tenders assumed by the operator are based on the quantities' estimations made available by the contracting authority.

According to Article 6 of Law no. 100/2016, the nature of the concession contract implies the transfer of the risks to the economic operator, therefore is is not adequate to complete the matrix with this risk.

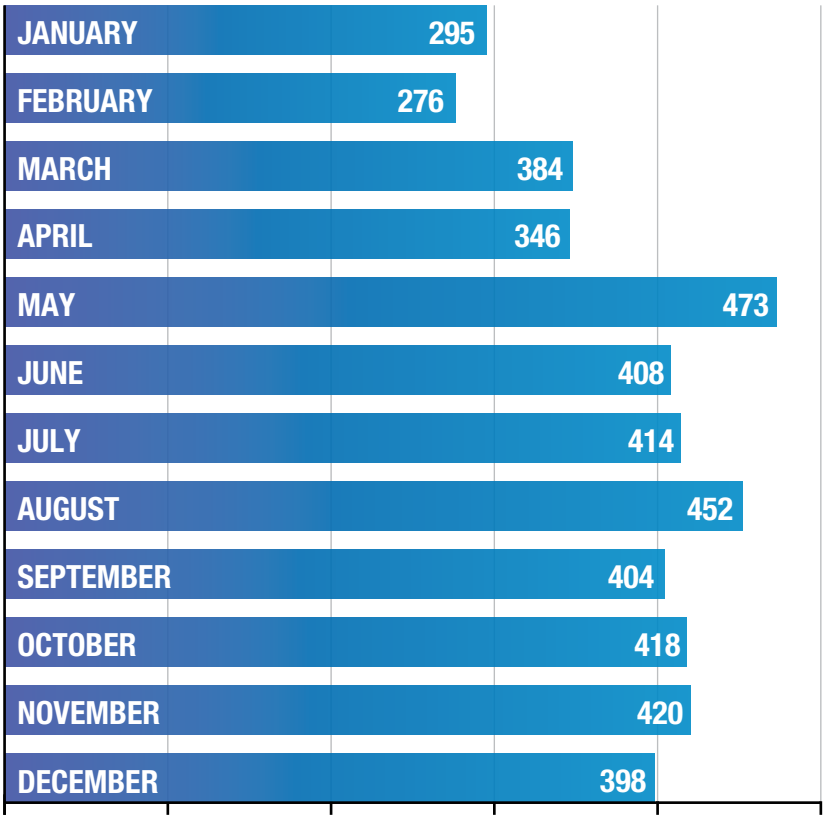
In addition, the Council notes that, in a previous critique, the contester complained of the quantity surplus, requesting to be quantified, but later on complained of the quantity deficit, concluding that it demands certain quantities, but this thing is not possible in a contract of this sort.

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

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

On the course of 2017, the complaints solving panels within N.C.S.C. issued 3.494 decisions, meaning the solving of a number of 4.652 files. The annual evolution of the complaints (case files) solved by the 11 complaints solving panels within the Council is as it follows **(Fig. 22)**:

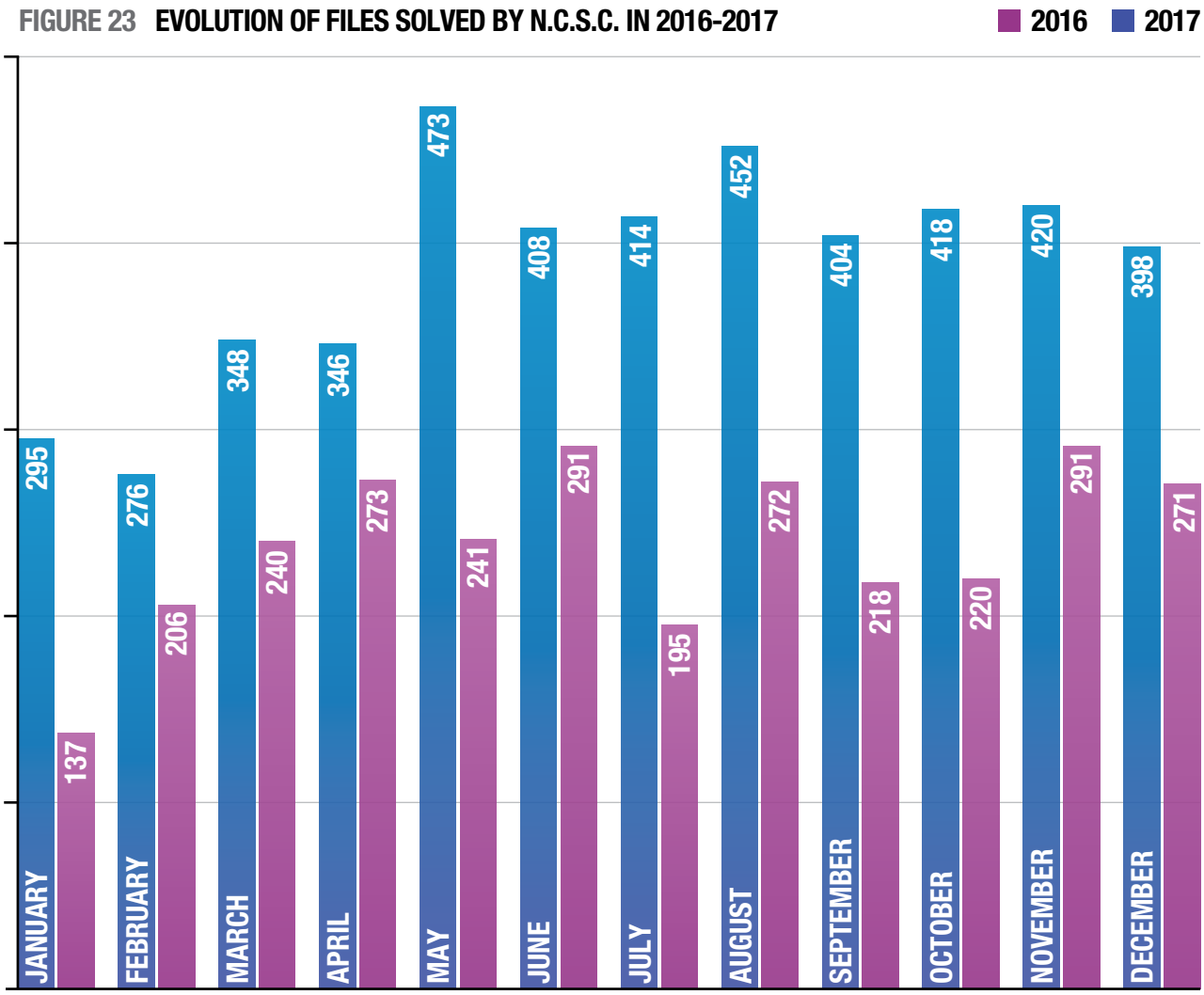
FIGURE 22 **EVOLUTION OF FILES SOLVED BY N.C.S.C. IN 2017**



Comparing the number of cases solved by N.C.S.C. during 2016 and 2017, we note that last year the Council has solved 1.797 files more compared to the previous year, which meant an increase of 62.94 %, which is apparent from the **Figure 23**.

It should be stressed that since the establishment of the Council until 31 December 2017, the total number of cases solved by the complaints solving panels within the institution has reached 61.354.

FIGURE 23 EVOLUTION OF FILES SOLVED BY N.C.S.C. IN 2016-2017



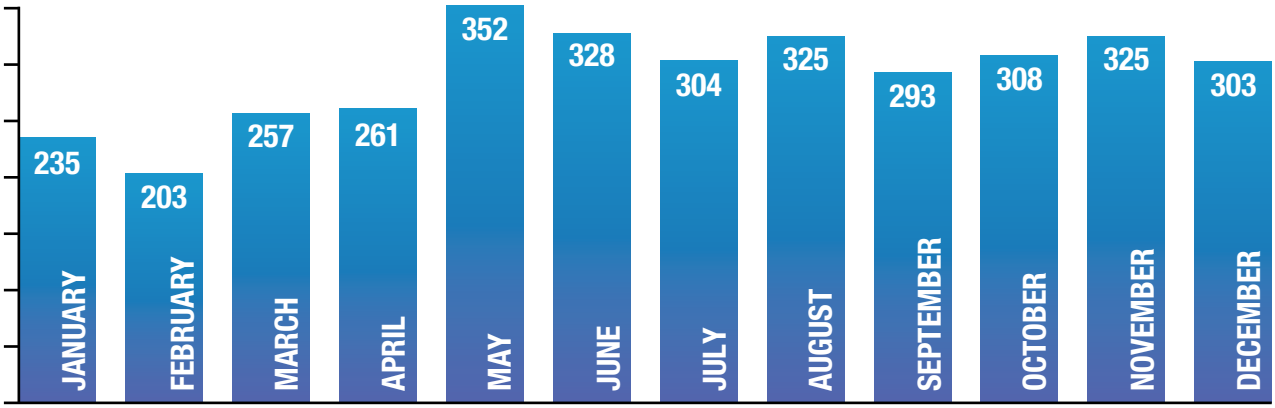
2.3. DECISIONS TAKEN BY N.C.S.C.

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

During 1 January - 31 December 2017, the 11 panels for solving complaints within N.C.S.C. issued a number of 3.494 decisions.

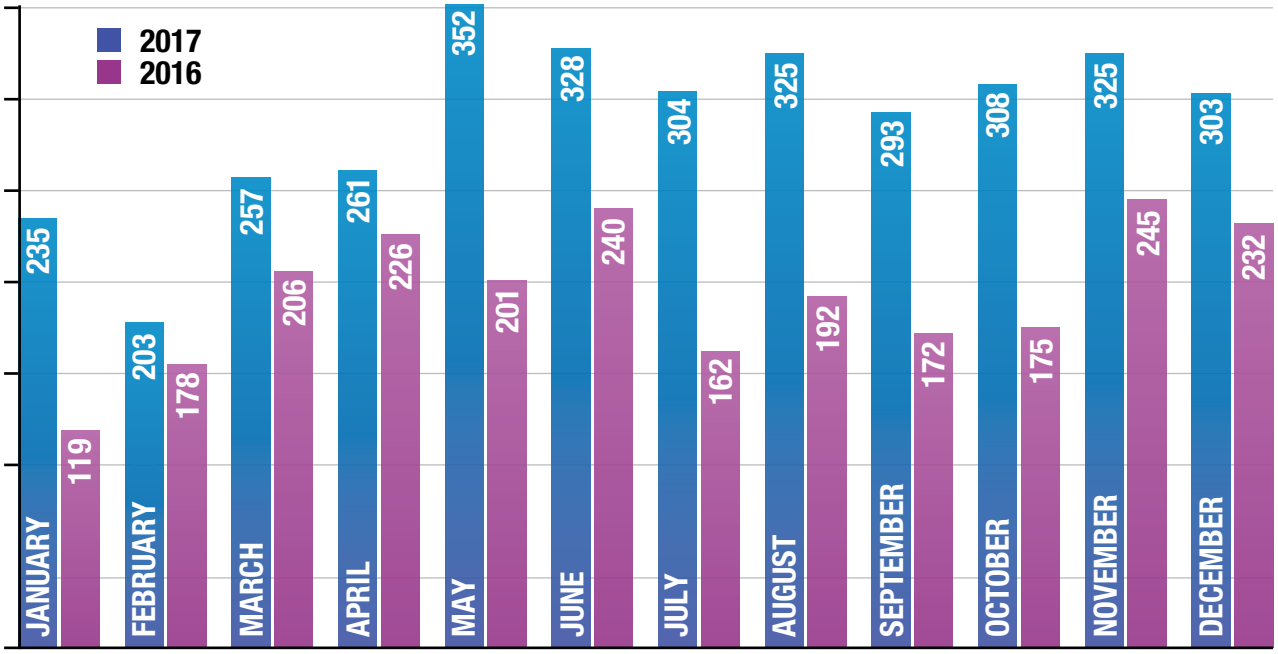
Broken down by months, in 2017, the situation of the issued decisions has evolved as follows **(Fig. 24)**:

FIGURE 24 **EVOLUTION OF THE DECISIONS ISSUED BY N.C.S.C. IN 2017**



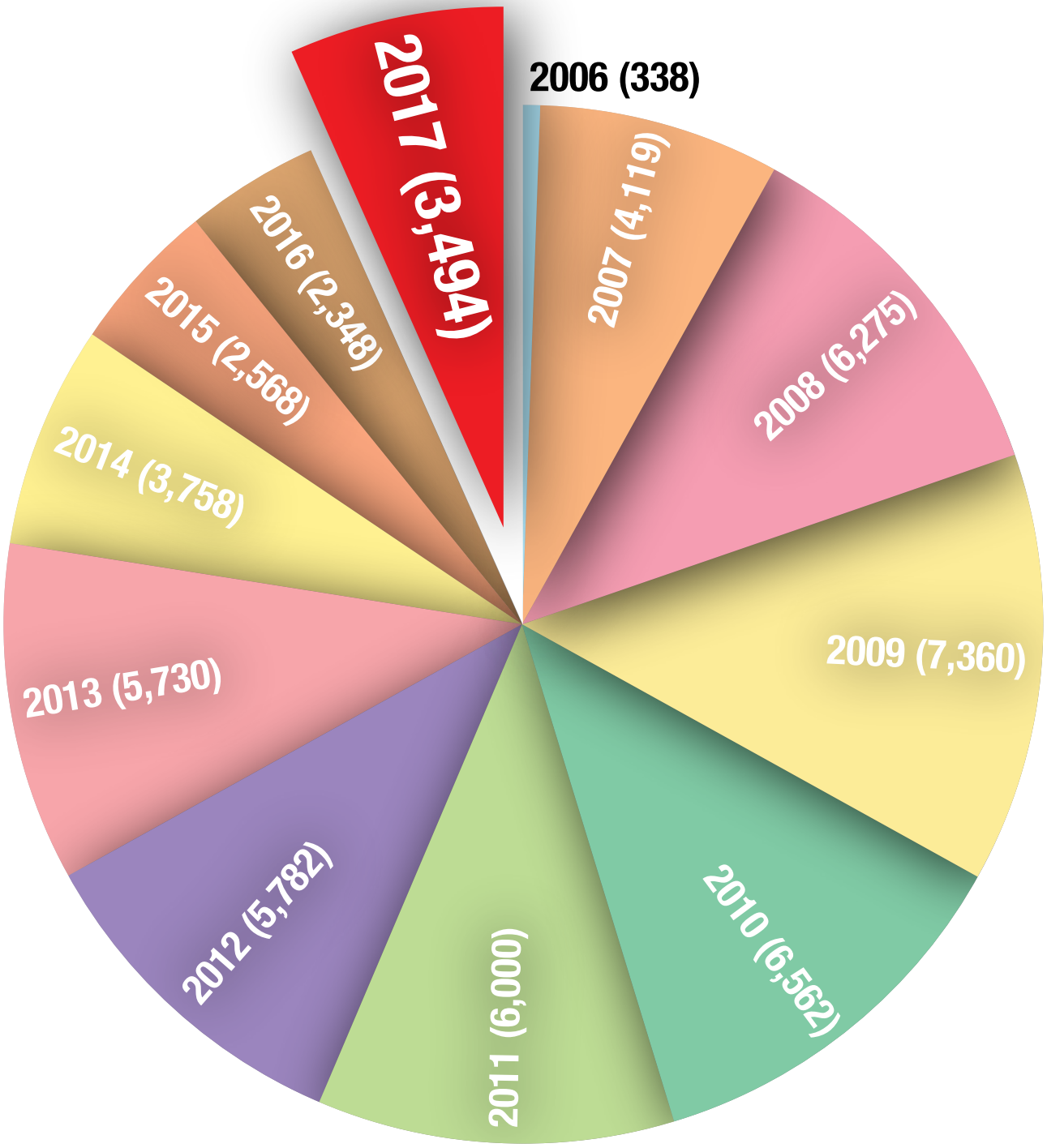
In the context of the significant increase of the number of complaints lodged by economic operators, **in 2017 the Council has issued 1.146 complaints more compared to the previous year, which meant an increase of 48.80 %.** For a clear view on the monthly evolution of the decisions issued by N.C.S.C. in 2017, compared to 2016, we are presenting the following chart **(Fig. 25)**.

FIGURA 25 **EVOLUTION OF THE DECISIONS ISSUED BY N.C.S.C. IN 2016-2017**



Overall, since the establishment of the Council until 31 December 2017, the total number of decisions issued by the institution was of 54.334, which is apparent from the chart below.

FIGURE 26 SITUATION OF THE DECISIONS ISSUED BY N.C.S.C. IN 2006-2017



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

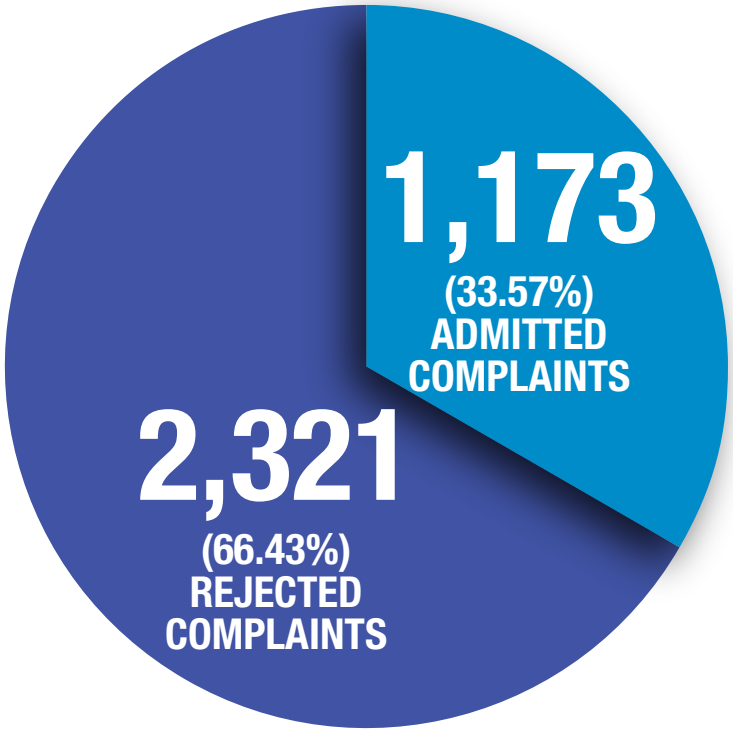
As previously specified, **between January 1st and December 31st 2017, the total number of decisions issued by the 11 complaints solving panels within N.C.S.C. was of 3,494.**

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

- ✔ 1,173 decisions for which it ordered to admit the complaints formulated by the economic operators. In these cases, the solution requested by the complainant and adopted during the deliberations by the settlement panel was in line with the administrative-legal defence necessity of the violated subjective right or unrecognized, and with reconsidering it as to provide for its holder the advantages acknowledged by the law.
- ✔ 2,321 decisions for which it ordered the denial of the complaints lodged by the economic operators. These cases, of rejecting the complaints lodged by economic operators, were generated by the following situations:
  - the Council could not pronounce on the merits of the cause, because a plea on the merits or a procedural plea was invoked by the parties or ex oficio (the complaint was belated, it was unnecessary, was inadmissible, without purpose, without interest, was introduced by people without quality, etc.);
  - the Council appreciated, regarding the content of the solved complaint, to give in favour of the contracting authority, because the litigious substance of the complaint submitted by an economic operator proved to be groundless;
  - the complainant yielded the lodged complaint, thus the mere request for waiver of the objection raised by the initiator of the litigious approach results in the immediate closure of the file.

Figure 27 reveals that, due to the solving of the complaints lodged by economic operators, 33.57% of the decisions issued by the Council admitted the complaints, while 66.43% of the decisions issued by the Council rejected the complaints and ordered the resuming of the awarding procedures.

FIGURA 27 SITUATION OF THE DECISIONS ISSUED BY N.C.S.C. IN 2017



The analysis of the evolution of the decisions admitted and rejected by the Council in 2016-2017, reveals that **in 2017, in comparison with the previous year, due to the significant increase of the number of complaints, the number of decisions, through which the complaints lodged by economic operators were admitted, has grown with 46.07 %, while the number of decisions through which the Council has rejected the complaints has increased with 50.23% (Fig. 28).**

All this considered, the official data show that the percentage of the decisions issued by N.C.S.C. through which the complaints were admitted, as well as the percentage of the decisions through which the complaints were rejected did not suffer major modifications in 2017 compared to the previous years, **thus the percentage of the admitted and rejected complaints out of the total of the decisions issued by N.C.S.C. remained aproximately constant (34% admitted complaints, 66% rejected complaints), which is apparent from the Figure 29**.

FIGURE 28 EVOLUTION OF THE DECISIONS ISSUED BY N.C.S.C. IN 2016-2017

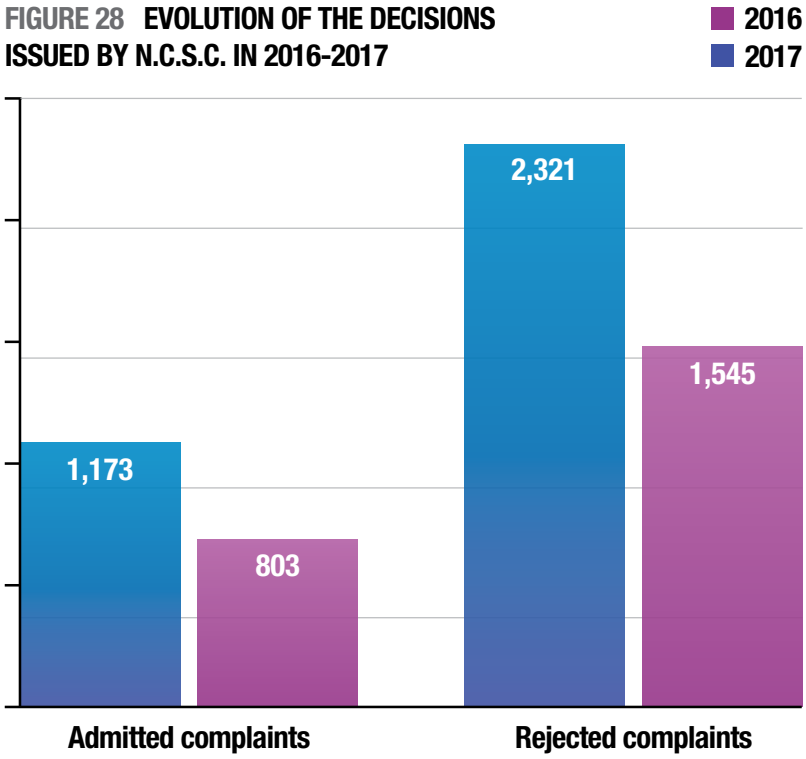
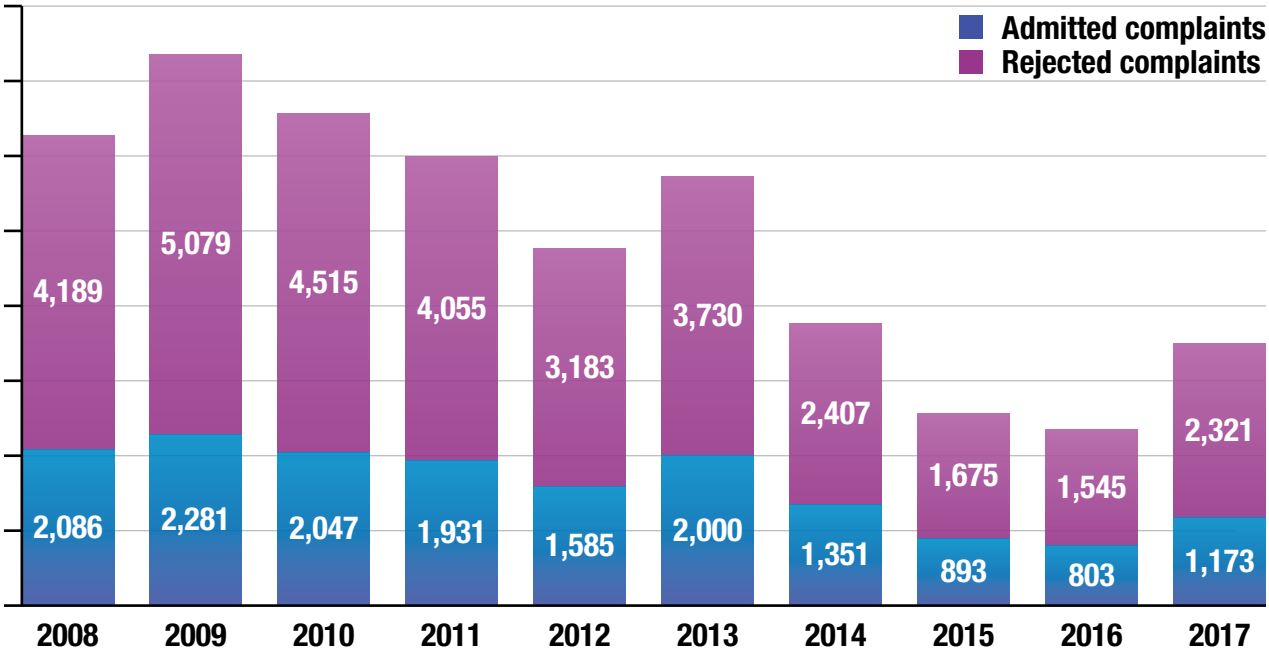
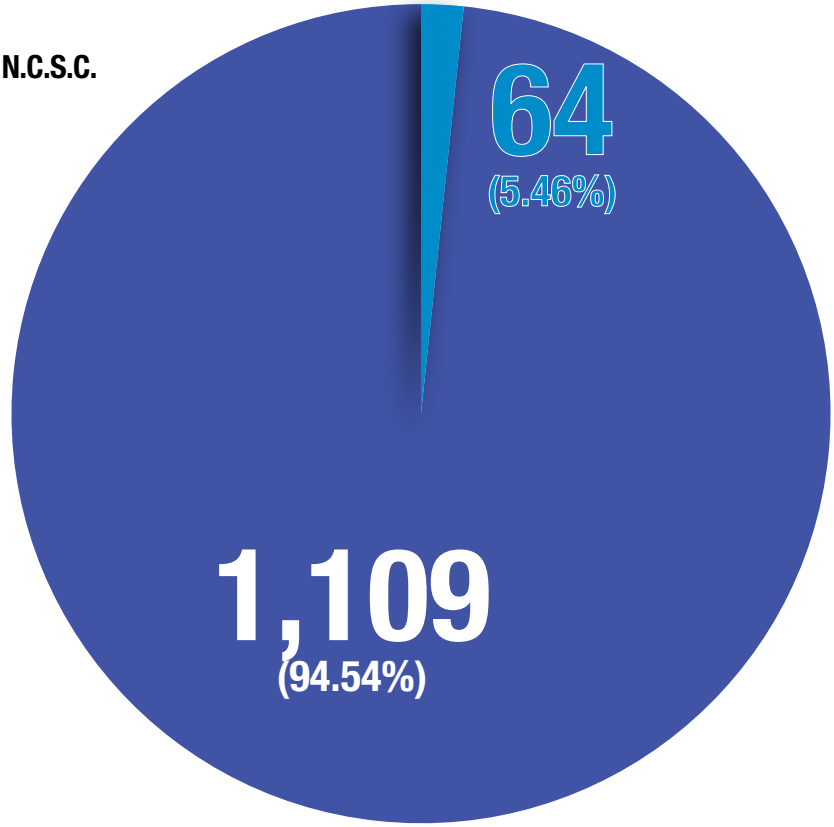


FIGURE 29 EVOLUTION OF THE DECISIONS ISSUED BY N.C.S.C. IN 2008-2017



Regarding the admission decisions issued by the Council in the previuos year (1,173 decisions), it must be noted that in the case of 64 decisions (5.46 %), was ordered cancellation of the awarding procedures, while in the case of 1,109 decisions (94.54 %), the Council ordered remediation of the awarding procedures, so they may continue by respecting the legal provisions in the field of public procurement (Fig. 30).

FIGURE 30 MEASURES DISPOSED BY N.C.S.C. FOLLOWING THE ADMISSION OF THE COMPLAINTS IN 2017



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 2017, N.C.S.C. issued decisions within certain public procurement procedures with an estimate value of 51,194,150,448.65 RON, equivalent to 11,206,880,420.49 EURO12[31], thus resulting that **the total estimated value, in national currency, of the procedures in which N.C.S.C. issued decisions increased by 105.44% compared to 2016 (Fig. 31).**

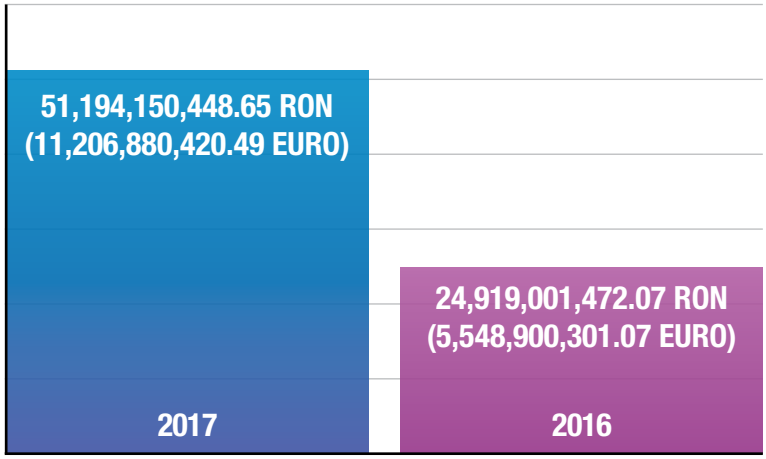


FIGURE 31 TOTAL ESTIMATED VALUE OF THE DECISIONS ISSUED BY N.C.S.C. IN 2016-2017 IN RELATION WITH THE TOTAL ESTIMATED VALUE OF THE PROCEDURES

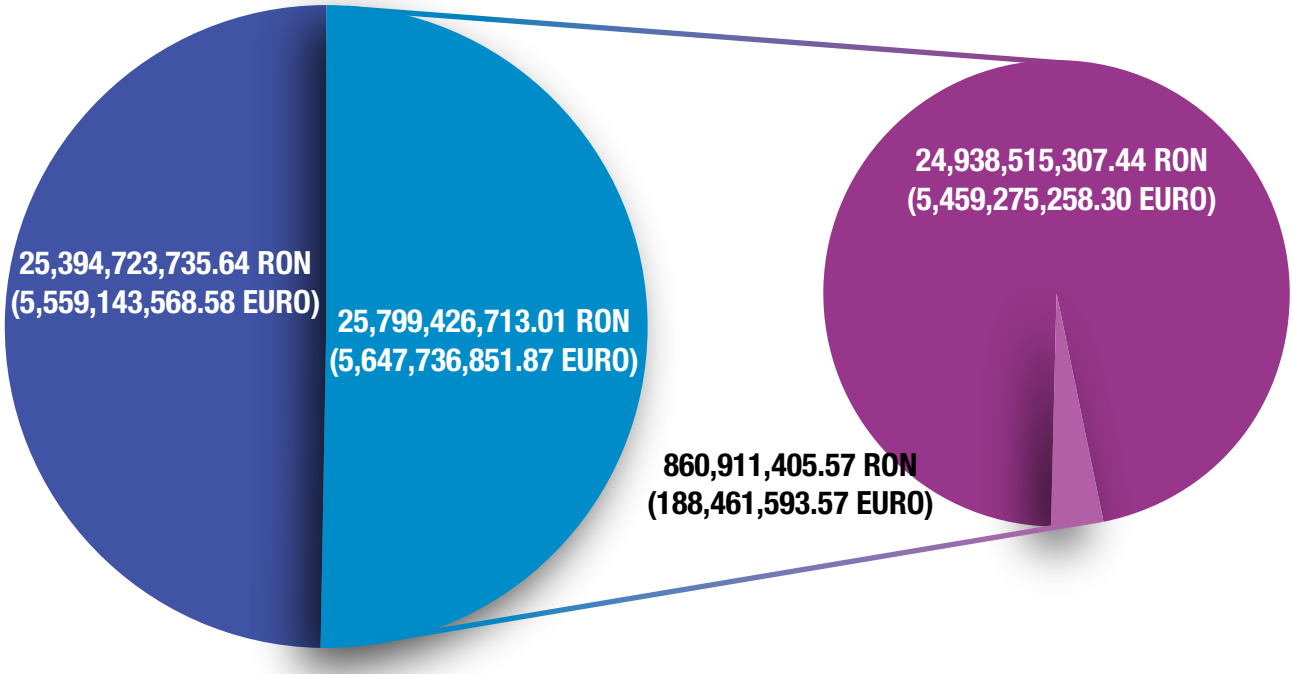
Regarding the total estimated value of the awarding procedures for whi-ch N.C.S.C. issued decisions to admit the complaints lodged by the economic operators, this reached in 2017 the sum of 25,799,426,713.01 RON, equivalent to 5,647,736,851.87 EURO[31] **(Fig. 31)**.

Also throughout 2017, 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 25,394,723,735.64 RON, equivalent to 5,559,143,568.58 EURO[31] **(Fig. 31)**.

Of the total estimated value of procedures for which decisions have been issued for admitting the complaints in 2017, the estimated total value of the awarding procedures for which the Council ordered annulment was of 860,911,405.57 RON, equivalent to 188,461,593.57 EURO[31], while the total estimated value of the awarding procedures through which remedy measures were ordered amounted to 24,938,515,307.44 RON, equivalent to 5,459,275,258.30 EURO16[31] **(Fig. 31)**.

Analyzing the numbers listed above, it can be seen that in 2017 the total estimated value of award procedures for which N.C.S.C. issued decisions for admitting the complaints lodged by the economic operators (25,799,426,713.01 RON) represented 50.40 % of the total value of procedures in which N.C.S.C. has decided (51,194,150,448.65 RON), while the value of the procedures in which the Council issued decisions rejecting the complaints lodged by the economic operators (25,394,723,735.64 RON), represented 49.60% of the total estimated value of the procedures in which N.C.S.C. has decided **(Fig. 31)**.

FIGURE 32 TOTAL ESTIMATED VALUE OF THE PROCUREMENT PROCEDURES IN WHICH N.C.S.C. ISSUED DECISIONS IN 2017



- **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 disposed the remedy of the procedures**
- **Estimated value of the procedures in which N.C.S.C. admitted the complaints and disposed the cancellation of the procedures**

Compared with 2016, in 2017 the estimated value of the awarding procedures in which the Council admitted the complaints and cancelled procedures decreased by 59.61%, while the estimated value of the procedures in which N.C.S.C. admitted the complaints and ordered remedy of the procedures increased by 168.61% **(Fig. 33)**.

Referring to the total estimated value of the awarding procedures in which N.C.S.C. issued decisions which admitted the complaints lodged by the economic operators and ordered the cancellation of the public procurement procedures (860,911,405.57 RON, equivalent to 188,461,593.57 EURO[31]), it must be emphasized that the N.C.S.C. demonstrated its role of effective filter for preventing irregularities in the field of public procurements.

It must be noted that of the total estimated value of the awarding procedures in which the Council issued decisions which admitted the complaints lodged by the economic operators and ordered the cancellation of the public procurement procedures (860,911,405.57 RON, equivalent to 188,461,593.57 EURO[31]), a percentage of 1.61% (13,858,852.72 RON, equivalent to 3,033,833.04 EURO[31]) represented the value of certain public procurements awarding procedures financed from European funds were cancelled **(Fig. 34)**.

Concerning the decisions through which the complaints lodged by the economic operators were admitted, it must be highlighted that in 2017 the Council admitted a number of 55 complaints that regarded a number of 46 public procurement procedures (having a total estimated value of 176,172,903.62 RON, equivalent to 38,565,903.46 EURO[31]; these procedures had a total estimated value in which N.C.S.C. admitted the lodged complaints), through which the economic operators have requested cancellation of the unilateral and unfounded decisions of some CA to cancel the respective public procurement procedures.

FIGURE 33 TOTAL ESTIMATED VALUE OF THE AWARD PROCEDURES IN WHICH N.C.S.C. ISSUED DECISIONS IN 2016-2017

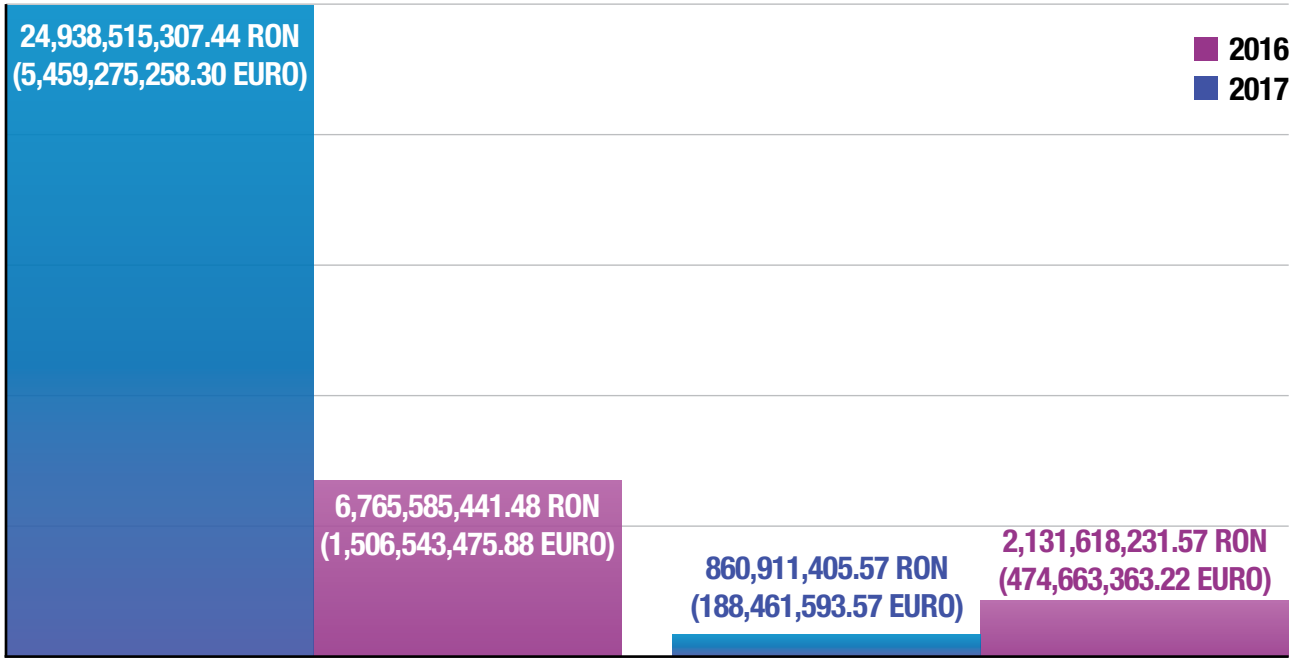
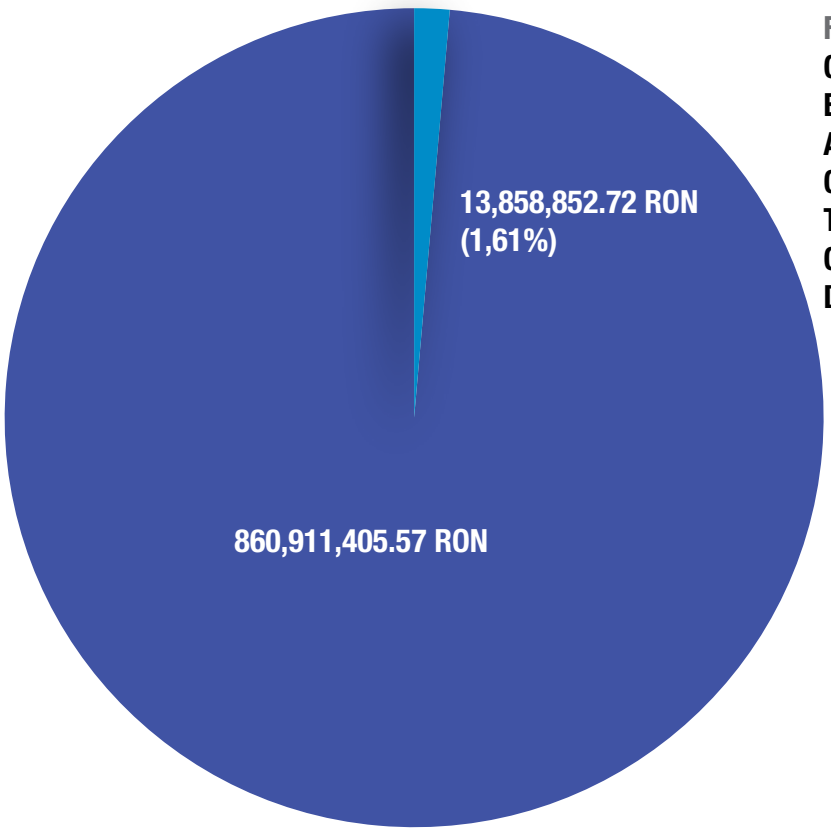


FIGURE 34 TOTAL ESTIMATED VALUE OF THE PROCEDURES FINANCED FROM EUROPEAN FUNDS IN WHICH N.C.S.C. ADMITTED THE COMPLAINTS AND ORDERED CANCELLATION, IN RELATION TO THE TOTAL ESTIMATED VALUE OF THE PROCEDURES IN WHICH N.C.S.C. DISPOSED CANCELLATION



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

According to the official data provided by the Romanian Agency for Digital Agenda, within the communication platform used in the awarding process of the public procurement contracts (System Electronic for Public Acquisitions - S.E.P.A.), a number of 28,165 award procedures were initiated, with a total estimated value of 103,729,231,689.66 RON, equivalent to 22,707,303,187.25 EURO[31].

Compared to 2016, when in S.E.P.A. a number of 19,079 procedures for awarding public procurement contracts were initiated, with a total estimated value of 60,165,319,375.71 RON (13,397,461,337.78 EURO[32]), in terms of quantity, we can observe that in 2017 the number of awarding procedures of the initiated public procurement contracts increased significantly, by 9.086 procedures (+ 47.62%), and, in terms of value, an increase by 43,563,912,313.95 RON (+72,41%).

Regarding the procedures financed from European funds, according to the official data provided by A.A.D.R., a number of 2,011 were initiated in 2017, which means an increase by 1,215 procedures (+152.64%) in comparison to the previous year[33] **(Fig. 37)**.

Concerning value, in 2017 the procedures financed from European funds initiated in the public procurement electronic platform reached the total estimated value of 28,096,693,669.23 RON (equivalent to 6,150,630,167.73 EURO), representing an increase by 239.11%[33] in comparison to the previous year **(Fig. 38)**.

Although 2017 represented a "boom" for the number of procedures financed from European funds initiated in S.E.P.A., compared to the previous year, both numerically (+152.64%) and regarding value (in national currency +239.11%), the number of procedures financed from European funds effectively attributed in S.E.P.A. did not register a similar growth. Practically, of the 2,011 procedures financed from European funds initiated in S.E.A.P., only 1,203 procedures were awarded, with the total estimated value of 5,010,136,828.52 RON (equivalent to 1,096,766,013.99 EURO[31]).

FIGURE 35 TOTAL NUMBER OF PROCEDURES INITIATED IN S.E.P.A. IN 2016-2017 BY ADVERTISMENTS AND PARTICIPATION INVITATIONS

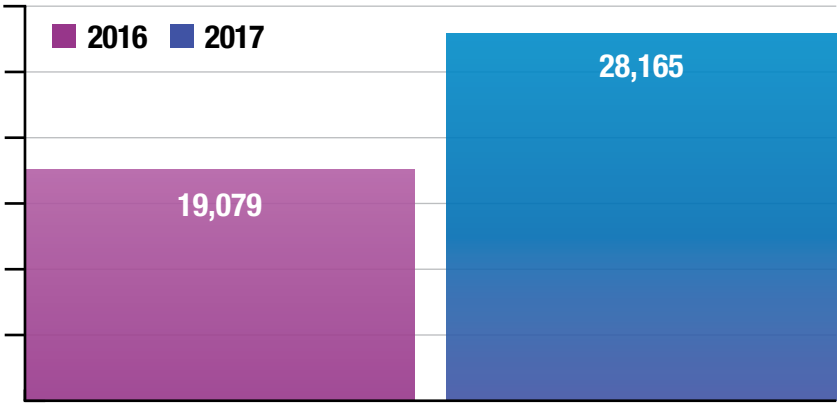
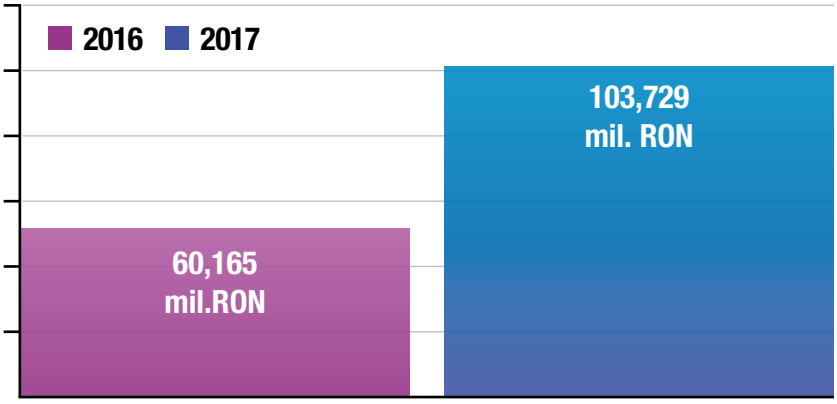


FIGURE 36 TOTAL ESTIMATED VALUE OF THE PROCEDURES INITIATED IN S.E.P.A. IN 2016-2017 BY ADVERTISEMENTS AND PARTICIPATION INVITATIONS



It is therefore apparent that, in 2015-2016, we have witnessed an increase of 105.59 % in the number of procedures financed by European funds[34] that were awarded through S.E.P.A., while the total estimated value of the respective procedures increased only by 74.44 %.

Comparing the total estimated value of the procedures initiated in S.E.P.A. (103,729,231,689.66 RON, equivalent to 22,707,303,187.25 EURO[31]), it may be observed that in 2017 the total estimated value of the procedures in which N.C.S.C. issued decisions (51,194,150,449 RON, equivalent to 11,206,880,420.49 EURO[31]) represented 49.35 % from the total estimated value of the procedures initiated in S.E.P.A.

However, if we compare the total estimated value of the procedures initiated in 2017 in S.E.P.A. (103,729,231,689.66 RON) with the total estimated value of the procedures in which N.C.S.C. had admitted the complaints lodged by the economic operators and disposed remedy measures of the procedures/ cancellation (25,799,426,713.01 RON), it results that the latter represented 24.87% of the total estimated value of the procedures initiated in S.E.P.A.

FIGURE 37 NUMBER OF THE PROCEDURES INITIATED AND EFFECTIVELY ATTRIBUTED IN S.E.P.A. IN 2016-2017

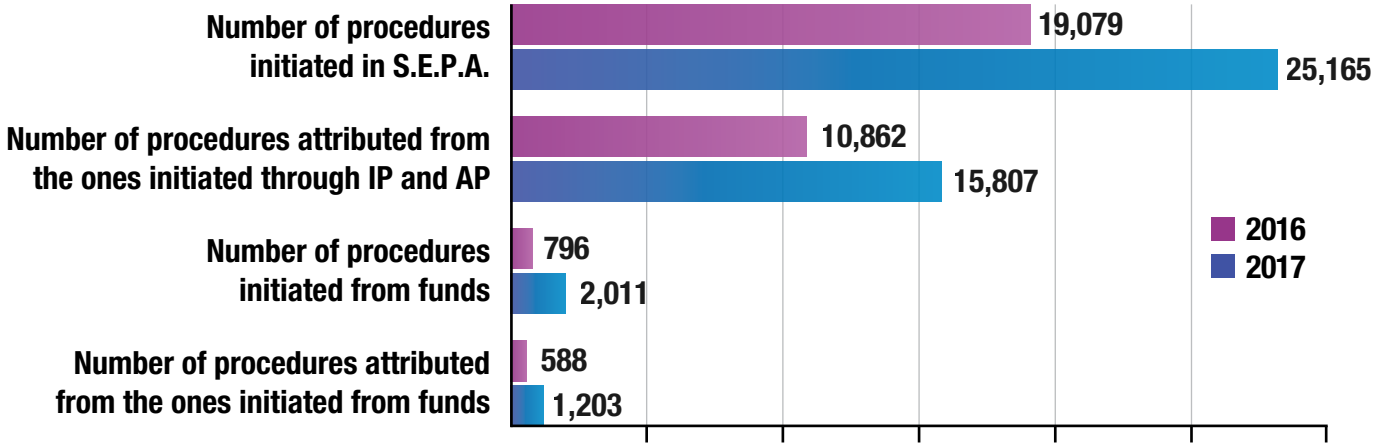
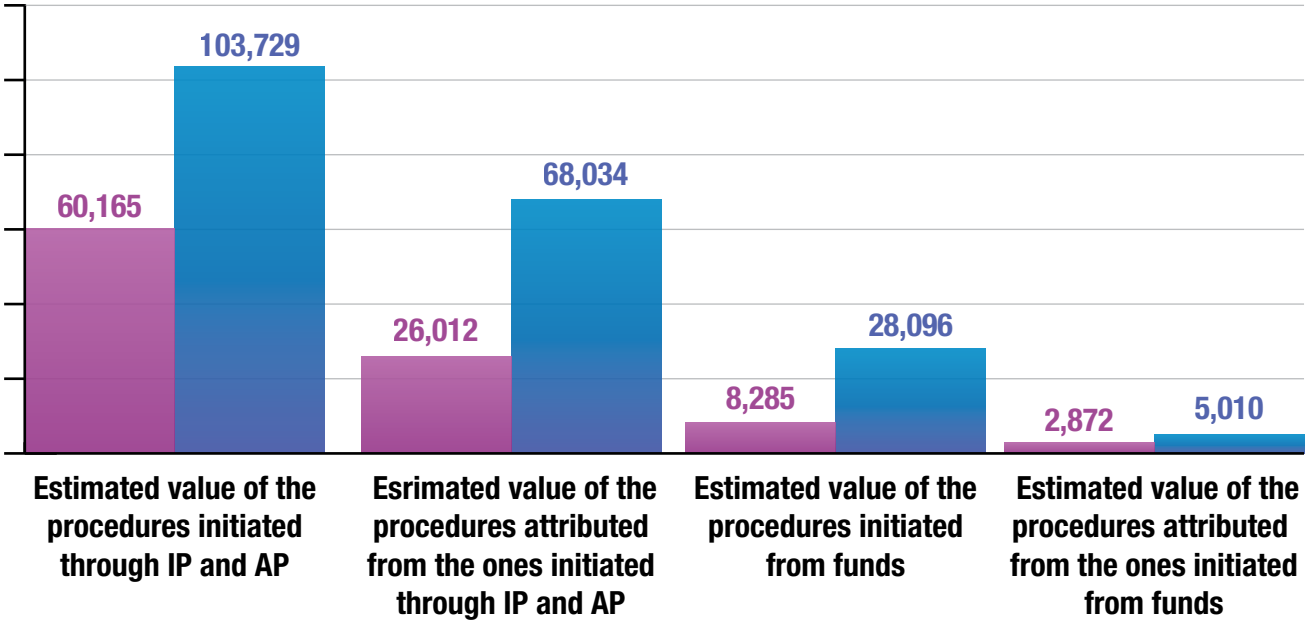


FIGURE 38 TOTAL ESTIMATED VALUE OF THE PROCEDURES INITIATED AND EFFECTIVELY ATTRIBUTED IN S.E.P.A. IN 2016-2017 (milions RON)



At the same time, if we compare the total estimated annual value of the procedures initiated in 2017 in S.E.A.P. (103,729,231,689.66 RON) with the total estimated value of the procedures in which N.C.S.C. issued decisions through which it admitted the complaints lodged by the economic operators and ordered certain measures, we may observe the following:

- The estimated value of the procedures in which N.C.S.C. upheld the complaints and ordered remedy measures was of 24,938,515,307.44 RON, which represented 24.04 % of the total estimated value of the procedures initiated in S.E.P.A.;
- The estimated value of the procedures in which N.C.S.C. upheld the complaints and ordered cancellation of the procedures was of 860,911,405.57 RON, which represented 0.83 % of the total estimated value of the procedures initiated in S.E.P.A.

3. THE QUALITY OF N.C.S.C. ACTIVITY

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

Respecting the constitutional principle of access to justice, the legislator has determined that the decisions issued by the Council after solving the complaint by administrative - legal proceeding may be "controlled" by a higher court of law, so as to allow the remedy of potential errors committed during the first settlement. The existence of this control type represents a warranty for the parties involved in a public procurement procedure that any injustice or error may be eluded/remedied, and for the public procurement solving counsellors it is a stimulant in the respect of fulfilling their attributions under the law, with rigorosity and professional exigency.

Therefore, the decisions issued by the Council are "verified" by 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. issued in the field of public procurement contracts, including sectorial contracts and framework agreements in the fields of defence and security.

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

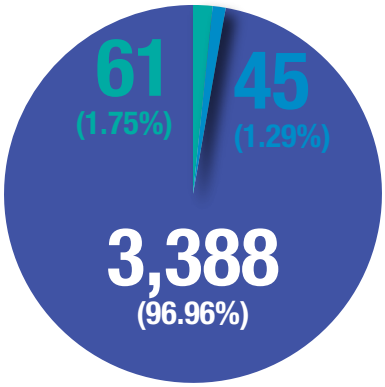
Under the legislation, the complaint against the decisions of N.C.S.C. can be initiated either by the contracting authority or by one or more economic operators involved in a public procurement procedure, or by the contracting authority with one or more economic operators involved in a public procurement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

For this reason, against a decision issued by N.C.S.C. more than one complaint may be lodged with the competent courts of appeal against the decisions of the Council on procedures for awarding services and/or works related to the national interest transport infrastructure.

During 2017, of the total of 3.494 decisions issued by the panels for solving complaints within N.C.S.C. a number of 670 decisions were appealed in competent Courts of Appeal.

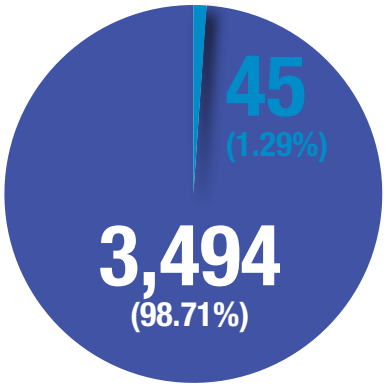
At the end of 2017, following the resolution of the complaints lodged with the competent Courts of Appeal[35], a number of 45 decisions issued by N.C.S.C. were in all invalidated / abolished by the courts (1.29 % of the total decisions issued by the Council), while 61 were modified in part (1,75% of the total decisions issued by the Council) **(Fig. 39, Fig. 40, Fig. 41)**.

FIGURE 39 SITUATION OF COMPLAINTS AGAINST THE DECISIONS ISSUED BY N.C.S.C. IN 2017



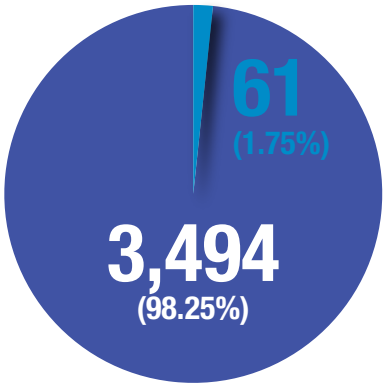
- Definitive and irrevocable decisions
- Partially modifed decisions
- Abolished/invalidated decisions

FIGURE 40 NUMBER OF DECISIONS ABOLISHED/ INVALIDATED IN ALL BY THE COURTS OF APPEAL, COMPARED TO THE NUMBER OF DECISIONS ISSUED BY N.C.S.C. IN 2017



- Decisions issued by N.C.S.C.
- Abolished/invalidated decisions in whole

FIGURE 41 NUMBER OF PARTIALLY MODIFIED DECISIONS BY COURTS OF APPEAL COMPARED WITH THE NUMBER OF DECISIONS ISSUED BY N.C.S.C. IN 2017



- Decisions issued by N.C.S.C.
- Partially modified decisions

Analysing the numbers above, it results that **during 2017 a number of 3.388 decisions issued by the Council (97.25 % of all the issued decisions) remained final and irrevocable in the form issued by our institution, which maintains its high credibility, confidence and professionalism of its employees.**

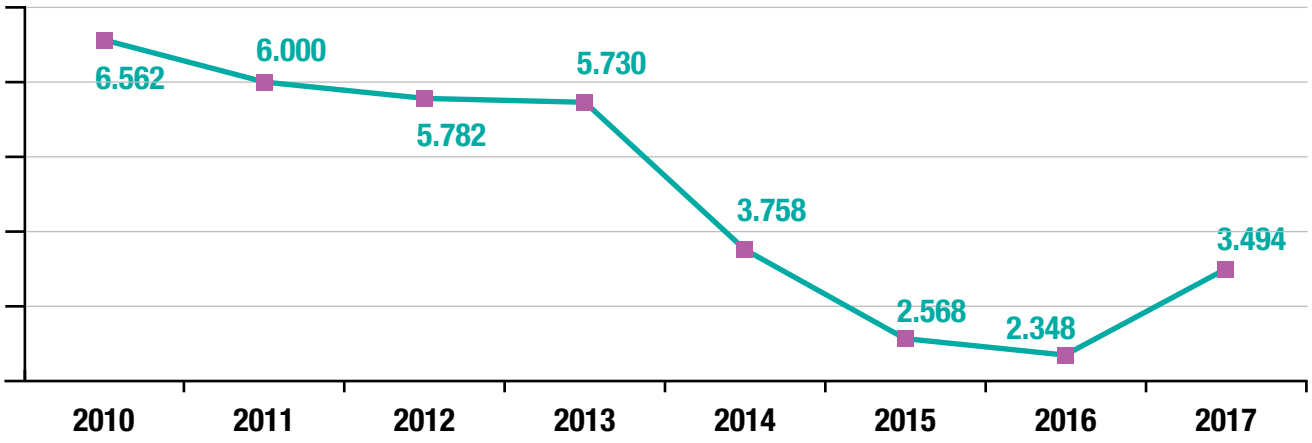
It is important to mention that during 2010 – 2017, the Council issued a number of 36.242 decisions and, among these, following the complaints lodged with competent Courts of Appeal, a total number of 868 decisions were abolished/modified in all or partially (205 decisions abolished/modified in all and 366 decisions modified in part), which means that 35.374 of these decisions issued by our institution, namely 97.6 %, remained definitive **(Fig. 42, Fig. 43)**.

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 2017 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 its establishment (September 2006) until the end of 2017, from the total number of 54,334 decisions issued by the Council, the total number of the decisions abolished/modified in all and in part by the competent Courts of Appeal reached 1,087 (Fig. 44).**

As a result, **between September 2006 – December 2017, the number of decisions that remained final and irrevocable in the form issued by the Council, after being contested by complaints lodged by the economic operators/CA with the competent Courts of Appeal, was of 53.247 decisions, which represents 98 % from the total number of decisions issued by the Council (Fig. 44).**

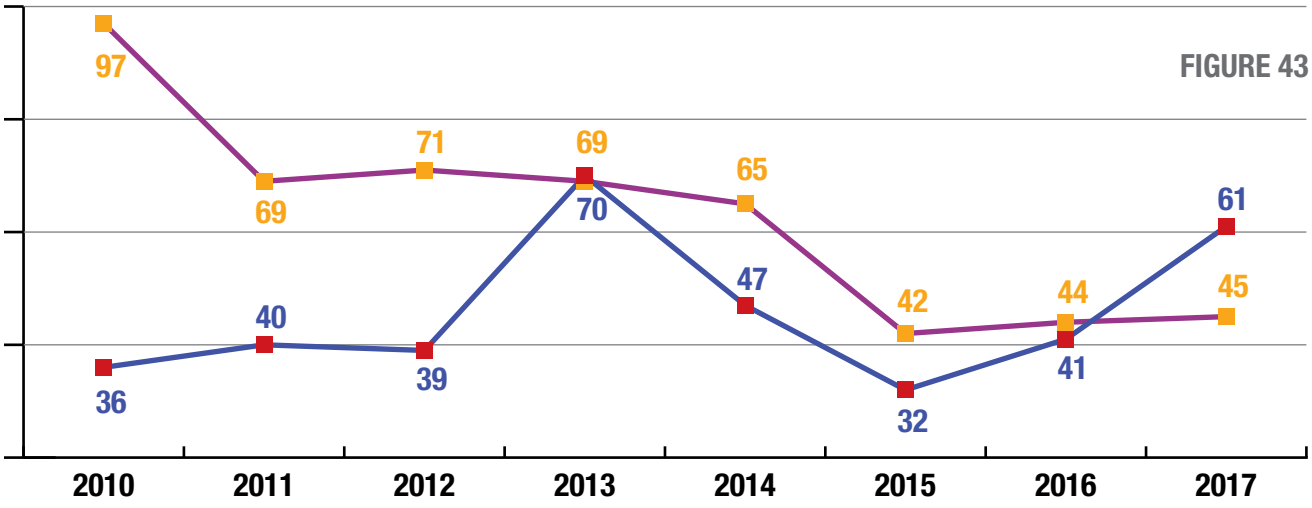
DECISIONS ISSUED BY N.C.S.C.

FIGURE 42



PARTIALLY MODIFIED DECISIONS ABOLISHED/INVALIDATED DECISIONS IN WHOLE

FIGURE 43

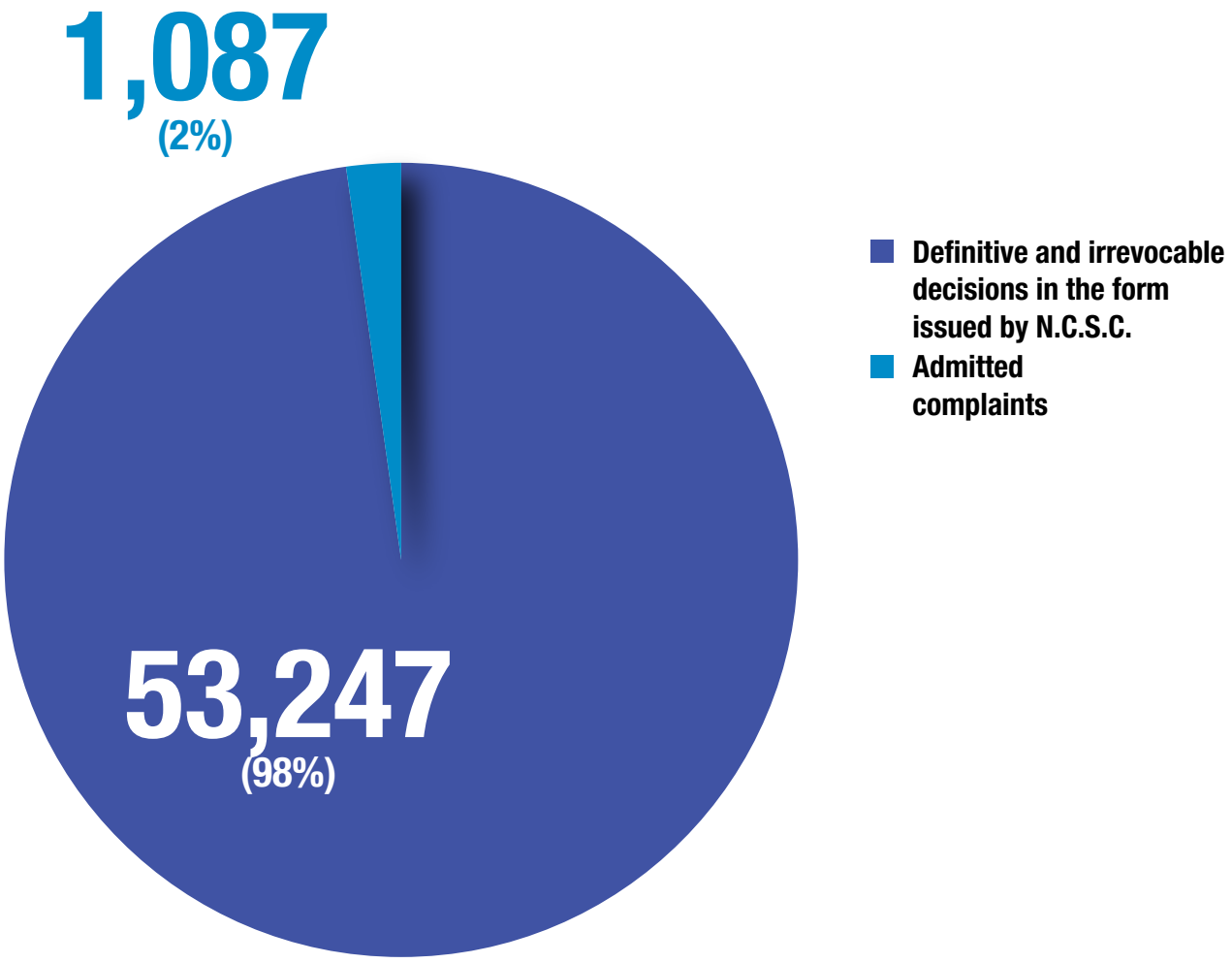


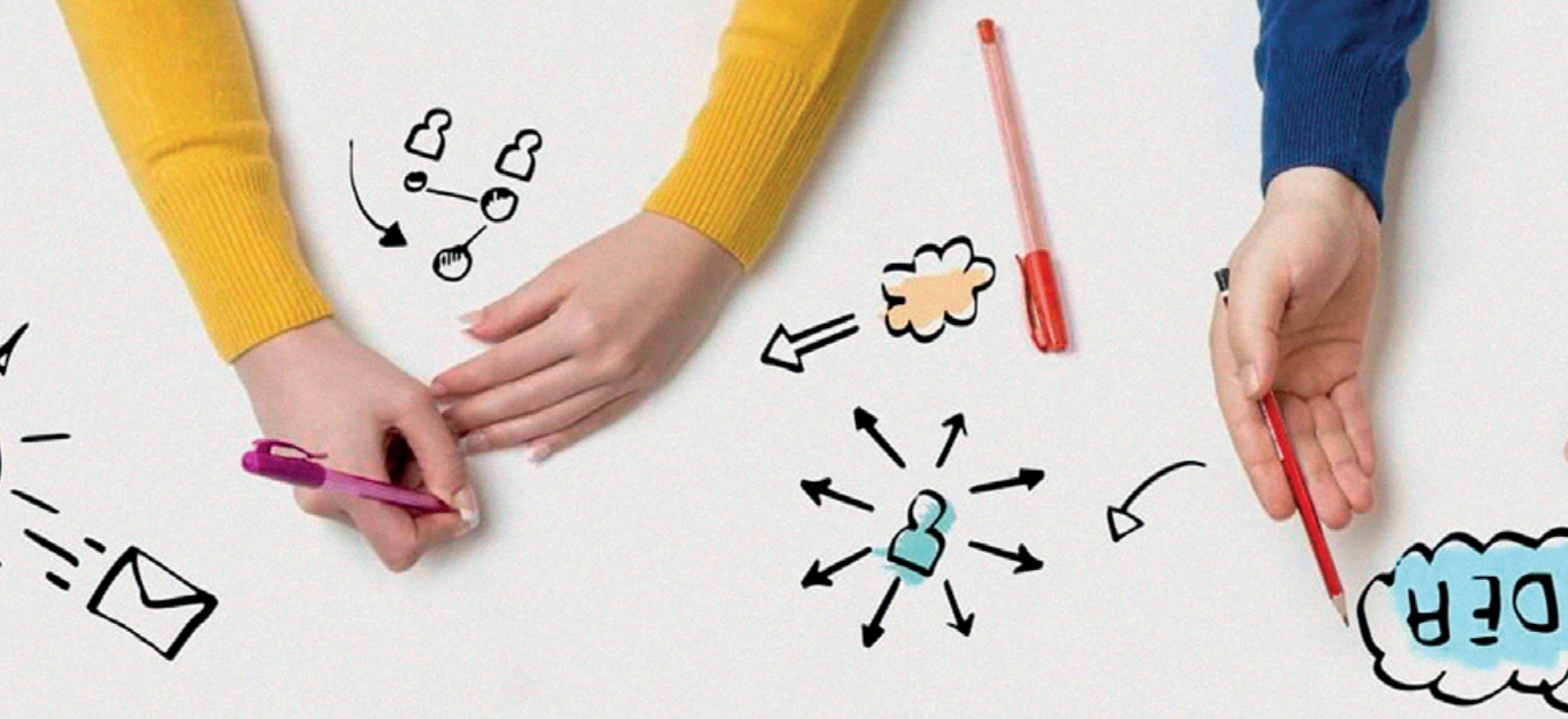
Although the trust level of our institution was maintained at a very high rate throughout the 11 years of activity (98 % of the total number of decisions issued by the Council remained definitive in the form issued by the Council, after being contested with complaints with the competent Courts of Appeal), there were however some cases which questioned this status.

Surprisingly, on the course of 2017, o series of complaints lodged against the decisions issued by the Council belonged to contracting authorities, who were declaring themselves interested in the fast development of the public procurement procedures. Hence this fact only succeeded in prolonging without justification the development of the public procurement procedures, respectively the awarding of the contracts.

As a consequence, in 122 cases (3.5 % of the total number of decisions issued by the N.C.S.C.), the contracting authorities decided to contest the decisions issued by the Council with complaint with the competent Courts of Appeal. The official data show that, in percentage of 89.34 %, the Courts of Appeal maintained the decisions in the form issued by the Council or they have modified them in part, the modifications regarding in fact aspects that did not affect the essence of the decisions of the Council.

FIGURE 44 **SITUATION OF THE DECISIONS ISSUED BY N.C.S.C. IN 2006-2017 REMAINED DEFINITIVE AND IRREVOCABLE AFTER BEING CONTESTED WITH COMPLAINTS LODGED WITH COMPETENT COURTS OF APPEAL**





4. INSTITUTIONAL TRANSPARENCY AND STAFF TRAINING

4.1. INSTITUTIONAL TRANSPARENCY

During 2017, the management of the National Council For Solving Complaints 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, so that the local public procurement system would benefit of predictibility, but also a coherent and unitary functioning which would contribute to the increase of european funds' absorption.

In this regard, the Council 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. STAFF TRAINING

According to Law no. 188/1999 on The status of civil servants, republished, as amended and supplemented, the vocational training and professional development are both a right and an obligation of the civil servants. In the case of N.C.S.C., strengthening the institutional capacity is strictly determined by an adequate process of training the complaints solving counsellors, which are civil servants with special status, in fields and themes of vocational training/professional development in compliance with the real needs of the public procurement system. Interested in the continuous staff training, but also in unifying the administrative-judicial practice at national and European level, the members of the Council attended in 2017 two seminars, alongside officials of the National Institute of Magistracy (N.I.M.), the Romanian Agency for Digital Agenda , the Competition Council, the National Agency for Public Procurement – NAPA, and several judges from on a number of Courts of Appeal and courts.

- **Unification of administrative – judicial practice according to Law no. 101/2016, Targu Mures (24 - 27 May 2017)**

Organized by N.C.S.C. in cooperation with N.I.M. and the support of Targu Mures Court of Appeal, the seminar was honoured with the presence of officials from NIM, A.N.A.P., Ministry of European Funds, Audit Authority, Court of Auditors, Public Ministry, but also of judges within the administrative and financial law sections of the CA Bucharest, Cluj, Brasov, Alba, Craiova, Ploiesti, Pitesti and the courts of Bucharest, Constanta, Mures, Bihor, Cluj and Brasov. During the seminar, the participants debated, alongside the complaints solving counsellors and the technical-administrative personnel within N.C.S.C., a series of complex themes regarding the unification of the administrative-judicial practice in the field of public procurement.

The seminar, moderated by Mr. Horaţiu Pătraşcu, judge at CA Bucharest and N.I.M. trainer, debated on the course of three days a series of complex subjects from the field of public procurement, such as:

- Legal control performed by the administrative law courts in the field of public procurement, under the new regulations of Law no. 101/2016. The effects of this law concerning the specific procedural aspect of complaint and limiting the administration of evidence in its course;

- The application mode of Article 161 of Law no. 554/2004, limits, effects on procedural plan; Procedural intervention ways of other economic operators that participated at the public procurement procedure in the complaint's procedure. The limits of the analysis admittance in complaint or contest when these contain supplementary reasons to those developed in the prior notification or, if any, complaint; The lack of real motivation in the prior notification – consequences;
- 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; The legal nature of the Notification concerning the use of DUAE of 01.09.2016; Inadvertences of form and substance; The lack of electronic signature of DUAE; Practical app for DUAE use.
- The regime of the clarification request from the contracting authority; The limits of the clarification request, procedural and substantial consequences;
- Qualification and selection criteria in the context of the regulations in the field of public procurement; Reasons for exclusion of the candidate/tenderer in the procedure for awarding the public procurement contract/framework agreement; Limits of revocation by the contracting authority of administrative acts issued under a tendering procedure;
- Procedural difficulties in the application of the complaint's solving procedure with N.C.S.C. and of the complaint with the Court of Appeal.

- **Unification of administrative – judicial practice according to Law no. 101/2016, Predeal (27 - 29 October 2017)**

Organized by N.C.S.C. in partnership with A.N.A.P., A.A.D.R and Competition Council, the seminar benefited from the support of Bucharest CA and focused, mainly, on the unification of administrative – judicial practice according to Law no. 101/2016. In this context, the participants also analysed the relevant jurisprudence of the Court of Justice of the European Union in the field of public procurement, taking into account the provisions of Directive no. 2014/24/UE of the European Parliament and the Council for public procurements and of the abolishment of Directive no. 2004/18/CE, in which the necessity of clarification for certain basic notions and concepts in mentioned, in order to ensure the judicial security and to incorporate the jurisprudence in this field of the Court of Justice of the European Union.

During this event, a large number of subjects and relevant causes were debated, but also potential modifications of the national legislation in the field of public procurements, starting with the fact that even the relevant jurisprudence of the Court of Justice of the European Union is the object of divergent interpretations between the member states and even contracting authorities. At the same time, other current themes from the field of public procurements were discussed, such as:

- The interpretation of Article 4, par. (3) and (4) of Law no. 101/2016, respectively the solving competence of the causes and the necessity of their connection. Problems met in the practice of N.C.S.C. and of the courts;
- Researching the dispute by N.C.S.C. (evidence, suspending the procedure, case study)
- System Electronic for Public Acquisitions – S.EP.A./S.I.C.A.P;
- Competition in public procurement. The importance of ensuring a real competition during the awarding procedures.

4.3. RELATION WITH THE MEDIA AND THE WIDE PUBLIC

In terms of the relationship with the media and the general public, the activity developed by N.C.S.C. in 2017 materialized, as in other years, through an interactive approach that ensured institutional transparency. Thus, for the purpose of correct information of the public opinion, the Information and Public Relations Office, in collaboration with the Statistics and IT Office within N.C.S.C. were concerned with 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 parallel, the Information and Public Relations Office took special care in respecting the regulations of Law no. 544/2001 on free access to public information, answering with celerity to all the requests lodged by individuals/entities or journalists.

Regarding the number of punctual requests arrived during 2017, the Information and Public Relations Office within N.C.S.C. received about 300 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.

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 2016 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, so as to ensure that any information regarding the functioning of the Council to be centralized, processed, and accessed without any restrictions by all individuals and entities interested in the analysis of the national and European system of public procurement.

In 2017, the Council paid special attention to the continuous development of its IT platform, which allowed any interested person easy on-line access to any information regarding files' solving, the decisions issued by the Council, as well as any other relevant and information, useful for the prevention of irregularities in the field of public procurement.

5. DE LEGE FERENDA

In the report for 2016 we commented on one of the pillars of the new approach in the field of public procurement, respectively the prior notification, stating that "the compulsoriness of a dialog between economic operators and contracting authorities may constitute for the latter even an opportunity to learn and better understand the field/industry in which they have initiated the awarding procedure".

The affirmation was made in the context in which, within G.D. no. 901/2015 on approving the National strategy in the field of public procurement, the following were stated "The current judicial remedy system will be improved through a set of systemic and complementary measures, meant to ensure a consequent jurisprudence and the predictability of the decisions in order to prevent the abusive use of judicial-administrative law and courts, but without affecting the right of economic operators to lodge complaints. Consequently, the prior notification of the contracting authority by the economic operator will become mandatory, for allowing the contracting authorities to take adequate measures before a complaint has been formally submitted. The contracting authority will have to answer with celerity to any notification in the allocated time for analysis. The complaint may be lodged only after receiving the answer of the contracting authority or if no answer has been sent in the established term (...) Prior notification of the contracting authority will become mandatory; a complaint will be lodged only after receiving the answer of the contracting authority or if no answer has been sent within the legal term. The object of this endeavour is to make the contracting authorities more responsible and to ensure that they have the real possibility to take remedy measures".

In correlation to prior notification, it was appreciated at that time that "at the communication of the award decision during a procurement procedure, the contracting authority should provide sufficient information to all the tenderers in order to allow them to adequately evaluate the reasons for rejecting the non-winning tenders/the acceptance of the winning tender".

As a consequence, in Article 214 par. (2) of Law no. 98/2016 on public procurement, it was set out the fact that "during the evaluation process, the contracting authority has the obligation to send the candidates/ tenderers the partial results, associated to each intermediary stage of this process, respectively the result of verifying the candidacy/DUAE and the result of evaluating the tenders, in conformity with the specific conditions set out through the methodological regulations for the application of the current law".

Comparing the data from 2016 with the ones from 2017, we note an increase with 59.13 % (+1.777 complaints) of the number of complaints in the last year, as opposed to the reference year, 2016. The growth of the complaints' number was monitored permanently by the Council, their variations imposing, in our opinion, the promotion of a legislative modification according to which "prior notification addressed to the contracting authority must regard the same aspects that will later represent the object of the complaint, so that the contracting authority would have the possibility to correct the violated acts. The undiscussed contested aspects by the means of prior notification will be rejected as inadmissible". In the opinion of the Council, this legislative modification will avoid the situations in which a complainant notifies some irregularities to the contracting authority, and others with N.C.S.C. or the administrative law court.

Despite the Council's efforts, the proposal regarding the aforementioned legislative modification was not taken into consideration by the legislator. However, we appreciate that the functioning and adjusting of the legislative package concerning the field of public procurement are treated with attention by the Council, because in real time legislative corrections lead to the stability and predictability of the system.

6. BUDGET OF N.C.S.C.

THE BUDGET OF N.C.S.C. FOR 2017, amounted 11,265 thousands RON and was distributed as follows:

– Budgetary provision for Current expenditures: 11.201 thousands RON of which:
- Staff expenditure: 9,558 thousands RON.
- Goods and services: 1,643 thousands RON.

– Budgetary provision for Capital expenditures: 64 thousands RON.

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

THE BUDGET OF N.C.S.C. FOR 2017 (THOUSANDS LEI)

CODE	NAME OF THE INDICATOR	Of year total, of which,				
		BUDGET	TRIM. I	TRIM. II	TRIM. III	TRIM. IV
5000	TOTAL BUDGET	11.265	2.814	2.833	2.790	2.828
01	CURRENT EXPENDITURE	11.201	2.779	2.812	2.783	2.827
10	TITLE I - STAFF EXPENDITURE	9.558	2.377	2.371	2.367	2.443
20	TITLE II - GOODS AND SERVICES	1.643	402	441	416	384
70	CAPITAL EXPENDITURES	64	35	21	7	1
71	TITLE XII NON-FINANCIAL ASSETS	64	35	21	7	1
5001	EXPENDITURE – STATE BUDGET	11.265	2.814	2.833	2.790	2.828
01	CURRENT EXPENDITURE	11.201	2.779	2.812	2.783	2.827
10	TITLE I - STAFF EXPENDITURE	9.558	2.377	2.371	2.367	2.443
20	TITLE II - GOODS AND SERVICES	1.643	402	441	416	384
70	CAPITAL EXPENDITURES	64	35	21	7	1
71	TITLE XII NON-FINANCIAL ASSETS	64	35	21	7	1
5101	PUBLIC AUTHORITIES AND EXTERNAL ACTIONS	11.265	2.814	2.833	2.790	2.828
01	CURRENT EXPENDITURE	11.201	2.779	2.812	2.783	2.827
10	TITLE I STAFF EXPENDITURE	9.558	2.377	2.371	2.367	2.443
20	TITLE II GOODS AND SERVICES	1.643	402	441	416	384
70	CAPITAL EXPENDITURES	64	35	21	7	1
71	TITLE XII - NON-FINANCIAL ASSETS	64	35	21	7	1
01	EXECUTIVE AND LEGISLATIVE AUTHORITIES	11.265	2.814	2.833	2.790	2.828
03	EXECUTIVE AUTHORITIES	11.265	2.814	2.833	2.790	2.828

1. Constitution of Romania – Article 21, par. (4);
2. Law no. 101/2016, Article 44, Article 1, par. (1), (2);
3. Law no. 101/2016, Article 44, par. (1);
4. Law no. 101/2016, Article 44, par. (2);
5. Law no. 101/2016, Article 46, par. (1);
6. Law no. 101/2016, Article 45, par. (1);
7. Law no. 101/2016, Article 13, par. (1);
8. Law no. 101/2016, Article 13, par. (2);
9. Law no. 101/2016, Article 6, par. (1), letters a), b);
10. Law no. 101/2016, Article 37, par. (2);
11. G.D. no. 1037/2011 was published in the Official Gazette, Part I no. 775, from 2 November 2011 (the normative act abolished G.D. no. 782/2006)
12. Law no. 101/2016, Article 37, par. (3);
13. Law no. 101/2016, Article 14, par. (2);
14. Law no. 101/2016, Article 15, par. (1);
15. Law no. 101/2016, Article 14 par. (1);
16. Law no. 101/2016, Article 13 par. (1);
17. Law no. 101/2016, Article 13 par. (2);
18. Law no. 101/2016, Article 44, par. (1);
19. Law no. 101/2016, Article 44, par. (1);
20. Law no. 101/2016, Article 38, par. (2);
21. Law no. 101/2016, Article 44, par. (3);
22. Law no. 101/2016, Article 40, par. (1);
23. Law no. 233/2016, Article 29;
24. G.E.O. nr. 114/2011, Article 188;
25. Law no. 101/2016, Article 13, par. alin. (3);
26. Law no. 101/2016, Article 39;
27. Approved by G.D. no. 1037/2011;
28. Law no. 101/2016, Article 24, ar. (1), (2);
29. CA – Contracting Authority
30. ATU – Administrative Territorial Unit (County)
31. The medium official course communicated by BNR for 2017 for 1 euro was of 4,5681 lei
32. The medium official course communicated by BNR for 2016 for 1 euro was of 4,4908 lei
33. In 2016 the 796 procedures financed from European funds initiated in S.E.P.A. had a total estimated value of 8.285.385.629,69 RON (equivalent to 1.844.968.742,69 EURO on the annual medium course leu – euro communicated by BNR32)
34. In 2016 the 588 procedures financed from European funds which were effectively awarded in S.E.P.A. had a total estimated value of 2.872.133.216,16 RON (equivalent to 639.559.369, 41 EURO on the annual medium course leu – euro communicated by de BNR32)
35. Law no. 101/2016, Article 32, par. (1), (2)