

# TABLE OF CONTENTS

<b>1. GENERAL CONSIDERATIONS .....</b>	<b>6</b>
1.1. C.N.S.C. ROLE AND MISSION .....	6
1.2. C.N.S.C. MANAGEMENT, HUMAN RESOURCES AND ORGANISATIONAL STRUCTURE .....	10
<b>2. ACTIVITY DEVELOPED BY C.N.S.C. IN 2018 .....</b>	<b>12</b>
2.1. COMPLAINTS LODGED BY BUSINESS OPERATORS .....	12
2.1.1. TRENDS OF THE COMPLAINTS LODGED BY THE BUSINESS OPERATORS .....	12
2.1.2. SUBJECT MATTER OF THE COMPLAINTS LODGED BY THE BUSINESS OPERATORS .....	25
2.2. FILES SOLVED BY THE NATIONAL COUNCIL FOR SOLVING COMPLAINTS .....	38
2.2.1. THE TREND OF THE FILES SOLVED BY THE NATIONAL COUNCIL FOR SOLVING COMPLAINTS .....	38
2.3. DECISIONS RENDERED BY THE NATIONAL COUNCIL FOR SOLVING COMPLAINTS .....	39
2.3.1. THE TREND OF THE NUMBER OF THE DECISIONS ISSUED BY THE NATIONAL COUNCIL FOR SOLVING COMPLAINTS .....	39
2.3.2. THE STANDING OF THE SETTLEMENT OF COMPLAINTS LODGED WITH THE NATIONAL COUNCIL FOR SOLVING COMPLAINTS .....	41
2.4. THE ACTIVITY OF THE NATIONAL COUNCIL FOR SOLVING COMPLAINTS IN RELATION TO THE ESTIMATED VALUE OF THE AWARD PROCEDURES .....	44
2.4.1. THE ESTIMATED VALUE OF THE AWARD PROCEDURES IN WHICH THE NATIONAL COUNCIL FOR SOLVING COMPLAINTS RENDERED DECISIONS .....	44
2.4.2. THE TOTAL ESTIMATED VALUE OF THE PROCEDURES IN WHICH THE NATIONAL COUNCIL FOR SOLVING COMPLAINTS ISSUED DECISIONS FOR THE ACCEPTANCE OF THE COMPLAINTS,, IN COMPARISON WITH THAT TONE OF THE PROCEDURES COMMENCED VIA S.E.A.P. ....	47
<b>3. THE QUALITY OF THE N.C.S.C. ACTIVITY .....</b>	<b>49</b>
3.1. THE STANDING OF THE DECISIONS ISSUED BY C.N.S.C. AND AMENDED BY THE COURTS OF APPEAL AS A CONSEQUENCE OF THE ACTIONS BROUGHT AGAINST .....	49
3.1.1. THE STANDING OF THE DECISIONS ISSUED BY C.N.S.C. AS TO THE SUBSTANCE OF THE COMPLAINTS AND AMENDED BY THE COURTS OF APPEAL AS A CONSEQUENCE OF THE ACTIONS BROUGHT AGAINST .....	49
<b>4. THE INSTITUTIONAL TRANSPARENCY AND THE PERSONNEL TRAINING .....</b>	<b>53</b>
4.1. THE INSTITUTIONAL TRANSPARENCY .....	53
4.2. PROFESSIONAL TRAINING .....	54
4.3. THE RELATION WITH MASS-MEDIA AND GENERAL PUBLIC .....	56
4.4. THE REPRESENTATION OF THE NATIONAL COUNCIL FOR SOLVING COMPLAINTS AT INTERNATIONAL EVENTS – 2018 .....	57
<b>5. THE BUDGET OF THE NATIONAL COUNCIL FOR SOLVING COMPLAINTS .....</b>	<b>58</b>



# FOREWORD

2018 knew fundamental amendments to the Act no. 101/2016 governing the activity of the National Council for Solving Complaints (C.N.S.C.). Some of these are the variation of the term for solving the complaints before the Council, of the term for bringing an action against the Council decisions, as well as the establishment of a bond by the party claiming to be aggrieved, prior to the settlement of the complaint.

Amendments were made also to primary legislation in the area of public and sector procurement, as well as of concessions, the Council being concerned with incorporating these too.

Correlated or not to such law amendments, however a declining trend is noteworthy in the number of complaints submitted to the Council in the course of that year, as opposed to the increasing complexity and diversity in substance and procedures that the administrative-jurisdictional body has encountered.

With a view to ensuring a consistent approach of cases in the judge chambers, in the course of 2018 the Council has held meetings with the magistrates involved in solving public procurement disputes in court of appeals and county courts, as well as with experts of the National Agency for Public Procurement (ANAP), management authorities and public central institutions.

Despite the challenges occurring generally in laws and in society, the Council goal will keep being to strengthen and improve their ability to

examine the complaints of jurisdiction with celerity, impartiality, transparency and in line with the legal provisions.

In addition to this, for 2019 the Council intends to keep holding workshops for unifying the administrative-jurisdictional practice with an ever increasing number of expert magistrates of ANAP and other categories of experts; to make use of their power granted by the Emergency Decree (O.U.G.) no. 45/2018, namely to request the Prosecutor General of the Prosecutor's Office attached to the High Court of Cassation and Justice to commence the procedure of appeal for uniform interpretation of law when particular matters of law have received different solutions from the Council judge chambers or from the courts of law, so that the administrative-jurisdictional practice may become unitary, an essential condition for increasing quality and trust in the administrative-jurisdictional deeds.

PRESIDENT  
Florentina DRĂGAN



In a technical and legal sense, the principle of collegiality implies that a judgment should be conducted by several judges, the pro argument being that it serves in securing impartiality and in preventing errors due to mutual control between judges, the guarantee of rendering the fairest decisions due to the exchange of ideas between the chamber members and keeping independence against any intromissions.

The abovementioned principle is laid down in article 13 (1) of the Act no. 101/2016 on remedies and appeals in the award procedure of the public procurement contracts, of sectorial contracts and of the concession contracts for works and services, as well as for the organization and functioning of the National Council for Solving Complaints. According to this act, *„a complaint shall be solved by a chamber of three members of the Council, of whom one must have a Bachelor's degree in law, with minimum nine-year seniority in the legal field”*. The same principle is promoted by the provisions of article 62 (1) and (2) of the Act no. 101/2016<sup>1</sup>.

In the course of the last year, the Council held monthly plenary meetings, where each chamber alternately put forward a particular topic, thus the proceedings becoming more and more intense and full of substance at each meeting. Such proceedings proved to be useful altogether, particularly in the situations that required a review of the changes in law, a relevant example in this respect being the introduction of the bond by O.U.G. no. 45/2018. Upon the plenary meeting, the Council website posted the information necessary for the parties to exercise their relevant rights.

Moreover, in the past year the Council successfully held semestral meetings with judges of the courts of law and representatives of other institutions in the field of public procurement, while making consistent efforts to strengthen unitary practice. The attendance of the President of the National Agency for Solving Complaints of the Republic of Moldova at the workshop held in Constanța is further evidence that the approached topics were of current interest.

However, the international relationships of the Council are much more complex, in 2018 our institution being visited by representatives of similar institutions from Slovenia and Kazakhstan. Additionally, the Council answered in the affirmative to the request of attending the proceedings of the 14<sup>th</sup> PRIMO Forum (Procurement, Integrity, Management and Openness) organized by the World Bank in Bucharest, as well as the events organized by the Permanent Representation of Romania to the European Union, in Brussels.

At the time of this report Romania is already holding the Presidency of the Council of the European Union for the period 1 January – 30 June 2019. It is a time characterized by the joint effort of the Member States to identify answers to major challenges confronting the European project, for which reason the Romanian Presidency motto is *„Cohesion, a common European value”*.

Under this motto, the 6<sup>th</sup> meeting of the EU Network of First Instance Public Procurement Review Bodies will be held in Bucharest between 2 and 4 April 2019, when the National Council for Solving Complaints together with the European Commission will play an important role as moderator/mediator of the major themes of the meeting agenda. This role undertaken by the Council is a recognition of its activity within the Network ever from the establishment of the latter, Bucharest 2019 being a landmark moment.

In 2019 as well my office as President of the Council came to an end and at this time the institution has a new President. Personally I wish her success in her activity and for the Council to stay under the sign of cohesion and collegiality.

Silviu - Cristian POPA  
President 2016 - 2019

<sup>1</sup> Article 62 (1)-(2) of the Act no. 101/2016 „(1) The Council organizes monthly meetings where talks are held on the legal issues that have led to different solutions being decided in similar cases. Moreover, the talks will concern the implementation and the interpretation of the newly arising regulations in the field of public procurement, as well as in any other fields of interest to the Council members' professional activity. (2) The legal issues referred to in par. (1) are first reviewed by one or several Council members appointed by the Council President, who put(s) forward a study on such issues touching both the Council practice and the national and the European practice and must present their opinion well accounted for, such study being then subject to the members' proceedings.”

# 1. GENERAL CONSIDERATIONS

## 1.1. C.N.S.C. ROLE AND MISSION

National Council for Solving Complaints (C.N.S.C.) is operating pursuant to the Act no. 101/2016<sup>2</sup> on remedies and appeals in the award procedure of the public procurement contracts, of sectorial contracts and of the concession contracts for works and services, as well as for the organization and functioning of the National Council for Solving Complaints, as subsequently amended and supplemented<sup>3</sup>, a regulatory act that became effective in May 2016.

Pursuant to the provisions of article 37 (1) of the Act no. 101/2016 transposing article 2 (9) of Directive no. 86/665/EEC<sup>4</sup> as subsequently amended and supplemented, and article 2 (9) of Directive 92/13/EEC<sup>5</sup>, as subsequently amended and supplemented, the Council is an administrative body of public law, with jurisdictional powers, enjoying the independence necessary for fulfilling administrative-jurisdictional deeds, insubordinate to any public authority or institution and compliant with the provisions of the Romanian Constitution article 21 (4).

The institution was created in 2006 by the Government Emergency Decree (O.U.G.) no. 34/2006, with the purpose of serving a fundamental condition of the abovementioned directives, according to which the Member States should provide for effective and quick remedies against the decisions made by contracting authorities/entities.

Although the activity of the Council for Solving the Complaints lodged by the business operators under the public procurement procedures leads to the framework of the judiciary, it cannot be regarded as part thereof due to its nature, therefore

being a part of the executive-administrative power.

C.N.S.C. operates according to its own rules for organization and functioning, which is approved by decision made with absolute majority of the plenary Council, published in the Romanian Official Gazette. Until it becomes effective, the provisions of the Regulation for organization and functioning approved by Government Resolution (H.G.) no. 1037/2011<sup>6</sup> will remain in force, insofar as they are not contrary to the provisions of the Act no. 101/2016, as subsequently amended and supplemented.

Pursuant to the provisions of article 44 of the Act no. 101/2016, the Council has 36 members at least half of whom must have a Bachelor's degree in law, with a nine-year seniority in the legal field. They are public servants of special status appointed by decision of the Romanian Prime Minister on the proposal of the President of the Council upon successfully passing a competition<sup>7</sup>.

In their activity the Council members are



<sup>2</sup> published in the Official Gazette, Part I no. 393 of 23 May 2016

<sup>3</sup> Emergency Decree no. 107/2017 amending and supplementing regulatory acts of impact in the field of public procurement, published in the Official Gazette, Part I no. 1022 of 22 December 2017; Emergency Decree no. 45/2018 amending and supplementing regulatory acts of impact on the system of public procurement, published in the Official Gazette, Part I no. 459 of 04 June 2018; Act no. 212/2018 amending and supplementing the Administrative Litigation Act no. 554/2004 and other regulatory acts, published in the Official Gazette, Part I no. 658 of 30 July 2018

<sup>4</sup> Directive no. 86/665/EEC coordinating the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts, published in the Official Journal L 395 of 30.12.1989

<sup>5</sup> Directive no. 92/13/EEC coordinating, the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors, published in the Official Journal no. L 076 of 23.03.1992

<sup>6</sup> Resolution no. 1037/2011 approving the Regulation for the organization and functioning of the National Council for Solving Complaints, published in the Official Gazette, Part I no. 775 of 02 November 2011

<sup>7</sup> Pursuant to article 45 correlated to article 46 of the Act no. 101/2016



subject only to the law<sup>8</sup>, for which purpose they render decisions and conclusions<sup>9</sup> through the chambers for solving complaints, while making sure that the legislation in force is being implemented in the pursuit of their activity, according to the principles of law specifically and imperatively regulated, namely the principle of lawfulness, of expedience, the adversarial principle, protection of the rights of the defence, impartiality and independence of the administrative-jurisdictional activity<sup>10</sup>.

Pursuant to the provisions of article 12 correlated to article 3 (a) of the Act no. 101/2016, the Council duty is limited to solving the complaints lodged under the award procedures provided by article 68 of the Act no. 98/2016<sup>11</sup>, by article 82 of the Act no. 99/2016<sup>12</sup> and article 50 of the Act no. 100/2016<sup>13</sup>, however it has been enhanced by the amendments made to these acts, by the Government Emergency Decree (OUG) no. 45/2018, which adds new paragraphs to the provisions of article 68 of the Act no. 98/2016 and of article 82 of the Act no. 99/2016, regulating the award procedure applied to welfare services and to other specific services.

With regard to the Council duties, the ECJ practice is relevant as follows:

- The case C-26/03 Stadt Halle and RPL Lochau, paragraphs 33 and 34 of the Judgment dated 11.01.2005: „Where a contracting authority decides not to initiate an award procedure on the ground that the contract in question does not, in its opinion, fall within the scope of the relevant Community rules, such a decision constitutes the very first decision amenable to judicial review.

Having regard to that case-law and to the objectives, scheme and wording of Directive 89/665, and in order to preserve the effectiveness of that directive, it must be concluded that any act of a contracting authority adopted in relation to a public service contract within the material scope of Directive 92/50 and capable of producing legal effects constitutes a decision amenable to review within the meaning of Article 1(1) of Directive 89/665, regardless of whether that act is adopted outside a formal award procedure or as part of such a procedure.”

- The case C-391/15 Marina del Mediterráneo



SL and Others versus Agencia Pública de Puertos de Andalucía, paragraph 26 of the Judgment dated 05.04.2017: „It should be noted that the wording of Article 1(1) of Directive 89/665 assumes, by using the words ‘as regards ... procedures’, that every decision of a contracting authority falling under EU rules in the field of public procurement and liable to infringe them is subject to the judicial review provided for in Article 2(1)(a) and (b) of that directive. That provision thus refers generally to the decisions of a contracting authority without distinguishing between those decisions according to their content or time of adoption (see judgment of 11 January 2005, Stadt Halle and RPL Lochau, C 26/03, EU:C:2005:5, paragraph 28 and the case-law cited)”.

The complaints lodged by the business operators via administrative-jurisdictional proceeding are assigned for settlement at random<sup>14</sup>, by electronic means, to the chamber solving the complaints, each chamber consisting of 3 (three) members, of whom one is fully chairing. The chamber chairpersons are established by rotation procedure.

At least one member of each chamber must

<sup>8</sup> Pursuant to article 37 (3) of the Act no. 101/2016

<sup>9</sup> Pursuant to article 14 (2) of the Act no. 01/2016

<sup>10</sup> Pursuant to article 15 of the Act no. 101/2016

<sup>11</sup> Public Procurement Act no. 98/2016, as subsequently amended and supplemented

<sup>12</sup> Sectoral Procurement Act no. 99/2016, as subsequently amended and supplemented

<sup>13</sup> Act no. 100/2016 on the concessions of works and the concessions of services, as subsequently amended and supplemented

<sup>14</sup> Pursuant to article 14 (1) of the Act no. 101/2016



have a Bachelor's degree in law with a minimum nine-year seniority in the legal field<sup>15</sup>.

For the proper functioning of the institution and for expedient settlement of the complaints lodged by the business operators, each chamber for solving the complaints receives the assigned technical and administrative staff employed under contract and graduate in legal, business or technical fields<sup>16</sup>.

The Council President is elected by secret voting with absolute majority of the Council members for a three-year term. The President must be a graduate in law with a minimum nine-year seniority in the legal field<sup>17</sup> and has the power of Chief Authorising Officer<sup>18</sup>, as required by the provisions of article 2 (9) paragraph 2 of Directive no. 86/665/CEE<sup>19</sup> and of article 2 (9) paragraph 2 of Directive no. 92/13/EEC<sup>20</sup>.

The amount of work pursued by C.N.S.C. is reflected mainly by the number of complaints submitted to the Council, by the number of issued decisions and conclusions, respectively by the number of solved files, whereas the effects/results of the Council activity are reflected by the number of the decisions that were appealed (authorized for solving the appeals being the court of appeal of territorial-administrative jurisdiction in the area where the contracting authority is headquartered) and by the number of appeals granted by the court

of administrative litigation.

It must be emphasized that, in addition to the settlement of the complaints lodged under the award procedures for the public procurement contracts, sectoral procurement and concessions of works and/or services, the Council has the power:

- to solve the complaints lodged under the award procedures for the public-private partnership contracts<sup>21</sup> regulated by O.U.G. no. 39/2018<sup>22</sup> as subsequently amended and regulated;
- to solve the complaints lodged under the award procedures for the public procurement contracts in the fields of defence and security regulated by O.U.G. no. 114/2011<sup>23</sup>, for which purpose the counsellor solving the complaints are authorized, in compliance with the provisions of the Act no. 182/2002 on the protection of classified information, as subsequently amended and supplemented.

For this reason, in order to exercise its powers regulated by O.U.G. no. 114/2011 on the award of public procurement contracts in the field of defence and security, a regulatory act in force as from 1 October 2012, the Council became an «Entity holding classified information », for which purpose the following actions were pursued:

- the system of relationships with the Appointed Authority for Security - ADS (specialized entity within the Intelligence Service - SRI) was established;
- the lawful measures were taken in the relationship with ORNISS (National Registry Office for Classified Information) for commencing and developing the checkout procedures with a view to issuing the security certificates and the permits of access to classified state information;
- security certificates and permits of access to classified information were obtained;
- measures were implemented for physical protection against unauthorized access to classified information, staff protection and protection of the sources generating information;

<sup>15</sup> Pursuant to article 13 of the Act no. 101/2016

<sup>16</sup> Pursuant to article 45-46 of the Act no. 101/2016 correlated to article 16 of HG no. 1037/2011

<sup>17</sup> Pursuant to article 38 correlated to article 44 (3) of the Act no. 101/2016 correlated to article 6 (1)-(2) of HG no. 1037/2011

<sup>18</sup> Pursuant to article 40 (1) of the Act no. 101/2016

<sup>19</sup> „The members of such independent body shall be appointed and leave office under the same conditions as the members of the judiciary, as regards the authority responsible for their appointment, for their period of office and their removal. At least the President of this independent body shall have the same legal and professional qualifications as the members of the judiciary. The independent body shall make its decisions following a procedure in which both sides are heard and such decisions shall, by means determined by each Member State, be legally binding.”

<sup>20</sup> „The members of the independent body referred to in the first paragraph shall be appointed and leave office under the same conditions as the members of the judiciary, as regards the authority responsible for their appointment, for their period of office and their removal. At least the President of this independent body shall have the same legal and professional qualifications as the members of the judiciary. The independent body shall make its decisions following a procedure in which both sides are heard and such decisions shall, by means determined by each Member State, be legally binding.”

<sup>21</sup> Pursuant to article 29 of O.U.G no. 39/2018

<sup>22</sup> O.U.G. no. 39/2018 on the public-private partnership, as subsequently amended and supplemented.

<sup>23</sup> article 188 of O.U.G. no. 114/2011 on the award of public procurement contracts in the fields of defence and security, published in the Official Gazette no. 932/29.12.2011

- approval was issued for the commencement of the IT system Security Accreditation process;
- the IT system Security Accreditation Strategy was issued;
- the IT system Security Accreditation was obtained.

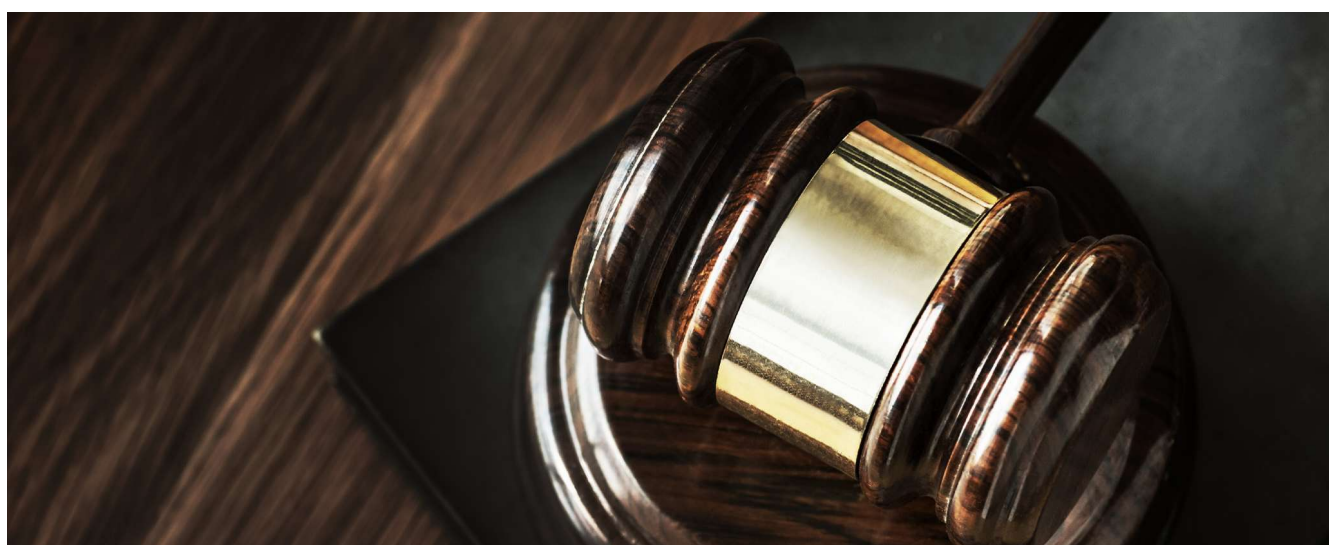
It is worth mentioning that, in compliance with the provisions of the Government Resolution (H.G.) no. 583/2016 approving the National Anticorruption Strategy for the period of 2016-2020, the performance indicator sets, the risks related to the Strategy goals and measures and the sources for the checkout, the inventory of the measures of institutional transparency and prevention of corruption, the indicators for assessment and the standards for publication of the information of public interest, the Council adhered to the fundamental values, the principles, the goals and the mechanism of monitoring provided in the Government Resolution, upholding the anticorruption fight and promoting the fundamental values in terms of integrity, priority of public interest, transparency of the decision-making process and unhindered access to the information of public interest.

Moreover, the Council passed the Integrity Plan, under which the institution identified its own risks and institutional weaknesses related to the main working processes and established measures for strengthening the prevention mechanisms

already in place.

Having regard to the legal provisions, the Council role and mission, throughout the year 2018 it took active part in all the meetings, working groups, sessions etc. held by various public institutions (Parliament of Romania, the National Agency for Public Procurement – ANAP -, the National Agency for Integrity – ANI -, the Competition Council, Courts of Appeal etc.) or in partnership with them for the purpose of passing and strengthening the legislation, respectively interpreting the same and also for creating a shared practice in terms of unitary approach of the legal provisions in the field of public procurement.

It must be emphasized that in the summer of 2018, the Council lodged its first request for a preliminary ruling to the Court of Justice of the European Union, the case C-353/18, thus being recognized CNSC capacity as „court or tribunal of a Member State” within the meaning of article 267<sup>24</sup> TFUE, of legal origin, as permanent, with binding powers, enforcing the legal rules, as independent and the CNSC procedure for solving complaints being conducted according to the adversarial principle and the principle of respect for the rights of defence.



<sup>24</sup> Article 267 of TFEU „The Court of Justice of the European Union shall have jurisdiction to give preliminary rulings concerning:

(a) the interpretation of the treaties;

(b) the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union;

Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court to give a ruling thereon.

Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court.

If such a question is raised in a case pending before a court or tribunal of a Member State with regard to a person in custody, the Court of Justice of the European Union shall act with the minimum of delay”.



## 1.2. C.N.S.C. MANAGEMENT, HUMAN RESOURCES AND ORGANISATIONAL STRUCTURE

C.N.S.C. worked in 2018 with 33 counsellors for solving complaints in the field of public procurement, pursuant to H.G. no. 1,037/2011, organized as 11 (eleven) chambers for solving complaints.

The Council staffing scheme includes 53 technical-administrative employees, although, according to the provisions of H.G. no. 1,037/2011 approving the C.N.S.C. Regulation for organization and functioning, 64 posts are provided to be allotted for the technical-administrative staff.

In the course of 2018, the Council was managed by Mr. Silviu – Cristian POPA, who was holding his first office as President of this institution, which expired in February 2019.

Thus, starting with 25 February 2019, the new President of this institution, as elected for a

three-year office by secret voting of the C.N.S.C. counsellors for solving complaints, is Ms. Florentina DRĂGAN.

According to the applicable legislation, in the exercise of her powers the Council President is assisted by a college<sup>25</sup> of three members (Mr. Lehel – Lorand BOGDAN, Mr. Cristian COSTACHE, Mr. Dumitru Viorel PÂRVU), as elected with absolute majority by secret voting from the counsellors for solving the public procurement complaints, whose office expires on 01.08.2019.

In terms of gender structure, at the end of the past year 61 of the Council employees were women (71.76%) and only 24 men (28.24%), all having completed higher education.

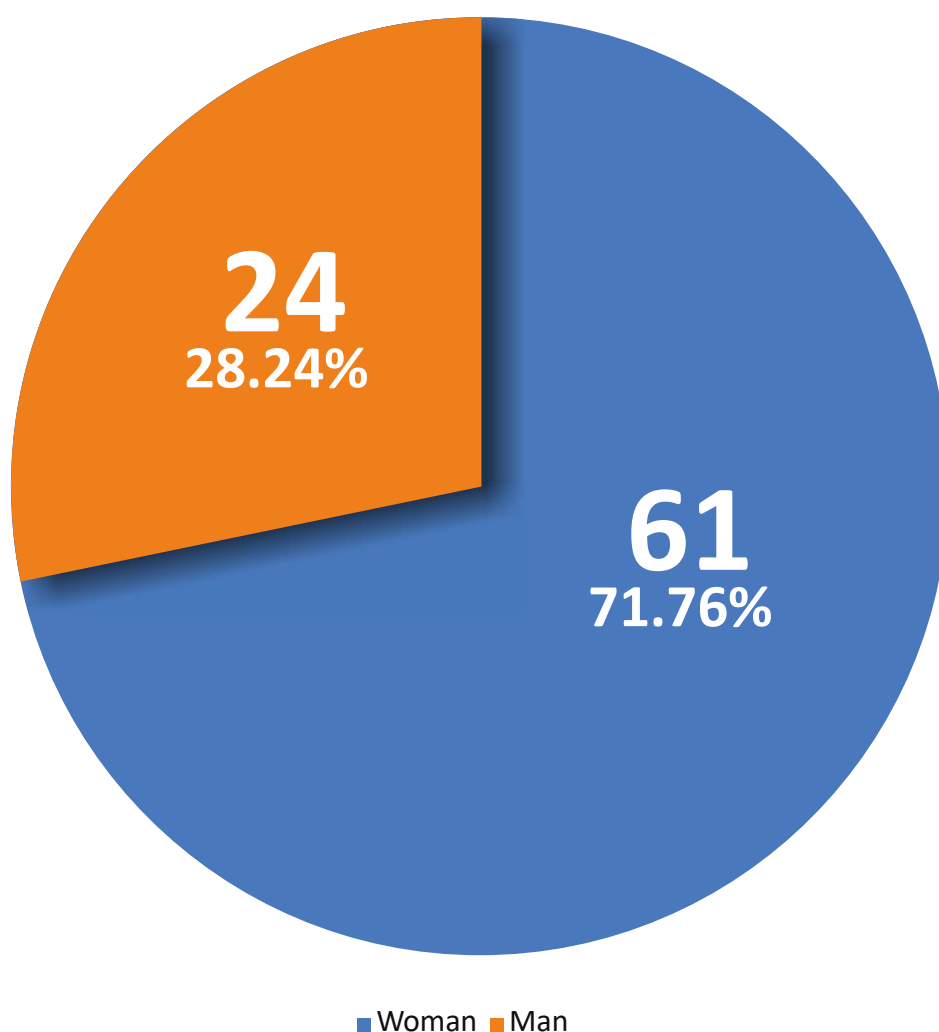


Figure 1 – Gender structure of the C.N.S.C. employees in 2018

<sup>25</sup> Pursuant to article 39 of the Act no. 101/2016



It should be mentioned that in the course of 2018 the weight of the female counsellors for solving public procurement complaints was 63.63%, whereas the weight of the female employees hired under contract was 75.47%.

With regard to the C.N.S.C. employee average age in 2018 it was 45 at the level of the institution.

According to the Council Regulation for organization and functioning<sup>26</sup>, the technical-administrative staff pursues its activity under the following structures:

- Registry, Archives and Library Service including:
  - Registry, Archives and Library Office;

- Statistics and IT Office;
- Economic-Administrative and Public Procurement Service including:
  - Human Resources Office;
  - Information and Public Relations Office;
  - Financial-Accounting Department;
  - Public Procurement Department;
- Technical Service of the chambers;
- Legal Department including:
  - Legal and Administrative Litigation Service;
  - Legal service of the chambers for solving complaints;
- Internal Public Audit Department.

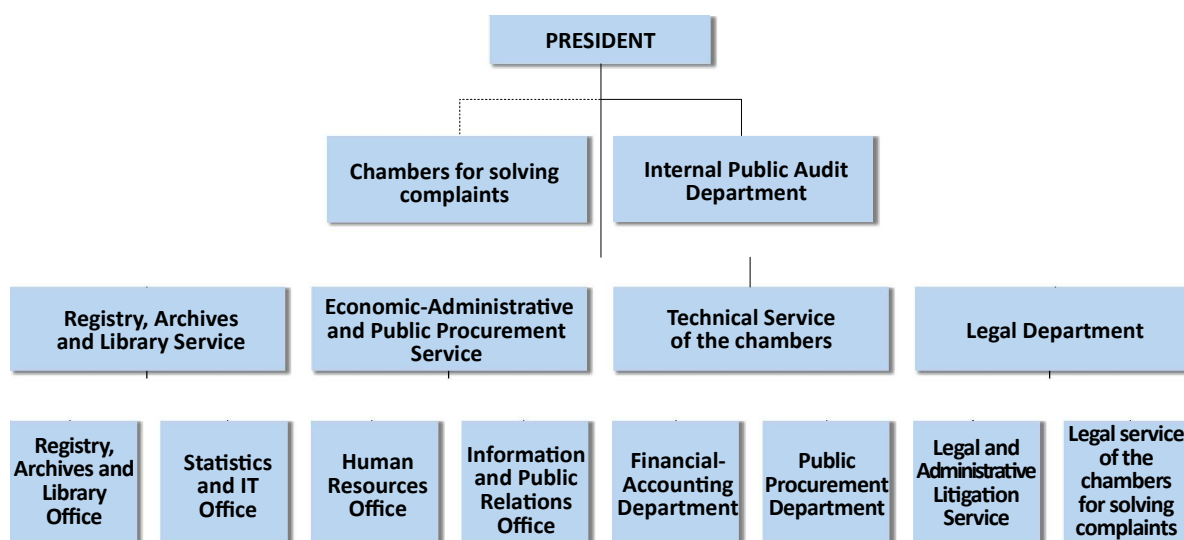


Figure 2 – C.N.S.C. Organization Chart



<sup>26</sup> Approved by H.G. no. 1037/2011





## 2. ACTIVITY DEVELOPED BY C.N.S.C. IN 2018

### 2.1. COMPLAINTS LODGED BY BUSINESS OPERATORS

The main indicators that are used to analysed the C.N.S.C. activity are the number of complaints lodged by the business operators, the yearly progress trend thereof and the number of the issued decisions, as well as the number of complaints that became final upon settlement of the actions brought against the Council decisions.

At the same time there are further relevant indicators, such as the subject matter of the lodged complaints, the complexity thereof, how the complaints were solved, as well as a statement of the award procedures commenced in the Electronic Public Procurement System - S.E.A.P.

An objective analysis of the Council activity based on official figures shows that the institution has never been a hindrance to the projects financed by national and European fund, on the contrary, it has been a highly efficient filter for preventing a significant number of irregularities in the public procurement procedures that were developed in 2018.

This results from an analysis of the main indicators characterizing the Council activity:

- the number of complaints lodged between 2016 - 2018 under procedures financed by European funds;
- the number and the value of the procedures financed from European/national funds that were commenced in the Electronic Public Procurement System - S.E.A.P. in the period 2016 - 2018 for which the Council issued remedial/cancellation decisions;
- the number and the value of the procedures financed by European/national funds awarded by the contracting authorities after the Council solved the lodged complaints;
- the number of the decisions that remained final in such form as issued by the Council, after they were appealed by actions brought in the administrative courts in the contracting authorities' territories etc.

#### 2.1.1. TRENDS OF THE COMPLAINTS LODGED BY THE BUSINESS OPERATORS

In the period 1 January – 31 December 2018, the number of complaints (files) lodged by the business operators and registered with C.N.S.C. amounted to 3,642, of which 15 were submitted to the county courts for joining the complaints, pursuant to article 4 (4) of the Act no. 101/2016,

3,627 complaints being actually solved by C.N.S.C.

Thus, in the period January – December 2018, the number of complaints lodged by the business operators and registered with C.N.S.C. had the following trend:

January	299	July	311
February	380	August	248
March	387	September	226
April	369	October	273
May	428	November	201
June	327	December	193

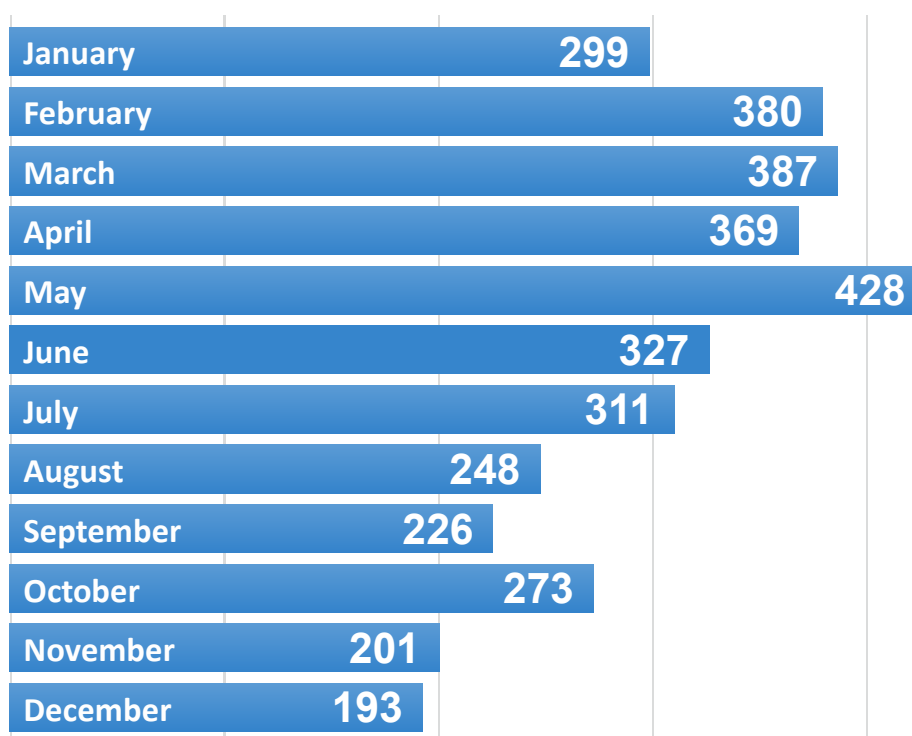
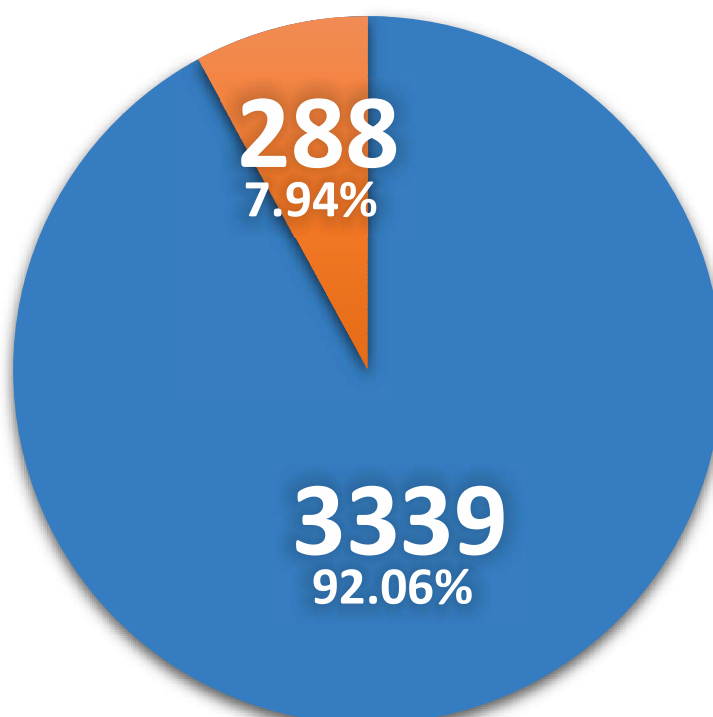


Figure 3 – The trend of the complaints submitted by the business operators to C.N.S.C. in the period 1 January 2018 – 31 December 2018

Of the 3,627 complaints that were actually solved by the Council in the course of 2018, in 288 cases the business operators waived the

complaints, accounting for 7.94% of the total complaints submitted to the Council.



■ Complaints ■ Waivers of complaints

Figure 4 – Number of the waivers of complaints in relation to the number of complaints solved by CNSC in 2018

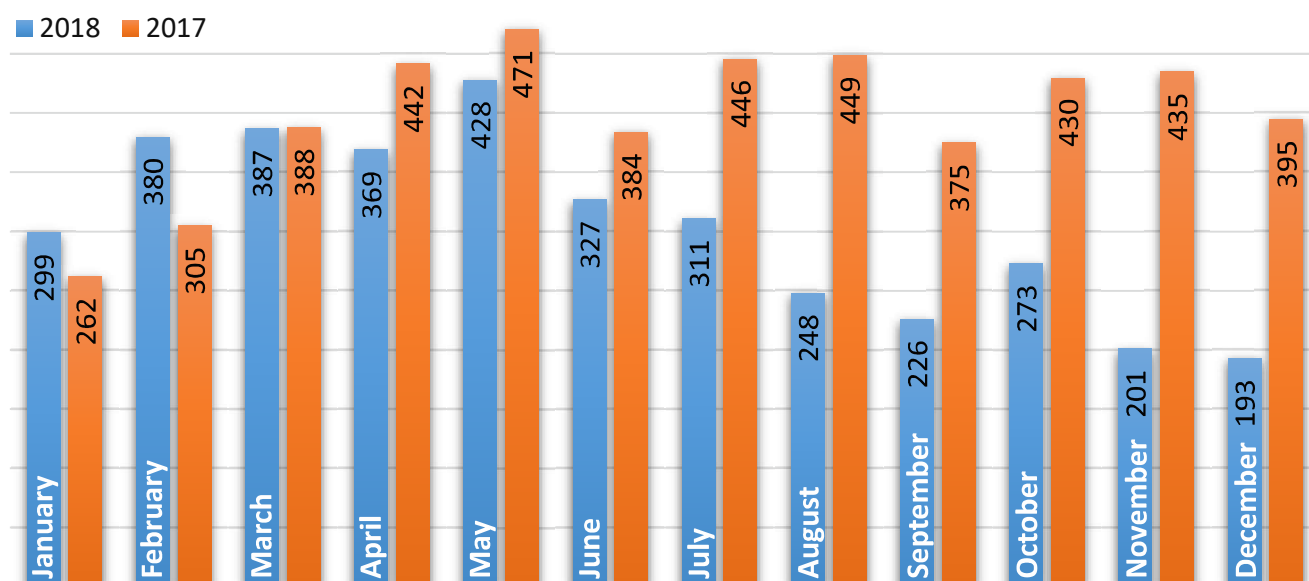


Figure 5 – The trend of the complaints submitted by the business operators to C.N.S.C. in the period 2017-2018

Upon comparison of the complaints submitted by the business operators to C.N.S.C. in the course of 2018 (3,642) to the complaints submitted in 2017 (4,782), it can be noticed that last year the year-on-year number dropped by 23.84% on the account that in June 2018 O.U.G. no. 45/2018 was passed to regulate the obligation of submitting a bond according to the assessed/determined value of the contracts<sup>27</sup>, as prerequisite for lodging the complaint and repealed the provisions regarding previous notice.

On a comparison of the semestral trend in the complaints lodged by the business operators in 2018 and 2017, it can be noticed that in the course of the past year the yoy number thereof was lower in both semesters.

The reason of such decline in the yoy number of complaints submitted to C.N.S.C. by the business operators in 2018, respectively in the second half of the year compared to the first half, was the introduction of the business operators' obligation to establish a bond<sup>28</sup> for the entire period between the date of lodging the complaint and the expiry of the 30-day term when the decision remains final, the amount of such bond being established according to the type/kind and the assessed/determined value of the contract to be awarded and the type of the contracting authorities, the maximum value being RON

880,000.

In fact, the obligation for the business operators to submit the bond for the entire period between the date of lodging the complaint and the expiry of the 30-day term when the decision remains final led in the second half of 2018 to a 33.70% decline in the number of the complaints that were lodged in comparison to the first half of the same year.

The purpose of introducing the bond was to protect the contracting authorities against the risk of the complaining parties' potential improper behaviour, their obligation being to submit a bond for the entire period between the date of lodging the complaint at C.N.S.C. or at the relevant courts or tribunals and the date when the Council or the court decision becomes final<sup>29</sup>.

In most of the files the contracting authorities specifically declare that they suffered no damage as a result of the complaints lodged by the business operators and that they brought no actions in the relevant courts for any damages that may have been caused by the complaints within the 30 day-term from the day when the decision became final. In relation to this aspect, the bond failed to reach its purpose, however the legal provisions had another effect, namely that the business operators refrained more in complaining before the Council or the courts. It must be

<sup>27</sup> Article 611 of the Act no. 101/2016

<sup>28</sup> Pursuant to the provisions of article 611 added by item 40 of the Emergency Decree (OUG) no. 45/2018 amending and supplementing regulatory acts of impact on the public procurement system, published in the Official Gazette no. 459 of 04 June 2018.

<sup>29</sup> See the Substantiation Note to the Government Emergency Decree no. 45/2018 amending and supplementing regulatory acts of impact on the public procurement system <http://gov.ro/ro/guvernul/procesul-legislativ/note-de-fundamentare/nota-de-fundamentare-oug-nr-45-24-05-2018&page=5>

emphasized that this instrument is no guarantee that the award procedures after 04.06.2018 were

commenced and developed in a fair and lawful manner.

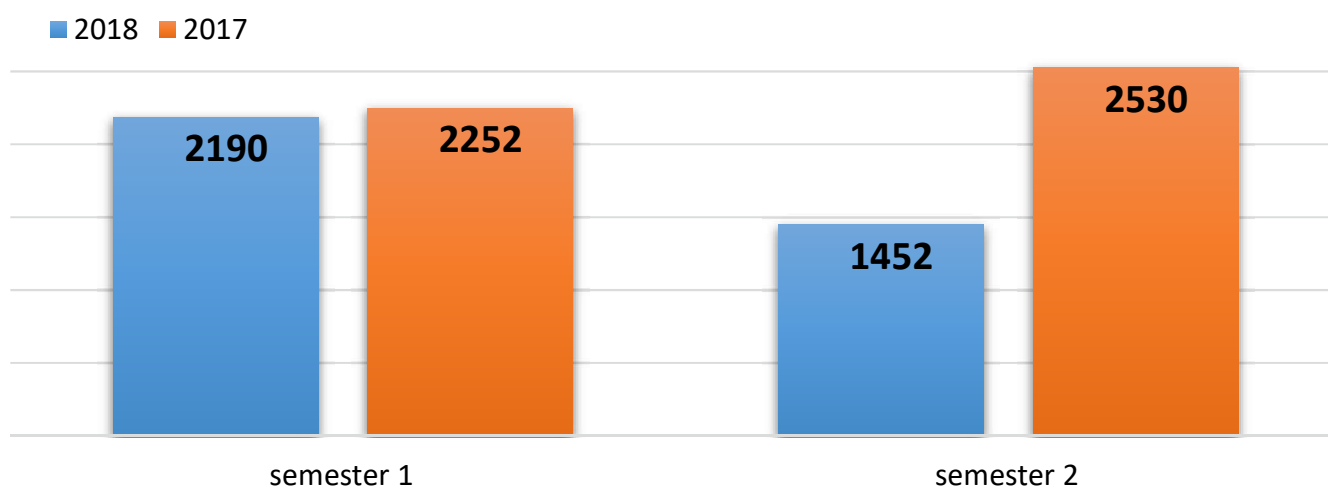


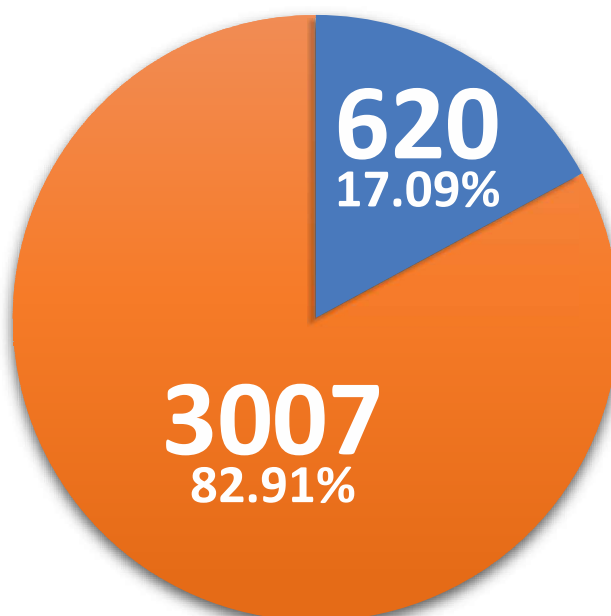
Figure 6 – Semestral trend of the complaints submitted by the business operators to C.N.S.C. in the period 2017 – 2018

Thus, in the first half of 2018, the yoy number of complaints declined only by 2.75% (62 complaints), however in the second half of the year – soon after the obligation was introduced for the complaining business operators to submit a bond – the yoy number of complaints dropped by 42.61% (1,078 complaints).

It must be emphasized also that this decline in the yoy number of complaints submitted to C.N.S.C. in the course of 2018 occurred under the

circumstances of a decline in the number of public procurement procedures actually commenced via SEAP.

In 2018, 17.09% (620) of the complaints submitted by the business operators via administrative-jurisdictional channel were directed against the tender documentation, while 82.91% (3007) were brought against the result of the award procedure.



- complaints against the result of the award procedure
- complaints submitted against the tender documentation

Figure 7 – Statement of the complaints submitted against the tender documentation and against the result of the award procedure in 2018

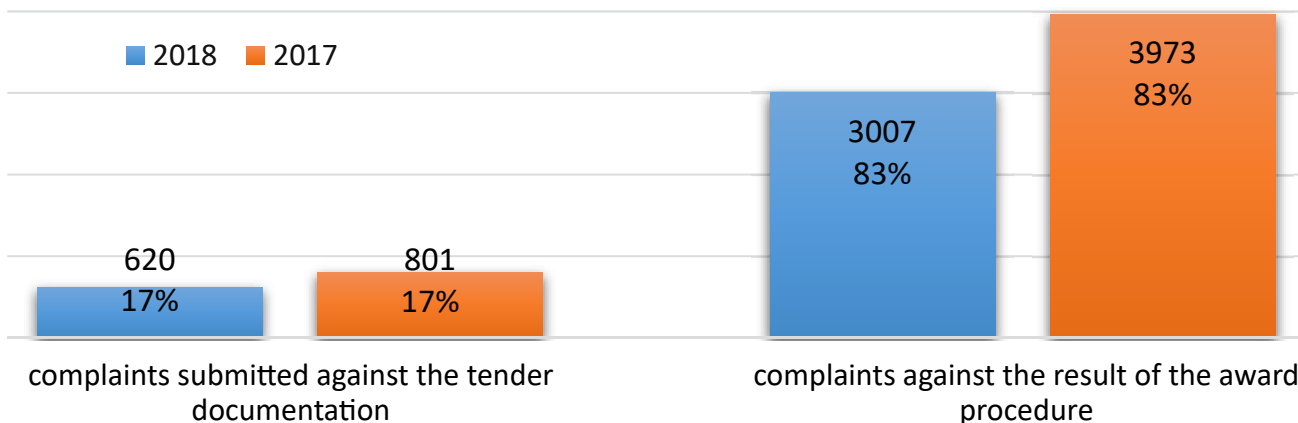


Figure 8 – Year-on-year comparison of the complaints submitted against the tender documentation and against the result of the award procedure in the period 2017-2018

It is interesting to notice that, although the yoy number of complaints submitted to C.N.S.C. in 2018 declined, however the weight of the complaints directed against the tender documentation, respectively against the result of the award procedure

out of the total number of complaints kept being constant at 17% complaints against the tender documentation, respectively 83% complaints against the result of the award procedure out of the total number thereof.

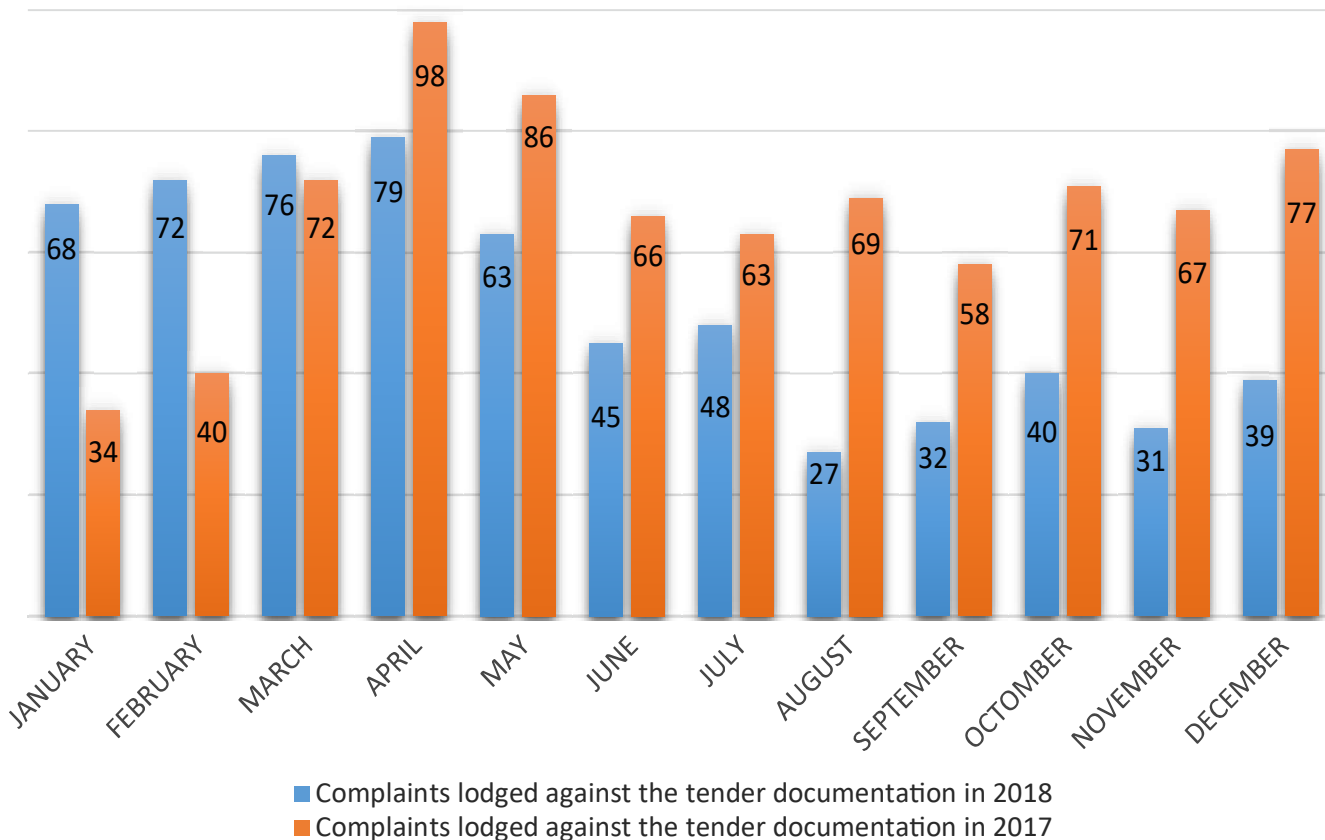


Figure 9 – Trend of the complaints lodged against the tender documentation in 2018



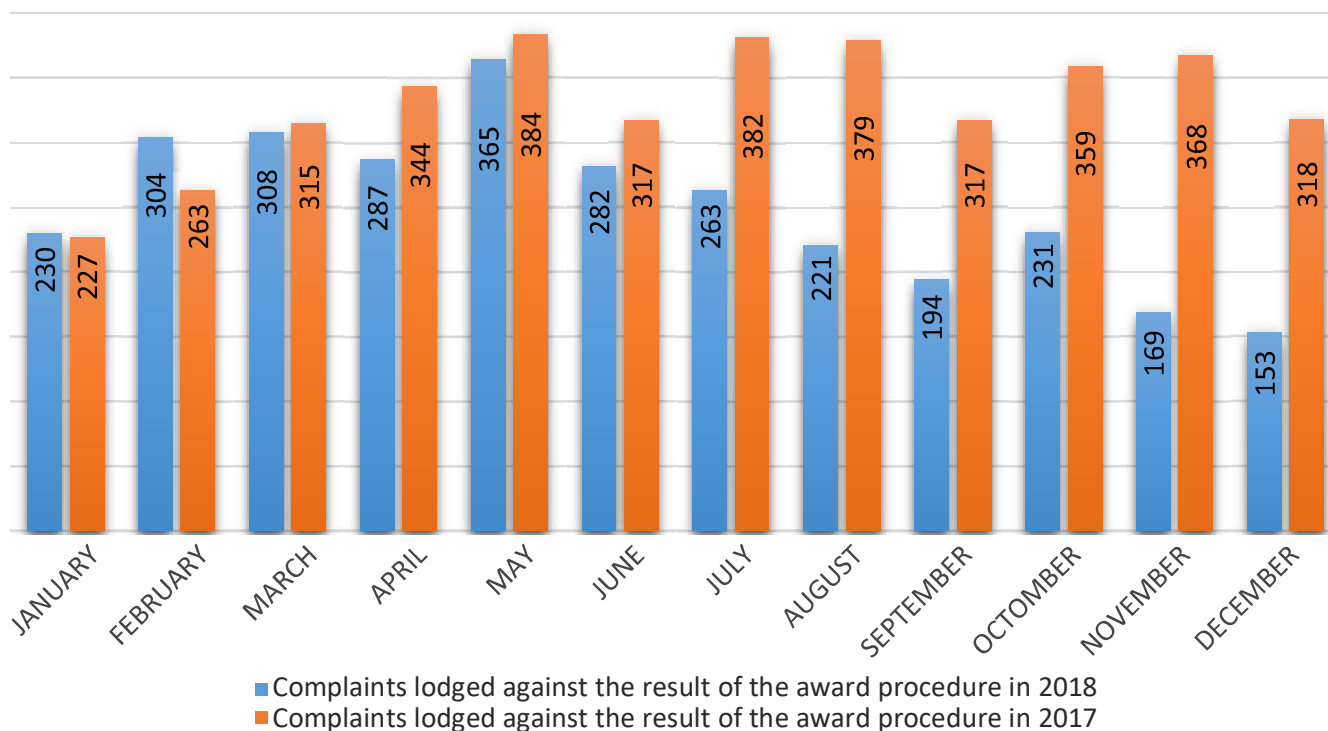


Figure 10 - Trend of the complaints lodged against the result of the award procedure in 2018

With regard to the weight of the complaints submitted to C.N.S.C. against the award procedures in 2018 out of the total number of award procedures commenced via SEAP was

7.08%, which is the lowest proportion reported in the past three years in relation to the award procedures commenced by the contracting authorities.

	2016	2017	2018
Number of award procedures challenged before C.N.S.C.	1,988	2,800	2,507
Total number of public tender procedures commenced via SEAP	19,079	28,165	35,434
Weight	10.42%	9.94%	7.08%

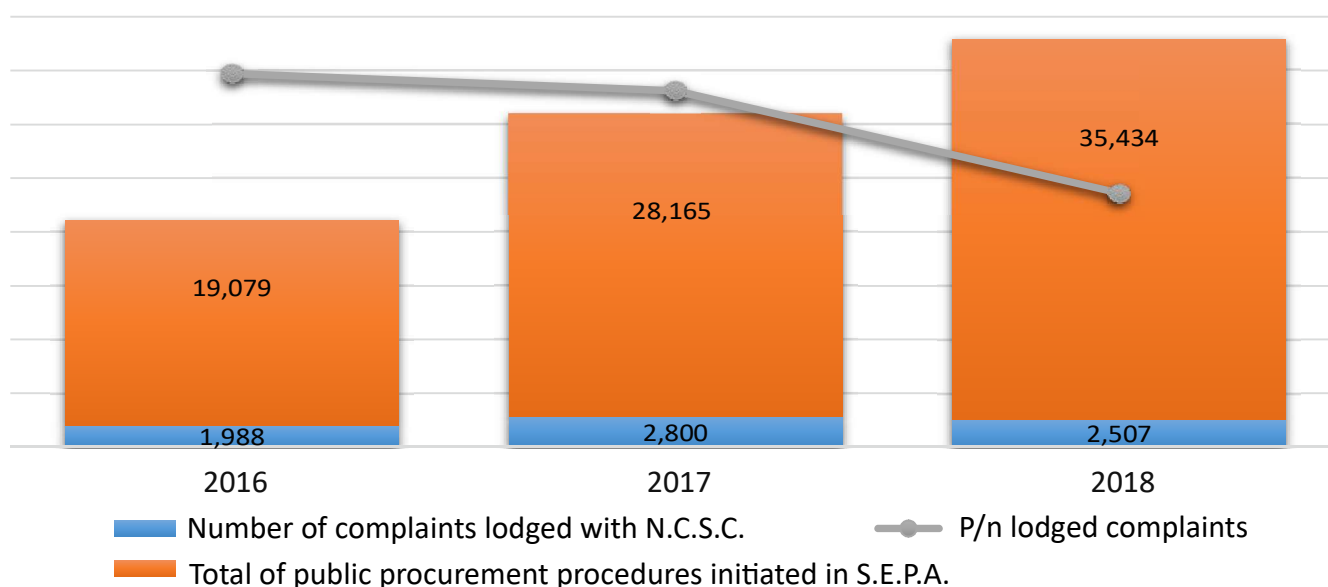


Figure 11 – Weight of the award procedures challenged before C.N.S.C. in the period 2016 – 2018 out of the total number of the award procedures commenced via SEAP

With regard to the award procedures financed by European funds, it can be noticed that 4,572 award procedures were commenced via SEAP out of which complaints were lodged in 395 award procedures, the weight thereof being only 8.64%.

The following table shows the 2018 monthly trend of the complaints submitted to C.N.S.C. under the procedures financed by European funds, compared to the award procedures commenced via SEAP and financed by European funds.

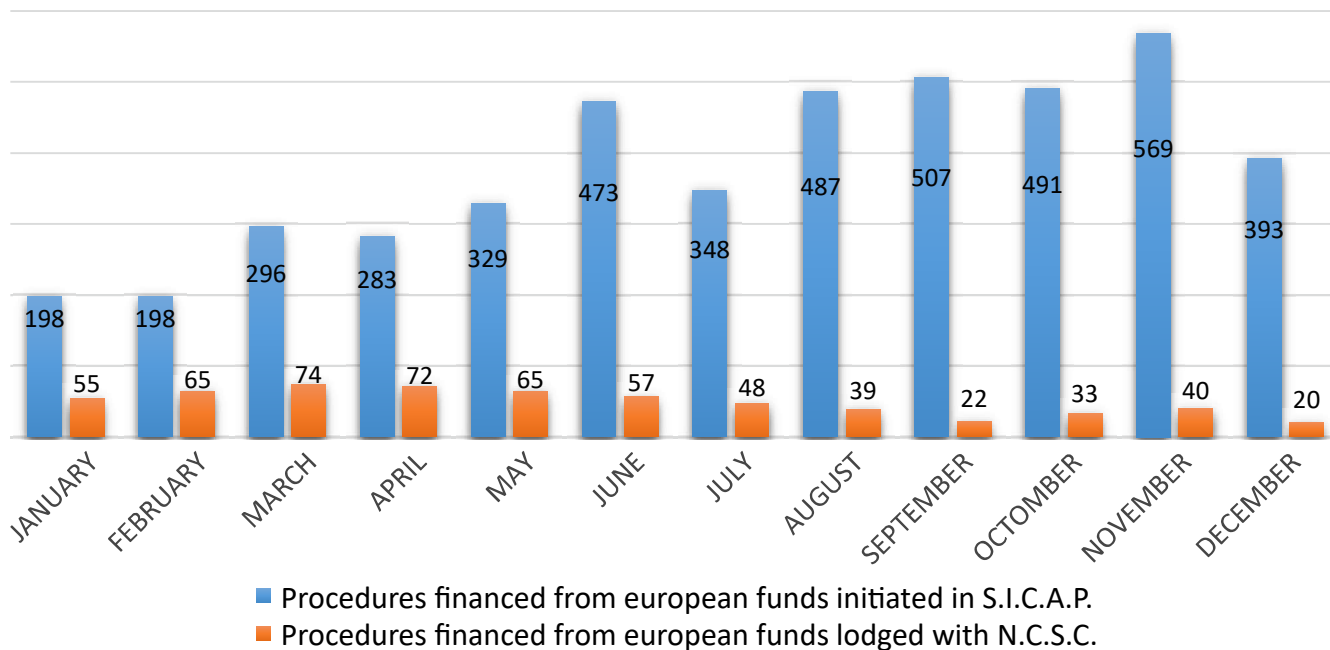
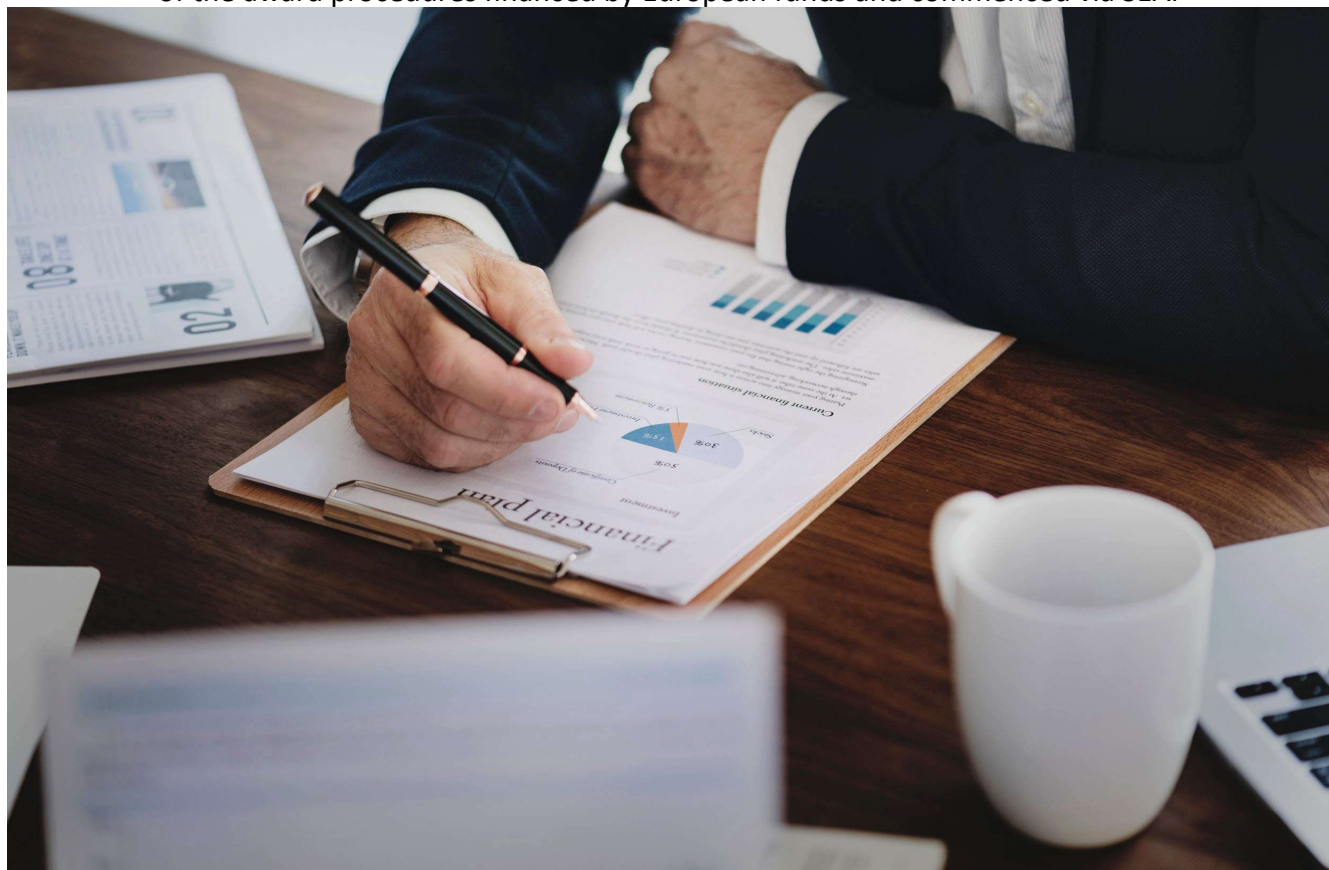


Figure 12 – Trend of the number of complaints submitted to C.N.S.C. in 2018 under the award procedures financed by European funds compared to the number of the award procedures financed by European funds and commenced via SEAP





In relation to the funding source (European/national funding) for the award procedures commenced for entering into public procurement contracts, it must be emphasized that in 2018 a number of 590 (16.27%) complaints were submitted

to C.N.S.C. under award procedures financed by European funds, while 3,037 (83.73%) complaints were directed against the award procedures financed by national public funds.

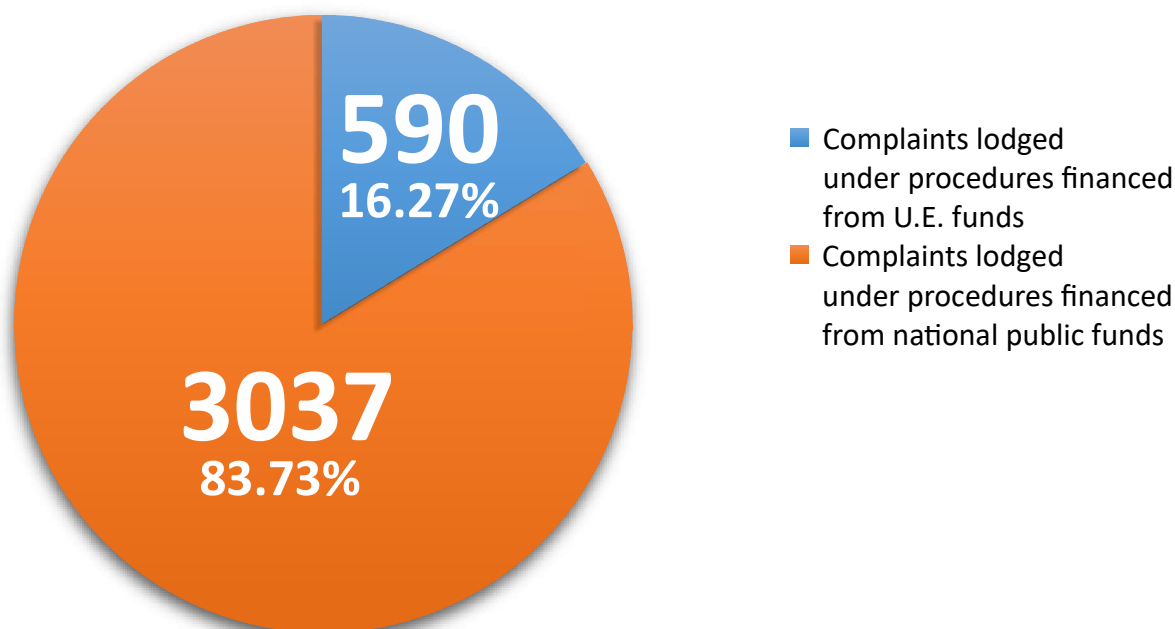


Figure 13 – Complaints submitted to C.N.S.C. in 2018 under award procedures, by the funding source

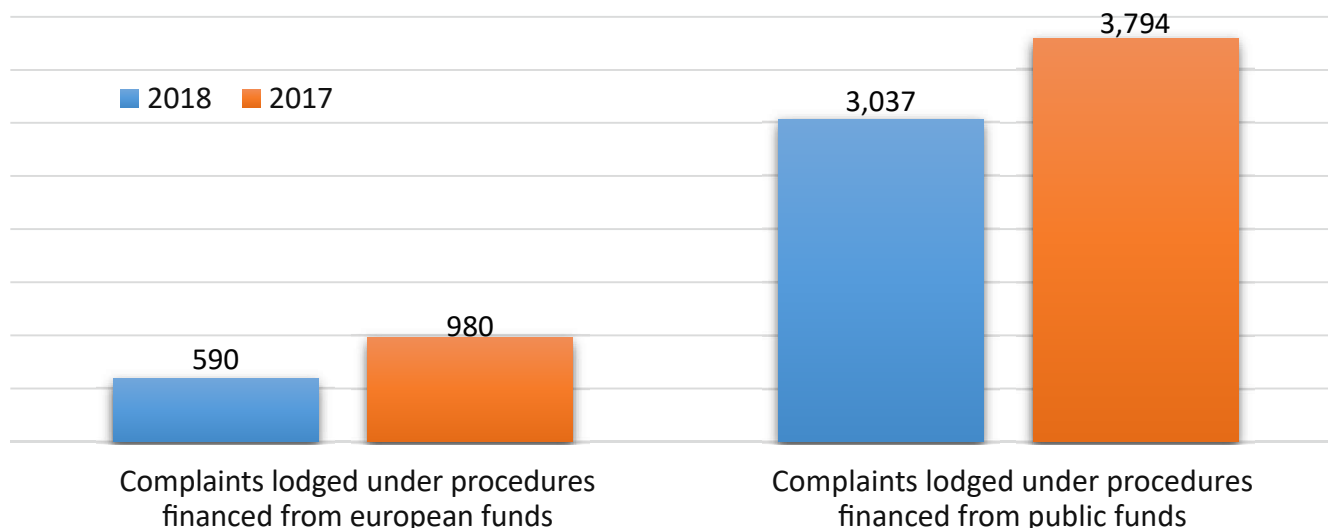


Figure 14 – Trend of the complaints submitted to C.N.S.C. in the period 2017-2018, by the funding source for the award of the public procurement contracts

On a comparison of the number of complaints submitted to C.N.S.C. by the funding source for the award of the public procurement contracts, it can be noticed that in 2018, the yoy number of complaints lodged under the award procedures financed by European funds significantly declined by 39.8% (390

complaints), while the yoy number of the complaints lodged under the award procedures financed by national public funds declined only by 19.95% (757 complaints).

In terms of the monthly trend, the yoy number of the complaints submitted to C.N.S.C.

under the award procedures for the public procurement contracts financed by European

funds in 2018 had such trend as shown in the following chart.

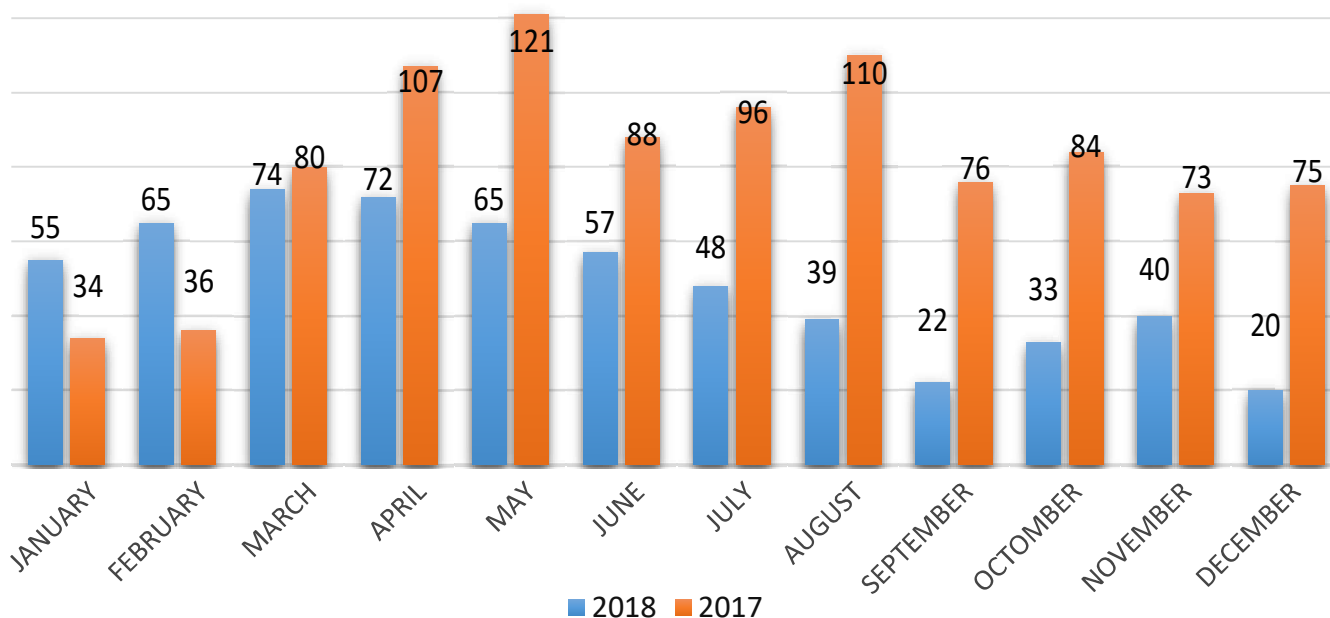


Figure 15 – Complaints submitted to C.N.S.C. in the period 2017 - 2018 under the procedures financed by European funds

Similarly, the yoy number of the complaints submitted to C.N.S.C. in 2018 under the award procedures for the public procurement contracts

financed by national funds (local/state budget) had the following trend.

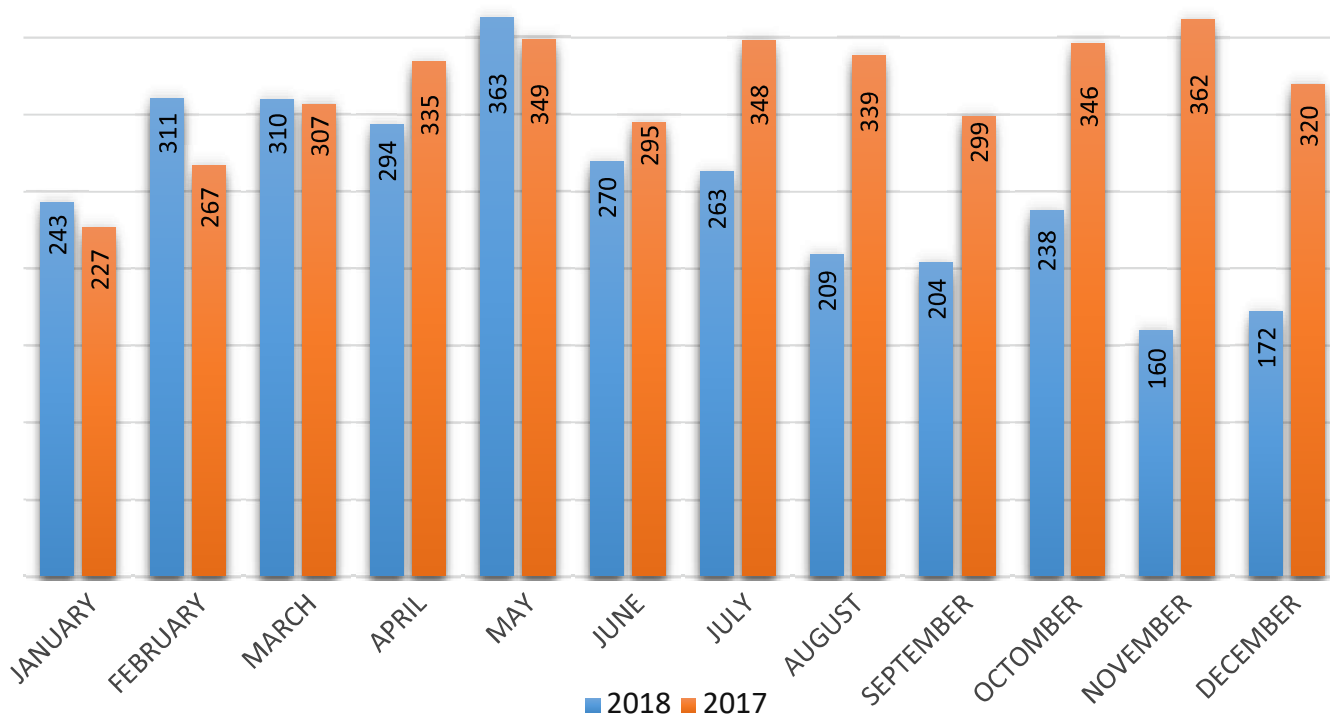


Figure 16 – Complaints submitted to C.N.S.C. in the period 2017 - 2018 under the procedures financed by national funds



In statistical terms, from its establishment until 31 December 2018, 65,021 complaints have been submitted to C.N.S.C. by business operators

participating in various public procurement procedures.

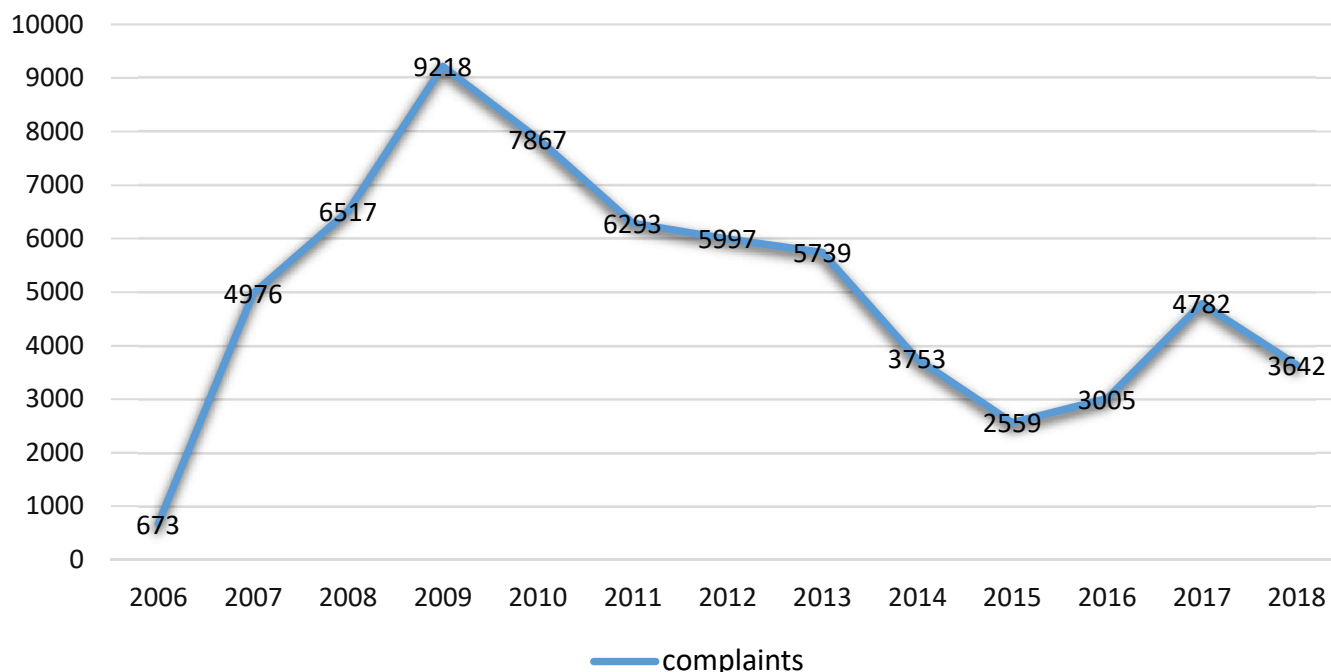


Figure 17 – Trend of the complaints submitted by the business operators to CNSC in the period 2006-2018

This chart shows that the number of complaints has been continuously declining from the year 2009.

In the course of 2017 and throughout 2018, in disregard of the missing institutional transparency and legislative stability that favoured vicious management of public funds and resulted, on the one hand in a high number of irregularities in the commenced public procurement procedures and, on the other hand, in an acute lack of trust of the business operators in the public procurement contract award system, there have been voices that insinuated that the main reasons that generated low absorption of the European funds were the high number of complaints and the missing unitary practice in solving the complaints both by administrative-jurisdictional and judicial channels.

The proof that the criticism against the Council had no grounds and that the authorities disregarded to solve the real issues encountered by the public procurement domestic system is that the contracting authorities fail to implement the rendered decisions correctly but formally. therefore in 2018 there were:

- 1 (one) award procedure in which C.N.S.C ordered ten times that the bids shall be reassessed,

for which purpose it rendered 10 decisions;

- 1 (one) award procedure in which C.N.S.C ordered five times that the bids shall be reassessed, for which purpose it rendered 5 decisions;

- 9 (nine) award procedures in which C.N.S.C ordered four times that the bids shall be reassessed, for which purpose it rendered 4 decisions;

- 28 (twenty eight) award procedures in which C.N.S.C ordered three times that the bids shall be reassessed, for which purpose it rendered 3 decisions;

- 100 (one hundred) award procedures in which C.N.S.C ordered twice that the bids shall be reassessed, for which purpose it rendered 2 decisions.

Another aspect that must be emphasized is that 108 decisions were issued under which the Council granted the complaints and ordered that the bids shall be reassessed, however the contracting authorities preferred to bring an action and not to implement the CNSC decision, of which 70 actions were denied and the CNSC decisions were maintained, 13 decisions were partly amended and 6 fully amended, with 19 outstanding actions pending settlement as of the date hereof.

In terms of distribution by administrative-



territorial units (UATs), the number of complaints lodged by the business operators in 2018 had the following trend:

COUNTY	No. of complaints	COUNTY	No. of complaints
VRANCEA	2	ARAD	53
COVASNA	15	GORJ	66
CALARASI	20	DAMBOVITA	68
IALOMITA	24	GALATI	68
TELEORMAN	32	BOTOSANI	69
BUZAU	33	NEAMT	69
CARAS SEVERIN	33	ARGES	74
VALCEA	34	HUNEDOARA	74
HARGHITA	38	BACAU	79
SATU MARE	40	SUCEAVA	80
TULCEA	43	BIHOR	82
MARAMURES	44	DOLJ	91
OLT	45	SIBIU	91
SALAJ	46	TIMIS	100
MEHEDINTI	47	BRASOV	124
BRAILA	48	PRAHOVA	128
VASLUI	48	CLUJ	137
GIURGIU	49	CONSTANTA	137
BISTRITA NASAUD	50	MURES	138
ALBA	51	IASI	150
ILFOV	52	BUCURESTI	955

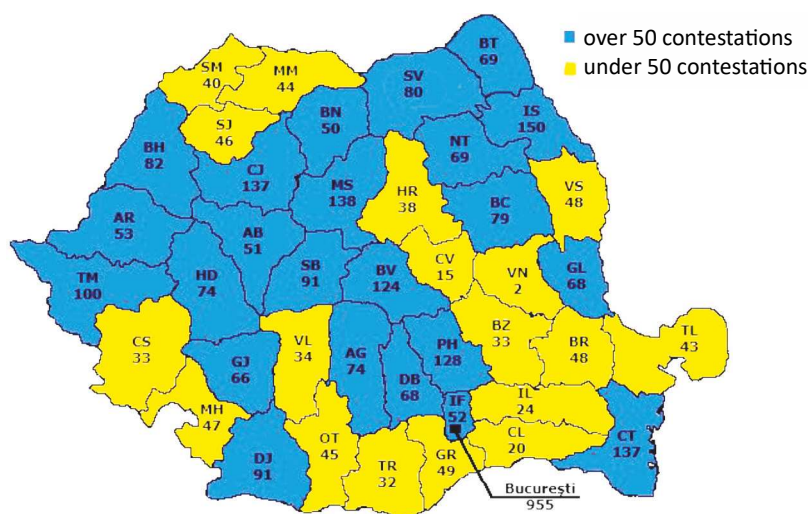
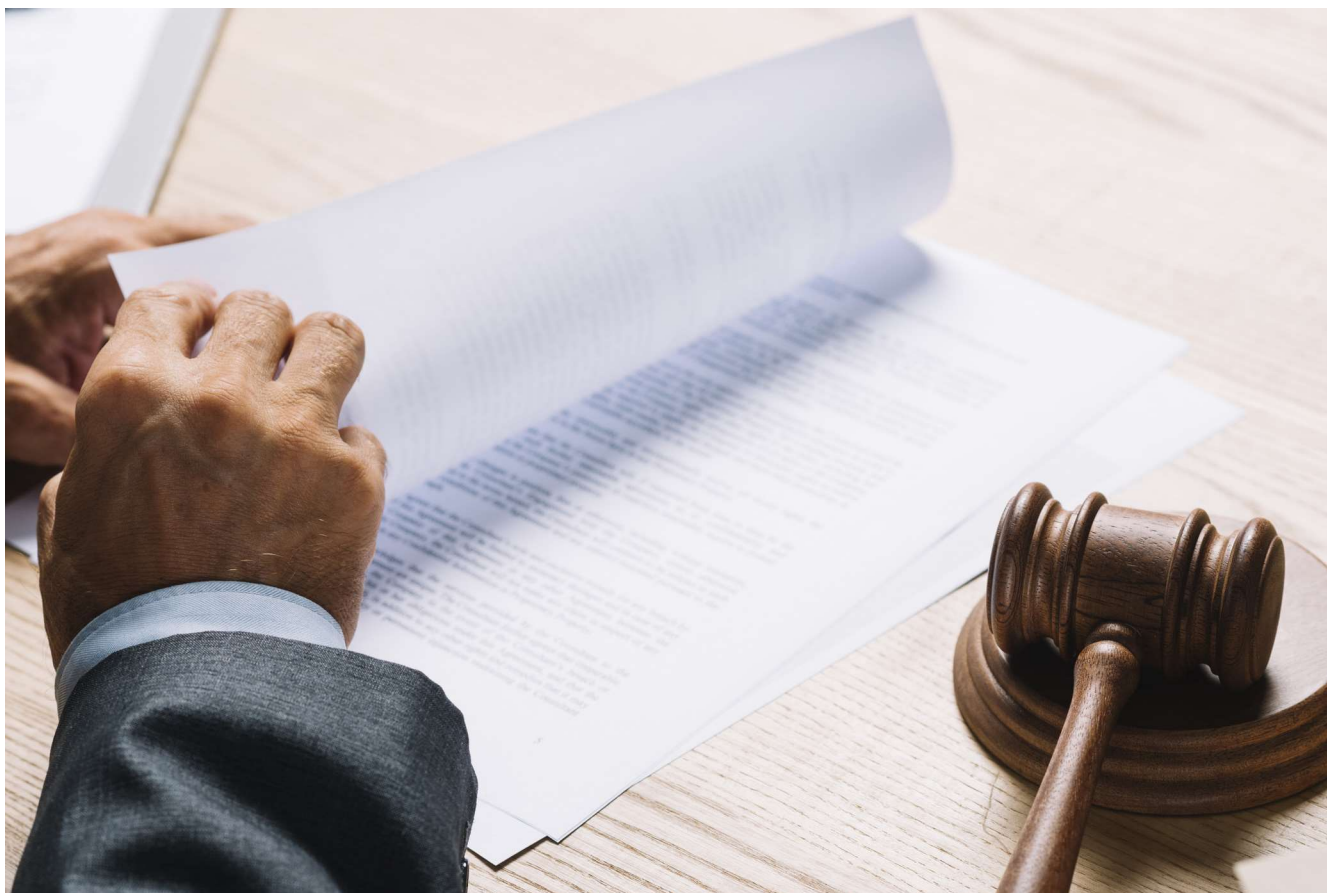


Figure 18 – Distribution by administrative-territorial units of the complaints submitted by the business operators to C.N.S.C. in 2018



Another important item to consider in the analysis of the complaints lodged by the business operators under the award procedure of the public procurement contracts is the subject matter of the public procurement contract.

Official data show that in the period January – December 2018, the number of complaints lodged by the business operators according to the subject matter of the public procurement contract had the following trend:

- award procedures for the public procurement contracts with the subject matter performance of works – 1,311 (36.15%);
- award procedures for the public procurement contracts with the subject matter performance of services – 1,334 (36.78%);
- award procedures for the public procurement contracts with the subject matter supply of products – 982 (27.07%).

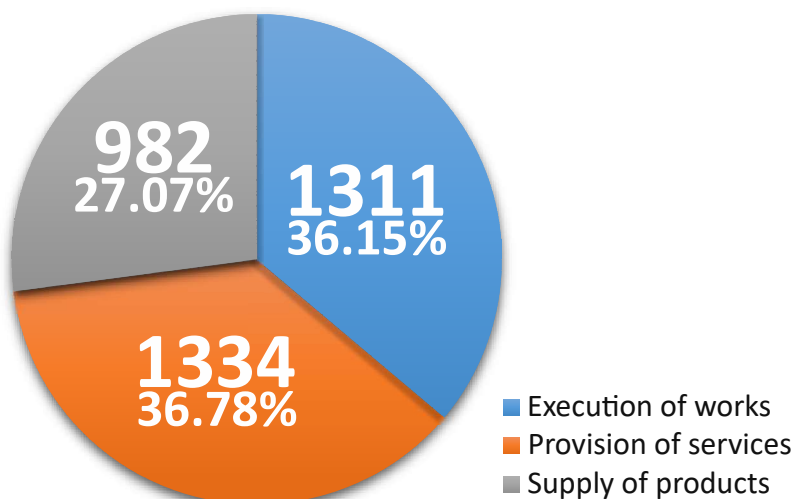


Figure 19 - Statement of the complaints lodged in 2018 by the business operators under the award procedures, according to the contract type

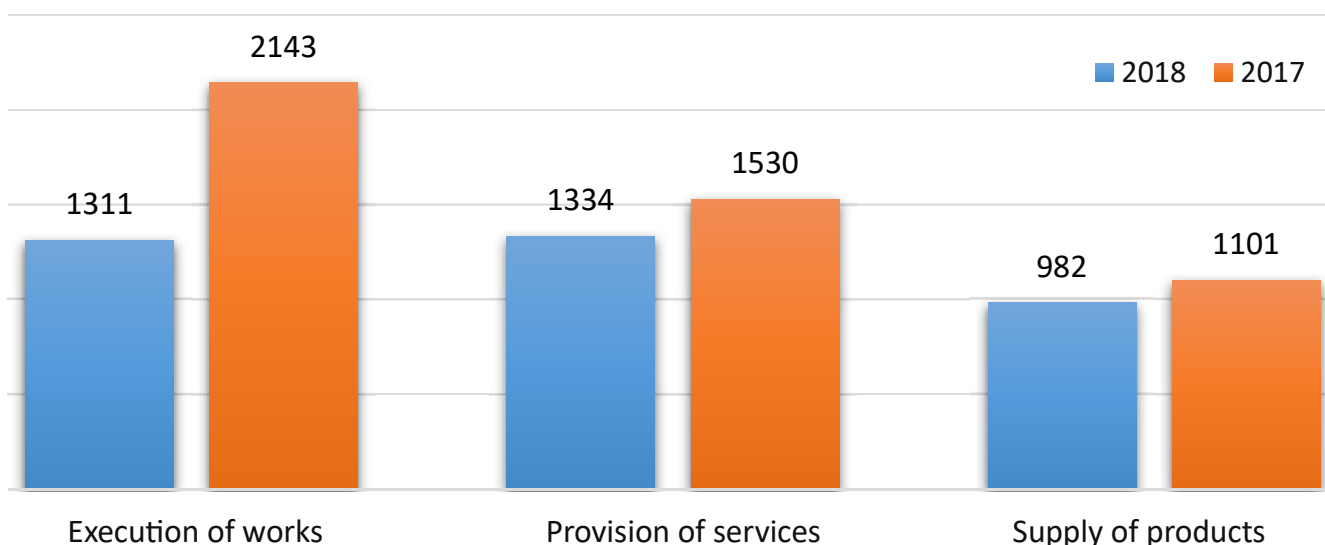


Figure 20 – Statement of the complaints submitted to C.N.S.C. in the period 2017 – 2018 according to the subject matter of the public procurement contract

Compared to the year 2017, when most complaints were found to be related to contracts dealing with the performance of works, the data for 2018 show that a balance was reached in the number of complaints lodged against the award procedures for the public procurement contracts dealing with the performance of works and those dealing with the performance of services (1,311 complaints – procedures dealing with the performance of works, 1,334 complaints – procedures dealing with the performance of services).

In the course of 2018, an average of 330 complaints/files were randomly allotted to the 11 chambers for solving complaints, resulting in an average monthly load of 28 complaints/files.

Although the number of the complaints lodged in 2018 by the business operators declined,

the complexity of the files was high and the 11 Council chambers for solving complaints accurately observed the deadlines for solving the complaints, as provided in article 24 (1) of the Act no 101/2016, as amended by OUG no. 45/2018, which is only 15 days from the day of reception, pursuant to article 18 (2) of the Act no. 101/2016, of the public procurement/sectorial procurement/concession file, respectively 5 days in case of occurrence of an exception preventing the actual analysis of the complaint.

Moreover, the introduction of the bond increased the number of deeds issued by the Council and the complexity thereof, 1107 conclusions being issued, as compared to the 684 issued in 2017.

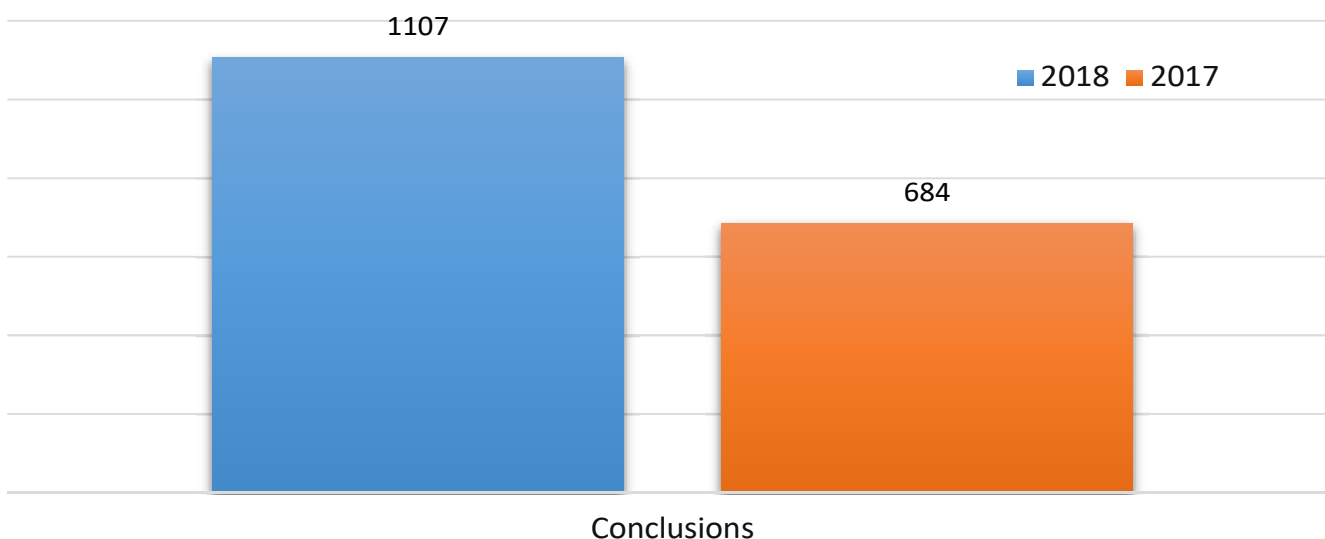


Figure 21 – Trend of the conclusions issued by CNSC in the period 2017-2018



## 2.1.2. SUBJECT MATTER OF THE COMPLAINTS LODGED BY THE BUSINESS OPERATORS

Irrespective of the subject matter of the subjective law (performance, forbearance), the subject matter of the complaint lodged under an award procedure is the protection of such rights, however there might be cases when the subject matter is the protection of legitimate interests.

When a complaint is put forward, it should be customized thus becoming a suit/litigation, the subject matter thereof being the parties' claims submitted for settlement, what the parties ask the counsellors to check, to assess, find and solve. Thus it results „ipso facto” that the action of solving the complaint puts forward both a matter of law and a matter of fact which the counsellors are called to solve via a Council decision with a view to ensuring the subjective law.

The subject matter of the complaint may be total or partial cancellation of a deed of the contracting authority/entity or to compel the

contracting authority/entity (within the meaning of the Act no. 98/2016, Act no. 99/2016 or Act no. 100/2016) refusing to issue a document or to perform a certain operation or adopt a specific conduct, as defined in article 3 (a)<sup>30</sup> of the Act no. 101/2016.

Thus in 2018, as a result of reviewing the subject matter of the 3,627 complaints lodged by the business operators and actually solved by the Council, it was found that 620 complaints concerned the award documentations (17.09%) while 3,007 concerned the result of the procedure (82.91%).

Upon analysis of the subject matter of the complaints lodged by the business operators against the requirements of the award documentation, the most frequent challenges were found to be:

D1	restrictive requirements on the qualification criteria	92
D1.1	restrictive requirements on the qualification/selection criteria related to the candidate's or the bidder's personal status	8
D1.2	restrictive requirements on the qualification/selection criteria related to the ability to pursue professional activity	19
D1.3	restrictive requirements on the qualification/selection criteria related to economic and financial condition	10
D1.4	restrictive requirements on the qualification/selection criteria related to technical and/or professional capacity	34
D1.4.1	restrictive requirements on the qualification/selection criteria related to similar experience	6
D1.5	restrictive requirements on the qualification/selection criteria related to quality assurance standards	3
D1.6	restrictive requirements on the qualification/selection criteria related to environment protection standards	2
D2	requirements on the award criterion	19
D2.1	irrelevant factors of assessment, missing calculation algorithm, with non-transparent or subjective calculation algorithm	18
D2.2	other requirements related to the award criterion	7
D3	restrictive requirements in terms of technical specification	110
D3.1	missing mention “or equivalent”, in such cases as provided by the law in force	2
D3.2	other restrictive requirements in terms of technical specification	53
D4	missing clear, complete, unambiguous answer from the contracting authority on the requests for clarification of the award documentation provisions	37

<sup>30</sup> Article 3 (a) of the Act no. 101/2016 „contracting authority deed – any deed, any operation that has or might have legal effects, failure to meet within the legal time an obligation required by the relevant legislation, omission or refusal to issue a deed or to proceed to an operation in relation to or under an award procedure referred to in article 68 of the Public Procurement Act no. 98/2016, as subsequently amended and supplemented, in article 82 of the Sectoral Procurement Act no. 99/2016, as subsequently amended and supplemented, or in article 50 of the Act no. 100/2016 on the concessions of works and the concessions of services, as subsequently amended and supplemented.”



D5	form of establishing the bid bond	2
D6	infliction of unfair or excessive contractual provisions	30
D7	failure to split the procurement by batches, in case of similar products/works	14
D8	other reasons related to the award documentation	178
DA	other criticism to the documentation	96

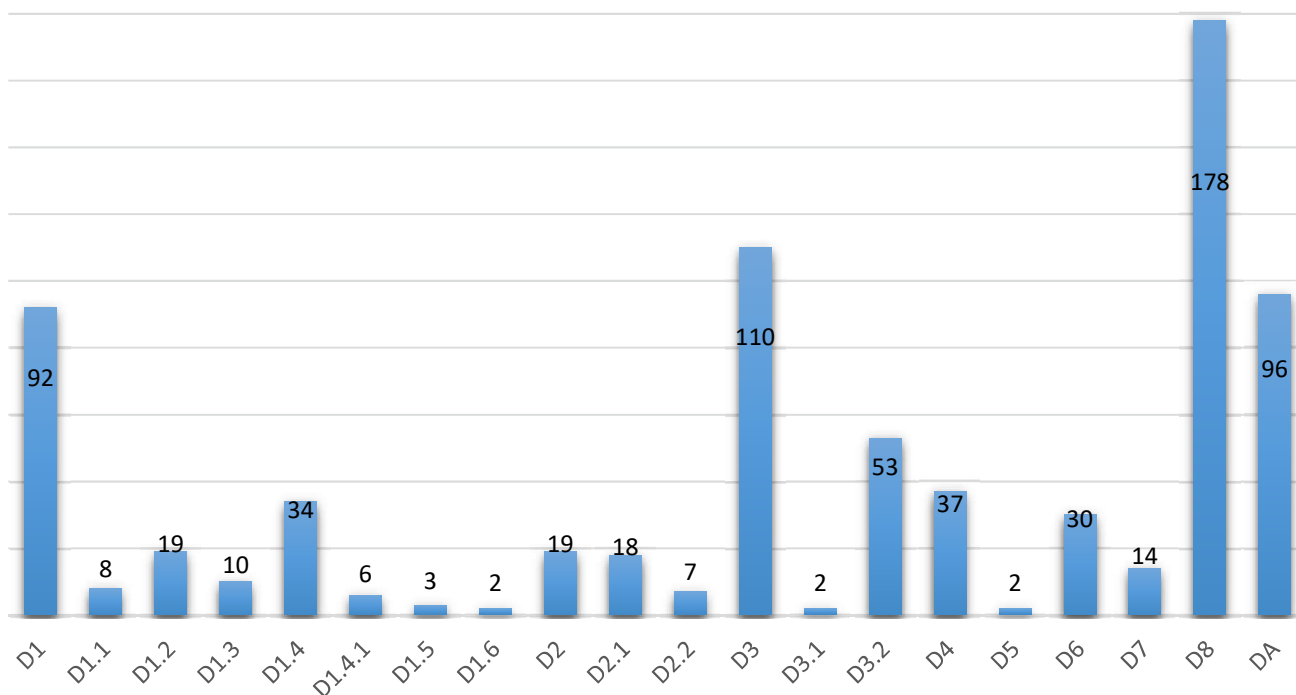


Figure 22 – Statement of the criticism raised by the business operators against the award documentation in 2018







For a better understanding of these aspects the following case examples are given:

**Amendments of the technical specification with observance of the provisions of article 155 (1) and (6) of the Act no. 98/2016**

Criticism item 2.1.1. (1) refers to the technical specification: Antiscatter grid for reducing scatter radiation, active both in 2 D and in tomosynthesis.

In the preliminary notice the plaintiff requested that this technical feature should be replaced by Antiscatter grid for reducing scatter radiation, as used in 2D imaging, for the following reasons:

Antiscatter grid is used by the majority of manufacturers only in 2D mammography, the use thereof in tomosynthesis leads to increased dosing and further artifacts due to the make thereof. The solution to Pristina system fails to raise sufficiently the spatial resolution and tomosynthesis to the level of other systems.

In their answer to the notice, the contracting authority accepted to reword the specification as follows:

[...] bids are accepted also for "Antiscatter grid for reducing scatter radiation, as used in 2D imaging", provided that there are studies proving that missing antiscatter grid in tomosynthesis for the proposed system does not lead to further artifacts such as: asymmetries and magnifications.

The requirement was justified by conclusions and images of the specialty article Scatter radiation in digital tomosynthesis of the breast by: Ioannis Sechopoulos, Sankararaman Suryanarayanan, Srinivasan Vedantham, Cari J. D'Orsi, Andrew Karellasa.

The complaint objected both to supplementing the requirement with the obligation to prove the effect of missing grid in tomosynthesis and to producing studies as evidence, for which purpose article 158 of the Act no. 98/2016 was claimed.

The claim is based on restriction of competition and missing clinical relevance of the contracting authority's requirements. Moreover, the plaintiff added:

[...] the use thereof in tomosynthesis leads to increased dosing and further artifacts due to the make thereof.

The authority's standpoint answer to the complaint was that they proceeded to accepting digital mammography machines not featuring 2D antiscatter grid, however they requested that all

business operators intending to bid with 2D antiscatter grid shall prove by solid argumentation, such as scientific studies, manufacturer technical files, that missing grid on the tomosynthesis procurement does not lead to further artifacts. [...] Taking into consideration the specification of the specialty literature, the contracting authority finds that the use of antiscatter grid in tomosynthesis helps improving the information available in the 3D procurement. [...]

In solving this criticism, the Council finds relevant the study produced by the authority in the answer to the preliminary notice, such study being part of an extended article published also at [www.ncbi.nlm.nih.gov/pmc/articles/PMC4280187](http://www.ncbi.nlm.nih.gov/pmc/articles/PMC4280187) on 19 January 2007. [...]

Therefore, according to the conclusions of the study cited by the contracting authority, one may notice that the antiscatter grids in tomosynthesis are not requested. The authors of the study analysed the quality of the mammography result in relation to the X rays scattering characterized by the projection angle, the scatter to primary ratio etc. (exemple given by the authors: At a tomosynthesis projection angle of 10°, approximately 65% and 88% of the primary x rays would be cut off at the center of the detector by antiscatter grids with grid ratios of 4:1 and 5:1, while at 15° and 11°, respectively, all primary x rays would be cut off.)

However, the requirement of the contracting authority in the variation made in the answer to notice, is to prove by studies/technical files that missing antiscatter grid in tomosynthesis for the proposed system does not lead to further artifacts such as asymmetries and magnifications, their arguments being not founded on effective values, rules or standards, although the studies and the images of the study with regard to asymmetries are given as effective values. On the other hand, the opinions of the authors of the study themselves reveal different approaches for reducing the X ray dispersion/scatter in tomosynthesis, no particular technical solution being specified, as the contracting authority requested in the tender book. If the hospital entity finds that the cited study is relevant, then they should have worded the requirement in the tender book with reference to quantifiable parameters.

As the complaining party criticized, the reference to asymmetries and magnifications has no clinical relevance for this procurement. Similarly, the text and the images in the answer to notice have no relevance to uphold the



requirement, since the contracting authority took over fragments thereof and put them next to the technical feature to give the impression that it is real. When purchasing devices, the technical quantifiable parameters thereof, not the structural solution chosen by a manufacturer, are of importance.

It should not be ignored that ten years have passed from the publication of the specialty article (2007) until the time when the contracting authority identified their need (2017-.....), during which technology progressed considerably.

Consequently, the Council grants the plaintiff's criticism and will compel the contracting authority to amend the technical specification in relation to the antiscatter grid, subject to the provisions of article 155 (1) and (6) of the Act no. 98/2016.

**The complaining party's demand for repayment of the expenditures incurred for solving of complaint, as claimed only in written conclusions, is inadmissible**

Any potentially new reasons to complain (newly-claimed irregularities) that SC [...] SRL put in the written conclusions no. [...] / 08.01.2018 prove to be inadmissible, as they were not prior subject to the talks with the contracting entity via preliminary notice and complaint. The same meaning is reinforced by article 21 (3) of the Act no. 101/2016, which provides that putting forward new reasons to complain and/or raising new claims in the written conclusions or orally or via clarifications to complaint after the legal deadline for doing this is inadmissible. According to this legal provision, it turns out that the new claim that the complaining party raises at the end of the written conclusions of 08.01.2018 is inadmissible too. Consequently, this ancillary claim is denied as inadmissible (qualified as such also by the High Court of Cassation and Justice, the Chamber for solving out specific matters of law, in Judgment no. 59 of 18 September 2017, published in the Official Gazette of Romania, Part I, no. 871 of 6 November 2017).

Article 21 (3) of the Act no. 101/2016 makes no distinction between main, ancillary, additional or incidental demands („Putting forward new reasons to complain and/or raising new claims in the written conclusions or orally or via clarifications to complaint after the legal deadline for doing this is inadmissible.”), and ubi lex non distinguit, nec nos distinguere debemus.

In the complaint of SC [...] SRL no. [...] / 18.12.2017 no claim for repayment of legal fees can be found so that the authority might respond and defend itself. It can be found only in the written conclusions of 08.01.2018, however such a demand is improper for the written conclusions. It should have been there as early as from the beginning of the proceeding, even if it can be detailed further and proven in the course of the proceeding.

**The mails exchanged with the contracting authority whereby the complaining party asked for clarifications or remediation of the tender documentation do not result in any prolongation of the legal deadline for lodging the complaint against the documentation nor in any shift of the date from which it starts flowing.**

It is implicit that the date for acknowledging the content of the award documentation published in SEAP, is the date of the publication of the award documentation.

Instead of submitting complaint to the Council and to the organizing entity within the 5-day deadline starting from the day following that of acknowledgment of the restrictive or incomplete documentation, the company submitted several questions (requests for clarification), whereby they requested the entity to specify what database licences and what versions will be available, to accept that a requirement may be covered either by the presentation of a RAS/IAS diploma/certification or by the presentation of Oracle financial certification and to confirm the acceptance of two experts instead of one. The mails exchanged with the contracting authority whereby the complaining party asked for clarifications or remediation of the tender documentation do not result in any prolongation of the legal deadline for lodging the complaint against the documentation nor in any shift of the date from which it starts flowing. Otherwise, if an interpretation were admitted to the contrary, in that any request for clarification on the award documentation might result in a prolongation of the deadline to appeal the documentation, the consequence might be an evasion of the deadline for complaining required by the law.

The business operator was aware of the complained aspects of the documentation as early as from the publication thereof and should have proven minimum diligence to appeal them within the legal deadline, if they wanted the documentation to be rectified. Such deadline may come to be void of any

effect and thus the legal provisions might be misapplied if, under the cover of a notice of request for clarification/variation/supplementation the business operator might later on complain of the provisions of the documentation, on the account that the deadline started to flow from the answer received to their notice.

[...]

The plaintiff discontent starts from the deficiencies in how the award documentation was drawn up, however in order to tackle them they should have appealed the award documentation, not the clarification answers, which are observing the legal limits and those set by this documentation.

**By participating in the award procedure, the operator does not forfeit their right to complain, subject to the legal deadline, of the clarification answers posted by the authority in SEAP**

The exceptions claimed by the contracting authority in their standpoint no. [...] / 02.02.2018 are groundless too. There is no legal provision forbidding the damaged party to appeal the clarification answers on the account of participation in the summary procedure. Nothing excludes that the damaged party might realize, even subsequently to participation, that some clarifications given in the pre-bidding stage may be indicative of irregularities. To put it in other words,

even if they failed to complain at the Council of any irregularities found in the clarification answers, the the damaged party does not forfeit their right to complain of the same in subsequent complaint (in post-bidding stage) and such right is not withdrawn, subject to observing the deadlines. Moreover, the party's silence cannot be taken for silent acquiescence or for a waiver of complaining in court about any irregularities found in the documentation while analysing the answers. The waiver of a right, just like the constitutional right to have access to a jurisdiction, shall not be assumed (article 13 of the Civil Code), which means that waiver must be proven.

Similarly, one cannot assume that by participating in the bidding procedure the company agreed to the award documentation or to the two clarifications of which they are complaining, or that they forfeit the right to complain ever of any potential irregularities thereof. Such an interpretation would be incompatible with article 2 (1) of the Act no. 101/2016 and also with article 21 of the constitution, since it would deny the damaged party at this moment the right to appeal in court the damaging deed adopted by the contracting authority in the pre-bidding stage.

In parallel, from the complaints lodged by the business operators against the result of the procedure, it was noticed that in 2018 the most appealed/criticized were:

Criticism code	Criticism name	Number of complaints
R1	Complaints of the minutes of the bid opening meeting (failure to take into consideration the bid bond, how the bid opening meeting was held)	10
R2	Dismissal of the complaining party's bid as noncompliant or unacceptable	1305
R2.1	Dismissal of the complaining party's bid a unacceptable	146
R2.1.1	Dismissal of the complaining party's bid a unacceptable, as it was submitted after the deadline date and time or at another address than specified in the tender notice	1
R2.1.2	Dismissal of the complaining party's bid a unacceptable, as it was not accompanied by the bid bond in such amount, form and with the validity term as requested in the award documentation	17
R2.1.3	Dismissal of the complaining party's bid a unacceptable, as it was submitted by a bidder that fails to meet one or several of the requirements for qualification	126
R2.1.4	Dismissal of the complaining party's bid a unacceptable, as it has an unusually low price	42



Criticism code	Criticism name	Number of complaints
R2.1.5	Dismissal of the complaining party's bid a unacceptable, as it was submitted in violation of the provisions on the conflict of interests	5
R2.1.6	Dismissal of the complaining party's bid a unacceptable for other reasons than as listed in R.2.1.1-5	39
R2.2	Dismissal of the complaining party's bid a noncompliant	89
R2.2.1	Dismissal of the complaining party's bid a noncompliant, as it fails to properly meet the tender book requirements	171
R2.2.2	Dismissal of the complaining party's bid a noncompliant, as the bidder failed to send the requested clarification/answers within the term specified by the assessment board or when the bidder's explanation was not	59
R2.2.3	Dismissal of the complaining party's bid a noncompliant, as the bidder altered the content of the technical proposal by the answers they provided	24
R2.2.4	Dismissal of the complaining party's bid a noncompliant, as the bidder altered the content of the financial proposal by the answers they provided	15
R2.2.5	Dismissal of the complaining party's bid a noncompliant for other reasons than as listed in R.2.2.1-4	20
R3	The bids of other bidders in the tender procedure are unacceptable	262
R3.1	The bids of other bidders in the tender procedure were submitted after the deadline date and time or at another address than as specified in the tender notice	1
R3.2	The bids of other bidders in the award procedure were not accompanied by the bid bond in such amount, form and with the validity term as required in the award documentation	14
R3.3	The bids of other bidders in the award procedure were submitted by such bidders that fail to meet one or several qualification requirements	99
R3.4	The bids of other bidders in the award procedure were submitted in violation of the provisions on the conflict of interests	87
R3.5	Other reasons that render as unacceptable the bids of other bidders in the award procedure	22
R4	The noncompliance of the bids of other bidders in the award procedure	178
R4.1	The unusually low price of the bids of other bidders in the award procedure	116
R4.2	Variation of the content of the technical and/or financial proposal via the answers sent by other bidders in the award procedure to the requests for clarification	11
R4.3	Other reasons that render as noncompliant the bids of other bidders in the award procedure	55
R5	The contracting authority's failure to observe the minimum content required by the legal provisions in force for the notice informing of the result of the procedure	8



Criticism code	Criticism name	Number of complaints
R5.1	The contracting authority's failure to inform each dismissed candidate of the actual reasons underlying the decision to dismiss their candidacy, in the notice informing of the result of the procedure	1
R5.2	The contracting authority's failure to inform each dismissed bidder of the actual reasons underlying the decision for dismissal, in the notice informing of the result of the procedure	8
R5.3	The contracting authority's failure to inform each bidder that submitted an admissible yet non-winning bid of the relative characteristics and advantages, in the notice informing of the result of the procedure	2
R5.4	The contracting authority's failure to inform each candidate/bidder dismissed or declared non-winning of the deadline by which they are entitled to lodge complaint, in the notice informing of the result of the procedure	2
R6	The bid was dismissed even if the contracting authority requested no clarifications about the technical proposal/financial proposal or the clarification answers were wrong assessed	33
R7	Cancellation of the award procedure by the contracting authority without legal grounds	114
R8	Other reasons regarding the result of the procedure	323
RA	Other criticism of the result	136

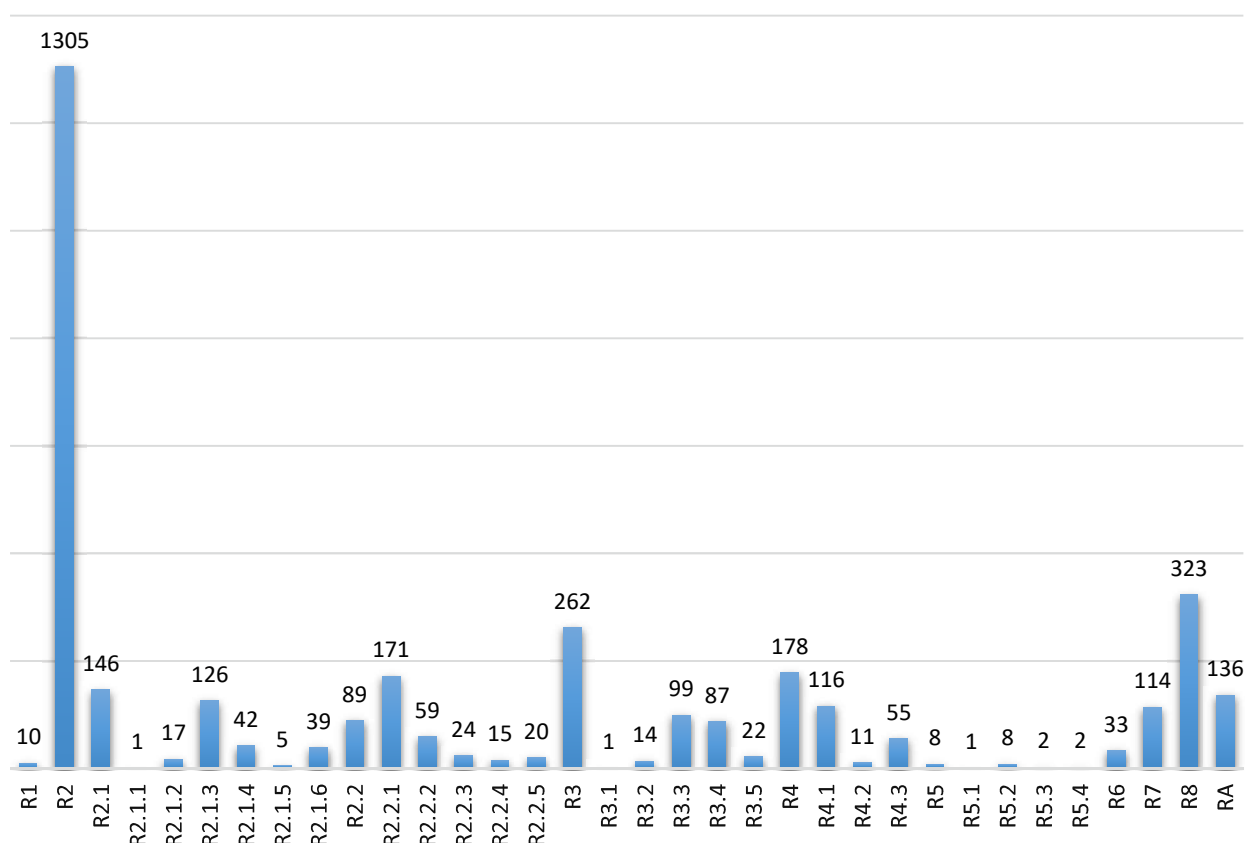


Figure 23 – Statement of the complaints in relation to the criticism raised against the result of the procedure in 2018





In order to understand these aspects, a few case examples are given below:

### **Contracting authority's obligation to check out the details of the document of findings**

The current legal rule and the act regulated by the Government Resolution (HG) no. 66/2016 establishes the contracting authority's obligation to check the details of the document of findings (when a decision is made to dismiss a candidate/bidder, according to such document of findings the assessment board must consider whether it reflects the fulfilment of the cumulative conditions listed in article 181 (c') of the Emergency Decree). Therefore, both the concerned provision and article 167 (1) (g) of the Act no. 98/2016 correlated to article 171 of the Act no. 98/2016 establish the contracting authority's obligation to check out the cumulative fulfilment of the following conditions, namely:

- the facts must have occurred in the past three years;
- they must have violated seriously or repeatedly their major obligations, failed to meet or met improperly their contractual obligations,
- such violations resulted in early termination of the contract, in payment of damages or other comparable penalties.

Under such legal circumstances, it is out of any question that any third-party notice in relation to the conflict at judgment, namely the Notice from APIA (Agency for Payments and Intervention in Agriculture) of which the operator is unaware and could not defend themselves, is enforceable against the latter, specifically that the authority can restrict their right to bid in the concerned procedure after more than 3 years from the occurrence of the events. Article 167 (1) (g) correlated to article 171 of the Act no. 98/2016 clearly establish the conditions under which an operator can be excluded from an award procedure and such right can only be restricted provided that the operator is able to appeal the deeds establishing the reasons for exclusion.

It is further proof of the authority's belief that the operator is not guilty of the damages the former is claiming the fact the authority brought an action against APIA not against SC L SRL for recovering the damages.

The Council will not enter the dispute about the deadline for applying the penalty of exclusion from the procedure, namely of two years, as enforceable under the former law that gave rise to the situation for exclusion, or of three years, as enforceable under the new law that gives rise to

the reason for exclusion from this procedure, since this matter is subject to different approaches in practice, but will find that more than three years have passed from the date of occurrence of the contractual breaches claimed by the authority.

Thus, according to the provision of article 171 (5) (b) of the Act no. 98/2016:

„(5) In case the business operator is not prevented by a final judgment from participating in award procedures for public procurement contracts/framework contract or concession contract for a certain period of time, the situations for exclusion listed in articles 164 and 167 shall not apply:

b) if, in case of the situations, facts or the events provided in article 167, a three-year period lapsed from the occurrence of the situation, perpetration of the fact or occurrence of the relevant event”.

The situations referred to in article 167 of the Act no. 98/2016 are highly diverse, in this case being of relevance item g: the business operator seriously or repeatedly violated their major obligations under a public procurement contract, a sectorial procurement contract or concession contract already executed and such violations resulted in early termination of the contract, payment of damages or of other comparable penalties.

Since the contract no. 1527/30.01.2015, having as subject matter „supply of fruit in schools for the pupils in the preparatory forms and in forms I to VIII of the public and private schools in the county of Călărași, in the academic year 2014-2015”, for which the document of findings no. 10894/30.07.2015 was issued showing that „no damages were caused to the contracting authority during the development of the contract” and the grade given to SC L SRL is „good”, later on, upon notice from another authority, specifically APIA, finding that there was a damage, it results that the breaches of the contract could only occur during the effective term of the contract. Therefore, even if the APIA notices resulted from the notice of denial of the payment request no. 1187/15.02.2016, the three-year term is not flowing since then, as the legal provisions given as reasons for dismissal of the bidder under the procedure do not concern the time when the extent of the alleged damage is known, namely the time when the notice was issued, but the time of occurrence of the facts by which the business operator seriously or repeatedly violated their major obligations under a public procurement contract, a sectorial procurement contract or concession contract already executed and





such violations resulted in early termination of the contract, payment of damages or of other comparable penalties. The document of findings is indicative of some flaws of communication with the operator and non-observance of the circuit of documents, such aspects being mentioned also in APIA notice of refusal of payment. Insofar as the authority was diligent, it should have refused themselves to pay the invoices and to release the performance bond when the operator's documentation was found not to be in the best condition for obtaining funding, the content of the document itself proving that they were aware of such violations. Thus, as they knew of the violations since 2015, they cannot claim now that they learnt about them at the time of the APIA notice of refusal of payment. Therefore, better management of the documents was needed from the contracting authority itself and such management cannot arise after more than three years from the event for which the document of findings no. 10894/30.07.2015 was issued and claim not to have known it. Consequently, the circumstances of this case are not identical in fact either to that understood by the Court of Appeal in Judgment no. 3386/07.06.2016, as three years have passed from the time of the contractual breach, the notice was appealed in the court subject to different regulatory acts.

Alternatively, even if the three-year term were deemed to start flowing from the time of receiving the APIA Notice, renewed checking is needed in relation to the admissibility of the complaining party's bid and considering the occurrence of the exceptional situations regarding the exclusion of the operator, namely the incidence of the provisions of article 171 (1), (2) and (3) of HG no. 395/2016, as the enforcement of such provisions does not result from this assessment.

**In the phase for the evaluation of the bids, the provisions of the tender book cannot be subject to amendment.**

Under the letter no. 8578/the 08th of November 2017, the contracting authority communicated to the complaining party as follows: „(...) based on the Cancellation Report registered under the no. 8508/the 07th of November 2017, we do hereby communicate to you as follows: The award procedure of the supply contract „Reducers and spare parts for reducers”, with the deadline for filing the bids (...) the 18th of September 2017 was cancelled, as per the provisions of the art. 225 (1) (c) of the Act 99/2016 (if the violations of the legal provisions affect the award procedure), correlated to the art. 225 (2) in the Act 99/2016- «in the senses

of the provisions of the para. (1) (c), violations of the legal provisions mean the case in which errors or omissions are found during the award procedure and the contracting authority cannot take corrective actions that might not lead to the violation of the principles provided for in the art. 2 (2).

Explanation: THE LOT 1:

For the reducer 2 H-M 1060-0-4, piece that is part of the mechanism for lifting the bucket ladder of the excavator ERc 1400-30/7, (machine in balance), mechanism providing the safety in its operation and the safety of the workers, was requested under the tender book «Cylindrical step I and Cylindrical step II, with right toothing», the correct requirement from the construction standpoint being «Cylindrical step I and Cylindrical step II with merely inclined cylinder toothing»:

The evaluation committee found the error upon evaluating the technical offer filed by the business operator ...SRL that mentioned in the technical offer «Cylindrical step I and Cylindrical step II with merely inclined cylinder toothing».

Following the results, the evaluation committee considered that the bids of the participating business operators cannot be evaluated uniformly as a result of the errors and omissions in the tender book and in order to comply with the principles of the Act 99/2016, the contracting authority, based on the report registered under the no. 8508/the 07th of November 2017, approved by the entity's manager, cancels the procedure”.

The members of the evaluation Committee also mentioned in the Cancellation Report no. 8508/the 07th of November 2017 as follows:

- „We mention that provided that such reducer is not carried out within the technical parameters established by the machine designer under its technical book, technical and human accidents may be caused with very serious consequences”;

- „consequently, those two technical offers posted in the Electronic Public Procurement System cannot be evaluated uniformly by the evaluation committee (...)”.

By analysing the provisions of the Tender Book, the Council takes into account that in the Chapter 3 – Main Technical principles, item 3.1. Reducers, subitem 3.1.3. Cylindrical reducer 2H-M-1060-0-4, i=14,9 (accompanied by the sheet for measurements for parts US control), there are the following mentions:

„- Cylindrical step I - with right toothing;

- Cylindrical step II with right toothing (...)"

Moreover, the Council takes into account that the contracting authority mentioned in the Tender Book, Chapter 8, item 8.1 The Technical Offer as follows: „(...) The technical proposal will be prepared so that it arises in a clear, detailed and itemised way the technical features in the bid, according to the chapter 3 in the tender book”.

By verifying those two technical proposals filed in this award procedure (...), it is found that one of the bidders filed a bid for the product as it was requested in the tender book „right toothing” and the other bidder filed a bid for the product according to the actual needs of the contracting authority „cylindrical with inclined toothing”, but without complying with the provisions of the tender book as the requirement was mentioned erroneously in such document.

By analysing the criticism of the complaint author related to the contracting authority decision to cancel the award procedure, the Council considers it as groundless for the following reasons:

(..)

In this award procedure, the technical specifications mentioned erroneously as to the lot 1 in the said tender book: „«Cylindrical step I and II, with right toothing», the right requirement from the construction standpoint being «Cylindrical step 1 and step II with merely inclined toothing»” were not the subject matter of any request of clarifications from the interested business operators. The Council cannot take into account the allegation of the complaining party related to the fact that „the construction particularity “right toothing” is a reference to a construction detail that does not give power of technical specification pursuant to law as the technical specifications are “performance requirements or functional requirements”, for as per the provisions of the art. 3 rr) of the Act no. 99/2016 „technical specifications” represent „requirements, prescriptions, technical features enabling each product, service or work to be described impartially in such a way to comply with the contracting authority’s need” and the Council considers in this case that the erroneous information mentioned by the contracting authority in the tender book actually represents technical specifications.(...)

As per the provisions of the art. 129 (1) of the Government Resolution no. 394/2016: „The bidder prepares the bid in compliance with the provisions of the tender documentation (...)"

The Council considers that by mentioning such erroneous information in the tender book,

the contracting authority did not informed fairly, fully and accurately on its need and the transparency principle provided for in the art. 2 (2) d) of the Act no. 99/2016 was violated. (..)

As to the foregoing, the Council considers that in this phase of the award procedure, the provisions of the Tender Book cannot be subject to amendment and the contracting authority must evaluate the bids in relation to the provisions of this document as they were communicated to the prospective bidders on the 12th of August 2017 [the date the contract (sectorial) notice no. 178059 and the related tender documentation were posted in the Electronic Public Procurement System]. Accepting the complaining party’s standpoint would mean the agreement related to the amendment of some provisions of the tender documentation during the award procedure, which violates the effective legislation related to the public procurements. Under such conditions, the Council considers that this matter cannot be regulated by addressing some requests of clarification to those two bidders in the phase for the evaluation of their bids. (...)

As to the foregoing, as per the art. 26 (6) of the Act no. 101/2016, the Council will dismiss as groundless the complaint lodged by SC ...SRL, according to those items mentioned in the explanation.

**The business operators must comply with the date and time established as the deadline for filing the documents**

The competitive negotiation procedure was commenced by ..., as contracting authority for the purposes of awarding the contract whose subject matter is „ SINGLE PHASE AND THREE-PHASE CURRENT METERS”, by publishing the contract notice no. ..., and the implemented award criterion was „the lowest price” and the estimated contract value was RON 34,556,650 exclusive of VAT. (..)

Under this complaint, .. it formulates criticisms in relation to the reason for rejecting the candidacy of the aforementioned association, alleging its unlawfulness, as the provisions of the art. 3 (2) b) of the Act no. 99/2016, as subsequently amended and supplemented, apply, respectively “The deadlines provided for in this act are calculated according to the following rules: b) with the proper enforcement of the provisions of a) and d), the deadline specified in days starts to run at the first hour of the first day of the deadline and ends upon



the expiry of the last hour of the last hour of the deadline”, invoking to this effect, other decisions of NCSC and other legal provisions.

The Council takes into account that the contracting authority under the mentioned letter of clarifications requested that the supporting documents proving the satisfaction of those ones assumed by filling out ESPD be submitted, as per the provisions of the art. 205 (1) and (3) of the Act no. 99/2016, as subsequently amended and supplemented, respectively ”(1)The contracting authority may request to the candidates/bidders to file all or a part of the supporting documents as evidence for the information in ESPD, at any time during an award procedure, if it is required in order to the provide the proper development of the procedure.

(3) By exception from the provisions of para. (2), as for the procedures that take place in several phases, the supporting documents are requested to all the selected candidates before the service of the notices of invitation to the second phase of the award procedure”, by giving a sufficient 10-day deadline, even if a significant part of them should have been with the bidder (ESPD is filled out based on them) in the documents filed by it as there is solely one, respectively the certificate of good standing issued by the National Companies Register Officer which is dated in such time bracket.

Moreover, the Council takes into account that the bidder did not take any action in order to inform the contracting authority on the presumed unlawfulness of the established deadline in terms of the hour or under which it would request an eventual shifting of it, but conveyed the documents after the established deadline, without reasoning such delay to the contracting authority under the expression of interest to the documents or to the Council, by means of complaint, by assuming the risk that they are not accepted.

Under such circumstances, the Council considers that the association ... had to comply with the date and hour established as deadline for filing the documents and the contracting authority’s decision to reject its candidacy for the aforementioned reason complies with the principles provided for in the art. 2 (2) of the Act no. 99/2016, as subsequently amended and supplemented and the complaining party has failed to submit arguments and evidence from which the unlawfulness of such decision would arise.

The Council does not take into account, for settlement purposes, the complaining party’s allegations related to the enforcement of the

provisions of the art. 3 (2) b) of the Act no. 99/2016, as subsequently amended and supplemented, as on one hand, they refer to the deadlines established in the act, and on the other hand, the determination of a limit hour is not prohibited explicitly by the applicable legal provisions, as it is a request of the contracting authority that either must be complied with, or objected to, prior it takes effects.

Taking into account the listed actual and legal aspects, by virtue of the art. 26 (6) of the Act no. 101/2016 on remedies and appeals in the award procedure of the public procurement contracts, of sectorial contracts and of the concession contracts for works and services, as well as for the organization and functioning of the National Council for Solving Complaints, the Council is to dismiss as groundless the complaint lodged by ....., against ...

**The exclusion of this bidder as per the provisions of the art. 167 (1) f) of the Act no. 98/2016**

As to the second criticism prepared by the complaining party A, it refers to the participation in the procedure within the association X-Y-Z-W of the business operator W SRL, the author of the feasibility study (DALI), part of the award documentation.

As per the provisions of the art. 167 (1) f) of the Act no. 98/2016:

„Art. 167. - (1) The contracting authority excludes from the award procedure of the public procurement contract/ master agreement any business operator which is in any of the following cases:.....

f) the prior participation of the business operator in the preparation of the award procedure led to a deformation of the competition and such case cannot be remedied through other less strict measures.”

The Council ascertains that in this case, the business operator W SRL has not only participated previously in the preparation of the procedure by the fact that it prepared previously the Documentation for the Approval of the Intervention Works (DALI), but it participated intensively in the current procedure by preparing all the technical answers to the clarifications requested by the business operators.

Thus, the Council ascertains that W SRL prepared immediately in this procedure answers to 15 requests for clarifications to the documentation from the total 27 and established practically all the

technical solutions and all the rules that are to be complied with from the standpoint of the technical offer.

Moreover, the business operator W SRL prepares also some answers that contradict flagrantly the contracting authority's claims (authority that attempted to minimize the involvement of W SRL in the organization of the procedure).

Thereby, the authority claims in its standpoint conveyed to the Council that „as per the Government Resolution no. 907/2016, the lists of quantities are prepared in the phase for the preparation of the detail design which represents the documentation comprising written and drawn parts related to the execution of the investment establishments and not in the DALI phase” an apparently correct affirmation, as the subject matter of the procedure consists in the design and execution, not only execution.

On the other hand, officially in the answer to the clarification no. 8, to the question 3): „Please specify whether the lists of quantities from the award documentation must be complied precisely with or as the award procedure also includes the design service, amended quantities may be submitted, as per the finding of the designer partners with the bidder”, the answer of W SRL was „The lists of quantities from the award documentation must be precisely complied with, in order to provide an unitary framework for the submission and evaluation of the bids”.

Therefore, the Council finds that the participation of the business operator W SRL in the preparation and development of the current procedure was not limited in the least to the fact that it prepared, based on the service contract no. 6/1017/the 03rd of February 2016, „The documentation for the approval of the intervention works, the economic-financial analysis and the technical documentation required for the procurement of the planning permit and the documentations required for the procurement of the requested approvals and agreements, including the agreement of CNADNR for location and access to DN2, E85 for the work THE INCITEMENT OF THE MOBILITY AT REGIONAL LEVEL THE MODERNIZATION OF THE ROAD INFRASTRUCTURE ...”, fundamental part of the award documentation in this procedure.

Practically, the business operator W SRL set forth on behalf of the contracting authority all the technical solutions that the bidders must adopt and all the rules that the bidders must comply with

in this procedure.

The allegations of the intervenient X SA according to which W SRL did not participate in any way in the administration, organization and preparation of the tender procedure organized by the contracting authority are completely unreal, when in fact the business operator W SRL in terms of the fundamental aspect of the technical proposals, has an involvement higher than the authority itself.

Under these conditions, the participation in the procedure (as associate) of the business operator W SRL distorts seriously the competition and no less severe measure is acceptable, except the exclusion from the procedure of the association X-Y-Z-W, according to the provisions of the art. 167 (1) f) of the Act no. 98/2016.

Consequently, although evidence on this aspect might be procured solely after the fulfilment of the contract, the Council considers that there are some clues in the sense that „W SRL is the only one that knows precisely which categories of works were included solely formally and are not required for the execution of the work, categories of works which are relinquished subsequently”, as per the presumptions listed by the complaining party.

Thus, the fact that the association including the preparer DALI and the answers to the clarifications related to the technical offer (W SRL named „designer” in all the documents representing answers to clarifications) filed a financial offer in amount of RON 55,858,758.20, exclusive of VAT, respectively only 61.78 % in relation to the estimated value triggers some uncertainties related to the fact that some categories of work were included solely formally, works which may be relinquished.

Therewith, the Council finds that the answer of the National Agency for Public Procurement (as to the case when the preparer of the documentations in the DALI and/or SAFI phase may participate in the procurements of the design services at Detail Design +Execution phase as bidder) is not relevant in this case, as ANAP was not properly informed, namely it was not informed at all on the involvement of the business operator W SRL in the development of the current procedure.

Taking into account the aforementioned considerations, the Council considers perfectly grounded the second criticism submitted by the complaining party A and therefore orders the cancellation of the contracting authority's decision to declare acceptable the bid filed by the association





X-Y-Z-W, as well as the exclusion of such bidder as per the provisions of the art. 167 (1) f) of the Act no. 98/2016.

### Case potentially generating conflict of interest

As per the certificate of good standing no. 433752/the 10th of August 2018 issued by the National Companies Register Office, B is a shareholder within the Company X and its percentage of participation in benefits and losses is 10%.

The complaining party claims that exactly the capacity of shareholder of the contracting entity within X represents a case potentially generating conflict of interest that might generate the exclusion of the association X-Y (winning bidder) from the procedure.

Such claims will be subject to analysis in relation to the provisions of the Law no. 99/2016, respectively:

Art. 71. - Throughout the implementation of the award procedure, the contracting entity must take all the required measures in order to prevent, identify and remedy the cases of conflict, for the purposes of avoiding the denaturation of the competition and the provision of equal treatment to all the business operators.

Art. 72. - As per this act, conflict de interest means any case in which the personnel of the contracting authority or of a procurement service provider acting on behalf of the contracting authority which are involved in the award procedure or that may influence on its result have directly or indirectly, a financial, economic interest or another personal interest, that might be considered as an element compromising their impartiality or independence in the award procedure.

- art. 73 (1) d) and (2) – „Any case that might generate a conflict of interest as per the art. 72, such as the following cases, regulated as examples represent cases potentially generating conflict of interest:

(...)

d) when the individual bidder/ associate bidder/ proposed subcontractor/ third party providing support has as members in the board of directors/ the management or supervisory board and/or has as shareholders or significant shareholders, persons that are husband/wife, relative or kin up to twice removed including or which is in business relations with persons holding decision-making positions within the contracting authority or the procurement service provider

involved in the award procedure;

(2) As per the provisions of the para. (1) d) shareholder or significant shareholder means the person exercising rights related to some shares representing cumulatively at least 10% of the share capital or granting to the holder at least 10% of the total voting rights in the general meeting.

Firstly, the Council takes into account that the cases potentially generating conflict of interest have been listed as examples by the legal provisions.

In this case, the associate bidder X has in the board of directors a representative of the contracting authority, as B is a shareholder within X. Therefore, in the Council's opinion, there are business relations and the contracting authority's business interest in relation to the business operator X and any shareholder of a commercial company aims at gaining profit from carrying out its business. According to the procurement documentation, it is true that the person designated by B in the X board of directors is Mister John Doe, person who is not part of the category of the persons holding decision-making-positions or involved in the verification/ evaluation of the requests of participation/ bids, but according to the certificate of good standing issued by the National Companies Register Office, mister John Doe is a director within X.

It may be presumed that the contracting authority itself having a financial interest, might aim at the association X -Y's winning of the public procurement contract, provided that the winning of the contract might lead to the increase of the company income in which it is a shareholder. Such case may be considered as one that might compromise the impartiality or the independence in the development of the award procedure.

The representative of the contracting authority in the X board of directors will act under the direct guidance of the persons holding decision-making-positions within the contracting authority, aiming certainly at the winning of some contracts that might generate profit to the commercial company in which the entity is shareholder.

Consequently, the Council considers that the associate bidder X, member of the association X-Y is in a case potentially generating conflict of interest, so that the contracting authority must implement the provisions of the art. 75 (3) correlated to the provisions of the art. 180 (1) e) of the Act no. 99/2016.

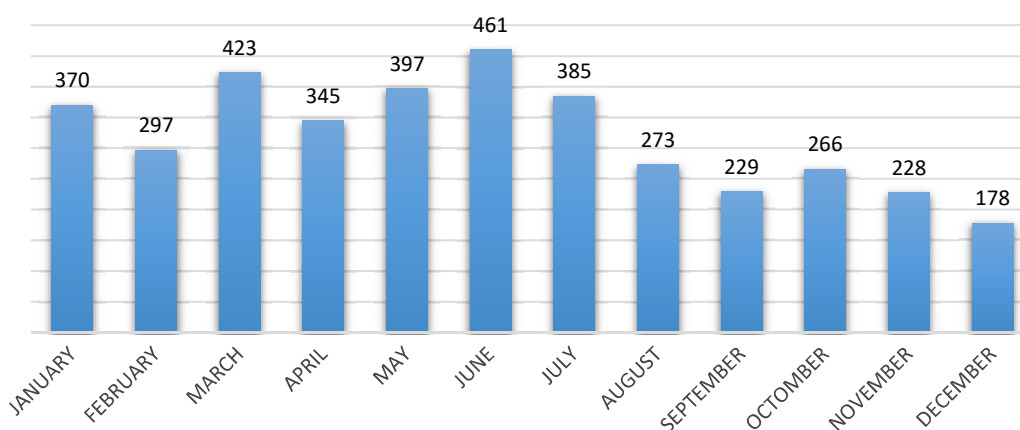
## 2.2. FILES SOLVED BY THE NATIONAL COUNCIL FOR SOLVING COMPLAINTS

### 2.2.1. THE TREND OF THE FILES SOLVED BY THE NATIONAL COUNCIL FOR SOLVING COMPLAINTS

In 2018, the chambers for solving complaints within N.C.S.C. issued 3,186 decisions, which meant the settlement of 3,852 files.

The annual trend of the complaint (files) settlement by those 11 chambers for solving complaints within the Council is at follows:

January	370	July	385
February	297	August	273
March	423	September	229
April	345	October	266
May	397	November	228
June	461	December	178



■ The trend of the files settled by N.C.S.C in 2018

Figure 24 - The trend of the files settled by N.C.S.C in 2018

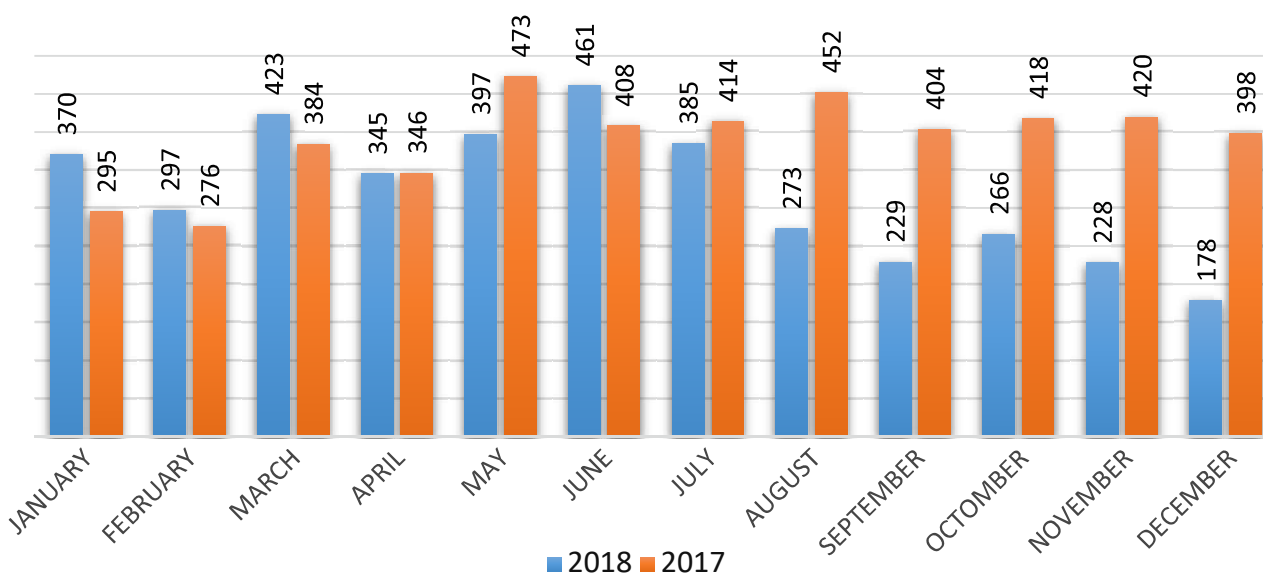


Figure 25 – Comparative standing – files settled in the period 2017-2018 by NCSC





It must be pointed out that since the Council was created (2006) and until the 31st of December 2018, the total number of files settled

by the chambers for solving complaints within the institution reached 65,206.

## 2.3. DECISIONS RENDERED BY THE NATIONAL COUNCIL FOR SOLVING COMPLAINTS

### 2.3.1. THE TREND OF THE NUMBER OF THE DECISIONS ISSUED BY THE NATIONAL COUNCIL FOR SOLVING COMPLAINTS

As we previously mentioned from the 1st of January to the 31st of December 2018, those 11 chambers for solving complaints within N.C.S.C. rendered 3,186 decisions.

Divided per months, the monthly standing of the decisions rendered by the Council had the following trend:

January	288	July	320
February	234	August	236
March	330	September	187
April	289	October	235
May	312	November	205
June	388	December	162

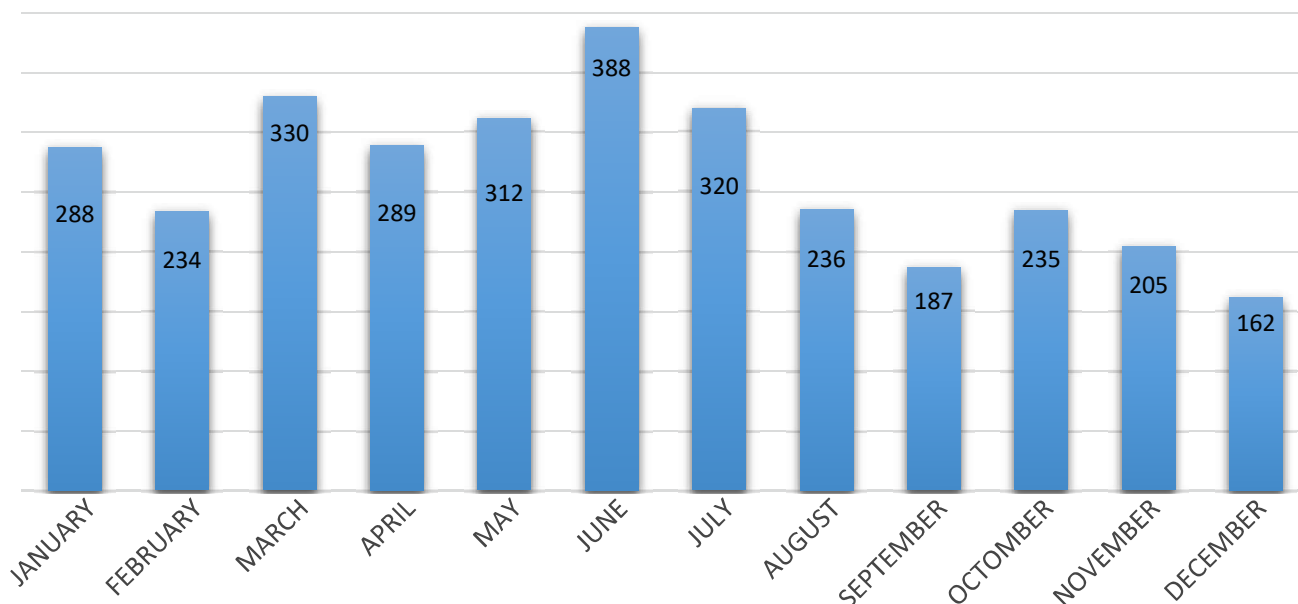
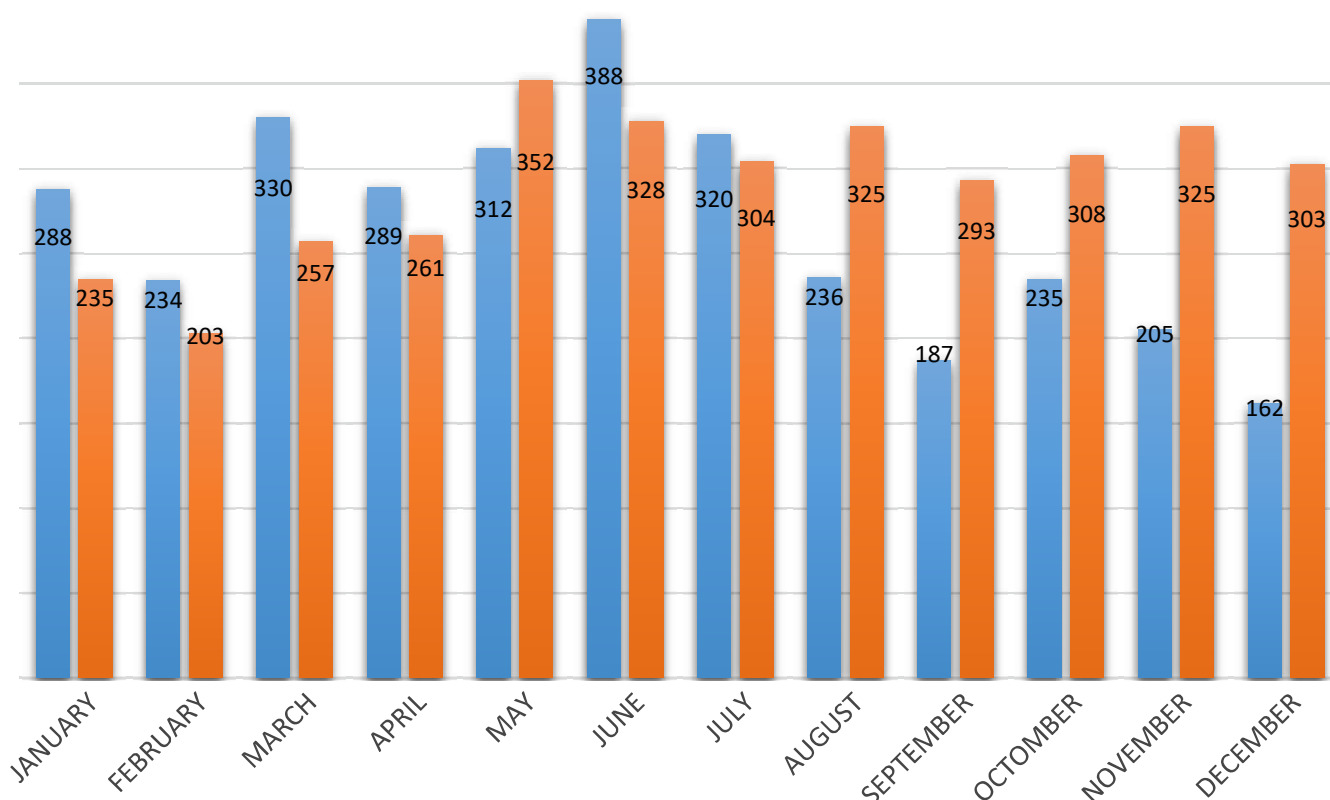


Figure 26 - The trend of the decisions issued by N.C.S.C. in 2018

According to the legislative amendments passed in 2018, amendments meant to determine the speeding of the public procurement procedures and implicitly the decrease of the number of complaints lodged by the business operators, the

number of the decisions issued by the Council dropped by 8.81% in comparison with the previous year (- 308 decisions), as it arises from the following chart:



■ The decisions rendered by C.N.S.C. in 2018 ■ The decisions rendered by C.N.S.C. in 2017

Figure 27 - The trend of the decisions rendered by N.C.S.C. in the period 2017 - 2018

As a whole, since the Council was created and until the 31st of December 2018, the total number of

the decisions issued by the Council amounted to 57,520, as it arises from the following chart.

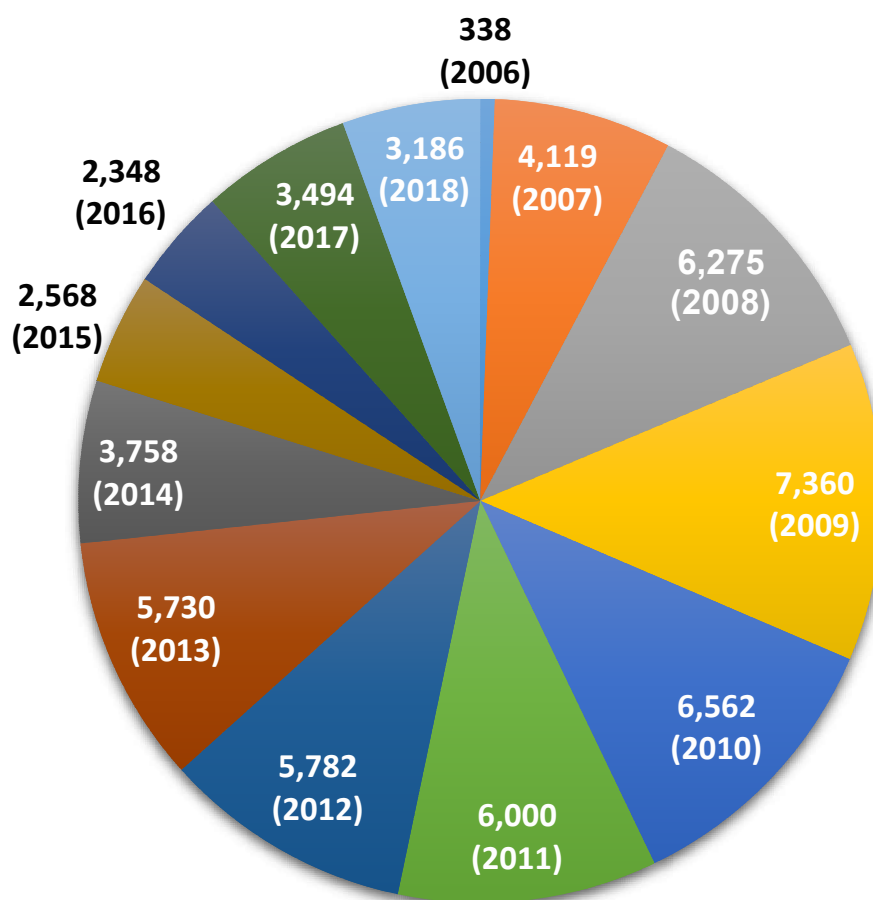


Figure 28 - The trend of the decisions rendered by N.C.S.C. in the period 2017 - 2018

## 2.3.2. THE STANDING OF THE SETTLEMENT OF COMPLAINTS LODGED WITH THE NATIONAL COUNCIL FOR SOLVING COMPLAINTS

As we have pointed out in the previous subchapter, in 2018 the total number of the decisions issued by those 11 chambers for solving complaints within the Council amounted to 3,186.

As a consequence of the settlement of the complaints lodged by the business operators, the Council rendered:

- 1,056 decisions (33.15% of the total issued decisions) in which it ordered the acceptance of the complaints submitted by the business operators. In such cases, the solution requested by the complaining party and adopted upon the deliberation by the chamber for solving complied with the need of defence by administrative-jurisdictional way of the subjective right violated or unacknowledged by the contracting authority and its reinstation so that it provides its holder with the rights acknowledged by law.
- 2,130 decisions (66.85%) under which it

ordered the dismissal of the complaints submitted by the business operators. Such cases of dismissal of the complaints submitted by the business operators were generated by the following cases:

- The complaining party waived the submitted complaint, so that the simple request of waiving the complaint submitted by the originator of the litigation results immediately in the file closing;
- The Council considered as to the tenor of the solved complaint, to go in favour of the contracting authority as the litigation substance of the complaint submitted by a business operator proved to be groundless;
- The Council could not render a decision on the substance of the case as a substance or procedure exception was alleged by the litigant parties or ex officio (the complaint was submitted with delay, is subjectless, unacceptable, interestless, submitted by persons without capacity, etc.).

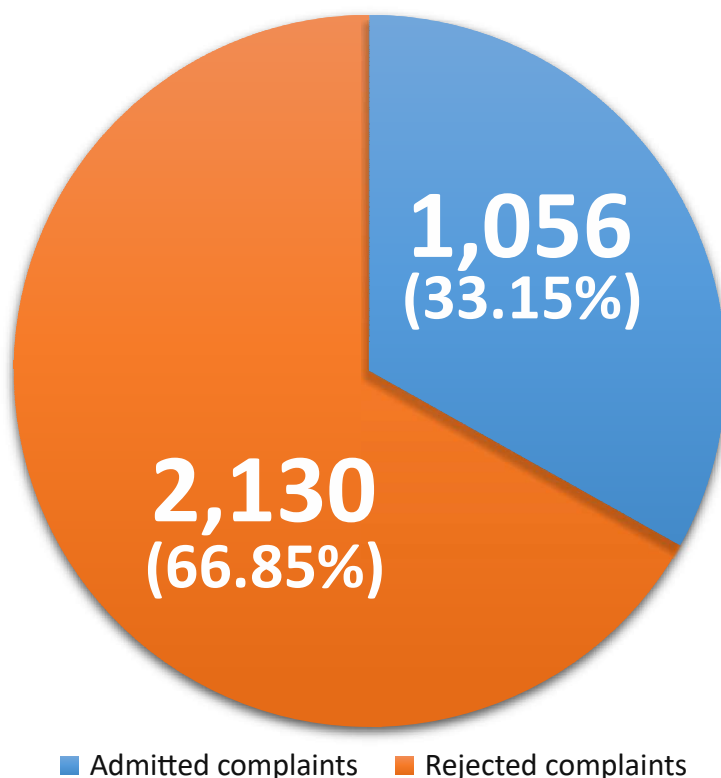


Figure 29 - The standing of the decisions rendered by N.C.S.C. in 2018

By analysing the trend of the decisions accepted and dismissed by the Council in 2018, it can be noticed that both the percentage of the decisions under which the Council accepted the complaints submitted by the business operators

and that one of the decisions under which the Council rendered the dismissal of the complaints, was steady in comparison with the previous year, at 33%, respectively approximately 67%.

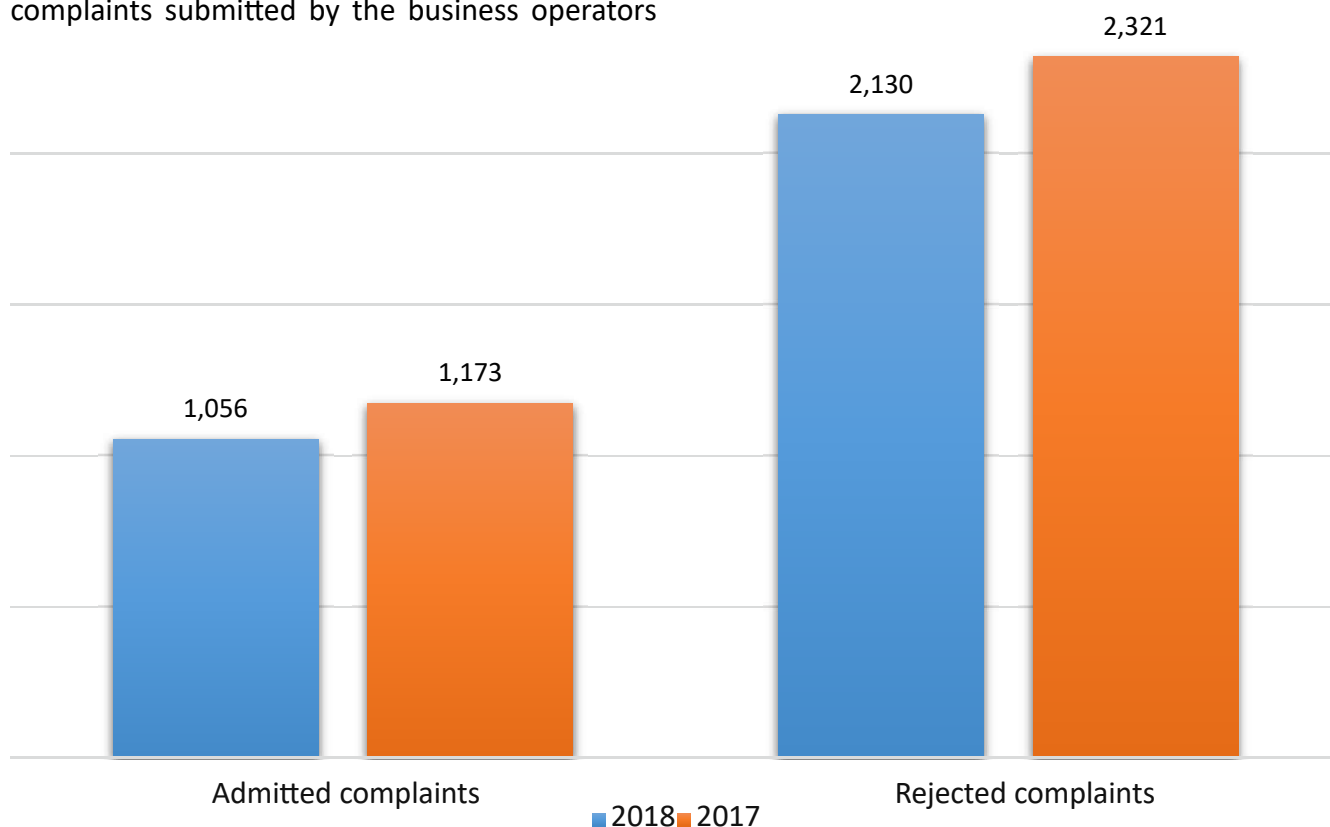


Figure 30 - The trend of the decisions rendered by N.C.S.C. in the period 2017-2018



Therewith, the statistical data show that the percentage of the decisions rendered by the Council under which the complaints were accepted and that one of the decisions under which the complaints were dismissed, have not been subject to major amendments in the past 10 years, so that

the percentage of the accepted and dismissed complaints from the total decisions issued by the Council remained approximately steady (34% - accepted complaints, 66% - dismissed complaints), which may be noticed in the following chart:

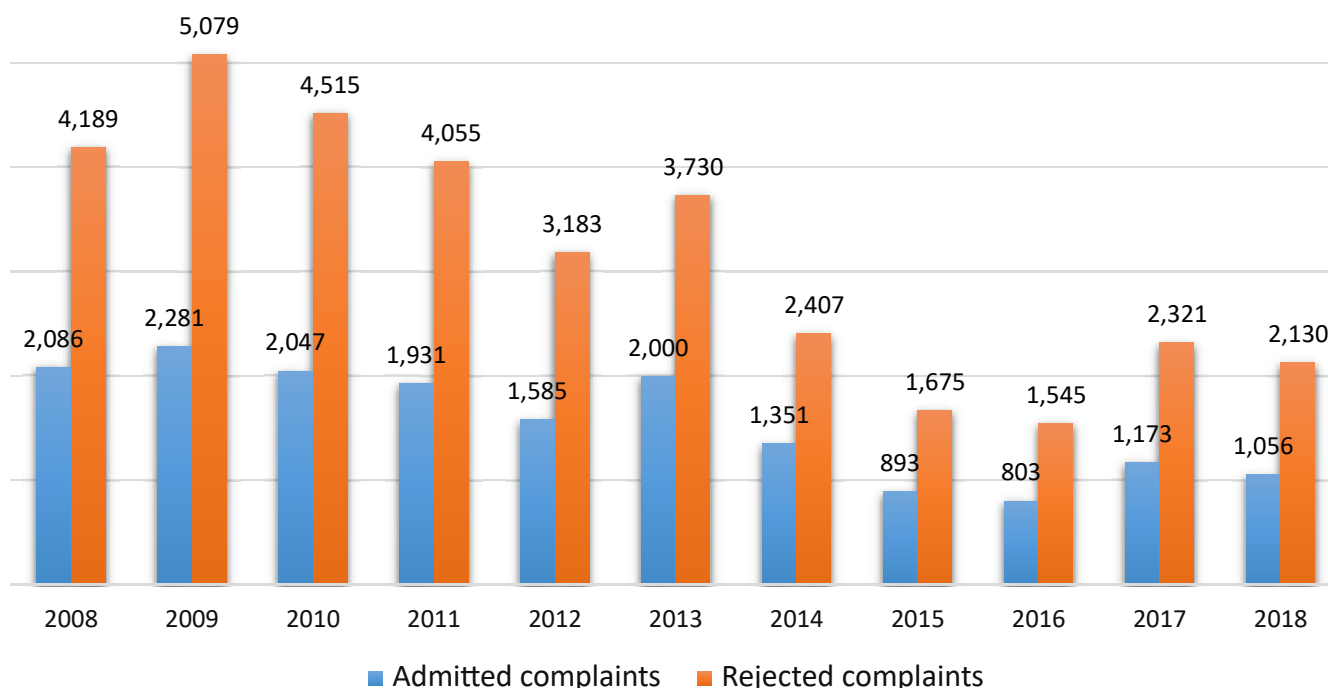


Figure 31 - The trend of the complaints rendered by N.C.S.C. in the period 2008-2018

As to the decisions accepted by the Council (1056) in 2018, it must be mentioned that as for 75 decisions (7.10%) it was taken the measure for the acceptance of the complaints and the cancellation of the award procedures, whereas for 981 decisions

(92.90%) the Council ordered the acceptance of the complaints submitted by the business operators and the remedy of the award procedures, so that they may continue in compliance with the legal provisions in terms of the public procurements.

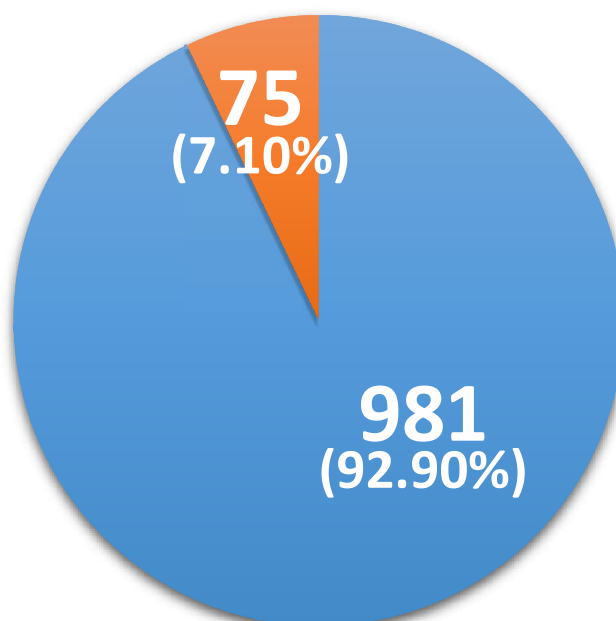


Figure 32 - The measures ordered by N.C.S.C. as a result of the acceptance of the complaints



## 2.4. THE ACTIVITY OF THE NATIONAL COUNCIL FOR SOLVING COMPLAINTS IN RELATION TO THE ESTIMATED VALUE OF THE AWARD PROCEDURES

### 2.4.1. THE ESTIMATED VALUE OF THE AWARD PROCEDURES IN WHICH THE NATIONAL COUNCIL FOR SOLVING COMPLAINTS RENDERED DECISIONS

In 2018, the National Council for Solving Complaints rendered decisions in some award procedures amounting to a total estimated value of

RON 47,595,671,175.60 (the equivalent amount of EURO 10,227,929,768.05<sup>31</sup>).

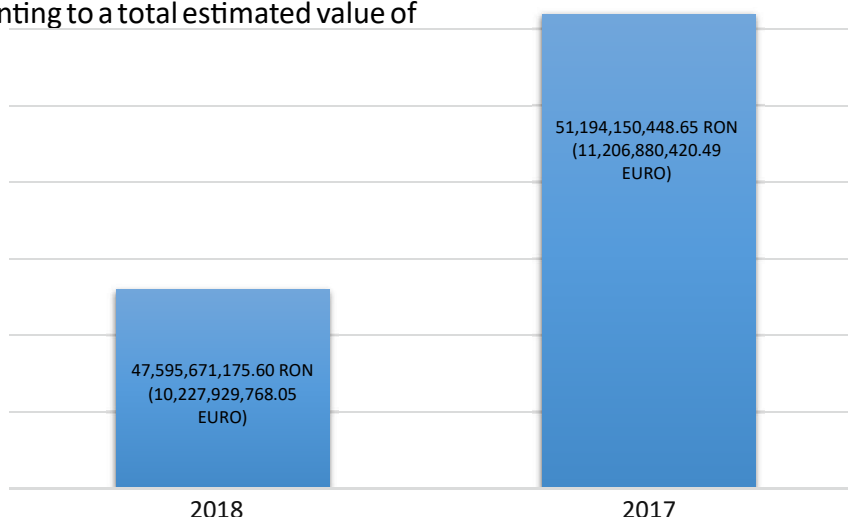


Figure 33 - The total estimated value of the decisions rendered by the National Council for Solving Complaints in the period 2016-2017 in relation to the total estimated value of the procedures

As to the total estimated value of the tender procedures in which N.C.S.C. rendered decisions for the acceptance of the complaints lodged by the business operators, it amounted to RON 11,294,919,655.16 (the equivalent amount of EURO 2,319,714,212.24<sup>32</sup>) in 2018.

Therewith, in 2018 the total estimated value of the procedures in which N.C.S.C. issued decisions for the dismissal of the complaints submitted by the business operators amounted to RON 36,300,751,520.44 (the equivalent amount of EURO 7,800,741,704.19<sup>33</sup>).

From the total estimated value of the procedures in which decisions for the acceptance of the complaints submitted by the business operators were issued, the total estimated value of the award procedures in which the Council ordered their cancellation amounted to RON 500,129,568.49 (the equivalent amount of EURO 107,743,851.61<sup>34</sup>), whereas the total value of the award procedures in which measures of remedy were ordered, amounted to RON 10,794,790,086.67 (the equivalent amount of EURO 2,319,714,212.24<sup>35</sup>).



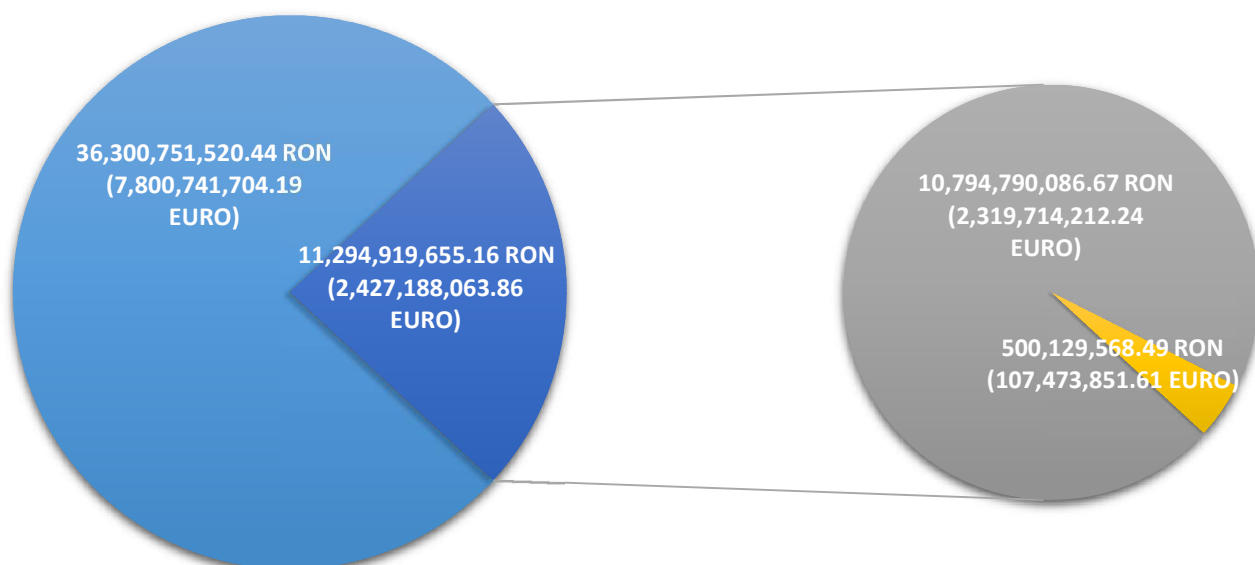
<sup>31</sup> The amount was calculated at an annual average exchange rate communicated by the National Bank of Romania for the year 2018 of 4.6535

<sup>32</sup> The amount was calculated at an annual average exchange rate communicated by the National Bank of Romania for the year 2018 of 4.6535

<sup>33</sup> The amount was calculated at an annual average exchange rate communicated by the National Bank of Romania for the year 2018 of 4.6535

<sup>34</sup> The amount was calculated at an annual average exchange rate communicated by the National Bank of Romania for the year 2018 of 4.6535

<sup>35</sup> The amount was calculated at an annual average exchange rate communicated by the National Bank of Romania for the year 2018 of 4.6535



- 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

Figure 34 - The total estimated value of the award procedures in which N.C.S.C. rendered decisions in 2018

By analysing the above figures, it is noticed that in 2018 the total estimated value of the award procedures for which N.C.S.C. rendered decisions for the acceptance of the complaints (RON 11,294,919,655.16) accounted for 23.73% of the total estimated value of the procedures in which N.C.S.C. rendered decisions (47,595,671,175.60), whereas the total value of the procedures in which the Council issued decisions for the dismissal of the complaints (RON 36,300,751,520.44) accounted for 76.27% of the total estimated value of the procedures in which the Council rendered decisions.

As such, it can be noticed that in 2018 the Council did not represent an obstacle in the completion of the public procurement procedures, respectively in the absorption of the European funds.

In comparison with the previous year, in 2017, the estimated value of the award procedures in which the Council accepted the complaints and cancelled procedures dropped by 59.61%, whereas the estimated value of the procedures in which N.C.S.C. rendered decisions for acceptance of the complaints and ordered the remedy of the procedures increased by 168.61%.



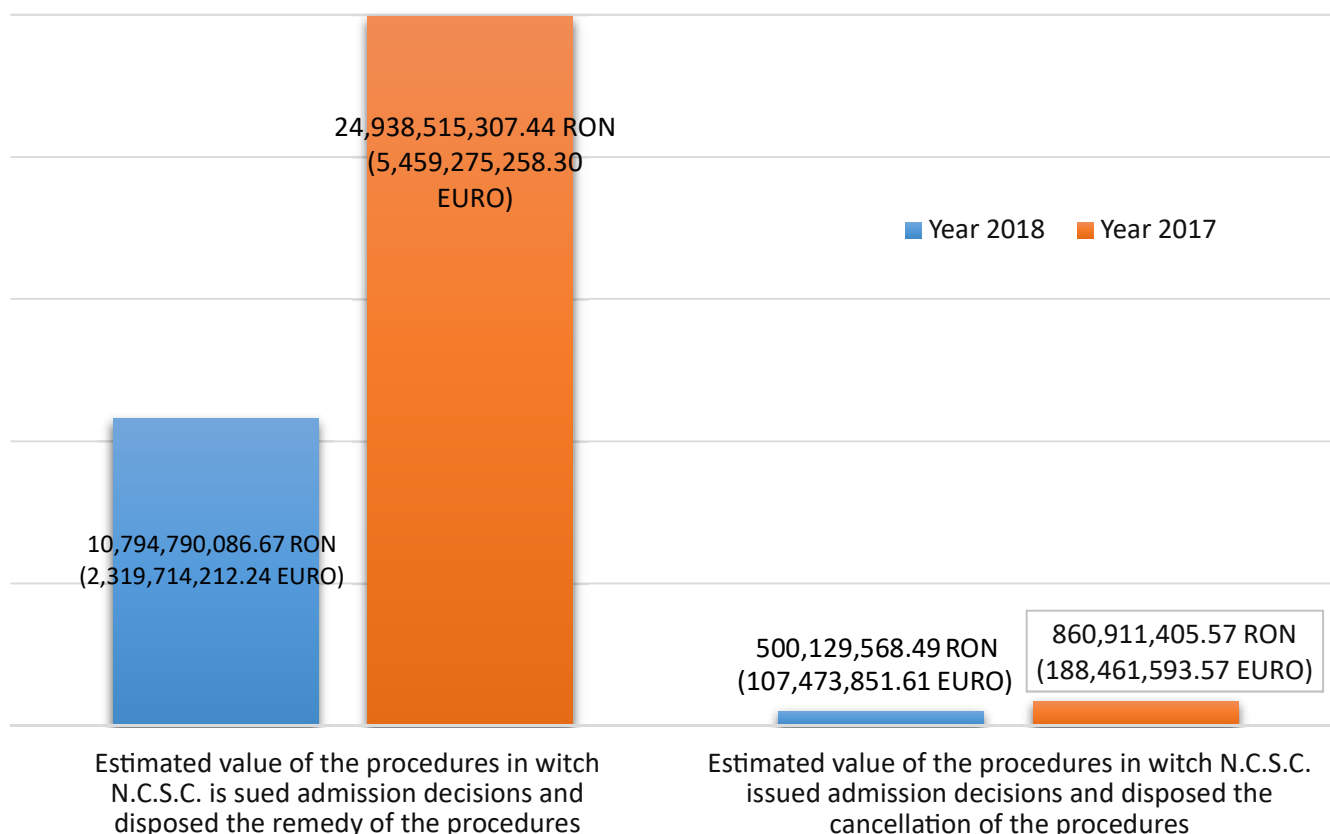


Figure 35 - The total estimated value of the award procedures in which N.C.S.C. rendered decisions for the acceptance of the complaints in the period 2017-2018

If we refer to the total estimated value of the procedures in which the Council rendered decisions under which the complaints submitted by the business operators were accepted and ordered the cancellation of the public procurement procedures (RON 500,129,568.49, the equivalent amount of EURO 107,473,851.61<sup>36</sup>), it may be concluded that N.C.S.C. represents an extremely efficient filter for the prevention of the irregularities in the public procurement field.

It must be mentioned that the value of some

public procurement procedures funded from the European funds that were cancelled (RON 11,441,259.14, the equivalent amount of EURO 2,458,635.26<sup>37</sup>) that were cancelled represented solely 2.29% out of the total estimated value of the award procedures in which the Council issued decisions for the acceptance of the complaints submitted by the business operators and ordered the cancellation of the award procedures (RON 500,129,568.49, the equivalent amount of EURO 107,473,851.61<sup>38</sup>).

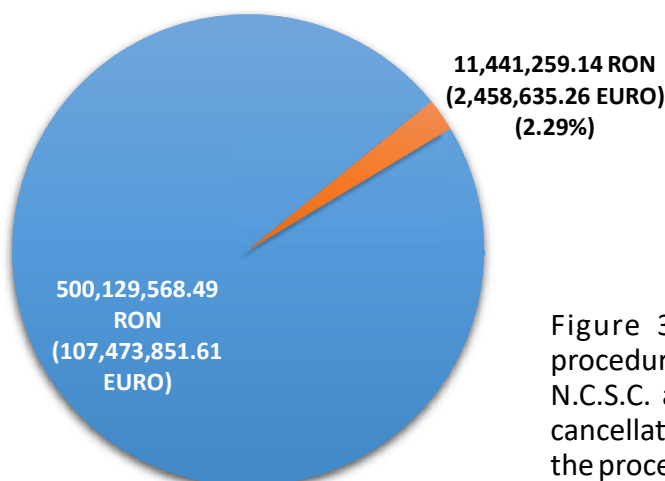


Figure 36 - The total estimated value of the procedures funded from the European funds in which N.C.S.C. accepted the complaints and ordered their cancellation, in relation to the total estimated value of the procedures in which the cancellation was ordered

<sup>36</sup> The amount was calculated at an annual average exchange rate communicated by the National Bank of Romania for the year 2018 of 4.6535

<sup>37</sup> The amount was calculated at an annual average exchange rate communicated by the National Bank of Romania for the year 2018 of 4.6535

<sup>38</sup> The amount was calculated at an annual average exchange rate communicated by the National Bank of Romania for the year 2018 of 4.6535

## 2.4.2. THE TOTAL ESTIMATED VALUE OF THE PROCEDURES IN WHICH THE NATIONAL COUNCIL FOR SOLVING COMPLAINTS ISSUED DECISIONS FOR THE ACCEPTANCE OF THE COMPLAINTS, IN COMPARISON WITH THAT TONE OF THE PROCEDURES COMMENCED VIA S.E.A.P. .

According to the official data provided by the Agency for Digital Agenda of Romania (A.A.D.R.) within the Electronic Public Procurement System, 35,434 procedures totalising an estimated value of RON 140,288,319,986.96 (the equivalent of EURO 30,146,840,010 EURO<sup>39</sup>) were commenced in 2018, through contract notices and notices of invitation to tender.

In comparison with 2017 when 28,165 award

procedures for the public procurements contracts totalising an estimated value of RON 104,662,081,013.41 (EURO 22,911,512,666.84<sup>40</sup>) were commenced via the Electronic Public Procurement System, it is found that in 2018 the number of the award procedures for the public procurement contracts increased both in terms of quantity (7269 procedures), by 25.81% and in terms of value (RON 35,626,238,973.55) by 34.04%.

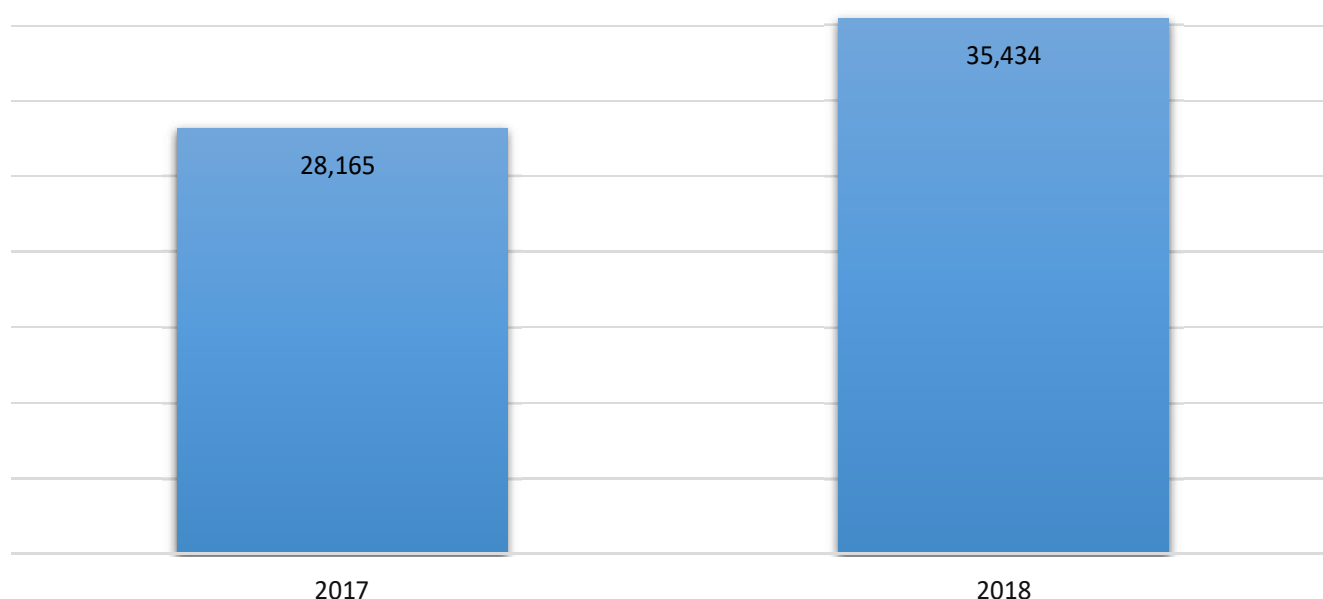


Figure 37 - The total number of the procedures commenced via S.E.A.P. through contract notices and notices of invitation to tender in the period 2017 – 2018

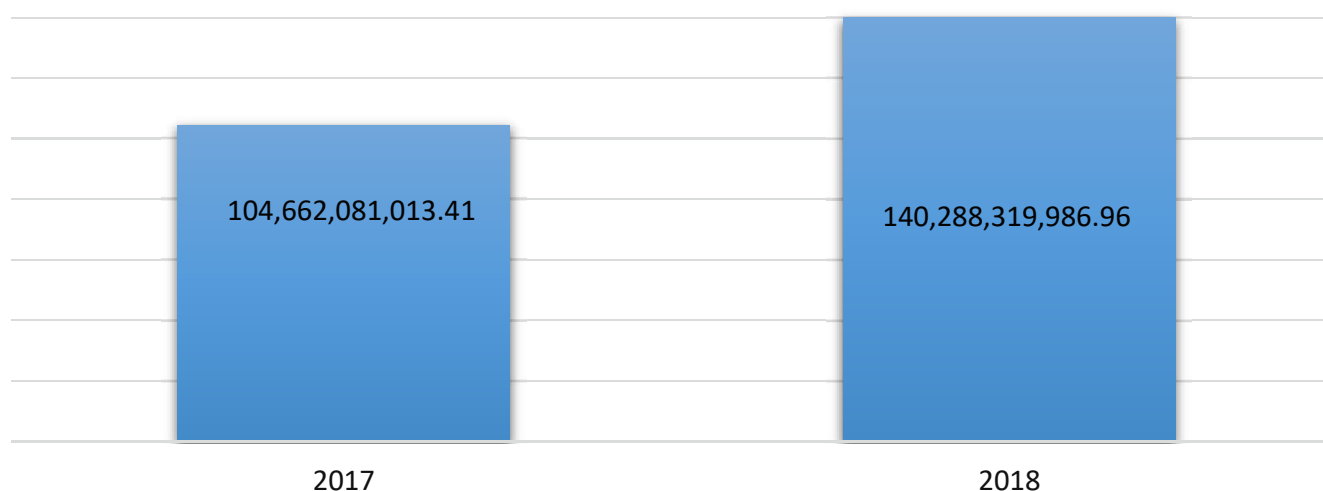


Figure 38 - The total estimated value of the procedures commenced via S.E.A.P. through contract notices and notices of invitation to tender in the period 2017- 2018

<sup>39</sup> The amount was calculated at an annual average exchange rate communicated by the National Bank of Romania for the year 2018 of 4.6535

<sup>40</sup> The amount was calculated at an annual average exchange rate communicated by the National Bank of Romania for the year 2017 of 4.5681

As to the public procurement procedures funded from the European funds commenced through contract notices and notices of invitation to tender in SEAP, the data provided by A.A.D.R. for

2018 show that there were 4572 procedures which in comparison with the previous year (2,472 procedures) represented an increase by 84.95% (+ 2,100 procedures).

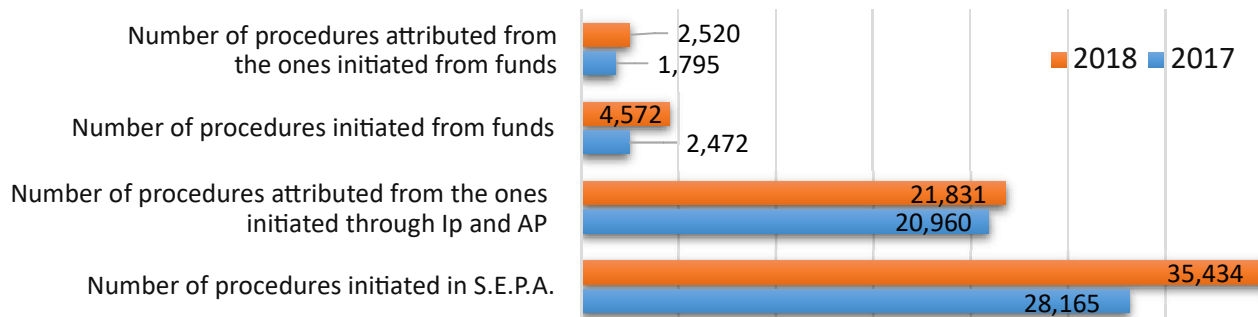


Figure 39 - The number of the procedures commenced and effectively awarded via S.E.A.P in the period 2017 - 2018

But, although the number of the procedures funded from European funds commenced through contract notices and notices of invitation to tender in S.E.A.P. increased in 2018 by 2,100, in terms of the estimated value, they dropped both in terms of the „commenced procedures” chapter and the

„awarded procedures”. Thus, in 2018 the estimated value of the procedures funded from the European funds commenced through the contract notices and the notices of invitation to tender in SEAP dropped in comparison with the prior year by RON 6,763,015.847.81 (EURO 1,453,318,115 EURO<sup>41</sup>)



<sup>41</sup> The amount was calculated at an annual average exchange rate communicated by the National Bank of Romania for the year 2018 of 4.6535





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

#### 3.1. THE STANDING OF THE DECISIONS ISSUED BY C.N.S.C. AND AMENDED BY THE COURTS OF APPEAL AS A CONSEQUENCE OF THE ACTIONS BROUGHT AGAINST

##### 3.1.1. THE STANDING OF THE DECISIONS ISSUED BY C.N.S.C. AS TO THE SUBSTANCE OF THE COMPLAINTS AND AMENDED BY THE COURTS OF APPEAL AS A CONSEQUENCE OF THE ACTIONS BROUGHT AGAINST

In compliance with the constitutional principle of the access to justice, the legislator has established that it is necessary that the decision rendered by the Council, as a result of the settlement of the complaint by the administrative-jurisdictional way, be „controlled” by a law court so that the remedy of the committed errors be enabled in the first settlement stage. Therefore and as to the decisions rendered by the administrative-jurisdictional way by the Council, they are „verified” by a higher body, respectively the courts of appeal in the jurisdiction where the contracting authority is headquartered or the Court of Appeal in Bucharest as for the actions brought against the N.C.S.C. decisions rendered in the procedures for the award of services and/or works corresponding to the national interest transport infrastructure.

The existence of such a control represents a guarantee for the stakeholders, in the sense that any error may be removed/ remedied and as for the counsellor for solving complaints it represents an incentive for the purposes of carrying out their duties with maximum strictness and severity, being aware that their decision might be subject to a control by a higher court.

Concretely, the decisions rendered by the Council are „verified” by the aforementioned courts, if either the contracting authority, or one or several business operators participating in a public procurement procedure, or both the contracting authority and one or several participating business operators bring actions against the decisions of N.C.S.C. rendered in terms of the public procurement

contracts/ sectorial/ concession contracts and the master agreements awarded in the defence and security field.

Such possibility is provided for by the art. 29 (1) of the Act no. 101/2016 providing the right that, following the settlement by the Council of the complaints submitted by the business operators, the decisions issued by the Council may be appealed within 10 business days<sup>42</sup> following the service, both for illegal and ungrounded reasons, with the law court provided for by the art. 32 (1) and (2) in the mentioned legal instrument.

For this reason, several actions may be brought concurrently with the competent courts of appeal against a decision issued by the Council in the award procedures.

In 2018, out of 3,186 decisions issued by the chambers for solving complaints within N.C.S.C., 654 were appealed with the competent courts of appeal.

At the end of 2018, as a result of the settlement of the actions lodged with the competent law courts, 53 of the decisions issued by N.C.S.C were overridden/ annulled totally by the courts (1.66% out of the total decisions issued by the Council), 45 were amended partially (1.41% of the total decisions issued by the Council), 515 remained in the form issued by N.C.S.C., while 41 appealed decisions are to be settled in 2019.

<sup>42</sup> As the art. 29 of the Act no. 101/2016 was amended under the Government Emergency Ordinance no. 45/2018

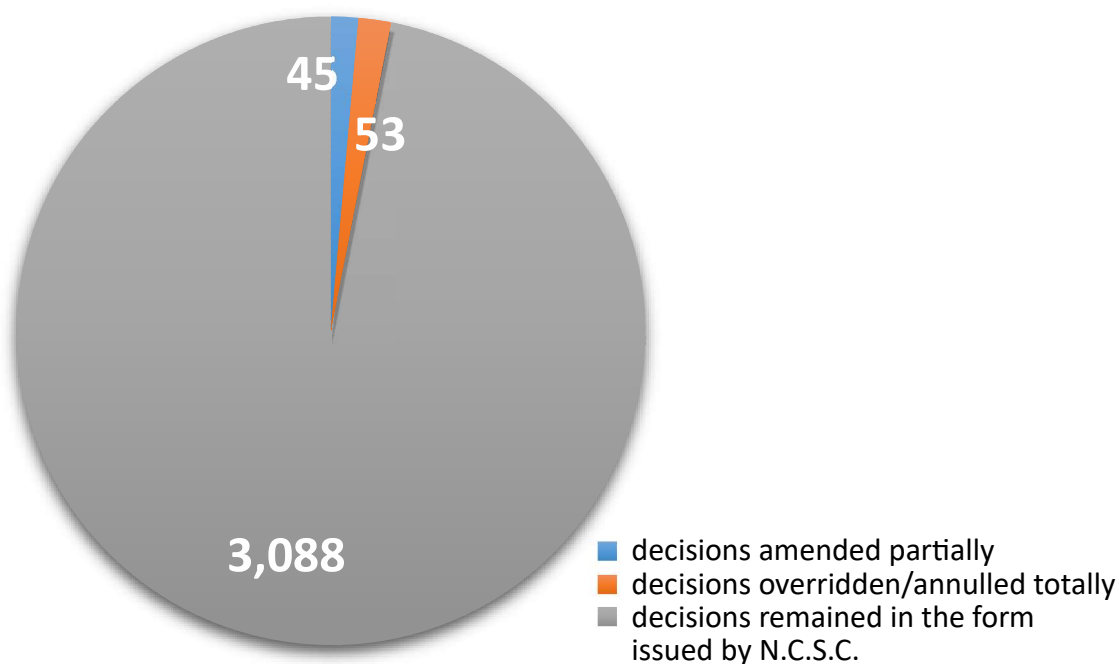


Figure 40 - The standing of the actions brought against the decisions rendered by N.C.S.C. in 2018

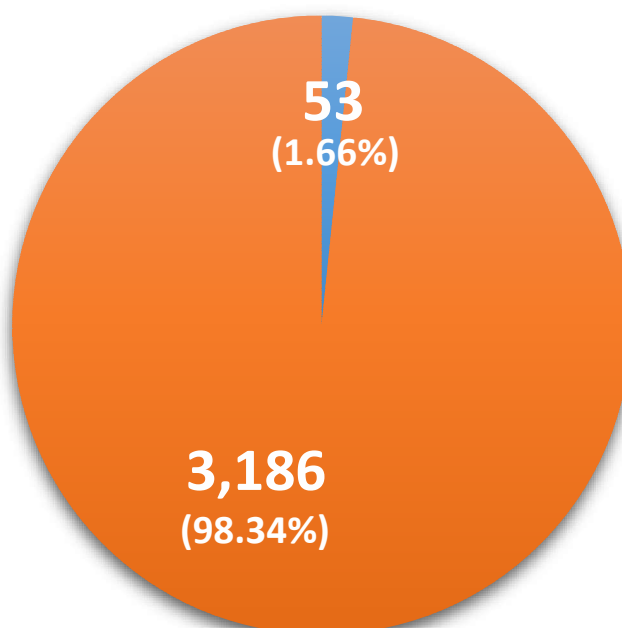
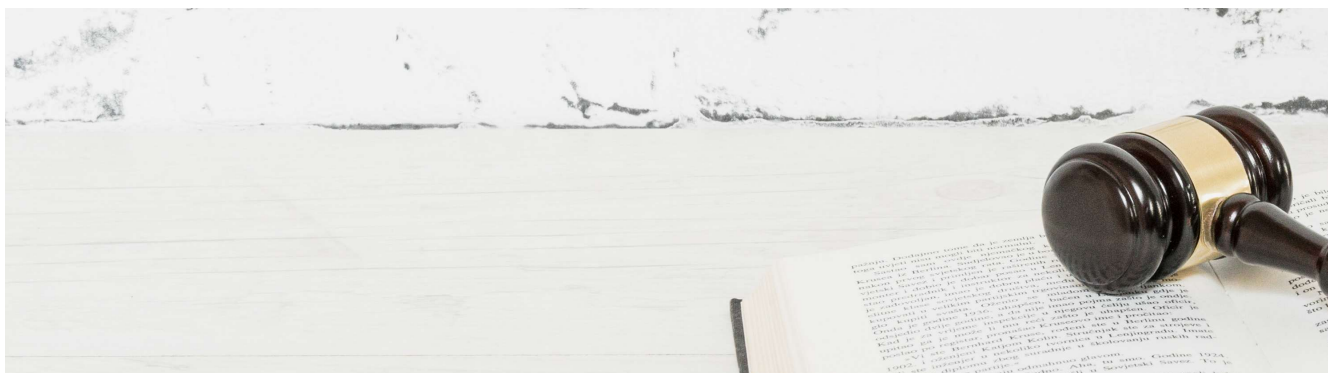


Figure 41 - The number of decisions overridden/ amended totally by the courts of appeal, in comparison with the total number of decisions issued by N.C.S.C in 2018

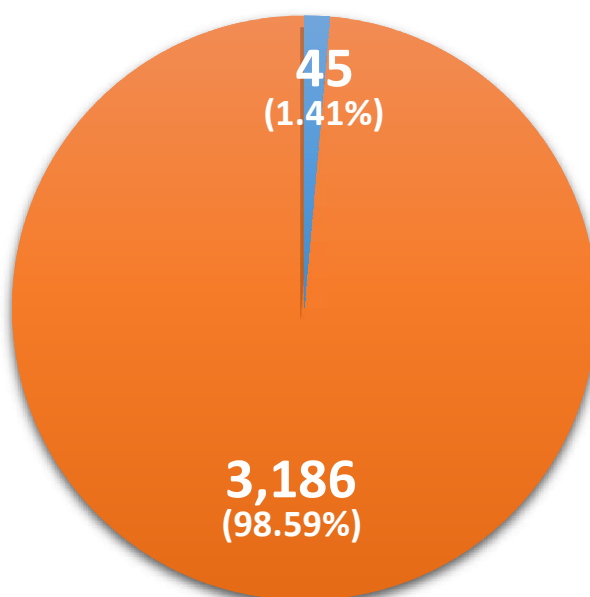


Figure 42 - The number of decisions amended partially by the courts of appeal in comparison with the total number of decisions issued by N.C.S.C. in 2018

Practically, by analysing the aforementioned figures it arises that in 2018, 3,088 decisions issued by the Council (96.92% of the total issued decisions) became final, in the form issued by our institution which reflects the level of its employees' credibility, reliability and professionalism.

It is important to mention that in the period 2010 – 2018, the Council issued 39,428 decisions

and as a result of the actions brought against with the competent Courts of Appeal, solely 868 decisions (555 decisions overridden/ amended totally and 411 decisions amended partially) were overridden/amended totally and amended partially, which means that 38,462 decisions issued by our institution (97.55%) became final.

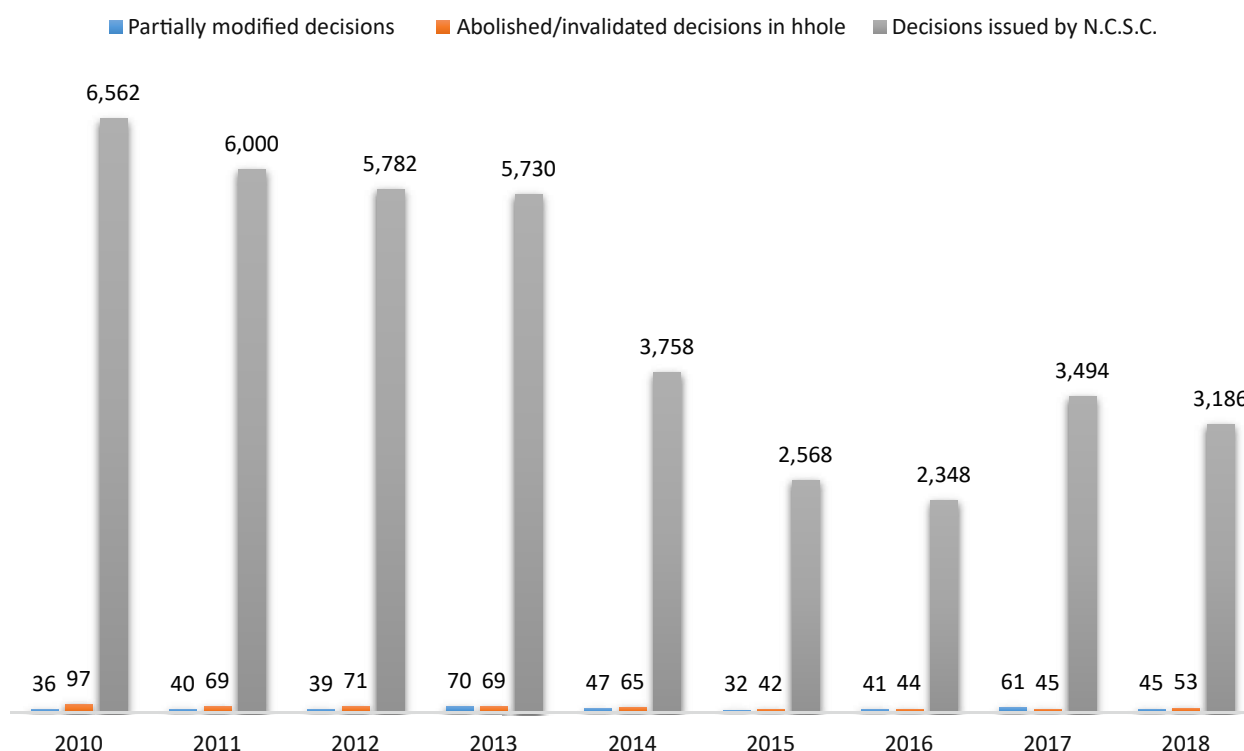


Figure 43 - The trend of the actions brought against with the courts of appeal against the decisions in the period 2010-2018

It may be concluded from the statistical records that the percentage of the decisions accepted by the Courts of Appeal since the Council was created and until the end of 2018 is steady and however very low in comparison with the percentage of the decisions rendered by it and which became final.

Practically, since its creation (September 2006) and the end of 2018, from the total 57,520 decisions rendered by the Council, the total number of the decisions totally overridden/ amended and

partially amended by the competent courts of appeal amounted merely to 1,185.

Therefore it arises that from September 2006 to December 2018, the decisions that are final in the form issued by the Council, after having being brought an action against them with the competent Courts of Appeal by the business operators/ Contracting Authority amounted to 56,335 which accounted for 97.94% of the total decisions issued by the Council.

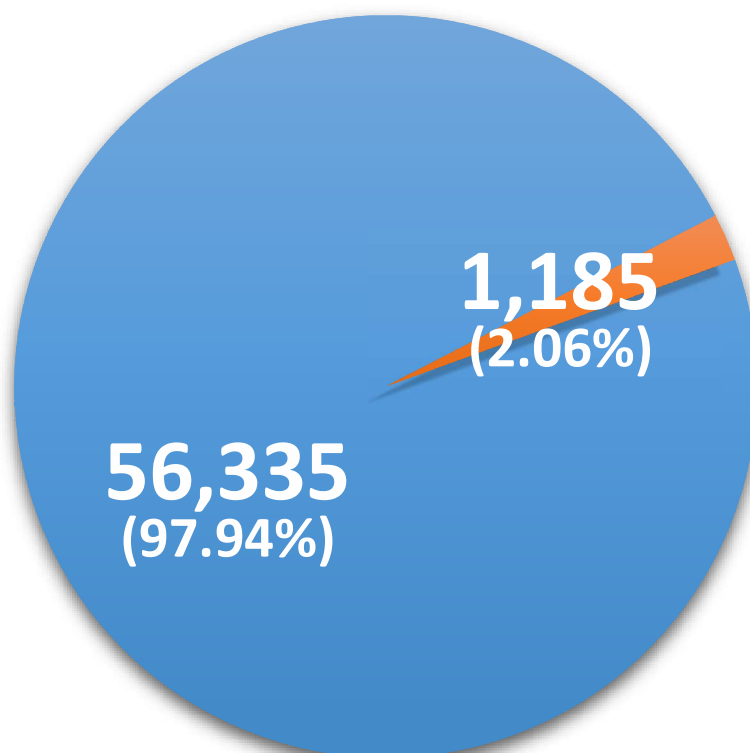


Figure 44 - The standing of the decisions issued by N.C.S.C. in the period 2006-2018 that became final after an action was brought against them with the competent courts of appeal

Surprisingly, as the trustworthiness of our institution has remained very high in the 11 years of activity (98% of the total decisions issued by the Council became final in the form issued by the Council, after they were appealed with the competent courts of appeal), and the Council did its best in implementing some European good practices in speeding the procedures, in 2018 there were also cases in which the public procurement market was blocked even by the contracting authorities – the main entities directly interested in implementing the projects funded either from national public funds, or European funds.

Thereby in 2018, the contracting authorities brought 138 actions out of 654 actions with various

Courts of Appeal against the N.C.S.C, namely over 21% provided that they, at least in declarations, showed interest for the expedient development of the public procurement procedures.

And it only has generated the totally ungrounded extension of the public procurement procedures, respectively the award of the contracts that they had, as the actions brought against by the contracting authorities proved mostly to be ungrounded.

## 4. THE INSTITUTIONAL TRANSPARENCY AND THE PERSONNEL TRAINING

### 4.1. THE INSTITUTIONAL TRANSPARENCY



In 2018, the Council management has dealt permanently with the nationwide promotion of the European practices and policies for the prevention and fight against the anti-competition practices, the increase of the institutional transparency, as well as the sharing of its own experience to the institutional partners, so that the local public procurement system would benefit from predictability and a coherent and uniform operation contributing to the expedient settlement of the complaints, implicitly in the increase of the European funds absorption.

Similarly to the previous years, in 2018 the Council has also attached a special importance to the institutional collaboration with bodies with duties in the public procurement field (the National Agency for Public Procurement - A.N.A.P., the Competition Council, the National Integrity Agency – A.N.I., courts of appeal, the Tribunal of Bucharest, the Prosecutor's Office attached to the High Court of Cassation and Justice, the National

Institute of Magistracy, the Ministry of European Funds, the Court of Accounts, the representation of the European Commission in Bucharest).

Therewith, the Council kept on conveying on a weekly basis to the National Agency for Public Procurement, based on the conventions entered into with such institution, the official reports related to the evaluation time limits determined by the contracting authorities in various running projects, the decisions issued by the Council as well as the measures of remedy ordered by the chambers for solving complaints in the public procurement procedures challenged by the business operators.

The decisions issued by N.C.S.C rendered anonymous are weekly posted in the official bulletins on the website of N.C.S.C..





## 4.2. PROFESSIONAL TRAINING

As per the provisions of the Act no. 188/1999 on the bylaws of the public servants, as republished, subsequently amended and supplemented, the professional training and improvement represent both a right and an obligation of the public servants.

The implementation of the good governance principles in the public sector supposes good knowledge of the administrative system and especially of the public procurement system as well as of the requirements and exigencies required by it.

Taking into account that in this context, the professional training and improvement represent a priority at national level, each central and local public institution and authority has the jurisdiction to support such process.

According to the effective regulations, the Council has full competence in planning the training, in procuring the training services and in monitoring and evaluating the training of the public servants.

The consolidation of the Council's institutional ability is strictly determined by a process adequate for the training of the counsellors for solving complaints in the public procurement field, as public servants of special status, in fields and topics for professional training/improvement that would reflect the real need of the administrative system and especially of the public procurement system and the public sector.

The supply of some services of professional training and improvement, at a quality standard adequate to the requirements of a modern public administration, under permanent change, is a key element of the general process for the provision of quality personnel training within the public administration. The continuance of the reform for the public function, within the context of a wide reform of the administration, in aggregate, may be incited by the existence of a qualified, driven, good, competitive and professionally well-prepared personnel.

The preservation and subsequently, the development of the professional performances within the Council is indissoluble linked to the necessity of continuous training of its personnel.

As far as our institution is concerned, the consolidation of the institutional ability is strictly determined by an adequate process for the training of the counsellors for solving complaints in the public procurement field, in fields and topics

for the professional training/ improvement in compliance with the real needs of the public procurement system.

Interested in the continuous improvement of the personnel and the administrative-jurisdictional practice unification at national and European level, the members of the Council participated in 2018 in three conferences, together with officials of the National Institute of Magistracy (I.N.M.), the Agency for Digital Agenda of Romania (A.A.D.R.), the Competition Council, the National Agency for Public Procurement (A.N.A.P.) and some judges from various country courts of Appeal and Tribunals.

### **The Analysis of the Latest Legislative Amendments in Terms of the Public Procurements**

The workshop organized at the end of June, at the headquarters of the Court of Appeal in Bucharest, took place in the presence of the counsellors for solving the public procurements within N.C.S.C., some judges from the Court of Appeal in Bucharest and the representatives of A.N.A.P.

Complex topics related to the unification of the administrative-jurisdictional in the field of public procurements were discussed, in the sense that the legislative amendments in the field of the public procurement—especially those ones related to the Act no. 101/2016, but many non-unitary relevant solutions - at the level of the Court of Appeal in Bucharest and other country courts of appeal were subject to analysis.

The Council members discussed in the meeting on the Regulation (EU) no. 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) in order to clarify the mode of providing the documents from a case file to the person desiring to examine such file. Within this context, the representatives of the Court of Appeal in Bucharest mentioned that the court relies on one of the exceptions provided for by law and mentioned that the National Council for Solving Complaints should be deemed law court in terms of this aspect, being exempted from the Regulation 2016/679 of the European Parliament and of the



Council of 27 April 2016.

**The unification of the administrative-jurisdictional practice as per the Act no. on remedies and appeals in the award procedure of the public procurement contracts, of sectorial contracts and of the concession contracts for works and services, as well as for the organization and functioning of the National Council for Solving Complaints**

The representatives of the National Agency for Public Procurement and the Agency for Digital Agenda of Romania, the National Agency for Solving Complaints of the Republic of Moldova, as well as judges of the contentious-administrative and tax divisions within the Tribunal of Bucharest and the Court of Appeal in Bucharest attended the workshop organized by N.C.S.C.

Within the discussions related to the current issues in the field of public procurements, there were discussed various matters related to the unification of the administrative-jurisdictional practice as per the Act no. 101/2016, taking into account the relevant jurisprudence of the Court of the Justice of the European Union in terms of the public procurements, for the purposes of clarifying some basic notions and concepts with a view to providing the legal security and the incorporation of the jurisprudence of the Court of Justice of the European Union in the field.

Within this context, taking into account that including the relevant jurisprudence of the

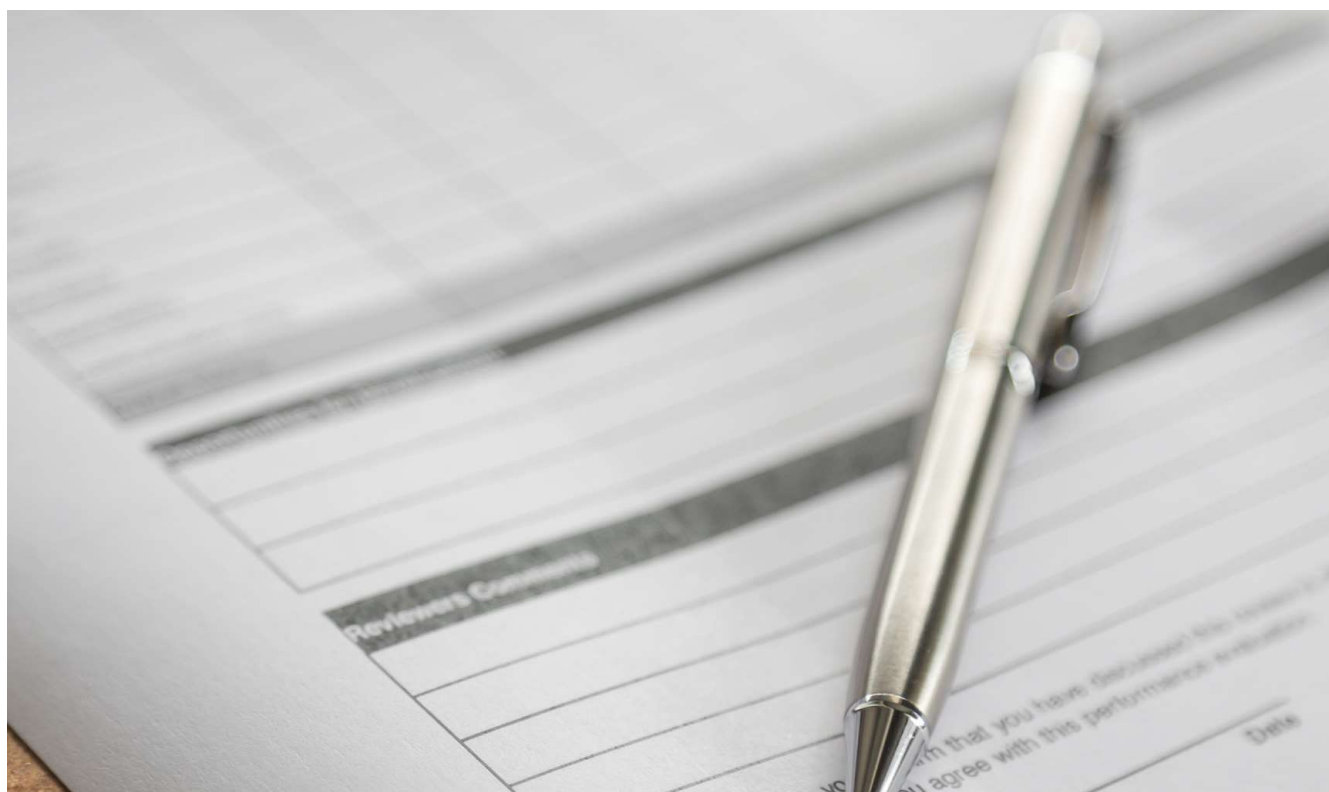
Court of Justice of the European Union is subject to some divergent interpretations between the member states and even between the contracting authorities, many relevant cases were discussed and analysed within the workshop.

On such occasion, substance and procedure aspects referring to the bond imposed by the legislator were discussed, as a prior obligation to inform the Council, the topic being analysed together with the Chief Judge of the 2nd Contentious-Administrative and Tax Division within the Tribunal of Bucharest and judges from the 8th Contentious-Administrative and Tax Division within the Court of Appeal in Bucharest.

**Exchange of Good Practices in the Public Procurement Field**

The workshop was organized in November at the headquarters of the Court of Appeal in Bucharest, in the presence of the counsellors for solving the public procurements within N. C.S.C., of several judges from the Court of Appeal in Bucharest and the representatives of the National Agency for Public Procurement.

Complex topics related to the unification of the jurisdictional-administrative practice in the public procurement field were discussed within the event, in the sense that various cases solved by N.C.S.C. were subject to review in relation to the opinion of the National Agency for Public Procurement presented in the case library published on its own website.



### 4.3. THE RELATION WITH MASS-MEDIA AND GENERAL PUBLIC

The activity carried out in 2018 by the National Council for Solving Complaints in the relation with mass-media and general public consisted in a interactive and open approach providing a full institutional transparency.

According to the Regulation for Organization and Functioning, in 2018 the communication with mass-media and general public, together with the preservation of the relation with the other institutions were managed within the Office for Information and Public Relations.

Periodically, for the purposes of a fair information of mass-media, implicitly of the public opinion, the Office for Information and Public Relations in collaboration with the Statistics and IT Office within N.C.S.C. dealt with the organization and the management of the institution ([www.cnsc.ro](http://www.cnsc.ro)), in the sense of posting information and data related to the institution activity as well as with the expedient update of the Council Official Bulletin so that any natural person or legal entity would have immediate and unrestricted access to the Council decisions.



Simultaneously, the Office for Information and Public Relations within the Council dealt continuously with the precise compliance with the provisions of the Act no. 544/2001 on the free access to the public information, in the sense of providing expediently answers to all the requests submitted by natural persons/ legal entities or by the mass-media representatives.

As to the number of itemised requests in the year 2018, the Office for Information and Public Relations within N.C.S.C. received from journalists or natural persons and legal entities 315 requests submitted in written or oral form as per the Act no.

544/2001 on the free access to public information and most of them were solved favourably, usually on the day they were submitted.

The activity of the Office for Information and Public Relations also consisted in the preparation of some press releases, but also in the preparation and conveyance of the Council Statement of Work to the central or local public administration institutions (Presidency, Government, Parliament, county councils, county residence town halls, prefectures, etc.), courts of appeal, the High Court of Cassation and Justice, non-governmental organisations, but also mass-media.

For the purposes of providing a total transparency, the institution management paid a special importance to the development of the Statistics and IT Office created in 2011 so that any information related to the functioning of the Council may be registered, processed and freely accessed by any natural person and legal entity interested in analysing the European and national public procurement system.

The Office for Information and Public Relations provided on a daily basis information to the institution management as to the news in the press and how the activity of N.C.S.C was pictured in mass-media.

Therewith, in 2018 the Council paid a special attention to the continuous development of its IT platform whose goal was the easy access by any interested natural person or legal entity to any information related to the status of the settlement of the cases lodged with the Council, the decisions issued by the Council, the history of the completed files or those ones in progress, as well as to any other relevant and useful information in order to prevent the irregularities in the field of public procurements.



## 4.4 THE REPRESENTATION OF THE NATIONAL COUNCIL FOR SOLVING COMPLAINTS AT INTERNATIONAL EVENTS – 2018

Consistent with its involvement in the international meetings aiming at the global development of the remedy system in the public procurement field, the Council participated in the fourteenth PRIMO Forum, organized by the World Bank in Bucharest. Its involvement consisted firstly in its active participation as speaker within the section - The reform of the public procurement system through (legislative) simplification, the key for innovative procurement.

Moreover, in 2018 the Council attended the common meeting, at expert level, within the European network of remedy institutions in the public procurement field, organized at Sofia, upon Bulgaria's presidency of the Council of the European Union.

On such occasion, the representative of the Council together with those ones of the European Commission chaired the debate on „the so-called abusive/ frivolous complaints”.

The meeting in the capital of Bulgaria provided to the President of the National Council for Solving Complaints the opportunity to make officially the proposal to the representatives of the

EU member states that the sixth meeting of the network of experts within the remedy institutions of the European Union be in Bucharest.

Such invitation got materialized in the fifth meeting of the expert network which took place in November last year, at Zagreb, Croatia. During such meeting, the president of the National Council for Solving Complaints together with the representative of the European Commission announced that the sixth meeting of the expert network will take place in Bucharest, under the aegis of the Romanian Presidency of the Council of the European Union.

To the extent of the collaboration with the bodies of the European Commission, the Council also participates in the events organized at Brussels, by the Permanent Representation of Romania to the European Union and last year it contributed to the success of the meeting on the topic: The Public Procurements in Romania and Belgium - opportunities of investments.





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

The budget of the National Council for Solving Complaints corresponding to the year 2018 amounted to RON 11,851 thousand and was distributed as follows:

- \* The budget provision for Current expenditure: RON 11,781 thousand out of which:
  - Personnel expenses: RON 10,198 thousand.
  - Goods and services: RON 1,491 thousand.
- \* Budget provision for Capital expenditure: RON 70 thousand.

The budget of N.C.S.C., detailed per titles and budget chapters is shown in the below table.

- RON thousand -

Chapter	Subchapter	Paragraph	Group/Title	Article	Indent	Name	PROGRAMME	Quarter I	Quarter II	Quarter III	Quarter IV
5000						TOTAL BUDGET	11,851	3,380	3,030	3,012	2,429
			01			CURRENT EXPENDITURE	11,781	3,340	3,010	3,002	2,429
			10			TITLE I – PERSONNEL EXPENDITURE	10,198	2,900	2,600	2,600	2,098
			20			TITLE II – GOODS AND SERVICES	1,491	417	387	379	308
			70			CAPITAL EXPENDITURE	70	40	20	10	0
			71			TITLE XII NON-FINANCIAL ASSETS	70	40	20	10	0
5001						EXPENDITURE - STATE BUDGET	11,851	3,380	3,030	3,012	2,429
			01			CURRENT EXPENDITURE	11,781	3,340	3,010	3,002	2,429
			10			TITLE I PERSONNEL EXPENDITURE	10,198	2,900	2,600	2,600	2,098
			20			TITLE II GOODS AND SERVICES	1,491	417	387	379	308
			70			CAPITAL EXPENDITURE	70	40	20	10	0
			71			TITLE XII NON-FINANCIAL ASSETS	70	40	20	10	0
5101						PUBLIC AUTHORITIES AND EXTERNAL ACTIONS	11,851	3,380	3,030	3,012	2,429
			01			CURRENT EXPENDITURE	11,781	3,340	3,010	3,002	2,429



- RON thousand -

Chapter	Subchapter	Paragraph	Group/Title	Article	Indent	Name	PROGRAMME	Quarter I	Quarter II	Quarter III	Quarter IV
			10			TITLE I PERSONNEL EXPENDITURE	10,198	2,900	2,600	2,600	2,098
			20			TITLE II GOODS AND SERVICES	1,491	417	387	379	308
			59			TITLE XI OTHER EXPENDITURE	92	23	23	23	23
			70			CAPITAL EXPENDITURE	70	40	20	10	0
			71			TITLE XII NON-FINANCIAL ASSETS	70	40	20	10	0
	01					Executive and legislative authorities	11,851	3,380	3,030	3,012	2,429
		03				Executive Authorities	11,851	3,380	3,030	3,012	2,429

