



NATIONAL COUNCIL
FOR SOLVING
COMPLAINTS



romania2019.eu

THE NATIONAL COUNCIL FOR SOLVING COMPLAINTS

2019

ACTIVITY
REPORT

TABLE OF CONTENTS

FOREWORD	1
1. GENERAL CONSIDERATIONS	2
1.1. The N.C.S.C. role and mission	3
1.2. The human resources, the management and organisational structure	7
2. THE ACTIVITY DEVELOPED BY N.C.S.C. IN THE PERIOD	
THE 01ST OF JANUARY – THE 31ST OF DECEMBER 2019	9
2.1. Complaints lodged by business operators	9
2.1.1. The trend of the complaints lodged by the business operators	10
2.1.2. The subject matter of the complaints lodged by the business operators	25
2.2. Files solved by the National Council for Solving Complaints	43
2.2.1. The trend of the files solved by the National Council for Solving Complaints	43
2.3. Decisions rendered by the National Council for Solving Complaints	45
2.3.1. The trend of the number of the decisions issued by the N.C.S.C.	45
2.3.2. The standing of the settlement of the complaints lodged with the N.C.S.C.	49
2.4. The activity of the N.C.S.C. in relation to the estimated value of the award procedures ..	52
2.4.1. The estimated value of the award procedures under which the National Council for Solving Complaints rendered decisions	52
2.4.2. The estimated value of the procedures under which the N.C.S.C. issued decisions for the acceptance of the complaints in comparison with that one of the procedures commenced via S.E.A.P.	56
3. THE QUALITY OF THE N.C.S.C. ACTIVITY FROM	
THE 01ST OF JANUARY 2019 TO THE 31ST OF DECEMBER 2019	59
3.1. The standing of the decisions issued by N.C.S.C. and amended by the courts of appeal as a consequence of the actions brought against	59
3.1.1. The standing of the decisions issued by N.C.S.C. as to the substance of the complaints and amended by the courts of appeal as a consequence of the actions brought against	59
4. THE INSTITUTIONAL TRANSPARENCY AND THE PERSONNEL TRAINING	63
4.1. The institutional transparency	63
4.1.1. The involvement of the council within the network of first instance review bodies on public procurement from the member states and the romania's holding the presidency of the Council of the European Union	64
4.1.2. Projects and initiatives	66
4.2. The unification of the administrative-jurisdictional practice	67
4.3. Professional training	70
4.4. Institutional collaborations	71
4.5. Decisions related to the existence of some possible conflicts of interests	71
4.6. The relation with mass-media and general public	76
5. THE BUDGET OF THE NATIONAL COUNCIL FOR SOLVING COMPLAINTS	78
CONCLUSIONS AND FORECASTS	79



FOREWORD



FLORENTINA DRĂGAN
President of the N.C.S.C.

2019 was a year full of events as far as the public procurement system in Romania is concerned, if we consider the organization in Bucharest of the 6th meeting of the Network of First Instance Review Bodies on Public Procurement from the Member States of the European Union, the National Council for Solving Complaints playing an important role of moderator/ mediator of the major items in the meeting agenda.

The number of complaints is an indicator of the malfunctions within the system, and the amendment and the supplementation of the new legal frameworks reveals, most probably, other hardships, for choice, related to the accurate assimilation reading thereof.

The jurisdictional mechanism provided by the Council proved to be capable of generating in a short period of time lawful and grounded solutions which determined the majority of the persons damaged by the contracting authorities to address it. For an

unitary approach in settling the complaints by the 11 chambers, the prevention and decrease or removal of the inconsistencies in the chambers' approaching of the cases, the Council continued to organize consultation meetings with the magistrates involved in the settlement of the disputes related to the public procurements, especially from the courts of appeal, but also with experts from the National Agency for Public Procurements. It becomes more obvious that the focused effort of the professionals is more than ever required in order to deal with the changes arising at an accelerated rate.

Maintaining the focus on providing some fast and quality results, corroborated with the accumulated experience in those 14 years following the creation, have strengthened the position of the Council in the specialised administrative-jurisdictional system and equally, diminished the vulnerabilities of the institution.

The Council proposes to strengthen its functional capacity and to identify unitary practical and predictable solutions on the complaints which would exclude possible disputes. Certainly, together with the efficiency of the legal act, one of the undertaken objectives is still the increase of the economic operator's trust in the administrative jurisdiction..

As we mentioned above, the insufficiencies in the system are outlined the best in the complaints forwarded to the Council by the business environment, body that is to continue to endeavour to obtain justice, but it mainly depends on the quality and the coherence of the legal framework.

1. GENERAL CONSIDERATIONS

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



THE NATIONAL COUNCIL FOR SOLVING COMPLAINTS

(N.C.S.C.) is a specific jurisdictional body (in the field of the public procurements), created in order to guarantee the compliance with the legislation by the contracting authorities, due to its main role of remedy and in the alternative, of cancellation in the unlawful award procedures.

The Council is an administrative body of public law, with jurisdictional powers, which benefits from the independence necessary for fulfilling the administrative-jurisdictional deeds, insubordinate to any public authority or institution and compliant with the provisions of the Romanian Constitution art. 21(4).

Although the activity of the Council for Solving Complaints lodged by the business operators under the procedures for the award of the public procurements/ sectoral/ concession ones 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.

Pursuant to the legal provisions¹, those 36 members of the Council, at least half of whom have a Bachelor's degree in law, with a 9-year seniority in the legal field, are special public servants, appointed by the decision of the Prime Minister, at the proposal of the President of the Council upon successfully passing a competition².

The main task of the Council members consists in the settlement of the complaints lodged under the award procedures, through specialized chambers, consisting of 3 members³.

Pursuant to the provisions of the article 12 correlated to the article 3 (a) in the Act no. 101/2016, the Council duty is limited to settling the complaints lodged under the award procedures provided by the article 68 in the Act no. 98/2016⁴, article 82 in the Act no. 99/2016⁵ and art. 50 in the Act no. 100/2016⁶, however it has been enhanced by the amendments made to these acts, by the Government Emergency Ordinance no. 45/2018, regulation that adds new paragraphs to the provisions of the article 68 in the Act no. 98/2016 and of the article 82 in 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 European Court of Justice practice is relevant as follows:

¹ The annex no. 1 to the Regulations for the organization and operation of the National Council for Solving Complaints approved under the Government Resolution no. 1037/2011, published with the Official Gazette, Part I, no. 775 as of the 02nd of November 2011

² Pursuant to the article 45 correlated to the article 46 in the Act no. 101/2016

³ The article 13 in the Act no. 101/2016

⁴ The Act 98/2016 on public procurements, as subsequently amended and supplemented

⁵ The Act no. 99/2016 on sectoral procurements, as subsequently amended and supplemented

⁶ The Act no. 100/2016 on the concessions of works and concession of services, as subsequently amended and supplemented



• The case C-26/03 Stadt Halle and RPL Lochau, paragraphs 33 and 34 of the Judgement 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)”.

Pursuant to law, N.C.S.C. operates by virtue of its own Regulations of organization and operation which was approved under the Government Resolution no. 1037/2011⁷. While carrying out its activity, N.C.S.C. observes solely the law; while exercising its duties, the Council renders decisions and while carrying out its activity, the Council provides the coherent enforcement of the effective law, according to the specifically regulated law principles⁸ - ***lawfulness, expedience, contradictorality, the provision of right to defence, the impartiality and the independence of the administrative-jurisdictional activity.***

Pursuant to the article 14 (1) in the Act no. 101/2016, the complaints lodged by the business operators via administrative-jurisdictional proceeding are assigned for settlement at random, by electronic means, to a chamber consisting of three Council members, out of which at least one member is graduate in law, with a minimum nine-year seniority in the legal field. The chamber is chaired by one of its members, appointed based on the rotation procedure.

For the proper operation 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.

⁷ Published with the Official Gazette, Part I no. 775 as of the 2nd of November 2011

⁸ The article 15 in the Act no. 101/2016

The Council President, elected from among the members of the Council, for a 3-year-period⁹, by secret voting, with absolute majority¹⁰ of the Council members, must be a graduate in law¹¹ and has the power of Chief Authorising Officer¹².

The amount of work pursued by N.C.S.C. is reflected mainly by the number of submitted complaints, by the number of issued decisions and conclusions and by the number of solved files, whereas the quality and results of the Council activity are reflected by the number of the decisions that were appealed with the Courts of Appeal, in the territorial jurisdiction in the area where the contracting authority is headquartered and by the number of appeals granted.

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**¹³ regulated by the Government Emergency Ordinance no. 39/2018¹⁴ as subsequently amended and supplemented;

- to solve the complaints lodged under **the award procedures for the public procurement contracts in fields of defence and security**, regulated by the Government Emergency Ordinance no. 114/2011¹⁵, for which purpose the counsellors 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 the Government Emergency Ordinance no. 114/2011 on the award of public procurement contracts in the field of defence and security, a regulation in force as of the 1st of 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 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, personnel protection and protection of the sources generating information;

- 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.

⁹ With the possibility of renewing the commission one time

¹⁰ The article 38 in the Act no. 101/2016

¹¹ Pursuant to the article 44 in the Act no. 101/2016

¹² Pursuant to the article 40 in the Act no. 101/2016

¹³ Pursuant to the article 29 in the Government Emergency Ordinance no. 39/2018

¹⁴ The Government Emergency Ordinance no.39/2018 on the public-private partnership, as subsequently amended and supplemented

¹⁵ The article 188 in the Government Emergency Ordinance no. 114/2011 on the award of certain public procurement contracts in the defence and security fields, published with the Official Gazette no. 932/29.12.2011



It is worth mentioning that, in compliance with the provisions of the Government Resolution 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, as well as 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 such regulation, 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 process and established measures for strengthening the prevention mechanisms already in place.

In 2019, the Council took part actively in all the meetings, working groups, sessions, etc. held by various public institutions (the Parliament of Romania, the National Agency for Public Procurement, the National Office for Centralized Procurements, the Courts of Appeal, etc.) or in partnership with them for the purposes of passing and strengthening the legislation, interpreting the same for creating a shared practice in terms of the unitary approach of the legal provisions in the public procurement field transposing the public procurement-related directives.

1.2 THE HUMAN RESOURCES, THE MANAGEMENT AND ORGANISATIONAL STRUCTURE

As organizational structure, the Council worked in the year 2019 with 32 counsellors for solving complaints in the field of public procurements, as per the Government Resolution no. 1037/2011, organized in 11 chambers for solving complaints in the field of public procurements..

The Council staffing scheme also includes 52 technical-administrative employees although pursuant to the provisions of the Government Resolution no. 1037/2011 approving the N.C.S.C. Regulation for the organization and operation, 64 posts are provided to be allotted for the technical-administrative staff.

The management of the **NATIONAL COUNCIL FOR SOLVING COMPLAINTS** is provided by Ms. Florentina DRAGAN, holding the second year-commission.

In the exercise of her powers, the President of the National Council for Solving Complaints is assisted by a college consisting of three members (Mr. Lehel-Lorand BOGDAN, Ms. Doina-Florica ENIȚĂ, Mr. Cătălin POPESCU), as elected with absolute majority by secret voting from the counsellors for solving the public procurement complaints, in their first-year commission.





Within the **NATIONAL COUNCIL FOR SOLVING COMPLAINTS**, on the 31st of December 2019, there were 84 employees (100% holding higher education), 58 of them being women (69,05%) and 26 men (30,95%) and the average age is 48 at the level of the institution.

From the 84 persons employed on the

31st of December 2019 with N.C.S.C., 53 accounted for the technical-administrative staff as execution public servants, employed to the chambers for solving complaints while 32 accounted for counsellors for solving complaints – as special public servants and the remaining personnel as contractual personnel.

According to the Council Regulation for organization and operation¹⁶, 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 attached to the chambers;
- Legal Department including:
 - Legal and Administrative Litigation Service;
 - Legal Service of the chambers for solving complaints;
- Internal Public Audit Department;

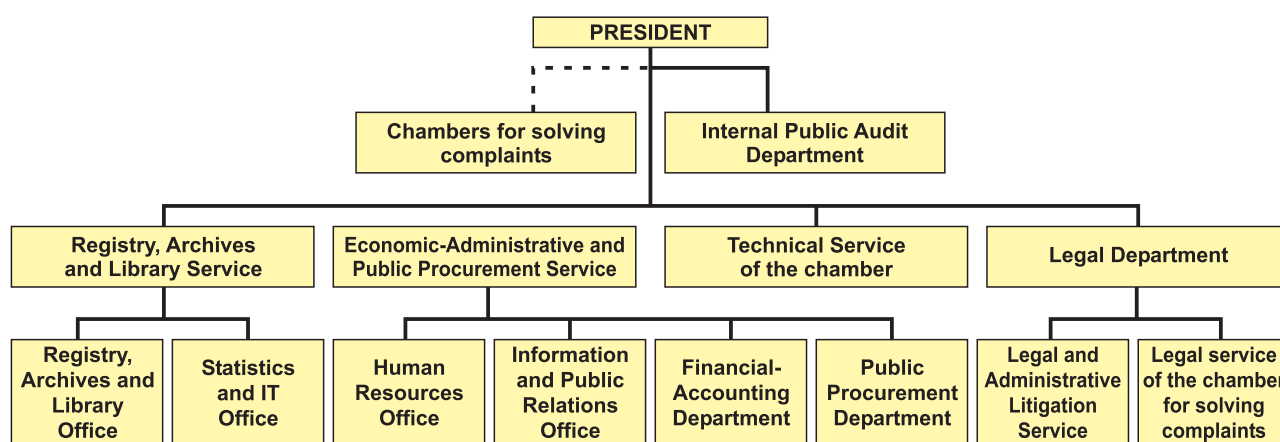


Figure 1 - N.C.S.C. ORGANIZATIONAL CHART

¹⁶ Approved under the Government Resolution no. 1037/2011

2. THE ACTIVITY DEVELOPED BY N.C.S.C.

IN THE PERIOD THE 01ST OF JANUARY – THE 31ST OF DECEMBER 2019

2.1. COMPLAINTS LODGED BY BUSINESS OPERATORS



The number of the complaints filed and lodged by the business operators, their trend, the subject matter of the complaints, the complexity thereof, how the complaints

were solved represent important indicators that may be used in the analysis of the activity carried out by the Council.



2.1.1. THE TREND OF THE COMPLAINTS LODGED BY THE BUSINESS OPERATORS

In the period **the 1st of January – the 31st of December 2019**, the number of **complaints (files)** lodged by the business operators and registered with N.C.S.C. amounted to **2,803**.

Throughout those twelve months of the year 2019, the number of complaints submitted by the business operators and lodged with N.C.S.C. had the following trend:



January	138	July	253
February	178	August	223
March	215	September	294
April	213	October	289
May	258	November	231
June	262	December	249

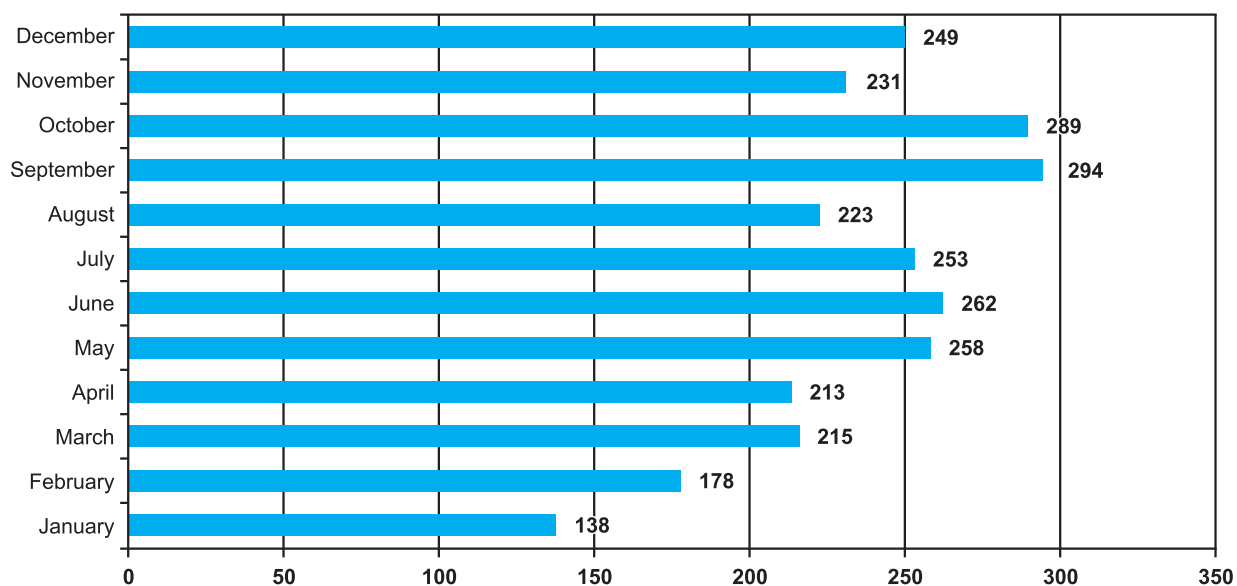


Figure 2 - The trend of the complaints submitted by the business operators to N.C.S.C. in 2019

Of the total 2,803 complaints lodged in the course of 2019, in 307 cases the business operators waived the complaints, accounting for 10,95% of the total complaints.

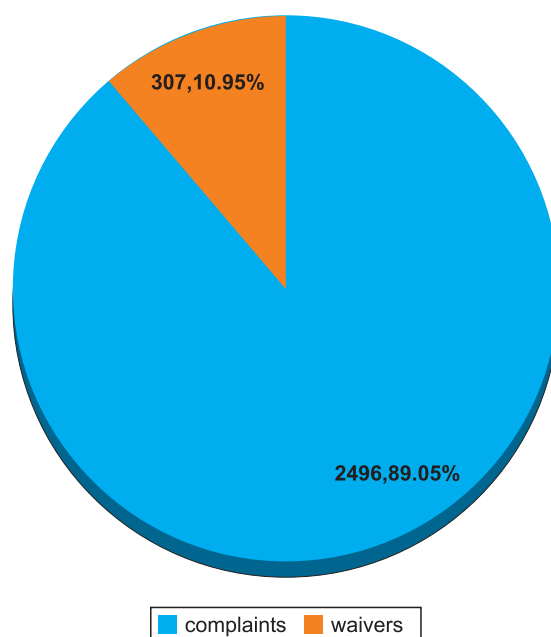


Figure 3 - The number of the waivers of complaints in relation to the number of complaints settled by N.C.S.C. in 2018

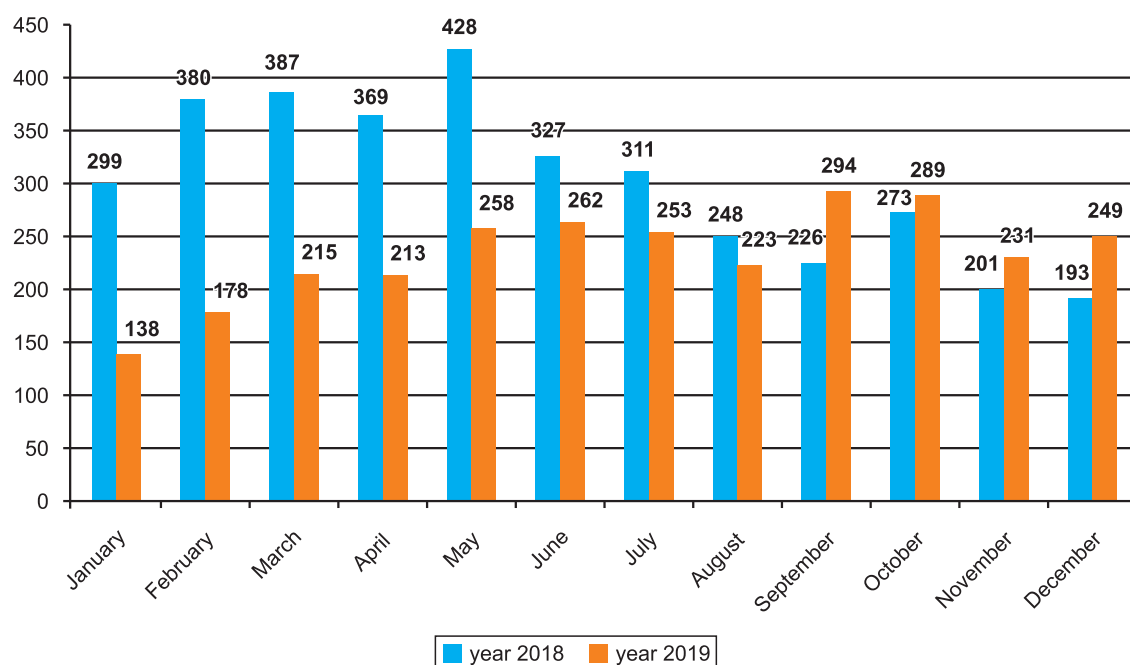


Figure 4 - The trend of the complaints (files) submitted by the business operators to N.C.S.C. in the period 2018 – 2019

By analysing the trend of the complaints (files) submitted by the business operators and lodged with N.C.S.C. in the course of the years 2018 and 2019 it can be noticed that in the course of 2019, the number of the complaints dropped in the first semester in relation to the first semester of 2018, on the account that in the summer of 2018, the Government Emergency Ordinance no. 45/2018 was passed to regulate the condition of admissibility for lodging the complaint, the establishment of a bond according to the assessed value and the filing of the prior notice with the contracting authority was removed.

Upon comparison of the total trend of the complaints submitted in 2019 to the

trend submitted in 2018, it can be noticed a decrease by 22,72%, decline that may be deemed significant.

The reason of such decline in the number of complaints submitted to N.C.S.C. by the business operators in 2019 compared to the previous year was the introduction of the business operators' obligation to establish a bond¹⁷ 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 and the assessed/ determined value of the contract to be awarded and the type of the contracting authority, the maximum value being RON 880,000.

¹⁷ The trend of the complaints (files) submitted by the business operators

The purpose of introducing this bond is to protect the contracting authorities against the risk of the complaining parties' potential improper behaviour, their obligation being to set up a bond for the entire period between the date of lodging the complaint with N.C.S.C. or the competent courts and the date when the Council or the court decision is rendered final.

It must be mentioned that the decline of the number of complaints submitted by the business operators in 2019, in comparison with the previous years is due to the package of legislative amendments initiated in 2018 which diminished "the boom" of the business operators of submitting complaints by the introduction of the bond.

In most of the files, at the request of

the Council as to some possible claims on the bond, 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 the day when the decision was rendered final¹⁸.

In relation to these aspects, the bond reaches its purpose partially, in the meaning that the legal provisions had another effect, namely that the business operators refrained in complaining before the Council or the courts. It must be emphasized that the absence of the complaints is no guarantee that the award procedures in the course of 2019 were commenced and developed in a fair and lawful manner.

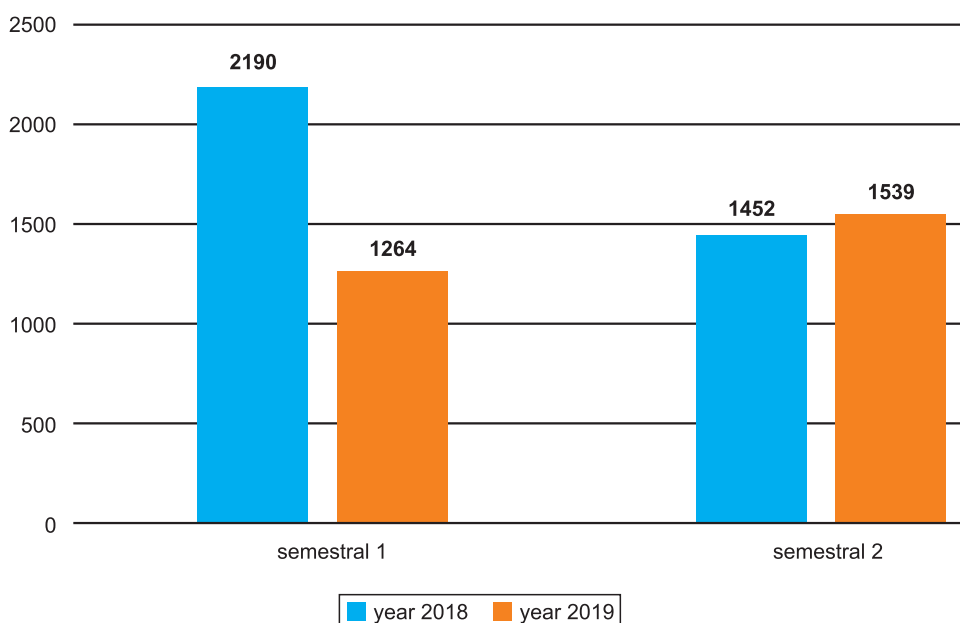


Figure 5 - The semestral trend of the complaints submitted by the business operators to N.C.S.C. in the period 2018 – 2019

¹⁸ See the Substantiation Note to the Government Emergency Ordinance no. 45/2018 for the amendment and supplementation of some legal instruments with 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>



Thus, in the first semester of 2019, the number of complaints declined by 42.28% (926 complaints) in comparison to the similar period in the previous year, but in the second semester – their number increased a little by 5.65% (87 complaints) in relation to the second semester of 2018.

It must be emphasized also that this decline in the number of complaints submitted to N.C.S.C. in the course of 2019, in comparison to the previous year,

occurred under the circumstances of the introduction of the obligation to set up the bond.

In 2019, **17,66% (495)** of the **complaints** submitted by the business operators via administrative-jurisdictional channel were directed **against the tender documentation**, while **82,34% (2308)** were brought **against the result of the award procedure**.

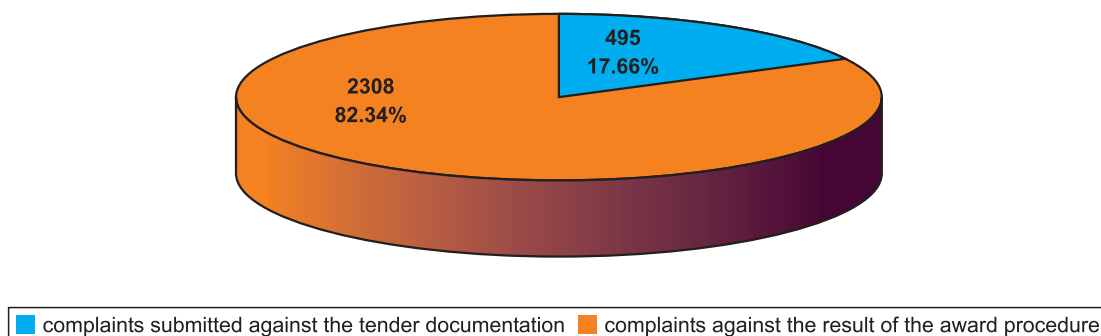


Figure 6 - The standing of the complaints submitted against the tender documentation in comparison to those ones submitted against the result of the award procedure in 2019

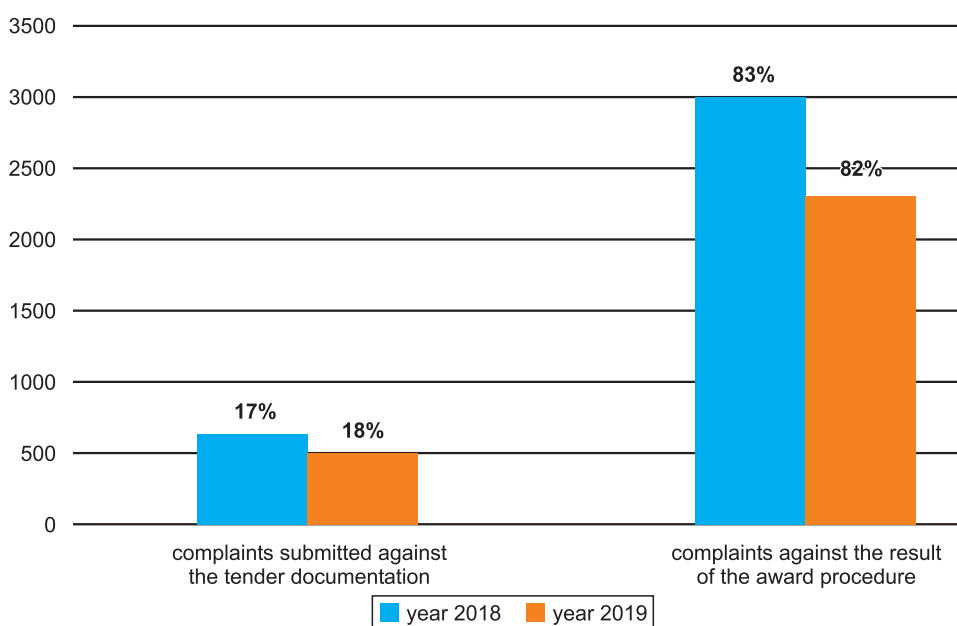


Figure 7 - The comparison statement of the complaints submitted against the tender documentation and against the result of the award procedure in the period 2018-2019

It is interesting to notice that, although the number of complaints submitted to N.C.S.C. in 2019 declined in comparison to the previous year, 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 18% complaints, respectively 82% complaints against the result of the award procedure out of the total number thereof.

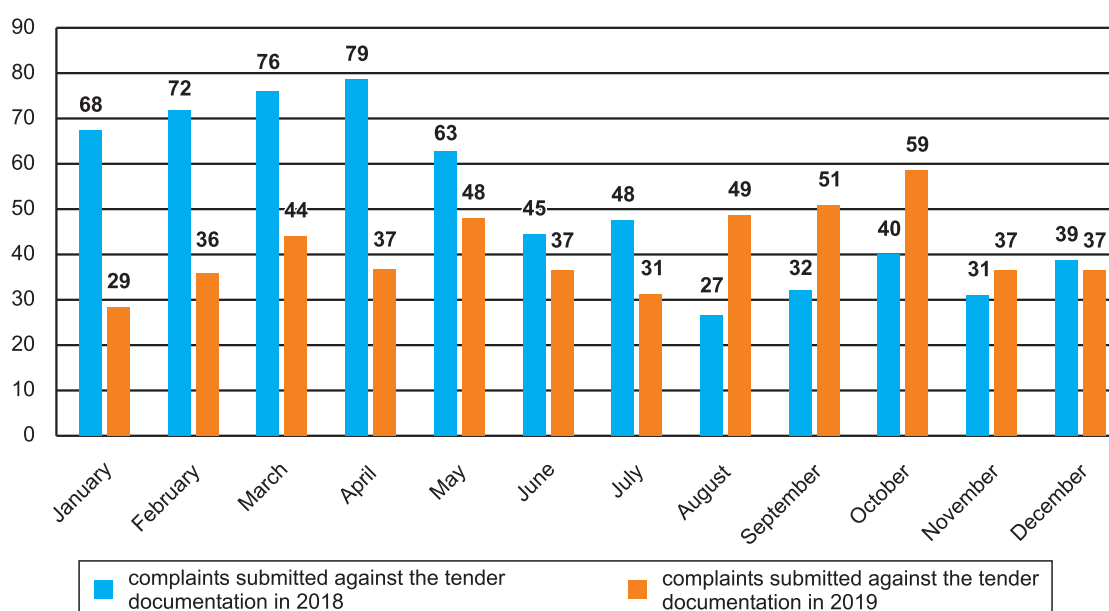


Figure 8 - The trend of the complaints submitted against the tender documentation in 2019, in comparison to 2018

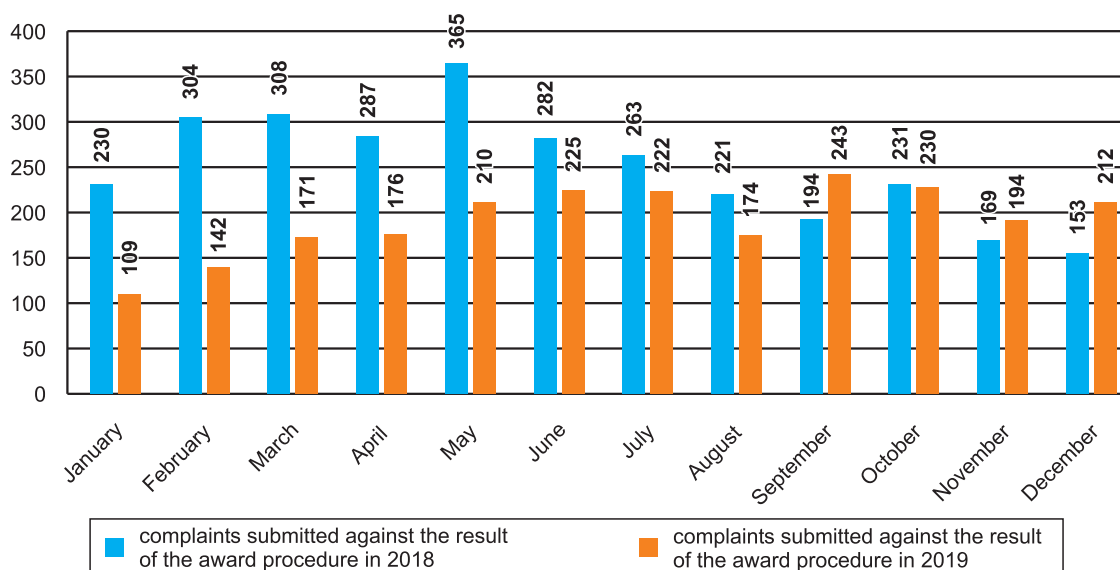


Figure 9 - The trend of the complaints submitted against the result of the award procedure in 2019, in comparison to 2018



Reported to the number of the award procedures challenged in 2019 to the award procedures commenced via SEAP in comparison to 2018 is found a **decrease by 7,78%** in comparison to 2018, while the

number of the procedures commenced with SEAP in 2019 increased by 56,58% in comparison to 2018, as it may be seen in the below chart .

	2016	2017	2018	2019
Number of award procedures challenged before N.C.S.C.	1.988	2.800	2.507	2.312
Total number of public tender procedures commenced via Electronic Public Procurement System	19.079	28.165	35.434	62.629
Weight	10,42%	9,94%	7,08%	3,69%

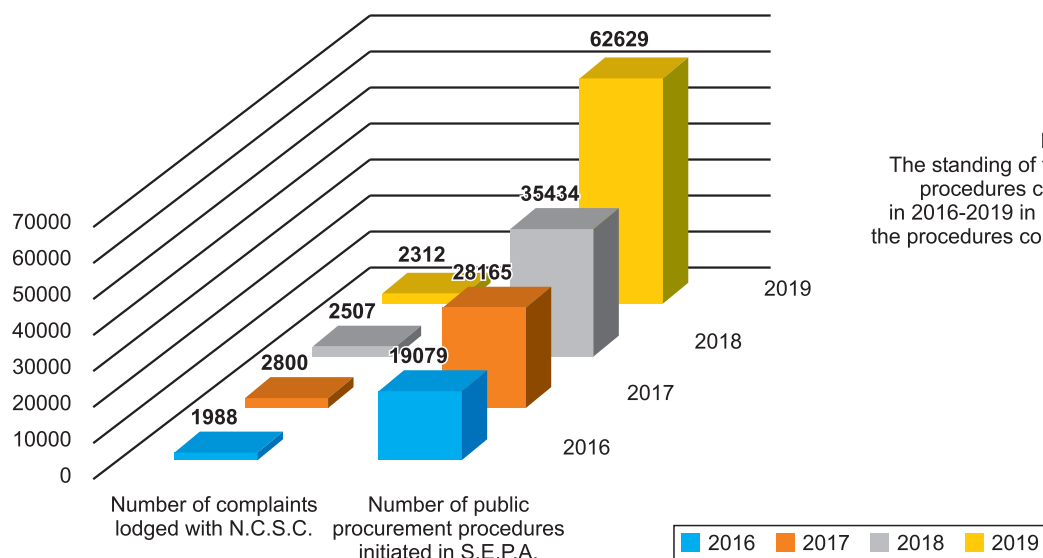


Figure 10
The standing of the award
procedures challenged
in 2016-2019 in relation to
the procedures commenced
via SEAP

By analysing this chart it may be noticed that in 2019 there were still the effects of restriction generated by the legal obligation to set up a bond, effects that commenced since the second half of 2018.

In terms of the distribution by administrative-territorial units (UAT), the number of complaints submitted by the business operators in 2019 had the following trend:

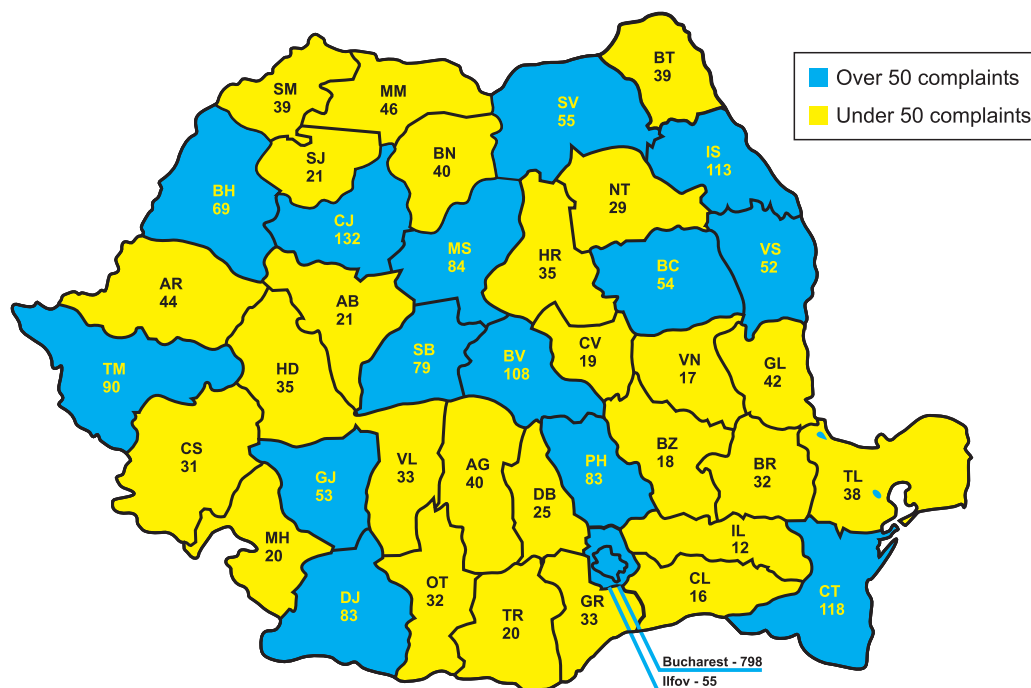


Figure 11 - Distribution by counties of the complaints submitted by the business operators in 2019

COUNTY	COMPLAINTS	COUNTY	COMPLAINTS
IALOMIȚA	12	ARGEȘ	40
CĂLĂRAȘI	16	BISTRIȚA NĂȘĂUD	40
VRANCEA	17	GALAȚI	42
BUZĂU	18	ARAD	44
COVASNA	19	MARAMUREȘ	46
MEHEDINȚI	20	VASLUI	52
TELEORMAN	20	GORJ	53
ALBA	21	BACĂU	54
SĂLAJ	21	ILFOV	55
DÂMBOVIȚA	25	SUCEAVA	55
NEAMȚ	29	BIHOR	69
CARAȘ SEVERIN	31	SIBIU	79
BRĂILA	32	DOLJ	83
OLT	32	PRAHOVA	83
GIURGIU	33	MUREȘ	84
VÂLCEA	33	TIMIȘ	90
HARGHITA	35	BRAȘOV	108
HUNEDOARA	35	IAȘI	113
TULCEA	38	CONSTANȚA	118
BOTOȘANI	39	CLUJ	132
SATU MARE	39	BUCUREȘTI	798



With regard to the award procedures funded by European funds, it can be noticed that 5372 award procedures were commenced via SEAP and 405 complaints were lodged within such procedures.

It can be noticed in the below table, the

2019 monthly trend of the complaints submitted to N.C.S.C. under the procedures funded by European funds, compared to the procedures commenced via SEAP and funded by European funds.

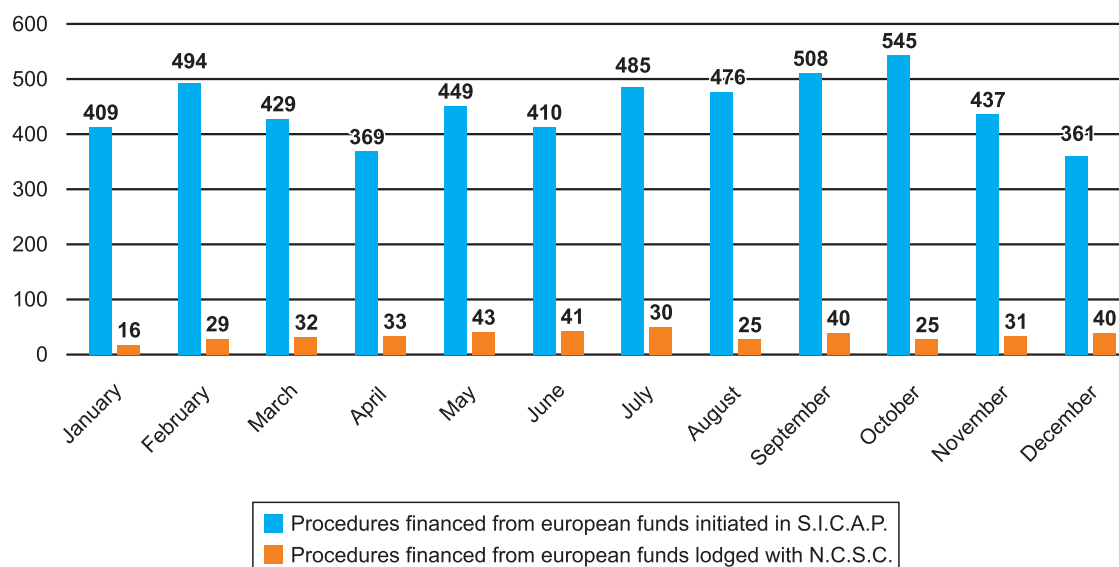


Figure 12 - The trend of the number of complaints submitted to N.C.S.C. in 2019 under the award procedures funded by European funds compared to the number of the award procedures funded by European funds and commenced via SEAP

In relation to the funding source for the award procedures commenced for entering into public procurement contracts, it must be emphasized that in 2019 a number of **405 complaints were lodged against the award procedures funded by European funds by administrative-jurisdictional way which accounted for 14,45% of the**

total complaints submitted to the Council, while **2,398** submitted complaints, that is **85,55% of the total complaints submitted by the business operators to N.C.S.C.** were directed against the award procedures for the public procurement contracts funded by national public funds.

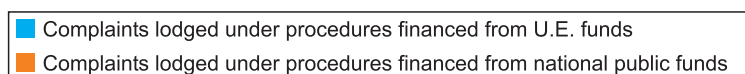
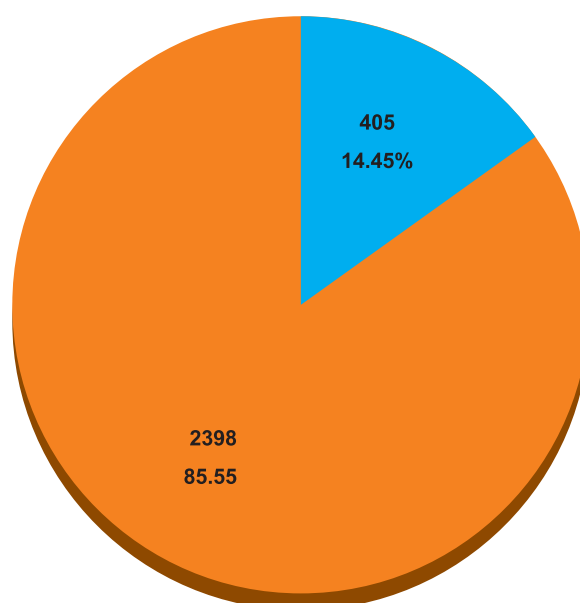


Figure 13 - Complaints submitted to N.C.S.C. in 2019 under award procedures by the funding source

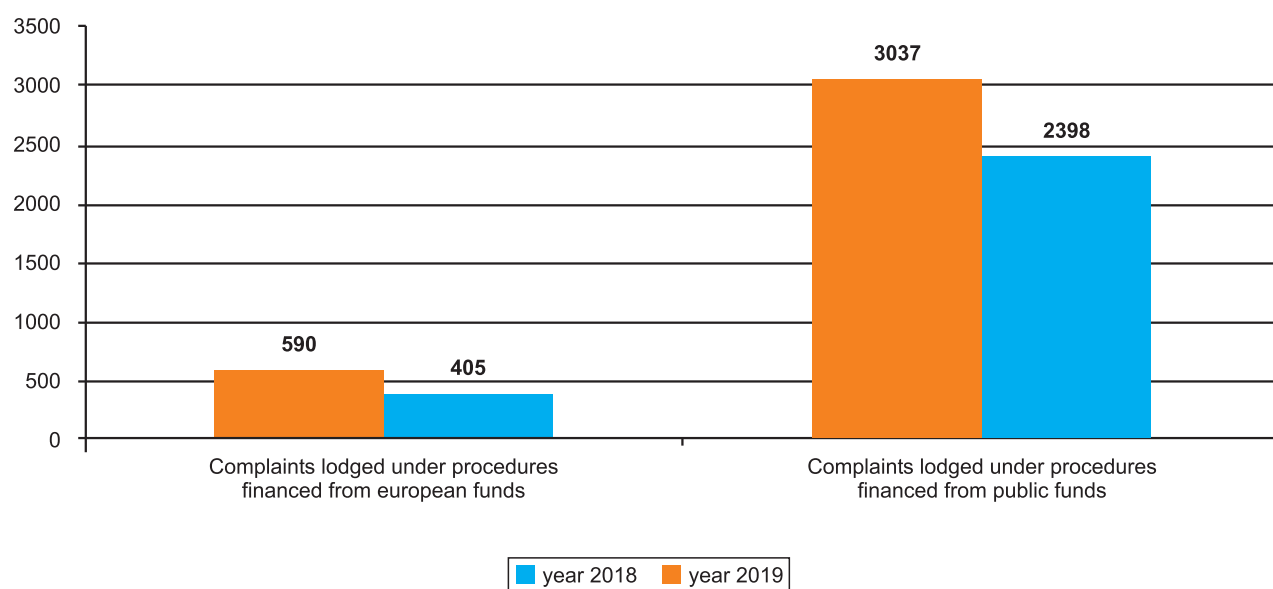


Figure 14 - The standing of the complaints submitted in 2019 by the business operators by the funding source of the award procedures in comparison to 2018



It can be noticed from the previous chart that the number of the complaints submitted in the award procedures funded by European funds declined in 2019 in comparison to the previous year, respectively by 31,36% (185 complaints), while the number of the complaints submitted in the award procedures funded by national public funds declined in 2019 only by 21.04% (639 complaints).

In terms of the monthly trend, the number of the complaints submitted to N.C.S.C. in the award procedures for the public procurement contracts funded by European funds in 2019 had such trend as shown below in comparison to previous year.

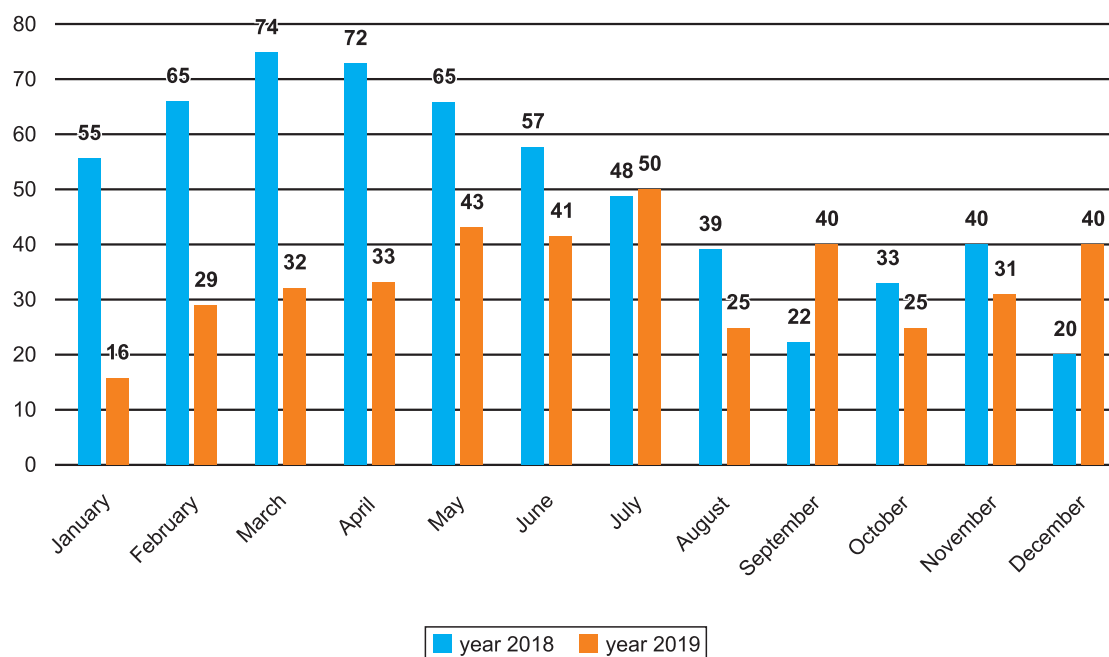


Figure 15 - The complaints submitted to N.C.S.C. in the period 2018 - 2019 under the procedures funded by European funds

Similarly, the number of the complaints submitted to N.C.S.C. in 2019 under the award procedures for the public

procurement contracts funded by national funds (local/state budget) had the following trend in comparison to the previous year.

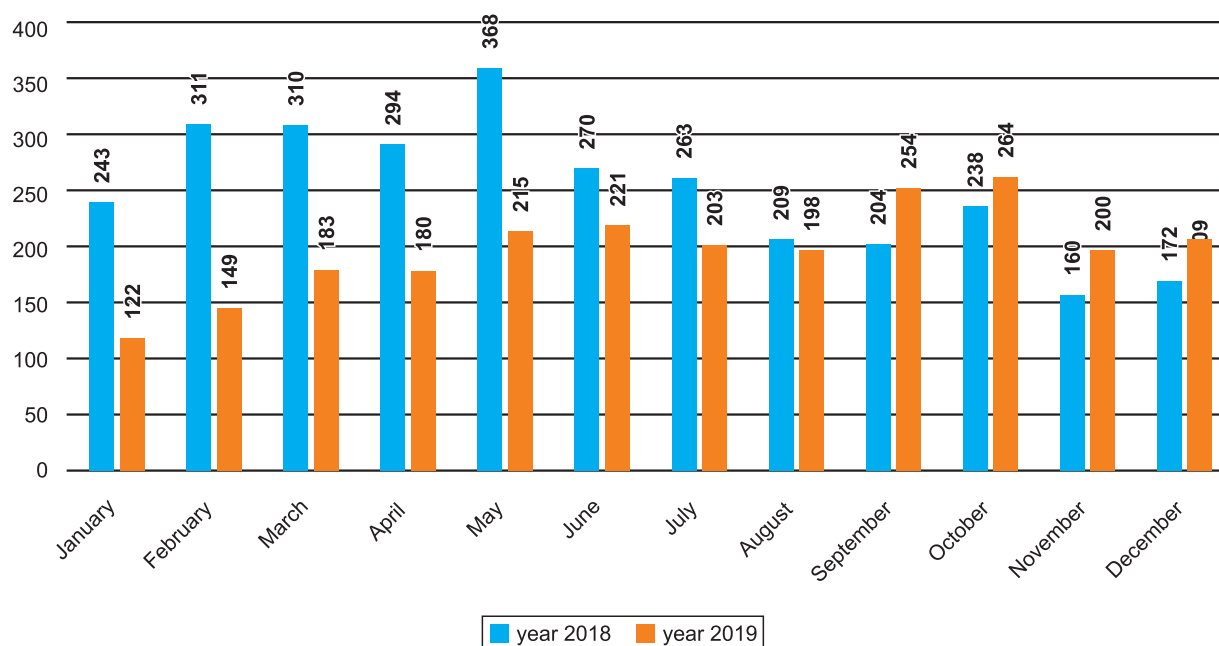


Figure 16 - The complaints submitted to N.C.S.C. in the period 2018 - 2019 under the procedures funded by national funds

In statistical terms, from its creation until the 31st of December 2019, **67,824** complaints were submitted to N.C.S.C. by business

operators participating in various public procurement procedures.

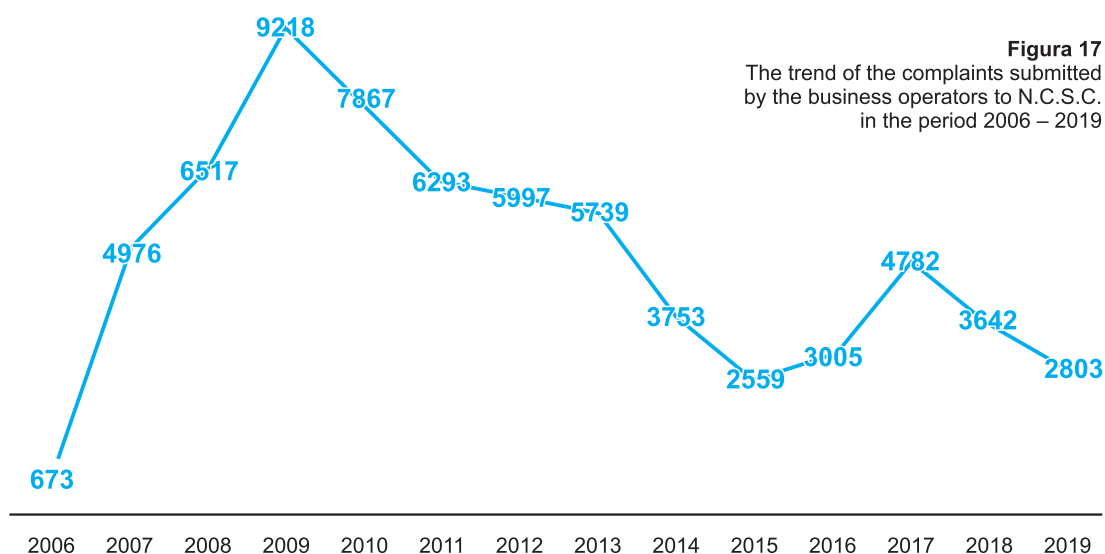


Figura 17
The trend of the complaints submitted by the business operators to N.C.S.C. in the period 2006 – 2019



By analysing this chart, it can be noticed that the number of the complaints have been continuously declining from 2009, when a maximum number of complaints were lodged.

In the course of 2018 and throughout 2019, in disregard of the missing institutional transparency and legislative stability that favoured the 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 settling 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 2019 there were:

- 1 (one) award procedure under which N.C.S.C. ordered 7 times that the bids shall be reassessed, for which purpose it rendered 7 decisions;
- 4 (four) award procedures under which N.C.S.C. ordered 6 times that the bids shall be reassessed, for which purpose it rendered 6 decisions;
- 7 (seven) award procedures under which N.C.S.C. ordered 5 times that the bids shall be reassessed, for which purpose it rendered 5 decisions;
- 11 (eleven) award procedures under which N.C.S.C. ordered 4 times that the

bids shall be reassessed, for which purpose it rendered 4 decisions;

- 41 (forty-one) award procedures under which N.C.S.C. ordered 3 times that the bids shall be reassessed, for which purpose it rendered 3 decisions;

- 214 (two hundred and fourteen) award procedures under which N.C.S.C. ordered 2 times that the bids shall be reassessed, for which purpose it rendered 2 decisions.

Another aspect that must be emphasized is that 103 were issued under which the Council accepted the complaints and ordered that the bids shall be reassessed, however the contracting authorities preferred to bring an action and not to implement the N.C.S.C. decision, of which, 56 actions were dismissed and the N.C.S.C. decisions were maintained, 10 decisions were partly amended and 16 fully amended, with 11 outstanding actions pending settlement as of the date hereof.

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 in the course of 2019, 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 - 678 complaints (24.19%);**
- award procedures for the public procurement contracts with the subject matter **performance of services - 939 complaints (33.50%).**
- award procedures for the public procurement contracts with the subject matter **supply of products - 1.186 complaints (42.31%);**

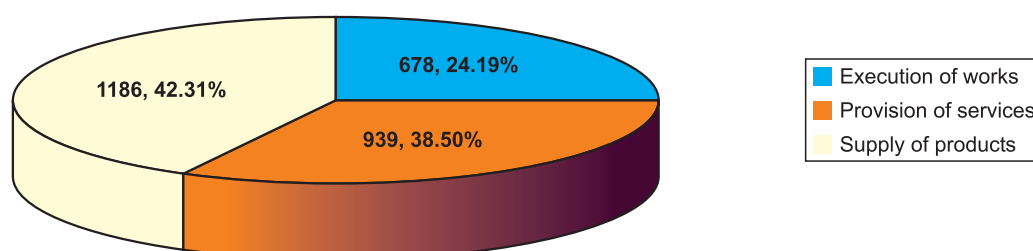


Figure 18 - The standing of the complaints submitted in 2019 by the business operators, according to the contract type

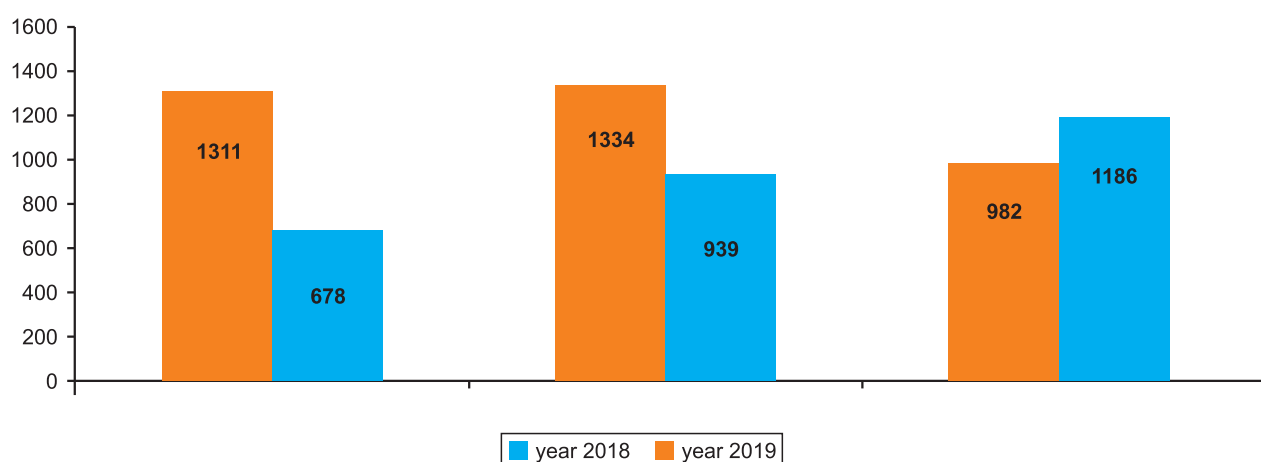


Figure 19 - The standing of the complaints submitted in 2019 by the business operators, according to the contract type, in comparison to the year 2018

By analysing the chart related to the complaints submitted according to the type/ subject matter of the public procurement contract, it can be noticed that upon the decline of the number of complaints in 2019 in comparison to the previous year, the most important decline was in terms of the complaints lodged against the award procedures for the public procurement contracts dealing with the performance of works (48.28%), followed by the decline of the complaints lodged against the award procedures of the procurement contracts

dealing with the performance of services (29.61%). In terms of the complaints lodged against the award procedures for the procurement contracts dealing with the procurement of products, it can be noticed that it increased in comparison to the previous year by 17.20%.

In the course of 2019, 255 complaints/ files were allotted randomly, electronically, for settling purposes, to the **11 chambers for solving complaints** within N.C.S.C. resulting in an average monthly load of around 21 complaints (files)/chamber.



Although the number of the complaints lodged in 2019 by the business operators declined, the complexity of the files was high and the 11 chambers for solving complaints within the institution accurately observed the deadlines for settling the complaints, as provided for in the article 24 (1) in the Act no. 101/2016. In terms of the deadline for settling the complaints it must be emphasized that it is the shortest in the European Union and Romania is ranked before Germany and Austria.

Moreover, the introduction of the bond increased the number of deeds issued by the Council and the complexity thereof, 2,125 decisions being issued, as compared to 1,107 issued in 2018 and the reimbursement of the bonds generated a high volume of activities (correspondence, decisions, the management of securities, the reimbursement thereof, etc.)

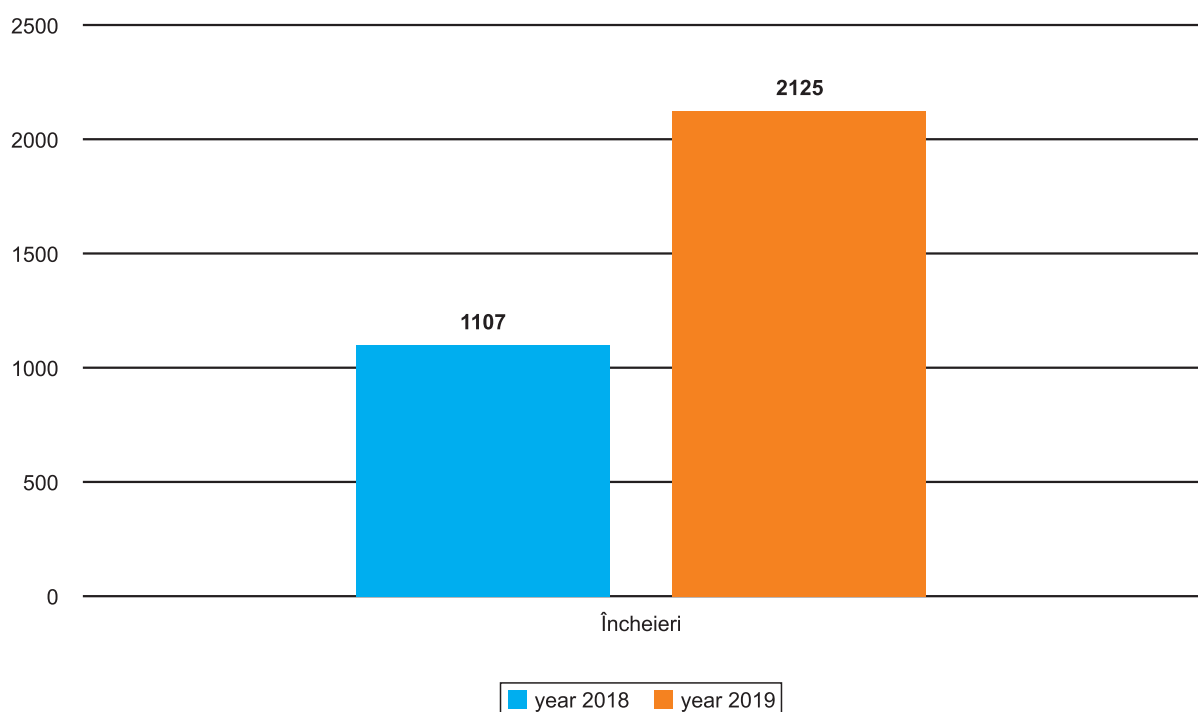


Figure 20 - The trend of the conclusions issued by N.C.S.C.
in the period 2018-2019

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

Irespective 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 settling 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 protection of 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 to issue a document or take a remedy measure, acknowledging the claimed right or legitimate interest.

As mentioned above, upon analysis of the **subject matters of those 2,803 complaints** lodged by the business operators with **the NATIONAL COUNCIL FOR SOLVING COMPLAINTS**, in the year 2019, it was found that **497 complaints concerned the tender documentations**, while **2,306 complaints** concerned the result of the procedure.

Within **563 complaints**, by virtue of the article 17 in the Act no. 101/2016 the business operators interested in participating in the award procedure, respectively, where applicable, the business operators participating in the award procedure submitted **applications of voluntary intervention in dispute**, which applications led to the increase of the file complexity and the fulfilment of some additional procedures.

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

D1	restrictive requirements on the qualification criteria	2
D1.1	restrictive requirements on the qualification/selection criteria related to the candidate's or the bidder's personal status	19
D1.2	restrictive requirements on the qualification/selection criteria related to the ability to pursue professional activity	1
D1.3	restrictive requirements on the qualification/selection criteria related to economic and financial condition	3



D1.4	restrictive requirements on the qualification/selection criteria related to technical and/or professional capacity	4
D1.4.1	restrictive requirements on the qualification/selection criteria related to similar experience	5
D1.5	restrictive requirements on the qualification/selection criteria related to quality assurance standards	6
D1.6	restrictive requirements on the qualification/selection criteria related to environment protection standards	7
D2	requirements on the award criterion	8
D2.1	irrelevant factors of assessment, missing calculation algorithm, with non-transparent or subjective calculation algorithm	9
D2.2	other requirements related to the award criterion	10
D3	restrictive requirements in terms of technical specifications	11
D3.1	missing mention "or equivalent", in such cases as provided by the law in force	12
D3.2	other restrictive requirements in terms of technical specifications	13
D4	missing clear, complete, unambiguous answer from the contracting authority on the requests for clarification of the tender documentation provisions	14
D5	form of establishing the bid bond	15
D6	infliction of unfair or excessive contractual provisions	16
D7	failure to split the procurement by lots, in case of similar products/works	17
D8	other reasons related to the tender documentation	18
DA	other criticism to the documentation	20

25

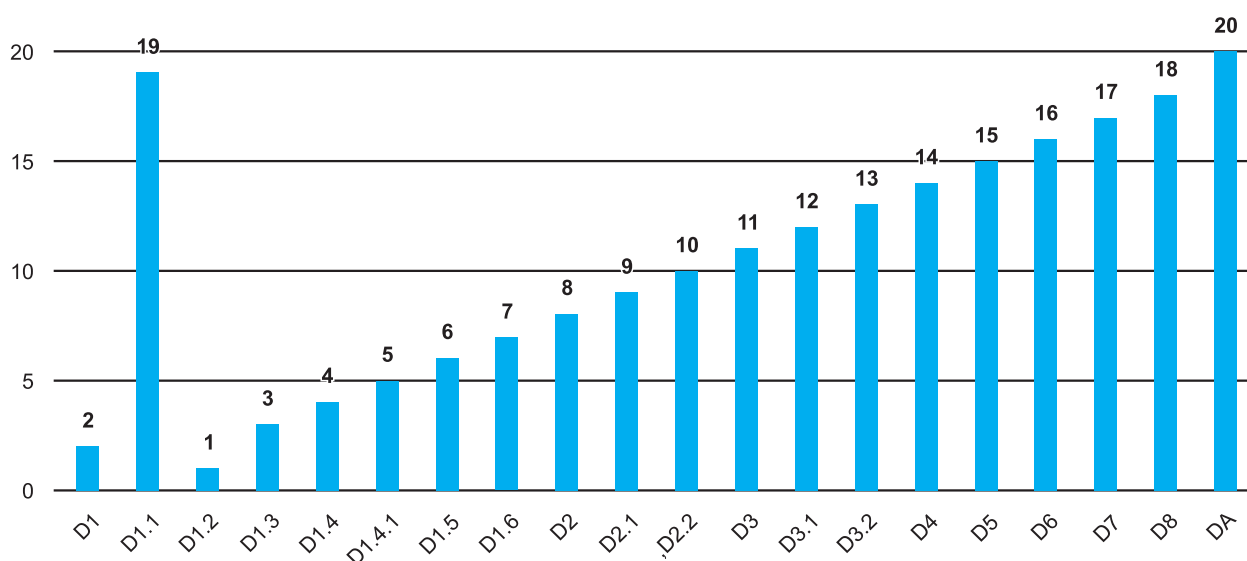


Figure 21 - The standing of the criticism raised by the business operators against the tender documentation in 2019

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

1. Division per lots

Upon the analysis of the criticism raised by SC _____ SRL against the tender documentation corresponding to the lots 4, 5, 6, 7, 8, 15 and 23 issued by the contracting authority _____, the Council finds that a first criticism consists in the complaining party's appraisal according to which the contracting authority had determined unlawfully the lots of products from the subject matter of the procurement in the meaning of „the non-division of the items per lots corresponding to each separate product”, aspect which would prejudice the purpose of the Act no. 98/2016 for the promotion of the competition between the business operators and the principles on the efficiency of the use of the public funds, non-discrimination, the equality of treatment and proportionality, for which reason, the Council will relate to the following aspects:

As per the provisions in the tender specifications, the subject matter of the procurement of medical devices for outpatient departments is divided per 24 lots and the lots that represent the subject matter of this case are set up as follows:

Lot 4: Pediatric Surgery Outpatient Department– estimated value of RON 185,160, consisting of: scyalitic lamp, operating table for minor surgeries, oscillating saw for plaster, handheld vacuum, electrocautery, screen for monitoring the vital functions, washbasin for 1 post, Mayo table;

Lot 5: Orthopaedics Outpatient Department – estimated value of RON 220,245, consisting of: scyalitic lamp, operating table for minor surgeries, washbasin for 1 post, oscillating saw for plaster, handheld vacuum, electrocautery, surgical engine, Mayo table;

Lot 6: Plastic Surgery Outpatient Department – estimated value of RON 122,264, consisting of: scyalitic lamp, operating table for minor surgeries, washbasin for 1 post, handheld pulse oximeter;

Lot 7: General Surgery Outpatient Department – estimated value of RON 404,495, consisting of: scyalitic lamp, operating table for minor surgeries, washbasin for 1 post, Mayo table, handheld pulse oximeter, electrocardiograph, handheld vacuum, multi-disciplinary ultrasound;

Lot 8: Vascular Surgery Outpatient Department – estimated value of RON 299,369, consisting of: scyalitic lamp, operating table for minor surgeries, washbasin for 1 post, Mayo table, handheld pulse oximeter, vascular Doppler ultrasound;

Lot 15: Obstetrics-Gynecology Outpatient Department – estimated value of RON 543,763, consisting of: scyalitic lamp, gynecology table, multi-disciplinary ultrasound for obstetrics-gynecology applications, cardiotocograph, screen for monitoring the vital functions, colposcope, uterine vacuum;

Lot 23: Neurosurgery Outpatient Department – estimated value of RON 122,264, consisting of: operating table for minor surgeries, handheld pulse oximeter, scyalitic lamp, washbasin for 1 post.



Upon the analysis of the organization of the procurement procedures and how the procurements are divided per lots, the Council takes into consideration that the following texts from the legal instruments apply to the matter: the article 3 (d) in the Act no. 98/2016, the article 18 (1) and (3) in the Act no. 98/2016, the article 141 (1) and (2) in the Act no. 98/2016, the article 17 in the Government Resolution no. 395/2016.

It arises from the aforementioned legal instruments that:

- upon establishing the types of procedures that are to be developed in the course of a budgetary year, the contracting authority must take into consideration the estimated value of all the procurements with the same subject matter or purposes of identical or similar use, data in relation to which it is established and it is included in the annual public procurements the procedure established for the development of the procurement.

- the lots will be structured by including in their structure only similar products, phrase supposing the cumulative satisfaction of two conditions: they would be intended for some identical or similar uses and respectively, they would be part of the normal range of products which are supplied/ marketed by business operators with permanent activity in such sector;

- additionally, the legislation in such field provides that the contracting authority will set forth the subject matter of each lot, on quantitative bases, adjusting the dimension of the individual contracts so that it would satisfy better the capacity of the small and medium-sized enterprises or on qualitative bases, in compliance with various involved occupations and specializations, in order to adjust the tenor of the individual contracts more closely to the specialized sectors of the small and medium-sized enterprises or in compliance with various subsequent stages of the project.

Consequently, the Council is to determine the similarity of the products grouped in the lots 4, 5, 6, 7, 8, 15 and 23 so that such groups would comply with the legal conditions of satisfying cumulatively the stringencies:

- having identical or similar uses;

- being part of the normal range of products which are supplied/ marketed by business operators with permanent activity in the field, stringencies which do not include the criteria invoked by the contracting authority in its point of view, as well as the common intended purpose of the products or the satisfaction of the necessity, considerations that might lead to the erroneous conclusion that it would be beneficial to the contracting authority the insertion in a sole award procedure of the whole annual procurement programme, without being divided into lots so that there would be an uniformization, compatibilization, integration in the general activity of a sole contractor, so that there would not be "delivery-related or guarantee-related problems" with other providers, etc.

Upon the analysis of the lots representing the subject matter of this complaint, the Council considers that there were included in the challenged lots both medical equipments (for example, scyalitic lamp, handheld pulse oximeter) and medical furniture (for example, Mayo table) or technical-sanitary equipment (for example, washbasin for 1 post).

Moreover, it is found that a series of equipments/ products, although they have the same technical specification, they are found divided in several lots according to their

intended purpose. Thus, for example the products „scyalitic lamp” and „operating table for minor surgeries ” are found both in the lot 4 – Pediatric Surgery Outpatient Department and in the lot 5 – Orthopaedics Outpatient Department, the lot 6 – Plastic Surgery Outpatient Department, the lot 7 – General Surgery Outpatient Department, the lot 8 – Vascular Surgery Outpatient Department and the lot 23 – Neurosurgery Outpatient Department.

There is a similar situation as to the „handheld vacuum” product which can be found both in the lot 4 and in the lots 5, 7 and 9 or the „Mayo table” product which can be found in the lots 4, 5, 7 and 8 .

Moreover, it cannot be taken into consideration the similarity of the products grouped by the contracting authority in the challenged lots (4, 5, 6, 7, 8, 15 and 23) provided that the Regulation (EC) no. 213/2008 of the Commission as of the 28th of November 2007 provides different CPV codes for these products, such as for example:

- multi-disciplinary ultrasound, electrocardiograph (the lot 7), vascular Doppler ultrasound (the lot 8) and multi-disciplinary ultrasound for obstetrics-gynecology applications (the lot 15) may be classified into CPV 33112000-8 – Imaging equipment, with ultrasounds and Doppler;

- washbasin for 1 post (the lots 4, 5, 6, 7, 8 and 23) which may be classified into CPV 44411300-7 – Washbasins ;

- Mayo table (the lots 4, 5, 7, and 8) and operating table for minor surgeries (the lots 4, 5, 6, 7, 8 and 23) which may be classified into CPV 33192000-2 – Medical furniture.

Consequently, the contracting authority’s substantiations to include several types of products/ equipment in a sole lot according to the consideration „place of use” are not considered by the Council as pertinent and complying with the provisions of the article 141 (2) in the Act no. 98/2016, as the products/equipments included in a lot must be the subject matter of separate awards, according to their nature and type, in which case several interested business operators may participate in and thus the funds allotted to the project are used efficiently.

The Council cannot take into consideration the contracting authority’s allegations related to the fact that the complaining company may associate for the purposes of satisfying the contracting authority’s necessity with other business operators or subcontract as the association is not an obligation, but a right of the business operators and the provisions of the article 3 (yy) in the Act no. 98/2016, according to which the subcontractor is „any business operator which is not a party to any public procurement contract and which performs and/or supplies certain parts or elements of the works or of the construction or carries out activities that are part of the subject matter of the public procurement contract, being liable to the contractor for the organization and the development of all the stages required to this purpose” are relevant.

To this purpose, the Court of Appeal rendered the Civil Decision no. 7264 on the 20th of December 2018 in the case file no. 8396/2/2018, respectively: „As to the possibility for the bidders to associate according to the article 53 in the Act no 98/2016 in



order to participate in the procedure, it is considered that the necessity that the bidders would associate in order to file bids proves (...) that how the lot no. 1 was established is restrictive and the small-sized manufacturers or suppliers would not be able to file by themselves bids, and thus their participation in the bid is not encouraged. (...) As it cannot file a full bid, as it is not a supplier of one of the products in the lot it is obviously the complaining party's access to the procedure is restricted".

As to the foregoing and taking into consideration the letter from the Agency for Digital Agenda in Romania no. _____, registered with N.C.S.C. under the no. _____, from which it arises that the lots may be configured solely together with the tender documentation and such information cannot be amended throughout such procedure, the Council ascertains that no remedy measures may be ordered enabling the lawful continuance of the award procedure corresponding to the challenged lots.

Thus, in relation to those above mentioned and pursuant to the provisions of the article 26 (2) – (3) in the Act no. 101/2016, the contracting authority should be obliged to remedy the whole tender documentation, measure that would result in: the reorganization of the lots of products; the determination of new estimated values of the lots; the determination of the qualification criteria and the values of the bid bonds in relation to the new estimated values of the lots; the publishing of the erratum type announcement and the determination of new deadlines for the bid filing, etc., which case is equivalent effectively to a new commencement of the award procedure, aspects which make the award procedure be subject to the provisions of the article 26 (7) in the Act no. 101/2016 according to which – „If the complaint is accepted, if it is found that remedy measures cannot be ordered enabling the lawful continuance of the award procedure, the Council orders the cancellation of the award procedure".

As to the ascertained items, as per the provisions of the article 26 (2) and (7) in the Act no. 101/2016, the Council will accept the complaint lodged by SC _____ SRL against _____ and will order the cancellation of the award procedure corresponding to the lots 4, 5, 6, 7, 8, 15 and 23.

2. The contracting authority's legal possibility to establish the experience of the key experts as an evaluation factor.

On the merits of the complaint, the Council takes into consideration that the dispute between parties refers to the contracting authority's legal possibility to establish the experience of the key experts as an evaluation factor.(...)

Upon the analysis of the award criterion, "the best price-quality ratio" it is noticed that the authority grants a maximum scoring of 50 scores for this evaluation factor, therefore each 4 scores for each expert, those 5 scores being divided into 10 projects requested as experience, 0,50 scores per each project.

It does not arise from the lodged complaint that the complaining company would criticise the too high requested number of projects, but it complains about the scoring for such factor and it deems that as for a specialist in town planning to have right of signature, such specialist must attend a training practice, have a 6-year professional experience, have a portfolio of similar works, sit up for the graduation examination, etc. Thus, the complaining party alleges that the simple registration of the specialists with the Register for Town Planners in Romania supposes an experience.(...)

Upon the analysis of the provisions of the tender documentation and the parties' allegations, the Council takes into consideration that the subject matter of the contract consists in the update of the general town planning of Brasov Municipality, a contract of maximum complexity taking into account the size of the town, its nature of a tourist town, the special architecture, the age of buildings. Moreover, the contracting authority complied precisely with the aforementioned legal provisions, the existence of the evaluation factors related to the key experts and the determination of a number of projects for which scoring is given being fully accepted in the practice of procurements, complying with the legal provisions and principles.

Thus, the General Urban Plan (PUG) is a project that is part of the programme for the territory arrangement and locality development forming the territorial-administrative unity and comprises surveys, regulations and the town planning regulation for the whole administrative territory (surface areas both within the built-up area and outside the built-up area), sets forth general rules based on which the Area Urban Plan and then, the Detailed Urban Plan are prepared more in details and on a smaller scale.

The general categories of issues debated in the General Urban Plan are: the optimization of the locality relations with their county and administrative territory; the capitalization of the natural, economic and human potential; (...)

The ANAP instruction sets forth specific rules related to the case in which the experience of such experts may be used as evaluation factor, and attending a training practice and the passing of an examination are not essential, but the high level of particularization and adjustment of the activities to the specific of the contract subject matter, the singularity of the contract subject matter, the complex nature of the intellectual performances are. The item ii) to which the complaining party refers and which has been rewritten precisely in the reply of ANAP applies to the specialists whose performed activities, although they are important, complying with a certain regime, observe certain clear technical prescriptions, such as for example, electrician authorized by ANRE, gas installation verifier authorized by ANRE, authorized gas installation designer, Periodical Technical Inspection inspector authorized by RAR and other similar, compulsory and inseparably linked to the exercise of such activity providing right of signature, require a certain experience and examination, but with low-complexity intellectual load and the results cannot vary from one expert to another.



For such experts, the labour itself is more important than the identification of the solutions for the performance of the activities and there is no singularity in terms of their performance such it is the field of this award.

The contract whose award is pursued complies with all the requirements in order to enable the use of the criticized evaluation factors, respectively:

- high budget, the estimated value being a special one for the specific of this contract;
- difficult problems related to the planning/ implementation of the project/contract,
- a high level of customization and adjustment of the activities to the specific of the contract subject matter, respectively the contracting authority's/ entity's necessities,
- special social and economic importance,
- intellectual performances supposing a high complexity ,
- intellectual activities that result in the identification, preparation and development of future town planning development solutions,
- high complexity activities, thus, arising that the involved personnel's experience and quality have a significant impact on the quality of the service performance.

The Court of Appeal, upon settling the action, considered:

Obviously, the article 12 (ii) in the Instructions no.1/2017 issued by ANAP must be interpreted in relation to the notes (iii) and (iv) in the same article, as well as in relation to the provisions of the article 187 (3) (c), (4) and (5) (b) in the Act no. 98/2016, of the article 32 (3) in the Government Resolution no. 395/2016 and of the article 3 (6) (a) and (b) and the article 10 (1) (a) and (2) in the Instructions no. 1/2017.

To this effect, it must be noticed that the notes (iii) and (iv) of the article 12 in the Instructions no. 1/2017, which are listed subsequently to the note (ii), enable for the key experts whose professional experience in implementing some similar activities within some comparable projects, may influence directly the quality of how the contract is fulfilled and consequently, the economic value of the bid, the determination of some evaluation factors pursuing competitive advantages brought by a bid presenting superior key experts, in terms of the specific experience, in relation to other bids, recommending the determination of the some categories according to which the scoring should be given, each category representing a bracket (exceeding the minimum level) in which the key expert's experience representing the subject matter of the evaluation factor is classified, measured by the number of comparable projects which he/she is participating in, carrying out activities similar to those ones he/she is to implement in the future contract.

The Court ascertains that the Council for Solving Complaints fairly considered that the update of the general urban plan of B_ Municipality presents a maximum complexity, taking into account both the categories of issues dealt with in the general urban plan and the size of the town, the fact that it is a tourist town with old buildings of a special architecture.

In this case, there are met the conditions required by the said legal instruments related to the fact that in compliance with the provisions of the notes (iii) and (iv) of the article 12 in the Instructions no. 1/2017, the factors of evaluation which the appellant is not satisfied with be used, as it is a project which a high budget was allotted to raising difficult issues related to the planning/ implementation of the project/ contract, a high level of particularization and adjustment of the activities to the specific of the contract subject matter and the contracting authority's necessities triggering special social and economic importance, the required intellectual performance requiring a high complexity as they result in the identification, preparation and development of the solution for the future town planning development and high complexity activities.

Besides, under these conditions, the involved personnel's experience and quality have a special and significant impact on the performance of the services.

In relation to the said legal instruments, the appellant's claim is groundless in the meaning that the waive of the evaluation factor "The experience of the key experts" is required, the evaluation factor subject to criticism setting forth in compliance with the requirements imposed by law, an advantage for the companies submitting experts with a specific experience, giving scoring for each project he/she was involved in and a lower number of projects determining a scoring corresponding to the number of projects.

In the complaints lodged against the result of the procedure, it was noticed that 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)	2
R2	Dismissal of the complaining party's bid as noncompliant or unacceptable	3
R2.1	Dismissal of the complaining party's bid as unacceptable	4
R2.1.1	Dismissal of the complaining party's bid as unacceptable, as it was submitted after the deadline date and time or at another address than specified in the contract notice	5



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 tender documentation	6
R2.1.3	Dismissal of the complaining party's bid as unacceptable, as it was submitted by a bidder that fails to meet one or several of the requirements for qualification	7
R2.1.4	Dismissal of the complaining party's bid a unacceptable, as it has an unusually low price	8
R2.1.5	Dismissal of the complaining party's bid as unacceptable, as it was submitted in violation of the provisions on the conflict of interests	9
R2.1.6	Dismissal of the complaining party's bid as unacceptable for other reasons than as listed in R.2.1.1-5	22
R2.2	Dismissal of the complaining party's bid as noncompliant	10
R2.2.1	Dismissal of the complaining party's bid as noncompliant, as it fails to properly meet the tender specifications requirements	11
R2.2.2	Dismissal of the complaining party's bid as noncompliant, as the bidder failed to send the requested clarification/answers within the term specified by the evaluation commission or when the bidder's explanation was not	23
R2.2.3	Dismissal of the complaining party's bid as noncompliant, as the bidder altered the content of the technical proposal by the answers they provided	12
R2.2.4	Dismissal of the complaining party's bid as noncompliant, as the bidder altered the content of the financial proposal by the answers they provided	13
R2.2.5	Dismissal of the complaining party's bid as noncompliant for other reasons than as listed in R.2.2.1-4	14
R3	The bids of other bidders in the award procedure are unacceptable	1

R3.1	The bids of other bidders in the award procedure were submitted after the deadline date and time or at another address than as specified in the contract notice	24
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 tender documentation	25
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	15
R3.4	The bids of other bidders in the award procedure were submitted in violation of the provisions on the conflict of interests	26
R3.5	Other reasons that render as unacceptable the bids of other bidders in the award procedure	16
R4	The non-compliance of the bids of other bidders in the award procedure	27
R4.1	The unusually low price of the bids of other bidders in the award procedure	17
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	28
R4.3	Other reasons that render as noncompliant the bids of other bidders in the award procedure	29
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	30
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	31



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	32
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	33
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	18
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	34
R7	Cancellation of the award procedure by the contracting authority without legal grounds	19
R8	Other reasons regarding the result of the procedure	20
RA	Other criticism of the result	21

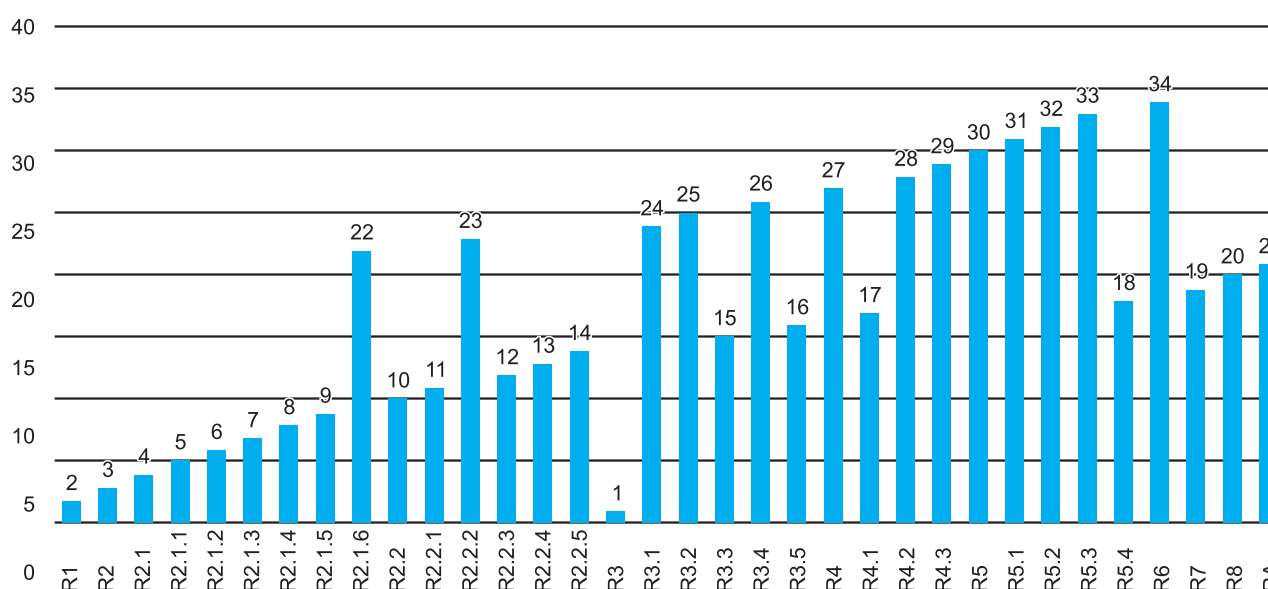


Figure 22 - The standing of the complaints in relation to the criticism raised against the result of the procedure in 2019

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

1. All the bidders must be applied the same rules in the same award procedure

The Council considered as follows:

Under the report no. 3 for the evaluation of the financial proposals registered under the no. xxx/28.03.2019 the contracting authority dismissed as non-compliant 3 bids out of the 4 ones accepted for this stage and the sole admissible bid was that one filed by SC R S SRL, declared the winning one following the verification of the support document in ESPD. Taking into account the foregoing, the Council considers the contracting authority's decision to annul the report no. 3 for the evaluation of the financial proposals registered under the no. xxx/28.03.2019, the annulment of the reports of evaluation of the document for the fulfilment of ESPD registered under the no. xxx/05.04.2019 and no. xxx/19.04.2019, the annulment of the procedure Report registered under the no. xxx/25.04.2019 and the subsequent documents, respectively the communications related to the result of the procedure is not grounded for the following considerations:

The evaluation committee ended its commission along with the preparation of the procedure report, document approved by the mayor on the 25th of April 2019 and the provisions of the article 127 in the Government Resolution no. 395/2016 apply to the case at issue. (...)

None of the 3 bidders, dismissed in the financial evaluation stage did not object to the result of the procedure on which they were informed on the 25th of April 2019, as it arises from the documents existing in the file. In such case, they do not have anymore the capacity of bidder in the procedure, and the following legal provisions are relevant to this effect:

- the article 2 (1) in the Act no. 101/2016, (...)
- the article 3 (1) (f) and (3) in the same legal instrument, (...)
- the article 2a (2) (2) in the Directive no. 66/2007 as of the 11th of December 2007 amending the Directives 89/665/CEE and 92/13/CEE of the Council on the improvement of the efficiency of remedies at law in terms of the award of the public procurement contracts, (...)

Consequently, the re-evaluation of the bids filed by these three bidders is not possible and they cannot be deemed as damaged parties.

As per the provisions of the article 9 in the Act no. 101/2016, the contracting authority may take remedy measures following the receipt of a complaint, case which is not found in this procedure, as none of the 3 bidders did not oppose to the documents received from the contracting authority.

The Contracting Authority does not have any legal basis for the decision of annulment of the procedure report no. xxx/25.04.2019 and for the documents underlying the preparation thereof.



The procedure no. xxx/25.04.2019 is final and binding and the contracting authority verified the financial proposals of those 3 bidders that acquiesced the decision of the evaluation committee related to their bids.

How the contracting authority acted in this award procedure, in relation to the circumstances of the case, exceeds its legal limits for the annulment of its own deeds in an award procedure.

A decision of N.C.S.C., issued in other procedure, cannot be a legal basis for the re-evaluation of the financial proposals of those 3 bidders dismissed definitively under the report no. 3 for the evaluation of the financial proposals, registered under the no. 64944/the 28th of March 2019, as the implementation of the equality of treatment, provided for by the article 2 (2) (b) in the Act no. 98/2016 takes into consideration that all the bidders are applied the same rules in the same award procedure.

The Court of Appeal, as a result of settling the action, considered:

As to the substance of the complaint, the complainant invoked the contracting party's right to revoke voluntarily any deeds issued prior to the signing of the public procurement contract, including those one that got in the civil circuit through communication. According to the report no. xxxxxx/the 12th of June 2019 prepared by the Directorate for Public Procurements and Investments within the Town Hall of _____, it was considered that some remedy measures are required, taking into account a decision of N.C.S.C. rendered in other similar case, respectively within a procedure for the procurement of stationery and office automation, under which it was established that as to the evaluation of the bids, it is considered relevant the submission of price-related supporting documents as closely as possible in time to the signing of the public procurement contract, subsequently to the submission of the bid.

The Court considers that pursuant to the article 212 (1) (c) in the Act no. 98/2016, the contracting authority must cancel the award procedure for the public procurement contract if violations of the legal provisions affect the award procedure or if it is impossible to enter into the contract and pursuant to the article 212 (2), violations of the legal provisions mean when throughout the award procedure, errors or omissions are found, and the contracting authority cannot take corrective measures so that it would not generate the violation of the principles provided for in the article (2) (2). But, such case cannot be considered as such violations of the relevant legal provisions are not alleged. The aspect of N.C.S.C.'s rendering a decision in a case considered as similar by the contracting authority does not give to the complainant the right to cancel the award procedure if violations in this procedure are not found and the excluded participants have not lodged complaints.

It was fairly taken into account that, under the decision of settlement challenged in this case, the contracting authority had, as per the article 143 in the Government Resolution no. 395/2016, the obligation to enter into the public procurement contract with the winner bidder, so that the action will be dismissed as groundless.

2. The complaining party's request to supplement the financial proposal could not be accepted by the contracting authority as a bid may be supplemented in relation to the already submitted documents.

The Council notices that, as both parties admit, the complaining party encrypted the bid price in the electronic system without attaching the documents corresponding to the financial proposal and the reason was how the files were loaded up, respectively their capacity.

Therefore, it is ascertained that the impossibility to attach the documents forming the financial proposal is the bidder's exclusive fault that by the limit date and time for filing the bid, did not manage to attach the documents in the electronic system.

Besides, as the contracting authority affirmed, the encryption of the bid price at 2:54 pm did not enable the encryption and saving of the documents corresponding to the financial proposal in those 6 minutes left until the limit time for filing the bids (3:00 PM), considering also their capacity, as it arises from ESPD message.

Pursuant to the article 125 in the implementing rules approved under the Government Resolution no. 395/2016 The risks related to the transmission of the bid, including force majeure or fortuitous case are incumbent upon the business operator transmitting such bid.

Therefore, as to the foregoing, it cannot be ascertained the impossibility to attach the documents due a malfunctioning of the electronic platform or due to the contracting authority's fault, and the fault rests with the business operator failing to endeavour so that its bid be fully attached in ESPD by the limit date and time for filing the bids.

As to the possibility of supplementing subsequently the whole financial proposal, on the ground of the existence of the encrypted price in SEAP, it is considered that as shows above The financial proposal will comprise the bid form which will have attached: a. The value schedule; b. The schedule of the payments broken down per main activities/categories of works; - Designing; - Site organization; - Construction; - Utilities; - Other activities.

Therefore, the bidder did not submit the financial proposal and it cannot be deemed that the encrypted price may replace all the other documents which are part of the financial proposal.

Pursuant to the article 3 (1) (h) in the Act no. 98/2016 the bid represents the legal deed under which the business operator consents to engage from the legal standpoint in a public procurement contract. The bid comprises the financial proposal, the technical proposal, as well as other documents established under the tender documentation.

Therewith, it must be taken into consideration that it was specifically mentioned in the procurement data sheet that the absence of the bid form represents the absence of the bid, respectively the absence of the legal deed for the engagement in the contract.

The complaining party's request to supplement the financial proposal cannot be accepted by the contracting authority as the bid may be supplemented in relation to the already submitted documents, but in this case no document was filed, except the encrypted price.



The Court of Appeal upon the settlement of the action, considered:
Under the Decision no. issued by the National Council for Solving Complaints, the complaint lodged by the complaining party P.& XXX SRL was dismissed.

The Court considers that such decision is fair and grounded.

Pursuant to the article 3 (1) (h) in the Act no. 98/2016 on the public procurements, the bid represents the legal deed under which the business operator consents to engage from the legal standpoint in a public procurement contract. The bid comprises the financial proposal, the technical proposal, as well as other documents established under the tender documentation.

The provisions of the article 125 in the Government Resolution no. 395/2016 are unambiguous as to the risks related to the transmission of the bid, determining that the risks of the bid transmission, including the force majeure or the fortuitous case are incumbent upon the business operator transmitting such bid.

Moreover, the contracting authority specified in the procurement data sheet that the absence of the bid bond represents the absence of the bid, respectively the absence of the legal deed of engagement in the contract.. The bidders were informed that the failure to encrypt the total value of the financial proposal in SEAP and the loading-up of the documents supporting the value of the financial value in other section than that one exclusively dedicated by SEAP for this operation triggers their non-registration as bidders in the section "Procedure details Evaluation" and their bids cannot be evaluated.

As to the foregoing, N.C.S.C. fairly concluded that it cannot be ascertained the impossibility to attach the documents due to a malfunctioning of the electronic platform or due to the contracting authority's fault, and the fault rests with the business operator that failed to endeavour so that its bid be fully attached in SEAP by the limit date and time of filing.

The Court cannot take into consideration the document filed at the leaf 32 in the court case file by the appellant as to the size of the document that could not be encrypted in SEAP firstly because it could not be determined when it was listed, from which computer system and nor in connection with which award procedure. Upon the examination of the lawfulness and substantiation of the N.C.S.C. decision, we consider that such instrument was not filed with the N.C.S.C. file. Besides, the allegation that none of the 3 scanned files containing the financial bid did not exceed the size of 10MB represents a new defence that was not submitted under the complaint lodged with N.C.S.C., assimilable to a new inadmissible application in the second appeal stage.

The foregoing justifies the assumption that the appellant did not comply with the deadline for loading up the financial proposal in the form requested by the contracting authority in SEAP, assuring itself a sufficient time frame.

As to the foregoing and considering that there are no good reasons for the annulment of the Decision no. issued by the National Council for Solving Complaints, to this effect the action is to be dismissed as groundless.

3. The Contracting Authority established the evaluation factor for the expert

In the Annex award criterion, the contracting authority determined the evaluation factor for the expert "Power Engineering/ Thermal Engineering Engineer or equivalent": the maximum scoring (6) is granted for the participation in more than 5 contracts/ projects related to the preparation of Strategies/ Pre-feasibility Studies/ Feasibility Studies/ design services (irrespective of the design stage) for the implementation/ revamping of the thermo-energetic installations in the power plants.

The complaining party criticised the non-scoring for expert of the contract submitted as professional experience, whose subject matter is Consultancy services (feasibility study, approvals and agreements, building permit, funding application) for the purposes of attracting the funds required for the execution of a cogeneration installation to... the project The execution of a highly efficient cogeneration installation of maximum 8MW to

The Council found that the bids were thoroughly reviewed following the filing of the complaint by the signatory of the point of view although such operation rests exclusively with the evaluation committee.

As the contracting authority did not reason in the Contracting Strategy the employed evaluation factors, respectively the requirements imposed for experts, the Council considers that upon analysing how the evaluation factors are implemented, the provisions of the article 209 (5) (b) and the article 210 in the Act no. 99/2016, the article 38 (3) in the Government Resolution no. 394/2016 apply. As per the legal provisions, the experience of the appointed personnel must be reviewed in compliance with/by similarity to the activities that they are to carry out within the future contract and according to the contracting entity's necessity established in the technical specifications.

To this effect, the Council considers as relevant the information in the tender documentation related to the subject matter of the procurement, namely The preparation of the design documentation Feasibility Study- Capacities of production in cogeneration of 200 MW \pm 25 % with modern technology for the Power Plant ... II.

Moreover, the information in the tender specifications/ section III is also relevant specifying: The power plant was built between the years 1977 1989 and at this date, two power units of 120/150 MW and two industrial steam boilers, units of production producing electric and thermal power in cogeneration and capacities producing solely thermal energy are operating.

In the Theme for design/ intended purpose and functions, it was mentioned: The execution of a energy group with modern technology, of a power of around 200 \pm 25 % MW and maximum 180 220 Gcal/h with fuel full natural gases, based on state-of-the-art modern technologies (cycle combined with gas turbines) existing at present European



wide and worldwide, will provide the production of electric power and thermal power, for the industrial and domestic consumers in the municipality of

Therefore, according to the subject matter of the contract that is to be awarded and the descriptions in the tender specifications, the desired feasibility study refers to an energy group, ... a capacity of production in cogeneration (production of electric power and thermal power).

Consequently, according to the description of the contract, but also from the subsequent explanations provided by the complaining party, the expert participated in the preparation of a feasibility study meeting the purchaser's requirements, similar to that one described in the tender specifications. The fact that the title of the contract varies (the execution of an installation of cogeneration, instead of "the implementation of the thermo-energetic installation within a highly efficient power plant ... of maximum 8MWe ") from that one used by the contracting authority cannot represent a reason for the bidder's downgrading.

Another criticism submitted by the complaining party refers to the fact that the contracting entity reasoned the downgrading also on the consideration that the documentation prepared by the proposed personnel "is in order to attract funds". The complaining party specified that the said Feasibility Study is used by the investors pursuant to law, respectively according to the Government Resolution no. 907/2016. Thus, the Council cannot take into consideration as pertinent the purchaser's reasoning as the feasibility study subject to this procurement must be prepared while considering the future funding possibilities.

On the other hand, it is requested in the description of the evaluation factor solely the participation in the preparation of the feasibility studies, without other details on the funding or monitoring sources for the future investment. Adding conditions to the evaluation factors at the present represents a violation of the principles on transparency and equality of treatment provided for by the article 2 (2) (b) and (d) in the Act no. 99/2016. The use of the feasibility studies for attracting funding sources and as supporting documentation does not change the intended purpose of the financing documentation. The inexistence of the reasons invoked by the contracting authority in the tender documentation obliges the members of the evaluation committee to implement the award criterion and evaluation factors, as provided in the contract notice, pursuant to the provisions of the article 133 (1) (l) in the Government Resolution no. 394/2016.

Based on the said considerations, the Council obliged the contracting authority to re-evaluate the bid by giving the corresponding scoring to the contract from which the experience of the involved expert arises.

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

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



In the course of 2019, the chambers for solving complaints within N.C.S.C. issued **2,352 decisions**, which meant **the settlement of 2,758 complaints (files)**.

The annual trend of the complaints (files) settlement by the chamber for solving complaints within the Council is as follows:

January	186	July	329
February	150	August	225
March	210	September	228
April	212	October	283
May	246	November	272
June	197	December	220

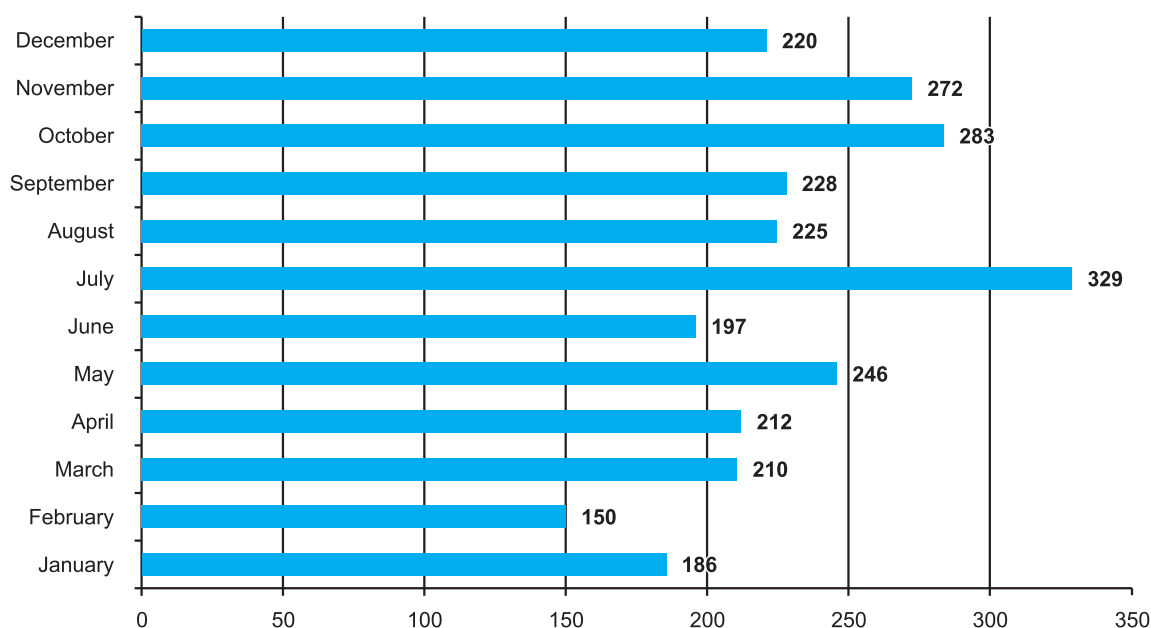


Figure 23 - The trend of the files settled by N.C.S.C. in 2019

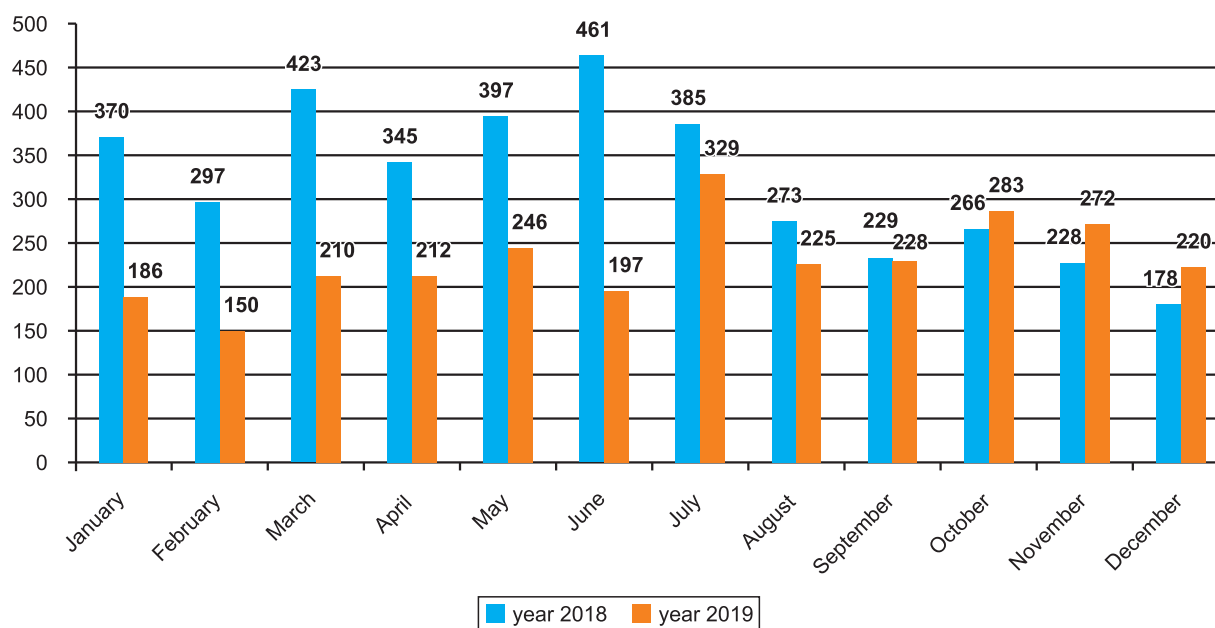


Figure 24 - The trend of the files settled by N.C.S.C. in the period 2018-2019

It must be emphasized that since the Council was created and until the 31st of December 2019, the total number of files solved by the chambers for solving complaints within the institution reached 67,964.

2.3. DECISIONS RENDERED BY THE N.C.S.C.

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



From the 1st of January to the 31st of December 2019, the 11 chambers for solving complaints within N.C.S.C. rendered 2,352 decisions and 2,125 conclusions, totalising 4,477 decisions.

Divided per months, the statement of the rendered decisions had the following trend in 2019:

January	163	July	249
February	133	August	196
March	195	September	197
April	184	October	242
May	201	November	231
June	169	December	192

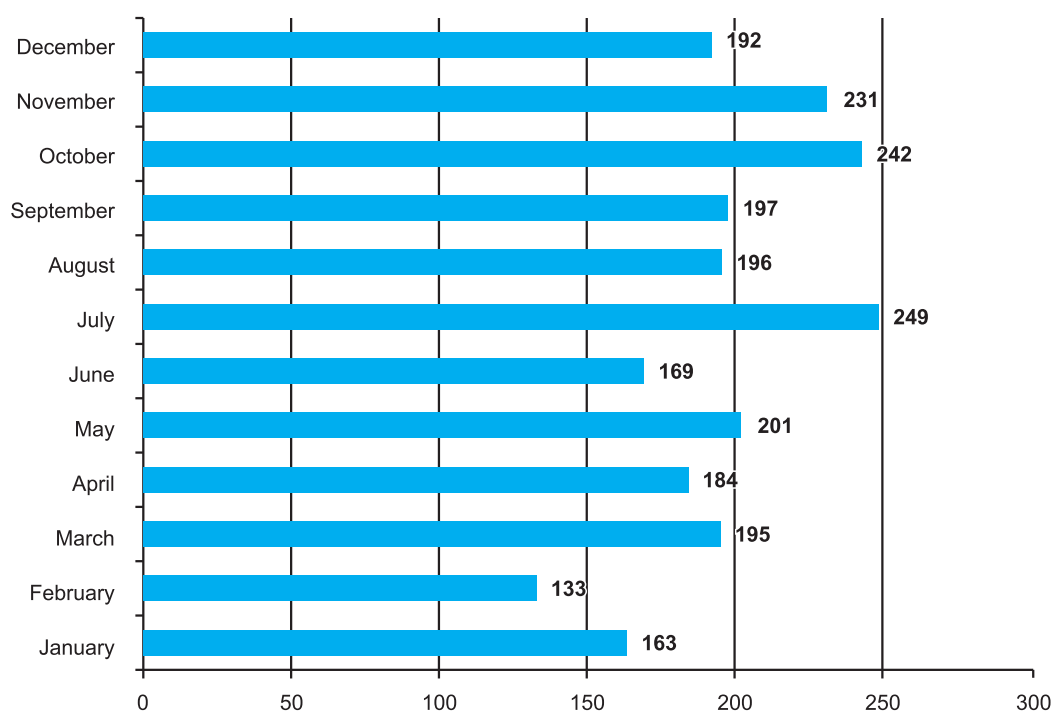


Figure 25 - The trend of the decisions issued by N.C.S.C. in 2019

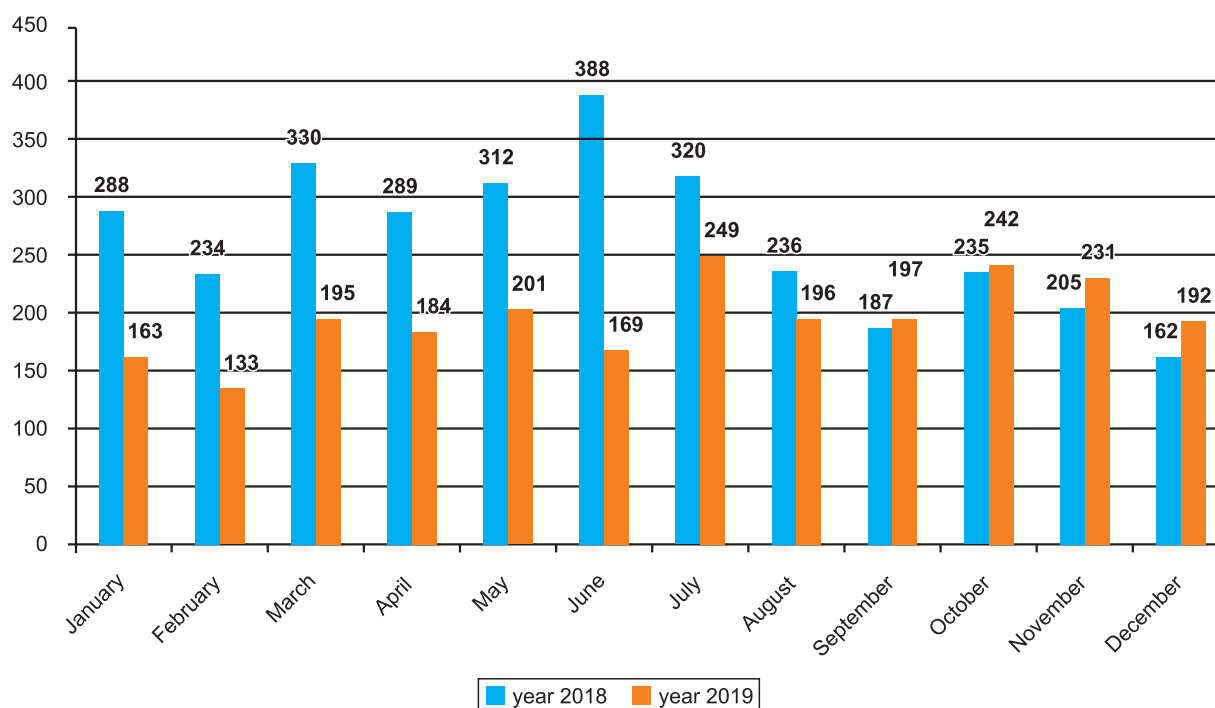


Figure 26 – The trend of the decisions issued by N.C.S.C. in the period 2018 - 2019

In 2019 the number of the decisions rendered by N.C.S.C. dropped by 26.18% as compared to the previous year (834 decisions) but the load of work doubled reasoned by the introduction of the bond

and the release thereof, under the Government Emergency Ordinance no. 45/2018, the Council also rendered 2,125 conclusions in 2019.

The standing of the conclusions rendered in 2019 had the following trend:

January	170	July	187
February	185	August	175
March	165	September	160
April	130	October	191
May	173	November	233
June	144	December	212

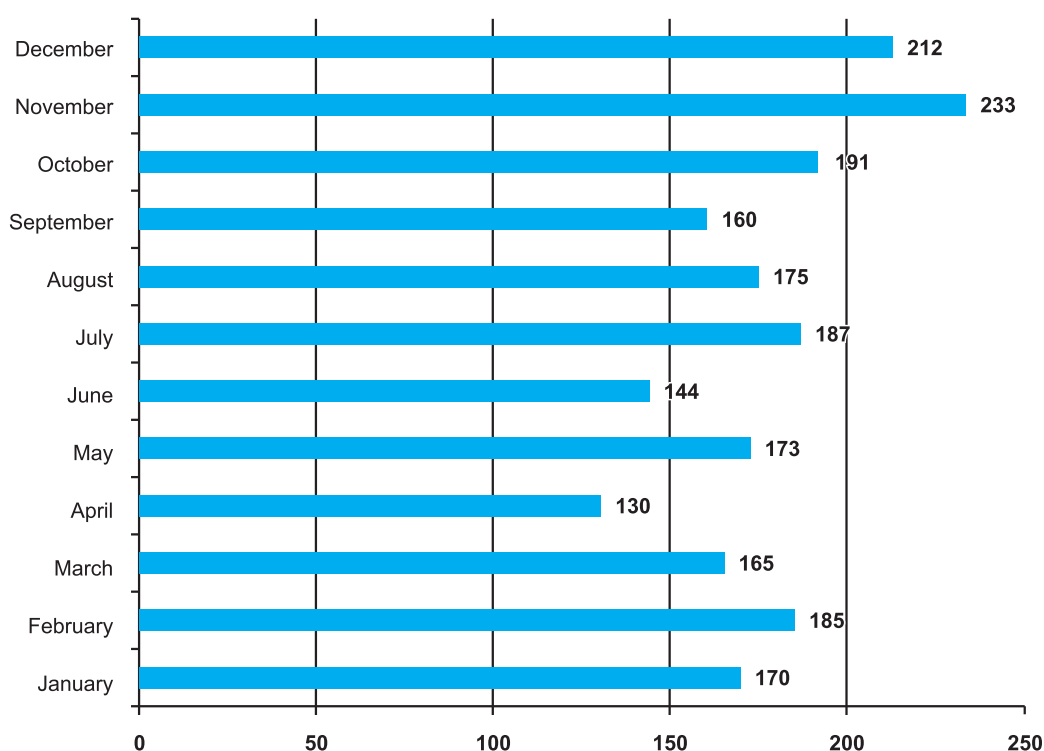


Figure 27 - The trend of the conclusions rendered by N.C.S.C. in 2019



The decisions rendered by the Council has the following trend in 2019:

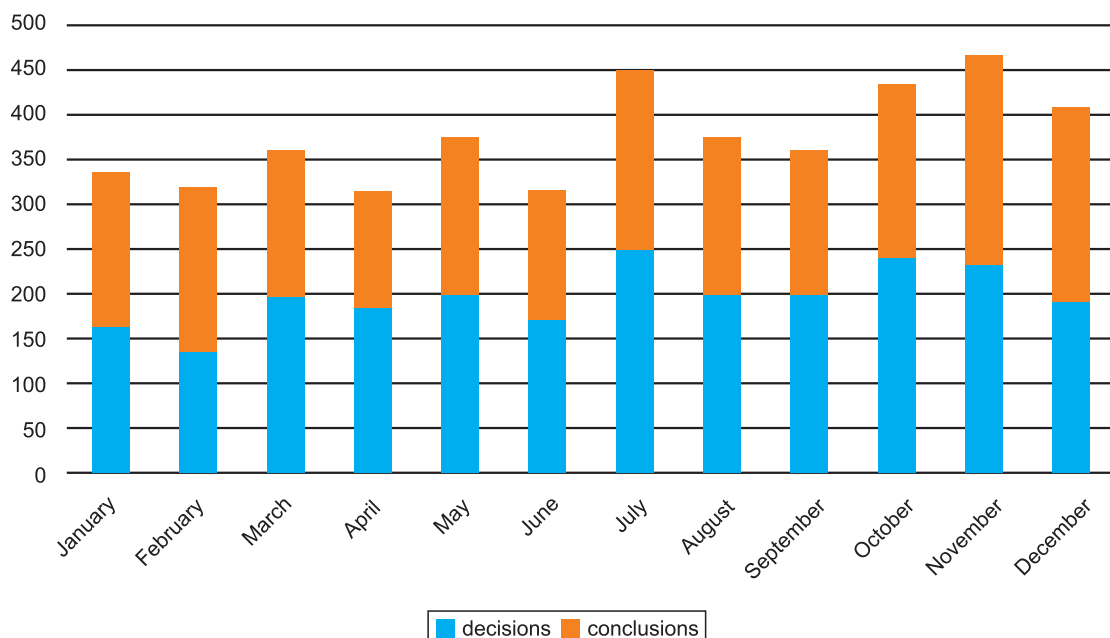


Figure 28 - The trend of the decisions rendered by N.C.S.C. in 2019

As a whole, since the Council was created and until the 31st of December 2019, the total number of the decisions issued by the institution amounted to 59,872.

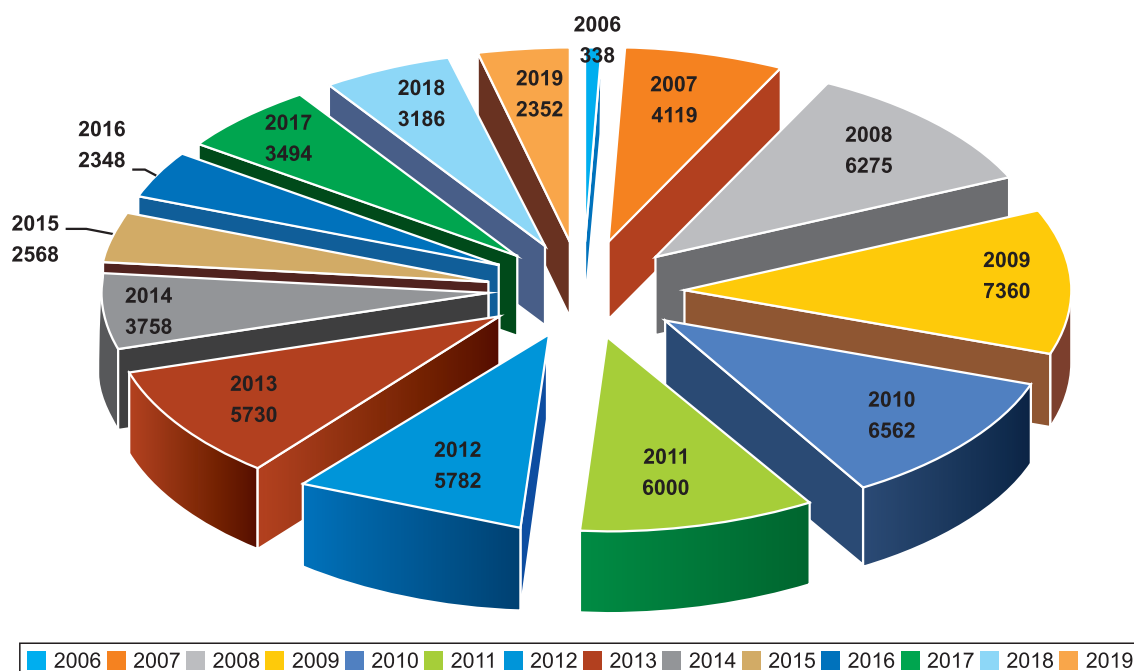


Figure 29– The standing of the decisions rendered by N.C.S.C. in the period 2006-2019

2.3.2. THE STANDING OF THE SETTLEMENT OF THE COMPLAINTS LODGED WITH THE N.C.S.C.

As we previously mentioned, the total number of the decisions issued by the 11 chambers for solving complaints within N.C.S.C. amounted to 2,352 from the 01st of January to the 31st of December 2019.

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

- 905 decisions (38.49% of the total issued decisions) under which it was ordered the acceptance of the complaints submitted by the business operators. In such cases as to the legal and contentious relation referred for settlement purposes, it went in favour of the complaining party. The solution requested by the complaining party and adopted upon the deliberation by the chamber for solving complaints complied with the need of defence by administrative-jurisdictional channel of the violated or unacknowledged subjective right and the reinstatement thereof so that it provides its holder with the rights acknowledged by law.

- 1,446 decisions (61.51 of the total rendered decisions) under which it ordered the dismissal of the complaints submitted by the business operators as:

- the complaining party failed to set up the bond as per the art. 611 in the Act no. 101/2016.

- the Council considered as to the tenor of the settled 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 had to „hold its tongue”, reasoned by the fact that a substance or procedure exception was alleged by the litigant parties or ex officio (the complaint was submitted with delay, is subjectless, unacceptable, purposeless, interestless, was submitted by persons holding no capacity, etc.);

- the complaining party exerted its right to waive the submitted complaint, putting an end to its litigation. Thus, the simple request of waiving the complaint submitted by the complaining party results immediately in the dismissal of the case.

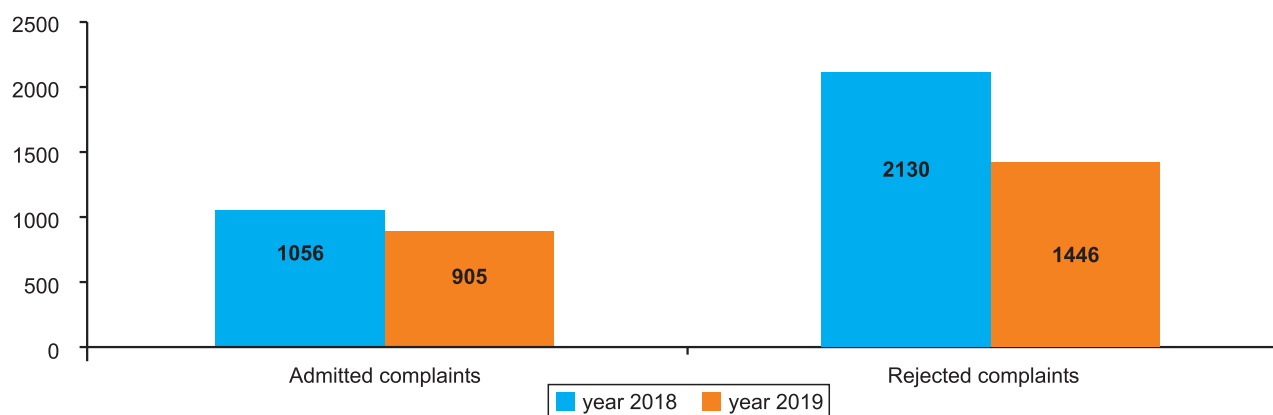


Figure 30 - The standing of the solutions rendered by N.C.S.C. in the period 2018-2019



By analysing the trend of the decisions accepted and dismissed by the Council in 2019 in comparison with the previous year it arises that the percentage of the decisions rendered by the Council under which the

complaints were accepted increased in comparison with the previous year of approximately 5% and that one of the decisions under which the complaints were dismissed dropped in 2019.

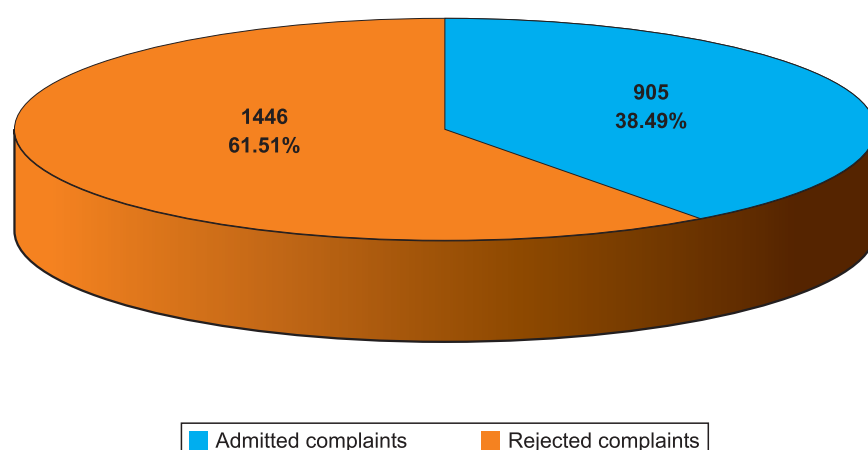


Figure 31 - The trend of the solutions rendered by N.C.S.C. in 2019

Therewith, the statistical data show that the percentage of the decisions rendered by the Council under which the complaints were accepted as well as that one of the decisions under which the complaints were dismissed, have not been subject to major amendments in the first 13 years, 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), and the year 2019 was an exception when the percentage of the accepted complaints increased to 38% and that of the dismissed complaints dropped to 62% which may be noticed in the following chart:

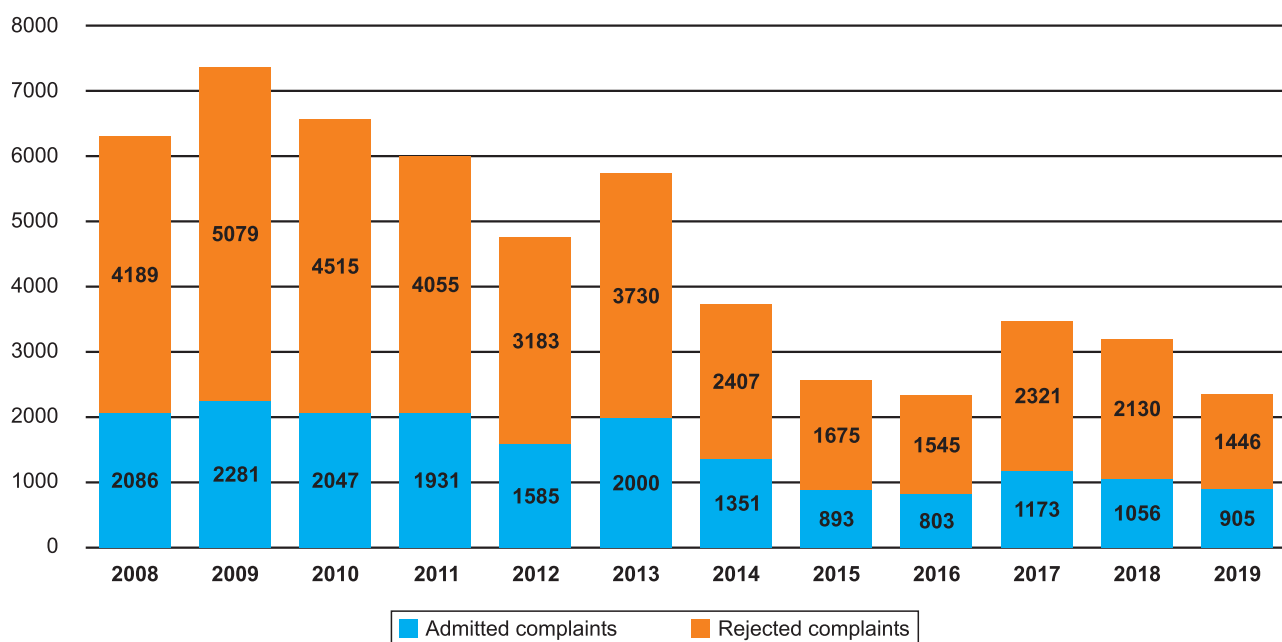


Figure 32 - The trend of the solutions rendered by N.C.S.C. in the period 2008- 2019

As to the accepted decisions (905 decisions rendered by the Council), it may be noticed from the statistical data that as for 56 decisions (6.19%) it was ordered the cancellation of the award procedure, as for the others it was ordered the remedy of the

award procedures - so that such procedure may continue and in compliance with the legal provisions; 2 such award procedures were financed by European funds - the remedy could not be effected without the violation of the effective legal provisions.

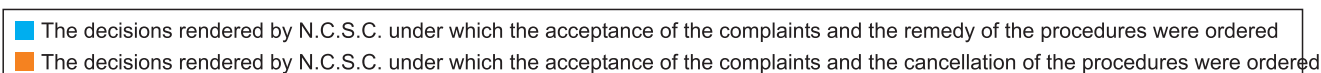
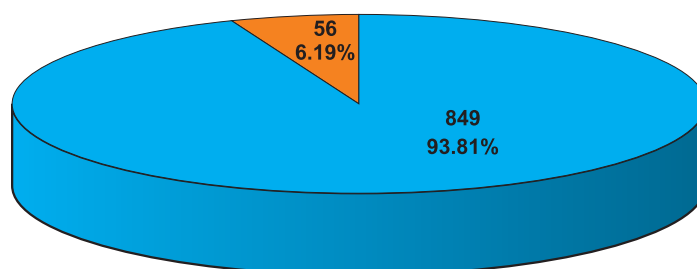


Figure 33- The measures ordered by N.C.S.C. as a result of the acceptance of the complaints in 2019



2.4. THE ACTIVITY OF THE N.C.S.C. IN RELATION TO THE ESTIMATED VALUE OF THE AWARD PROCEDURES

2.4.1. THE ESTIMATED VALUE OF THE AWARD PROCEDURES UNDER WHICH THE N.C.S.C. RENDERED DECISIONS



In 2019, N.C.S.C. rendered decisions in some award procedures amounting to a total estimated value of RON 60,504,663,081.38, the equivalent of

EURO 12,750,708,733.33²⁰, thus arising a value of 21.34 % higher in comparison with 2018.

²⁰ The amount was calculated at an annual average exchange rate communicated by the National Bank of Romania of RON/EURO 4.7452

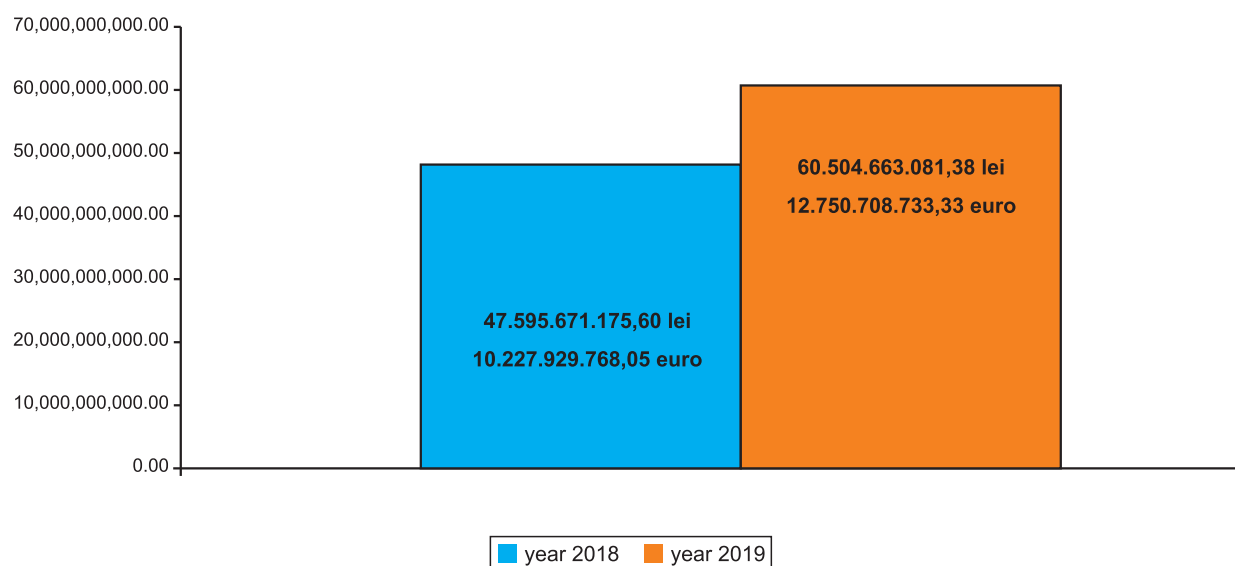


Figure 34 - The trend of the decisions rendered by N.C.S.C. in relation to the total estimated value in the period 2018-2019

In terms of the value, in 2019, **the total estimated value of the award procedures under which N.C.S.C. rendered decisions for the acceptance of the complaints** lodged by the business operators, amounted to **RON 27,421,248,842.79**, the equivalent amount of **EURO 5,778,734,056.05**²¹.

In the course of 2019, **the total estimated value of the procedures under which N.C.S.C. issued decisions for the dismissal of the complaints** submitted by the business operators amounted to **RON 33,083,414,238.59**, the equivalent amount of **EURO 6,971,974,677.27**²².

From the total estimated value of the procedures under which decisions for the acceptance of the complaints were issued, **the total estimated value of the award procedures under which the Council ordered their cancellation** amounted to **RON 1,159,767,529.74**, the equivalent amount of **EURO 244,408,566.50**²³, whereas that one under which measures of remedy were ordered, amounted **RON 26,261,481,313.05**, the equivalent amount of **EURO 5,534,325,489.56**.

²¹ The amount was calculated at an annual average exchange rate communicated by the National Bank of Romanian of RON/EURO 4.7452

²² The amount was calculated at an annual average exchange rate communicated by the National Bank of Romanian of RON/EURO 4.7452

²³ The amount was calculated at an annual average exchange rate communicated by the National Bank of Romanian of RON/EURO 4.7452

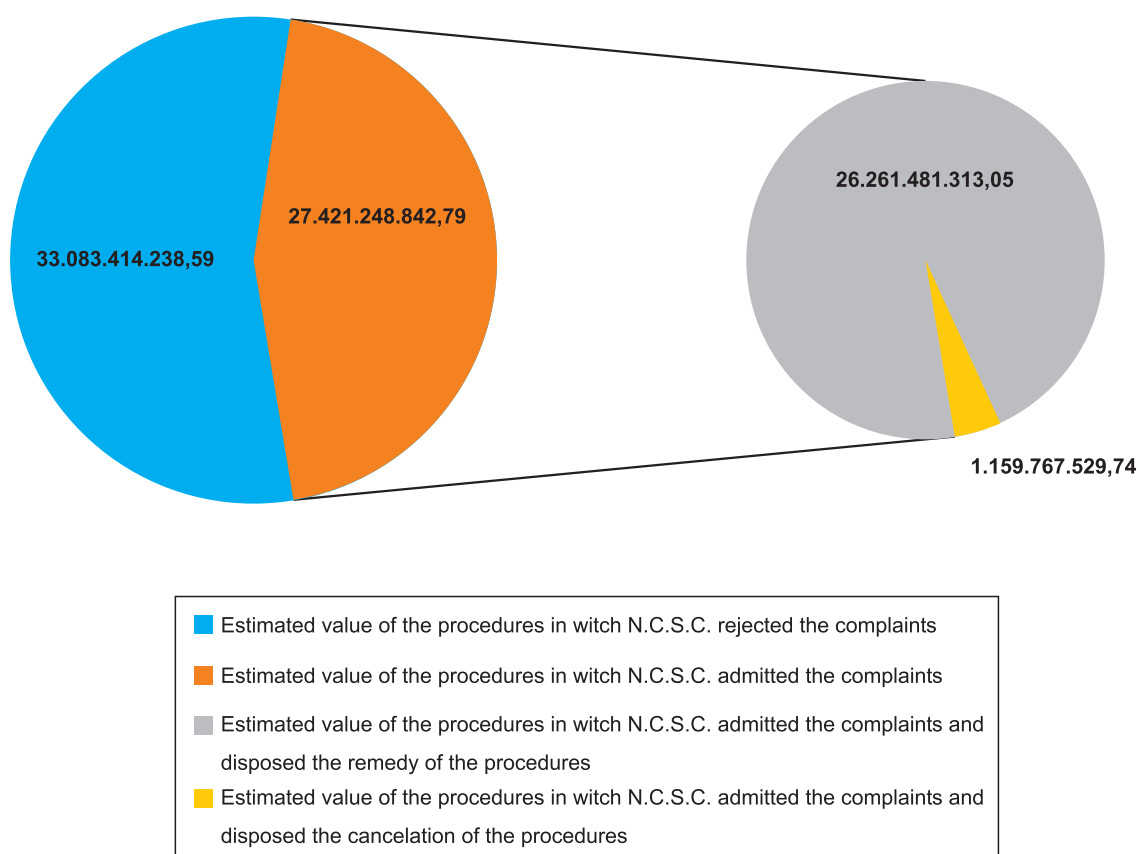


Figure 35 - The total estimated value of the award procedures under which N.C.S.C. rendered decisions in 2019

By analysing this chart, it can be noticed that in 2019 **the total estimated value of the award procedures for which N.C.S.C. rendered decisions for the acceptance of the complaints** submitted by the business operators (RON 27,421,248,842.79) accounted for 45.32% of the total estimated value of the procedures under which N.C.S.C. rendered decisions (RON

60,504,663,081.38), whereas **the total value of the procedures under which the Council issued decisions for the dismissal of the complaints** submitted by the business operators (RON 33,083,414,238.59) accounted for 54.68% of the total estimated value of the procedures under which the Council rendered decisions.

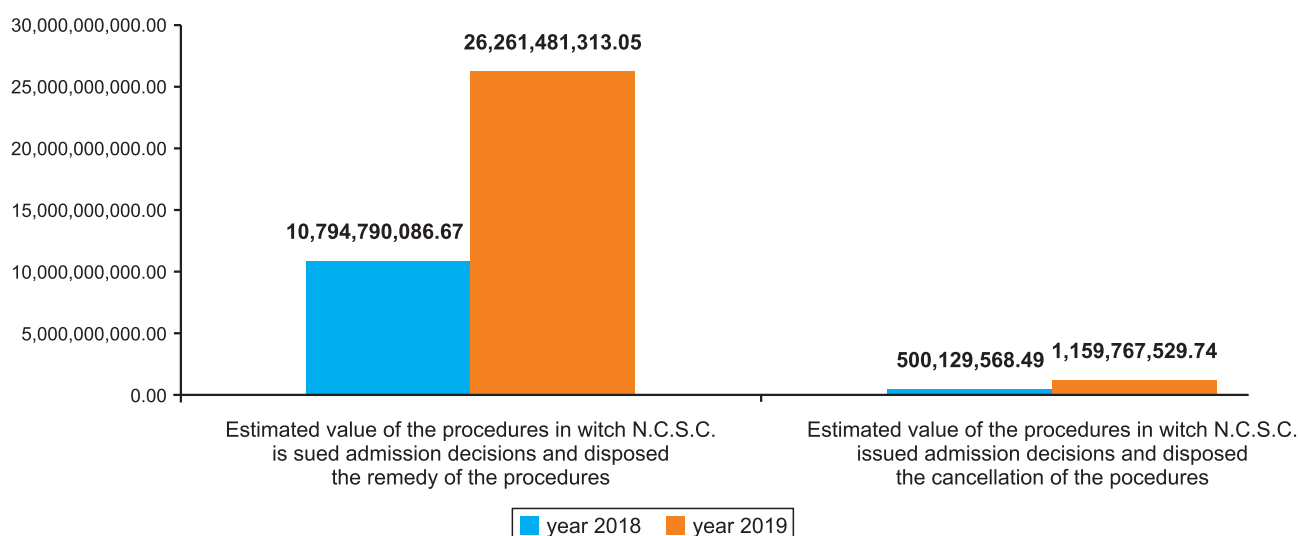


Figure 36 - The trend of the estimated value of the award procedures under which N.C.S.C. rendered decisions in the period 2018-2019

As it can be noticed in 2019, the total estimated value of the award procedures under which the Council cancelled procedures increased by 56.88% in comparison with 2018, and the estimated value of the award procedure under which N.C.S.C. ordered remedies increased by 58.89% in comparison with 2018, thus the Council proving one more time its role of efficient filter for the prevention of the irregularities in the public procurement field, a role that has also been acknowledged by the European Commission in the MCV reports.

Out of the estimated value of **RON 1,159,767,529.74**, the equivalent of **EURO 244,408,566.50** of the award procedures under which the Council ordered the cancellation, the amount of **RON 15,165,119.95**, the equivalent of **EURO 3,195,886.36** represents the award procedures financed by the European funds, namely 1.31% of the total value of the award procedures under which the cancellation was ordered and 0.03% of total value of the challenged award procedures.

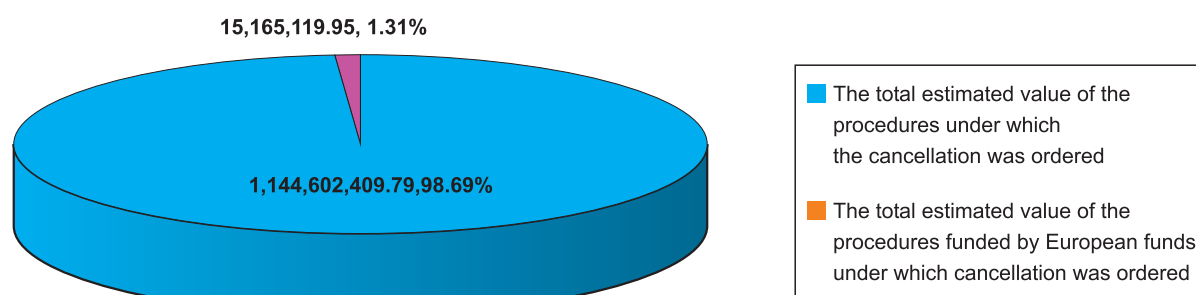


Figure 37 - The total estimated value of the procedures funded by European funds under which the cancellation of the award procedures was ordered in relation to the total estimated value of the procedures under which the cancellation was ordered



2.4.2. THE ESTIMATED VALUE OF THE PROCEDURES UNDER WHICH THE N.C.S.C. ISSUED DECISIONS FOR THE ACCEPTANCE OF THE COMPLAINTS IN COMPARISON WITH THAT ONE OF THE PROCEDURES COMMENCED VIA S.E.A.P.

The official data provided by the Electronic Public Procurement System (S.E.A.P.) show that **in 2019, within the communication platform used in the award process for the public procurement contracts 62,629 award procedures were commenced,**

totalising an estimated value of RON 72,719,093,840, the equivalent amount of EURO 15,324,768,996²⁴.

In comparison with 2018 when 35,434 award procedures were commenced, it is found that in 2019 the number of the award procedures increased by 56.58%.

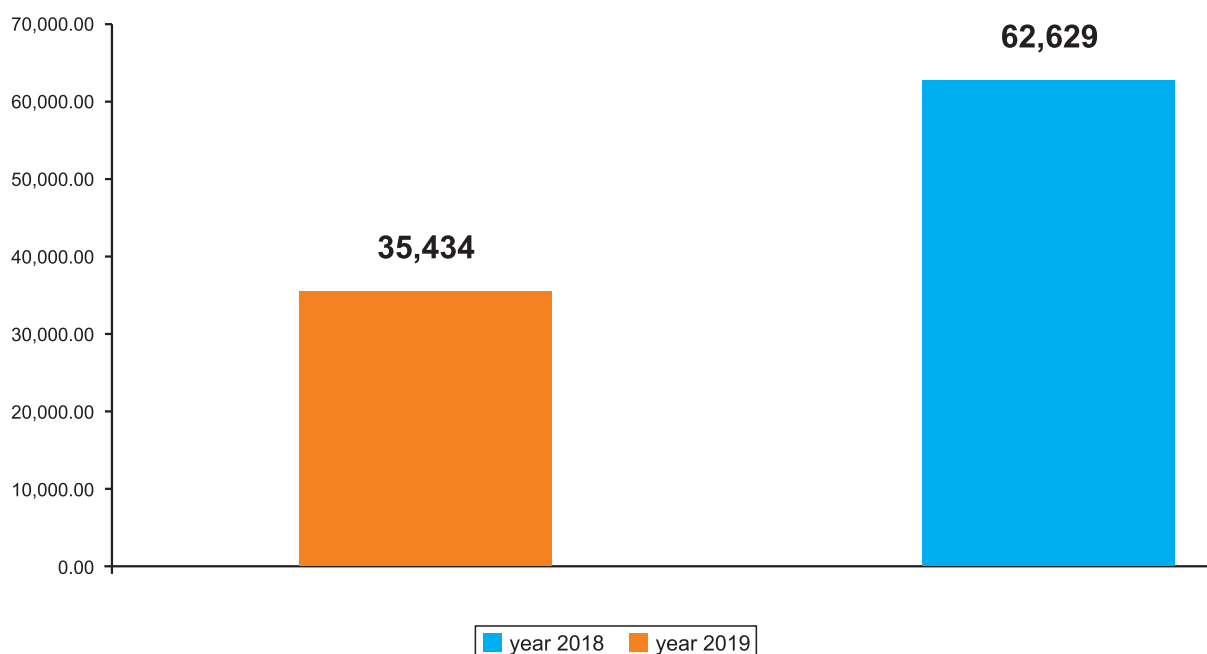


Figure 38 - The trend of the award procedures commenced by SEAP in the period 2018-2019

²⁴ The amount was calculated at an annual average exchange rate communicated by the National Bank of Romania of RON/EURO 4.7452

Comparing the total annual estimated value of the procedures commenced via S.E.A.P. in 2019 (RON 72,719,093,840) and the total estimated one of the award procedures under which N.C.S.C. rendered decisions (RON 60,504,663,081.38), it arises the latter accounted for 83.20% of the total estimated value of the procedures commenced via S.E.A.P.

But, if we compare the total annual estimated value of the procedures commenced via S.E.A.P. in 2019 (RON 72,719,093,840) with the total estimated value of the procedures under which N.C.S.C. accepted the complaints submitted by the business operators and ordered measures of remedy for the

procedures/ cancellation of the procedures (RON 27,421,248,842.79) it arises that the latter accounted for 37.71% of the total estimated value of the procedures commenced via S.E.A.P out of which

- the estimated value of the procedures under which N.C.S.C. ordered measures of remedy amounted to RON 26,261,481,313.05 (36.11% of the total estimated value of the procedures commenced via S.E.A.P.);

- the estimated value of the procedures under which N.C.S.C. ordered the cancellation thereof amounted to RON 1,159,767,529.74 (1.59% of the total estimated value of the procedures commenced via S.E.A.P.).

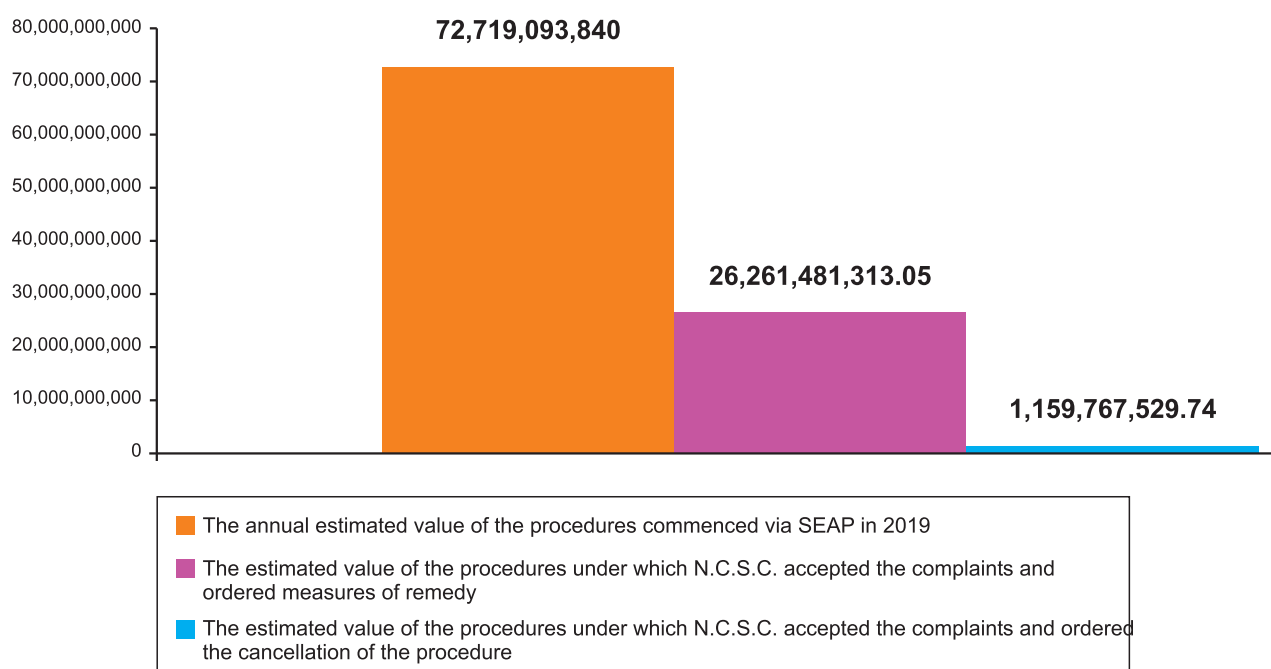


Figure 39 - The standing of the estimated value of the procedures commenced via S.E.A.P. and of the procedures under which the Council accepted the complaints and ordered measures of remedy or the cancellation of the procedure



Comparing in terms of value, the values of the award procedures commenced via SEAP in 2019 (RON 72,719,093,840) and the previous year, respectively 2018 (RON 140,288,319,986.96), it is found that in 2019 **the estimated value of the award procedures commenced via SEAP dropped by 48,16% in comparison with 2018.**

As to the public procurement procedures funded by European funds commenced via SEAP through contract notice and notices of invitation to tender, the data provided by the Agency for Digital Agenda of Romania (A.A.D.R.) for the year 2019, it arises that there were 6,659 award procedures which means in comparison with the previous year (4,572 award procedures) an increase by 68.66% (+ 2,087 award procedures).

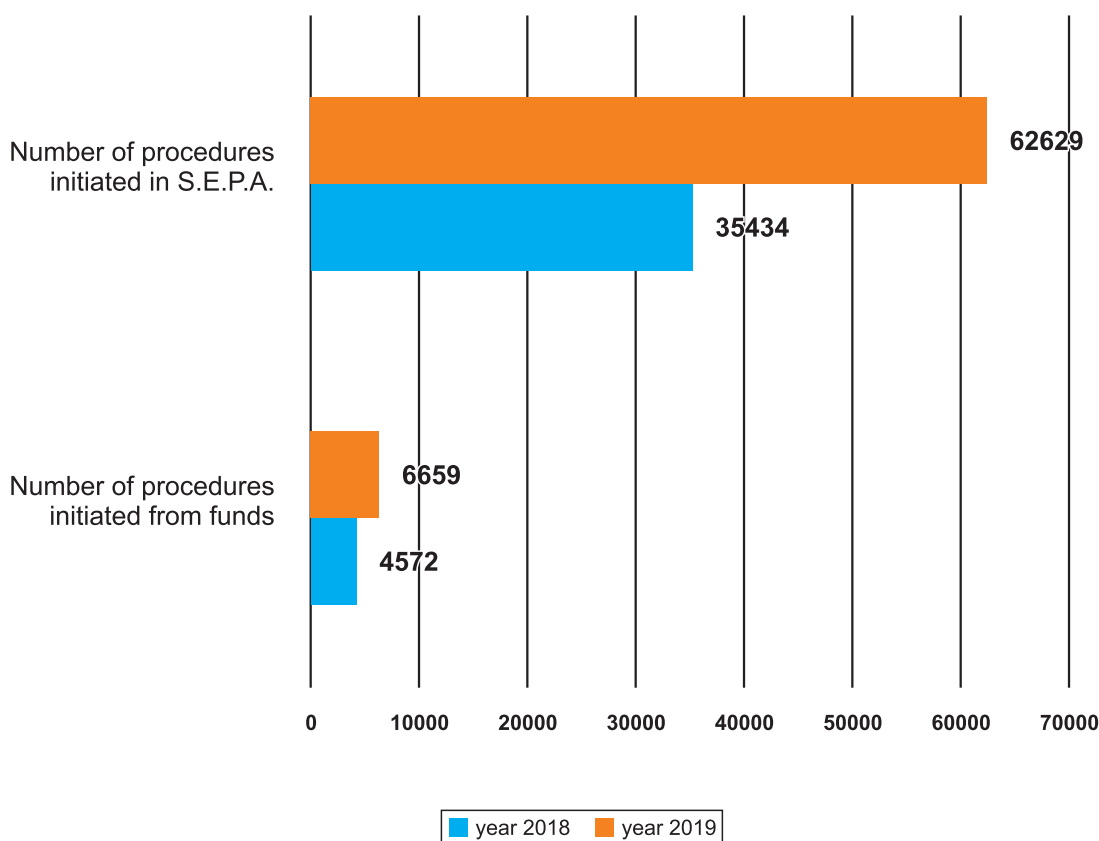


Figure 40 - The number of procedures commenced and effectively awarded via S.E.A.P. in the period 2018 - 2019

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

FROM THE 01ST OF JANUARY 2019 TO THE 31ST OF DECEMBER 2019

3.1. THE STANDING OF THE DECISIONS ISSUED BY N.C.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 N.C.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 channel, 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 channel 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 counsellors for solving complaints it represents an incentive for the purposes of carrying out their duties with maximum strictness and severity, being aware that their decisions might be subject to a control by a higher court, therefore each action is a test to term, a verification of their knowledge.

Following the settlement by the Council of the complaints submitted by the business operators, in compliance with the article 29 (1) in the Act no. 101/2016, the decisions of the Council for the settlement of the complaint may be appealed with the law court provided for by the article 32 (1)-(2) in the aforementioned act, within 10 business days following the service, both for illegal and ungrounded reasons.

Pursuant to the effective legislation, the

complaint against the decisions of N.C.S.C. may be lodged either by the contracting authority, or by one/ several business operators participating in a procedure, or by the contracting authority together with one or several business operators involved in a public procurement procedure.

For this reason, often several actions are brought against a decision issued by , N.C.S.C. with the competent law courts, respectively the Courts of Appeal, in whose jurisdiction the contracting authority is headquartered.

In the course of 2019, **557 decisions were appealed with the competent Courts of Appeal**, in whose jurisdiction the contracting authority is headquartered, of the total **2,352 decisions issued** by the chambers for solving complaints within N.C.S.C.

In 2019, as a result of the actions lodged with the competent Courts of Appeal in whose jurisdiction the contracting authority is headquartered, **53 decisions issued by N.C.S.C. were overridden/ annulled totally by the courts (2.25% out of the total decisions issued by the Council) and 45 were amended partially (1.41% of the total decisions issued by the Council).**

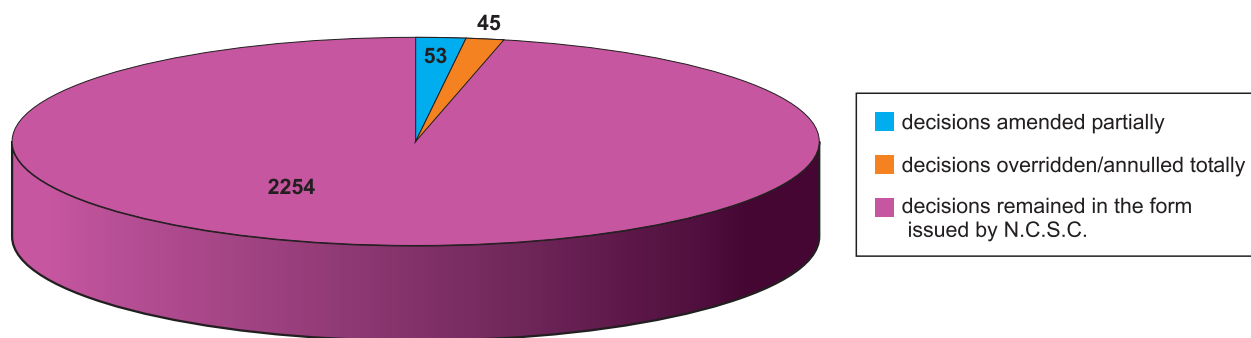
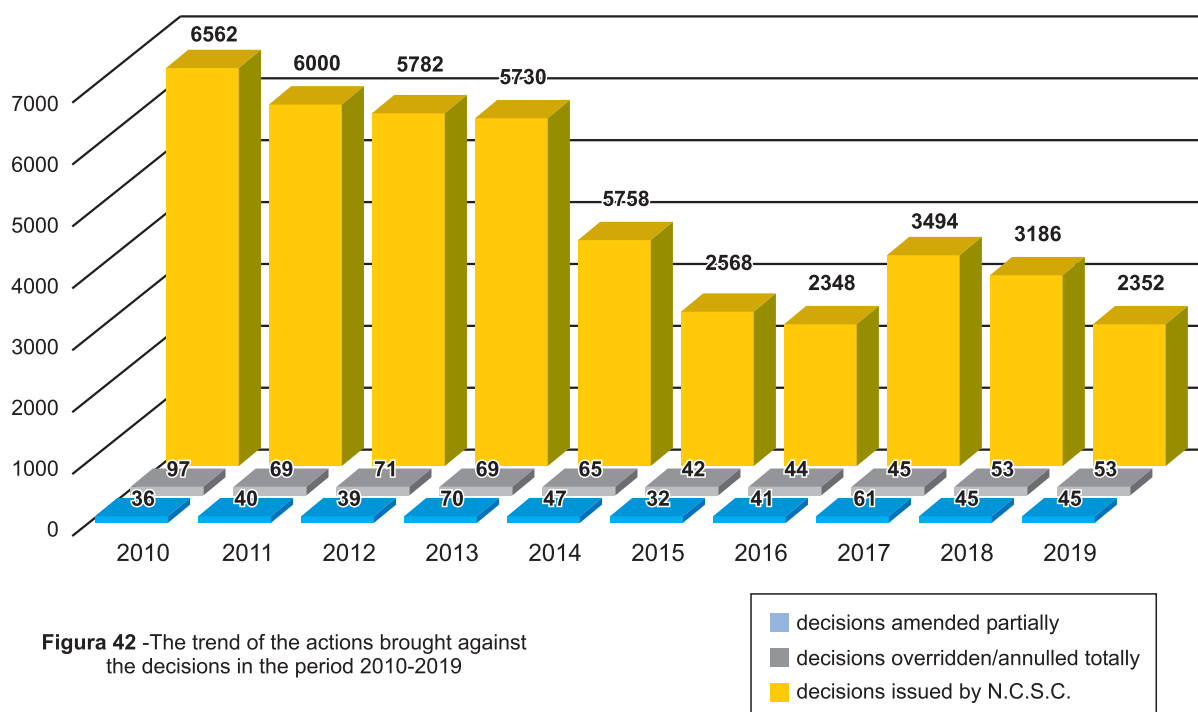


Figure 41 - The standing of the actions brought against the decisions rendered by N.C.S.C. in 2019

²⁵ The article 29 in the Act no. 101/2016 effective upon the carrying the reported activity, the year 2019



It arises that in the course of 2019, **2,254 decisions** issued by the Council (**95.84% of the total decisions issued in the course of 2019**) were rendered final and irrevocable in the form issued by our institution which reflects the Council's very high level of credibility and reliability.

It may be concluded from the statistical records that the percentage of the decisions admitted by the courts of appeal since the Council was created and until the end of 2019 was very reduced in comparison with the percentage of the decisions rendered by it and which became final and irrevocable.

If we sum up the decisions issued by N.C.S.C. since its creation and until the end of 2019, it arises that our institution rendered **59,872 decisions**.

Practically, since its creation (September 2006) and until the end of 2019, the total number of decisions totally overridden/ amended and partially amended by the competent courts of appeal amounted to 1,283 of the total 59,872 decisions rendered by the Council.

Therefore it arises that from September 2006 to December 2019, the decisions that are final in the form issued by the Council, after having been brought an action against them with the competent courts of appeal by the business operators/ Contracting Authority amounted to 58,589 decisions which accounted for 97.86% of the total decisions issued by the Council.

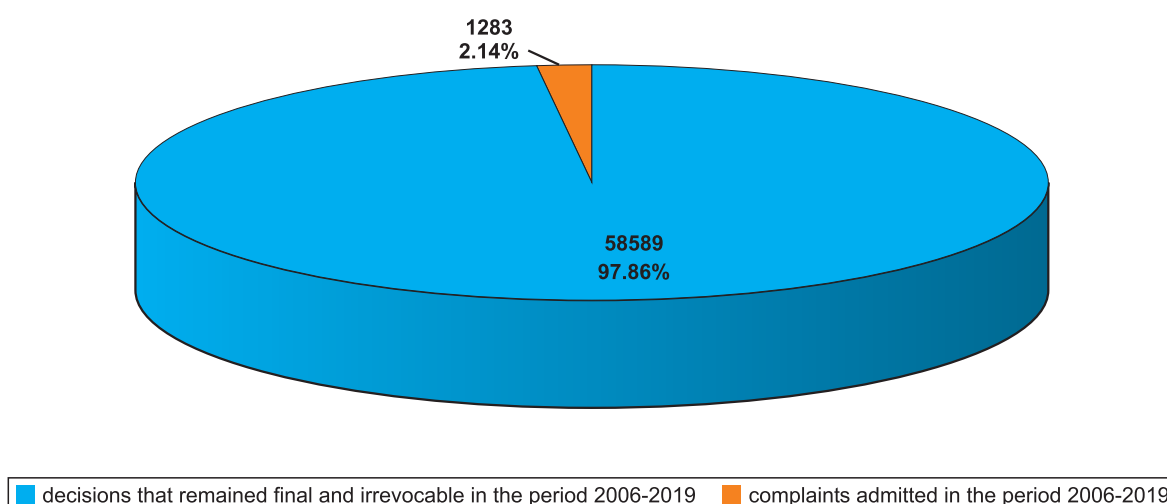


Figure 43 - The standing of the actions admitted by the law courts in the period 2006-2019

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 issued form, 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 the course of 2019, 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 project funded either from national public funds or European funds.

Thereby, in the course of 2019, the contracting authorities brought 103 actions out of which 557 actions lodged with various courts of appeals against the

N.C.S.C. decisions, namely over 18,49%, provided that such authorities, at least in declarations, showed interest for the expedient development of the public procurement procedures.

But, it only has generated the totally ungrounded extension of the public procurement procedures, respectively the award of the contracts, as the actions brought against by the contracting authorities proved mostly to be ungrounded. Due to the total independence that the Council benefited and still benefits, but also the profile and expertise of its employees, in 2019, the quality of our institution activity and the expedience in settling the complaints lodged by the business operators represented the fundamental element of the N.C.S.C. performance.

4. THE INSTITUTIONAL TRANSPARENCY AND THE PERSONNEL TRAINING

4.1. THE INSTITUTIONAL TRANSPARENCY



In 2019, the Council management 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 the increase of the European funds absorption. Moreover, a special priority was given to its own personnel training, in parallel with that of prevention and fight against the anti-competitive practices in the public procurement field.

In this respect, N.C.S.C. has also attached a special importance to the institutional collaboration with bodies with duties in the public procurement field (the Competition Council, the National Agency

for Public Procurement - A.N.A.P., the National Integrity Agency - A.N.I., courts of appeal, the Tribunal of Bucharest, the representation of the European Commission in Bucharest, etc.).

Interested in the coherent operation and stability of the local public procurement system and in the absorption of European funds, the Council kept on conveying on a weekly basis to the National Agency for Public Procurement (A.N.A.P.) - 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 and the measures of remedy ordered by it as a result of the complaints lodged by the business operators.

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



NATIONAL COUNCIL
FOR SOLVING
COMPLAINTS

4.1.1. THE INVOLVEMENT OF THE COUNCIL WITHIN THE NETWORK OF FIRST INSTANCE REVIEW BODIES ON PUBLIC PROCUREMENT FROM THE MEMBER STATES AND THE ROMANIA'S HOLDING THE PRESIDENCY OF THE COUNCIL OF THE EUROPEAN UNION



In the first semester of 2019, Romania held for the first time since its membership, the Presidency of the Council of the European Union.

This period was defined by the joint effort of the member states to identify some replies to the major challenges in terms of the European project, for which reason, the motto of the Romanian Presidency was

“cohesion, a common European value”.

By this motto, from the 2nd to the 4th of April 2019, the 6th meeting of the Network of First Instance Review Bodies on Public Procurement from the Member States of the European Union which the National Council for Solving Complaints is part of, was held in Bucharest, event organized in collaboration with GROW Directorate General – Internal

Market, Industry, Entrepreneurship and SMEs, on which occasion the National Council for Solving Complaints, together with the European Commission played an important role of moderator/mediator of the major items in the meeting agenda. It could not have been otherwise, as Bucharest 2019 celebrated 5 (five) years following the adoption of the set of European directives in the public procurement field. Representatives of OECD (The Organisation for Economic Co-operation and Development) and EFTA (European Free Trade Association) attended such event together with the representatives of the review institutions from the European Union of the European Commission.

Nowadays it is unanimously accepted that the role assumed by the Council represented an appreciation of its activity within the European network since its creation and Bucharest 2019 is an important moment.

On the 03rd of April 2019, the Council hosted at its head office the meeting of the Working Group at the level of the experts in the public procurement field of the European Commission, event organized by the European Commission.


At the 6th meeting of the Network of First Instance Review Bodies on Public Procurement from the Member States of the European Union, meeting held in Bled, Slovenia, October 2019, the Council made the headlines by presenting the new project carried out in partnership with the National Office for Centralized Procurement (ONAC) – The development and the implementation of some integrated electronic mechanisms for the development and monitoring of centralized procurements.

The representative of the Council pointed out at such meeting that not all the


Member States have an institution for centralized procurement which represents a potential breach in the dissemination of the good practices at European level, with direct impact on the European Digital Single Market.

Accordingly, the Council invited the partner institutions within the network to a permanent dialogue on the subject, especially that one of the Project desiderata consists in the integration of the artificial intelligence in the settlement of the complaints.

Not in the least, the aforementioned project provides to the Council members a good opportunity to meet counsellors for solving complaints from other two similar institutions within the European Union and such events were held in the course of 2019.



EUROPEAN COMMISSION
Directorate-General for Internal Market, Industry,
Entrepreneurship and SMEs
SINGLE MARKET FOR PUBLIC ADMINISTRATIONS



NATIONAL COUNCIL FOR SOLVING
COMPLAINTS
Romania

AGENDA

6th Meeting - "Network of first instance public procurement review bodies"

3rd April 2019
Bucharest, Romania

WELCOME RECEPTION

The Romanian National Council for Solving Complaints is inviting all members of the Network to attend a reception on **2nd April 2019 at 6pm**. The event will take place at the Council's premises (Str. Stavropoleos nr. 6, sector 3, Bucharest).



4.1.2. PROJECTS AND INITIATIVES

The Council, together with the partners from the National Office for Centralized Procurement and the Ministry of Home Affairs - The Department for Emergency Cases and the General Inspectorate for Emergency Cases prepared the project „The development and the implementation of some integrated electronic mechanisms for the development and the monitoring of the centralized procurements”.

The purpose of the Council involvement in this project is the preparation of a practical guidebook for the avoidance of potential blockages that might arise in the course of the centralized procurements, by analysing and identifying the main problems, claimed under the complaints, in the award of the products/ services that may represent the subject matter of the centralized procurements.

Therewith, it is also pursued in this Project the strengthening of N.C.S.C. capacity to meet the challenges and to avoid delays in issuing decisions and diminishing the risk of extension of the deadline for the award/ implementation of the master agreements related to centralized procurements. There will be organized 2 (two) study visits to the correspondent review bodies from 2 Member States of the European Union using the centralized procurement system which will generate subsequently the institutional professionalization and understanding how institutions similar to N.C.S.C. are organized, how the settlement of the complaints in the centralized procurement field is optimized by the efficient use of the material and human resources, the examples of good practices in the field, the identification of new additional mechanisms in order to provide an unitary practice within the Council. Furthermore, there will be organized 2 workshops approaching subjects related to the main users' necessities materialized in a tender documentation, respectively the avoidance

to include some restrictive requirements/ specifications/conditions, as well as the evaluation of the bids, the admission of the complaint and the ordering of the re-evaluation of the bids, the determination of the winning bid. The information collected from the study visits and those 2 workshops will be used for the completion of the review on the challenged procedures whose subject matter is the procurements of centralized goods and services and the preparation of the practical Guidebook for the avoidance of potential blockages/ delays that might arise in the course of the procedure for the award of centralized procurements.

For 2020, the Council proposes to prepare a project for the improvement of capacity to process the data, the growth of the performances related to the reporting and evaluation of the results through an unitary practice by developing an application based on Big data technology and architecture and data analysis which provides the capacity to collect new information, both from structured sources and non-structured sources (media, web, audio, video, geographical locations, social communities, smart devices, etc.). Taking into account the abundance of sources supposing very much scattered information that apparently does not have any connection to each other, predictive analysis implemented by means of the Big Data type technologies will enable the Council to identify connections and interest patterns in the fields subject to analysis (the decisions of CJUE, the decisions of the courts of appeal, the decisions of tribunals, the decisions of N.C.S.C., etc.) whose identification will be impossible due to the inexistence of such instruments. In 2019 the Council began to prepare the feasibility study and the technical support for the implementation of this project.

4.2. THE UNIFICATION OF THE ADMINISTRATIVE-JURISDICTIONAL PRACTICE



Within the Council, there is a permanent preoccupation for the unification of the practice and pursuant to the article 62 in the Act no. 101/2016, plenary sessions are organized monthly in the course of which each chamber, at a time, submits a report on a subject, of its choice, in the practical situations dealt with while settling complaints. As a result of such plenary sessions, insofar as there is sufficient relevant practice of the courts on the issue subject to debate, a decision for the unification of the administrative-jurisdictional practice compulsory for all the members is taken. Sometimes, invitees from other institutions also attend the plenary sessions. For example, in 2019 specialists from ANAP, judges from the Court of Appeal in Bucharest, the Tribunal of Bucharest and even from other countries attended.

At least twice a year, there are organized meetings and seminars with judges and other institutions with duties in such field, in the course of which non-unitary solutions both from our activity and

of courts are presented and the solution to be followed is to be established. If non-unitary solutions of the courts are identified, the High Court of Cassation and Justice is notified and pursuant to law, the procedure for the second appeal provided for in the article 63 in the law is to be followed.

The issues approached in a non-unitary mode are notified both by the counsellors and parties, equally contracting authorities and complaining parties, ANAP, management authorities or even law courts. The received notices are reviewed seriously and subject to debate as mentioned in the plenary sessions. Not always a solution of unitary interpretation of law is accepted, aspect which must not be a discouraging one and the divergent issue is to be subject again to debate, as the courts of appeal render new decisions. The frequent legislative amendments are not likely to clarify the divergent aspects, and in most cases they do not manage to improve the legislation, but on the contrary cause confusion and divergent practice.

So that the practice be unified, it is normal that it be initially a non-unitary one,





especially in a relatively new legal framework as the legislative package was passed 3 years ago and it has already been subject to multiple amendments.

Pursuant to the provisions of the Act no. 101/2016, the Council organized seminars with judges from law courts and specialists from ANAP, as well as with other categories of experts in the course of which

there is a debate on the law-related issues leading to different solutions in similar cases, the enforcement and the interpretation of the newly-issued regulations in the public procurement field, as well as in any other fields which represent an interest to the professional activity of the Council members.



Thus, three seminars were organized in 2019:

- a summer seminar, at the seminar organized by the Council, which in addition to the counsellors for solving complaints, representatives of the Court of Appeal in Bacau, the Court of Appeal in Bucharest, ANSC Moldova also attended, on which occasion the following law-related issues were debated:

- o the determination of the value of the bond for the settlement of the complaints lodged against the public procurement procedures - the presentation of non-unitary practice cases

- o The limits of the bid re-evaluation - the submission of the Decision no. 66/2018 rendered by the High Court of Cassation and Justice

- o How the indirect expenses are determined and reasoned by virtue of the article 133 in the Government Decision no. 395/2016 (issue identified by the review of the decision rendered in the case file no. 275/32/2019)

o The exclusion from the award procedure of the business operators that violated seriously or repeatedly their main obligations in a public procurement contract - the submission of the non-unitary practice cases

o The competence for settling the complaints related to documents issued by contracting authorities in some own procedures erroneously named by the authorities in SEAP as direct procurements as well as in the direct procurements

- In autumn, the Council organized 2 seminars which many invitees attended in addition to the counsellors for solving complaints, as follows:

o Representatives of the Tribunal of Bucharest, the Court of Appeal in Pitesti, the Court of Appeal in Galati, the Court of Appeal in Bucharest, the Court of Appeal in Ploiesti, the Court of Appeal in Craiova, the Court of Appeal in Constanta attended the first seminar, on which occasion the following law-related issues were debated:

- The contracting authority's requesting from the tender documentation of the requirements related to the time of action and the removal of some substances (aldehydes, chlorine, iodine, phenols, etc.) from the composition of some disinfectants

- The enforceability of the provisions of the article 156 (6) in the Act no. 98/2016

- The condition of interest in the light of the jurisprudence of the Court of Justice of the European Union in terms of the public procurements

- The division per lots of the subject matter of the procurement. To what extent may the division per lots restrict the participation of the operators in the procedure, contrary to the purpose pursued by the legislator?

o The representatives of the Court of Appeal in Bucarest attended the second seminar on which occasion the following law-related issues were debated:

- The presentation of the practice of the Court of Appeal in the public procurement field.

- The determination of the time since the deadline for challenging the act of the bid evaluation starts if it is posted in SEAP on a certain date and the communication of the evaluation result is transmitted to the bidders by the authority at a subsequent date.





4.3. PROFESSIONAL TRAINING

As per the provisions of the Government Emergency Ordinance no. 57/2019²⁶, 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 the professional training and improvement represent a priority nationwide within this context, 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 special public servants, 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 qualified, driven, good, competitive and professionally well-prepared personnel.

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

Therefore, taking into account the obligation to improve continuously their skills and professional training²⁷ and being interested in the continuous improvement of the personnel, the members of the Council attended in the summer of 2019 the course whose subject is the whistleblower and the lecturers were the representatives of the Ministry of Justice and the purpose of the meeting consisted in understanding the legal provisions in the field.

²⁶ The Emergency Ordinance no. 57/2019 on the Administrative Code

²⁷ article 458 in the Government Emergency Ordinance no. 57/2019

4.4. INSTITUTIONAL COLLABORATIONS

In 2019, the Council entered into a collaboration protocol with the NATIONAL AGENCY FOR SOLVING COMPLAINTS in the Republic of Moldova for an interinstitutional collaboration intended for promoting the mutual exchange of experience, on which occasion two meetings were held, law-related issues in the public procurement field were discussed and procedures for solving the complaints within the two institution were submitted.

Moreover, it entered into a protocol with the FOUNDATION „ROMANIAN INSTITUTE FOR LEGAL INFORMATION” (ROLII) with a view to promote the free access to the public legal information in the public procurement field, respectively, the mutual facilitation of an exchange of legal information consisting in the import from the platform developed by ROLII of the

anonymous rendered decisions ordered by the law courts in Romania – save the High Court of Cassation and Justice under which remedies at law/ actions lodged against the decisions/ conclusions issued by N.C.S.C. were settled, in order to be published on the N.C.S.C. website in the section dedicated to the official bulletin, next to those decisions that were appealed, respectively, the import from the N.C.S.C. website of the decisions issued by the Council/N.C.S.C., as they are published in the official bulletin, in order to be published on the platform developed by ROLII. This collaboration aims at creating the premises for an unitary administrative-jurisdictional practice and is effected according to the parties' engagement to comply with the effective legislation in terms of the protection of personal data (GDPR).

4.5. DECISIONS RELATED TO THE EXISTENCE OF SOME POSSIBLE CONFLICTS OF INTERESTS

The issue of the conflict of interests in the public procurement field is one of the various aspects mentioned in the report for the Evaluation of the Public Procurement System in Romania carried out by the company Deloitte and taken over by the European Commission.

Due to the aforementioned collaboration protocols, N.C.S.C. has contributed and still contributes to the creation of a general framework for the unitary enforcement of both the specific legislation and the competition-related legislation which has made possible the identification of some possible conflicts of interests between the contracting authority and various business operators or of the unfair competition as a consequence of

some “arrangements” between various business operators.

Under such circumstances, we mention that in 2019 N.C.S.C. did not have to inform the National Agency of Integrity (A.N.I.), the National Agency for Public Procurements - A.N.A.P. on award procedures under which the existence of some possible conflicts of interests were invoked.

However, the Council rendered its decisions on such aspects, upon being notified by some business operators and to this effect, we present as an example the following case under which the Council rendered a decision preserved by the court of appeal.



1. The obligation to exclude from the tender the candidate that through its previous participation in the preparation of the award procedure led to a distortion of the competition, operates solely insofar as such distortion cannot be remedied by other less severe measures

In the decision, N.C.S.C. took into the following:

As to the non-compliance of the association bid on the ground that the statements of the member of Rxxx association in the ESPD are untrue, the complaining party shows that under the European Single Procurement Document Rxxx (party in the winner association) replied to the following question related to the Conflict of interests: Has the business operator or an enterprise which has connections with it provided consultancy to the contracting authority or the contracting entity or has participated in any other way in the preparation of the public procurement procedure ? The answer of Rxxxx was NO, but the complaining party shows that such answer is untrue, it has not stated that is the major shareholder of the entity that is the elaborator of the tender technical documentation, respectively lxxx SA, that designed a part of the requested poles and Cxxxx performed them in the course of time for other projects.

As per the article 180 (1) e) in the Act no. 99/2016, the entity must exclude from the tender the candidate that through its previous participation in the preparation of the award procedure led to a distortion of the competition and such situation cannot be remedied by other less severe measures. The Council considers from the facts presented by the parties that a part of the tender documentation, respectively the tender specifications were drawn up under a line design contract signed in 2010 by the Consortium TxxExxxx SA and lxxx SA. The complaining party reasons the distortion of the competition by the fact that the designer provided in the documentation a model of pole manufactured by Cxxx and designed by lxxxx, companies in which Rxxxx is a majority shareholder. It also states that the statements of Rxxxxx from ESPD are false. Thus, the complaining party claims that the bidder had to be rejected both for false statement and for conflicts of interests.

As per the article 72 in the Act no 99/2016, „pursuant to this law, conflict of interests means any situation in which the personnel of a contracting entity or of a procurement service provider acting on behalf of the contracting entity which are involved in the running of the award procedure or which may influence on the result thereof have directly or indirectly a financial, economic interest or other personal interest which might be perceived as an element compromising their impartiality or independence in the award”.

As it arises from the contract notice, the subject matter of the procedure consisted in designing and execution. According to the contract notice, the design services consisted in the preparation of the Detail Design, Detail Engineering and the As-Built documentation corresponding to the products, systems and installations within this project. The Detail Design and the Detail Engineering will comprise the interfaces with the existing installations and/or with other running projects.” Thus, the documentation prepared many years ago is at the level of feasibility study and at this stage it is impossible to have an influence on the result of the procedure.

This procedure takes place after 9 years as of the time of the preparation of the project which the tender documentation is based on. At the same time, as the contracting authority presents, the designing was carried out by an association, respectively Txxx and lxxx, and Rxxxx is the shareholder of the latter. The fact that an industrial design (pole), ownership of Txxx, designed in 2005 by lxxxx, in which the entity has right of intellectual property cannot lead to the conclusion of a conflict of interests, especially that according to the tender specifications, the entity enabled the operators to execute and design the poles according to the said design, requesting that „the building Contractor must carry out the prototype, carry out the homologation and test the pole Sn+6 400250 according to a testing programme approved by the Employer. Moreover, it must also submit the detail engineering for all the poles", and under the reply no. 10 in the Set no. 4 of clarifications, specified „the Contractor will verify by computerized calculation all the poles according to which the detail design and mounting will be carried out. It is understood that it will undertake the responsibility for the pole projects, in compliance with the article 9 "Designing by the building Contractor" in the Contract – General Conditions ." The pole model indicated by the entity in the documentation is a standard one, used by Txxxxx and the same model is not manufactured solely by Cxxxx, but also by other operators, even the complaining party can manufacture it under the conditions specified in the documentation. Therefore, solely in terms of the reference to this model of pole, designed and developed for Txxxx in 2005, it may not be concluded that there is a conflict of interest or competition. Moreover, it arises from the said provisions that the documentation does not impose the manufacturer of the poles, and the condition is that they must be homologated and tested, a requirement which is as a matter of fact, reasoned by the importance of the investment.

The Council deems also relevant the argument of the entity according to which the types of poles proposed to be used under the tender specifications are part of a group/ range which was designed for Txxxx, so that unitary solutions are provided at the level of the company for the equipment of the power lines, solutions that would enable the provision of feedstock, easy maintenance and immediate intervention in case of damage, as the standard model may render the remedy of damages more easily and in terms of the promotion of a construction investment of a new open-air transmission line, the determination of the range of poles enables to go through all the stages preceding the procurement of a construction work such as: the approval of the technical-economic indicators, the procurement of approvals and agreements, the determination of the surfaces and their locations for expropriation purposes, the determination of the value of the damages, the procurement of the approvals related to the crossing of the line with roads, railways, other networks, the procurement of the building permits, etc., such arguments appear to be fully valid and the contracting entity's necessity comes first.

The Council considers also relevant the provisions of the article 73 in the Act no. 99/2016, „(1) Any situations that might lead to a conflict of interests in the meaning of the article 75 represent situations potentially generating conflicts of interests, such as, listed as an example:

a) the participation in the verification/ evaluation of the applications of participation/



bids of the persons holding shares, stakes, shares of the subscribed share capital of one of the bidders/ candidates, third parties providing support or proposed subcontractors or of the persons that are members of the board of directors/ management body or supervisory board of one of the bidders/ candidates, third parties providing support or proposed subcontractors;

b) the participation in the verification/ evaluation of the applications of participation/ bids of a person who is husband/ wife, relative or kin up to twice removed inclusive, with persons that are members of the board of directors/ management body or supervisory board of one of the bidders/ candidates, third parties providing support or proposed subcontractors;

c) the participation in the verification/ evaluation of the applications of participation/ bids of a person about whom/ which it is found or in relation to whom/which there are reasonable signs/ actual information that such person may have directly or indirectly a personal, financial, economic interest or otherwise or is likely to affect the independence and the impartiality throughout the evaluation process;

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

e) if the bidder/ candidate appointed among the main persons designated for the fulfilment of the contract persons that are husband/wife, relative or kin up to twice removed inclusive or who has business relations with persons holding decision-making positions within the contracting authority or the procurement service provider involved in the award procedure.

(2) Pursuant to the provisions of the para. (1) d), significant shareholder means the person exercising rights corresponding to some shares that cumulatively account for at least 10% of the share capital or grants to the holder at least 10% of the total voting rights in the general meeting.

However, the conflict of interests in the procurement legislation means the distortion of the competition by a bidder's being favoured by the members of the evaluation committee or the persons in charge within the contracting authority which is based on some relations, kinships or business interests.

The bidder's participation in the preparation of the tender documentation does not trigger de jure its rejection, not even in the case of the competition distortion, and even the article 180 e) setting forth that the obligation to exclude from tender the candidate that by the previous participation in the preparation of the award procedure led to a distortion of the competition, operates solely insofar as such distortion cannot be remedied by other less severe measures. Therefore, the restriction of an operator's right to participate in the procedure is an extreme measure and the distortion of the competition must be proved

and not presumed. The fact that a member of the association is a shareholder of the designer and the manufacturer of the poles that the contracting authority uses is not likely to lead to the conclusion of competition distortion. As a matter of fact, the specialty market is a limited one, with a few business operators, so that it is impossible that one of them, at a given time, would not have designed something for the contracting entity, but this is not likely to remove such bidder sine die from any competition, such an interpretation is an extreme one. Moreover, the long period of time from the preparation of the documentation to the organization of the procedure is a sufficient reason for rejecting the complaining party's allegations related to a possible conflict of interests or a distortion of the competition.

The decision of the Court of Appeal under which the action against the Council decision was settled, took into account the following:

As to the appellant's allegation related to the incidence of the reason of exclusion provided for in the art. 180 (1) (f) in the Act no. 99/2016, the Court takes into account as follows:

As per the article 180 (1) (e) in the Act no. 99/2016, the entity must exclude from the tender the candidate that by the previous participation in the preparation of the award procedure led to distortion of the competition and such case cannot be remedied by other less severe measures.

It arises from the abovementioned provision that so that a business operator be excluded from the procedure, three cumulative requirements must be met:

- the previous participation of the business operator in the preparation of the tender documentation;
- such participation had led to the distortion of the competition;
- the situation could not have been remedied by other less severe measures.

In this case, only the first one of the requirements is met without the second one, the distortion of competition and implicitly, without the third one.

To this effect, the Court considers that the participation of a company held by the bidder winning the preparation of the technical documentation has not caused any advantage to such bidder.

Thus, the pole projects carried out by Ixxxx Sa represent the contracting authority's property enabling their use and execution by any of the bidders.

Consequently, all the bidders may execute such poles, thus the winner bidder does not benefit from any advantage from the fact that a company held by it designed such poles.

As to the alleged advantages arising from the winner bidder's having executed such poles, the Court considers that such an advantage arises from the winner bidder's market share and not from its previous participation in the preparation of the tender documentation.(...)

As to the foregoing, the Court ascertains that the N.C.S.C. decision is legal and grounded.



4.6. THE RELATION WITH MASS-MEDIA AND GENERAL PUBLIC



Either it is about an internal or external communication, it represents the connection making an institution work. As such, the communication represents the sine qua condition through which the institutional relations exist and evolve.

Following this principle, the activity carried out in the course of 2019 by the Office for Information and Public Relations within the National Council for Solving Complaints relied on the promotion of the transparent communication concepts expediently and of the respect in the relation with the business operators, the contracting authorities, the governmental and non-governmental institutions involved in the public procurement field, but also with mass-media which materialized in an

interactive approach providing a full institutional opening and a fair information of the general public.

For the purposes of informing periodically, the Office for Information and Public Relations, in collaboration with the Statistics and IT Office within the Council focused on the reconfiguration of the institution website in a mobile friendly one which contributed to the unrestricted access to the information on the institution website (www.cnsc.ro), so that any legal entity or individual could disseminate online, in real time, the decisions and conclusions issued by the Council, the history of the files in progress or completed ones, the statistical information and data related to the institution activity, the

legislative amendments dealing with the national and European legislation in the public procurement field, as well as any other information relevant and useful for the prevention of irregularities in the public procurement field and the promotion of the good practices.

As to the number of enquiries of public information recorded in the course of 2019, either by the business operators, or the contracting authorities, public institutions, non-governmental organizations or individuals, over 500 itemised enquiries were submitted to N.C.S.C., either in written form, or oral form, by virtue of the Act no. 544/2001 on the free access to public information and most of them were solved expeditiously, even on the date they were submitted, as well as in compliance with rules on the protection of the personal data. Therewith, the activity of the Office for Information and Public Relations considered the provision of the support required for the organization of some conferences and press releases by the institution management, in preparing the press releases, but also in the preparation

and dissemination of some statistical data related to the institution activity that were provided by the Council management to some institutions involved in the public procurement field (Courts of Appeal, ANAP, ANI, the Competition Council, governmental institutions, etc) and subsequently included in the annual Council Statement of Work.

Moreover, in the course of 2019, the Office for Information and Public Relations provided the support required for the institution management whenever the accredited journalists requested itemised statement or interviews on the institution activity, or if certain clarifications related to certain cases presented to the public that comprised misleading information, were required.

Not in the least, for the purposes of providing an efficient management, the Office for Information and Public Relations provided on a daily basis information to the Council management as to the information provided by the business operators, contracting authorities and mass-media.





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



The Budget of the National Council for Solving Complaints corresponding to the year 2019 amounted to RON 12,966 thousand and was distributed as follows:

- The budget provision for Current expenditure: RON 12,896 thousand out of which:
 - > Personnel expenses: RON 11,089 thousand.
 - > Goods and services: RON 1,723 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.

Chapter	Subchapter	Paragraph	Group/Title	Name	PROGRAMME	Quarter I	Quarter II	Quarter III	Quarter IV
5000				TOTAL BUDGET	12.966	3.163	3.539	3.142	3.122
			01	CURRENT EXPENDITURE	12.896	3.153	3.509	3.122	3.112
			10	TITLE I – PERSONNEL EXPENDITURE	11.089	2.700	2.990	2.699	2.700
			20	TITLE II GOODS AND SERVICES	1.723	431	497	403	392
			59	TITLE XI OTHER EXPENDITURE	84	22	22	20	20
			70	CAPITAL EXPENDITURE	70	10	30	20	10
			71	TITLE XII NON-FINANCIAL ASSETS	70	10	30	20	10
5001				EXPENDITURE – STATE BUDGET	12.966	3.163	3.539	3.142	3.122
			01	CURRENT EXPENDITURE	12.896	3.153	3.509	3.122	3.112
			10	TITLE I PERSONNEL EXPENDITURE	11.089	2.700	2.990	2.699	2.700
			20	TITLE II GOODS AND SERVICES	1.723	431	497	403	392
			59	TITLE XI OTHER EXPENDITURE	84	22	22	20	20
			70	CAPITAL EXPENDITURE	70	10	30	20	10
			71	TITLE XII NON-FINANCIAL ASSETS	70	10	30	20	10
5101				PUBLIC AUTHORITIES AND EXTERNAL ACTIONS	12.966	3.163	3.539	3.142	3.122
			01	CURRENT EXPENDITURE	12.896	3.153	3.509	3.122	3.112
			10	TITLE I PERSONNEL EXPENDITURE	11.089	2.700	2.990	2.699	2.700
			20	TITLE II GOODS AND SERVICES	1.723	431	497	403	392
			59	TITLE XI OTHER EXPENDITURE	84	22	22	20	20
			70	CAPITAL EXPENDITURE	70	10	30	20	10
			71	TITLE XII NON-FINANCIAL ASSETS	70	10	30	20	10
	01			Executive and legislative authorities	12.966	3.163	3.539	3.142	3.122
		03		Executive Authorities	12.966	3.163	3.539	3.142	3.122

CONCLUSIONS AND FORECASTS

Not on a few occasions, the Constitutional Court, in compliance with the provisions of the first article of the fundamental Law, rendered a decision on the nature of Romania as „state of law”, whose essential feature consists in the supremacy of the Constitution and the compulsoriness to comply with law. The same Court noticed that the Parliament has the duty to enact proper regulations so that it is really provided the observance of the free access to justice, in whose absence the state of law cannot exist. Without fulfilling such duty, the constitutional regulations would be merely enunciative which is unacceptable for a state sharing democratic values being part of the European public order.

Although there is no doubt the justice is provided by the law courts mentioned in the article 126 in the Constitution, we assume to appreciate that in the years of activity, the National Council for Solving Complaints, a body of the executive power proved to be an active partner, capable and reliable in providing justice, as a public interest service, pursuing the observance of the *de jure* order, the fundamental freedoms, the legitimate rights and interests of individuals and legal entities, the enforcement of the law and the provision of the supremacy thereof. Thereby, the National Council for Solving Complaints has also contributed successfully to the reinstatement of the *de jure* order by the judicial authority within the state mechanism.

As to the constitutional legitimacy of the administrative-jurisdictional procedures, the Plenum of the Constitutional Court,

under the decision no. 1/1994 acknowledged the exclusive competence of the legislator to set up such procedures generally intended for providing the faster settlement of some categories of litigations, the relieving of the law courts from the cases that may be settled by this way and the avoidance of the legal costs. From this perspective, the outstanding efficiency of the Council in achieving the goals is undeniable as in the course of the years of activity, the institution managed to relieve the law courts from over 67,000 complaints, settled within the legal deadline. Moreover, the absence of any fees of access to the Council jurisdiction, in contrast with the fees charged by the law courts, has represented an important advantage to the business operators damaged by unlawful deeds of the contracting authority and they have had not hesitation in appealing faithfully to the Council's impartial jurisdiction.

Unfortunately, in 2018 as a result of the establishment of a bond under the emergency ordinance, there was a decline in the complaints in terms of the public procurements and the business operators hesitated to exercise their right of access to a court (administrative or judicial), right provided for by the Constitution provisions. We are sorry that the decline of the number of complaints in such field was not determined by a decrease in possible abuses committed by the contracting authorities in terms of the award of the contracts, but a tightening of the damaged persons' conditions of access to the Council and to the competent law courts in reinstating the lawfulness in the cases in



which there were suspicions in terms of the fraudulent award of the contracts.

The access to the Council must be unbundled, free of any security and available to any damaged person, with or without financial resources. Only thus Romania will be capable to diminish and to prevent the corruption in the public procurement field, an issue pointed out in all the monitoring reports from the European Commission.

The increase of the transparency in the award procedure will implicitly lead to the avoidance of the conflicts of interests.

The provision of the access to the business operators, corroborated with a strengthening of the Council role certainly represent a measure of prevention and fight against fraud and corruption in the public procurement field.

The irregularities in the public procurement field extend their effects on the entire society forced to incur also the highest costs of the public services and an unreliable quality thereof. Therewith, the reimplementing of the corrective actions related to certain irregularities in the tender documentations even from the procedure

commencement may have serious subsequent consequences: financial corrections, the cancellation of the procedure due to the impossibility to appoint a winner, the business operators' failure to participate in the procedure as a consequence of the fact that some extremely restrictive requirements are imposed, etc.

We hope 2020 would represent a rethinking and attenuation of the business operators' conditions of access to the public procurement-related jurisdiction and the effect which is aimed at supposes a more extended involvement in the fight against fraud and corruption in this field, respectively in disciplining the contracting authorities' conduct.

In conclusion, we assure our readers that in the following period, our goal continues to be the strengthening and the improvement of the Council functional capacity to examine expeditiously, impartially, transparently and in compliance with the legal provisions, at the highest standards, all the complaints that are submitted to the Council.