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FOREWORD

2020 was a year full of challenges and events generated by the COVID-19 pandemic, as Romania went through a state of emergency period. This situation hindered the interaction at institutional and individual level, but also in the field of public procurements. One should also consider the fact that two normative acts were adopted for modifying the entire regulations package in the field of public/sectoral procurements and in the field of concessions for services and for works, respectively Emergency Ordinance no. 23/2020 on the modification and completion of several normative acts with impact in the public procurements system – this normative cat was declared unconstitutional by the Constitutional Court through Decision no. 221/2020 – and Emergency Ordinance no. 114/2020 on the modification and completion of several normative acts with impact in the public procurements system.

In this difficult context, our institution functioned permanently and solved the complaints submitted during the award procedures for closing the public, sectoral and concession procurements contracts. Their number increased in 2020 with almost 6% compared to last year, despite the fact that Romania was in a state of emergency for two months and in a state of alert for eight months.

The jurisdictional mechanism provided by the Council, with only 31 solving counsellors, alongside the technical-administrative staff, proved to be capable of managing the situation caused by the pandemic. The balance of lodging complaints was tilted towards the award procedures initiated in the medical and major infrastructure fields. In addition, the Council was able to issue with celerity lawful and grounded solutions, which determined the majority of economic operators, persons injured by the acts issued during the initial award procedures by the contracting authorities, to address this manner. Therefore, the total estimated value of the award procedures under which the N.C.S.C. rendered decisions in 2020 was 87,182,749,715.72 lei, the equivalent of 18,023,764,180.13 euro. The total estimated value of the award procedures under which the N.C.S.C. rendered decisions of admission and, implicitly, of remedy for the award procedures was 23,750,197,681.11 lei (the equivalent of 4,910,007,583.28 euro).

N.C.S.C.: For 15 years an efficient filter for stopping the deficient spending of public money

COMISSION'S REPORT TO THE EUROPEAN PARLIAMENT AND COUNCIL regarding the progresses registered by Romania under the cooperation and verification mechanism - 2015

FLORENTINA DRĂGAN
N.C.S.C. PRESIDENT

In the following, we will present relevant data for the entire activity of our institution, for the quality and complexity of our work. The percentage of entirely/partially modified or abolished decisions was relatively small.

By maintaining the accent on rendering rapid quality solutions, corroborated with the experience accumulated in the 15 years since founding, the position of this low budget institution has been consolidated in the administrative-jurisdictional system. This was also a method for avoiding the deficient spending of public money.

CHAPTER 1

GENERAL CONSIDERATIONS

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

Functional since September 2006, the **NATIONAL COUNCIL FOR SOLVING COMPLAINTS (N.C.S.C.)** is a specific jurisdictional body created in order to guarantee the compliance with the legislation in the field of public procurements by the contracting authorities.

The Council was conceived as an administrative body of public law, with jurisdictional powers, which respects the constitutional provisions of Article 21 paragraph (1). Therefore, it benefits from the independence of fulfilling the administrative-jurisdictional act, insubordinate to any public authority or institution.

Although the activity of solving the complaints lodged by business operators under the award procedures of the public procurements/ sectoral/ concession contracts leads to the framework of the judiciary, it cannot be regarded as part thereof due to its nature. This organism is a part of the executive-administrative power due to its main role of remedy and, in subsidiary, of cancellation of the illegal award procedures.

The 31 counsellors for solving the complaints in the field of public procurements are members of the Council and public servants with special status, appointed by the decision of the Prime Minister, at the proposal of the Council's President, upon successfully passing a competition[1]. At least half of them have a Bachelor's degree in law and a 9-year seniority in the field of law.

The main task of the Council members is solving the complaints lodged under the award procedures, through specialised chambers formed by three members[2].

Pursuant to the provisions of Article 12 correlated to Article 3 letter a) of Law no. 101/2016, the competence of the Council is limited to settling the complaints lodged under the award procedures provided by Article 68 of Law no. 98/2016[3], Article 82 of Law no. 99/2016[4], and Article 50 of Law no. 100/2016[5]. However, it was enhanced through the amendments made to these normative acts by the Government Emergency Ordinance no. 45/2018, which introduced new paragraphs to the provisions of Article 68 of Law no. 98/2016 and Article 82 of Law no. 99/2016, regulating the award procedure applied to social services and to other specific services.

According to the national legislation, N.C.S.C. operates on the basis of its own Organisation and Operating Regulations, approved through Government Decision no. 1.037/2011[6].

In its activity, N.C.S.C. shall be subject only to the law; in exercising its attributions, the Council adopts decisions; in carrying out its activity, the Council ensures the coherent application of the law in effect, according to the principles of law expressly regulated: legality, celerity, contradictoriality, ensuring the right to defence, impartiality, and independence of the administrative-jurisdictional activity.

Pursuant to Article 14 paragraph (1) of Law no. 101/2016, the complaints lodged by business operators via administrative-jurisdictional proceeding are assigned for settlement at random, by electronic means, to a chamber consisting of three Council members. At least one of them is graduate in law, with a minimum ten-year seniority in the legal field. The chamber is chaired by one of its members, appointed in accordance with the rotation principle.

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 with public servants status, graduates in legal, business or technical fields.

The President of the Council has to be a law graduate[7] and has the quality of Chief Authorising Officer[8]. He/she is elected, for a period of three years[9], by secret voting from among the members of the

1. Pursuant to Article no. 45 of Law no. 101/2016, corroborated with Article 46
2. Article 13 of Law no. 101/2016
3. Law no. 98/2016 on public procurements, as subsequently amended and supplemented
4. Law no. 99/2016 on sectoral procurements, as subsequently amended and supplemented
5. Law no. 100/2016 on the concessions of works and concession of services, as subsequently amended and supplemented
6. Published in the Official Gazette, Part I no. 775 as of the 2nd of November 2011
7. Pursuant to Article 44 of Law no. 101/2016
8. Pursuant to Article 40 of Law no. 101/2016

Council, with absolute majority[10] of the solving counsellors votes.

The activity performed 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's activity are reflected by the number of the decisions that were appealed with the Court of Appeal in the territorial-jurisdiction area where the contracting authority is headquartered, and by the number of complaints granted as definitive in the form pronounced by the Council.

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[11] regulated by the Government Emergency Ordinance no. 39/2018[12] 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. 114/2011[13], for which purpose the counsellors solving the complaints are authorised, in compliance with the provisions of Law no. 182/2002 on the protection of classified information, as subsequently amended and supplemented.

For this reason, in order to exercise its competences regulated by the Government Emergency Ordinance no. 114/2011 on the award of public procurement contracts in the field of defence and security, a normative act 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 (specialised unit 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 in order to issue 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 regarding physical protection against unauthorised access to classified information, personnel protection, and protection of the information generating sources;
- the commencement of the IT system's Security Accreditation process was approved;
- the IT system's Security Accreditation Strategy was issued;
- the IT system's Security Accreditation was obtained.

It is worth mentioning that, in compliance with the provisions of the Government Decision no. 583/2016 on the approval of the National Anticorruption Strategy for the 2016-2020 period, of the performance indicator sets, of the risks related to the strategy goals, of the strategy measures and the checkout sources, of the inventory comprising the measures of institutional transparency and prevention of corruption, of the assessment indicators, as well as of the publication standards for the information of public interest, the Council adhered to the fundamental values, the principles, the goals, and the monitoring mechanisms regulated by the respective normative act, upholding the anticorruption fight and promoting the fundamental values concerning 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, document under which the institution identified its own risks and institutional weaknesses related to the main working processes and established measures for strengthening the prevention mechanisms already in place.

9. With the possibility of renewing the commission one time
10. Article 38 of Law no. 101/2016
11. Pursuant to Article 29 of G.E.O. no. 39/2018
12. G.E.O. no. 39/2018 on the public-private partnership, as subsequently amended and supplemented
13. Article 188 of G.E.O. 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

1.2. HUMAN RESOURCES, MANAGEMENT AND ORGANISATIONAL STRUCTURE

The management of the National Council for Solving Complaints was ensured in 2020 by Ms. Florentina DRĂGAN, for the second year in office.

In the exercise of her powers, the President of the Council wss assisted by a College consisting of three members (Mr. Lehel Lorand BOGDAN, Ms. Daina-Fiorica ENIȚĂ, Mr. Cătălin POPESCU), elected with absolute majority by secret voting from the counsellors for solving the public procurement complaints.

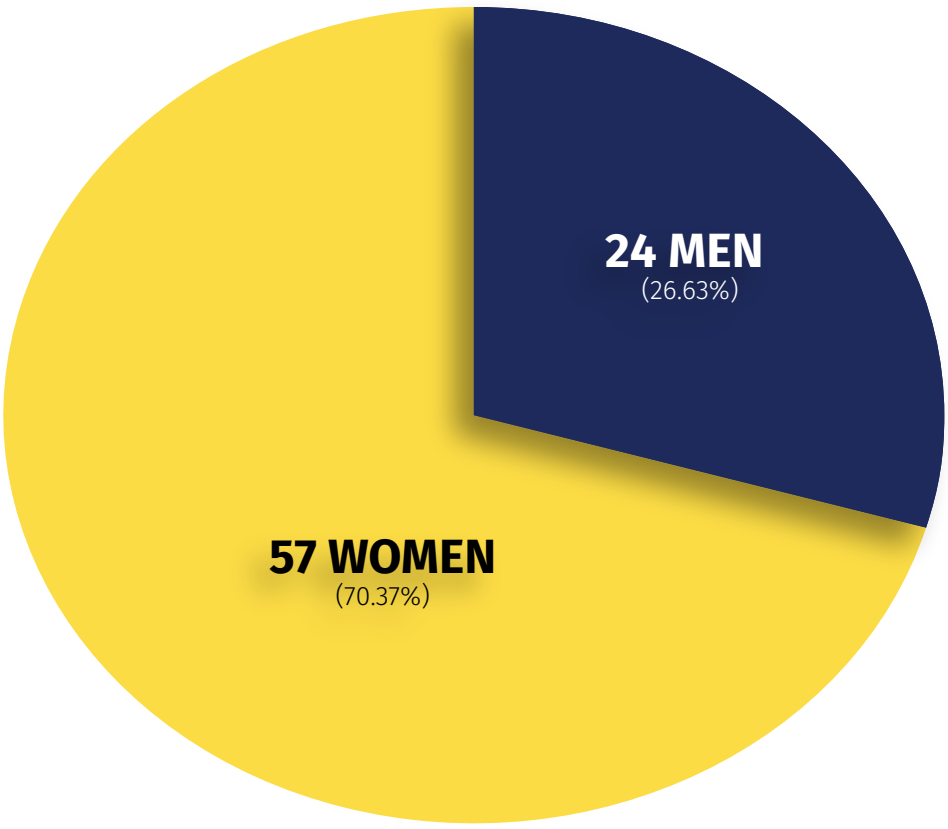
As organisational structure, the Council functioned in the year 2020 with a number of 31 counsellors for solving complaints in the field of public procurements – public servants with special status pursuant to Government Decision no. 1037/2011. They were organised in 11 chambers for solving complaints in the field of public procurements.

The Council personnel scheme was reduced, including only 49 technical-administrative employees, although 64 positions are provided to be allocated for the technical-administrative staff, pursuant to the provisions of the Government Decision no. 1,037/2011 on approving the N.C.S.C. Organisation and Operating Regulations.

Out of the 81 persons being under employment with N.C.S.C. on the 31st of December 2020, all of them having higher education, 49 were accounted as technical-administrative staff for the chambers of solving complaints, while one person was accounted as contractual personnel.

Regarding gender structure, there are 57 women (70.37%) and 24 men (29.63%), the average age being 48 at the level of the institution.

N.C.S.C. EMPLOYEES STRUCTURE BY GENDER

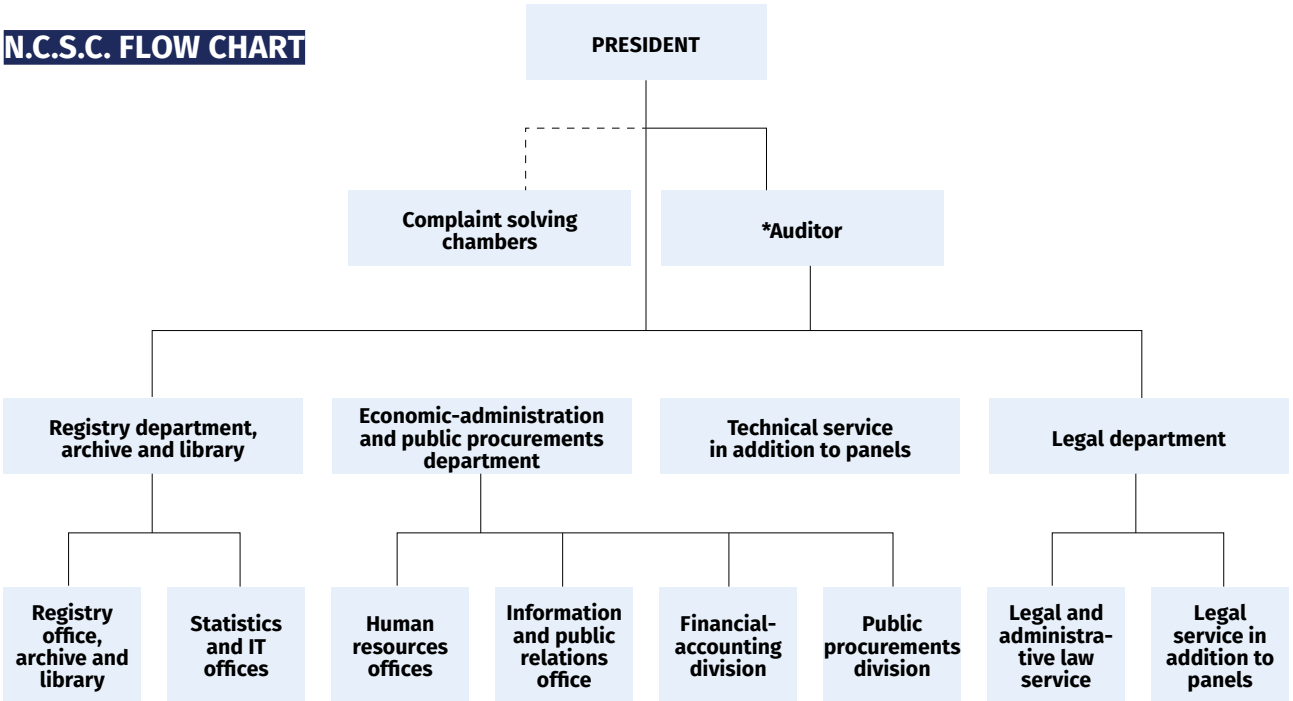


It must be mentioned that, related to the total number of employees with the N.C.S.C., the female persons percentage remains high both for the counsellors of solving the complaints in the field of public procurements (64.52%) and the contractual staff (74%).

According to the Council's Organisation and Operating Regulations[14], the technicaladministrative 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 Procurements Service including:
  - Human Resources Office;
  - Information and Public Relations Office;
  - Financial-Accounting Department;
  - Public Procurements 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;

N.C.S.C. FLOW CHART



14. Approved by G.D. no. 1,037/2011

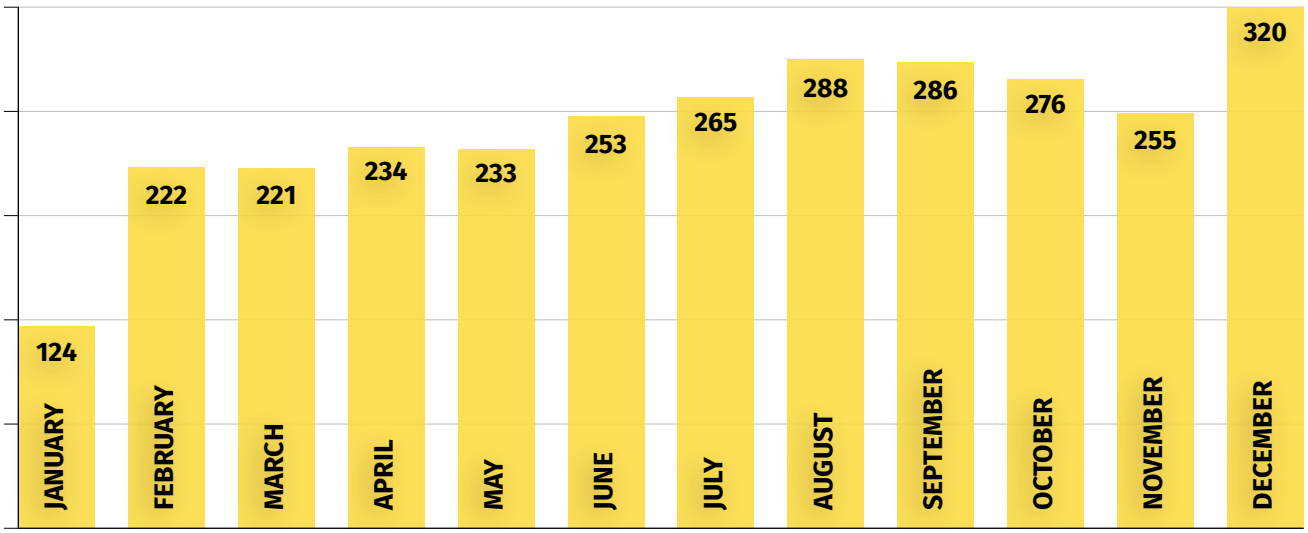
CHAPTER 2

THE ACTIVITY PERFORMED BY N.C.S.C. IN 2020

2.1. THE TREND OF THE COMPLAINTS LODGED BY THE BUSSINESS OPERATORS

The number of complaints filed and lodged by business operators, their object and complexity, as well as the trend and the manner of their solving represent important indicators which characterise the analysis of the annual activity performed by the National Council for Solving Complaints.

Between the 1st of January – 31st of December 2020, the number of complaints (files) lodged by the business operators and registered with N.C.S.C. amounted to 2,983. Consequently, throughout the twelve months of the year 2020, the number of complaints submitted by the business operators and lodged with N.C.S.C. had the following trend:

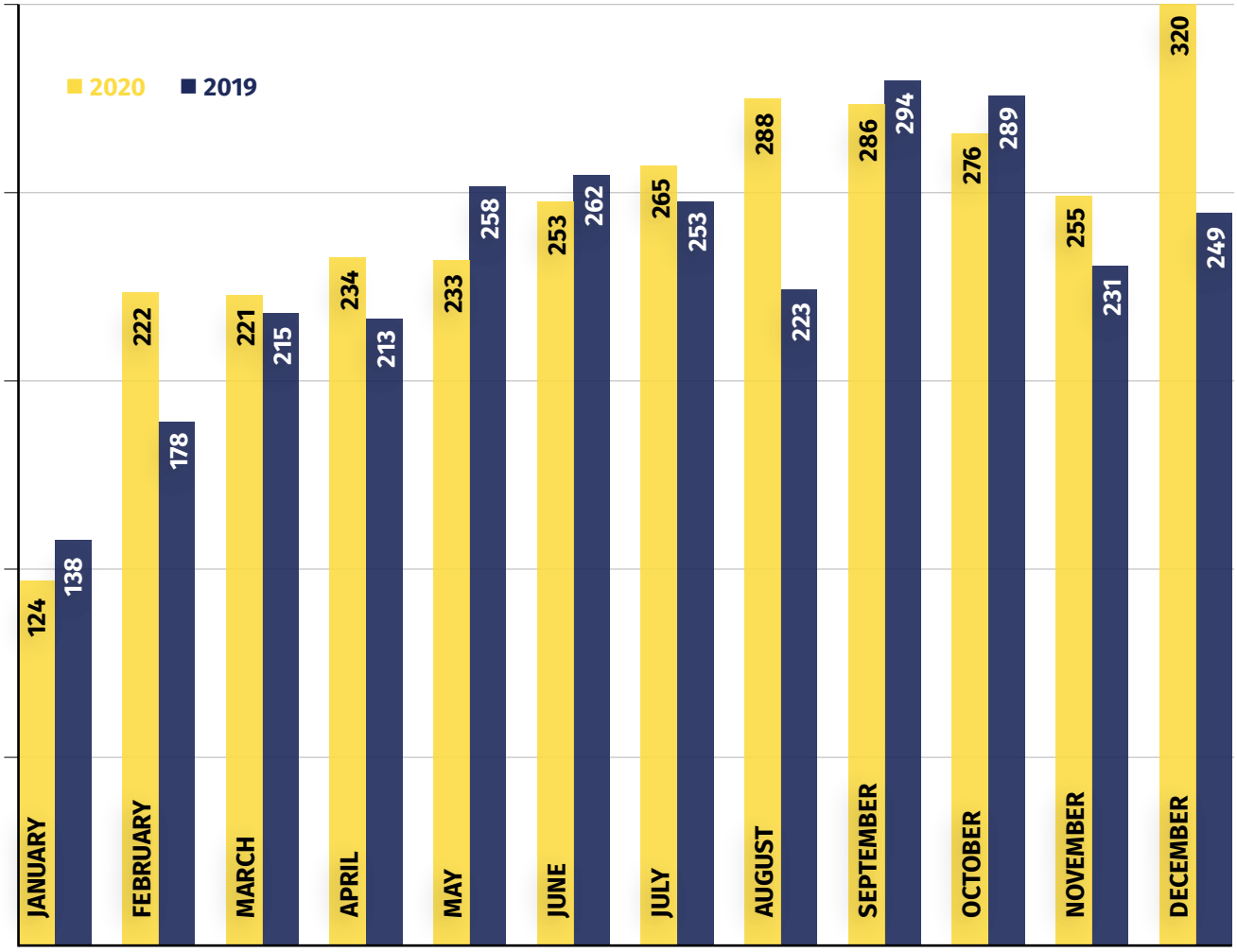


By analysing the trend of the complaints submitted by the business operators and lodged with N.C.S.C. in the course of the years 2019 and 2020 it can be noticed that in the course of last year the number of the complaints increased in both semesters, compared to the similar period of the previous year, despite the COVID-19 pandemic and the regulations of Government Emergency Ordinance no. 45/2018, which introduced the establishment of a bond, according to the assessed value of the public procurement procedure and to the procedural stage of the award procedures for which the complaint is lodged, as an admissibility condition for lodging the complaint.

Thus, comparing the total trend in 2020 regarding the number of complaints lodged by business operators with the Council with the one registered for the year 2019, their increase with 6.2% can be ascertained (+174 complaints).

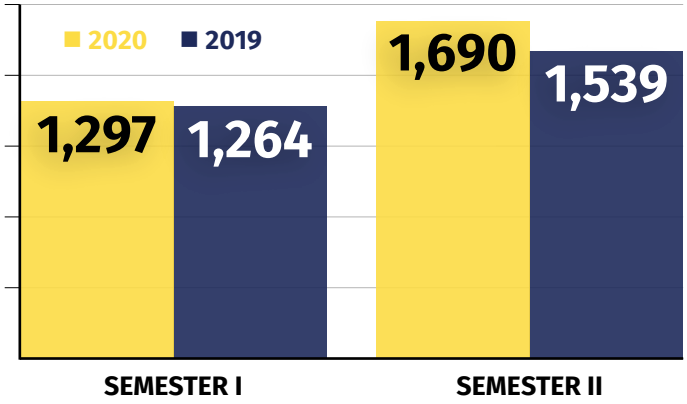
Although the increase of the number of complaints lodged with N.C.S.C. in 2020 does not seem consistent, this must be regarded however in relation to the fact that it was produced on the background of the COVID-19 pandemic. Furthermore, the number of initial procedures commenced in the year 2020 via the Electronic Public Procurement System (S.E.A.P) decreased with 18.42% in comparison with the previous year.

THE TREND OF THE COMPLAINTS LODGED BY BUSSINESS OPERATORS WITH THE N.C.S.C. IN THE YEAR 2020, IN COMPARISON WITH 2019



Concerning the semestrial trend of the complaints lodged with the Council, it may be observed that their number increased in both of the semesters of the year 2020 in comparison with similar periods of the previous year, as seen in the graph below.

THE SEMESTRIAL TREND OF THE COMPLAINTS LODGED BY BUSSINESS OPERATORS WITH N.C.S.C. IN THE YEAR 2020, COMPARED TO THE YEAR 2019



As noticed, the number of complaints lodged by the business operators with N.C.S.C. increased with 1.82% (+23 complaints) in the first semester of 2020, compared to the similar period in the previous year, while the increase in the second semester of 9.81% (+151 complaints) was more consistent. We emphasise that this increase of the number of complaints lodged with N.C.S.C. throughout the year 2020 in comparison with the previous year has occurred under the background of the COVID-19 pandemic, which practically "paralysed" the economic activity, of maintaining the obligation for the business operators of establishing the bond, but also of decreasing the procedures commenced under S.E.A.P.

By introducing the bond – with the declared goal to protect the contracting authorities against the risk of the complaining parties' potential improper behaviour – the legislator aimed for decreasing the number of the complaints lodged by the business operators under the commenced public procurement procedures. Yet in practice this thing did not happen because the contracting authorities did not exercise their right to raise claims on the established bonds. Consequently, in the large majority of files and at the Council's request regarding the potential claims on the bond, the contracting authorities specifically declared that they did not suffer any prejudice following the complaints lodged by the business operators and that they brought no actions in the relevant courts, within the 30 day-term since the day when the decisions were rendered final, for the payment of any due compensations that may have been caused by submitting any complaint. Hence, the conclusions that can be drawn from this practical situation reveal that the contracting authorities have considered that the appeals used by the business operators had not been abusive but a manifestation of the constitutional right to petition, or they considered that they have suffered no damage, or they have chosen the simple way of not charging themselves with litigations.

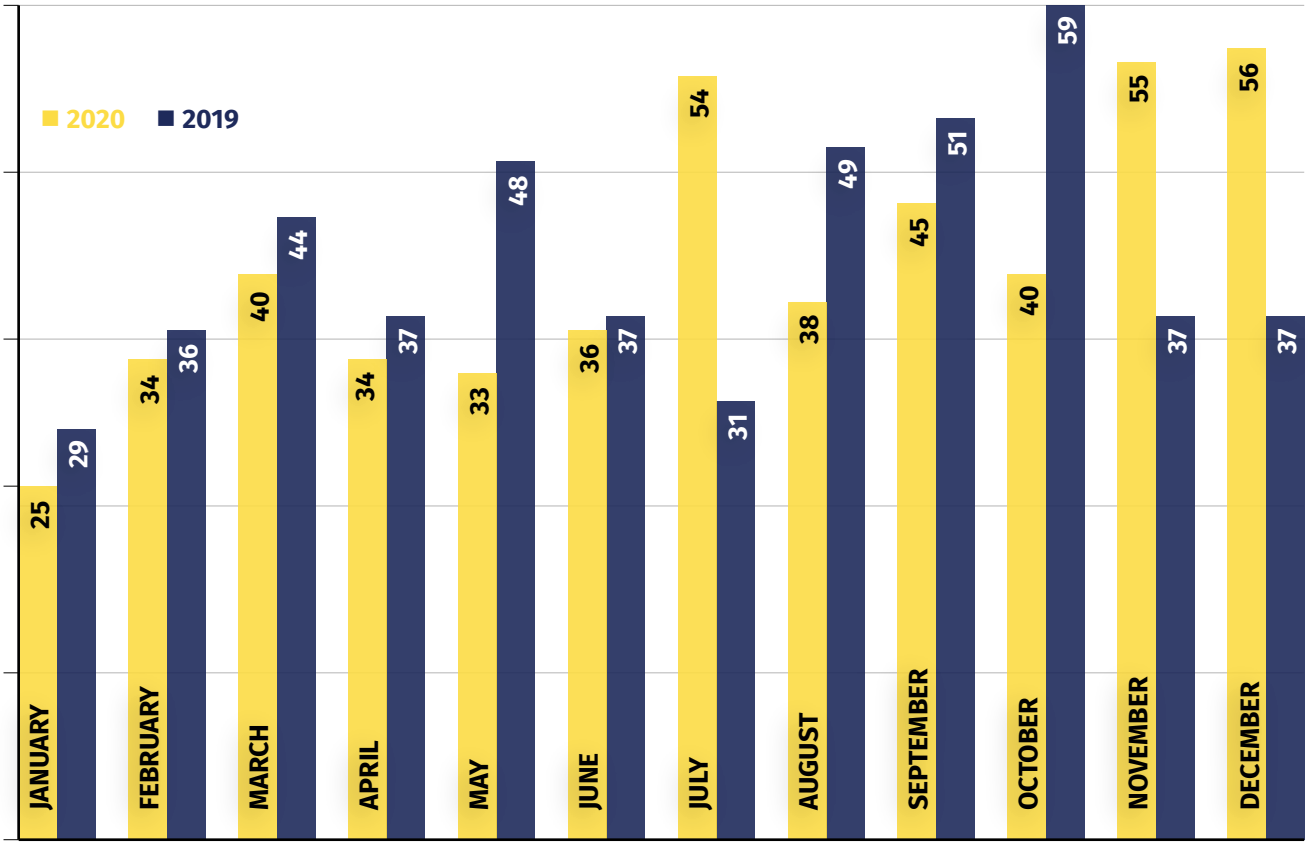
It must be highlighted that there is one court decision regarding the bond retention, rendered final and executed as such, respectively the sentence of Prahova Court no. 1,158 from the 10th of September 2019 through which it "admitted in part the introductory request submitted by the authority with the object claims and bound the defendant S.C. ... S.A. to payment in the amount of 27,520.84 lei in favour of the complaining authority, representing the equivalent of the prejudice caused by the delay of the award procedure, of the afferent interest, calculated for the respective amount, since the data when the damage has been produced and until the date of the entire debit

execution", and the resolution of N.C.S.C. no. 364/2,750 (year 2018) from 26.02.2020, through which "It admits the complaint of SC ... SA no. 877(or E77)/04.01.2019, reiterated through complaint no. E389/15.01.2020, and decides ...Bank SA the release towards SC ... SA of the partial bond in the amount of 191,432.06 lei, afferent to its litigation no. E10098/31.08.2018, as per recording receipt no. 204877029/1/ 07.09.2018".

Taking this aspect into account, we can remark that the purpose of introducing the bond was partially achieved by the legislator, in the sense that the legal provisions did not generate a reserve from the business operators in addressing the Council or the courts because of the lack of a firmer action of the contracting authorities for recovering the damages caused by delaying the award procedures. Practically, there wasn't any situation in which the contracting authorities invoked, for instance, the loss of certain European funds as a result of the abusive submission of complaints, a material prejudice caused by the fact that an installation was not replaced on time (malfunctions of some machines, fines paid towards other authorities, etc.).

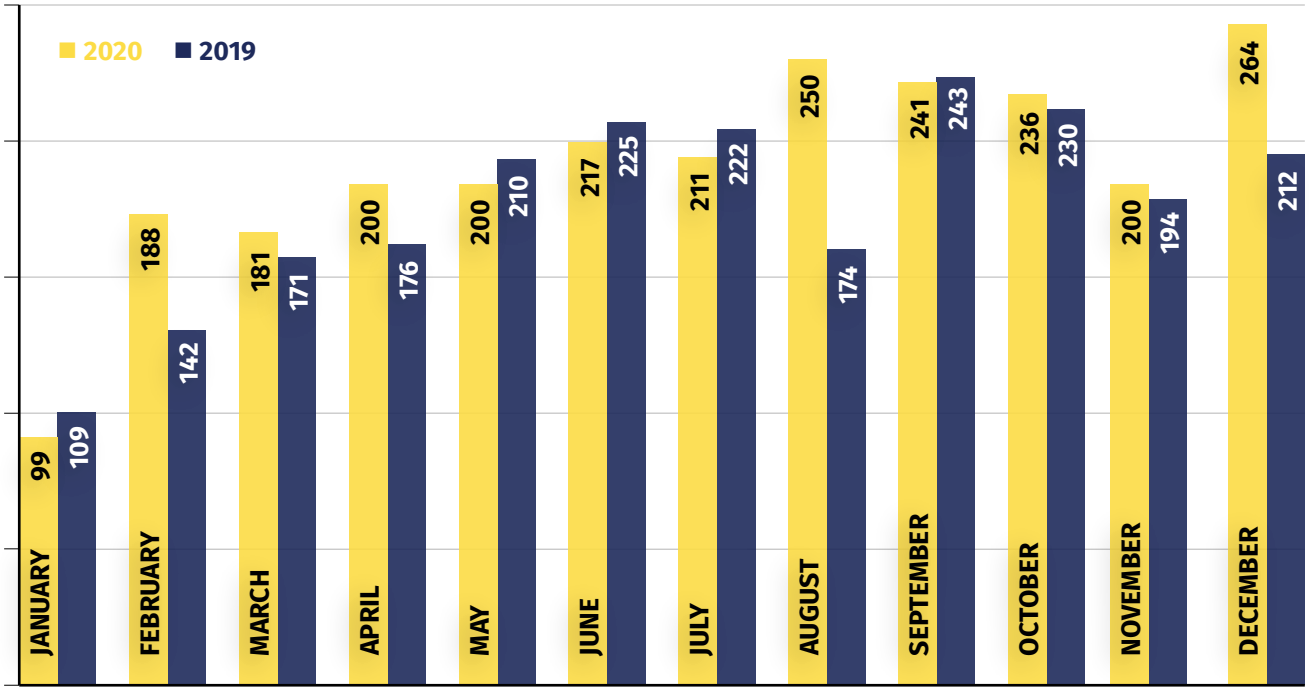
Regarding the complaints lodged by the business operators with the Council against the tender documentation and the result of the award procedure, the official data show that, compared to the previous year, a decrease of only 1.01% was registered in 2020 concerning the number of complaints submitted against the tender documentation (490 complaints as against the 495 from the previous year, therefore less with five complaints).

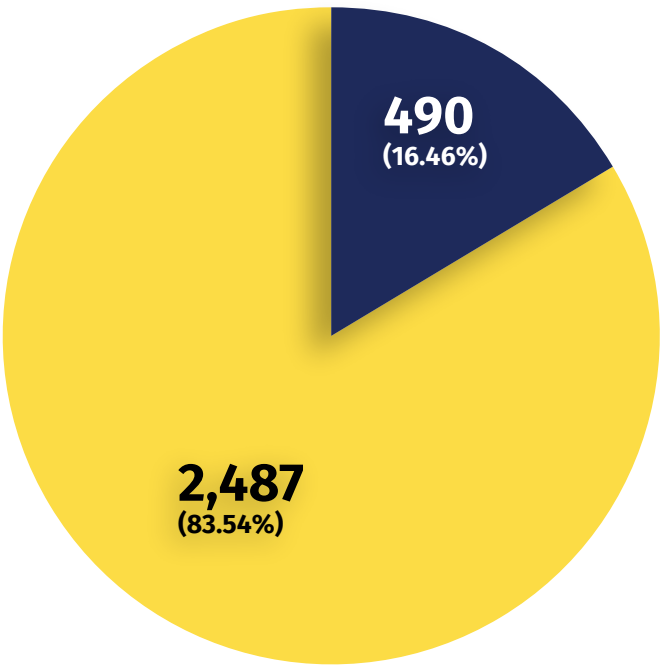
THE TREND OF COMPLAINTS LODGED BY BUSSINESS OPERATORS AGAINST THE TENDER DOCUMENTATION IN THE YEAR 2020, COMPARED WITH THE YEAR 2019



At the same time, we have witnessed an increase with 7.75% (+179 complaints) of the number of complaints lodged against the result of the award procedure.

THE TREND OF THE COMPLAINTS LODGED BY BUSSINESS OPERATORS AGAINST THE RESULT OF THE AWARD PROCEDURE IN THE YEAR 2020, COMPARED WITH THE YEAR 2019



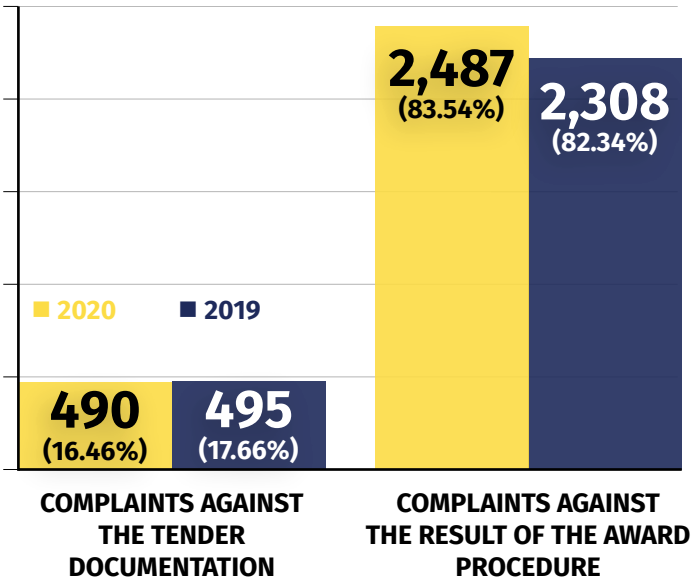


THE SITUATION OF THE COMPLAINT LODGED AGAINST THE TENDER DOCUMENTATION AND THE RESULT OF THE AWARD PROCEDURE IN THE YEAR 2020

In the year 2020, a percentage of 16.46% from the complaints lodged with the Council (490 complaints) were submitted against the tender documentations, while 83.54% (2,457 complaints) were submitted against the result of the award procedure.

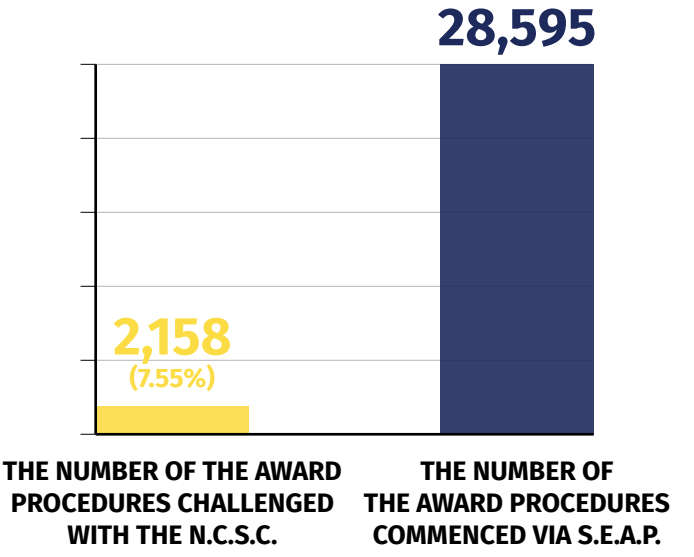
It is interesting to notice that although the number of complaints lodged against the tender documentation registered a slight decrease in the year 2020 in comparison with the previous year, still their percentage in regards to the total number of complaints remained constant, approximately 16-17%, while the number of complaints lodged against the result of the award procedure has grown, reaching a percentage of 82-83% of the total number of complaints lodged by business operators.

THE TREND OF THE COMPLAINTS LODGED AGAINST THE TENDER DOCUMENTATION AND THE RESULT OF THE AWARD PROCEDURE IN THE YEAR 2020, COMPARED TO THE YEAR 2019

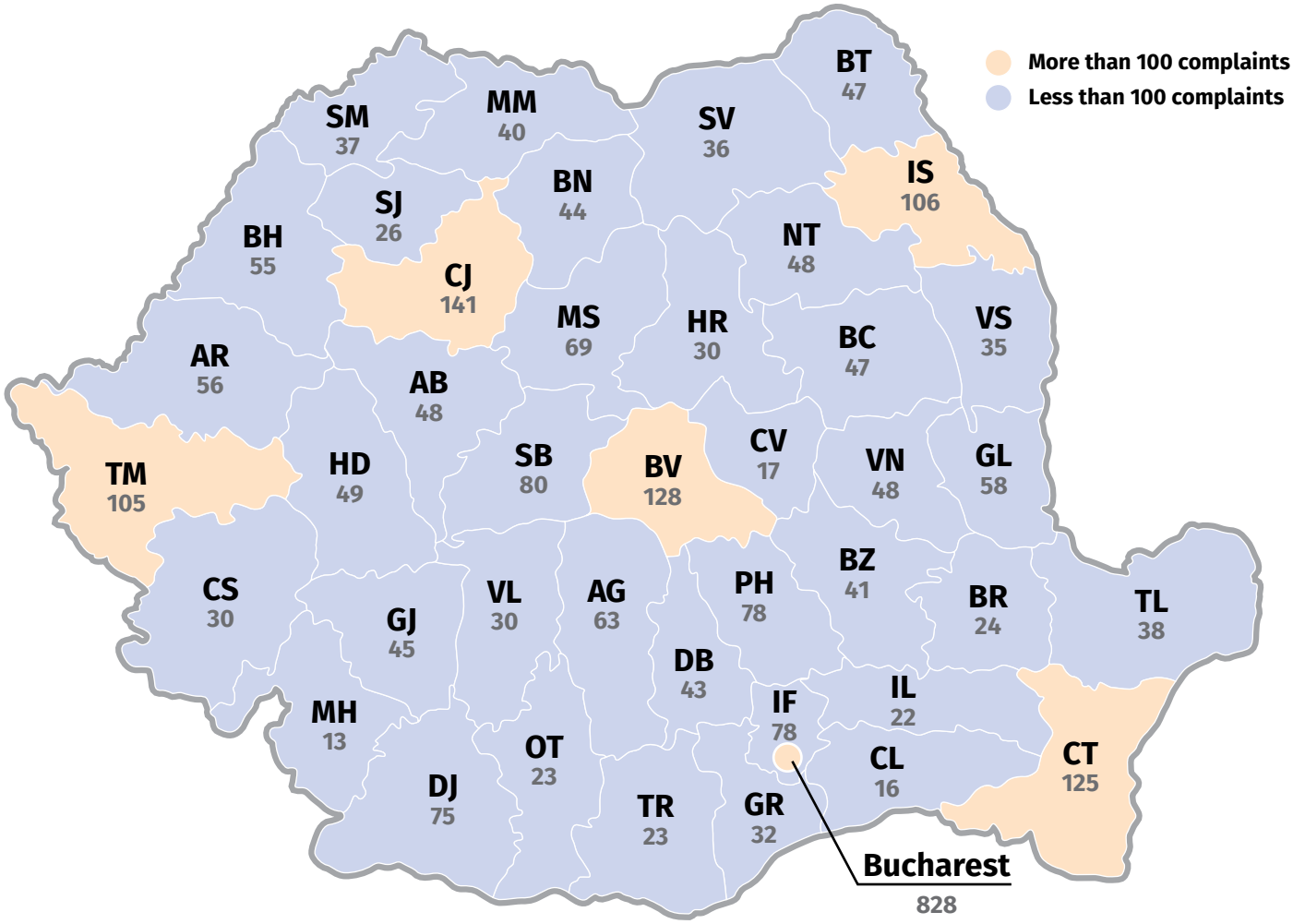


Relating the number of the challenged award procedures in the year 2020 at the number of the award procedures commenced via S.E.A.P., one may notice that, out of the 28,595 award procedures that were initiated in the previous year with the Electronic Public Procurements System, a number of 2.158 (unique procedures) were challenged with the Council, meaning a percentage of 7.55%.

THE NUMBER OF AWARD PROCEDURES CHALLENGED WITH N.C.S.C. IN THE YEAR 2020 RELATED TO THE TOTAL NUMBER OF AWARD PROCEDURES COMMENCED VIA S.E.A.P.



Judging on the distribution on administrative-territorial units (UAT), the number of complaints lodged by business operators developed on the course of 2020 as following:

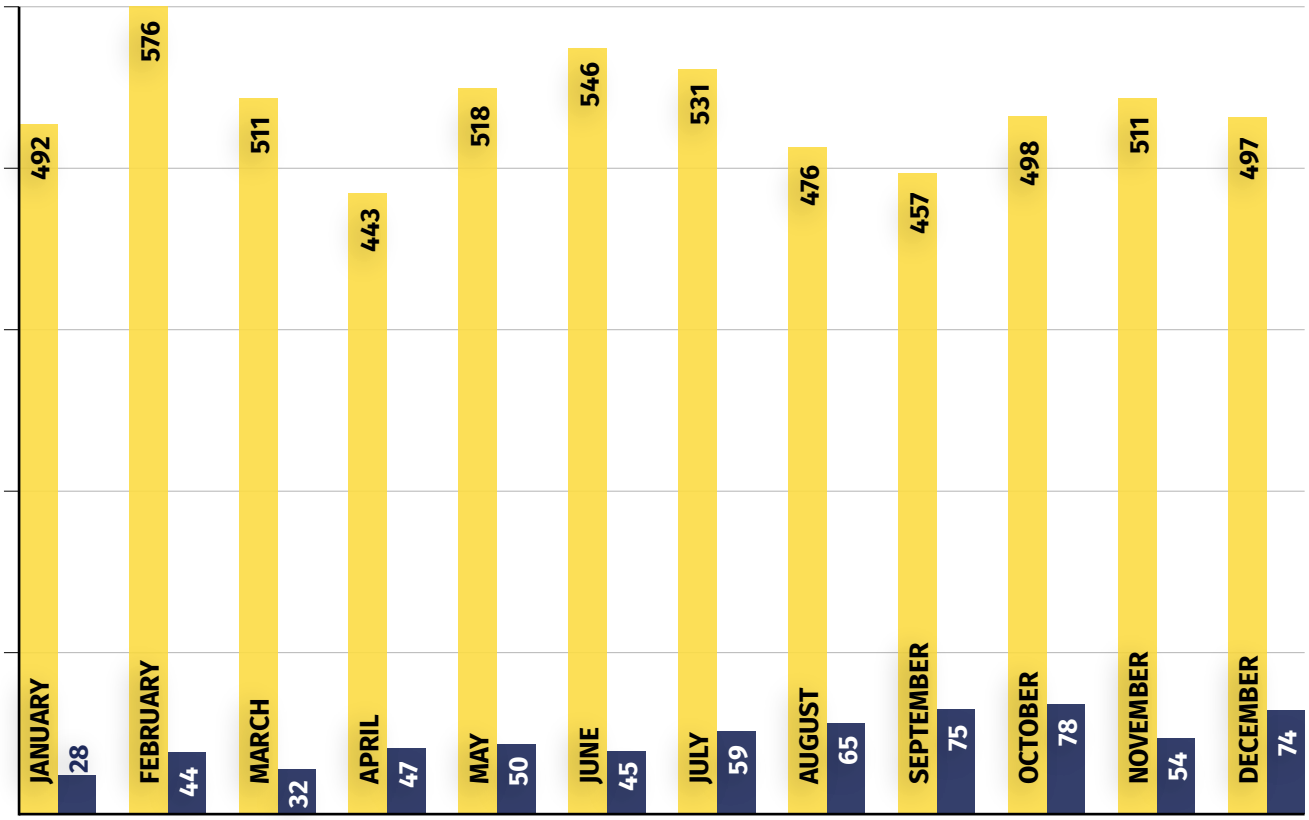


COUNTY	COMPLAINTS	COUNTY	COMPLAINTS	COUNTY	COMPLAINTS
BUCURESTI	828	BIHOR	55	SUCEAVA	36
CLUJ	141	HUNEDOARA	49	VASLUI	35
BRASOV	128	ALBA	48	GIURGIU	32
CONSTANTA	125	VRANCEA	48	VALCEA	30
IASI	106	NEAMT	48	HARGHITA	30
TIMIS	105	BOTOSANI	47	CARAS SEVERIN	30
SIBIU	80	BACAU	47	SĂLAJ	26
PRAHOVA	78	GORJ	45	BRAILA	24
ILFOV	78	BISTRITA NASAUD	44	TELEORMAN	23
DOLJ	75	DAMBOVITA	43	OLT	23
MURES	69	BUZAU	41	IALOMITA	22
ARGEȘ	63	MARAMURES	40	COVASNA	17
GALATI	58	TULCEA	38	CALARASI	16
ARAD	56	SATU MARE	37	MEHEDINTI	13

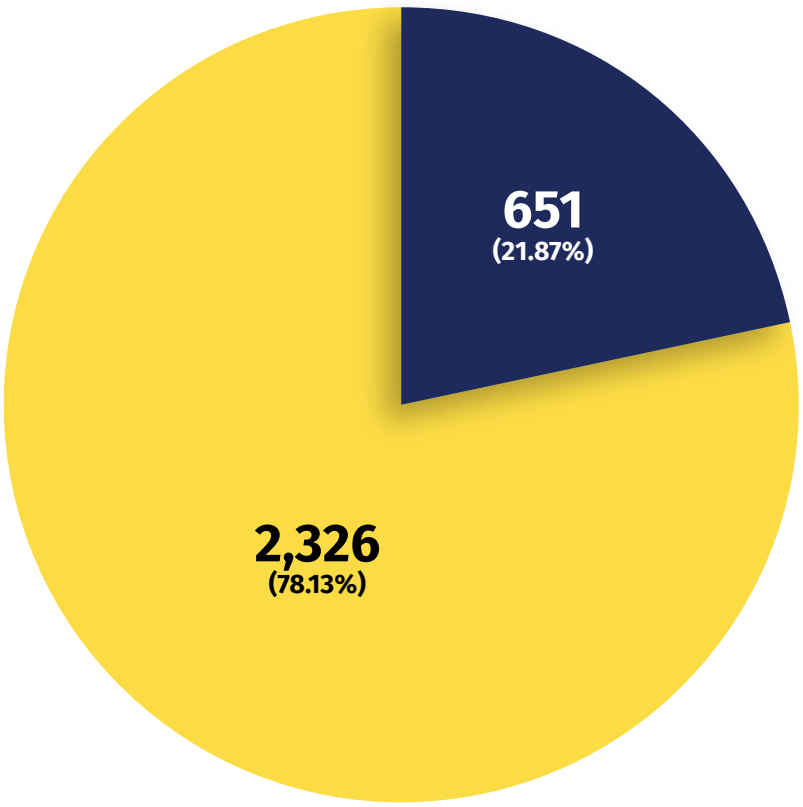
With regard to the award procedures funded by European funds, the official data reveal that, in the year 2020, 6,056 award procedures were commenced via S.E.A.P. Within such procedures, 651 complaints were lodged with N.C.S.C., meaning a percentage of 10.75% of the procedures commenced and developed via the Electronic Public Procurements System.

In the table below, one can notice for the year 2020 the monthly trend of the complaints submitted to N.C.S.C. under the procedures funded by European funds, compared to the procedures commenced via S.E.A.P. and funded by the same sources.

THE NUMBER OF COMPLAINTS LODGED WITH N.C.S.C. IN THE YEAR 2020 UNDER AWARD PROCEDURES FUNDED BY EUROPEAN FUNDS, COMPARED TO THE NUMBER OF AWARD PROCEDURES FUNDED BY EUROPEAN FUNDS COMMENCED VIA S.E.A.P.



In relation to the funding source for the award procedures commenced closing public procurement contracts, the 651 complaints lodged via administrative-jurisdictional way against the award procedures funded by European funds represented 21.87% of the total number of complaints submitted with the Council, while 2,326 complaints, that is 78.13% of the total number of complaints lodged by the business operators with N.C.S.C., were directed against the award procedures for the public procurement contracts funded by national public funds.



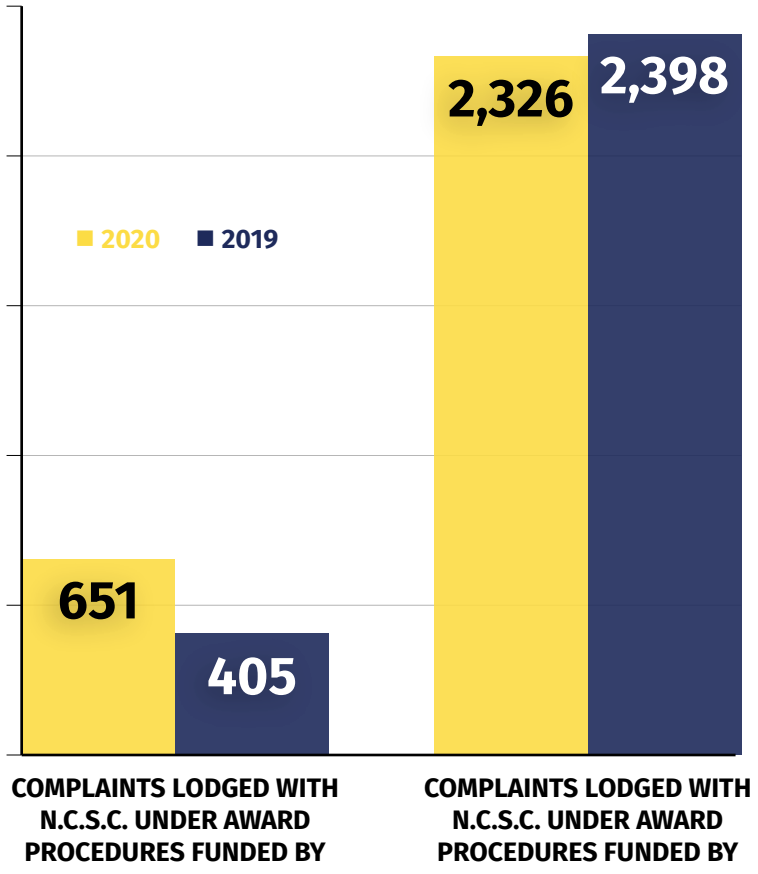
COMPLAINTS LODGED WITH N.C.S.C. IN THE YEAR 2020 RELATED TO THE FUNDING SOURCE OF THE AWARD PROCEDURES

■ COMPLAINTS LODGED WITH N.C.S.C. IN THE YEAR 2020 RELATED TO THE AWARD PROCEDURES FUNDED BY NATIONAL PUBLIC FUNDS

■ COMPLAINTS LODGED WITH N.C.S.C. IN THE YEAR 2020 RELATED TO THE AWARD PROCEDURES FUNDED BY EUROPEAN FUNDS

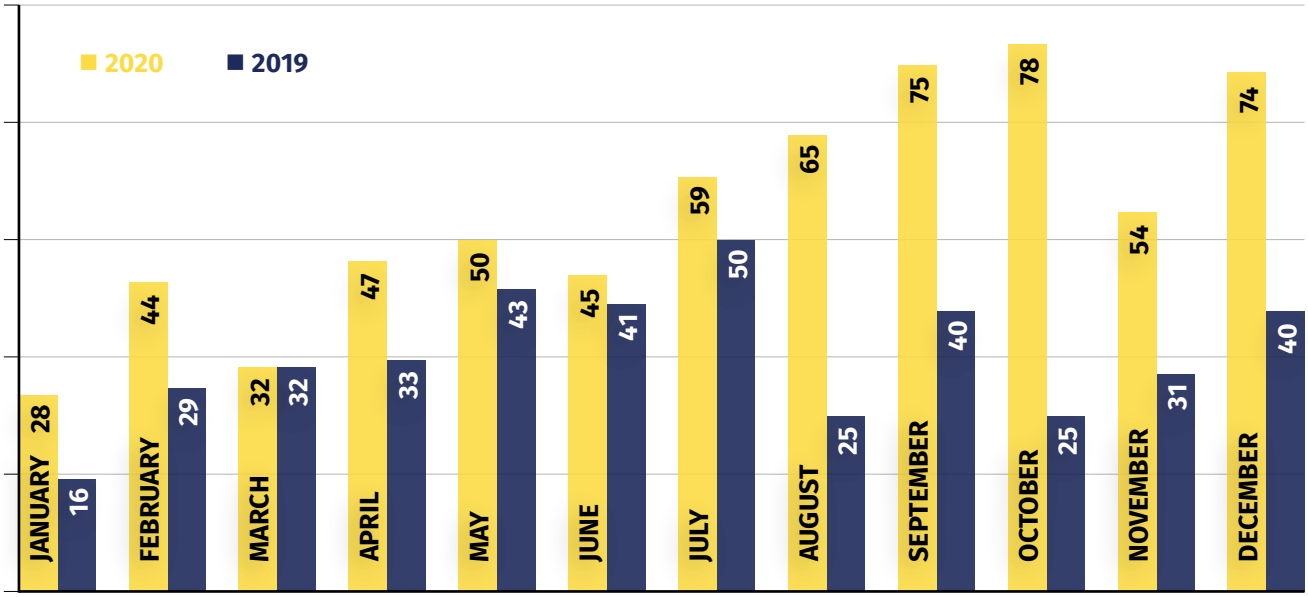
THE TREND OF THE COMPLAINTS LODGED WITH N.C.S.C. IN THE YEAR 2020 RELATED TO THE FUNDING SOURCE OF THE AWARD PROCEDURES, COMPARED TO THE YEAR 2019

It can be noticed from the previous chart that on the course of the year 2020 the number of the complaints submitted in the award procedures funded by European funds increased with 60.74% (246 complaints) in comparison to the previous year, whereas the number of the complaints submitted in the award procedures funded by national public funds declined with 3% (72 complaints).



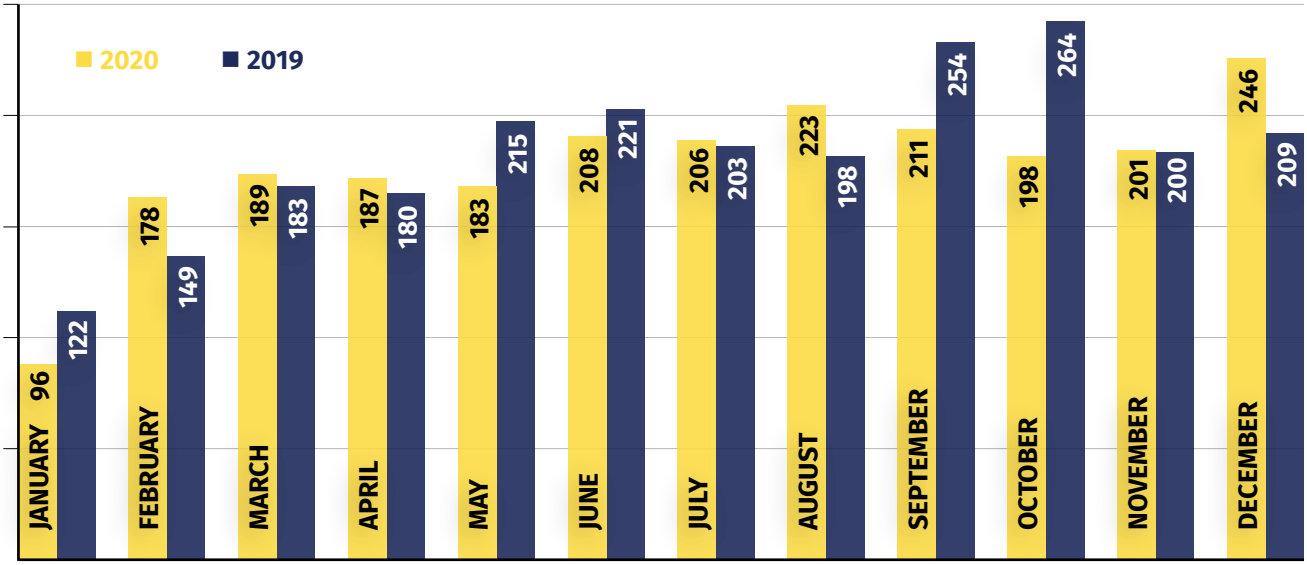
In terms of the monthly trend, the number of the complaints submitted to N.C.S.C. under the award procedures for the public procurement contracts funded by European funds developed in 2020, in comparison to the previous year, as shown below:

THE TREND OF COMPLAINTS LODGED WITH N.C.S.C. UNDER THE PROCEDURES FUNDED BY EUROPEAN FUNDS IN THE YEAR 2020, COMPARED TO 2019

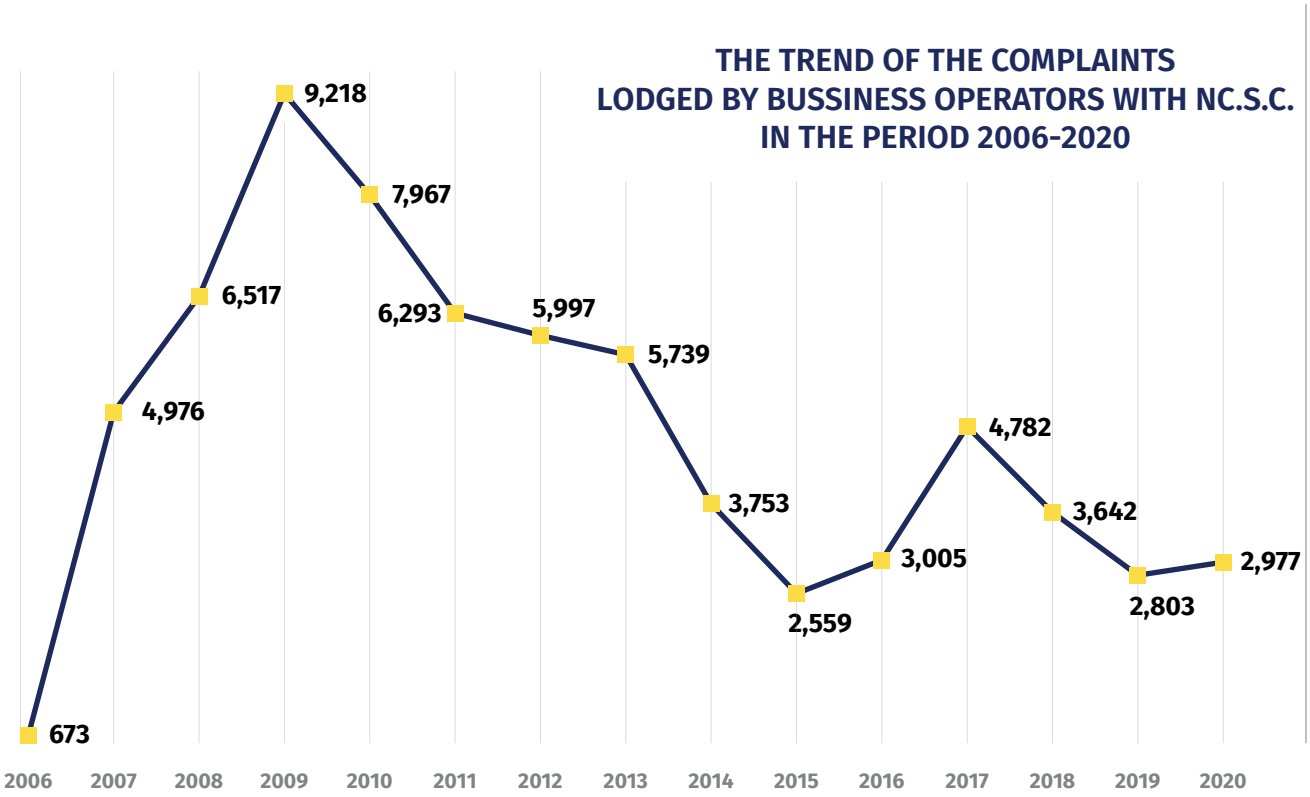


Similarly, the number of the complaints submitted to N.C.S.C. under the award procedures for the public procurement contracts funded by national funds (local/state budget) developed in the period 2019-2020 as follows:

THE TREND OF THE COMPLAINTS LODGED WITH N.C.S.C. IN THE PERIOD 2019 - 2020 UNDER THE PROCEDURES FUNDED BY NATIONAL PUBLIC FUNDS



Statistically, from its establishment and until the 31st of December 2020, 70,801 complaints were submitted to N.C.S.C. by business operators against various public procurement procedures, as revealed by the chart below.



By analysing this chart, it can be noticed that the number of the complaints lodged with N.C.S.C witnessed a sinusoidal trend. Each year, ups and downs have been registered in relation to the legislative framework and the economy level. The latter was reflected on the course of recent years in the decreasing number of procedures commenced via S.E.A.P., as a result of the decrease of the national public funds allocated to investments and of the reduced level of European funds absorption.

During 2020, several public attitudes argued that one of the reasons which have led to a low level of absorption of European funds had been the large number of complaints, in addition to the lack of a unitary practice in solving the complaints by both the administrative-jurisdictional and judicial channels.

Yet these criticisms proved to be totally groundless, the proof being the fact that the authorities did not consider to solve the real issues encountered by the domestic public procurements system (this fact favoured the vicious management of public funds, leading on the one hand to 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 procurements system). Furthermore, the contracting authorities failed on numerous occasions to correctly and concretely implement the rendered decisions issued by N.C.S.C. For this reason, on the course of 2020 there were procedures for which N.C.S.C. issued more than one decision, as follows:

- √ 1 (one) award procedure under which N.C.S.C. ordered 4 (four) times that the bids shall be reassessed, for which purpose it rendered 7 (seven) decisions;
- √ 15 award procedures under which N.C.S.C. ordered 3 (three) times that the bids shall be reassessed, for which purpose it rendered 3 (three) decisions;

√ 153 award procedures under which N.C.S.C. ordered 2 (two) times that the bids shall be reassessed, for which purpose it rendered 2 (two) decisions.

Although the Council permanently made sustained efforts for the implementation of European good practices for accelerating the development of the challenged procedures, on the course of 2020 there were still numerous cases in which the public procurements market was blocked by the contracting authorities themselves – the main entities which are directly interested, at least declaratory, in the implementation of projects financed either by national public funds or by European funds. Consequently, many contracting authorities refused to implement correctly and formally the decisions rendered by N.C.S.C., thus detaining the closing of contracts.

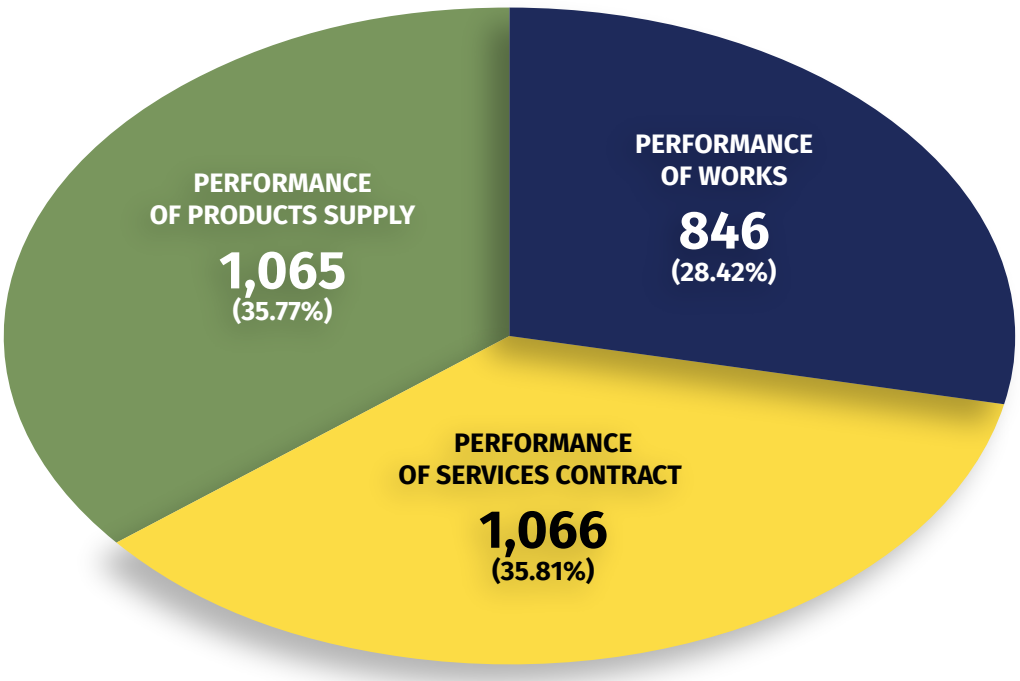
Official data show that, in the course of 2020, there were 94 decisions under which the Council accepted the complaints lodged by the business operators and ordered that the bids shall be reassessed. However, the contracting authorities preferred not to implement the N.C.S.C. decision and to bring an action to the superior court, although they knew that 98% of our institution's decisions have not been modified by the superior courts.

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

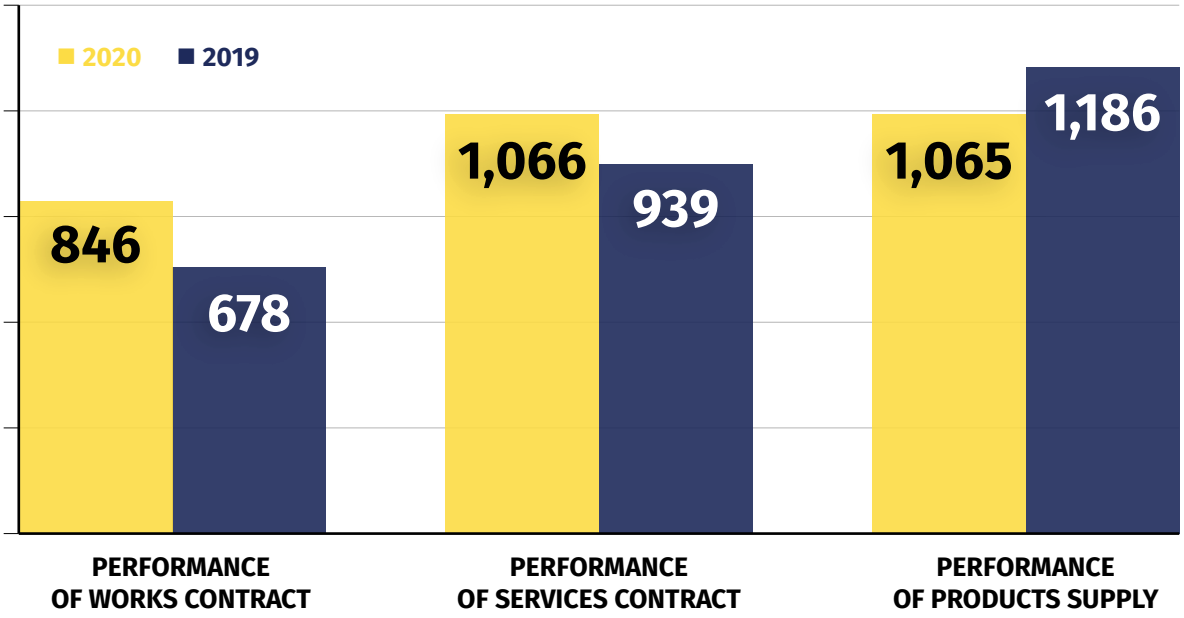
Official data for the year 2020 show that the number of complaints lodged by the business operators according to the subject of the public procurement contract had the following structure:

- award procedures for the public procurement contracts with the subject **performance of works – 846 complaints (28.42%);**
- award procedures for the public procurement contracts with the subject **performance of services – 1,066 complaints (35.81%).**
- award procedures for the public procurement contracts with the subject **supply of products – 1,065 complaints (35.77%).**

THE SITUATION OF COMPLAINTS LODGED BY BUSSINESS OPERATORS WITH N.C.S.C. IN THE YEAR 2020, RELATED TO THE CONTRACT TYPE



THE TREND OF THE COMPAINTS LODGED WITH N.C.S.C. IN THE YEAR 2020 RELATED TO THE CONTRACT TYPE, COMPARED TO 2019

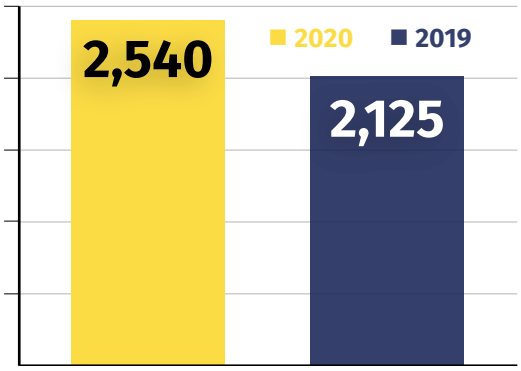


By analysing the chart related to the trend of the complaints submitted according to the type/ subject of the public procurement contract, it can be noticed that upon the increase of the number of complaints in 2020, in comparison to the previous year, we witnessed an increase of the complaints lodged against the award procedures commenced for closing performance of works contracts and of the ones lodged against the award procedures commenced for closing performance of services contracts. At the same time, an insignificant decline was registered for the number of the complaints lodged against the award procedures commenced for closing supply of products contracts.

Therefore, the number of the complaints lodged by business operators against the award procedures commenced for closing performance of works and performance of services contracts registered a growth of 24.78% (+168 complaints) in 2020, respectively of 13.52% (+127 complaints) in comparison with the previous year, while the complaints lodged by business operators against the award procedures commenced for closing supply of products contracts registered a decline of 10.2% (-121 complaints).

On the course of the year 2020, an average of approximately 271 complaints (files)/year were allotted for each of the 11 chambers for solving the complaints lodged with N.C.S.C., resulting in an average monthly load of around 23 complaints (files)/chamber.

THE TREND OF THE RESOLUTIONS ISSUED BY N.C.S.C. IN THE PERIOD 2019 - 2020



Compared to the previous year, when the average monthly load foe each chamber was of 255 complaints (files), in 2020 the average annual load for each chamber increased with 6.27%, that is with 16 complaints (files)/ year. It must be highlighted that the introduction of an obligation for the business operators to establish a bond increased the number of deeds issued by the Council and their complexity, requiring a large volume of activities (correspondence, resolutions, managing securities, their reimbursement, etc.). Thus, in the year 2020 the Council issued 2,540 resolutions, meaning an increase of 19.53% compared to the previous year when 2,125 resolutions were issued

Concerning the complexity and the work volume at the level of the Council in the year 2020, it must be also mentioned the fact that, based on Article 17 of Law 101/2016, applications of voluntary intervention in dispute were formulated within 725 complaints by the business operators interested to participate/participants under the award procedure. This contributed to the accomplishment of supplementary procedures by the complaints solving chambers within the Council but also to the increase of the complexity level of the respective files. If we make a comparison with the previous year, when 563 applications of voluntary intervention in dispute were formulated by the business operators interested to participate/participants under the award procedure, it may be observed that in 2020 the number of applications of voluntary intervention formulated on the course of the year increased with 28.77% (+162 intervention demands).

In order to provide a perspective on the work volume existent at the level of N.C.S.C. and on the complexity of the files on role with the institution in the year 2020, we mention that hundreds of files had even tens of complainants and interveners. Consequently, within some challenged award procedures the Council was forced to issue more than one decision but also tens of related documents.

We should recall some of the fields in regards to which there were several extremely complex files on role with N.C.S.C., with a large number of complainants and interveners:

■ **The field of road infrastructure:**

- 101 complaints and 54 applications of voluntary intervention only under the procedures commenced by the National Company for Road Infrastructure Administration S.A. and the National Company for Motorways and National Roads of Romania S.A. for works and services in the field of road infrastructure (planning/ implementation/ modernisation/ national/ county road/ motorways maintenance), for which 71 decisions and 60 resolutions were issued.

- **The field of railway infrastructure:**
  - 13 complaints and 4 (four) applications of voluntary intervention under the procedures commenced by the "CFR" National Railway Company S.A. in regards to the planning and implementation of railway infrastructure works/ feasibility studies/ modernisations/ supply of pieces, for which 8 (eight) decisions and 8 (eight) resolutions were issued.
- **The medical field (procurements related exclusively to combating the COVID – 19 pandemic):**
  - 211 complaints (7.1% of the total of registered complaints) under certain extremely complex public procurements procedures that were organised by medical units and public/ private institutions, in order to procure services and products/ equipment of maximum necessity used for ensuring public health, for which 161 decisions and 104 resolutions were issued.
- **The field of education:**
  - 51 complaints and 28 applications of voluntary intervention under the public procurements procedures for school books commenced by the National Assessment and Examination Center, for which 5 decisions and 18 resolutions were issued.
  - 5 (five) complaints within the National Programme "Safe Education" regarding the procurement of PC tablets (including internet connection services for a period of at least 24 months), for which 5 (five) decisions and 5 (five) resolutions were issued.
- **The field of road transportation/ underground railway:**
  - 19 complaints and 5 (five) applications of voluntary intervention under some public procurement procedures commenced by public local and central authorities regarding the procurement of new buses for the urban public transportation (including electric vehicles and charging stations), for which 16 decisions and 17 resolutions were issued.
  - 6 (six) complaints and 2 (two) applications of voluntary intervention under some public procurement procedures commenced by public local and central authorities regarding the procurement of new 18/ 25 meters trams, for the urban public transportation, and of a e-ticketing system, for which 3 (three) decisions and 5 (five) resolutions were issued.
  - 7 (seven) complaints and 5 (five) applications of voluntary intervention under some public procurement procedures commenced by Metrorex S.A. ("Link of the underground railway network with the Henri Coandã International Airport (line 6: 1 Mai – Otopeni. Planning and execution of resistance works for segment 1.1 1 Mai – Tokyo"; "New underground trains for subway line 5, segment Drumul Taberei – Iancului"; " lanning and technical assistance services related to the objective Line 5 (Drumul Taberei – Pantelimon), section Eroilor (PS Operã) – Piaţa Iancului"; "Maintenance services for the electric underground frames and for the railway vehicles specific to the subway infrastructure, for a period of 15 years"), for which 4 (four) decisions and 5 (five) resolutions were issued.
- **The field defence and public order**
  - 107 complaints and 24 applications of voluntary intervention under some public procurement procedures commenced/ developed by institutions in the field of defence and national security following certain award procedures, for which 94 decisions and 79 resolutions were issued.

Although the number of the complaints lodged by the business operators and of the applications of voluntary intervention increased in comparison to the previous year, simultaneously with the number of resolutions, and the complexity of the files was high, the 11 chambers for solving complaints within the Council have accurately respected the deadlines for settling the complaints, as provided for in Article 24 paragraph 1 of Law no. 101/2016. Concerning the deadline for settling the complaints, it must be emphasised that due to the activity of N.C.S.C. it is one of the shortest in the European Union, as Romania is ranked before Germany and Austria.

2.2. THE SUBJECT MATTER OF THE COMPLAINTS LODGED BY BUSSINESS OPERATORS

Regardless of the subject of the subjective law (performance, forbearance), the subject matter of the complaint lodged under an award procedure is always the protection of this right. However, there might be cases when the subject matter is the protection of certain legitimate interests.

When a complaint is put forward it should be customised, thus becoming a lawsuit/ 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 fact and a matter of law, which the counsellors for solving complaints in the field of public procurements are called to solve via a Council decision, in order to ensure the protection of the subjective law.

The subject of the complaint may be the total or partial cancellation of a deed of the contracting authority/ entity[15], or to compel the contracting authority/ entity to issue a document or take remedy measures, acknowledging the claimed right or legitimate interest.

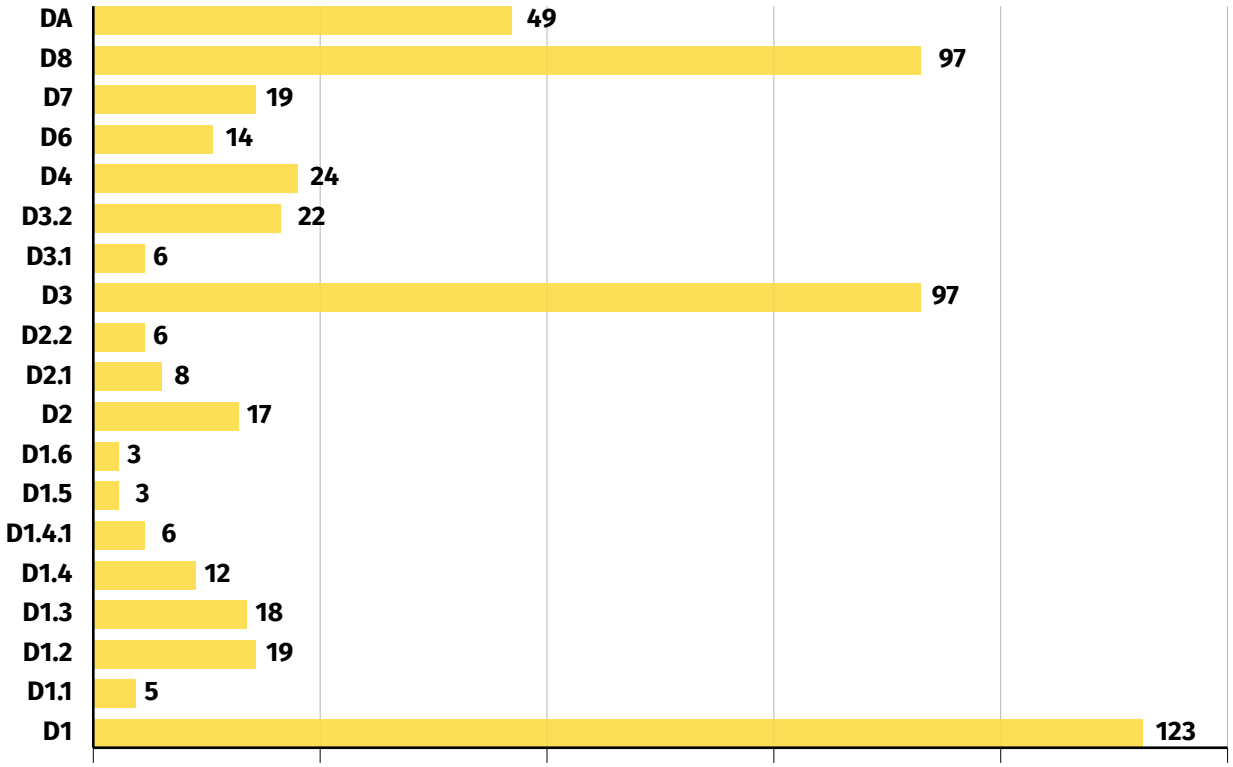
After analysing the subject matters of the 2,977 complaints lodged in the year 2020 by the business operators, it was concluded that 490 complaints concerned the tender documentation, while 2,487 complaints concerned the result of the procedure.

Concerning the subject matter of the complaints lodged with the Council against the requirements imposed within the tender documentations, it was noticed that the most numerous criticisms of the 490 complaints lodged by business operators were addressed to the requirements of the tender documentation, respectively:

CODE	CRITICISM	NUMBER OF CRITICISMS
D1	restrictive requirements on the qualification criteria	123
D1.1	restrictive requirements on the qualification/selection criteria related to the candidate's or the bidder's personal status	5
D1.2	restrictive requirements on the qualification/selection criteria related to the ability to pursue professional activity	19
D1.3	restrictive requirements on the qualification/selection criteria related to economic and financial condition	18
D1.4	restrictive requirements on the qualification/selection criteria related to technical and/or professional capacity	12
D1.4.1	restrictive requirements on the qualification/selection criteria related to similar experience	6
D1.5	restrictive requirements on the qualification/selection criteria related to quality assurance standards	3
D1.6	restrictive requirements on the qualification/selection criteria related to environment protection standards	3
D2	requirements on the award criterion	17
D2.1	irrelevant factors of assessment, missing calculation algorithm, with non-transparent or subjective calculation algorithm	8
D2.2	other requirements related to the award criterion	6
D3	restrictive requirements in terms of technical specifications	97
D3.1	missing mention "or equivalent", in such cases as provided by the law in force	6
D3.2	other restrictive requirements in terms of technical specifications	22
D4	missing clear, complete, unambiguous answer from the contracting authority on the requests for clarification of the tender documentation provisions	24
D5	form of establishing the bid bond	0
D6	infliction of unfair or excessive contractual provisions	14
D7	failure to split the procurement by lots, in case of similar products/ works	19
D8	other reasons related to the tender documentation	97
DA	other criticism to the documentation	49

15. As defined by Article 3 letter a of Law no. 101/2016

THE SITUATION REGARDING THE CRITICISMS LODGED AGAINST THE REQUIREMENTS INFLICTED IN THE TENDER DOCUMENTATION



In order to highlight the special diversity of the cases which the Council is invested with, we consider that is necessary to exemplify by presenting some decisions of the settling chambers, in parallel with the decisions of the courts which were noticed in regards to the exercise of their legality control.

The lack of the restrictive character of the requirement of demonstrating that the package in which the medicinal gases are provided is present in the Marketing Authorisation issued by the National Agency for Medicines, according to Article 700 of Law no. 95/2006, and that there is a price approval in CANAMED for each type of requested package.

N.C.S.C. DECISION no. 1,749/28.09.2020

For establishing if the challenged requirements could, in an unjustified way, restrict the access to the award procedure, as argued by the claiming society, the Council retained the incidence of the following legal provisions:

- Article 699, point 1, letter b), point 25 and point 26 of Law no. 95/2006, which defines the terms "medicine" and "primary package", the latter being "the recipient or any other form of package in direct contact with the medicine";

- Article 704 paragraph (1) of Law no. 95/2006: "No medicine can be marketed in Romania without a marketing authorisation issue by A.N.M.D.M.R., in compliance with the provisions of the present title, or without an authorisation issued in accordance with the centralised procedure";

- Article 706 paragraph (4), letter o) of Law no. 95/2006: "The marketing authorisation request must be supplemented with the following in-

formation and documents, which have to be forwarded in accordance to the analytical, pharmaco-toxicological, and clinical standards and protocols related to medicine testing, approved by Order of the Minister of Health: (...) an abstract of the product's characteristics, pursuant to Article 712, a layout of the secondary package, containing the details mentioned in Article 774 and of the primary package of the medicine, containing the details mentioned in Article 776, as well as the prospect, according to Article 781";

- Article 27 and 28 of the Regulations regarding the marketing authorisation and the supervision of human use medicines, approved by Order of the Minister of Public Health no. 895/2006, as amended and supplemented by Order of the Minister of Health no. 1448/2010, which states in Article 27 that "the marketing authorisation comprises the medicine's identification data (registration name, composition (...) release dosage, package, terms of validity, storage conditions, number of the marketing authorisation)", and in Article 28 that the number of the marketing authorisation inscribed on the secondary package of the medicine is formed by three groups of figures, of which the third represents "c) the number corresponding to the authorised package sizes".

Pursuant to Article 8 paragraph (1) of the aforementioned Regulations, "For commencing the authorisation procedure for marketing a human use medicine, the applicant has to lodge a request, according to the model presented in Annex no. 1, with the National Agency for Medicines and Medical Devices of Romania".

Annex no. 1 of the foregoing normative act contains the model/request type for the marketing authorisation of human use medicines, relevant for settling the complaint being the mentions within section "2.2. The pharmaceutical form, concentration, administration route, package and package size", paragraph 2.2.3. concerning "The recipient, opening mode and administration device, comprising the description of the building material (...)', where the following instruction can be found:

"For each package type it is specified:

2.2.3.1. The package size:

NOTE: For the products authorised through the mutual recognition procedure, all authorised package sizes are mentioned in the reference state member".

The Council rejected as unfounded the claims of the objector according to which only the medicinal oxygen producers who registered the medicine through the mutual recognition procedure would have listed all the package types with related sizes, because the Regulations regarding the marketing authorisation and the supervision of human use medicines issued by the Minister of Health in order to apply the provisions of Law no. 95/2006 on health reform, as subsequently amended and supplemented, explicitly establish the fact that all package types and their size are mentioned in the marketing authorisation request.

The Council retained that the note comprised in section 2.2.3.1 of the previously cited Regulations is not meant to exonerate the Romanian producers of the obligation to mention the size of each package type by submitting the related documentary evidence in order to obtain the authorisation. But it only establishes the method to highlight the package sizes that have been already authorised in other member states for the mutual recognition of the products' authorisation.

The way of filling in the dimensions of the primary packages in the marketing authorisation is regulated in Article 13 of the Guide for drafting the marketing authorisation and for the annexes of the marketing authorisation approved through Decision no. 7/19.12.2017 of the Scientific Council of the National Agency for Medicines and Medical Devices of Romania (A.N.M.D.M.), normative act available for public consultation on the webpage of the National Agency for Medicines and Medical Devices at the internet address https://www.anm.ro/medicamente-de-uz-uman/legislatie/hotarari-ale-consiliului-stiintific/. This act stipulates that "In the «Package» rubric must be included the information regarding the primary package (pack-

age type, nature of the material, closing system), the secondary package, the included administration device/ devices, and the package size".

The model for the marketing authorisation is found in Annex II of the Decision no. 7/19.12.2017 of the Scientific Council of the A.N.M.D.M. and it stipulates at page 2, section "Package" the following content: "The primary package (package type, nature of the material, closing and administration system, package size) and the secondary package".

Concerning the previous statements, the Council retained that the request of the contracting authority that the packages provided in the tender documentation for the supply of medicinal gases should be found in the marketing authorisation does not have the potential to restrain in unjustified manner the access to the award procedure because the authorisation of each package type and size represents a legal obligation stipulated in the previously mentioned normative acts, its verification being the attribute of the contracting authority pursuant to Article 127 paragraph (1) of Government Decision no. 395/2016.

This aspect also results from the address of the A.N.M.D.M. found in the case file, according to which "(...) a Holder of the Marketing Authorisation cannot commercialise the package sizes of a medicine that were not approved by A.N.M.D.M.R. (meaning included in Marketing Authorisation or in the Modification of the Marketing Authorisation issued following the approval of a variation proposed by DAPP)".

Moreover, the Council concluded by analysing the content of the complaint that the marketing authorisation held by the respective business operator for liquid medical oxygen comprises under point 6.5 a number of 8 (eight) package sizes used during transportation (various sized cryogenic cisterns).

As a result, the detail level of the medicines packing manner comprised in the marketing authorisation depends directly to the documentary evidence provided by the applicant to the A.N.M.D.M. in order to obtain the authorisation. This aspect was highlighted by the Scientific Council of the A.N.M.D.M. in the examples of notes regarding packing comprised in Article 13 of Annex 1 of the Decision no. 7/19.12.2017, therefore:

"a) For instance:

Box with two Al/PVC blisters, each of them containing 10 tablets

b) For instance:

Box with a brown glass vial provided with a child-safe closing system, containing 100 ml of syrup and a syringe for oral administration'.

The Council did not retain the claims of the objector regarding the different nature of the authorisation procedures in Romania compared to other member states of the European Union, which would have been generated, according to the complainant, by the alleged incomplete implementation of a Community provision indicated in the complaint as "European Dir. 1,234/2008". The reason is that after consulting the official page regarding EU legislation published by the Publications Office of the European Union, available for public consultation at the internet address https://eur-lex.europa.eu/, the Council concluded that the normative act indicated through the phrase "European Dir. 1,234/2008" in, in fact, the Regulations (EC) no. 1,234/2008 of the 24th of November 2008 Commission on examining the modification of the conditions for the marketing authorisations granted for the human and vet use medicines. The respective stipulates in Article 28 that "The current Regulations are mandatory in all their elements and apply directly in all member states", applicability which also result from the provisions of Article 288 of the EEC Treaty, according to which the regulations are applied directly in the national legislation, excluding any national reception measure or anything that could dissimulate its nature or effects.

Furthermore, and contrary to the claims of the complainant, the Regulations (EC) no. 1,234/2008 do not address the procedure of issuing marketing authorisations but the "modifications to the conditions for marketing authorisations" (variations), as it results from the application field of

this normative act stipulated in its Article 1 (form in force). In regards to the latter, "The current Regulations establish provisions for examining the modification of the terms for all marketing authorisations concerning human and vet use medicines, issued in compliance with the Regulations (EC) no. 726/2004, Directive 2001/83/EC, Directive 2001/82/EC and Directive 87/22/EEC of the Council", equally appliable to the marketing authorisations issued in all member states.

The Council retained that the applicability of the Regulations (EC) no. 1234/2008 concerning the variation requests related to the marketing authorisations submitted through national procedure was underlined by the A.N.M.D.M. on its own website (in this sense, see the text of the instructions entitled " important notice" from 25.07.2013, available for public consultation on the A.N.M.D.M. webpage at the internet address https://www.anm.ro/anunt-important-25-07- 2013/, according to which "for the variation requests related to the marketing authorisations submitted through national procedure (...) Variations to the terms of the marketing authorisation shall be submitted based on the Regulations no. 1,234 from 2008 as subsequently amended and supplemented and Law no. 95/2006 as subsequently amended and supplemented").

As a result, contrary to the claims of the complainant, the Regulations (EC) no. 1234/2008 are not relevant for the authorisation procedures but only to their modifications, context in which they apply equally for both authorisation through national and European procedure, the criticisms of the complainant being rejected as ungrounded regarding this aspect.

The Council retained that the previous reasoning related to the groundless character of the criticisms concerning the requirement in the specifications on highlighting the packages dimensions in the marketing authorisation is fully applicable in regards to the criticisms on the closing system (pressure regulator), because pursuant to Article 13 in Annex no. 1 of the Decision no. 7/19.12.2017, issued by the Scientific Council of the A.N.M.D.M., information regarding the closing system must be included in the "package" rubric from the marketing authorisation, as it result from the phrase "In the «Package» rubric must be included the information regarding the primary package (package type, nature of the material, closing system), the secondary package, the included administration device/ devices, and the package size", while in the marketing authorisation model from Annex no. 2 of the same decision there is a space reserved for the information related to the package, the closing and administration system being specifically mentioned.

Moreover, the Council retained that the provisions of Article 28 in Annex no. 1 of the Decision no. 7/19.12.2017, issued by the Scientific Council of the A.N.M.D.M. establish that the information comprised in the marketing authorisation related to "the pharmaceutical form, primary package, closing system and administration device shall be named in compliance with the current Regulations regarding the Romanian version of the standard terms adopted by the European Pharmacopoeia Commission for the pharmaceutical forms, administration routes, closing systems and administration devices", thus being ensured by respecting the Community specific regulations at national level.

Taking into account the previously mentioned legal provisions, the Council appreciated that the requests of the contracting authority for authorising the package dimensions and the closing system are not meant to restrict access to the award procedure but to check/ensure the contracting authority that the offered products will be delivered/ provided in a lawful manner, as regulated by the provisions of Article 3 paragraph (1) letter jj) of Law no. 98/2016, which define the business operator as "any natural or legal person, of public or private law, or group or association of such persons, who bid in a lawful manner the execution of works and/ or of a construction, supply of products or provision of services, including any temporary association formed by two or more such entities".

Furthermore, proceeding to the analysis of the criticism of the complainant on the request "(...) that a price

approval in CANAMED has to exist for each type of requested package", the Council retained the incidence of the following legal provisions within the Norms concerning the calculation method and approval procedure for the maximal prices of human use medicines approved by Order of the Minister of Health no. 368 from the 28th of March 2017:

- Article 1: "The current norms apply to all human use medicines for which a marketing authorisation has been issued (...)";

- Article 2 paragraph (1): "Regarding the manufacturer, wholesale and retail price, the medicines for which a medical prescription is issued and for which a marketing authorisation is required are subject to the approval of the ministry (...) as well as the wholesale and retail prices of the medicines which can be commercialised based on the parallel import authorisation or the parallel distribution authorisation";

- Article 2 paragraph (2): "Excepting the situation under Article 4 paragraph (3), it is forbidden to commercialise on the territory of Romania medicines for which the ministry did not issue an order for price approval".

The phrase "CANAMED" used by the contracting authority in formulating the claim challenged by the complainant is defined in Article 3 paragraph (1) letter b) of the aforementioned norms in this way: "The national catalogue of marketing authorised medicines' prices, named from now on Canamed – catalogue comprising the maximal prices of the human use medicines valid in Romania, which can be used/commercialised by the holders of a medicine marketing authorisation or their representatives, wholesale dealers, and providers of medical services and medicines, for those medicines which are the subject of a contractual relation with the Ministry of Health, health insurance houses and/or public health county and the city of Bucharest directions".

The Council retained that the practical use of the Canamed catalogue is present in the calculation of the contribution for financing some expenditures in the health, as stipulated by the provisions in Article 1 of G.E.O. no. 77/2011, according to which "The holders of medicine marketing authorisations or their legal representatives have the obligation to pay each trimester for the medicines included in the national health programmes, as well as for the medicines with or without personal contribution used in ambulatory care based on medical prescription through the open circuit pharmacies, in hospital care, and for the medicines used within medical services granted through dialysis centres, supported from the National Unique Fund of Social Health Insurances and from the Ministry of Health's budget, a trimestral contribution calculated according to the current emergency ordinance".

According to Article 5 paragraph (1) corroborated with paragraph (2) of the aforementioned normative act, the contribution stipulated in Article 1 of G.E.O. no. 77/2011 is managed by A.N.A.F. and is assimilated to the tax liability.

In order to determine and collect the trimestral contribution, Article 4 paragraph (2) established that "The holders of medicine marketing authorisations, Romanian legal persons, have the obligation to submit at the National Health Insurance House (...) the list of medicines for which the trimestral contribution is due to". Order no. 212/215 issued by the President of the National Health Insurance House approved not only the report format of the updated List of medicines for which the trimestral contribution is due to, provided in Annex no. 2 of the Order, but also its submission term, respectively "until including the 15th of the following month after the end of the trimester for which the contribution is due to" (see in this sense Article 4 of Order no. 212/215).

Proceeding to the verification of the report model of the updated medicine List, for which the trimestral contribution is due to, provided in Annex no. 2 of Order no. 212/215, the Council retained that is contains very detailed information, such as the CIM code of the medicine, the commercial name, the common international name, the ATC code, the pharmaceutical form, the concentration, package – complete description, number of therapeutical units per package, etc.

In addition to the ones

mentioned above, the Council retained that the medicine consumption report system of the contracting authority towards the National Health Insurance House is made based on an encoding named "CIM" (acronym for "medicine identification code"), dependent in turn on the package type approved by A.N.M.D.M. and which is found also in CANAMED.

In conclusion, the request in the specifications "(...) a CANAMED price approval has to exist for each type of requested package" was determined by the objective necessity of the contracting authority to report the medicine consumption separately for each CIM code from CANAMED, allocated for each type of package in accordance to the previously mentioned legal provisions.

Moreover, after proceeding to the verification of the Nomenclature of human use medicines available for public consultation on the A.N.M.D.M.R. website at the internet address https://www.anm.ro/nomenclator/medicamente, the Council retained that the complaining society possesses several products from the "compressed medical oxygen" category, differentiated by package size and bottling pressure, and from the "liquid medical oxygen" category, differentiated by the size of the cryogenic cisterns, amongst which a part of the recipients requested through the current award procedure are not found, which constitutes the necessity of the contracting authority.

As example, the Council retains that the contracting authority justifies in its point of view the request for the procurement of 8 litre gas tanks through the necessity of reducing the weight of the stretchers. The latter are provided in the context of the COVID-19 pandemic with various equipment (vital functions screen, three-four syringe pumps, perfusions, materials, oxygen tube), thus the difference between the larger gas tanks previously in use in hospitals (10 litres) and the 8 (eight) litres ones requested in the current award procedure, which should fit in the right place due to their size, represents a pertinent reason for their procurement.

The fact that the complaining society did not authorise the 8 litres gas tanks amongst the 24 dimensions of gas tanks that were authorised in accordance to the previously mentioned nomenclature cannot lead to the conclusion that the contracting authority would have restricted access to the award procedure by requesting this specific type of gas tanks as long as its necessity, determined by the specific type of activity (treatment of children), imposes the use of oxygen in gas tanks of this size.

Therefore, the award procedure under which the complaint was lodged, the subject of the current action, was organised for satisfying the objective necessities of the contracting authority, and not for the strict commercialisation of the products present in the portfolio of the complaining society.

Taking into consideration the aforementioned aspects of fact and of law, the Council rejected these criticisms as groundless.

CIVIL DECISION no. 2,457/10.12.2020 – Bucharest Court of Appeal (solving the complaint against the N.C.S.C. DECISION no. 1,749/28.09.2020)

The court retains that N.C.S.C. enunciated the incident legal provisions, correctly and with a complex argumentation rejecting the criticism related to the highlighting of the packages' sizes in the marketing authorisation, in the context in which it is beyond any doubt that the Regulations regarding the marketing authorisation and the supervision of human use medicines, issued by the Ministry of Health for the application of the provisions comprised in Law no. 95/2006 of health reform, as subsequently amended and supplemented, explicitly establish that the marketing authorisation application should mention both the types and size of the packages.

The court also appreciated as just the reasoning through which the criticism concerning the different nature of the authorisation procedures in Romania compared to other member states of the European Union was rejected. The arguments of the Council underlined the fact that there isn't any alleged incomplete implementation of a Community provision, as the Regulations (EC) no. 1,234/2008 of the Commission from the 24th of November 2008 on examining the modification of the conditions for the marketing authorisations granted for

the human and vet use medicines are mandatory as a whole and apply directly in all member states, without the necessity of their implementation in national law.

Related to the legal provisions which impose that APP should also comprise, according to law, the type and size of the package, it was correctly appreciated the criticism of the petitioner, who requests the removal of the phrase "the package should be found in APP and there should be a price approval in CANAMKD for each type of requested package", is ungrounded, as this is actually the exact implementation of the legal provisions.

Therefore, it is exaggerated to pretend that a requirement which faithfully transposes the legal provisions is restrictive.

The court retained as beyond any doubt that the regulation of public procurements consecrates equal access of business operators to the award procedure, yet the premise situation imposes that these operators should develop their activity with precise respect to the incident legal provisions, and the challenged request aims for ensuring the contracting authority that the delivered goods are supplied in a lawful manner.

The analysis of the Council targets legality aspects of the challenged documents, not their opportunity or economicity

N.C.S.C. DECISION no. 433/18.03.2020

The Council retains that the provision of Article 3 paragraph (1) letter a) of Law no. 101/2016 establish the competence of the Council in regards to the analysis of certain documents within the award procedure, in this sense defining as "document of the contracting authority – any document, any operation which produces or could produce judicial effects, the failure to meet in legal term an obligation stipulated by the legislation in the field, related to or within an award procedure...". Therefore, it clearly results that the authority cannot be forced in the future to organise the procedure on the premises of Law no. 100/2016 and not of Law no. 98/2016, the jurisdiction of the Council being exclusively for the procedure under analysis.

Thus, to the extent that the procedure chosen by the authority is likely to harm the business operators, it is certain that they will not make any bids. Therefore, the contracting authority will have to modify its contracting strategy at some point and choose another type pf procedure, more profitable for the business operators. Yet these aspects will be adjusted by the market, not by a decision of the Council which would pe pronounced on aspects which do not enter its sphere of competence.

Although the complainant proved the existence of some difficulties in obtaining the licences afferent to the specific activities, this fact is not a sufficient reason to invalidate the type of procedure chosen by the contracting authority. Thus, the Council retains that the framework-agreement is also circumscribed in the definition of the contract as established in Article 1166 of the Civil Code (The contract is the agreement of wills between two or more persons with the intention of establishing, amending or extinguishing a legal relationship). The obligation of signing the subsequent contracts does no damage to its mandatory judicial force, especially that we are dealing with a framework-agreement with only one bidder. Even the legislation related to the sanitation of localities fits the Romania's general legal context, in which the systematisation, unification and coordination of provisions must be ensured. It is not permitted to interpret the legal norms in such a manner that an important activity, like the one to be awarded, to be obstructed by bureaucratic impediments, respectively the obligation for operators to obtain a licence for each subsequent contract, some of which only for a month. In principle, the existence of discrepancies between the legislation on public procurements, which allows the award of framework-agreements for activities concerning the sanitation of localities, and the specific legislation for the respective field cannot be admitted, because the validity period of the subsequent agreement is too short, thus it is clear that the judicial norm, just like the contract, must be interpreted in the way that it produces effects, not in the sense that it does not produce any effect.

Furthermore, a public authority cannot intervene in a closed contract, against the will of the parties, by respecting the specific legal provisions and it cannot impose the introduction of certain clauses, especially because the public procurements legislation enforces the knowledge of the contractual clauses in the publication stage of the tender documentation. Yet the detailed analysis of this matter exceeds the current judicial framework, as the role of the Council is not to analyse the way in which other authorities interpret the normative acts outside the award procedures. For the coordinated interpretation of these provisions, the petitioner benefits of the specific legal route.

Pursuant to Article 26 paragraph (2) of Law no. 101/2016, "With respect to the principle of availability, the Council examines the challenged document in regards to legality and solidity and it may:

a) pronounce a cancelling decision, completely or partially;

b) compel the contracting authority to issue a document/to adopt the necessary measures to restore legality, with clear and precise indication of the operations that will be performed by the contracting authority;

c) cancel the award procedure in the situation in which the remedy of the challenged act is impossible".

Relating to the current disposition, the verification of the document's legality and solidity is one of the Council's attributions, unlike its opportunity or economicity. Therefore, the fact that business operators do not recover their investments' expenditures, in the context that their minimum amortisation period is 6 (six) years, the framework-agreement being considered as a too short time span, represents a matter that exceeds the legal competences of the Council. There is no legal provision in the field of public procurements or even in the Civil Code that allows the compelling of a certain authority to establish an extended period for the validity of a contract. On the other hand, the award of a framework-agreement for a period of 5 (five) years does not represent a violation of law, the provisions comprised in Article 115 paragraph (1) of Law no. 98/2016 stipulating that "the time span of a framework-agreement cannot exceed 4 (four) years excepting the exceptional cases which are solidly justified by the contracting authority, especially through the subject of the respective framework-agreement". To the extent that even the contracting authority requests a 6 (six) years concession, it cannot be considered that the period of the five years framework-agreement is justified, the presented arguments being in contradiction.

In addition, the Council retains that the tender documentation contains minimal and maximal amounts which are quantifiable, the operators being able to establish their own rates.

Therefore, the Council does not identify any errors in the tender documentation or deviations from the provisions of Order no. 109/2007 of A.N.R.S.C., referred to by the complainant at points C and D of the complaint. Moreover, the petitioner does not reveal in its complaint in what do the respective deviation consist of, thus concerning to this aspect the defences of the petitioner are inconsistent. In fact, we are dealing with aspects related to opportunity and economicity as well, in the given context that the Council does not check these aspects. It is clear that the contracting authority wishes to award subsequent contracts related to certain activities provided in the tender documentation, indicated in the complaint at page 12, the establishment of the medium rate (it is unique for each activity and there isn't any reference in the tender documentation at multiple rated for one activity) being more favourable to the operators, even considering the arguments of the complainant, who claims that in the lack of ensuring maximal amounts the contract will be detrimental. Yet these arguments of the petitioner (pages 11-13 of the complaint) are employed precisely to justify the change of the contract type in a concession one and not to prove some violations of the specific legislation in elaborating the tender documentation. Besides, it is clear that, since we are not dealing with a concession but with a provision of services contract with clear activities, not all the columns of the Order no. 109/2007 can be present, as there are no contract revenues or they are not of interest for the authority, with no programmed amounts, only

minimal and maximal quantities and total price, just like in the case of any other framework-agreement. Although the theory exposed by the petitioner might be justified from the economical point of view, under the interests of her company, it cannot be verified by the Council as it has the competence to check the legal aspects, and the choice of the procedure type falls in the hands of the contracting authority. Consequently, the potential harmful character of the contract will be appreciated by the business operators who will participate or not at the procedure depending on their economic interests.

CIVIL DECISION no. 398/2020 - Cluj Court of Appeal (solving the complaint against the N.C.S.C. DECISION no. 433/18.03.2020)

Regarding the inadmissibility of the complaint for cancelling the award procedure in relation to the option of the contracting authority for a certain object of the procurement from the perspective of the contractual form, of the contract period and the way of settling the rate, the court retains that this inadmissibility was discussed from the perspective of the attribution right and of the limits in which the control performed by the National Council for Solving Complaints may be accomplished.

Concerning opportunity, the Court retains that it targets the conformity of the administrative act with society's continuously changing necessities, entering the content of the appreciation right of the public authority. As a rule, the administrative act issued during the exercise of an appreciation power of the public authority cannot be cancelled by the administrative law court.

However, as an exception, in the hypothesis that the appreciation right is manifested using excess of power, the opportunity aspect becomes part of legality, a requirement of the administrative act's validity, thus the court is entitled to analyse this aspect as well, without the possibility of facing the argument of violating the separation of powers principle.

In the support of this conclusion, even we find the provisions of Article 2 paragraph (1) letter n) of Law no. 554/2004 on administrative law, which define excess of power as the exercise of the appreciation right of the public authorities through the violation of competence limits, as provided by law, or of citizens' rights and liberties.

As shown by the High Court of Cassation and Justice in Decision no. 3,359/30.05.2005, pronounced by the Administrative and Fiscal Law Section, the accepting excess of power without any control of the administration's activity is not allowed in a rule of law which, according to Article 1 paragraph (4) of Romania's Constitution, revised, is organised not just according to the separation of powers principle (legislative, executive and judicial), but also to the one of their balance within the constitutional democracy. The Supreme Court also revealed, in Decision no. 3,165/21.06.2012, pronounced by the Administrative and Fiscal Law Section, that Article 2 paragraph (1) letter n) of Law no. 554/2004 offers a normative consecration of the court's attribution to examine the behaviour of the public authorities, including the perspective of the exercise manner of discretionary power and of the framing within the limits of the appreciation margin provided by law. In this way an answer is provided to the requirement of maintaining a reasonable balance between the public interest and the subjective rights or the lawful private interests which may be harmed by administrative acts.

Concerning the special matter brought in front of justice, the court retains that the provisions of Article 26 paragraph (2) of Law no. 101/2016 stipulate that, by respecting the availability principle, the Council examines the challenged act in terms of legality and solidity. As noticed, the legislator did not intend to regulate a derogation from the common law provisions in this special matter.

By retaining these legal provisions and jurisprudential considerations, the court concludes that the National Council for Solving Complaints has rightfully appreciated that, within the procurement planification stage, the establishment of the type of the future award procedure is the sole privilege of the contracting authority. The attributions of the Council target exclusively the organisation stage of the procedure, from the moment of the announcement's publication in S.E.A.P. until the time of the contract award.

Hence, if the choice of an award procedure for a framework-agreement based on Law. no. 98/2016 is made by respecting the legal provisions, the Council does not have the competence to dispose the dismissal of the respective procedure for opportunity arguments regarding the choice of a certain procedure, as long as this choice falls under the appreciation right of the contracting authority.

In this sense, the provisions of Article 29 paragraph (8) of Law no. 51/2006 stipulate that a contract for delegating the management of public utilities services can be a concession of services contract or a public procurement contract. Therefore, on the grounds of this legal text, one may observe that the contracting authority has the right to choose the type of contract, following an analysis of all the elements involved in delegating the management of the respective services. In conclusion, the special law allows the contracting authority to choose between a concession contract or a public procurement contract, including a framework-agreement. Therefore, it was correctly appreciated that there is no reason to invalidate this option of the authority on the means of opportunity.

Concerning the criticisms comprised in points C and D of the complaint, the Court retains that they were qualified by the National Council for Solving Complaints as also being aspects linked to opportunity, the respective conclusions of the Council being unchallenged in the current complaint.

It is this way of drafting the complaint that determines the hereby court to ascertain the groundless character of the other claims of the petitioner in regards to these criticisms, because, to the extent that in this case the conclusions of the challenged decision, related to the establishment of a medium rate and to the minimal and maximal quantities, cannot be set aside, it is not possible to proceed to their analysis as aspects targeting the legality of the award procedure's development.

Besides, as thoroughly pointed by the Council as well, the tender documentation contains minimal and maximal amounts which are quantifiable, thus the operators have all the necessary elements to establish their rates, without any errors or deviations from the provisions of Order no. 109/2007 of A.N.R.S.C., while the medium rate, which is actually unique for each activity, is a favourable provision for the interested business operators.

Furthermore, it was correctly concluded in the challenged decision that, although the petitioner's arguments might seem economically pertinent regarding to her own situation, this aspect is not relevant in the current case because the analysis of both the Council and the court targets illegality aspects related to the development of the award procedure, not the special situation of one of the biding business operators and the extent to which the latter might be economically advantaged through the development of a certain type of procedure.

As a consequence, concluding that the National Council for Solving Complaints has correctly appreciated that its decision cannot replace the authority right to plan and organise the procedure, in the context in which the provisions of the challenged tender documentation do not violate the imperative legal dispositions and were taken during performing legal attributions, within the limits of the appreciation margin left by the specific legislation at the disposal of the contracting authorities, the court retains that the complaint lodged by the petitioner is groundless, thus its rejection is imposed and will be implemented.

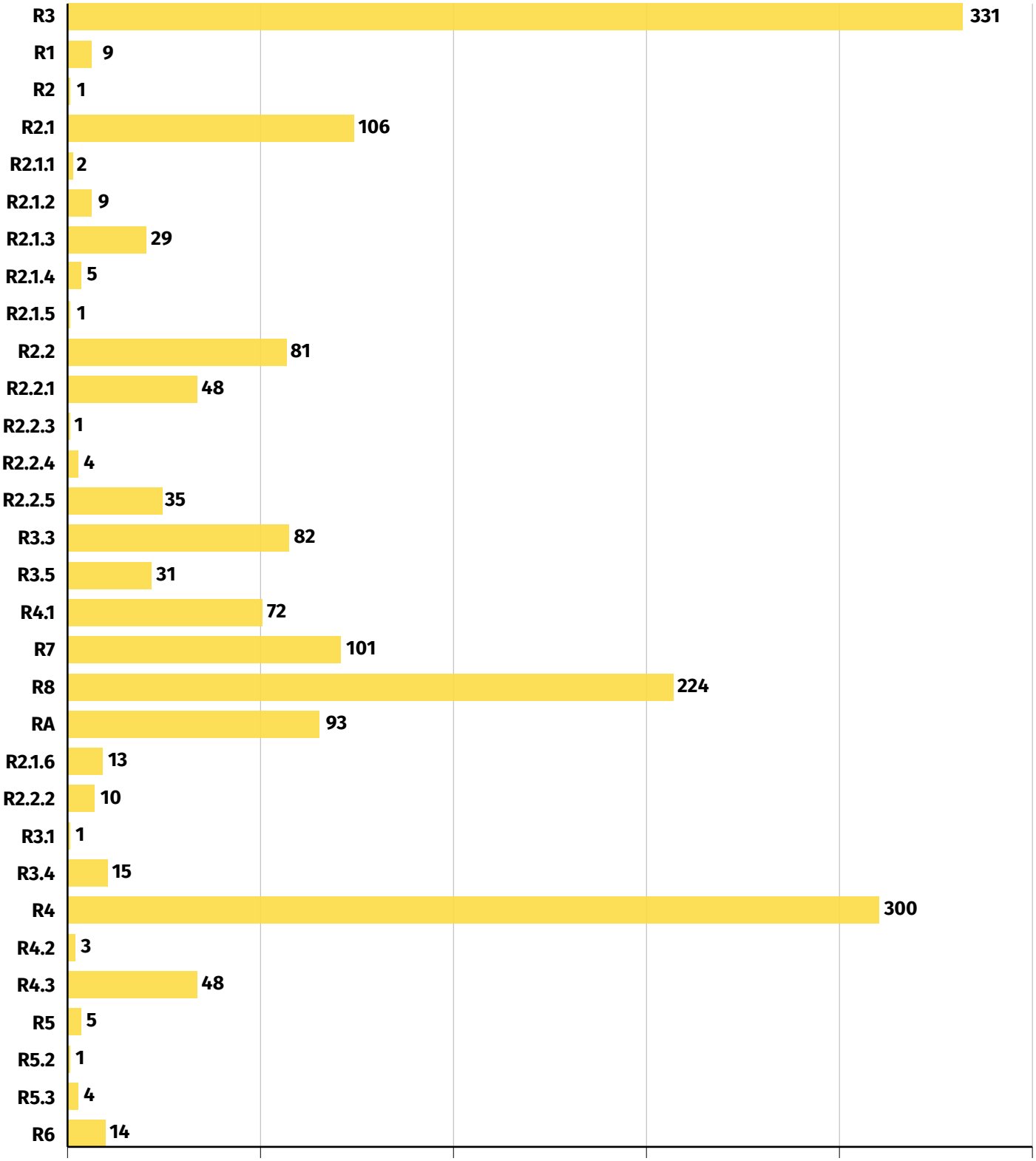
CONCLUSION:

A simple search on the Council's portal reveals a special variety of cases, the solving counsellors rapidly adapting to any matter we are invested with. Therefore, starting from simple procurements, such as office supplies and stationery, security services, etc., to complex procurements, for instance large infrastructure works, supply of machines with special technical elements, like complex medical equipment, complex IT systems, etc., all of these are simultaneously on the role of the solving chambers, taking a serious toll on their experience. Each of them has the conscience of the huge responsibility with which he was entrusted, completing the tasks in the most efficient way as possible.

Concerning the subject of the complaints lodged against the result of the award procedure, it was observed that within the 2,487 complaints lodged with the Council on the course of the year 2020 the most numerous criticisms were:

CODE	CRITICISM	NUMBER OF CRITICISMS
R3	the bids of other bidders in the award procedure are unacceptable	331
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)	9
R2	dismissal of the complaining party's bid as noncompliant or unacceptable	1,006
R2.1	dismissal of the complaining party's bid as unacceptable	106
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	2
R2.1.2	dismissal of the complaining party's bid as 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	9
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	29
R2.1.4	dismissal of the complaining party's bid as unacceptable, as it has an unusually low price	5
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	1
R2.2	dismissal of the complaining party's bid as noncompliant	81
R2.2.1	dismissal of the complaining party's bid as noncompliant,as it fails to properly meet the tender specifications requirements	48
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 that they provided	1
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 that they provided	4
R2.2.5	dismissal of the complaining party's bid as noncompliant for other reasons than as listed in R.2.2.1-4	35
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	82
R3.5	other reasons that render as unacceptable the bids of other bidders in the award procedure	31
R4.1	the unusually low price of the bids of other bidders in the award procedure	72
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	0
R7	cancellation of the award procedure by the contracting authority without legal grounds	101
R8	other reasons regarding the result of the procedure	224
RA	other criticism of the result	93
R2.1.6	dismissal of the complaining party's bid as unacceptable for other reasons than as listed in R.2.1.1-5	13
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	10
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	1
R3.2	the bids of other bidders in the award procedure were not accompanied by the bid bond in such amount, form and with the validity term as required in the tender documentation	0
R3.4	the bids of other bidders in the award procedure were submitted in violation of the provisions on the conflict of interests	15
R4	the non-compliance of the bids of other bidders in the award procedure	300
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	3
R4.3	other reasons that render as noncompliant the bids of other bidders in the award procedure	48
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	5
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	0
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	1
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	4
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	14

THE SUBJECT AND NUMBER OF COMPLAINTS LODGED AGAINST THE REQUIREMENTS IMPOSED AT THE RESULT OF THE AWARD PROCEDURE



Interpreting the provisions of Article 165 and 166 paragraph (2) of Law no. 98/2016 and the erroneous dismissal of a bid because it would appear with overdue in the fiscal records and individualised budget obligations, issued according to law and existent in the record of the fiscal for the purpose of recovery.

N.C.S.C. DECISION no. 816/19.05.2020

(...) By analysing the documents submitted by the petitioner following the clarification requests made by the contracting authority, the Council concludes that through the definitive Decision no. .../08.11.2019, the Bucharest Court of Appeal, the 5th Civil Section, ordered the dismissal of the measure taken by the judicial administrator regarding the approval of the payment in amount of 1,428,315 lei, afferent to the month of January 2018, to the state budget, mentioned in the report published in the Insolvency Procedures Bulletin no. .../05.10.2018 and rejected as inadmissible the restitution request of this amount by the General Direction of Administration of Large Taxpayers (D.G.A.M.C.).

In addition, it is noted the existence of the compensation claim submitted by X S.A., no. .../13.01.2020, registered with A.N.A.F. – D.G.A.M.C. with no. .../17.01.2020, concerning this amount of 1,428,315 lei, its receiving being confirmed in address no. .../27.01.2020, through which A.N.A.F. – D.G.A.M.C. requests the certified copy of the mentioned decision of Bucharest Court of Appeal.

Contrary to the analysis of the contracting authority within the minute no. .../11.02.2020, which ignored the petitioner's answer for invoking the provisions of the Fiscal Procedure Code referring to the legal compensation, the Council notes that in the current situation, on the one hand, there are the presented documents attesting the fact that the amount of 1,428,315 lei does not represent a current debt and that its payment was made following an illegal taxation (contrary to Law no. 85/2014 the procedure of insolvency), and, on the other hand, the fact that the legislator predicted to operate a legal compensation if the receivables exist at the same time.

The fact that no documents were submitted following the two clarification requests through which A.N.A.F. – D.G.A.M.C. would acknowledge the debit of 1,428,315 lei, respectively the express mention of accepting the compensation of this amount, should not have determined the contracting authority to exclude the complainant's bid as long as she made the proof of requesting the compensation of the respective amount, as provided by the Fiscal Procedure Code in Article 157 paragraph (3) (...).

The presented documents attest the existence of such a request and, on the other hand, because the focus of the discussion is the diligence of a third party to issue documents, state institution, the contracting authority may address, if it has any uncertainty, directly to A.N.A.F. – D.G.A.M.C. in order to clarify the existence/ inexistence of the current debts of X S.A..

These uncertainties of the purchaser, blamed on the petitioner's lack of diligence and having determined the rejection of her bid through the minute from 11.02.2020, could have been removed through the direct request addressed to A.N.A.F. – D.G.A.M.C.

Such an endeavour was necessary precisely not to allow the award of contracts to some business operators with debts to the state budget and to encourage the payment of eventual debts and the recovery of the amounts due.

If it had proceeded in this way, the contracting authority would have received the confirmation of the fact that the compensation application of an amount that was established as necessary to be included in the bankruptcy mass is on role with A.N.A.F. – D.G.A.M.C. for solving, as proved by Tax Registration Certificate no. .../28.02.2020, issued following the request from 10.02.2020. The latter comprises the mention, supported through the petitioner's answers at the received clarification requests, that her compensation claim from the 17th of January is pending even at 28.02.2020, Chapter III indicating as debit the exact amount in discussion.

The Council did not analyse the amounts representing receivables because these were not the subject of the dispute, the entire analysis being limited to the dismissal reasons of the contester's bid, respectively the fact that she would not have demonstrated that the obligations were met regarding the payment of taxes, tolls or contributions of

the general consolidated budget, although information were presented related to the existence of a debit and the payment of the amount due covering the payment of the current debts, and the existence of a compensation request.

Contrary to the intervener's claims, the Bucharest Court of Appeal has definitively established that the debts in amount of 1,428,315 lei are prior to the opening of the insolvency procedure. Bucharest Court of Appeal established unequivocally that the measure ordered by the judicial administrator regarding the approval and payment of the receivables in the amount of 1,428,315 lei to A.N.A.F. – D.G.A.M.C. are illegal and their dismissal is imposed.

The necessity of the rigorous compliance of the minimal requirements in the specifications during the period of evaluating the bids.

N.C.S.C. DECISION no. 994/16.06.2020

Compared to the previous mentioned, in this case, it must be clarified if the requirement from the specifications, point 4.1.2 The material of the visor should be transparent and resistant to splashes and liquid drops, as well as to medium energy impact, according to SR EN 166 (inclusively as aerosols), imposes compliance with point 7.2.2 of the SR EN Standard 166:2003.

(...) Provisionally, the Council retains that medium energy impact resistance according to SR EN 166 is a specific requirement of the specifications which should have been respected as such by business operators when preparing the bid, but also during the bid evaluation period by the evaluation commission.

Unchallenged and mot eliminated or modified in the legal term, the requirement remained mandatory in the form present in the documentation, therefore its opportunity or legality cannot be contested at the time of solving the complaint (...).

The requirement regarding medium energy impact resistance is found in Standard 166, chapter 7.2.2.

As argued by the complaining society, the products compliant to the increased solidity requirements in agreement with 7.1.4.2 are not automatically compliant to the medium energy impact resistance requirement, as further testing is necessary according to 7.2.2, which strictly and distinctly defines the medium energy impact.

Both X S.R.L., in its answer dated 28.04.2020, and the contracting authority, in the point of view for answering the criticisms of the contester, make reference to the increased solidity of the products and to the fact that the compliance with the condition within point 7.2.2. was not specifically requested, yet, as shown above, the increased solidity provided in point 7.2.2. implies a certain trial method in specific conditions and does not necessarily determine the compliance of the product with the requirement within point 7.2.2.

The Council verifies the legality of the bids evaluation by reference to the requirements imposed in the specifications, while the choice of the purchaser to consider that the requirement in discussion is covered within another requirement (that was not provided in the specifications and cannot demonstrate the equivalence related to medium energy impact) cannot be accepted (...).

The Council does not contest the relevance of the protection test against liquid drops and splashes and the claims of the Scientific Research Centre, yet, in this case, the bid evaluation, respectively the compliance of the visors, could have been performed only by reference to the requirements in the specifications, as developed and made available to the business operators, including the medium energy impact requirement.

The relevance of the requirement, by reference to the procurement's purpose, was established at the time of the development of the tender documentation, as long as it was provided as a minimal mandatory requirement. Clarifications relating to the technical point of view of the commission should have been taken into consideration at the time of drafting the tender documentation.

We cannot discuss a "generic condition", as claimed by the contracting authority in its point of view, as long as it was imposed in the specifications as a minimal requirement for the compliance of the bid. The purchaser cannot invoke at the time of solving the complaint that its objective necessity is linked to the protection against drops and

liquid splashes, in the context on which the formulation within the documentation makes also reference to the medium energy impact.

A modification of the tender documentation cannot be ordered, any criticisms related to it being late, thus the verification of the technical proposal can be made only in compliance with the imposed requirements (...).

Moreover, through imposing the requirement and the obligation of drafting the technical proposal accordingly, it is taken into consideration hindering those business operators whose products do not meet the requirement to take part in the procedure.

For evaluating the bids, the contracting authority must also take into account respecting the equal treatment principle.

In addition to the mentioned above, it is thus noted that the criticisms of the petitioner are founded concerning the incapacity to demonstrate the meeting of the medium energy impact requirement of the products offered by X S.R.L., its answer to the clarifications address of the contracting authority, dated 28.04.2020, being considered inconclusive.

In considering the aforementioned, the Council will partially accept the complaint...

Appreciating the quality of subcontractor or service provider; the necessity to hold the Road Transportation License for dangerous medical waste

N.C.S.C. DECISION no. 839/22.05.2020

After verifying the tender documentation, the Council retains that, in chapter III.1.1.b) the procurement's data sheet, "The capacity to exercise the professional activity", the following documents were requested: "2. Integrated environment authorisation/ Environment authorisation – for the activity of collecting, treating and disposal of dangerous waste.

3. Environment authorisation - for the activity of road transportation of goods (dangerous waste resulted from medical activity)". (...)

It may be observed in the cited provision (Article 45 of Order no. 1,226/3rd of December 2012) that the wastes treated through thermal decontamination are transformed into regular waste, in so far as the analysis reports reveal this aspect. Decontaminated wastes undergo a mincing and deforming activity, then they are deposited at the complaint facility (landfill) just like any other waste.

In the specifications there is no mention of the fact that business operators have to possess their own landfill or to associate/ be appointed subcontractors for the activity of waste depositing. Such an interpretation is restrictive for many reasons. Therefore, it must be taken into consideration the fact that within a certain geographical area there are a limited number of compliant waste deposits, so the support obligation of this activity by a third party, associate or subcontractor would restrict the competition, in the context in which the law expressly forbids the participation as associate, third party or subcontractor for several bids within the same procedure. When the company holding the landfill is a mere provider, it provides the respective service for every operator that participates at the respective procedure, if demands are made in this regard. On the other hand, given the relatively small amount of medical waste, it is possible that the business operators which possess landfills won't be interested to issue the necessary documents for an award procedure, the economic interest being minimal.

The reality that the complaining society understood precisely the provision in the tender documentation is proven also by fact that it did not declare a subcontractor for this activity, submitting, just like the winning bidder, a provision of services contract with S.C. ... S.R.L., an operator which is not declared as subcontractor. Although the contracting authority mentioned in its point of view the similitude regarding this matter between these two bids, the petitioner did not justify the reason for which the winning bidder should have been differently evaluated, as both have treated the landfill matter in the same way.

Considering these aspects, the Council retains that the first reason invoked by the complainant is groundless (...).

Concerning the fourth reason, the petitioner claims that the winning bidder ... S.R.L. does not hold the Road Transportation License for dangerous medical waste at national level, issued by the Romanian Rod Authority, pursuant to G.D. no. 1,061/2008, and that, consequently, cannot prove the legal transportation of the wastes subject to the contract. It also shows that the Ministry of Environment, which supervises all the County Environmental Agencies, established that the method through which the business operators are authorised to transport dangerous goods at the level of several counties (for the current procedure, the transportation of dangerous medical waste will take place on the radius of at least two counties - Cluj, Mures /Iasi) is the revision of the environmental authorisation by the competent environment authority which issued the environment Authorisation.

The contracting authority shows that "The road transportation license for medical wastes declared dangerous" is not requested in the tender documentation. The "environment authorisation - for the activity of road transportation of goods (dangerous waste resulted from medical activity)" was demanded, document submitted by both bidders. In addition, it cites Article 11 of G.O. no. 27/2011 on road transportation, which makes an exception concerning the obtaining of the goods transportation license for the vehicles with the permissible maximum laden mass, including the trailers, of less than 3.5 tones.

The Council retains that the vehicles presented by the bidder S.C. ... S.R.L. in the technical reports have the permissible maximum laden mass of 3,500 kg, respectively 2,175 kg, therefore they are excepted from obtaining of the goods transportation license at national level, as A.R.R. does not issue goods transportation licenses for the respective vehicles (national road transportation).

The Council retains that the complaining society is fully aware of the fact that it was not necessary to submit the respective license as it did not submit it as well. The fact that S.C. ... S.R.L. is present in the List of authorised business operators for the activity of dangerous waste transportation at the position ... is irrelevant in the current case, this fact proving that it possesses vehicle larger than 3.5 tones.

The contracting authority requested in the specifications "Environment authorisation - for the activity of road transportation of goods (dangerous waste resulted from medical activity)", document presented by both bidders, the winning bidder submitting the Environment Authorisation no. 10/... for the road transportation of dangerous goods, the requirement being thus met.

CIVIL DECISION no. 672/2020 - Cluj Court of Appeal (solving the complaint against the N.C.S.C. DECISION no. 839/22.05.2020)

1) Concerning the aspects highlighted within this reason, the Court retains that the ones presented by N.C.S.C. in the challenged decision are correct.

Thus, a thorough analysis of the legal text was performed, respectively Article 3 letter w) of Law no. 98/2016 regarding the quality of services providers, not of subcontractors, of the indicated third parties.

A detailed analysis was performed for the activity involving waste removal related both to the state of affairs and to the incident legal norms, respectively Article 45 of Oder no. 1,226/2012 on the approval of the technical norms for managing the wastes generated by the medical activity and of the methodology for gathering data for the national database concerning wastes generated by the medical activity.

The Court retains that the analysis performed by N.C.S.C. was based on the content of the previously mentioned legal norm, situation in which the point of view expressed by the petitioner, claiming that N.C.S.C. would have performed an economic analysis of the situation without having the professional competence in this regard, cannot be accepted.

Moreover, the Court retains the application of the equal treatment principle concerning the evaluation of the bids submitted by the complainant and the winning bidder (Article 2 paragraph (2) letter b) of law no. 98/2016), clearly resulting that both offers were treated in the same manner regarding the matter of waste removal, context in which there isn't any disadvantage or inequity against the petitioner to be retained (...).

4) Regarding this reason, the Court retains the aspects

revealed in the decision of N.C.S.C. confirmed by the contracting authority related to the tonnage of the vehicles for which the evaluation of the Ministry of Public Health is held, respectively the fact that their tonnage does not surpass 3.5 tones, situation in which, pursuant to Article 11 of G.O. no 27/2011 on road transportation, the obtaining of the goods transportation license is not necessary.

At the same time, the identity of the national regulations is also retained with the one mentioned in Article 5 letter a) of the EU Regulations no. 1,071/2009 regarding the fact that the provisions related to the access to the transportation operator occupation does not apply to the enterprises engaged exclusively in the following types of national road transportation: goods transportation using vehicles with the permissible maximum laden mass, including the trailers, which does not surpass 3.5 tones.

Taking into consideration the evidence resulting from the content of the documentation submitted by the winning bidder referring to the permissible maximum laden mass of the vehicles which will be employed in waste transportation, it is noted that it is not necessary to obtain the goods transportation licence, document which wasn't even requested by the contracting authority.

It is retained as well that the contracting authority requested the environment authorisation for the road transportation of goods activity, document which was forwarded by both bidders.

The modification of the technical proposal following the clarification request

N.C.S.C. DECISION no. 1, 675/17.09.2020

The information comprised in the complaining bidder's technical proposal confirms the aspects underlined by the contracting authorities, respectively the fact that in the document entitled the own health and work security plan for the temporary construction site "Execution of rainwater sewerage network Țânțăreni Stage I" (page 132 of the procurement file), it mentioned "approximately 20 workers are necessary for carrying out the works", while in the document entitled "Qualified and unqualified execution personnel" (page 292 din of the procurement file) 83 workers are enumerated, with the mention "Personnel and machinery shall be supplemented if necessary foe ensuring the technological flux and framing in the term assumed within the execution chart". [...]

Yet the Council observes that from the answer provided by the complaining bidder it results that it did not indicate within its technical proposal a clear number taken into account when establishing the necessary human resources which will be employed in the execution of the contract, underlining that "The real number of workers who will take part in the execution of works will be presented to the contracting authority at the moment of the commencement of the execution".

Consequently, it results that, at the moment of drafting the bid, its author did not concretely dimension the number of personnel used for the execution of the contract under the procurement procedure, the number following to be set only at the commencement of the contract's execution.

As this information is missing from the technical proposal, it is natural that the proof of the possibility to meet the contract's quantity and quality parameters requested in the specifications is impossible to verify, as long as the correct dimensioning of the personnel involved in fulfilling the contract presents a special importance in this respect.

The technical proposal is a composing element of the bid and has mandatory character. According to the provisions of Article 147 paragraph (1) of G.D. no. 395/2016, it becomes an inner part of the public procurement contract. Therefore, its content must be adapted and correlated with the requirements demanded by the contracting authority in order to prove it is able to satisfy its necessities which led to the development of the public procurement procedure.

Yet, in the context in which, from the information revealed by the bidder in his technical proposal, it is not clear what is the exact number of personnel employed in the development of the contract, neither can be retained its compliant character, thus the evaluation

commission is unable to verify the possibility of the bidder to execute the works which are the object of the procurement.

Moreover, on the one hand, although it indicates 20 workers and, on the other hand, makes reference to 83 workers employed in the execution of the works, through the answer forwarded to the contracting authority it presents a calculation which leads to the conclusion that the execution workmanship may be performed with 12 workers, thus modifying the technical proposal by indicating a number of workers employed in the development of the contract different from the one mentioned in the technical proposal. This situation is sanctioned by the legislator with the dismissal of the bid as inacceptable, in accordance with the provisions of Article 134 paragraph (6) of G.O. no. 395/2016. [...]

Hence, even if related to the other reasons exposed in the bid dismissal an analysis of the potential incidence of a form vice could be performed, which would allow to rectify the mentioned aspects, regarding the situation of the proposed personnel for the execution of the works, the exception regulated by the legislator in Article 135 of G.O. no. 395/2016 does not operate, taking into account that the modification operated by the bidder in regards to its technical proposal on the number of workers is not unequivocally supported by the sense and content of other initially existent information in other documents forwarded by the bidder, thus lacking a formal or a confirming correction/ amendment.[...]

Even in the hypothesis that the modification of the bid was not retained via the answer to the clarifications, the Council notes that the explications of the petitioner regarding the clarifications request received from the evaluation commission cannot be considered as conclusive because it did not mention which of the two nominated documents contains the correct number of personnel employed in the execution of the contract and, furthermore, it argued that "The real number of workers who will take part in the execution of works will be presented to the contracting authority at the moment of the commencement of the execution".

CIVIL DECISION no. 918/20.10.2020 - Ploiești Court of Appeal (solving the complaint against N.C.S.C. DECISION no. 1,675/17.09.2020)

The claims of the petitioner are groundless. As it was correctly retained within the challenged decision, the complainant did not correctly dimension the personnel number employed in the execution of the contract under procurement and it would be established only at the moment of the commencement of the contract's execution, as mentioned in the answer forwarded to the contracting authority.

Because this information lacks from the technical proposal, one cannot verify the demonstration of the possibility to meet the contract's quantity and quality parameters requested in the specifications, as long as the correct dimensioning of the personnel involved in fulfilling the contract presents a special importance in this respect.

The petitioner treated superficially the rigours imposed in the public procurement procedure, forwarding general and contradictory information within the technical proposal, which correctly determined the dismissal of its bid. The fact that the information forwarded by the complainant regarding the personnel involved in the development of the contract are general, and not adapted to the bid as imposed within the public procurement procedure, is also revealed through the answer provided to the clarifications requested by the contracting authority, out of which it results a different number of workers than the one previously indicated, respectively 12 workers. Taking into consideration these inconsistencies, the explanations of the petitioner against related to the clarifications request received form the evaluation commission cannot be considerate as conclusive because they do not bring forth any demanded mentions but only present a new variant, which supports exactly these inconsistencies noticed by the contracting authority in the submitted bid. [...]

The technical proposal, comprising part of the bid, is mandatory and, according to the provisions of Article 147 paragraph (1) of G.D. no. 395/2016, it becomes part of the public procurement contract, thus its content must be adapted and correlated with the requests demanded by the contracting authority in order to prove it is capable to meet its necessities which

have led to the development of the public procurement procedure, the aim of the law.

The application of the evaluation factors within the competition of solutions The appreciation right of the contracting authority.

N.C.S.C. DECISION no. 1,493/25.08.2020

Regarding the criticisms of the scores attributed by the jury both to its project and the project of the competitor, the Council noticed that the current case raises a problem specific to the competitional procedures opened with a high dosage of subjectivity in the evaluation of the submitted works, such as solutions' contests, in which the plan or project selection is the prerogative of a technical jury, not of an evaluation commission. [...]

The opinions expressed by these specialists in the exercise of their attributes are beyond the verification possibility of the administrative-jurisdictional entity, which should not be mistaken for a super-jury for evaluating the projects or for censoring the scores given by the jury composed of the seven nominated architects.

[...] related to this control, it is not within the Council's competence to substitute the appreciation of the seven members of the jury regarding the appreciation on the manner in which the analysed projects meet the evaluation factors established in the tender documentation [...]

After covering the report, the Council observes that, in principle, the jury complied to these factors and subfactors, with minimal relevant explanations for scoring, context in which its cancellation is not imposed. Moreover, it retains that it is completed by the annex in which the scores obtained by each participant project are highlighted, for all the established factors and subfactors. [...]

As for the justifications of the jury members presented for each given score, the Council retains that they, in their quality of specialist in the field of city planning, architecture and landscaping, have analysed the projects according to the imposed requirements, being the most able to pronounce and to issue recommendations. Hence, in the opinion of the Council, their explanations offered with scoring cannot be censured as long as the algorithm of converting the technical evaluation factors into points has an obvious subjective component, related to the perception of each member of the jury which is impossible to quantify mathematically or in comparison.

On the other hand, it is retained that the evaluation of the projects was performed in a responsible way, in compliance to the legal and procedural provisions on the premises of which the procedure was organised, the participant projects being concealed, thus any possibility of vitiating the analysis of their content was excluded.

Finally, the Council highlights the fact the particularity of this procedure implies a certain subjectivity note, natural in discussing the qualitive appreciation of the conception and information comprised in the participant projects, but which does not lead to the vitiation of the final result, in the context in which the bids were concealed and the members of the jury gave scores exclusively based on the content of the project, analysed by reference to the requirements within the tender documentation.

As long as normally the projects cannot be identical, it cannot be concluded that certain bidders would have been dis/advantaged, the scores being awarded depending on the appreciation of each member of the jury by reference to the manner in which the analysed project meets the imposed requirements, and not in comparison to the manner in which other projects have been conceived.

Therefore, the granted scores are the result of an individual analysis performed separately by each member of the jury, analysis which, in the lack of evidence to clearly prove a disregard of the rules established within the tender documentation, cannot be questioned under the aspect of their goodwill and professionalism.

In considering the aforementioned arguments, the Council determines that the authority, legally and based on the jury report, established the ranking and carried out the negotiation with the bidder placed in the first position, as there are no reasons to disapprove this result.

CIVIL DECISION no. 794/15.10.2020 - Alba Iulia Court of Appeal (solving the complaint against N.C.S.C. DECISION no. 1,493/25.08.2020)

Previously, the Court notes that grating scores for the evaluation procedure of the projects submitted within the procedure represents a prerogative of the jury, the court having the competence to exercise only the legality control of the evaluation procedure, without performing herself the evaluation and without the possibility to grant another score. Therefore, by reference to the fact that the evaluation itself is a matter of opportunity, the legality control exercised by the administrative law court must target the formal compliance of the procedure, which has to be in accordance with the legal provisions.

In this respect, the Council has correctly retained that the opinions expressed by the members of the jury in the exercise of their attributes are beyond the possibility of verification of the administrative-jurisdictional entity, which should not be mistaken for a super-jury for evaluating the projects or for censoring the scores given by the jury composed of the seven nominated architects.

Therefore, the court can only verify if the contracting authority respected the obligation for evaluating the projects submitted within the solutions competition in accordance to the provisions in Articles 108 and 109 of Law no. 98/2016.

Hence, for the evaluation of the projects submitted within the solutions competition the contracting authority named a jury composed exclusively of natural persons, independent in relation to the participants to the contest, thus in compliance with the provisions in Article 108 paragraph (1) of Law no. 98/2016.

According to Article 109, the jury is autonomous in the decision and opinions it issues, having the obligation to evaluate, anonymously and exclusively on the criteria indicated in the competition announcement, the plans and projects submitted by the participants. Similar provisions regarding the attributions of the jury are found in the contest Regulations.

In agreement with the Council, the court notes that the jury evaluated the projects based on the evaluation criteria indicated in the competition theme and the participation announcement, with additional minimal justifiable explanations for scoring. Moreover, the jury ranking Report is completed with an annex in which the scores obtained by each participant project are highlighted, in relation to all the established factors and subfactors. [...]

In conclusion, it is noted that the evaluation of the projects was performed in compliance with the legal and procedural provisions based on which the procedure was organised, the participant projects being concealed, thus any possibility of vitiating the analysis of their content was excluded. Furthermore, the granted scores are the result of an individual analysis performed separately by each member of the jury, analysis which, in the lack of evidence to clearly prove a disregard of the rules established within the tender documentation, cannot be questioned under the aspect of their goodwill and professionalism.

The incorrect appreciation of the contracting authority of the exclusion reason provided in Article 180 paragraph (1) letters g) and h) of Law no. 99/2016

N.C.S.C. DECISION no. 229/ 13.02.2020

In order to apply the exclusion reason provided in Article 180 paragraph (1) letters g) and h) of Law no. 99/2016, it is necessary to satisfy the following cumulative conditions:

√ severe or repeated violation of the main obligations;

√ the violation of the main obligations intervened in the development of one of the following types of previously closed contracts: public procurements contracts, sectorial contract, concession contract;

√ the severe or repeated violation of the main obligations led to the following consequences (sanctions): the early termination of the respective contract, payment of damages, other comparable sanctions.

Not any non-fulfilment of contractual clauses can generate the application of the provisions in Article 180 paragraph (1) letter g) of Law no. 99/2016, as not any certifying document must lead, tale quale, to the dismissal of the bidder, the legislator compelling the evaluation commission to verify the cumulative conditions provided in the respective article.

By analysing the afore-

mentioned legal provisions, it results that in order to exclude a business operator from the award procedure of the contract the following conditions must be satisfied cumulatively, not alternatively:

√ the business operator violated severely or repeatedly his main obligations within a public procurements contract, a sectorial contract, or a concession contract;

√ the violation of these obligations led to the early termination of the respective contract, payment of damages or other comparable sanctions.

In addition, the Council appreciates that in order to make use of the provisions of Article 180 paragraph (1) letter g) of Law no. 99/2016 on the exclusion of the winning society's bid, the contracting authority should have had the certitude of meeting the aforementioned cumulative conditions.

The measure of exclusion following the incidence of Article 180 paragraph (1) letter g) of Law no. 99/2016 may be taken by the contracting authority based on clear and concrete evidence which point beyond any doubt to the meeting of the cumulative conditions provided by the legal provisions. Because the contester did not prove that all the cumulative conditions to which Article 180 paragraph (1) letter g) of Law no. 99/2016 makes reference are satisfied, the bid submitted by the winner cannot be excluded.

Furthermore, the provisions of Article 180 paragraph (1) letter h) of Law no. 99/2016 are not incident as well, respectively:

"h) the business operator proved to be guilty of false statements within the content of the submitted information at the request of the contracting authority in order to verify the absence of the exclusion reasons or of meeting the qualification and selection criteria, did not present this information or is not able to present the request supporting documentation", because [pursuant to Article 180 paragraph (1) letter h) of Law no. 99/2016] the provision of relevant information concerning the exclusion regulated by Article 180 paragraph (1) letter g) of Law no. 99/2016 is mandatory. Thus, this is not the case of bidder MW ... S.R.L..

CIVIL DECISION no. 234/2020 - ALBA IULIA Court of Appeal (solving the complaint against N.C.S.C. DECISION no. 229/13.02.2020)

As retained by the Council as well, it was to be established if the exclusion motives provided in Article 180 paragraph (1) letters h) and g) of Law no. 99/2016 are incident in this case regarding the winning bidder.

In compliance with the provisions in Article 180 paragraph (1) letter g) of Law no. 99/2016, the contracting authority has the right to exclude from the award procedure of the contract any business operator which violated severely or repeatedly his main obligations within a public procurements contract, a sectorial contract, or a concession contract, and the violation of these obligations led to the early termination of the respective contract, payment of damages or other comparable sanctions.

According to Article 180 paragraph (6), in the sense of the provisions in paragraph (1) letter g), it is considered to be severe violations of the contractual obligations, as an example, the failure to execute the obligation regarding the provision of goods and services, the failure to execute the works, the provision of certain products or services which present major non-conformities making them improper for use according to the destination predicted by the contracting authority, the execution of works which do not meet the requirements in the specifications, or misbehaviour causing serious doubts concerning the credibility of the business operator.

The corroborated interpretation of the legal provisions previously stated reveals that in order to exclude a business operator from the award procedure of the contract the following conditions must be satisfied cumulatively:

√ the severe or repeated violation of the main obligations such as the ones listed as examples in paragraph (6) (the legal text does not refer to any unfulfillment or inadequate meeting of the contractual obligations by a bidder, rather they must be severe, an aspect which the contracting authority is compelled to analyse in regards to each contract);

√ the violation of the main obligations intervened in the development of one of the following types of previously closed contracts: public procurements contracts, sectorial

contract, concession contract;

√ the severe or repeated violation of the main obligations led to the following consequences (sanctions): the early termination of the respective contract, payment of damages, other comparable sanctions.

In this case, the following result from the certifying document no. 1/29.12.2016, on which the defendant relies on: ... S.R.L. (former... S.R.L.) closed a public procurement contract with the contracting authority Administration B, the contract was completed in term (31.12.2016), the contract was not cancelled and there aren't any mentions referring to the application of other sanctions (for instance, the payment of damages). More than that, in the certifying document there is no record of the produced prejudice or estimated to be produced.

At first, it must be mentioned that the existence of a certifying document, regardless of the comprised mentions, does not remove the obligation of the evaluation commission to analyse if it reflects the fulfilment of the cumulative conditions provided in Article 180 paragraph (1) letter g) of Law no. 99/2016, as it expressly results from the provisions of Article 161 paragraph (8) of G.D. no. 394/2016.

Secondly, it has to be noted that the certifying document analysed above does not meet the fulfilment of the cumulative conditions (it does not result from the document that sanctions were imposed to the society; also, there isn't sufficient information to consider that it represented a severe violation of the contractual obligations) of the provisions in Article 180 paragraph (1) letter g) of Law no. 99/2016.

Taking into consideration this aspect, as well as the lack of other evidence to prove the fulfilment of the aforementioned cumulative conditions, the Council correctly appreciated that the bid submitted by the winner could not be excluded.

Moreover, taking into account the abovementioned aspects, the Council correctly appreciated that the provisions of Article 180 paragraph (1) letter h) of Law no. 99/2016, which give the contracting authority the right to exclude the business operator the business operator proved to be guilty of false statements within the content of the submitted information at the request of the contracting authority in order to verify the absence of the exclusion reasons or of meeting the qualification and selection criteria, did not present this information or is not able to present the request supporting documentation, are not incident in this case.

The bidder cannot mention the capacities of other entities to formally meet the conditions imposed by the contracting authority, yet it has to prove that the third party, by supporting the similar experience, is compelled to effectively execute the contract part for which it grants the respective support

N.C.S.C. DECISION no. 18/07.01.2020

Thus, regarding the supporting third party, the contracting authority imposed within "The instructions for Bidders" the following requirements:

"(...) The following documents will be submitted at the same time with DUAE: the firm commitment of the supporting third party which comprises the effective way in which the support will be materialised, alongside the certifying documents, in accordance to Article 82 paragraph (4) of Law no. 98/2016 (...) in the case in which the business operator demonstrates its technical and/ or professional capacity by invoking also the support granted by one or more third parties, then the business operator has the obligation to prove to the contracting authority that all the necessary measures were taken in order to have access in any moment to the available resources, presenting in this regard a support agreement from the third party/ parties. At the same time with the support agreement, the bidder/ candidate has the obligation to present documents forwarded to him by supporting third party/ parties, out of which it results the effective manner through which the supporting third party/ parties will ensure the fulfilment of its own support agreement, documents which will become annexes to the respective agreement".

The Council retained as relevant for solving both complaints the legal provisions related to the supporting third party, respectively Article 182 of Law no. 98/2016, Article 48 and Article 50 of G.O. no.

395/2016, with the highlight of Article 182 paragraphs (2) and (4) of Law no. 98/2006, according to which "Regarding the meeting of the criteria referring to the educational and professional qualifications provided by Article 179 letter g) or to relevant professional experience, the business operator can rely on the capacity of the supporting third party only when effectively developing the works or services linked to the ones necessary for the respective qualifications" and "Together with supporting agreement, the bidder/ candidate has the obligation to present documents forwarded to him by supporting third party/ parties, out of which it results the effective manner through which the supporting third party/ parties will ensure the fulfilment of its own support agreement, documents which will become annexes to the respective agreement", as well as Article 48 paragraph (2) of G.D. no. 3985/2016 "The contracting authority has the obligation to take into consideration this support as a means to meet the minimal requirements imposed within the tender documentation, with the condition that the bidder/ candidate can prove that he effectively holds the resources of the entities granting support, necessary for the development of the contract".

The corroborated interpretation of the requirements within the tender documentation with the aforementioned legal provisions reveals that the bidders should have presented, for supporting the agreement, documents to prove both the fact that the supporting third parties will effectively develop the works which constitute the subject of the support, as well as the effective manner in which they will ensure the fulfilment of their own support commitments.

Upon analysing the bids of the two complainants and the subsequent clarifications, the Council noted that, besides the commitment model signed by the supporting third party, both complainants did not succeed to submit to the authority any document for revealing the effective way in which the third party will be involved in fulfilling the part of the procurement contract pertaining to the leader in the case it does not execute it. As it was retained above, the authority requested that, together with DUAE, the firm commitment of the supporting third party (form no. 7) had to be submitted, alongside other documents in order to reveal the effective manner in which the third party will ensure the fulfilment of the support commitments, documents which will become annexes to the respective agreement and which were totally missing in the case of the submitted bids.

As a consequence, the Council retains that, through the documents provided to the contracting authority, the complainants did not demonstrate that the supporting third parties will effectively develop the works for which they give support, thus the mere enumeration in DUAE of the details afferent to some previously executed contracts resulted only in the formal fulfilment of the qualification requirement imposed by the contracting authority regarding the similar experience.

Furthermore, the arguments of the legislator are relevant for the amendment of the provisions in Article 182 paragraph (2) of Law no. 98/2016 through G.E.O. no. 107/2017, in the Explanatory note of this normative act which justifies the mentioned modification: "The faithful transposition of Article 63 paragraph (1) of Directive 24/2014/EU is ensured, thus clarifying the concrete manner in which the support of the third party may be considered in regards to the requirement related to experience (Article 182 paragraph (2) of Law no. 98/2016) (...)".

During solving, the Council retained that the provisions of Article 63 of Directive 24/2014/EU of the European Parliament and the Council (...) provide the following: "(...) Concerning the criteria used in the case of (...) the relevant professional experience, business operators can, nevertheless, to rely only to the capacities of other entities when the latter will develop the activities or services for the fulfilment of which the respective capacities are necessary (...)".

In this context, it results that the supporting third party invoked for the fulfilment of the criteria which target "the relevant professional experience" (taking into consideration the previously mentioned arguments – "similar experience") should effectively execute the activities for which he provided support to the bidder.

By applying these legal provisions to the current case, the Council noted that the similar experience regarding the execution of works and/

or modernisation and/or rehabilitation of roads, required through the procurement date sheet, represents "the relevant professional experience" referred to in Article 182 paragraph (2) of Law no. 98/2016, therefore the supporting third party invoked for the fulfilment of this technical capacity should have effectively executed the works linked to the supporting agreement.

In the case C 324/14, Partner Apelski Dariusz against Zarząd Oczyszczania Miasta, with the participation of Remondis sp. z o.o., MR Road Servi-ce sp. z o.o., CJEU pronounced as follows:

"37. That being said, it must be stated, first, that, although it is free to establish links with the entities on whose resources it relies, and to choose the legal nature of those links, the tenderer is nonetheless required to produce evidence that it actually has available to it the resources of those entities or undertakings, which it does not itself own, and which are necessary for the performance of the contract (see to that effect, judgment in Holst Italia, C-176/98, EU:C:1999:593, paragraph 29 and the case-law cited).

38. Thus, in accordance with Articles 47 paragraph (2) and 48 paragraph (3) of Directive 2004/18, a tenderer may not rely on the resources of other entities in order to satisfy in a purely formal manner the conditions required by the contracting authority. (...)

41. It is conceivable that there may be works with special requirements necessitating a certain capacity which cannot be obtained by combining the capacities of more than one operator, which, individually, would be inadequate. In such circumstances, the contracting authority would be justified in requiring that the minimum capacity level concerned be achieved by a single economic operator or, where appropriate, by relying on a limited number of economic operators, in accordance with the second subparagraph of Article 44 paragraph (2) of Directive 2004/18, as long as that requirement is related and proportionate to the subject matter of the contract at issue (judgment in Swm Costruzioni 2 and Mannocchi Luigino, C-94/12, EU:C:2013:646, paragraph 35).

On those grounds, the Court (First Chamber) hereby rules:

1) Articles 47(2) and 48(3) of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts, read together with Article 44(2) thereof, must be interpreted as meaning that:

– they recognise the right of all economic operators, as regards a specific contract, to rely on the capacities of other entities, whatever the nature of the links existing between it and those entities, provided that it is proved to the contracting authority that the candidate or tenderer will have at its disposal the resources of those entities necessary for the performance of that contract, and

– it is conceivable that the exercise of that right may be limited, in specific circumstances, having regard to the subject matter of the contract concerned and its objectives. Such is the case, in particular, where the capacities that a third-party entity has, which are necessary for the performance of that contract, cannot be transferred to the candidate or the tenderer, so that the latter may rely on those capacities only if that third party entity directly and personally participates in the performance of that contract.

Moreover, from the content of the firm support agreements regarding technical capacity – the similar experience, and of the answer to the required clarifications, it results that the supporting third parties guarantee conditioned support to the contracting authority "in the case when it encountered difficulties in developing the contract" or "if it not able to execute the contract", provision repealed by G.E.O. no. 107/2017 [former Article 182 paragraph (5) of Law no. 98/2016].

Considering the aforementioned considerations, on the grounds on Article 26 paragraph (6) of Law no. 101/2016, the Council rejected the two complaints as groundless.

CIVIL DECISION no. 353/17.03.2020 – Bucharest Court of Appeal (solving the complaint against N.C.S.C. DECISION no. 18/07.01.2020)

The court retains that, by analysing the Community provision (Article 63 of Directive 24/2014/EU) as it was transposed in the national legislation, it clearly results that similar experience may be accepted only for a third party who will be effectively involved in the development of the contract: "when the latter will develop

the activities or services for the fulfilment of which the respective capacities are necessary".

The court also retained as Landmarks concerning the support in the procurement procedures the examples in the European jurisprudence, such as the cases C 389/92 Ballast Nedam Groep[5], C 176/98[6] Holst Italia Spa, C-94/12[7| Swm Costruzioni 2 și Mannocchi Luigino, C 314/01[8] Siemens, and ARGE Telekom, etc., through which it was ruled:

- "[...] a provider who does not fulfil himself the minimal conditions required for the participation at the procedure is allowed to rely [...] on the capacity of third parties, whose resources he proposes to be attracted if the contract will be awarded to him [9]" or
- "Depending on the case and for a specific contract, a business operator can mention the capacities of ither entities [...] in this case, the business operator must prove to the contracting authority that he holds the necessary means [10]".

Nevertheless, the court noted that in the case C 324/14, the Court of Justice of the European Union untied the matter of the third party's contribution to the bid and of his involvement in the developing of the contract, just like the Council retained in the challenged decision.

By analysing the considerations of the Decision issued by the Court of Justice of the European Union in the case C 324/14, the court retained the main ideas of the ruled case, concerning the role of the third party in the bid, are the following:

- without the financial and economic, as well as technical and/or professional capacities, the bidder could not have been accepted to participate at the procedure (idea comprised also in the case C 234/14[13]);
- the bidder has to prove that he "effectively" holds the means of these entities or enterprises which do not exclusively belong to him and which are necessary for the execution of the contract;
- the third party, by supporting the similar experience, is compelled to execute parts of the contract.

Therefore, the contracting authority has the task to verify the capacity of the bidder to execute a specific contract and it is not permitted to even presume that such a bidder holds or not the necessary means for the execution of the contract, all the more to a priori exclude means of proof.

As a consequence, the Court appreciates that for proving the fulfilment of the requirement regarding the similar experience, the supporting third party must present, alongside the firm agreement drafted in compliance with the legal provisions, documents which comprise the concrete manner for meeting the supporting agreement.

Thus, the proof does not have to remain at the level of the support agreement, respectively formal, the third party having more than just declarative attributions.

On the contrary, in the light of the aforementioned considerations of C.J.E.U. but also of the national legislation, the supporting third party is an involved party in the procurement procedure since the bid and later an executant of the contract, as the intervention opinion of the third party is infirmed only if the contractor encounters difficulties during the development of the contract.

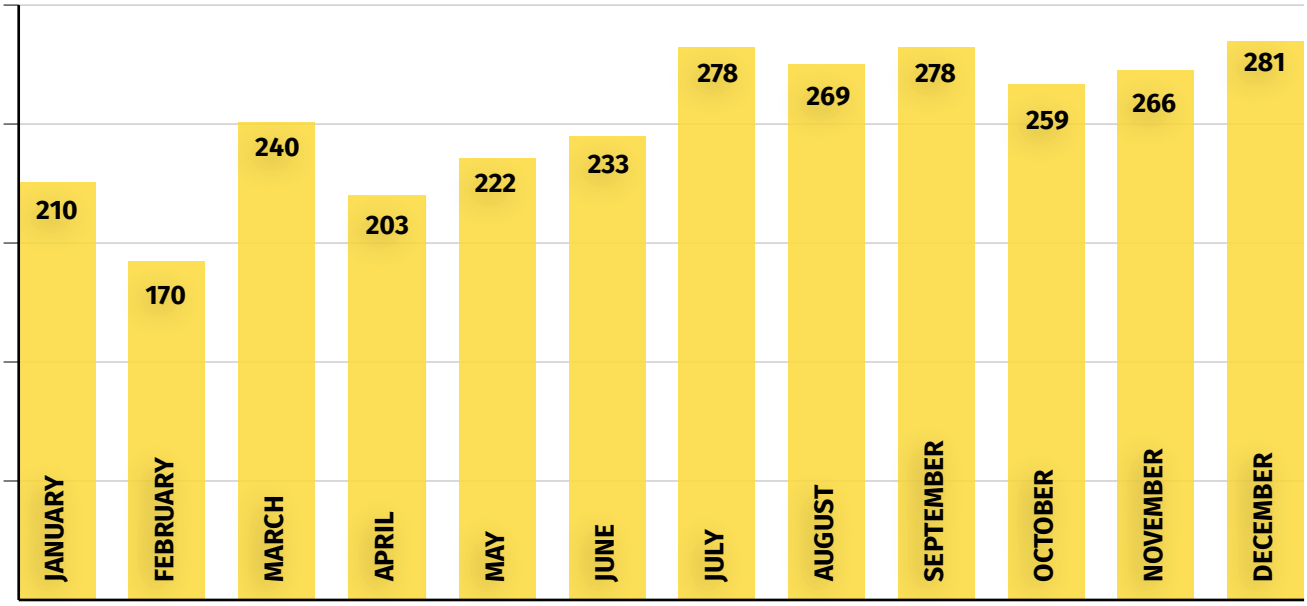
The fact that the European legislation does not employ the phrase "supporting third party" but the term "other entity" to which the bidder may call upon is irrelevant because, no matter the denomination, we are dealing with a third party who will not sign the contract, the capacities of the third parties being integrated in the ones of the bidder before the award of the contract.

In conclusion, taking into consideration that the similar experience cannot be a transmissible resource, as it proves that the beneficiary of the respective experience has previously performed contracts of the same complexity as the one about to being closed, the petitioners should have proved that the third party will effectively develop the works or services related to the support, pursuant to Article 182 paragraph (2) of Law no. 98/2016, which is not the case for the current lawsuit. The C.J.E.U. itself, in the mentioned case, notes that a bidder cannot mention the capacities of other entities in order to formally accomplish the conditions imposed by the contracting authority, but has to prove that the third party, by supporting the similar experience, commits to execute parts of the contract.

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

On the course of 2020, the solving complaints chambers within N.C.S.C. issued 2,453 decisions in order to solve a number of 2.909 complaints (files). The monthly trend of the complaints (files) ruled by the solving complaints chambers within the Council was as follows:

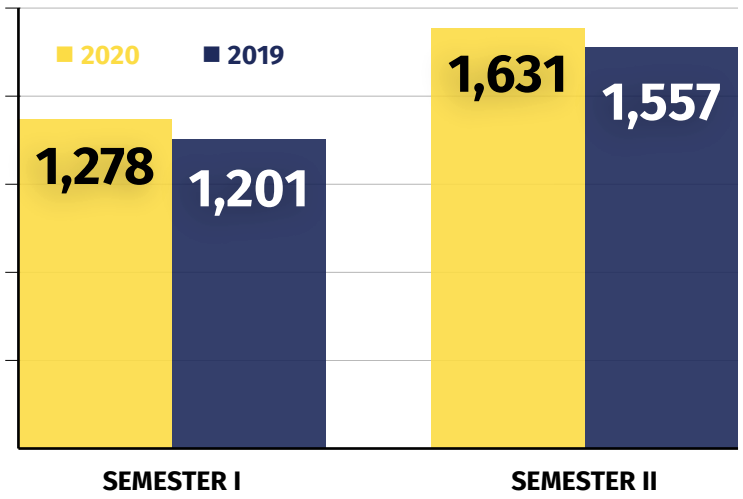
THE TREND OF THE FILES SOLVED BY N.C.S.C. IN THE YEAR 2020



Compared to the number of the complaints (files) solved by N.C.S.C. in the year 2020 with the one registered in the previous year (2,758 files), an increase of 5.47% (+151 files) may be observed.

The trend of the files solved by the Council in the year 2020 shows that in the first semester of last year an increase of 6.41% was registered in comparison to the similar period of the previous year, while in the last semester of 2020 the increase was of 4.75%.

THE SEMESTRIAL TREND OF THE FILES SOLVED BY N.C.S.C. IN THE YEAR 2020, COMPARED TO THE YEAR 2019



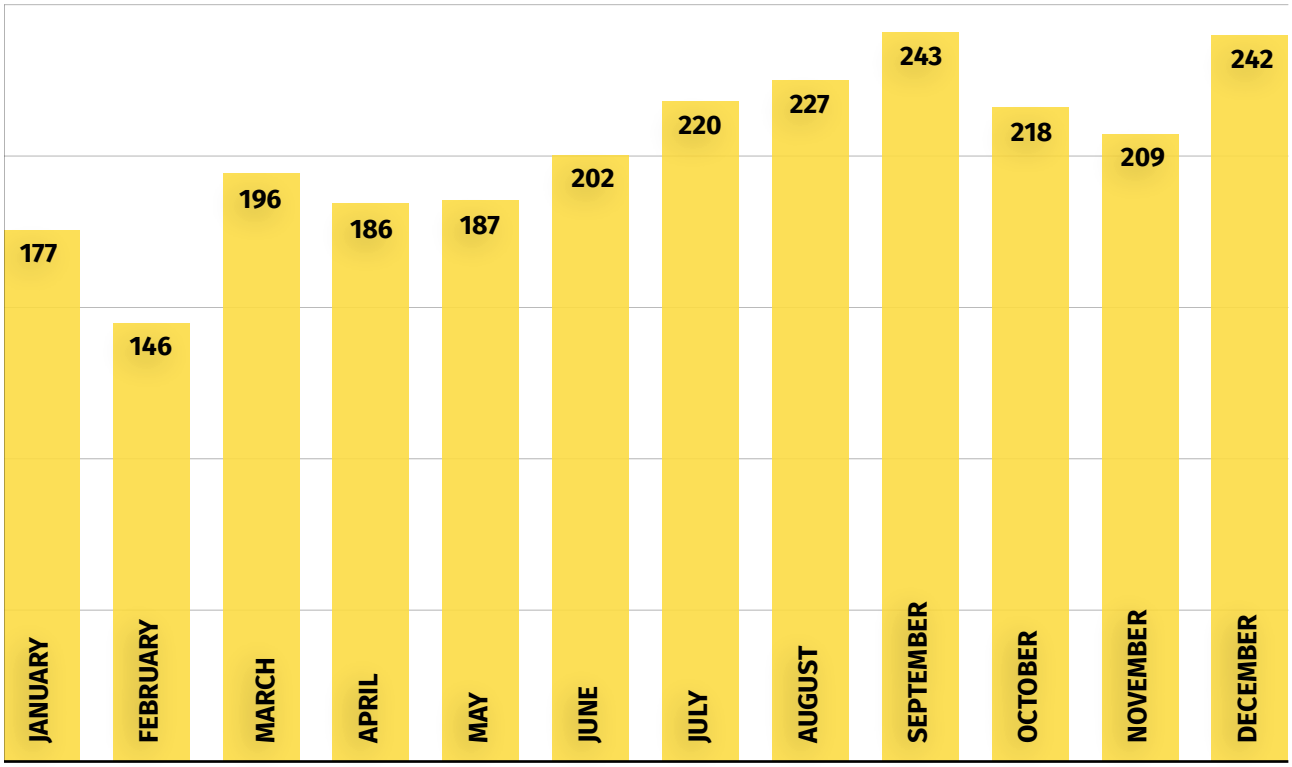
It must be mentioned that since the Council was created and until the 31st of December 2020, the total number of the files solved by the complaints solving chambers amounted to 70,873, meaning a monthly average of over 414 solved files.

2.4. DECISIONS RENDERED BY N.C.S.C.

Concerning the decisions rendered by the Council, the official data reveal that from the 1st of January to the 31st of December 2020, the 11 chambers for solving complaints within N.C.S.C. rendered 2,453 decisions and 2,540 conclusions, totalising 4,993 decisions.

Divided per moths, the statement of the rendered decisions had the following trend in 2020:

THE TREND OF THE DECISIONS ISSUED BY N.C.S.C. IN THE YEAR 2020

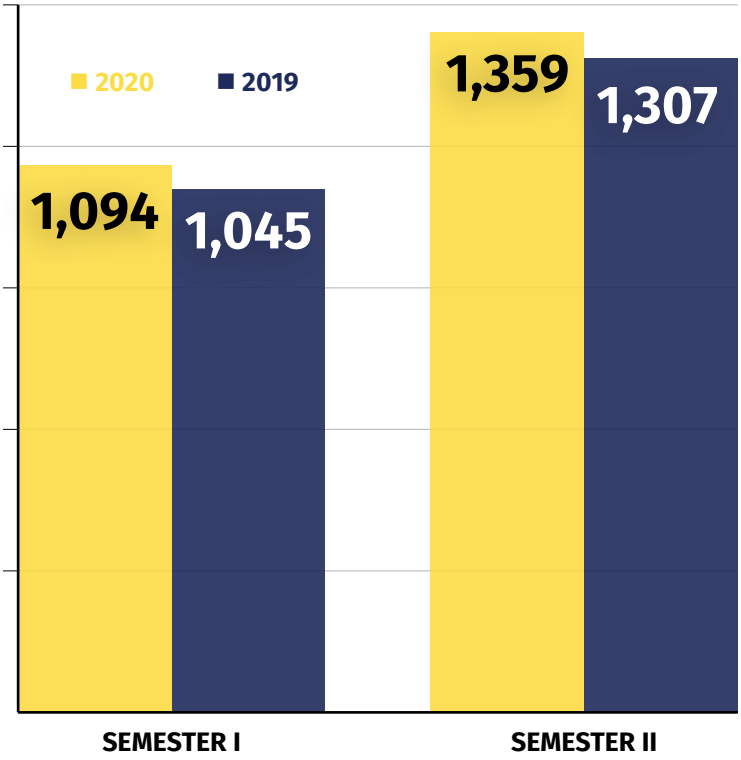


Statistics shows that in the year 2020 the number of the decisions rendered by N.C.S.C. was of 2,453, meaning an increase of 4.3% (+101 decisions) as compared to the previous year when 2,352 decisions have been rendered.

At first it might be interpreted that the number of decisions rendered by N.C.S.C. in the year 2020 did not witness a major growth in comparison with the previous year. Yet, it must be mentioned that pursuant to Article 17 paragraph (2) of Law no. 101/2016 on remedies and appeals concerning the awarding of public procurement contracts, sectorial contracts and concessions and for the organisation and functioning of the National Council for Solving Complaints, as subsequently amended and supplemented, all the complaint lodged within a procedure are joined in order to ensure the rendering of a unitary solution. Therefore, it must be taken into consideration that on the course of the year, in many cases, a procedure was challenged by minimum two business operators, in which case the respective complaints were joined.

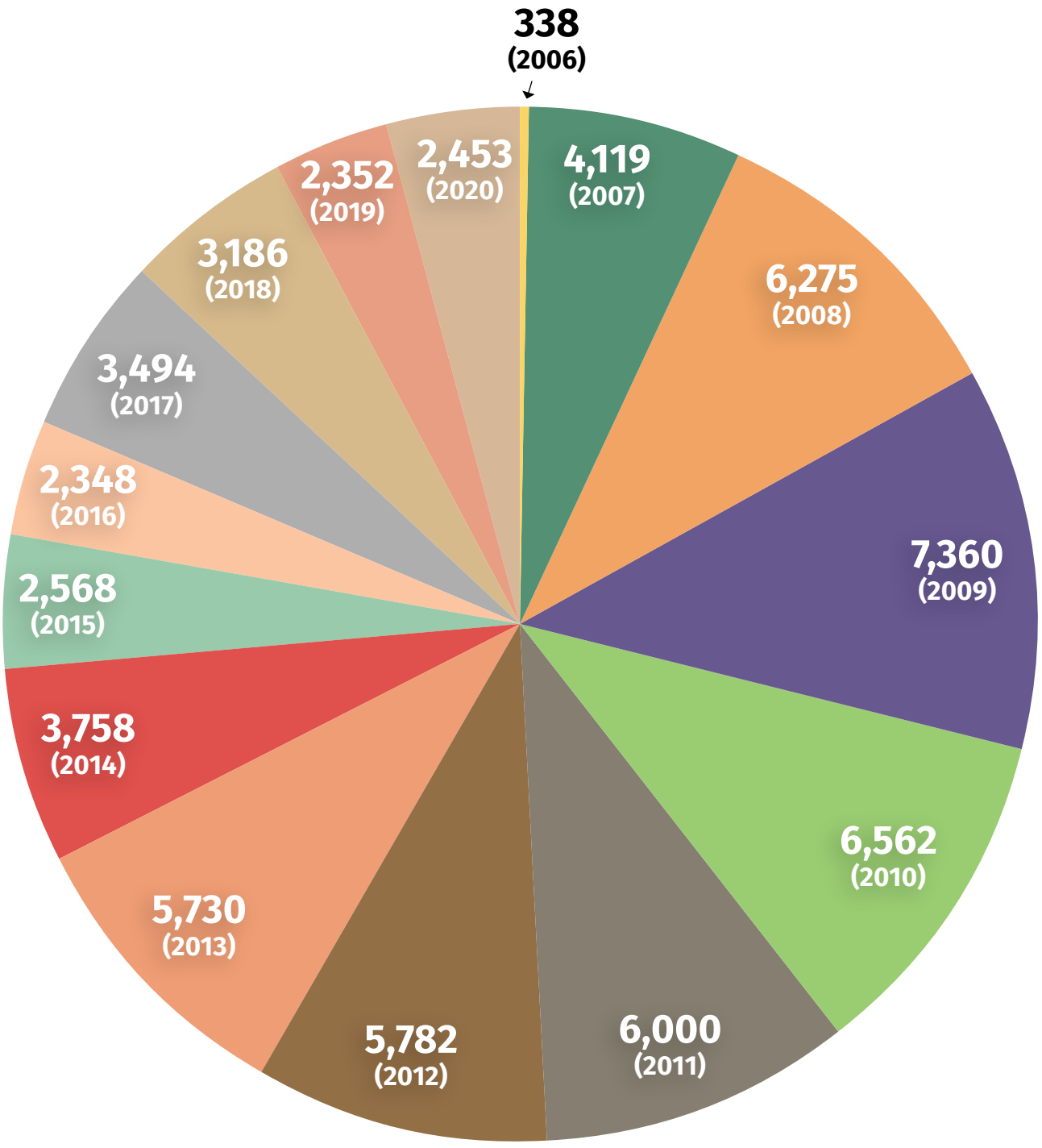
In order to provide a picture of the complexity of the rendered decisions, we underline that only in the case of the procurement of school books (8th grade) organised by the National Centre for Education Politics and Evaluation, a number of 43 complaints and 25 applications of voluntary interventions have been lodged by business operators with N.C.S.C., thus in this case a single Decision was rendered following the joining of the complaints and applications of voluntary interventions in a single file.

THE SEMESTRIAL TREND OF THE DECISIONS RENDERED BY N.C.S.C. IN THE YEAR 2020, COMPARED TO THE YEAR 2019



As a whole, since the Council was created and until the 31st of December 2020, the total number of the decisions issued by the institution amounted to 62,325.

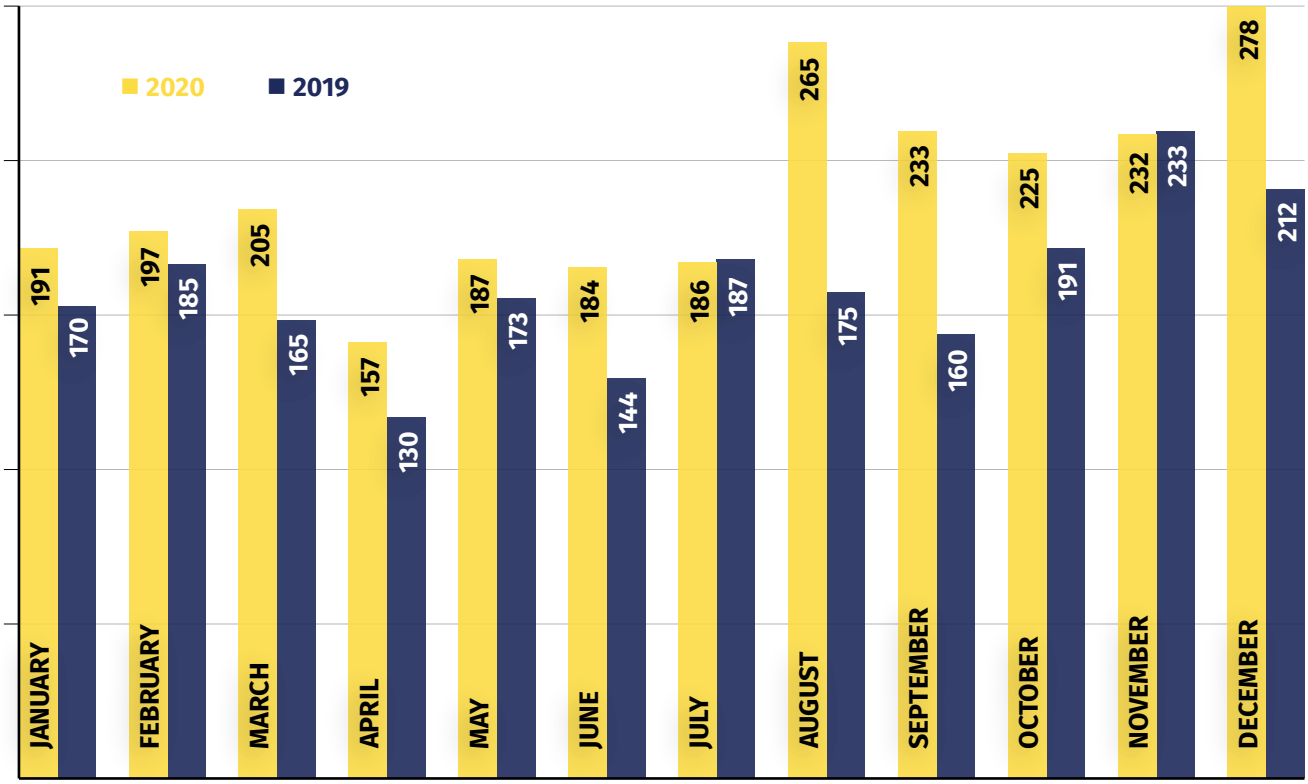
THE STANDING OF THE DECISIONS RENDERED BY N.C.S.C. IN THE PERIOD 2006-2020



Regarding conclusions, it must be mentioned that in the year 2020, they amounted to 2,540, thus resulting a 19.53% increase (+215 conclusions) compared to the previous year.

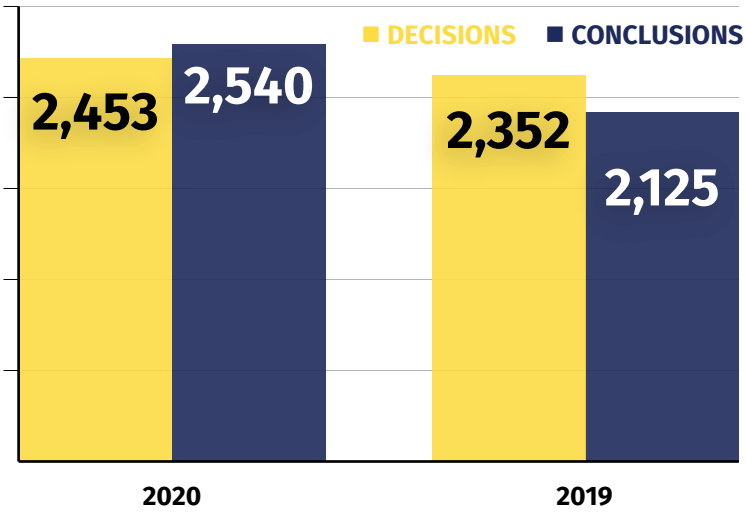
In fact, the monthly trend of the conclusions issued by N.C.S.C. in the year 2020 was as follows:

THE TREND OF THE CONCLUSIONS ISSUED BY N.C.S.C. IN THE YEAR 2020, COMPARED TO THE YEAR 2019



THE TREND OF DECISIONS RENDERED BY N.C.S.C. IN THE PERIOD 2019 - 2020

Taking into account the number of decisions and conclusions issued by the Council in the year 2020, it results the total number of the decisions rendered by the Council amounted to 4.993, meaning a 11.53% increase in comparison to 2019, as illustrated by the following chart:



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

As previously mentioned, the total number of the decisions issued by the 11 chambers for solving complaints within N.C.S.C. amounted to 2,453 from the 1st of January to the 31st of December 2020. As a consequence of the settlement of the complaints lodged by the business operators, the Council rendered:

■ 1,000 decisions (40.77% of the total issued decisions) under which it was ordered the acceptance of the complaints. 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.

• 1,453 decisions (5923% of the total issued decisions) under which it ordered the dismissal of the complaints, by several reasons:

• the complaining party failed to set up the bond as per Article 611 of Law no. 101/2016;

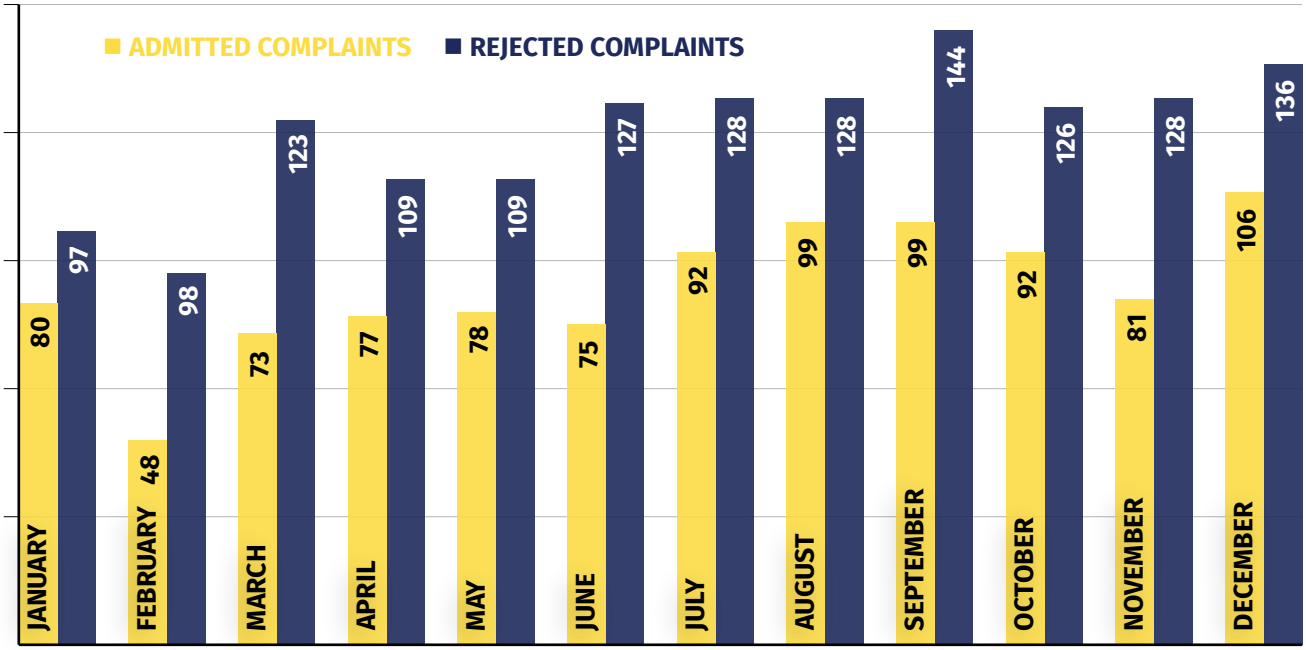
• the Council considered as to the tenor of the settled complaint, to go in favour of the contracting authority as the litigation substance of the complaint submitted by a business operator proved to be groundless;

• 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.

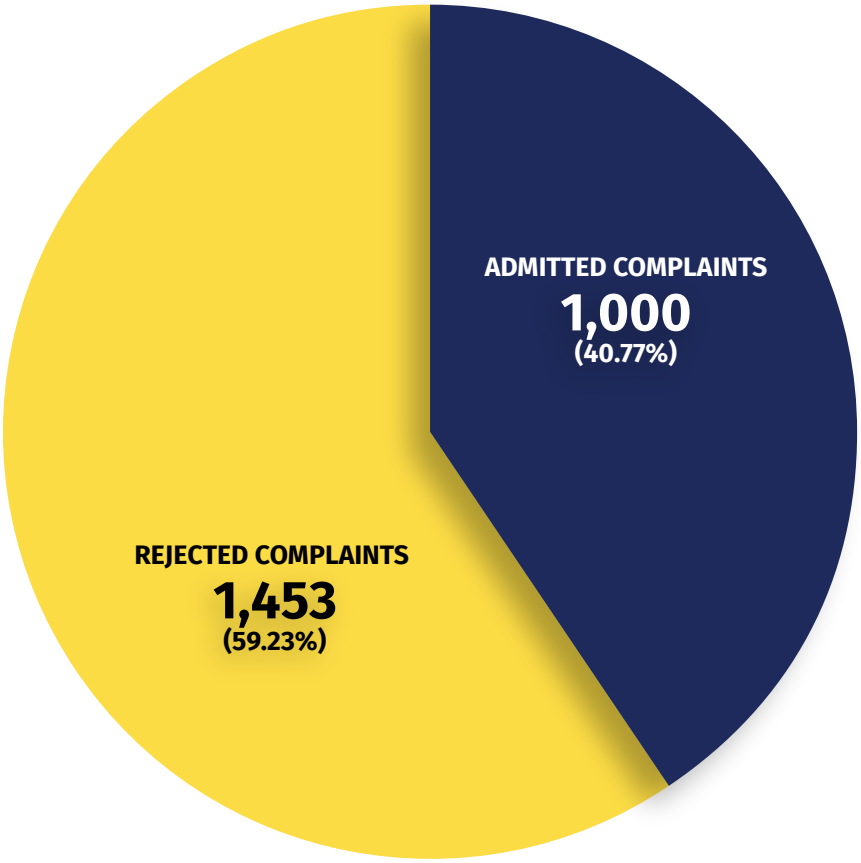
Concerning the monthly trend, the standing of the solutions rendered by N.C.S.C. following the settlement of the complaints lodged by busines operators was as follows:

THE MONTHLY TREND OF THE SOLUTIONS RENDERED BY N.C.S.C IN THE YEAR 2020



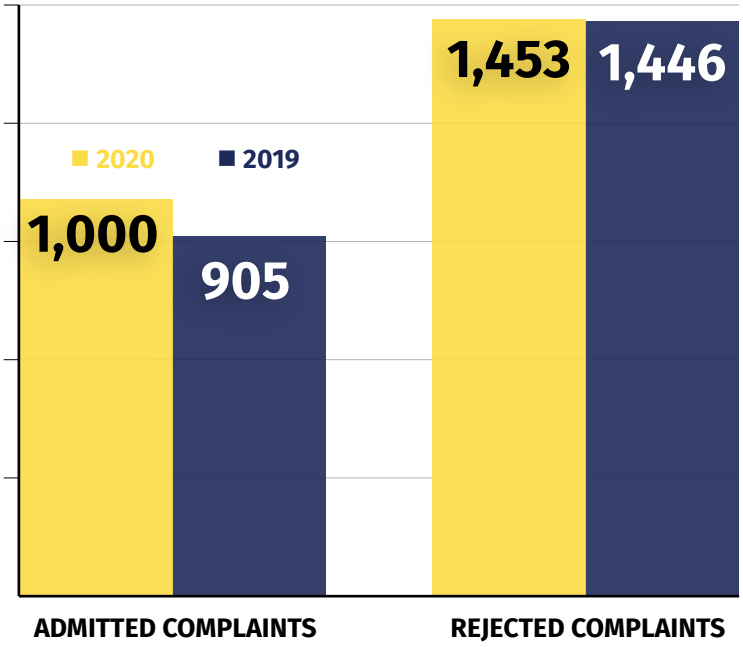
THE STANDING OF THE SOLUTIONS RENDERED BY N.C.S.C. IN THE YEAR 2020

Regarding the weight of the decisions rendered by the Council for accepting the complaints lodged by business operators, it amounted to 40.77% of the total rendered decisions, while for the rest of 59.23% of the total rendered decisions the Council ruled the dismissal of the complaints lodged by business operators.



Compared to the year 2019, when the weight of the decisions rendered by the Council for accepting the complaints lodged by busines operators was of 38.49% (905) of the total rendered decisions, in the year 2020 the weight of the decisions rendered by the Council for accepting the complaints lodged by busines operators increased with 10.50% (95 decisions), and the weight of the ones for rejecting the complaints increased with 0.48% (7 decisions).

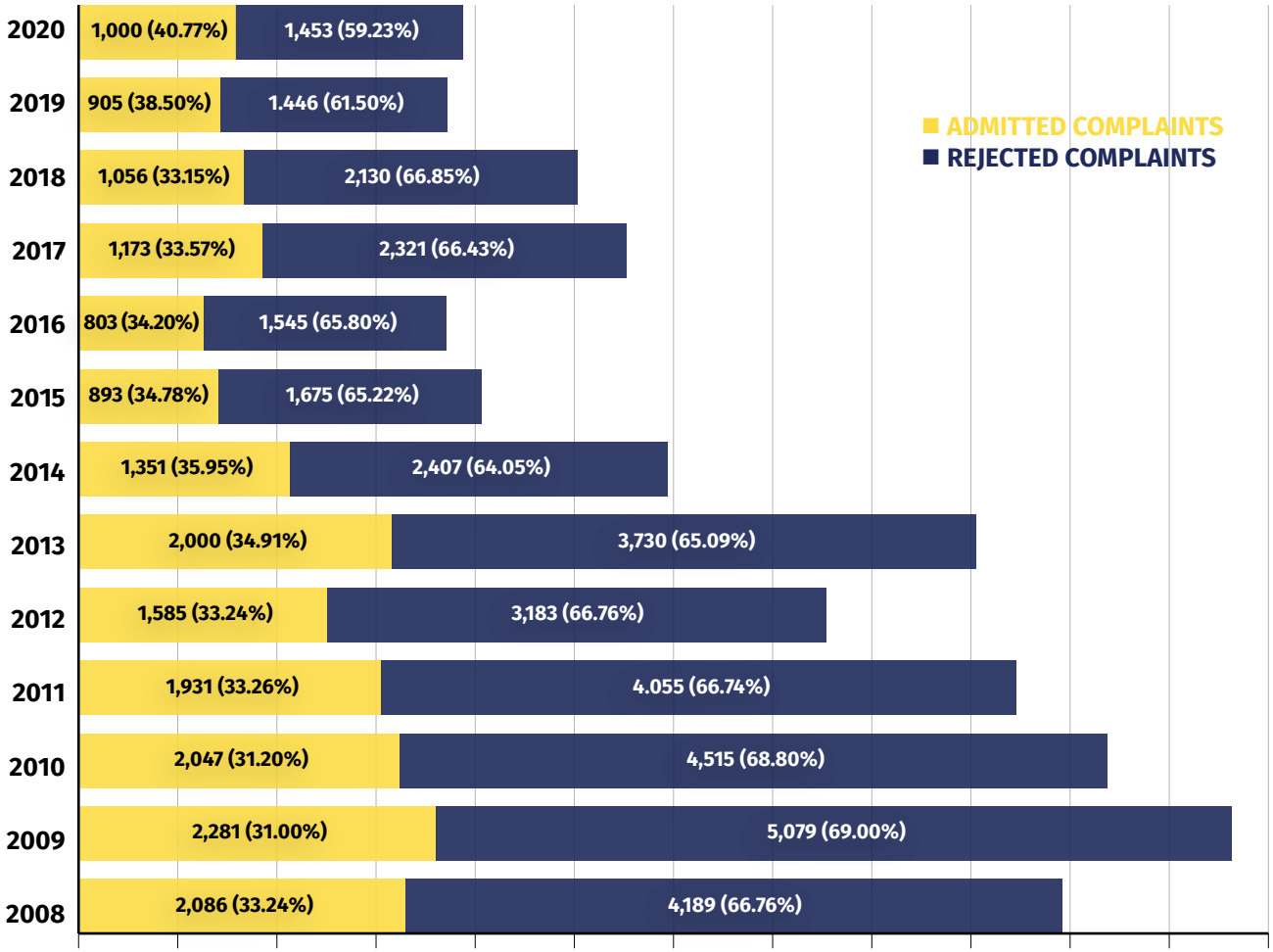
THE STANDING OF THE SOLUTIONS RENDERED BY N.C.S.C. IN THE PERIOD 2019-2020



It must be mentioned that in the period 2008-2020 the percentage of the decisions ruled by the Council for accepting the complaints, as well as the one of the decisions for rejecting the complaints, did not suffer major changes, in the sense that the weight of the decisions issued by the Council for accepting or rejecting the complaints lodged by busines operators was maintained approximately constant (34% - accepted complaints, 66% - rejected complaints).

As of 2019 the percentage of the accepted decisions started to increase from 38% to 40.77% in the year 2020, while the percentage of the rejected complaints remained around 62% of the total issued decisions.

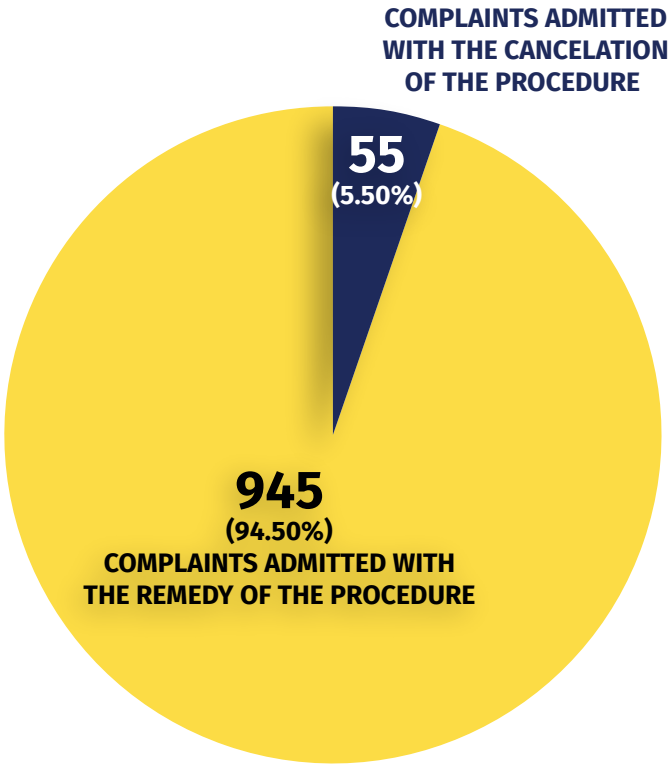
THE TREND OF THE SOLUTIONS ISSUED BY N.C.S.C. IN THE PERIOD 2008 - 2020

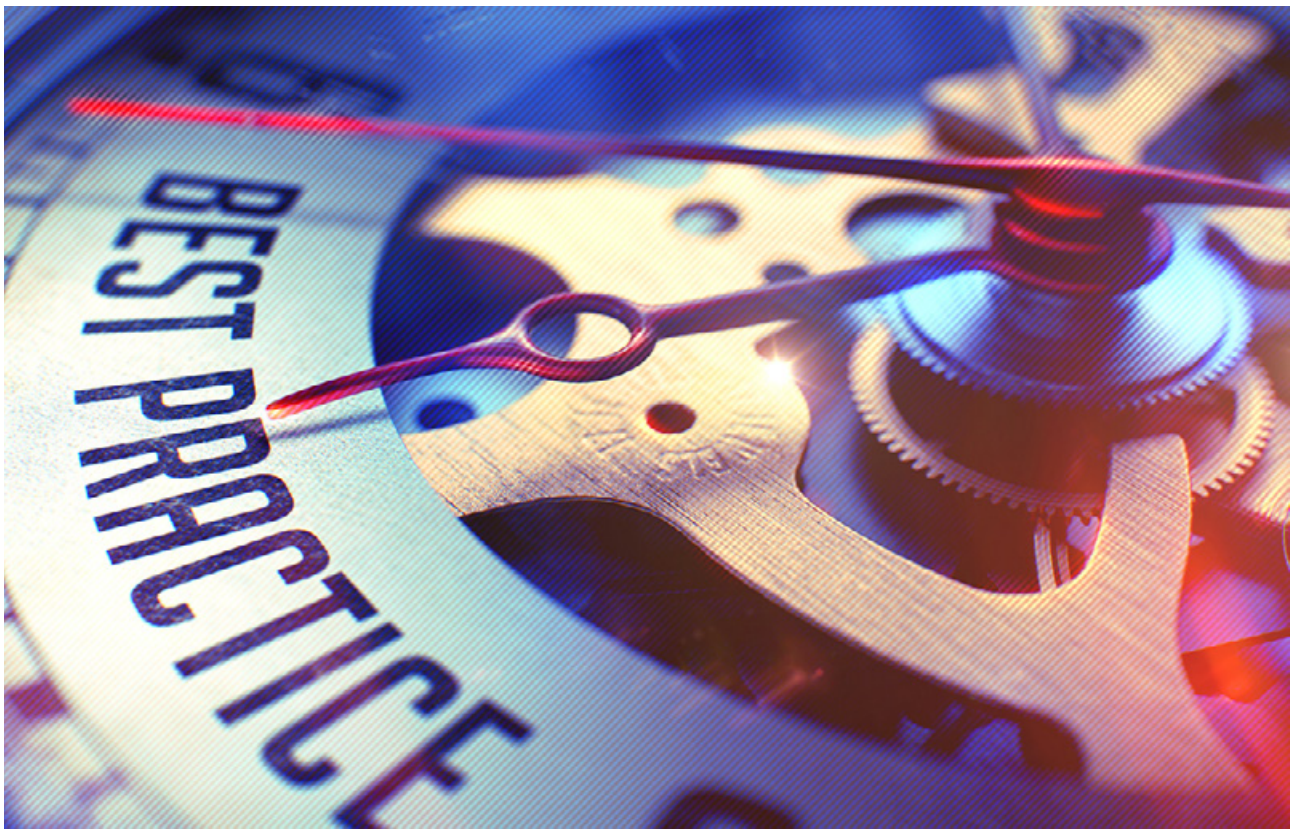


Therefore, the year 2020 was the first year of the 15 years of the institution's existence when the percentage of decisions ruled by the Council for accepting the complaints lodged by busines operators surpassed the threshold of 40% of the total lodged complaints, while the percentage of decisions ruled by the Council for rejecting the complaints declined below 60%. By analysing this trend, we may conclude that at the level of the contracting authorities there were problems, in the sense that their public procurement personnel revealed a poor knowledge of the legislation in the field, or, due to various reasons, at the level of the tender documentations of the commenced public procurements procedures or at their result there were deviations form the spirit and letter of the national and European legislation in the field.

As to the 1,000 decisions rendered by the Council for admitting the complaints lodged by business operators, it must be noted that in the case of 55 decisions (5.50%) the chambers of solving complaints ruled the cancelation of the award procedures, while 945 issued decisions ruled the remedy of the award procedures, so that they may continue in accordance with the legal provisions.

THE MEASURES RULED BY N.C.S.C. FOLLOWING THE ACCEPTANCE OF THE COMPLAINTS IN THE YEAR 2020



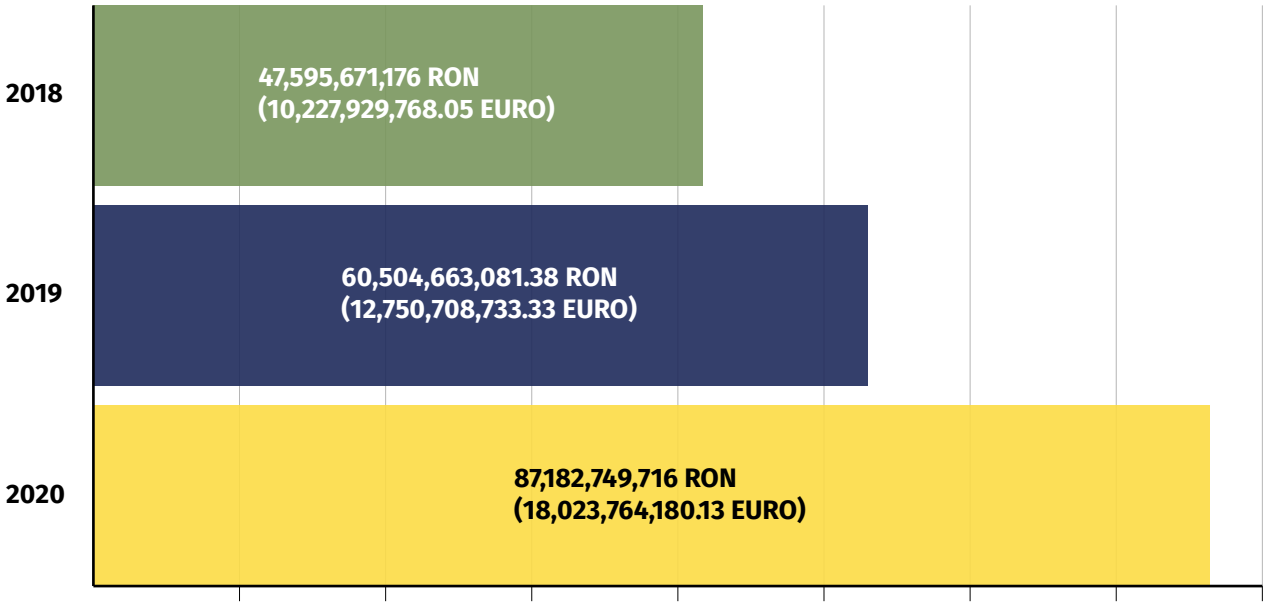


2.6. THE ACTIVITY OF N.C.S.C. IN RELATION TO THE ESTIMATED VALUE OF THE CHALLENGED AND SETTLED AWARD PROCEDURES

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

In the year 2020, the total estimated value of the award procedures under which N.C.S.C. rendered decisions was of 87,182,749,715.72 RON, the equivalent of 18,023,764,180.13 EURO[16], thus resulting a value of 44.10 % higher compared to the year 2019[17] and of 83.17% higher than the year 2018[18].

THE TREND OF THE DECISIONS ISSUED BY N.C.S.C. IN THE PERIOD 2018 - 2020 IN RELATION TO THE TOTAL ESTIMATED VALUE OF THE CHALLENGED PROCEDURES

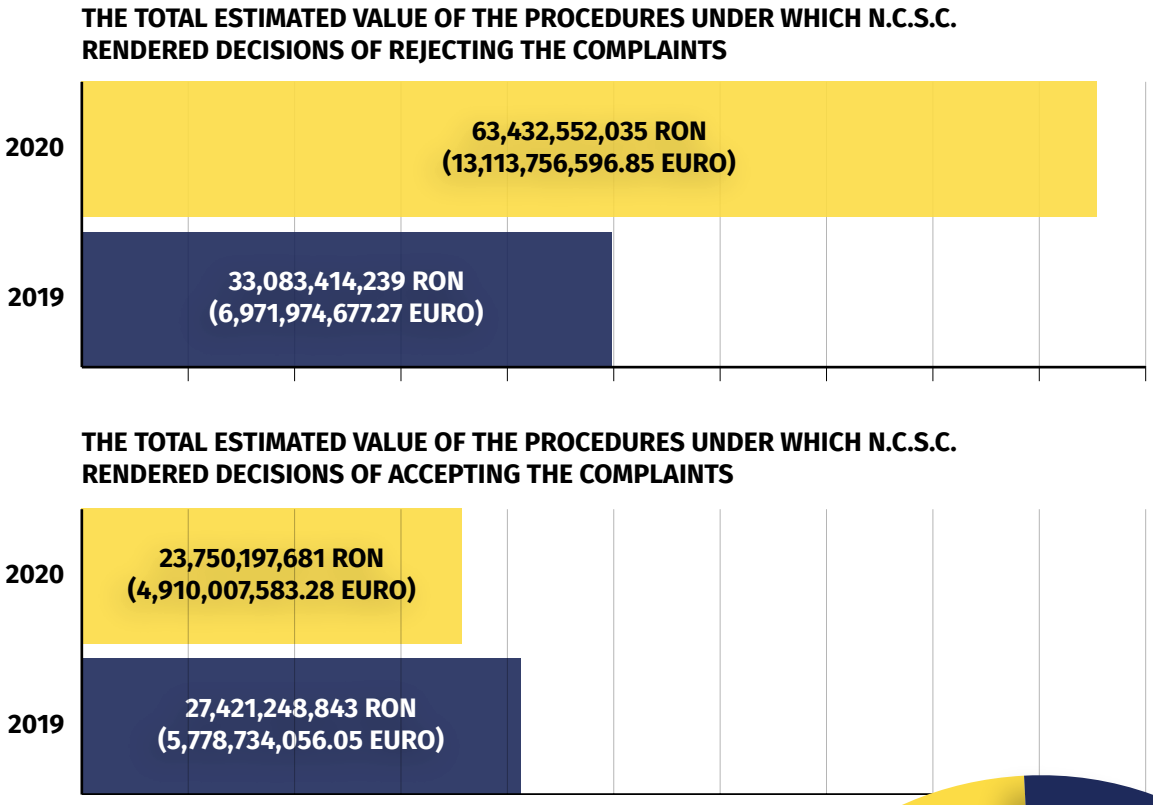


In terms of the value, in 2019, the total estimated value of the award procedures under which N.C.S.C. rendered decisions for admitting the complaints lodged by business operators was of 23,750,197,681.11 RON (the equivalent of 4,910,007,583.28 EURO), while the total estimated value of the procedures under which N.C.S.C. rendered decisions for rejecting the complaints reached the margin of 63,432,55,034.61 RON (the equivalent of 13,113,756,596.85 EURO).

Although that in the year 2020 the total estimated value of the award procedures under which N.C.S.C. rendered decisions was of 44.10% higher compared to the previous year, the total estimated value of the award procedures under which our institution rendered decisions for admitting the complaints lodged by business operators declined with 13.39% (3,671,051,161.58 RON, the equivalent of 758,936,379.56 EURO), while the value of the procedures under which N.C.S.C. rendered decisions for rejecting the complaints lodged by business operators increased with 91.73% (30,349,137,796.02 RON, the equivalent of 6,274,242,375.81 EURO).

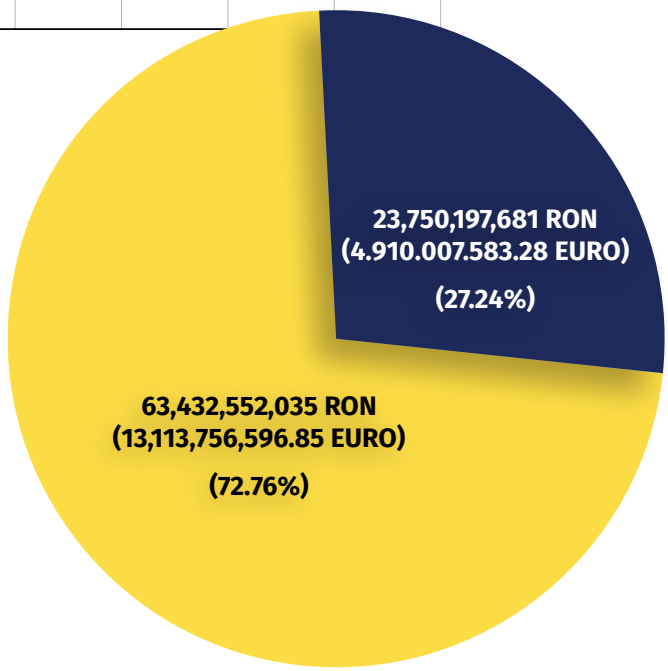
16. The amount was calculated at an annual average exchange rate communicated by the National Bank of Romania for the year 2020 of RON/EURO 4.8371
17. The amount was calculated at an annual average exchange rate communicated by the National Bank of Romania for the year 2019 of RON/EURO 4.7452
18. The amount was calculated at an annual average exchange rate communicated by the National Bank of Romania for the year 2018 of RON/EURO 4.6535

THE TREND OF THE TOTAL ESTIMATED VALUE OF THE PROCEDURES UNDER WHICH N.C.S. RENDERED DECISIONS OF ACCEPTING/ REJECTING THE COMPLAINTS IN THE PERIOD 2019 -



THE TOTAL ESTIMATED VALUE OF THE PROCEDURES UNDER WHICH N.C.S.C. RENDERED DECISIONS OF ACCEPTING/ REJECTING THE COMPLAINTS IN THE PERIOD 2019 - 2020

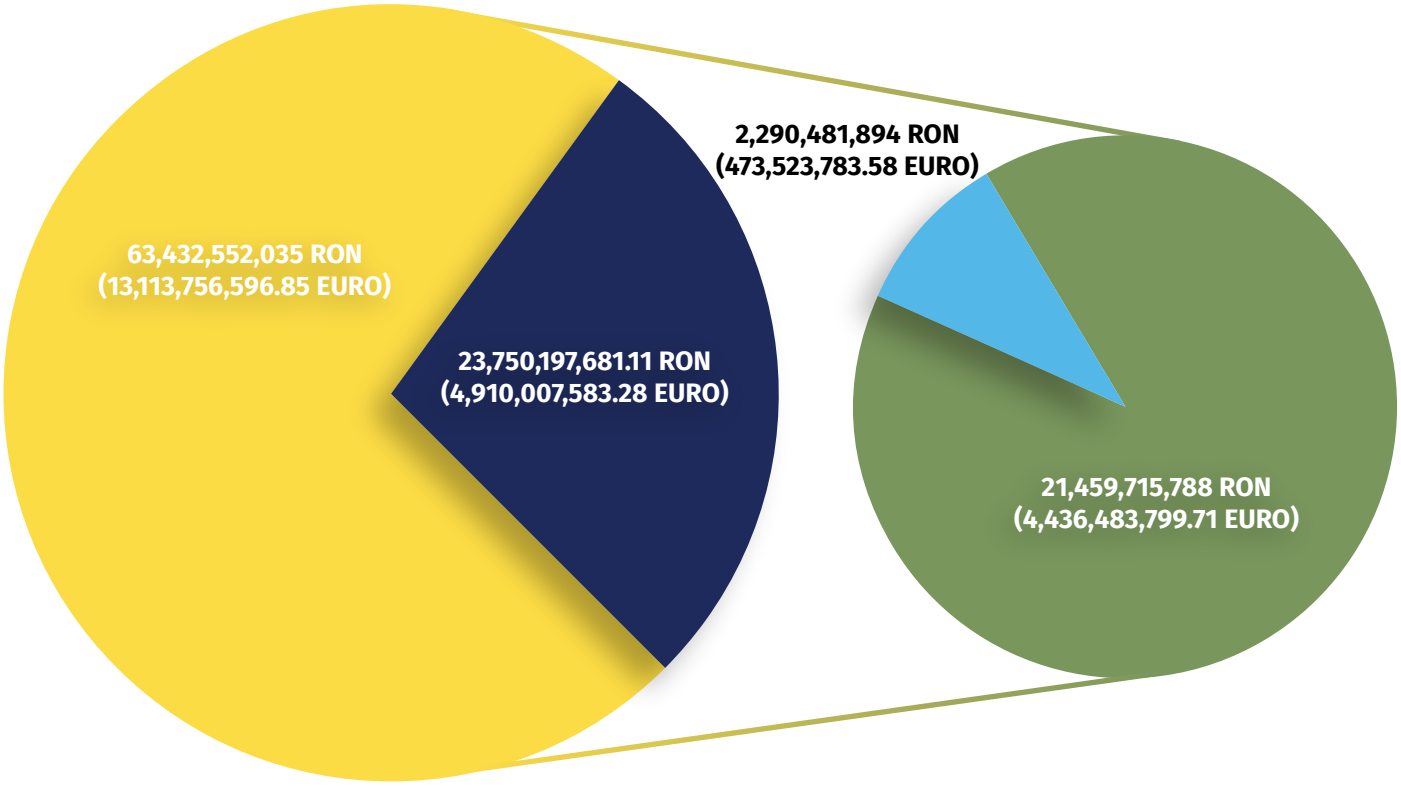
In fact, in the year 2020, the total estimated value of the award procedures under which N.C.S.C. rendered decisions for accepting the complaints lodged by business operators (23,750,197,681.11 RON, the equivalent of 4,910,007,583.28 EURO) represented 27.24% of the total estimated value of the award procedures under which N.C.S.C. rendered decisions (87,182,749,715.72 RON, the equivalent of 18,023,764,180.13 EURO), while the total estimated value of the award procedures for rejecting the complaints lodged by business operators (63,432,55,034.61 RON, the equivalent of 13,113,756,596.85 EURO) represented 72.76% of the total estimated value of the award procedures under which the Council ruled.



■ THE TOTAL ESTIMATED VALUE OF THE PROCEDURES UNDER WHICH N.C.S.C. RENDERED DECISIONS OF ACCEPTING THE COMPLAINTS
■ THE TOTAL ESTIMATED VALUE OF THE PROCEDURES UNDER WHICH N.C.S.C. RENDERED DECISIONS OF REJECTING THE COMPLAINTS

From the total estimated value of the award procedures under which N.C.S.C. rendered decisions for accepting the complaints, the total estimated value of the award procedures cancelled by the Council reached 2,290,481,893.55 RON (the equivalent of 473,523,783.58 EURO), and that of the award procedures under which remedies were ordered was of 21,459,715,787.56 RON (the equivalent of 4,436,483,799.71 EURO).

THE TOTAL ESTIMATED VALUE OF THE PROCEDURES UNDER WHICH N.C.S.C. RENDERED DECISIONS IN THE YEAR 2020



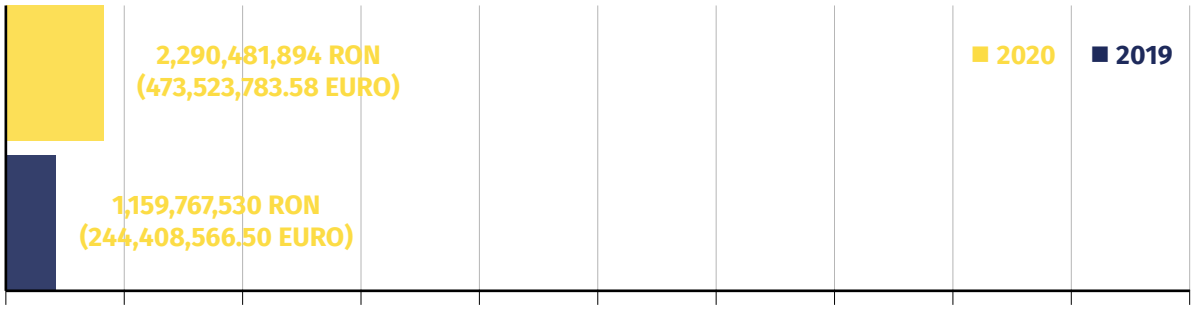
- THE TOTAL ESTIMATED VALUE OF THE PROCEDURES UNDER WHICH N.C.S.C. RENDERED DECISIONS OF REJECTING THE COMPLAINTS
- THE TOTAL ESTIMATED VALUE OF THE PROCEDURES UNDER WHICH N.C.S.C. RENDERED DECISIONS OF ACCEPTING THE COMPLAINTS
- THE TOTAL ESTIMATED VALUE OF THE PROCEDURES UNDER WHICH N.C.S.C. ACCEPTED THE COMPLAINTS AND ORDERED REMEDY MEASURES OF THE PROCEDURE
- THE TOTAL ESTIMATED VALUE OF THE AWARD PROCEDURES UNDER WHICH N.C.S.C. ACCEPTED THE COMPLAINTS AND ORDERED THE CANCELLATION OF THE PROCEDURE

A comparison with the previous year reveals that in the year 2020 the total estimated value of the award procedures under which the Council cancelled the award procedures increased with 97.9%, while the total estimated value of the award procedures under which the Council accepted the complaints and order the remedy of the procedures declined with 18.28%.

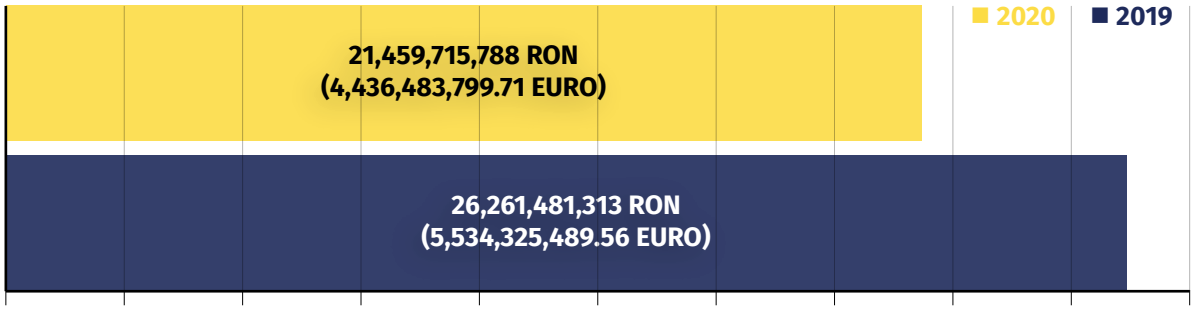
By analysing this set of data, it can be observed that our institution represented an efficient filter for preventing a significant number of irregularities within the public procurement procedures developed on the course of the year 2020, both in the case of projects funded by national funds and by European funds, this essential role being recognised by the European Commission as well in the CVM reports. Contrary to some opinions expressed in the public space, according to which N.C.S.C. was an obstacle in the way of the development of the public procurement procedures commenced at national level, the objective data reveal that issues regarding the development of public procurement procedures are found within the contracting authorities, most probably due to lack or under sizing of specialised personnel or even its intimidation in exercising the professional attributes.

THE TOTAL ESTIMATED VALUE OF THE PROCEDURES UNDER WHICH N.C.S.C. RENDERED DECISIONS OF ACCEPTING THE COMPLAINTS IN THE PERIOD 2019-2020

THE TOTAL ESTIMATED VALUE OF THE PROCEDURES UNDER WHICH N.C.S.C. ACCEPTED THE COMPLAINTS AND ORDERED THE CANCELLATION OF THE PROCEDURE



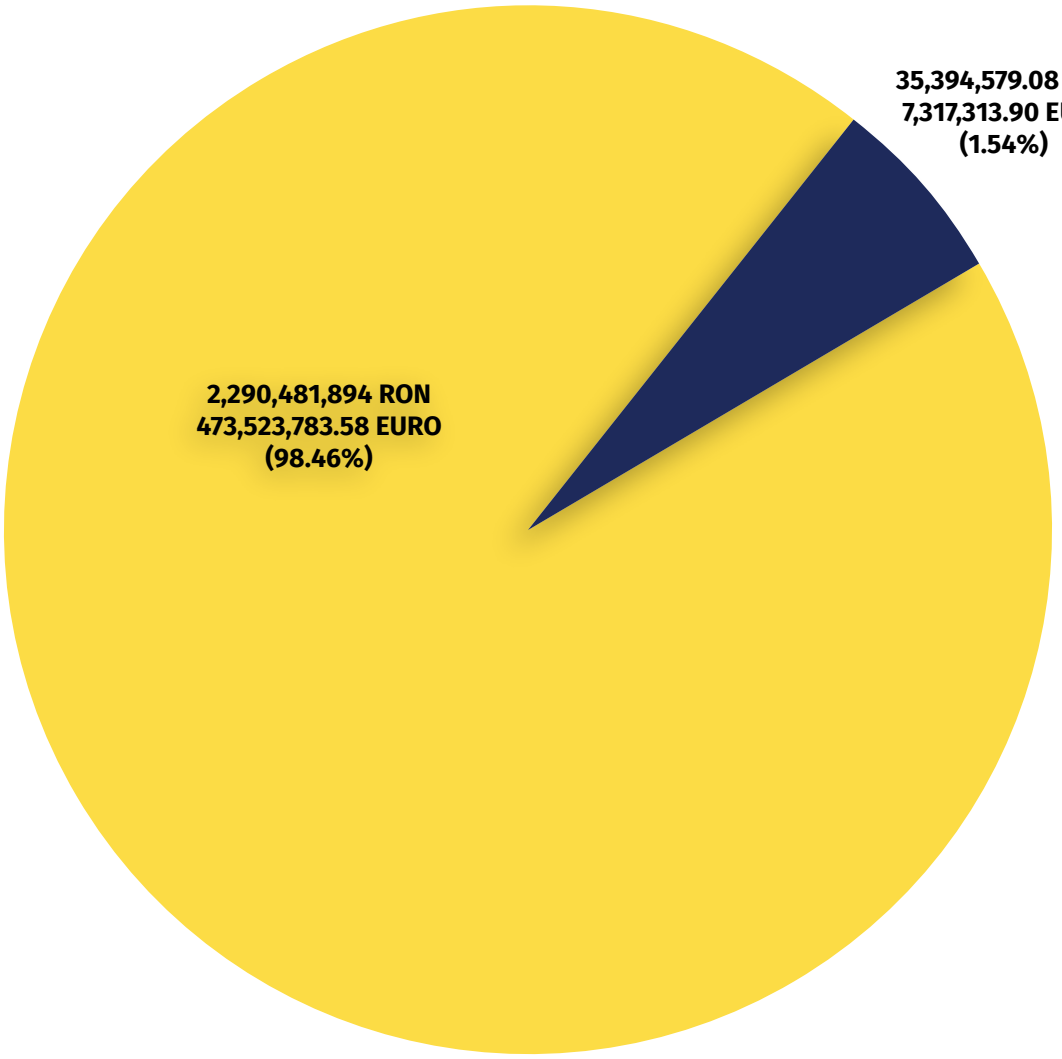
THE TOTAL ESTIMATED VALUE OF THE PROCEDURES UNDER WHICH N.C.S.C. ACCEPTED THE COMPLAINTS AND ORDERED REMEDY MEASURES OF THE PROCEDURE



As it can be noticed, in the year 2020, the total estimated value of the award procedures under which the Council cancelled the award procedures increased with 56,88% in comparison to 2019, while in the same period the total estimated value of the award procedures under which the Council ordered remedy measures increased with 58,89%, a fact demonstrating once again the role of the Council as an efficient filter for preventing irregularities within the public procurements field.

Of the total estimated value of 2,290,481,893.55 RON (the equivalent of 473,523,783.58 EURO) of the procedures under which the Council ordered the cancellation of the procedure, it must be mentioned that the equivalent of 35,385,233.03 RON (7,315,381.74 EURO) was represented by a number of eight award procedures funded by European funds. Therefore, in terms of percentage, the total estimated value of the challenged award procedures funded by European funds which were cancelled by the Council represented only 1.54% of the total estimated value of the award procedures for which cancellation decision were ordered, and only 0.04% of the total estimated value of the award procedures challenged by business operators.

THE TOTAL ESTIMATED VALUE OF THE AWARD PROCEDURES FUNDED BY EUROPEAN FUNDS UNDER WHICH THE COMPLAINT WERE ACCEPTED AND THE AWARD PROCEDURE WAS CANCELLED, IN RELATION TO THE TOTAL ESTIMATED VALUE OF THE AWARD PROCEDURES IN WHICH THE CANCELLATION OF THE AWARD PROCEDURES WAS DISPOSED



■ THE TOTAL ESTIMATED VALUE OF THE AWARD PROCEDURES FUNDED BY EUROPEAN FUNDS UNDER WHICH N.C.S.C. ACCEPTED THE COMPLAINTS AND ORDERED THE CANCELLATION OF THE AWARD PROCEDURE

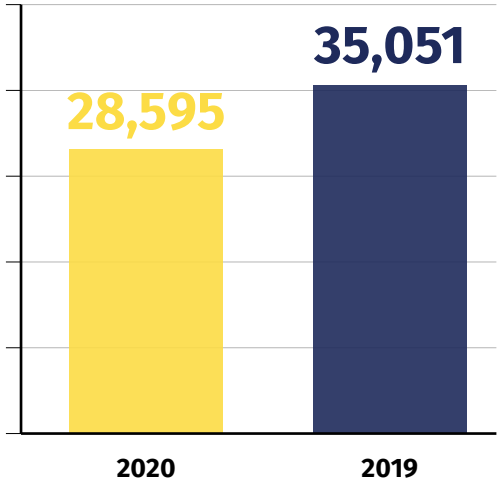
■ THE TOTAL ESTIMATED VALUE OF THE AWARD PROCEDURES UNDER WHICH N.C.S.C. ACCEPTED THE COMPLAINTS AND ORDERED THE CANCELLATION OF THE AWARD PROCEDURE

2.6.2. THE TOTAL ESTIMATED VALUE OF THE AWARD PROCEDURES UNDER WHICH N.C.S.C. RENDERED DECISIONS FOR ACCEPTING THE COMPLAINTS, IN COMPARISON WITH THAT OF THE S.E.A.P. COMMENCED PROCEDURES

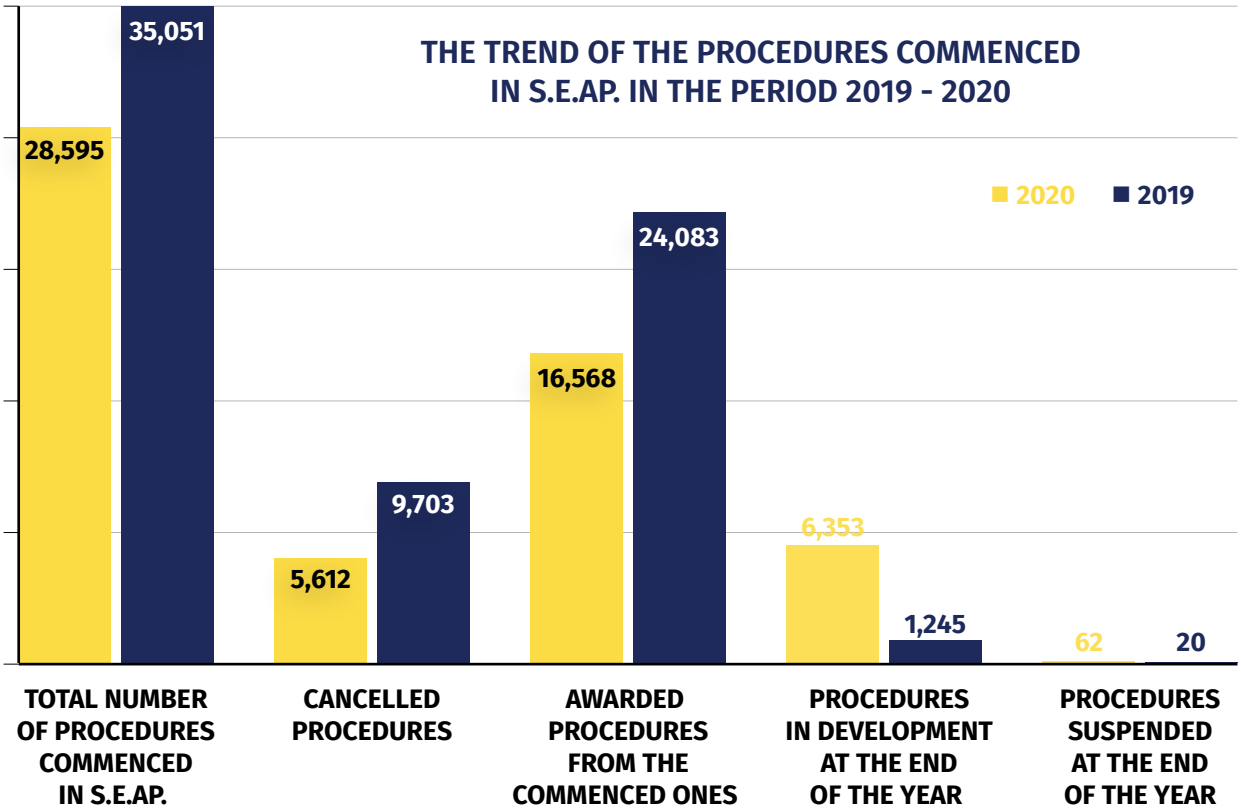
The official data provided by the Electronic Public Procurement System (S.E.A.P.) show that in the year 2020, within the communication platform used in the award process for the public procurements contracts, a number of 28,595 award procedures were commenced through participation announcements and invitations, amounting to a total estimated value of 167,501,086.791 RON (the equivalent of 34,628,410,988.19 EURO).

In comparison to the year 2019 when 35.051 award procedures were commenced in S.E.A.P. through participation announcements and invitations, it is found that in 2020 the number of the award procedures decreased with 18.42%, implicitly generating the diminish with 14.82% (-29,137,832.037 RON) of the total estimated value of the commenced award procedures.

AWARD PROCEDURES COMMENCED IN S.E.A.P. IN THE PERIOD 2019 - 2020



THE TREND OF THE PROCEDURES COMMENCED IN S.E.AP. IN THE PERIOD 2019 - 2020



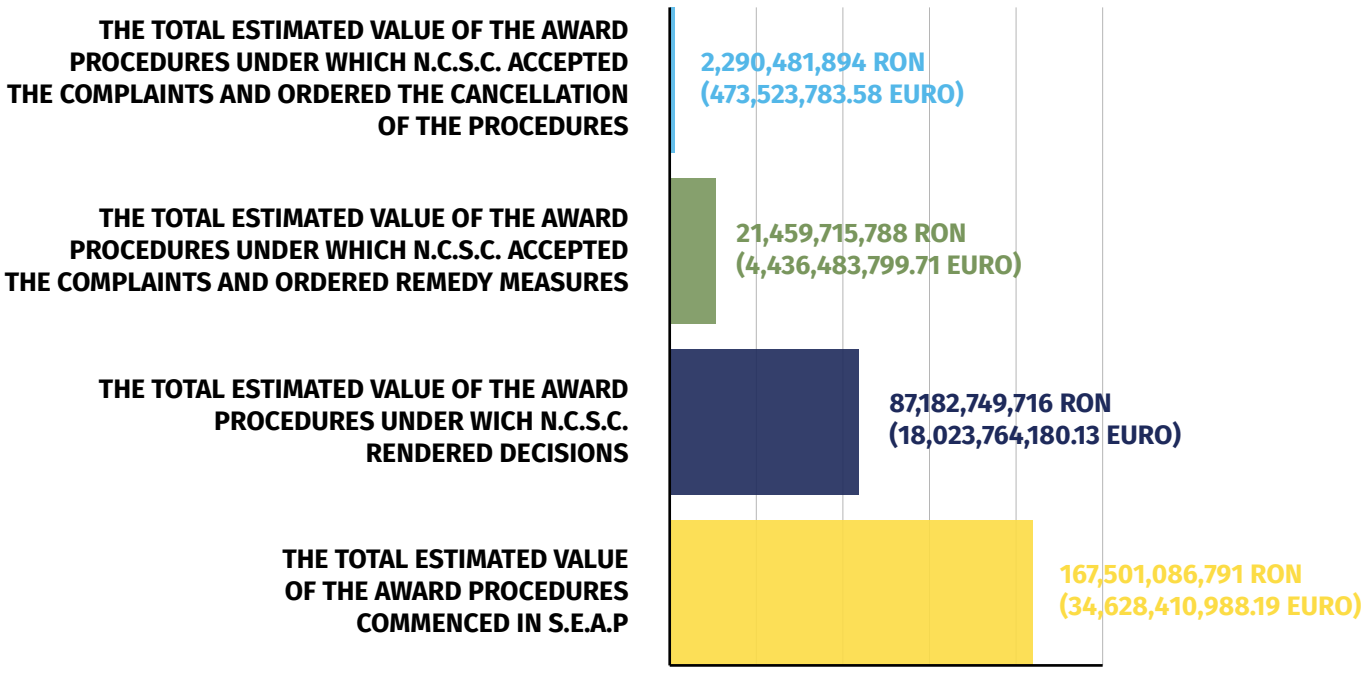
The official data provided by the Electronic Public Procurement System (S.E.A.P.) show that the end of 2020, of the total of 28,595 award procedures commenced in S.E.A.P, a number of 5,612 award procedures were listed as cancelled (either by the contracting authorities, by the administrative law courts or by decision of N.C.S.C.), 20 procedures were listed as being suspended (0.07%), 6,353 were in development, and 16,568 were already awarded (57.94%).

Comparing the total annual estimated value of the procedures commenced in S.E.A.P. in the year 2020 (167,501,086.791 RON, the equivalent of 34,628,410,988.19 EURO) the total estimated value of the procedures under which N.C.S.C. ruled decisions (87,182,749,715.72 RON, the equivalent of 18,023,764,180.13 EURO), it arises that the latter represented 52.05% of the total estimated value of the procedures commenced in S.E.A.P.

But if we compare the total annual estimated value of the procedures commenced in S.E.A.P. in 2020 (167,501,086.791 RON, the equivalent of 34,628,410,988.19 EURO) with the total estimated value of the procedures under which N.C.S.C. accepted the complaints lodged by business operators and ordered remedy measures/ the cancellation of the procedures (23,750,197,681.11 RON, the equivalent of 4,910,007,583.28 EURO), it results that the latter represented 37.71% of the total estimated value of the procedures commenced in S.E.A.P.

In fact, the total estimated value of the procedures under which N.C.S.C. ordered remedy measures of the challenged procedures was of 21,459,715,787.56 RON (14.18% of the total estimated value of the procedures commenced in S.E.A.P.), while the total estimated value of the public procurement procedures under which N.C.S.C. ordered their cancellation was of only 2,290,481,893.55 RON (1.37% the total estimated value of the procedures commenced in S.E.A.P.).

THE TREND OF THE TOTAL ESTIMATED VALUE OF THE AWARD PROCEDURES COMMENCED IN S.E.A.P COMPARED TO THAT OF THE PROCEDURES UNDER WHICH N.C.S.C. RULED, RESPECTIVELY ACCEPTED THE COMPLAINTS AND ORDERED REMEDY MEASURES/ THE CANCELLATION OF THE PROCEDURES

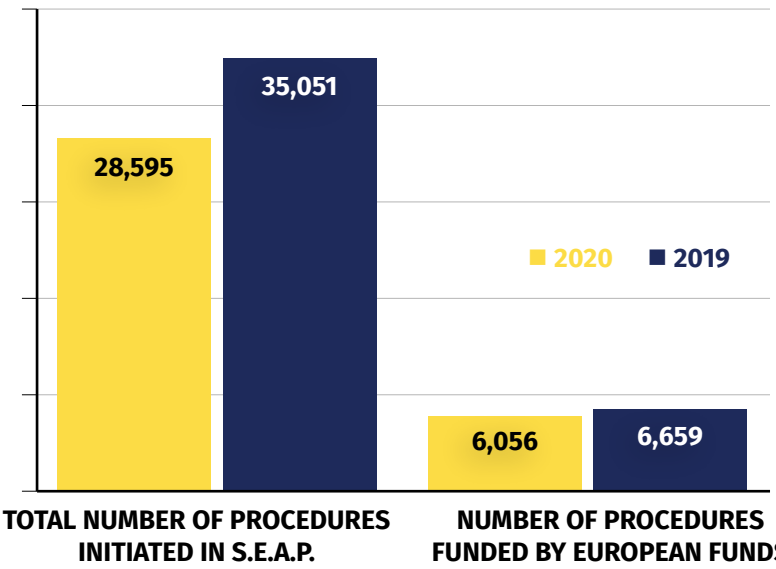


As previously mentioned, in the year 2020, after the launch in S.E.A.P, during their development, 5,612 public procurement procedures - meaning a percentage of 19.62% of the total of commenced procedures - were cancelled. Yet of the 5,612 cancelled procedures, the Council issued only 55 decisions for the cancellation of a similar number of public procurement procedures. Accordingly, the number of procedures commenced in S.E.A.P. and cancelled by the decision of N.C.S.C. represented only 0.19% of the total number of procedures commenced on the electronic platform of public procurements, and only 0.98% od the total of commenced procedures that were cancelled later on. These numbers certify once again that the role of N.C.S.C. was not to cancel public procurement procedures developed at national level only in the case when the measure of remedy, meant to prevent the violation of national and European legislation and the illegal spending of the public money, was not possible anymore.

Regarding the public procurement procedures funded by European funds commenced in S.E.A.P. through participation announcements and invitations, the data afferent to the year 2020 show that they reach 6,056, meaning a percentage of 21.18% of the total public procurement procedures commenced in the system (28,595 procedures). Compared to the previous year, when 6,659 public procurement procedures funded by European funds, in 2020 their number decreased with 603, meaning a percentage diminish of 9.05%.

Of the total number of 6,056 public procurement procedures funded by European funds commenced in S.E.A.P. in the year 2020 through participation announcements and invitations, a number of 1,659, meaning a percentage of 27.39% of the procedures commenced by European funds were cancelled exclusively by the contracting authority or by the administrative and fiscal law courts, and only 8 (eight) procedures, that is a percentage of 0.48% of the total procedures funded by European funds commenced in S.E.A.P were cancelled by the decisions of the Council.

THE TREND OF PROCEDURES FUNDED BY EUROPEAN FUNDS COMPARED TO THE ONE OF THE TOTAL PROCEDURES COMMENCED IN S.E.A.P. IN THE PERIOD 2019 - 2020



As it can be observed, with personnel limited in number, with minimal material expenditures, the Council proved its efficiency, its employees making huge efforts to answer the specific challenges of the occupied positions. Therefore, each employee is separately fully charged with specific activities and every person justifies its presence within the institution.

CHAPTER 3
THE QUALITY OF N.C.S.C. ACTIVITY IN 2020

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 any decision rendered by the Council, as a result of the settlement of any complaint by the administrative-jurisdictional channel, to be controlled by a law court so that the remedy of the potential committed errors is allowed within the first settlement. The existence of such control was intended as a warranty for the stakeholders, in the sense that any remedy can be removed/remedied by a superior court. For this reason, this institutional filter represents, even for the counsellors for solving complaints in the field of public procurements within the Council, a stimulative factor concerning the fulfilment with maximum rigour and exigence of their attributions, as they are fully aware of the fact that the decisions which they render may be controlled at any time by a superior court.

According to the legislation in the field of public procurements, the decisions rendered by the Council using the administrative-jurisdictional channel can be verified by the Courts of Appeal in the jurisdiction where the contracting authority is headquartered, or by the Bucharest Court of Appeal (for the procedures of awarding provision of services and/ or works afferent to the transportation infrastructure of national interest) when a complaint is lodged by the contracting authority and/

or by one or more business operators participating at a procurement procedure if they consider to be harmed by the measures ordered by the Council.

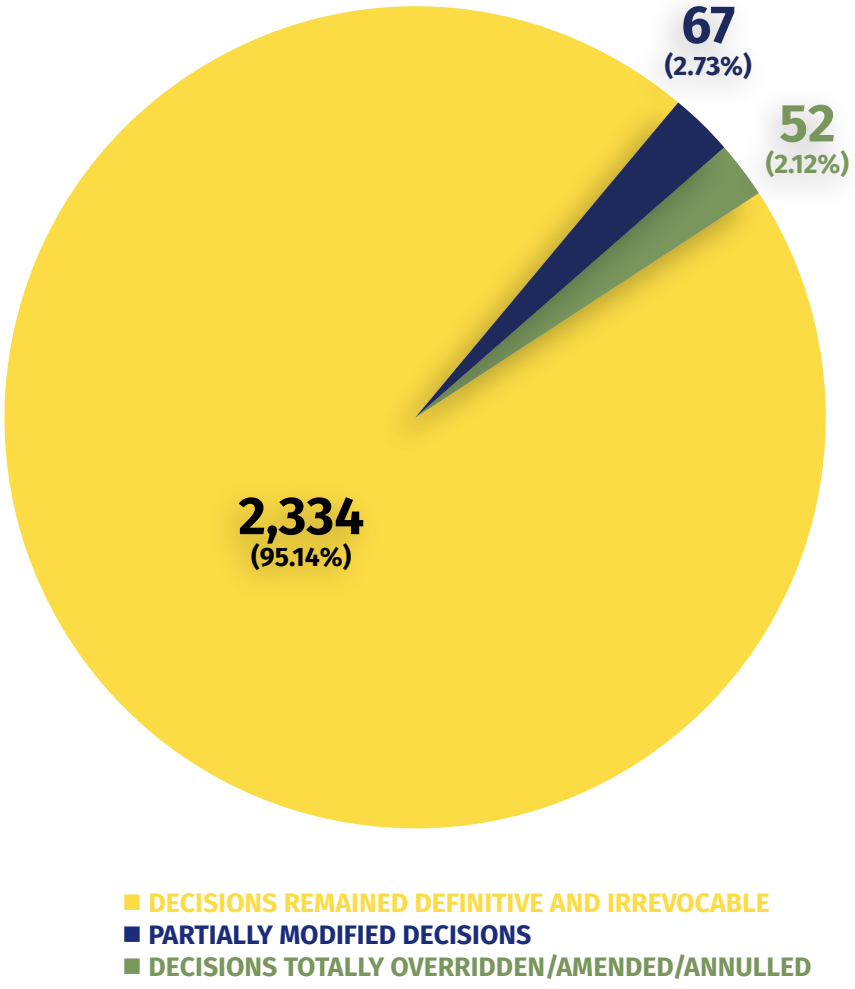
This fact resides in the provisions of Article 29 of Law no. 10/2016, which regulates that "the decisions of the Council regarding the settlement of the complaint can be challenged with appeal by the contracting authority and/ or by any person harmed by the measures ruled by the Council at the competent court of law, both for reasons of illegality and groundlessness, in term of 10 days from the notice to the parts in the case, respectively from the date of acknowledging by other harmed persons". Consequently, against a single decision ruled by the Council sometimes many complaints are lodged with the competent Courts of Appeal in the jurisdiction where the contracting authority is headquartered.

On the course of 2020, of the total of 2,453 decisions issued by the chambers of solving complaints within N.C.S.C., a number of 595 decisions were challenged with appeal.

Following the appeals lodged with the competent Courts of Appeal in the jurisdiction where the contracting authority is headquartered, compliant to Article 29 of Law no. 101/2016, out of the 2,453 decisions issued by N.C.S.C., 2,334 decisions remained definitive in the formed ruled by the Council, 52 were fully overridden/ amended/ annulled (2.12% of the total decisions issued by the Council), 74 were partially overridden/ amended/ annulled (3.02% of the total decisions issued by the Council), while for a number of 83 appeals the courts did not pronounce upon by the end of the year 2020.

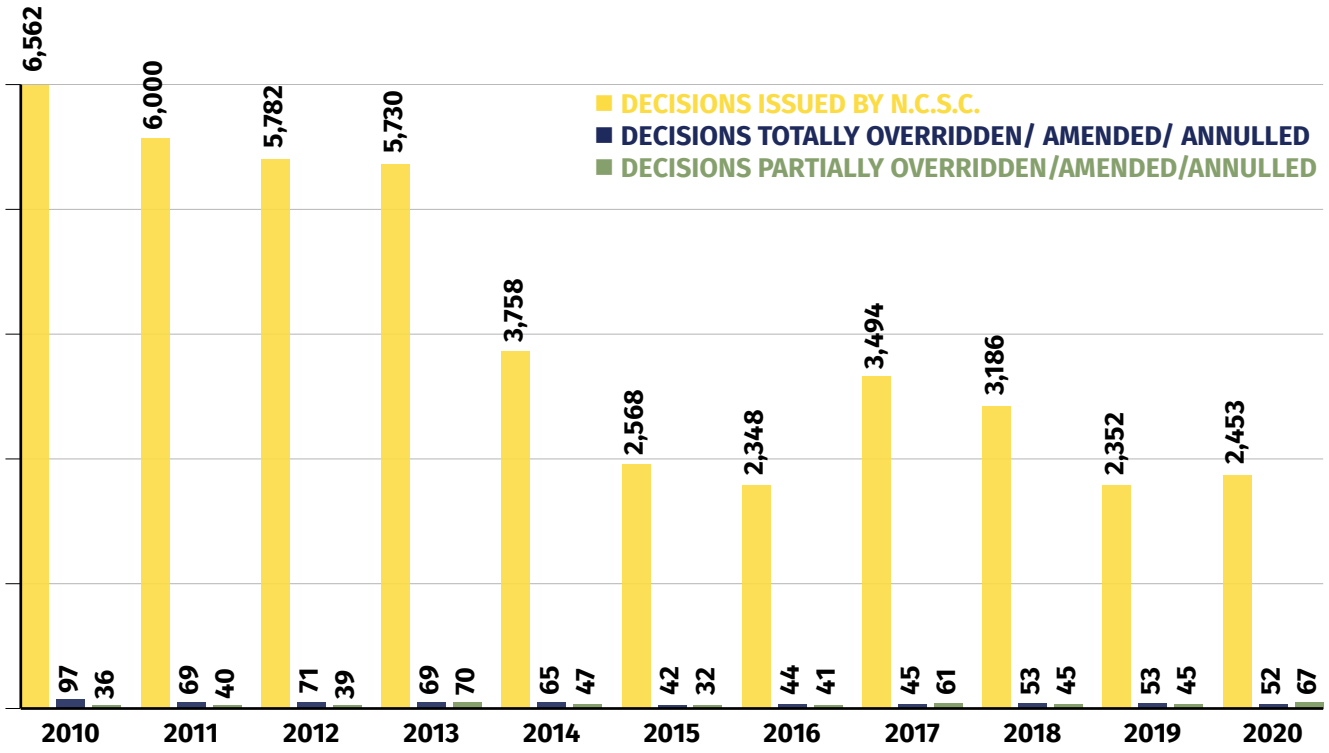
It must be noted that out of the 74 decisions that were partially overridden/ amended/ annulled by the Courts of Appeal in the area of the contracting authority, 7 (seven) decisions did not target the merits of the case judged by the Council, but exclusively the obligation of the contracting authority to pay the judicial costs. Therefore, the number of decisions challenged with appeal and partially overridden/ amended/ annulled is of just 67, representing a percentage of only 2.73% of the total decisions issued by the Council throughout 2020.

THE STANDING OF THE APPEALS LODGED AGAINST THE DECISIONS OF N.C.S.C. IN THE YEAR 2020



It may be observed that out of the 3,453 issued by the Council in the year 2020, 2,334 remained definitive and irrevocable in the form ruled by our institution. Concerning percentage, it means that 95,14% of the total decisions issued by N.C.S.C. remained definitive and irrevocable in the form ruled by our institution, even after the control of a higher court of law (Court of Appeal). This fact maintains a very high degree of credibility and trust for our institution both amongst the contracting authorities and the business operators active in the field of public procurements.

THE TREND OF THE APPEALS LODGED AGAINST THE DECISIONS OF N.C.S.C. IN THE PERIOD 2010 - 2020



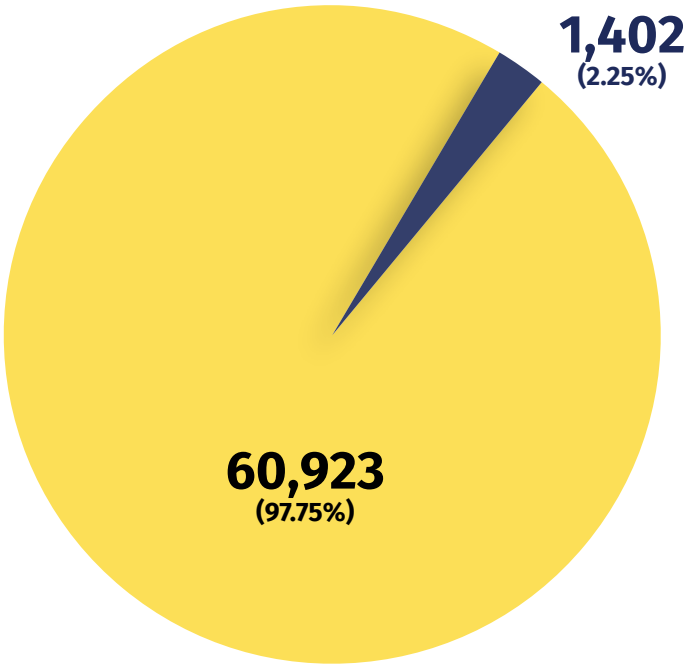
The statistical evidence in the last ten years of the Council's activity demonstrate that the percentage of decisions totally or partially overridden/ amended/ annulled by the Courts of Appeal was maintained at a very reduced level in comparison to the percentage of decisions ruled by our institution and remained definitive and irrevocable.

If we sum up the decisions issued by N.C.S.C. from its establishment and until the end of 2020, it arises that only 2.25%, meaning 1,402 decisions, out of the 62,325 decisions ruled by our institution during the mentioned time span were totally or partially overridden/amended/ annulled by the competent Courts of Appeal. Therefore, it is revealed that in the period September 2006 – December 2020 the total number of decisions remained definitive after being challenged with appeal at the competent Courts of Appeal was of 60,923, meaning that a percentage of 97.75% of the total ruled decisions remained in the form issued by the Council.

Probably the numbers mentioned in the current report do not mean much for the persons uninitiated in the public procurements market. But the results of the Council represented true performances for the analysts, who confirmed the role of this institution as guarantor in its field of competence for the supremacy of the law.

Consistent in enforcing and perfecting the institutional capacity which would allow the solving with transparency, celerity and impartiality of the complaints with which it is invested to settle, the Council will continue in the year 2021 to solve with celerity the complaints lodged by business operators and to represent a promotor of the European good practices, in order to contribute to the improvement and fluidisation of the award procedures for public contracts, as well as to the reduction of the "appetite" of the players on the public procurements market for committing potential corruption acts and actions.

THE STANDING OF THE DECISIONS ISSUED BY N.C.S.C. REMAINED DEFINITIVE IN THE PERIOD 2006 - 2020



3.1.2. NON-UNITARY PRACTICE

According to Articles 62 and 63 of Law no. 101/2016, at the level of the Council and law court there are mechanisms for the unification of its judicial and administrative-jurisdictional practice.

Since the law's coming into force and until the occurrence of the actual pandemic situation, semestrial meetings took place with the judges within the law courts and ANAP specialists, as well as other categories of experts. Moreover, in the same period, monthly member meetings were organised at the institution level, in order to discuss the law matters which have led to the rendering of different solutions in similar cases.

The current pandemic context put an end to this mechanism, as the material amenities of the institution did not allow the organisation of such meetings in safe conditions, in compliance to the provisions on distancing. Also, the logistics of the institution does not permit the development of videoconferences, communication being ensured by small groups, e-mail or telephone, methods that do not allow the efficient use of the legal mechanisms related to the unification of practice.

The lack of inter-institutional dialogue and at the level of the N.C.S.C. members left its mark on the national practice regarding the field of public

procurements, thus becoming more non-unitary and divided as ever.

This situation was also nourished by the frequent legislative amendments from 2019, as they did not bring any progress in the field, but on the contrary bewildering the national remedy system. The appearance of the legislative package in 2016 should have led in time to stability as there aren't any perfect law in practice, the application and interpretation inconsistencies being correlated by practice. No law can establish solutions for any practical case, thus the task to set up a unitary conduct and practical rules for these situations falls in the hands of the practitioners in the field of public procurements.

Non-unitary practice is capable of generating the vulnerability of the public procurements system, similar to the judicial one. Thus, non-unitary practice makes the system to be unpredictable, with major effects on the budget execution and the absorption of European funds.

The legislation's stability is the only one entitled to lead in time to a unitary practice, allowing the crystallisation of majority interpretations, which would later permit the initiation of some appeals in the interest of law.

In its activity, the Council met several situations in which certain problems were treated differently by the solving chambers. Some of them were settled following brainstorming, yet others still remain unsettled, the reason for this situation being the lack of a unitary practice at the level of the judicial control courts.

Thus, if two chambers issued different decisions in similar cases and both remained definitive following the legality control, it cannot be said which is the proper interpretation. In addition, in the situation with two decisions in similar cases and different solutions provided by the control courts, one cannot establish the right way. In order to unify practice, a sufficient and relevant number of court decisions is required, with diverse motivations, so that the more equitable variant is chosen. The intervention of the legislator will not result in unifying practice, but on the contrary.

In regards to the non-unitary practice of the law courts we recall the Civil Decisions

2.019/11.11.2020 and no. 2.127/16.11.2020, both issued by the Bucharest Court of Appeal for the solving of identical complaints against two decisions ruled by the Council containing unified solutions. The Court of Appeal rejected the complaint through the first decision and admitted the second. The extraordinary legal remedy of revision was exercised against the first decision by invoking non-unitary practice, being rejected as groundless by the Civil Decision no. 387/2021. Therefore, two large infrastructure contracts were not signed up to this moment as a consequence of non-unitary practice.

A simple lecture of the European jurisprudence reveals similar situations, respectively the lack of non-unitary interpretations of the European directives, the respective practice filling in certain situations, deficiently imported or erroneously interpreted in the national legislations.

The Romanian national legislation mostly takes over the European directives in the field of public procurements. As these directives proved their efficiency in other European states, there is no reason for which these directives will not be as efficient in Romania.

At the same time, any legislative change implies an adaptation effort to the new provisions. There are many situations in which the practice established on the premises of the old law continues after the adoption of the new law, based on the principle of inertia. Furthermore, the adoption of some amendments raises serious practical problems for the application of laws throughout the course of time, with many situations in which the contracting authorities commit mistakes especially for this reason.

In order to fill in the absence of the meetings with magistrates and plenary sessions, the management of the institution was constantly preoccupied in providing as much information as possible to the solving counsellors. The decisions of the courts of appeal were downloaded in electronic format, being accessible to all the employees. In addition, the Council's portal offers complete information to the parties as well. They are informed on every document issued/received by the Council for the better valorisation of the right of defence.

CHAPTER 4

INSTITUTIONAL TRANSPARENCY AND STAFF TRAINING

4.1. THE INSTITUTIONAL TRANSPARENCY

Although 2020 was an extremely difficult year in the context of the occurrence of the COVID – 19 pandemics, however the activity of the Council functioned permanently due to the measures disposed and implemented at the level of management.

Unlike other years, the management of the Council was put in a position of not being able to organise joint seminars/meetings together with entities with attributions on the public procurements market (the Competition Council, the National Agency for Public Procurement – A.N.A.P., the National Integrity Agency – A.N.I., courts of appeal, Court of Bucharest, the European Commission's representative in Bucharest, etc.), yet it was preoccupied actively with the promotion and implementation of the European practices and policies for preventing and discouraging anti-competitive practices, as well as with the growth of institutional transparency, so that the national public procurement system could benefit of a predictable, coherent and unitary functioning, which would contribute to solving the complaints with celerity and, implicitly, to increasing the absorption of European funds.

Due to the restrictions imposed by the COVID – 19 pandemics, the Council could not organise on the course of 2020 any physical seminars with judges of the law courts, A.N.A.P. specialists and other categories of experts, thus the management of the Council focused on the unification of the practice in the field. This measure was taken in the context in which several legislative changes were introduced over the years without succeeding, in most cases, to improve legislation but on the contrary. They created confusion and divergent practice therefore the existence of numerous non-unitary approached problems was observed by the counsellors of solving the complaints in the field of public procurements, but also by other contracting authorities, complainants, A.N.A.P., management authorities, even courts of law.

Thus, pursuant to Article 62 of Law no. 101/2016, plenary sessions were organised each month within the Council. On the respective occasion, each chamber forwarded a report concerning the practical situations encountered in the activity of solving complaints.

Specifically, following those plenary sessions and to the extent that there was sufficient relevant practice on the debated matters, the management of the institution issued decisions for the unification of the administrative-jurisdictional practice, mandatory for all the members and employees of The Council. When the courts ruled non-unitary solutions, the High Court of Cassation and Justice was noticed in order to follow the appeal in the interest of law procedure provided in Article 63 of Law no. 101/2016, as subsequently supplemented and amended.

Being interested in the stability and coherent functioning of the national public procurement system, the Council continued throughout the year 2020 to forward weekly official situations to A.N.A.P., based on the protocols with the respective institution, regarding the evaluation terms registered with the contracting authorities for the various undergoing projects, decisions issued by the Council, as well as remedy measures ruled by it following the complaints lodged by business operators.

The National Council for Solving Complaints

CHAPTER 5

THE RELATION WITH MASS-MEDIA AND THE GENERAL PUBLIC

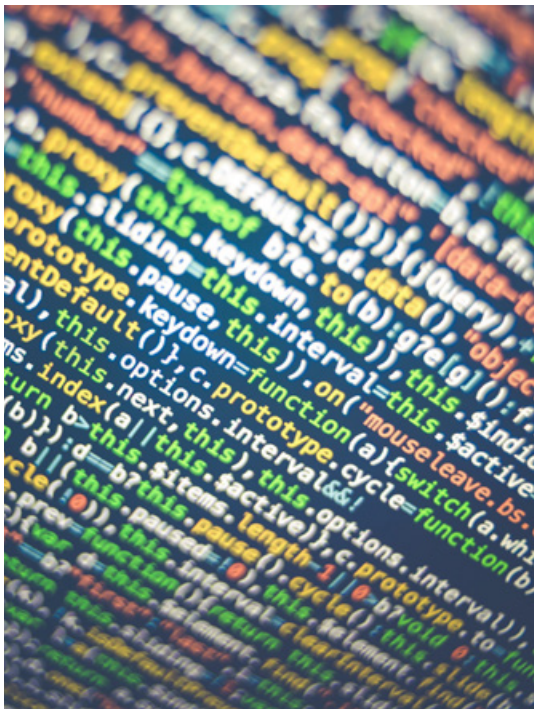
Communication represents the essential link that makes an institution to function, being also a sine qua non condition through which the institutional relations exist and develop. Starting from this principle, the activity performed in 2020 by the Information and Public Relations Office within the National Council for Solving Complaints was based on a transparent communication in relation to the business operators, contracting authorities, governmental and non-governmental institutions involved in the field of public procurements, but to the media as well, for a correct information of the general public. Therefore, the general objective of the Information and Public Relations Office was promoting the activity of the Council in the public space, ensuring a transparent relation with the media and the official institutions, as well as faithfully respecting the terms regarding the settlement of the requests on information of public interest submitted in compliance with Law no. 544/2001, subsequently amended and supplemented.

For the purpose of an efficient periodical briefing, the Information and Public Relations Office, in collaboration with the Statistics and IT Office within the Council, also focused in 2020 on developing the portal of the institution (www.cnsc.ro), so that any natural or legal person could benefit at any moment of an easy and unrestricted access to the information concerning the activity of the institution and could disseminate in real time the decisions and conclusions issued by the Council, the history of the files in progress or finalised, information and statistical data regarding the activity of the institution, normative changes in the national and European legislation in the field of public procurements, as well as any other kind of information useful and relevant to promotion of good practices.

Moreover, the activity of the Information and Public Relations Office comprised daily monitoring of the mass-media (written press, radio, television and internet) for elaborating the press review and to present it to the management of the Council, periodical drafting of press statements, maintaining the relation with the official institutions and the main actors in the field of public procurements, as well as ensuring the necessary support for the management of the institution, whenever accredited journalists requested statements or punctual interviews or clarifications were needed regarding certain cases promoted in the public space.

In addition, the Information and Public Relations Office performed various periodical activities targeting the elaboration of statistics related to the activity of the institution, this type of information being provided to both official institutions operating in the field of public procurements and the general public through media channels. Furthermore, the Information and Public Relations Office has periodically provided information to the management of the Council concerning the problems signalled by diverse business operators or authorities, and supervised the drafting of the Annual Report of the Institution.

Regarding the number of requests related to public information registered at the headquarters of N.C.S.C. on the course of 2020, made either by business operators or contracting authorities, public institutions, non-governmental organisations, or natural persons, they are represented by approximately 400 punctual requests, submitted in writing or verbally, in compliance to Law no. 544/2001 on free access to information of public interest. It must be noted that absolutely all petitions were settled with celerity in the same day that they were registered and in compliance with the rules of personal data protection.



CHAPTER 6

PROJECTS AND INITIATIVES

Although the actual system of solving complaints is perceived as having a special efficiency, the Council considered in its official statements that its perfectioning is necessary through enhancing the capacity of solving complaints with celerity and, implicitly, streamlining the procurement system in Romania. Otherwise, there is the danger of exceeding the legal term referring to solving the complaints, having major implications in the development of public policies and their related investments.

For a better development of its activity, the Council was consistent in the year 2020 in the implementation of efficient measures in order to ensure the material resources necessary for the activity performed by the specialised chambers, respectively for the development and strengthening of the working capacity of the "remedy" system in the time span 2021 - 2024, ensuring in this way the quality and efficiency of the Romanian public procurements system, in accordance to the requests and standards imposed at the level of the European Union. Under this aspect, the management of the Council performed a series of actions, as fisted below:

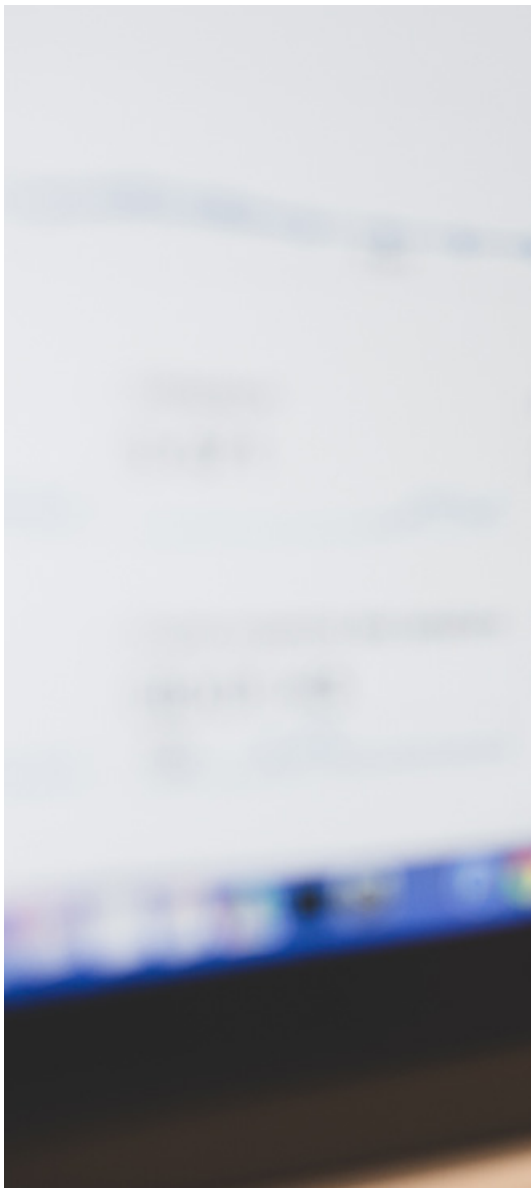
√ following the national practice and that of the European Court of Justice, through the collaboration of the N.C.S.C. members with judges within law courts and A.N.A.P. specialists, as well as other categories of experts in the field of public procurements;

√ consultations with similar entities to the N.C.S.C. from the European Union;

√ discussing the application and interpretation of new provisions in the field of public procurements, as well as any other domain which intersects the professional activity of the Council's members;

√ development of evidence related to following the administrative-jurisdictional practice in the field;

√ monitoring/ maintenance of the digital platform and access to a collection of cases settled by the Council, instruments



which are essential for the real time exposure of the information regarding the complaints to business operators and interested institutions.

Taking into consideration the abundance of information from disparate sources which apparently have no connection, the Council continued on the course of 2020 to make sustained efforts for the elaboration of a project designed to contribute to the improvement of the capacity of data processing, to the increase the performances of reporting, evaluating the results and data analysis through a unitary practice by developing an app based on Big Data architectures and technologies. The app would have the capacity to acquire new information from both structured and unstructured sources (media, web, audio, video, geographical locations, social communities, intelligent devices, etc.).

The necessity of this grand project resides in the predictive analyses implemented using Big Data type technologies which will be capable of allowing the Council to identify

connexions and patterns of interest in the analysed domains (CJEU decisions, Courts of Appeal decisions, Court decisions, N.C.S.C. decisions, etc.), as their identification would prove impossible in the absence of these tools.

Moreover, on the course of the previous year, the Council, together with the National Office for Centralised Procurement (O.N.A.C.), the Ministry of Internal Affairs – Department for Emergency Situations (M.A.I. – D.G.S.U.), and the General Inspectorate for Emergency Situations (I.G.S.U.) commenced the implementation of the project "The development and implementation of certain integrated electronical devices for the development and monitorisation of centralised procurements", which aims to elaborate a practice guide for avoiding the potential blockages that might occur in the development and awarding of the centralised procurement procedures, by analysing and identifying the main problems specified in the complaints. With this project, the Council targeted the consolidation o its capacity to address challenges and to avoid delays in issuing decisions and the reduction of the risk of prolongating the term for the award/ implementation of the framework agreements concerning centralised procurements.

Starting from the necessities of the main users objectified as a centralised tender documentation, respectively avoiding to include some restrictive requirements/ specifications/ conditions, as well as the evaluation of the bids, the admission of the complaint and the disposal to re-evaluate the bids, and establishing the winning bid, within this project the Council has disseminated the information gathered in the discussions with the counterpart institutions from the European Union, which use the centralised procurement system for terminating the analysis regarding the challenged procedures with the subject of procurement of centralised goods and services and for creating a practical Guide for avoiding the potential blockages/delays that might occur in the development of the centralised procurement award procedures.

CHAPTER 7

FORECASTS

In the year 2020, the Council hoped that the legislator would reconsider and attenuate the access conditions for the business operators to the public procurement jurisdiction. This hope was in vain as the legal provisions maintained the obligation of setting up a bond for lodging a complaint via the administrative-jurisdictional channel. In addition, a stamp duty was imposed at the amount of 2% of the estimated value of the contract when lodging a complaint via the judicial channel.

Just like the previous year, 2021 will continue to be an atypical one under the influence of the COVID-18 pandemic, as the whole private sector will affected. Accessing public money/ European funds by business operators will represent a "lifeline" for many. Therefore, it is possible that the participation to the award procedures of some public procurement contracts will increase, with a fierce competition.

Bearing in mind the declared intention of the Romanian government to expand the budget allocated to public investments, which would contribute to a healthy and sustainable economic growth, it is expected that we will witness at a significant increase of the number of public procurement procedures commenced by public authorities and, implicitly, of the number of complaints lodged by business operators as participants to these procedures.

Of course, one desideratum of the public authorities is that the public procurement procedures are not challenged and the result of the contract awarding is accepted by business operators regardless of the existence of suspicions related to the bias and vitiation of the procedure's result or the deficient spending of public money. Yet this desideratum can be achieved only at the time we will understand that making use of public money should be made transparently by the application of competitive principles and, last but not least, in a legal and efficient manner.

The Council will continue during the year 2021 to solve with celerity all the lodged complaints, the legal term of 20 days in our country being one of the most reduced in the European Union (for instance, France: 20 days, Hungary: 25 days, Slovakia, Croatia, Latvia and the Check Republic: 30 days, Germany: five weeks, Austria: six weeks, Greece and Lithuania: 60 days, Spain: two months, Portugal: 6 months[19]). However, this effort must be supported by a coherent legislation package, simple, fluent and stable, because the frequent legislatives changes in the field are bewildering both the practice of public authorities and business operators.

We wish to continue and successfully complete the POCA European project "Competence makes the difference", commenced in partnership with the National Office for Centralised Procurement. In the future, the Council intends to access additional European funded projects in order to further streamline the activity of solving complaints via the administrative-jurisdictional channel and the continuous update of the necessary knowledge for the proper application of legislation in the field of public procurements, and, though this, to the unitary, correct and efficient application of the legal provisions in the field of public procurements.

19. https://www.dzp.pl/files/shares/Publikacje/Functioning-of-legal-protection-measures-in-EU-countries-Warsaw.pdf

CHAPTER 8

THE BUDGET OF N.C.S.C.

The budget of N.C.S.C. corresponding to the year 2020 amounted to 15,533 thousand RON and was distributed as follows:

- The budget provision for Current expenditures: 15,553 thousand RON out of which:
  - Personal expenses: 12.776 thousand RON.
  - Goods and services: 1,723 thousand RON.

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

THE BUDGET OF N.C.S.C. FOR 2020 (THOUSANDS LEI)

CHAPTER	GROUP/ TITLE	NAME	PROGRAMME	QUARTER I	QUARTER II	QUARTER III	QUARTER IV
5000		**TOTAL BUDGET**	15.553	3.841	3.843	3.964	3.905
	01	**CURRENT EXPENDITURE**	15.553	3.841	3.843	3.964	3.905
	10	**TITLE I - STAFF EXPENDITURE**	12.766	3.100	3.100	3.267	3.299
	20	**TITLE II - GOODS AND SERVICES**	1,723	475	478	430	340
	58	**TITLE X PROJECTS WITH FINANCING FROM EXTERNAL FUNDS RELATED TO THE FINANCIAL FRAMEWORK 2014-2020**	974	244	243	244	243
	59	**TITLE IX OTHER EXPANDITURE**	90	22	22	23	23
	70	**CAPITAL EXPENDITURES**	0	0	0	0	0
	71	**TITLE XII NON-FINANCIAL ASSETS**	0	0	0	0	0
5001		**EXPENDITURE – STATE BUDGET**	15.553	3.841	3.843	3.964	3.905
	01	**CURRENT EXPENDITURE**	15.553	3.841	3.843	3.964	3.905
	10	**TITLE I - STAFF EXPENDITURE**	12.766	3.100	3.100	3.267	3.299
	20	**TITLE II - GOODS AND SERVICES**	1.723	475	478	430	340
	58	**TITLE X PROJECTS WITH FINANCING FROM EXTERNAL FUNDS RELATED TO THE FINANCIAL FRAMEWORK 2014-2020**	974	244	243	244	243
	59	**TITLE IX OTHER EXPANDITURE**	90	22	22	23	23
	70	**CAPITAL EXPENDITURES**	0	0	0	0	0
	71	**TITLE XII - NON-FINANCIAL ASSETS**	0	0	0	0	0