



The National
Council for
Solving
Complaints

ACTIVITY REPORT

2021

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FOREWORD

In the context of limitations generated by the COVID pandemic and by the modification of the legal background which regulates the public/sectorial procurements and the services and works concessions, taking into consideration that two normative were adopted in order to amend the entire legislative package in the field of public/sectorial procurements and the services and works concessions (a.n.

- Government Emergency Ordinance no. 25/2021 on the revision and completion of several normative acts in the field of public procurements and Government Emergency Ordinance no. 3/2021 on the revision and completion of several normative acts in the field of public procurements), which have generated through their content debates and controversies in relation to the interpretation and application way, one might say that the year 2021 represented a major challenge which our institution had to confront.

In these increasingly harder conditions, the Council has permanently fulfilled its role of guarantor for the correct implementation of the legislation in the national system of public procurements, by solving with celerity the complaints lodged



FLORENTINA DRĂGAN
N.C.S.C PRESIDENT

during the award procures, in the context in which their number increased in the year 2021 with approximately 15.1% in comparison with the previous year.

The jurisdictional mechanism endures by the Council with only 32 solving counsellors, until September 2021, and with only 35 solving counsellors, since the end of September 2021, proved to be capable of adequately managing a situation which tipped the balance in favour of lodging the complaints during the award procedures initiated in the medical and large infrastructure fields.

Although the workload was extremely heavy and

despite the diverse restraints which it is confronting, the Council issued lawful and grounded solutions, which determined the majority of business operators, persons injured by the acts issued during the initial award procedures by the contracting authorities/entities, to address especially the administrative-jurisdictional manner for solving the disputes.

This fact confirms the essential role of the Council, recognised even by the European Commission in the CVM reports, namely that our institution represents an efficient filter for preventing a significant number of irregularities in the undergoing

public procurement procedures, both in the case of the projects funded by national funds and by European funds.

Therefore, in the year 2021 the total estimated value of the award procedures under which the N.C.S.C. rendered decisions was 77.320.050.850,70 RON, the equivalent of 15.714.179.914,38 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 24.238.929.888,91 RON (the equivalent of 4.926.211.261,05 EURO).

In the year 2022, the role of our institution will prove

even more crucial in the context of the implementation of public investment projects financed by the funds soon to be allocated through the National Recovery and Resilience Plan, which will imply the conducting of a higher number of public procurements, considering the fact that our institution is the perpetual guarantor of the full and sustainable implementation of the national strategy in the field of public procurements, a recommendation specified by our country inclusively in the N.R.R.P.

In conclusion, we can state that considering the experience accumulated in the 15 years since founding

the Council will continue to be a guarantor for the application of the letter and spirit of the law and will continue to emphasise the rendering of rapid solutions which will enforce its position in the specialised administrative-jurisdictional system.

In the following, we will present at large the data for the activity developed by the Council in the year 2021, mentioning that the percentage of decisions which were entirely/partially modified or abolished by the Courts of Appeal was relatively small, a fact which reconfirms the quality and complexity of this institution with a small budget in relation to its real necessities.

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 (4). 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.

At the end of 2021, the Council had 35 counsellors for solving the complaints in the field of public procurements, 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 competition¹.

At least half of them have a Bachelor's degree in law and a 10-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 members².

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. 98/2016³, Article 82 of Law no. 99/2016⁴, and Article 50 of Law no. 100/2016⁵. 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. 1.037/2011⁶.

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 reg-

ulated⁷: legality, celerity, contradictoriness, 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 10 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 graduate⁸ and has the quality of Chief Authorising Officer⁹. He/she is elected, for a period of three years, by secret voting from among the members of the Council, with absolute majority¹⁰ of the solving counsellors votes.

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 15 of Law no. 101/2016

8. Pursuant to Article 44 of Law no. 101/2016

9. Pursuant to Article 40 of Law no. 101/2016

10. Article 38 of Law no. 101/2016

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 contracts¹¹ regulated by the Government Emergency Ordinance no. 39/2018¹² 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. 114/2011¹³, 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 OR-NISS (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.

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 2021 by Ms. Florentina DRĂGAN, for the second year in office. In the exercise of her powers, the President of the Council was 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 2021 with a num-

ber of 35 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.

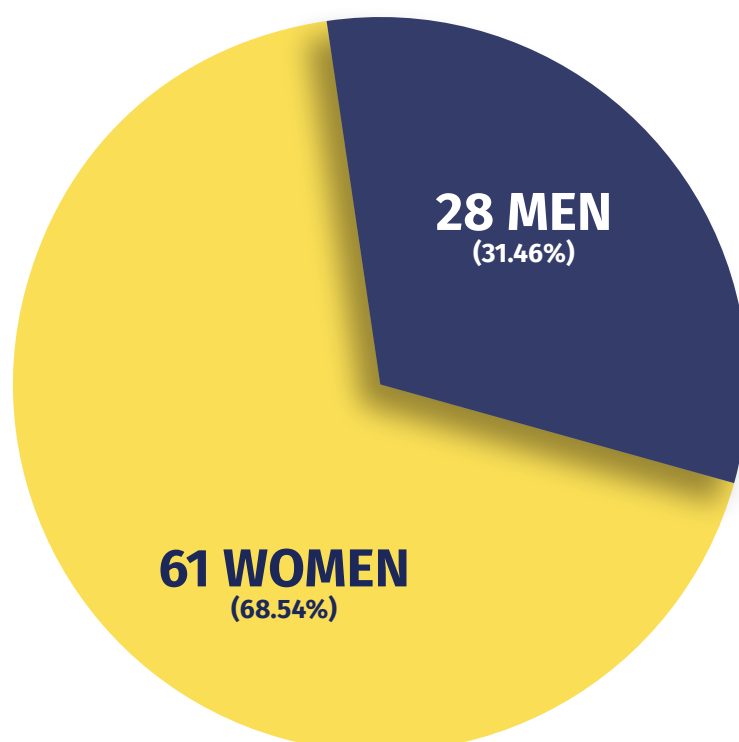
The Council personnel scheme was reduced, including only 54 technical-administrative employees, although 64 positions are provided to be allocated for the technical-administrative staff, pursuant to the provisions of the Government Decision no. 1.037/2011 on approving the N.C.S.C. Organisation and Operating Regulations.

Out of the 89 persons being under employment with N.C.S.C. on the 31st of December 2021, all of them having higher education, 53 were accounted as technical-administrative staff with public servants status for the chambers of solving complaints, while one person was accounted as contractual personnel.

Regarding gender structure, there was 61 women (68.54%) and 28 men (31.46%).

It must be mentioned that, related to the total number of employees with the N.C.S.C., the female persons percentage re-

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





mainly both for the counsellors of solving the complaints in the field of public procurements (60%) and the contractual staff (74,07%).

The average age being 48 at the level of the institution.

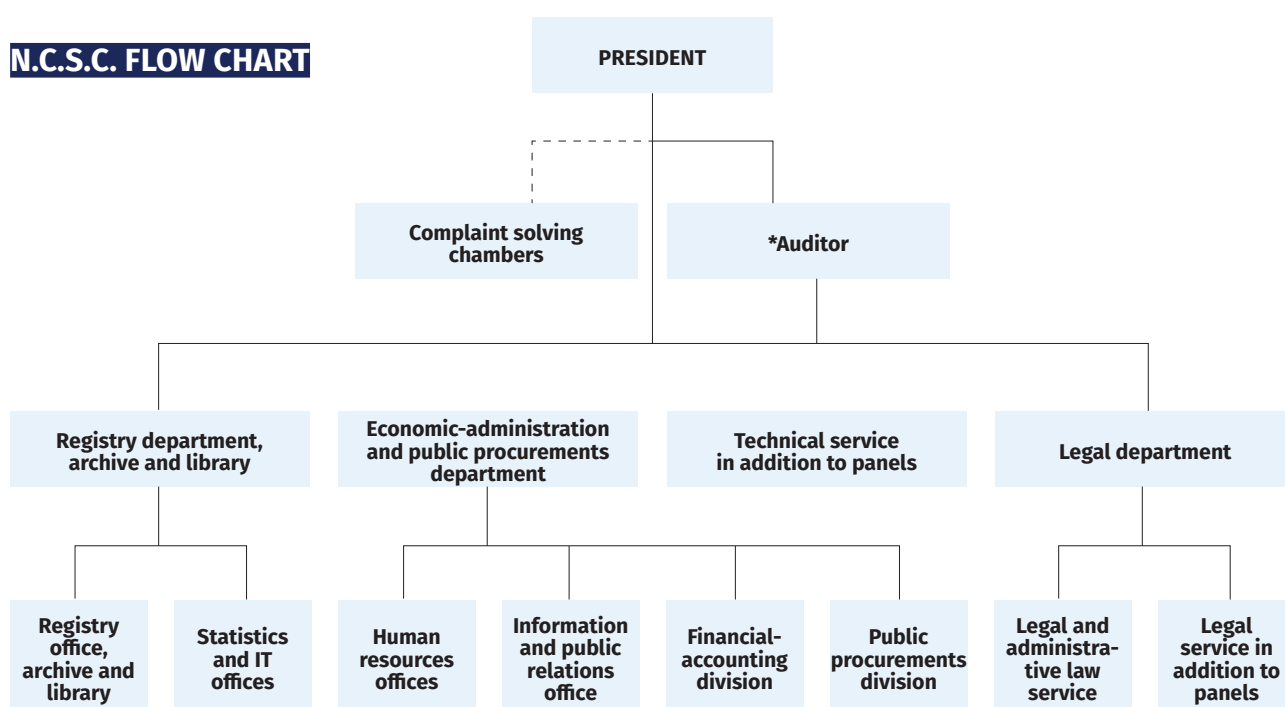
But the average age being 51 at the level of counsellors for solving complaints in the field of public procurements and 46 at the technical-administrative and contractual staff

According to the Council's Organisation and Operating Regulations¹⁴, the technical

administrative staff pursues its activity under the following structures:

- Registry, Archives and Library Service including:
 - Registry, Archives and Library Office;
 - Statistics and IT Office;
- Economic-Administrative and Public 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 C.N.S.C. IN 2021

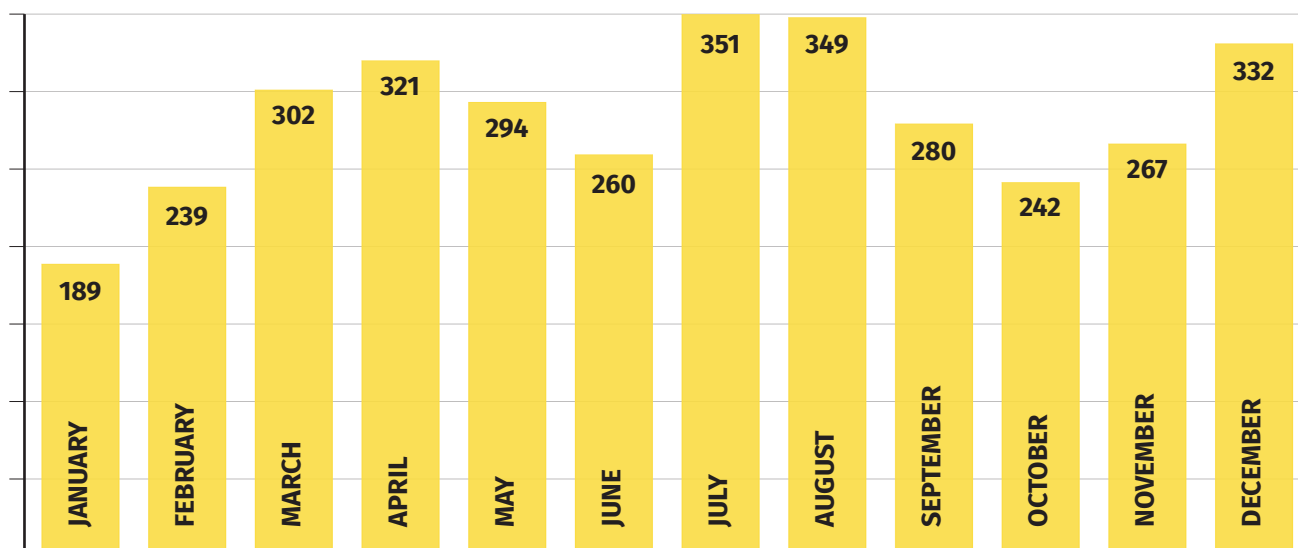
2.1. THE TREND OF THE COMPLAINTS LODGED BY THE BUSSINESS OPERATORS

The number of complaints filed and lodged by business operators with N.C.S.C., their object and complexity, as well as the trend and the manner of their solving represent the main indicators which characterise the analysis of the annual activity performed by the Council.

Between the 1st of January – 31st of December 2021, the number of complaints (files) lodged by the business operators and registered with N.C.S.C. amounted to 3,430, yet a number of four com-

plaints were removed from the role of the court. Consequently, throughout the twelve months of the year 2021, the number of complaints submitted by the business operators and lodged with N.C.S.C. amounted to 3,426 and had the following trend:

THE TREND OF THE COMPLAINTS LODGED BY THE BUSSINESS OPERATORS WITH NCSC IN 2021

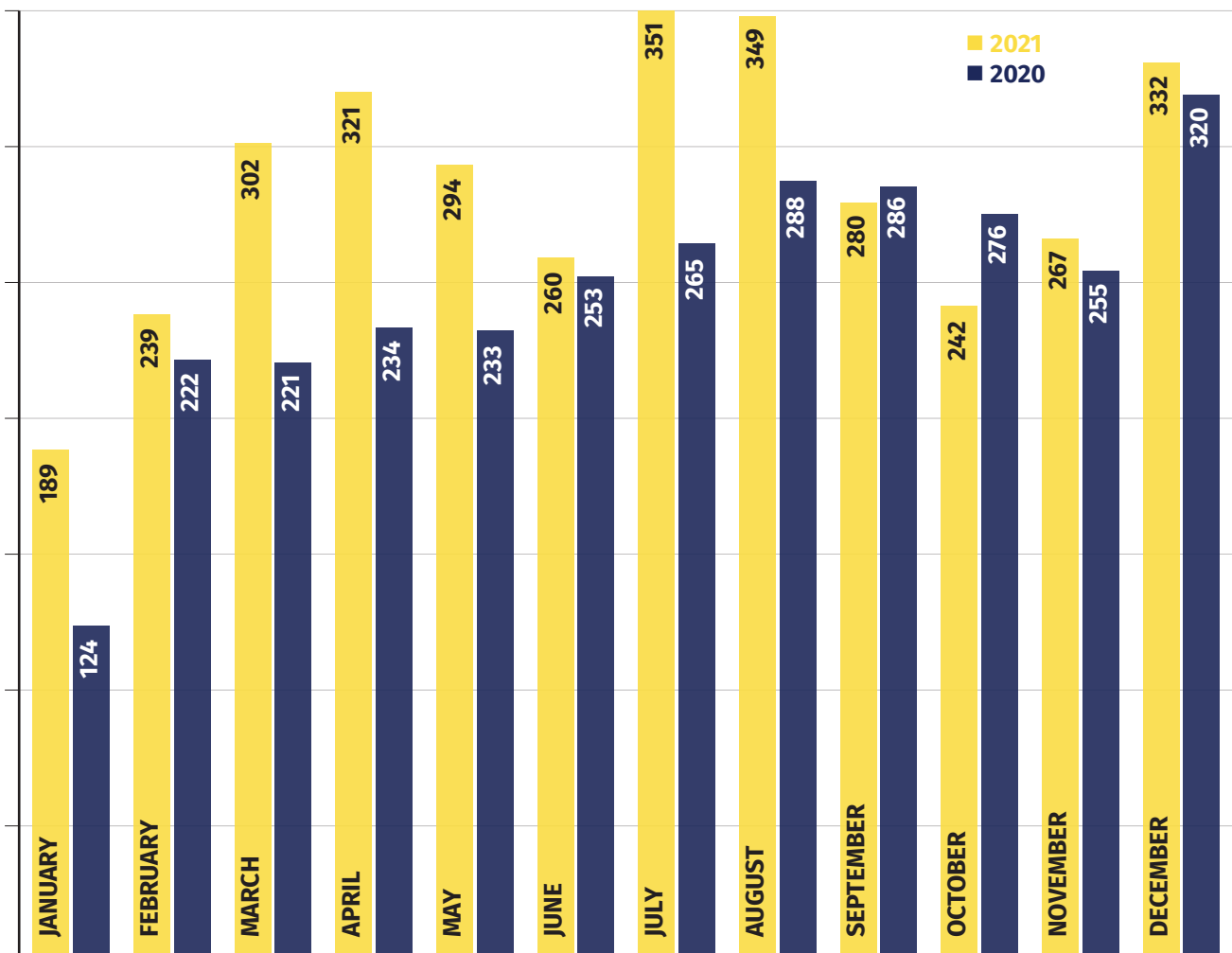


By analysing the trend of the complaints submitted by the business operators and lodged with N.C.S.C. in the course of the years 2020 and 2021 it can be noticed that in the course of last year the number of the complaints increased significantly in both semesters, compared to the similar periods of the previous year, despite the economic blockages generated by the COVID-19 pandemic, 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, and the changes brought by Government Emergency Ordinance no. 3/2021 which increased the maximum value limit of the bond up to the amount of 2,000,000 lei.

Thus, comparing the total trend in 2021 regarding the number of complaints lodged by business operators with the Council with the one registered for the year 2020, their increase with 15.1% can be

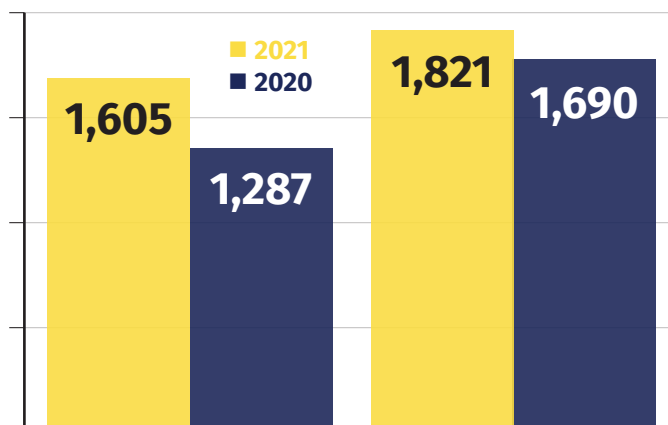
ascertained (+449 complaints). Although the increase of the number of complaints lodged with N.C.S.C. in 2021 does not seem consistent, this must be regarded however in relation to the fact that it was produced on the background of the economic downturn generated by the COVID-19 pandemic, leading to an insignificant "increase" of the number of procedures commenced, developed and finished via the Electronic Public Procurement System (S.E.A.P).

THE TREND OF THE COMPLAINTS LODGED BY BUSSINESS OPERATORS WITH THE N.C.S.C. IN THE PERIOD 2020 - 2021



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 2021 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 PERIOD 2020 - 2021



As noticed, the number of complaints lodged by the business operators with N.C.S.C. increased with 24.71% (+318 complaints) in the first semester of 2021, compared to the similar period in the previous year, while the increase in the second semester was of 7.75% (+131 complaints). We emphasise once more that this increase of the number of complaints lodged with N.C.S.C. throughout the year 2021 in comparison with the previous year has occurred under the background of maintaining the obligation for the business operators to establish the bond, but also due to the state of alert generated by the COVID-19 pandemic, which lead to the stagnation of the economic growth, and the increase of only 2.96% of the procedures commenced under S.E.A.P.

As previously commented in public statements, 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. The bond regulated by Law no. 101/2016 proves its usefulness only if the contracting authority requests that the court acknowledges the existence of a prejudice caused by the business operator which lodged the complaint, as well as the payment of repair compensations.

Consequently, in the large majority of files and at the Council’s request regarding the potential claims to refund the bond, the contracting authorities specifically declared that they did not suffer any prejudice following the complaint/complaints lodged by the business operators during a public procurement procedure 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 against an award procedure. Hence, it can be concluded that the contracting authorities have either 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 new litigations.

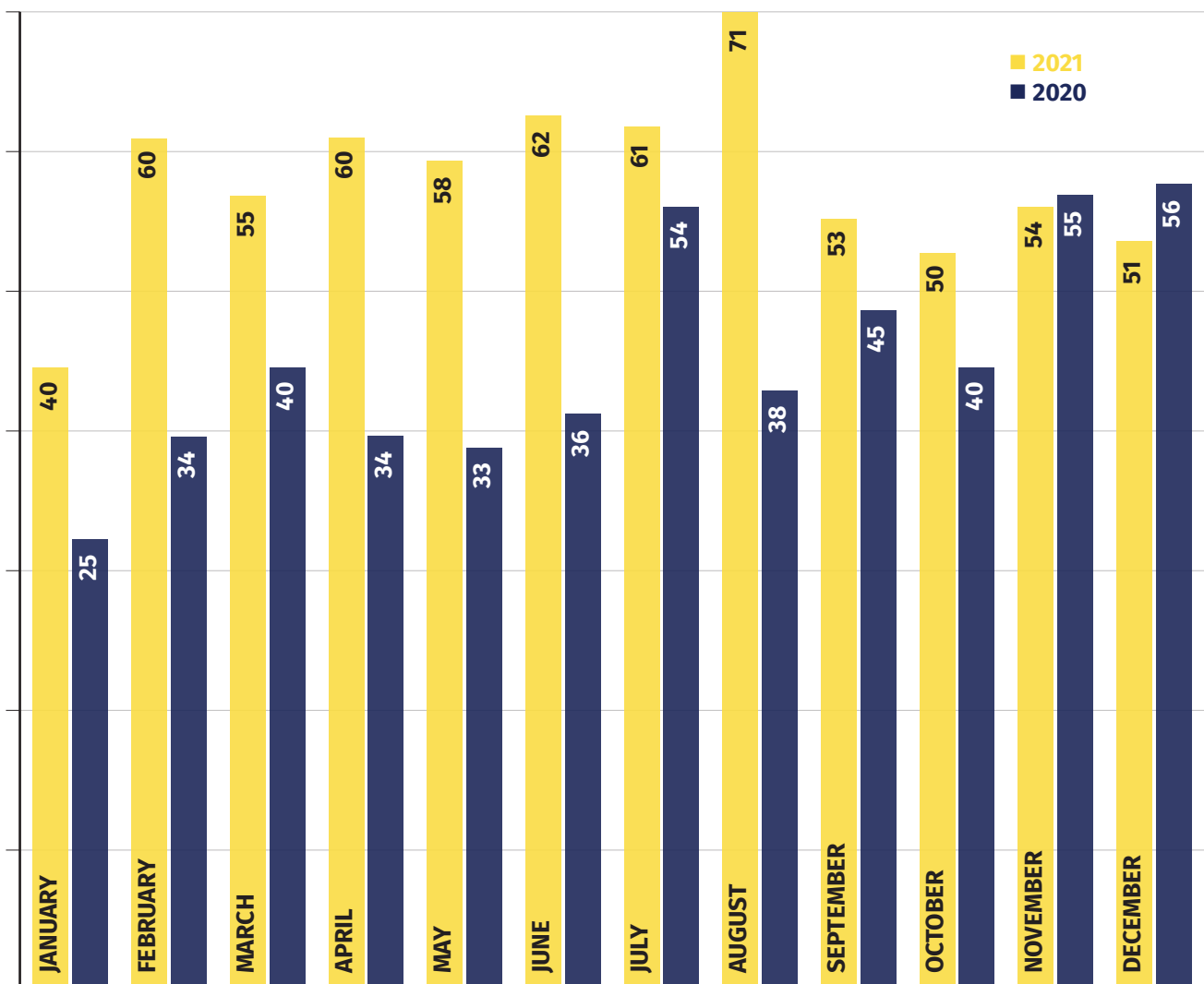
Taking this aspect into account, we can remark that the purpose of introducing the bond was only partially achieved by the legislator, in the sense that the legal provisions did not generate a reserve from the business

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 or the existence of a material prejudice caused by lodging a complaint.

Nevertheless, in accordance to Article 611 paragraph (8) of Law no. 101/2016 as amended and supplemented, a number of 44 bons amounted to a grand total of 759,887.68 lei (equivalent of 154,436.16 euro), for which the complainants did not request their refund in the three years term calculated from the date when the bond could have been requested, became revenue to the state budget in the year 2021.

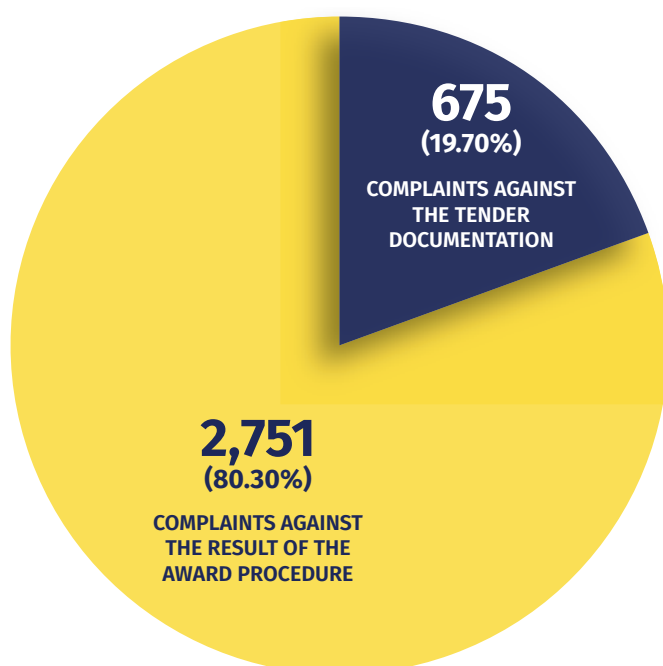
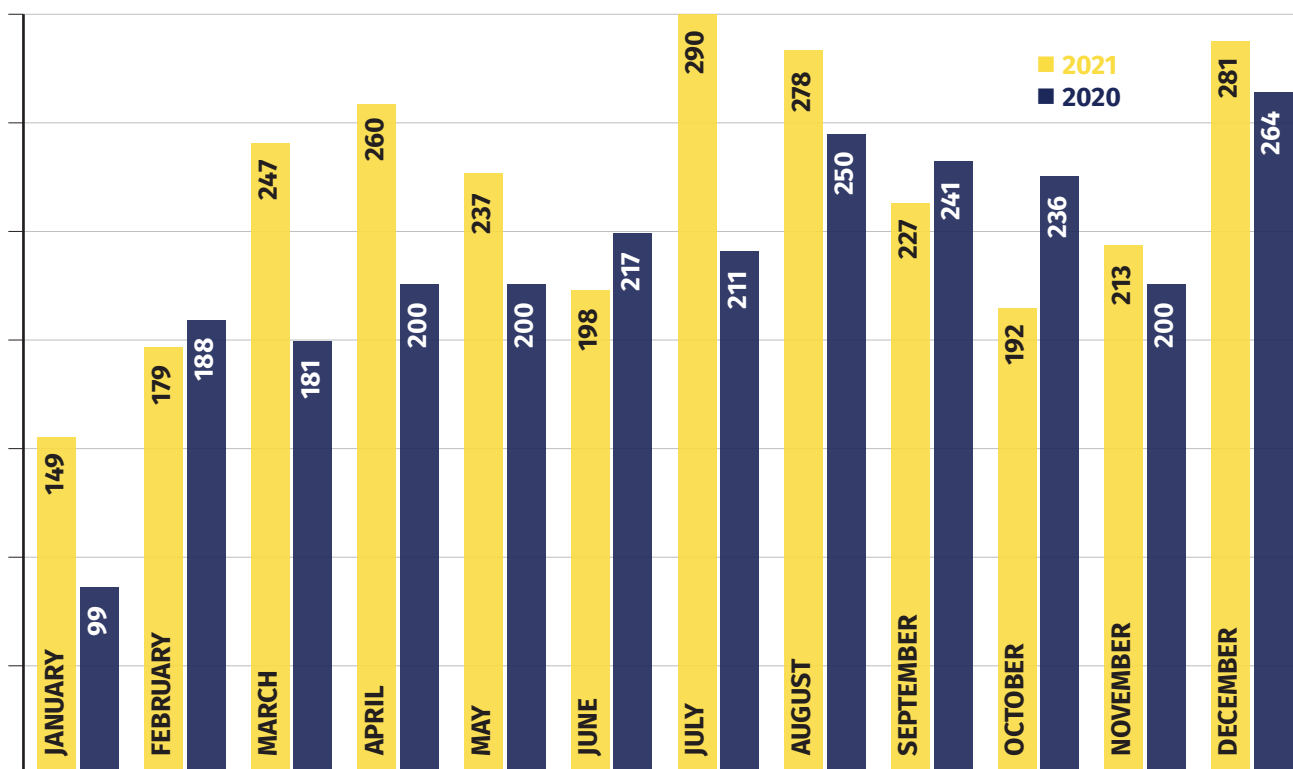
Regarding the complaints lodged by the business operators with the Council against the tender documentation and the result of the award procedure, the official data show that, compared to the previous year, a substantial increase of 37.75% was registered in 2021 concerning the number of complaints submitted against the tender documentation (+185 complaints).

THE TREND OF COMPLAINTS LODGED BY BUSSINESS OPERATORS AGAINST THE TENDER DOCUMENTATION IN THE PERIOD 2020 - 2021



At the same time, we have witnessed an increase with 10.61% (+264 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 PERIOD 2020 - 2021

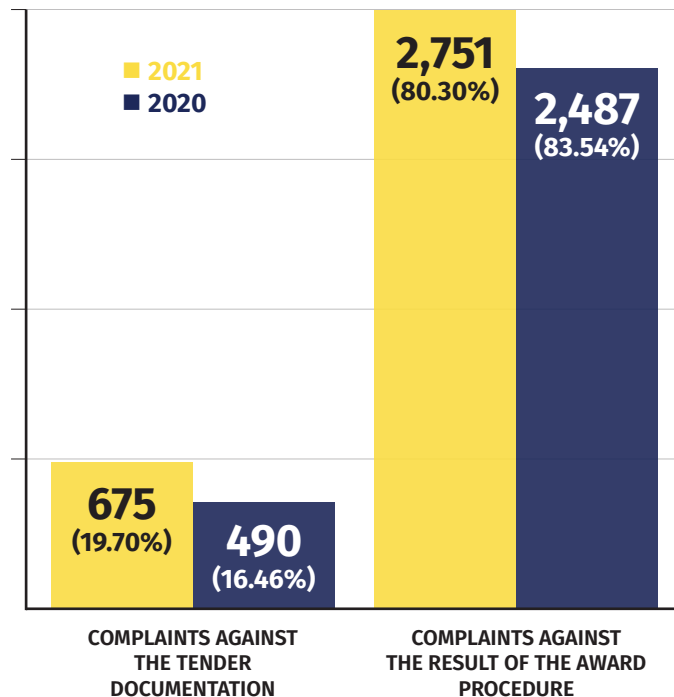


THE SITUATION OF THE COMPLAINTS LODGED AGAINST THE TENDER DOCUMENTATION AND THE RESULT OF THE AWARD PROCEDURE IN THE YEAR 2021

Overall, in the year 2021, a percentage of 80.30% from the 3,426 complaints lodged with the Council (2,751 complaints) were submitted against the result of the award procedure, while 19.70% (675 complaints) were submitted against the tender documentations.

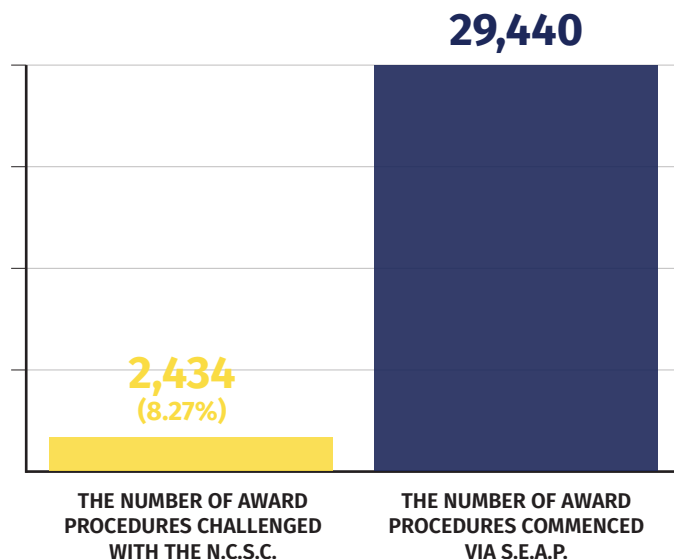
Official data show that although the number of complaints lodged against the tender documentation and the result of the procedure registered significant increases in the year 2021 in comparison with the previous year, still their percentage in regards to the total number of complaints remained under 20% in relation to the complaints lodged against the tender documentation and of approximately 80% concerning the complaints lodged against the result of the award procedure.

THE PERCENTAGE OF THE COMPLAINTS LODGED BY BUSINESS OPERATORS AGAINST THE TENDER DOCUMENTATION AND THE RESULT OF THE AWARD PROCEDURE IN THE PERIOD 2020-2021

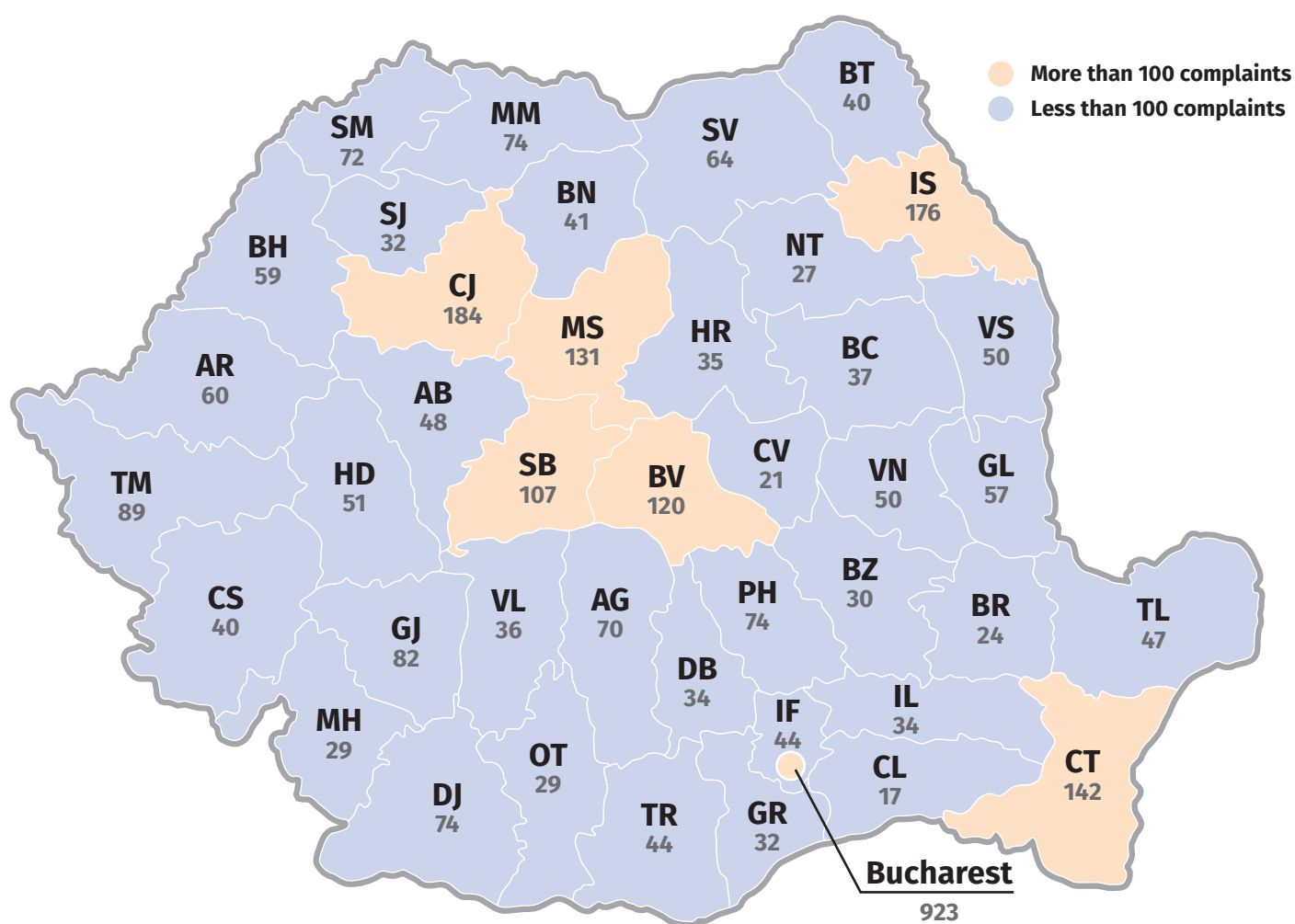


Relating the number of the challenged award procedures with the Council in the year 2021 at the number of the award procedures commenced via S.E.A.P., one may notice that, out of the 29,440 award procedures that were initiated in the Electronic Public Procurements System, a number of 2,434 (unique procurement procedures) were challenged with the Council, meaning a percentage of 8.27%.

THE SITUATION OF THE AWARD PROCEDURES CHALLENGED WITH N.C.S.C. IN THE YEAR 2021 RELATED TO THE TOTAL NUMBER OF 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 2021 as following:

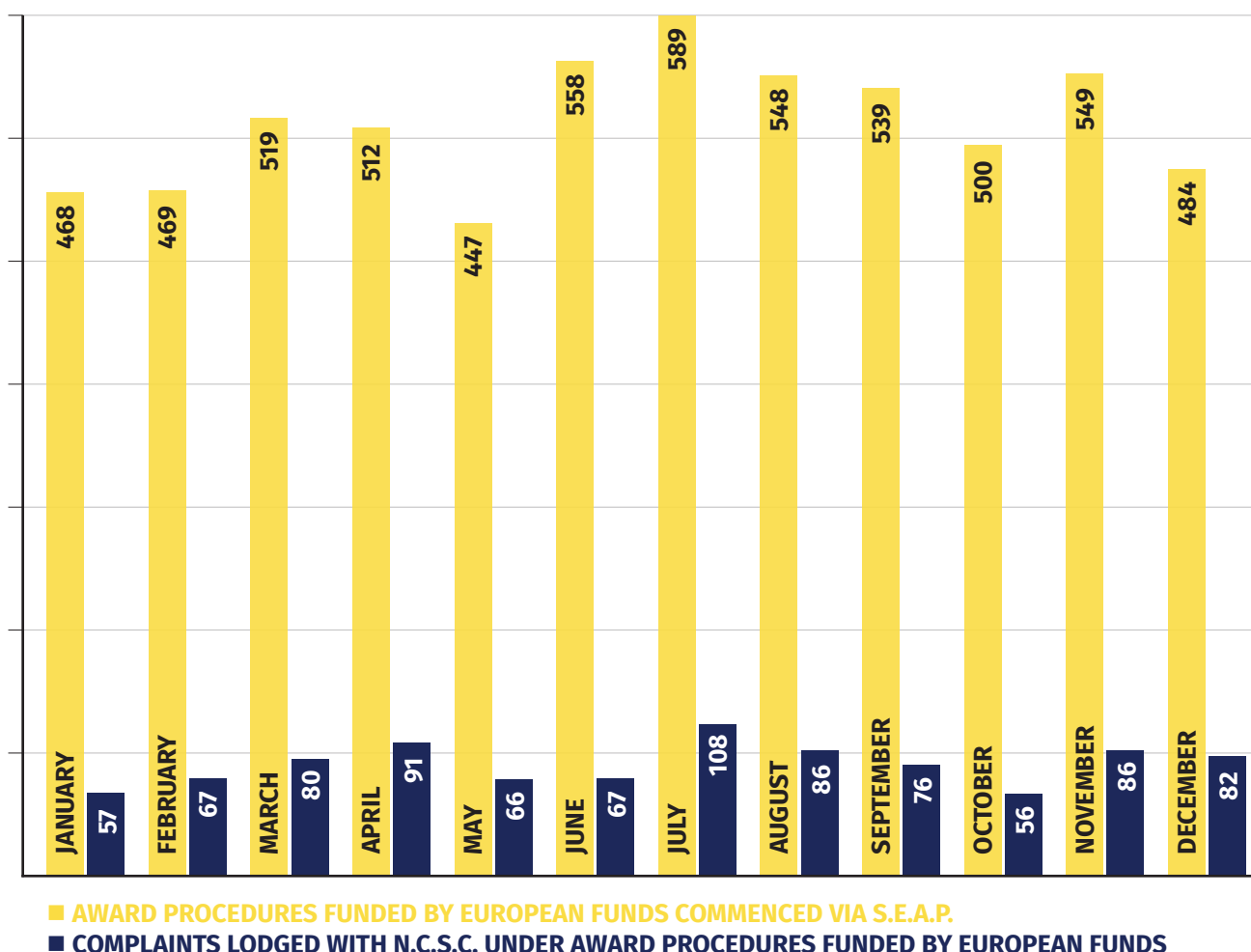


COUNTY	COMPLAINTS	COUNTY	COMPLAINTS	COUNTY	COMPLAINTS
BUCHAREST	923	SUCEAVA	64	BACAU	37
CLUJ	184	ARAD	60	VALCEA	36
IASI	176	BIHOR	59	HARGHITA	35
CONSTANTA	142	GALATI	57	DAMBOVITA	34
MURES	131	HUNEDOARA	51	IALOMITA	34
BRASOV	120	VASLUI	50	GIURGIU	32
SIBIU	107	VRANCEA	50	SALAJ	32
TIMIS	89	ALBA	48	BUZAU	30
GORJ	82	TULCEA	47	MEHEDINTI	29
DOLJ	74	ILFOV	44	OLT	29
MARAMURES	74	TELEORMAN	44	NEAMT	27
PRAHOVA	74	BISTRITA-NASAUD	41	BRAILA	24
SATU MARE	72	BOTOSANI	40	COVASNA	21
ARGES	70	CARAS-SEVERIN	40	CALARASI	17

With regard to the award procedures funded by European funds, the official data reveal that, in the year 2021, 6,182 award procedures were commenced via S.E.A.P. Within the respective procedures, 918 complaints were lodged with N.C.S.C., meaning that a percentage of 14.84% of the procedures funded by European funds, commenced and developed via the Electronic Public Procurements System, have been challenged.

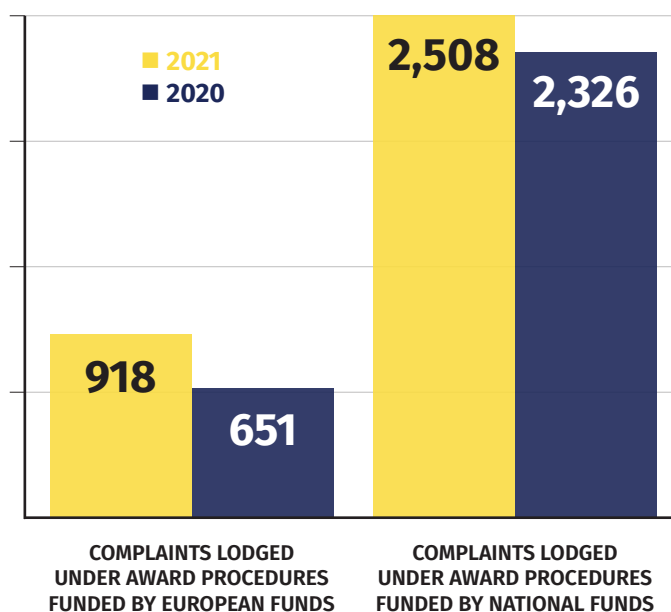
In the table below, one can notice the monthly trend of the complaints submitted to N.C.S.C. under the procedures funded by European funds for the year 2021, compared to the procedures commenced via S.E.A.P. and funded by the same sources.

THE NUMBER OF COMPLAINTS LODGED WITH N.C.S.C. IN THE YEAR 2021 UNDER AWARD PROCEDURES FUNDED BY EUROPEAN FUNDS, COMPARED TO THE NUMBER OF AWARD PROCEDURES FUNDED BY EUROPEAN FUNDS COMMENCED VIA S.E.A.P.

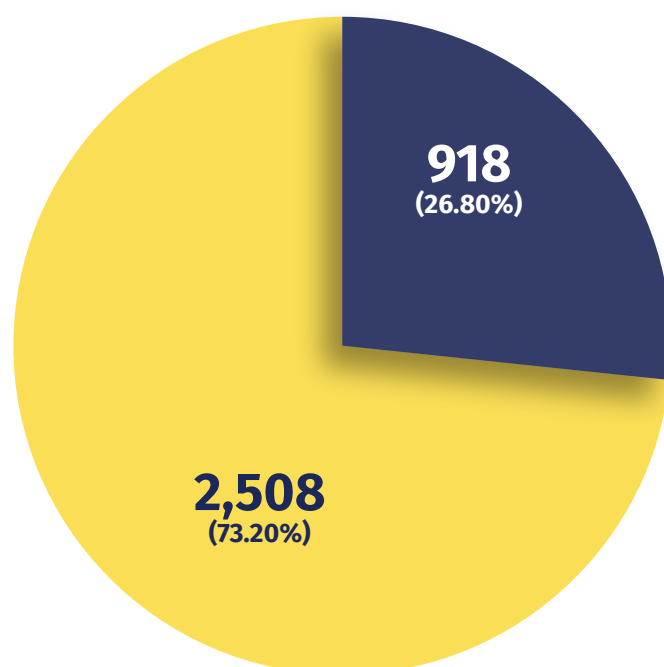


In relation to the funding source for the award procedures commenced in order to conclude public procurement contracts in the year 2021, a number of 918 complaints were lodged against the award procedures funded by European funds (26.80% of the total number of complaints submitted with the Council), while the number of complaints against the award procedures of public procurement contracts funded by national public funds was of 2,508 complaints (73.20% of the total number of complaints lodged with the Council).

**THE TREND OF THE COMPLAINTS
LODGED WITH N.C.S.C. RELATED
TO THE FUNDING SOURCE
OF THE AWARD PROCEDURES
IN THE PERIOD 2020-2021**



Compared to the previous year, the official data for the year 2021 reveal a 41.01% of the number of the complaints submitted under award procedures funded by European funds (+267 complaints), whereas the number of the complaints submitted in the award procedures funded by national public funds increased with 7.82% (+182 complaints).



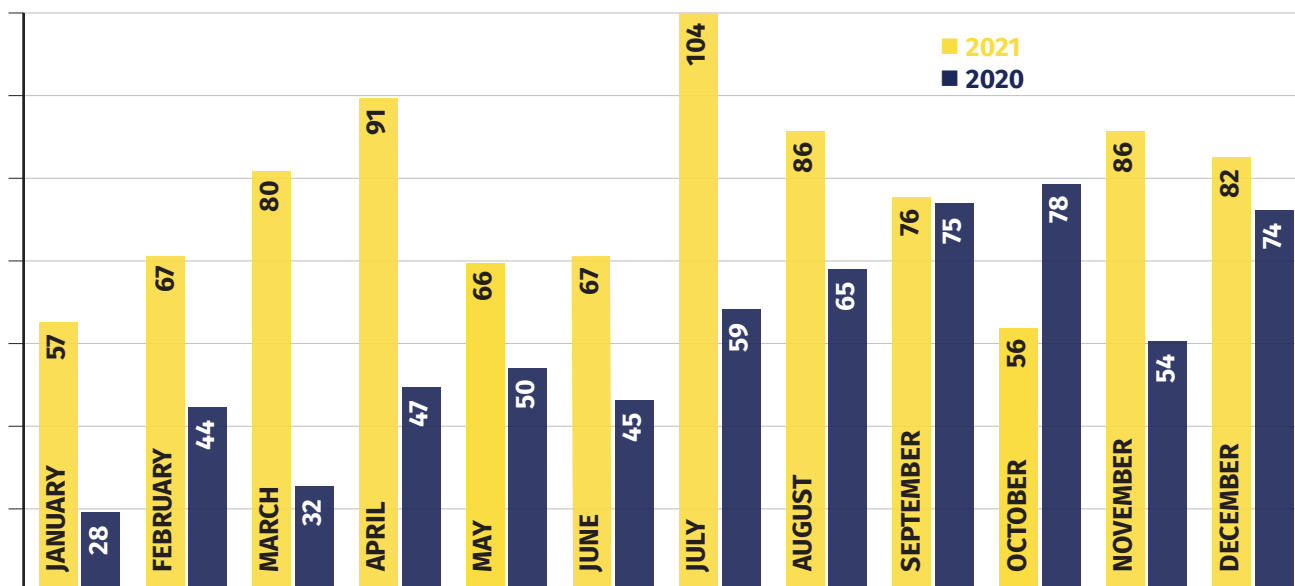
**THE SITUATION OF THE
COMPLAINTS LODGED BY
BUSINESS OPERATORS
WITH N.C.S.C. IN THE
YEAR 2021 RELATED TO THE
FUNDING SOURCE OF THE
AWARD PROCEDURES**

- COMPLAINTS LODGED UNDER AWARD PROCEDURES FUNDED BY NATIONAL FUNDS
- COMPLAINTS LODGED UNDER AWARD PROCEDURES FUNDED BY EUROPEAN FUNDS

After analysing the last presented chart, an alarming fact result, namely the significant increase of the complaints submitted under award procedures funded by European funds, which should raise serious question marks either regarding the way the contracting authorities are drawing the tender documentations, or regarding the way in which the evaluation of the bids is performed in order to award the respective procedures.

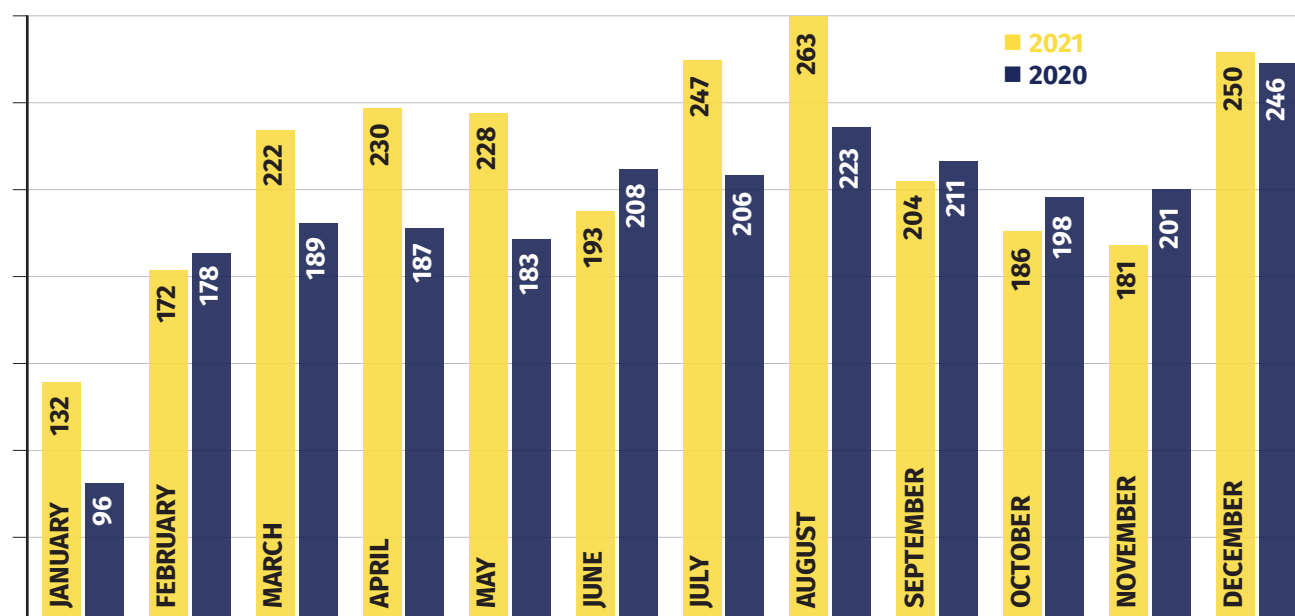
In terms of the monthly trend, the number of the complaints submitted to N.C.S.C. under the award procedures for the public procurement contracts funded by European funds developed in 2021, in comparison to the previous year, as shown below:

THE TREND OF COMPLAINTS LODGED BY BUSINESS OPERATORS WITH N.C.S.C. UNDER THE AWARD PROCEDURES FUNDED BY EUROPEAN FUNDS IN THE PERIOD 2020-2021



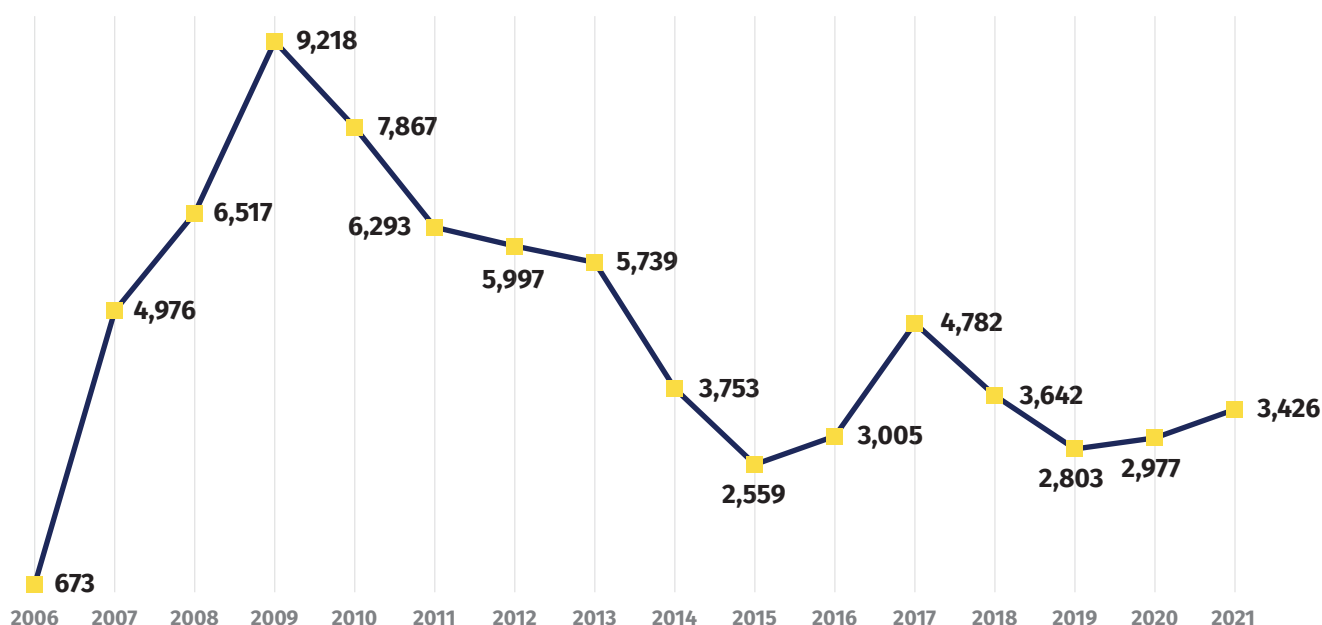
Similarly, the number of the complaints submitted to N.C.S.C. under the award procedures for the public procurement contracts funded by national funds (local/state budget) developed in the period 2020-2021 as follows:

THE TREND OF THE COMPLAINTS LODGED WITH N.C.S.C. BY BUSINESS OPERATORS IN THE PERIOD 2020 - 2021 UNDER THE AWARD PROCEDURES FUNDED BY NATIONAL PUBLIC FUNDS



Statistically, from its establishment and until the 31st of December 2021, 74,227 complaints were submitted to N.C.S.C. by business operators against various public procurement procedures, as revealed by the chart below.

THE TREND OF THE COMPLAINTS LODGED BY BUSSINESS OPERATORS WITH N.C.S.C. IN THE PERIOD 2006-2021



By analysing the previous 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 depending on the number of the public procurement procedures commenced in S.E.A.P., in relation to the legislative framework concerning public procurements, the absorption level of European funds, and the investments” level from the national budget.

In the last years, 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 unjust and groundless, the proof being the fact that the authorities did not consider to solve the real issues encountered by the domestic public procurements system, namely the lack of professionals in the field of public procurements but also the vicious management of public funds, issues which have led to a high number of irregularities in the commenced public procurement procedures and, implicitly,

in a lack of trust of the business operators in the public procurements system.

Furthermore, one should not overlook the fact that the contracting authorities failed on numerous occasions to correctly and concretely implement the decisions issued by N.C.S.C., often choosing to unjustly challenge them, a fact which unnaturally prolonged the finishing of multiple investments projects financed by European or national funds.

Although the Council permanently made sustained efforts for the implementation of European good practices

for accelerating the development of the challenged procedures, still on the course of 2021 there were numerous cases in which the public procurements procedures 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.

Official data show that, in the course of 2021, there were 120 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. decisions 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.

In order to shape a clear opinion, it must be mentioned that on the course of 2021 there were procedures for which N.C.S.C. issued more than one decision, as follows:

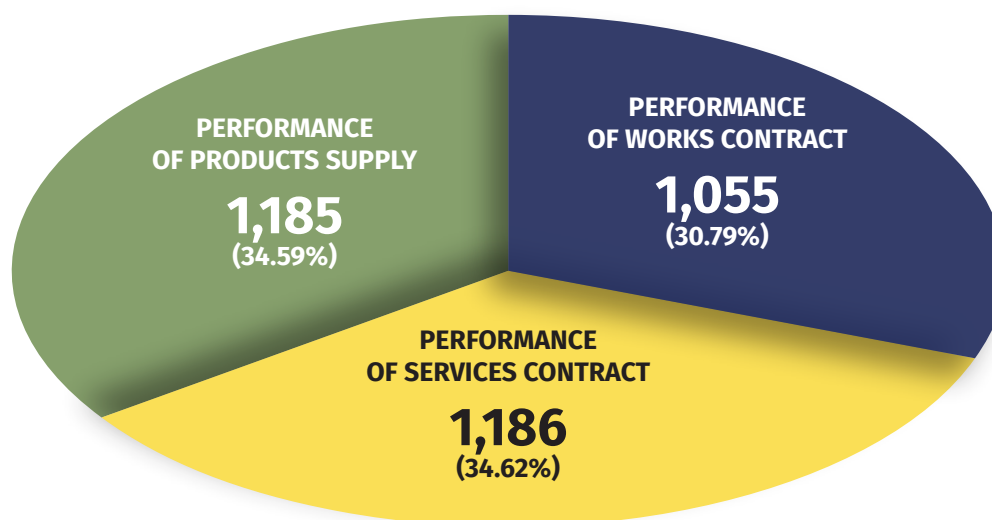
- 1 (one) award procedure under which N.C.S.C. ordered 5 (five) times that the bids shall be reassessed, for which purpose it rendered 5 (five) decisions;
- 9 (nine) award procedures under which N.C.S.C. ordered 4 (four) times that the bids shall be reassessed, for which purpose it rendered 4 (four) decisions;
- 78 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;
- 67 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.

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

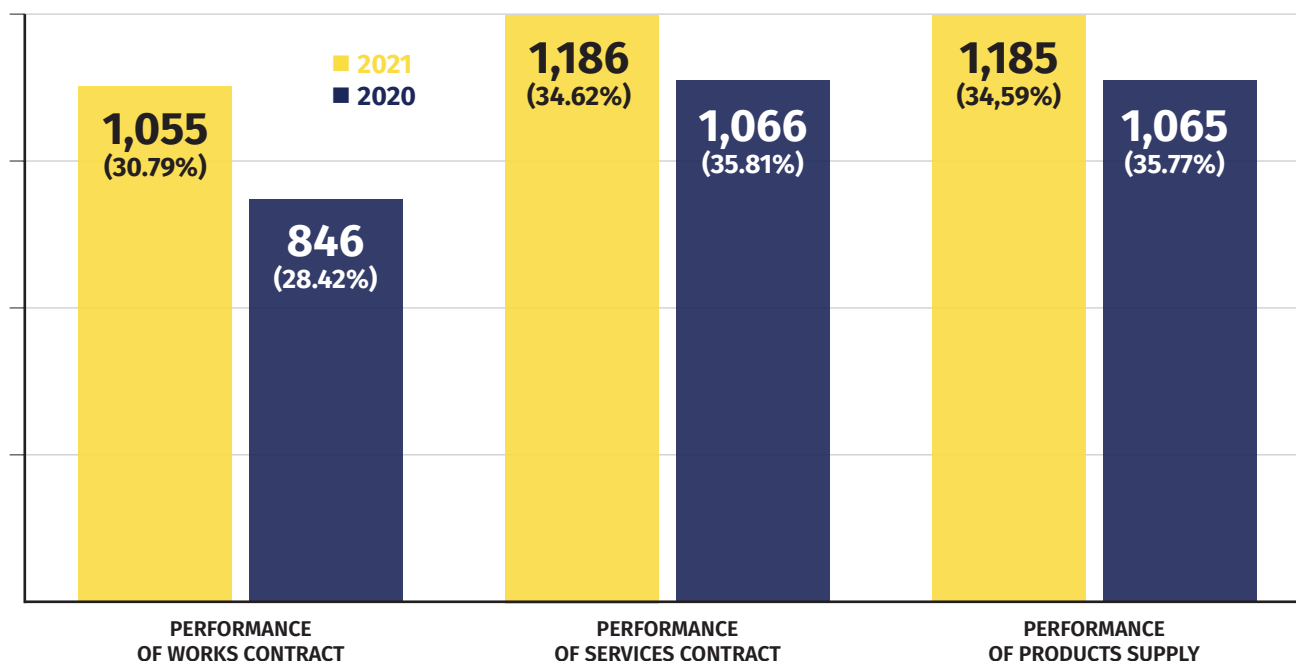
Official data for the year 2021 show that the number of complaints lodged by the business operators according to the subject of the public procurement contract had the following structure:

- award procedures for the public procurement contracts with the subject performance of works – 1,055 complaints (28.42%);
- award procedures for the public procurement contracts with the subject performance of services – 1,186 complaints (34.62%);
- award procedures for the public procurement contracts with the subject supply of products – 1,185 complaints (34.59%).

THE SITUATION OF COMPLAINTS LODGED BY BUSSINESS OPERATORS WITH N.C.S.C. IN THE YEAR 2021, RELATED TO THE CONTRACT TYPE



THE TREND OF THE COMPLAINTS LODGED BY BUSINESS OPERATORS WITH N.C.S.C. RELATED TO THE CONTRACT TYPE IN THE PERIOD 2020-2021



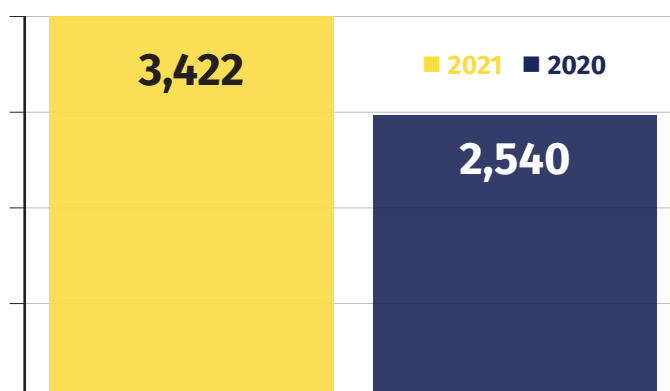
By analysing the chart related to the trend of the complaints submitted according to the type/subject of the public procurement contract, it can be noticed that upon the increase of the number of complaints lodged by business operators in 2021, in comparison to the previous year, we witnessed an increase of the complaints lodged against the award procedures commenced for concluding performance of works, performance of services and supply of products contracts.

Therefore, the number of the complaints lodged by business operators against the award procedures commenced for concluding performance of works contracts registered a growth of 24.70% (+209 complaints) in 2021, in comparison with the previous year, while the complaints lodged by business operators against the award

procedures commenced for concluding performance of services and supply of products contracts registered an increase of 11.26% (+120 complaints), respectively 11.27% (+120 complaints).

On the course of the year 2021, an average of approximately 311 complaints (files)/year were randomly and digitally 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 26 complaints (files)/chamber. Compared to the previous year, it can be observed that in 2021 the average annual load for each chamber increased with 14.80% (+40 complaints/files/year), meaning a monthly increase of 13% (+3 complaints/files/month).

THE TREND OF THE RESOLUTIONS ISSUED BY N.C.S.C. IN THE PERIOD 2020 - 2021



Obviously, the increase of the number of complaints/files generated, at the level of the Council, the increase of the number of deeds issued by the Council but also their complexity, requiring a larger volume of activities (correspondence, resolutions, managing securities - bonds, their reimbursement, etc.).

Thus, in the year 2021 the Council issued 3,422 resolutions, meaning an increase of 34.72% compared to the previous year, when 2,540 resolutions were issued, and of 61.03% compared to the year 2019, when 2,125 resolutions were issued.

Concerning the complexity and the work volume at the level of the Council on the course of 2021, it must be mentioned that, based on Article 17 of Law 101/2016, applications of voluntary intervention in dispute were formulated within 916 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 perform an analysis regarding the number of voluntary intervention in dispute which were formulated by the business operators interested to participate/participants under the award procedure, it may be observed that in the period 2019-2021 their number increased with 26.34% (+191) compared to the previous year and with 62.70% (+353) compared to 2019.

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 2021, 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:

523 complaints (15.26% of the total number of complaints lodged with N.C.S.C.) and 195 applications of voluntary intervention under the award procedures of public procurement contracts in the field of road infrastructure, with the subject of the performance of works, services and supply of products. Of the 523 complaints, 59 decisions were lodged against the tender documentation and 464 against the result of the procedure.

As a result of joining several files, in accordance with the provisions of Article 17 paragraph (2) of Law no. 101/2016, as amended and supplemented, the Council rendered a number of 397 decisions and 392 resolutions.

An important mention should be made concerning this field: in comparison with 2020, in the year 2021 the number of complaints lodged by business operators under the procedures commenced and developed in this activity field increased with approximately 418% (+422 complaints), while the number of applications of voluntary intervention increased with more than 261% (+141). At the same time, the number of decisions and resolutions rendered by the Council increased, in comparison with the previous year, with 459% (+326 decisions), respectively with 553% (+332).

THE FIELD OF RAILWAY/UNDERGROUND RAILWAY INFRASTRUCTURE:



58 complaints and 31 applications of voluntary intervention under the award procedures of public procurement contracts developed in the field of railway infrastructure, with the subject of the performance of works, services and supply of products. Of the 58 complaints, 13 were lodged against the tender documentation and 45 against the result of the procedure. As a result of joining several files, in accordance with the provisions of Article 17 paragraph (2) of Law no. 101/2016, as amended and supplemented, the Council rendered a number of 48 decisions and 38 resolutions.

THE MEDICAL FIELD (INCLUDING PROCUREMENTS RELATED TO COMBATING THE COVID – 19 PANDEMIC):

672 complaints (19.61% of the total of registered complaints with the Council) and 113 applications of voluntary intervention under the award procedures of public procurement contracts developed in the medical field, with the subject of the performance of works, services and supply of products. Of the 672 complaints, 322 were lodged against the tender documentation and 417 against the result of the procedure. As a result of joining several files, in accordance with the provisions of Article 17 paragraph (2) of Law no. 101/2016, as amended and supplemented, the Council rendered a number of 515 decisions and 418 resolutions.

Taking into account that the year 2021 was also under the sign of the COVID – 19 pandemic, the number of public procurement procedures developed in the medical field and with the subject of the performance of works, services and supply of products has increased. Consequently, considering the economic problems which the national has confronted, the battle for the public money was fierce. Therefore, many business operators challenged many of the public procurement procedures developed in this field.

Hence, compared to 2020, in the year 2021 the number of complaints lodged by business operators under the procedures developed in the medical field increased with approximately 218.50% (+461 complaints), while the number of applications of voluntary intervention increased with more than 391.3% (+90). At the same time, the number of decisions and resolutions rendered by the Council increased, in comparison with the previous year, with approximately 220% (+354 decisions), respectively with 302% (+314).

It is worthy to mention that during the pandemic a large number of award procedures in the medical field were carried out through negotiation, without the publication of an announcement, therefore the number of the complaints would have been definitely much larger if the procedures would have been developed through transparent award procedures with the publication of an announcement.

THE FIELD OF EDUCATION - RESEARCH:

74 complaints and 20 applications of voluntary intervention under the award procedures of public procurement contracts developed in the field of education-research, with the subject of the performance of works, services and supply of products. Of the 74 complaints, 12 were lodged against the tender documentation and 62 against the result of the procedure. As a result of joining several files, in accordance with the provisions of Article 17 paragraph (2) of Law no. 101/2016, as amended and supplemented, the Council rendered a number of 58 decisions and 35 resolutions.

THE FIELD OF DEFENCE, PUBLIC ORDER AND NATIONAL SECURITY:

186 complaints and 43 applications of voluntary intervention under the award procedures of public procurement contracts developed in the field of defence, public order and national security, with the subject of the performance of works, services and supply of products. Of the 186 complaints, 58 were lodged against the tender documentation and 128 against the result of the procedure. As a result of joining several files, in accordance with the provisions of Article 17 paragraph (2) of Law no. 101/2016, as amended and supplemented, the Council rendered a number of 166 decisions and 119 resolutions.

Although the number of the complaints lodged by the business operators and of the applications of voluntary intervention assigned for each chamber for solving complaints increased in comparison to the previous year, simultaneously with the number of rendered decisions and resolutions, and the complexity of the files was high, the 11 chambers for solving complaints within the Council have accurately respected the terms for settling the complaints, as provided for in Article 24 paragraph 1 of Law no. 101/2016. In this respect, it must be mentioned that the solving terms of the complaints lodged by business operators with N.C.S.C. were some of the shortest in the European Union, as Romania is ranked before states like Austria, Germany or Latvia.

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

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

Therefore, any complaint which is put forward will 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. Hence, 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, or to compel the contracting authority/entity¹⁵ to issue a document or take remedy measures, acknowledging the claimed right or legitimate interest.

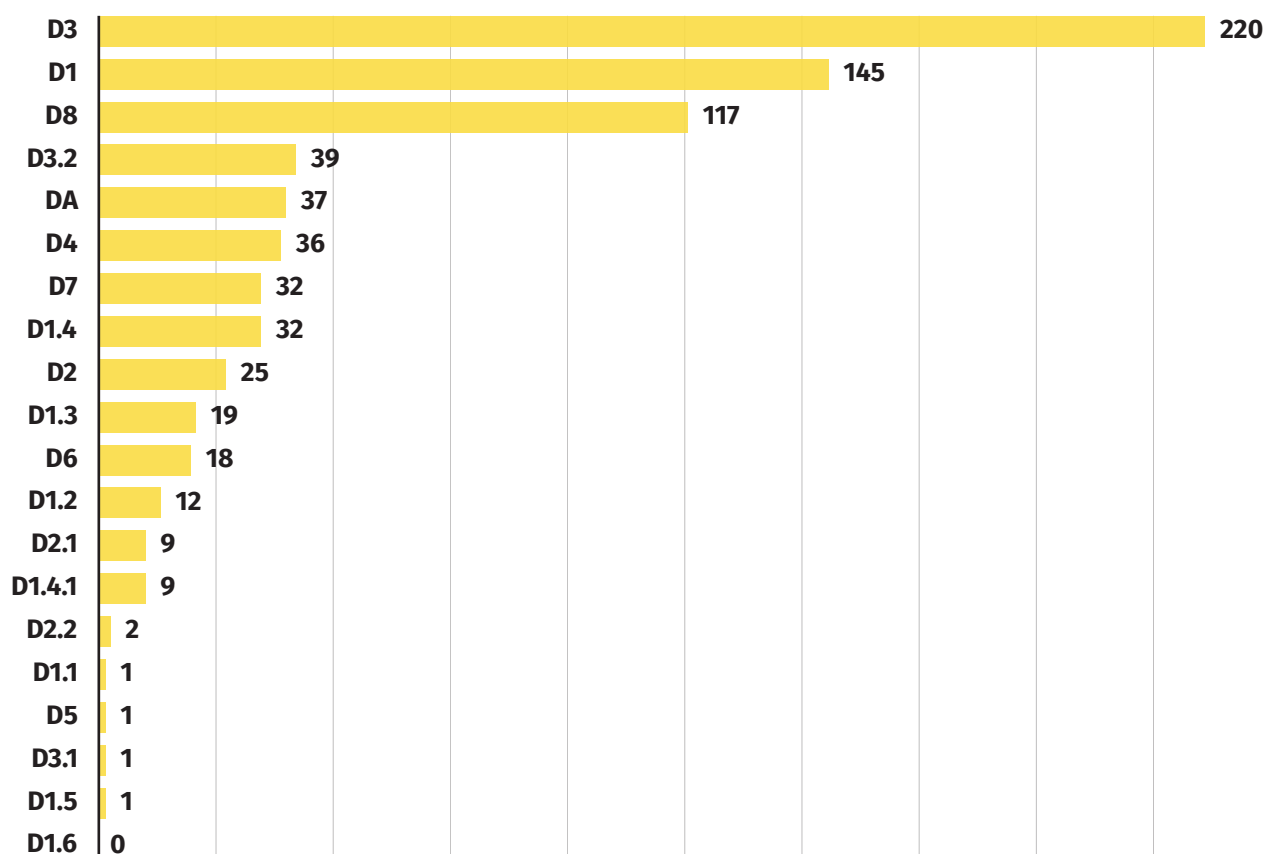
In the year 2021, After analysing the subject matters of the 3,426 complaints lodged in the year 2020 by the business operators with the Council, it was concluded that 675 complaints concerned the tender documentation, while 2,751 complaints concerned the result of the procedure.

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 675 complaints lodged by business operators were addressed to the requirements of the tender documentation, respectively:

CODE	CRITICISM	NUMBER OF CRITICISMS
D1.6	restrictive requirements on the qualification/selection criteria related to environment protection standards	0
D1.5	restrictive requirements on the qualification/selection criteria related to quality assurance standards	1
D3.1	missing mention "or equivalent", in such cases as provided by the law in force	1
D5	form of establishing the bid bond	1
D1.1	restrictive requirements on the qualification/selection criteria related to the candidate's or the bidder's personal status	1
D2.2	other requirements related to the award criterion	2
D1.4.1	restrictive requirements on the qualification/selection criteria related to similar experience	9
D2.1	irrelevant factors of assessment, missing calculation algorithm, with non-transparent or subjective calculation algorithm	9
D1.2	restrictive requirements on the qualification/selection criteria related to the ability to pursue professional activity	12
D6	infliction of unfair or excessive contractual provisions	18
D1.3	restrictive requirements on the qualification/selection criteria related to economic and financial condition	19
D2	requirements on the award criterion	25
D1.4	restrictive requirements on the qualification/selection criteria related to technical and/or professional capacity	32
D7	failure to split the procurement by lots, in case of similar products/works	32
D4	missing clear, complete, unambiguous answer from the contracting authority on the requests for clarification of the tender documentation provisions	36
DA	other criticism to the documentation	37
D3.2	other restrictive requirements in terms of technical specifications	39
D8	other reasons related to the tender documentation	117
D1	restrictive requirements on the qualification criteria	145
D3	restrictive requirements in terms of technical specifications	220

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.

1) N.C.S.C. DECISION NO. 1,704/2021 INVITATION TO THE NEGOTIATION PROCEDURE FOR A SINGLE BUSINESS OPERATOR WITHOUT THE PRIOR PUBLICATION OF AN ANNOUNCEMENT VIOLATES THE PRINCIPLES OF PUBLIC PROCUREMENTS

Proceeding to the research of the substance, taking into account that the legislator did not condition the review of the complaint criticisms in the order presented in its content, the Council will analyse, with priority, the criticism regarding the way in which the contracting authority respected the provision of Article 94 of Government Decision no. 395/2016, according to which: "The initiation of the negotiation procedure without prior publication is made by sending an invitation for participating at the negotiations, together with the award procedure, to one or, **whenever possible, to several business operators**".

In the Council's view, even of the legal norms do not impose to the contracting authority the obligation to invite to the procedure a certain business operator, the phrase *sending an invitation for participating at the negotiations, together with the award procedure, to one or, whenever possible, to many business operators* is translated exactly through **the obligation of the authority to always invite more business operators, if they exist.**

The type of services subject to the acquisition, namely sanitation services and specifically activities of sweeping, washing, sprinkling, and maintaining the public ways, as well as of collecting animal carcasses off the public domain and of handing them over to the rendering units or to the neutralisation installations from the municipality of X, may be provided by more business operators, as there is no competition deficit in this field.

Besides, the contracting authority made use of this procedure not as a consequence of the fact that the aforementioned services can be provided only by a certain business operator, but as a strict measure of necessity, until the end of the ongoing procurement procedure opened with the same object.

Consequently, the obligation of the contracting authority to invite for negotiating as many business operators as possible, in order to ensure an adequate competition, subsists in this case. Proving an eventual impossibility to send invitations to multiple societies in the field is the responsibility of the contracting authority. Yet, not only the municipality of X does not prove an objective impossibility to also invite other business operators to the negotiations, but it does not even present any support in this matter.

It results from the procedure documents that the participation invitation was sent

to only one business operator, S.C. Y S.A. This situation was inclusively emphasised in the Contracting Strategy no. .../2016, although within the same document the chosen award criterion is “the best quality/price ratio” and the evaluation factors which will contribute to establishing the bid hierarchy are described.

As nowhere within the drafted documents the acquirer does not offer any minimum justification for the decision to carry out negotiations with a singer business operator, the Council see itself forced to accede to the position expressed by the complaining bidder in the sense that, in the current procedure, the contracting authority did not precisely respect the provisions of Article 94 of the Government Decision no. 395/2016. The respective legal article does not confer a discretionary right to the organiser when it develops a negotiation procedure without the publication of a participation announcement, regulated by Article 104 of Law no. 98/2016.

In the same context, the Council observes that the administered evidence, in this case the addresses registered at the headquarters of the municipality of X under no. .../.../2021 and no. .../15.06.2021, prove without any doubt that the contracting authority had knowledge of the intention and interest of the complaining bidder to participate at the eventual procedures organised in order to award the right to provide the sanitation service on the territory of the municipality. Therefore, considering the provisions of Article 94 of the aforementioned norms, the authority should have invited the complaining bidder to the competition, alongside any other potential bidder in a similar situation.

Otherwise, the omissive act of non-inviting should have been motivated precisely for not to be considered discretionary.

The exercise of any right subject to Article 15 of the Civil Code: **“No right can be exercised with the purpose to harm or damage another or in an excessive and unreasonable way, contrarily to good faith”**, a right which, in the absence of any means of proof which would reveal that S.C. Z S.R.L. could not provide the necessary services for the contracting authority, the latter could not neglect the expressly manifested interest of the respective company to take part in the negotiation.

For this reason, in the presented context of fact and of law, the development legality of the contested negotiation procedure can not be validated, as it is evident that the contracting authority did not respect the provisions of Article 94 of Government Decision no. 395/2016, a situation which could vitiate the entire procedure. That being the case and taking into consideration its stage, respectively the approval of the procedure report no. 36/02.07.2021 on the contract award, the Council notes that, in the reference case, remedy measures can not be taken without affecting the principles of Article 2 paragraph (2) of Law no. 98/2016, therefore the cancellation of the entire procedure is imposed.

DECISION NO. 415/2021 – COURT OF APPEAL TÂRGU MUREŞ

On the substance of the complaint, the petitioner municipality of X invoked urgency in the implementation of a viable solution for the award of the public sanitation services contract, for a limited time span, until the completion of the award procedure through public tendering. In addition, it showed that the responding petitioner S.C. Z S.R.L. does not have a A.N.R.S.C. license in order to provide such services at the level of a county seat municipality and that there aren't any A.N.R.S.C. licensed operators in the area. For this reason, it considers that the allegation of the Council, according to which the invitation of more operators should have been imposed, cannot be upheld.

The National Council for Solving Complaints accepted the complaint and cancelled the public procurement procedure, noting the violation by the contracting authority of the provisions of Article 94 of Government Decision no. 395/2016, by inviting a single business operator to the negotiation.

According to the provisions of Article 94 of Government Decision no. 395/2016: **"The initiation of the negotiation procedure without prior publication is made by sending an invitation for participating at the negotiations, together with the award procedure, to one or, whenever possible, to several business operators."**

Considering the formulation manner of the cited text, the conclusion is imposed, noted also by the Council, that **the invitation to negotiate** of a single or several business operators **is not left to the discretion of the contracting authority**, yet **the invitation of more business operators, if they exist, is mandatory – "whenever possible"**.

This interpretation of the analysed norm is consistent with the principles which form the basis of awarding public procurements contracts, regulated by Article 2 paragraph (2) letters a), b) and d) of Law no. 98/2016, respectively non-discrimination, equal treatment and transparency, ensuring also the economic efficiency conditions to which Article 2 paragraph (2) refers to, through the free competition between the business operators.

Therefore, whenever the contracting authority invites a single business operator for negotiation, it has the obligation to justify this option right in the content of the tender documentation, in order to show if other business operators exist or not, respectively the reason for which other operators active on the market have not been invited.

In this case, the contracting authority did not justify in any way the invitation of a single business operator within the procurement documents. Moreover, it may be deduced from the method of elaborating the documentation that a competition situation was considered. Hence, the award criterion mentioned

in both the technical documentation approved by H.C.L. no. 148/2021 – "Bidders" Instructions", point II.2.5 (tabs 4-5, vol. II file) and the specifications, point 4.7.1 (tab 156 verso, vol. I file) is "the best quality=price ratio", criterion which presumes the comparison of several bids. In addition, in the technical documentation approved by H.C.L. no. 148/2021 – "Bidders" Instructions", section II.2.9 – "Information regarding the limitation of the number of candidates to be invited (excepting the open procedures)" it was mentioned that "it is not the case" (tab 5 verso, vol. II file).

The list of trading companies proposed for participating at the negotiation procedure without the prior publication of a participation announcement, for the delegation of this service, no. .../ADP/2021, comprises a single company, the one which received the invitation, S.C. Y S.A. (tab 101, vol. I file).

In "The Contracting Strategy" no. .../2021 it is revealed that the invitation for participating in the negotiation will be sent to the business operator S.C. Y S.A., according to the Internal Note no. .../2021 of ADP, considering the provisions of Article 94 of Government Decision no. 395/2016 and "the emergency character of the procedure and taking into account the history of sanitation emergency procedures blocked by complaints" (tab 13, vol. II file).

The emergency in awarding the contract and the necessity of ensuring the continuity in providing the sanitation services are aspects which can be analysed for justifying the fulfilment of the conditions concerning the initiation of this procedure, regulated by Article 104 of Law no. 98/2016. But these are not enough to justify the limited access of the business operators to the procedure and the elimination of any competition, as the provisions of Article 94 of Government Decision no. 395/2016, analysed above, force the contracting authority to invite more business operators, excepting the situation in which this is not possible. Yet, as observed by the Council, the contracting authority knew the fact that at least the responding petitioner was interested in participating at the procedure, therefore other business operators did exist.

The fact that inviting more than one business operator also attracts itself the risk of lodging a complaint regarding the development of the award procedure cannot be considered a legitimate reason for the access limitation to the procedure, being contrary to the provisions of Article 2 of Law no. 98/2016.

The Court also underlines the fact that the acts of the contracting authority issued on the initiation and development of the challenged procedure are subject of analysis, therefore the existence or not of a justification for inviting a single participant is exclusively examined in the light of these acts. As already shown, in the conditions in which the reason for not inviting more operators is not justified in the procurement documents, this lack cannot be complemented with the subsequent claims of the contracting authority, comprised in the complaint lodged against the Council decision. From this perspective, the aspects invoked by the petitioner referring to the possession of the A.N.R.S.C. license cannot be received and analysed, because they were not indicated in the procurement documents as reasons for the impossibility of inviting more participants.

2) N.C.S.C. DECISION NO. 560/2021 DRAFTING THE TENDER DOCUMENTATION WITH THE SERIOUS VIOLATION OF THE SPECIFIC LEGISLATION IN THE FIELD

The complainants are not satisfied with the waste categories that have to be collected separately, so:

- S.C. A S.R.L. claims that the information comprised in the exploratory study, although similar with the ones of a proper study performed by experts, is not real with the factual situation challenged by the complainant in its quality of exclusive operator of the waste collection service for the municipality of X, questioning the professionalism of both its own consultants and the ones of the contracting authority, claiming that: **“the consultant does not explain in the Exploratory Study the reason for which he did**

not consider this waste flux (a.n. biodegradable waste), but we consider that, in the current conditions, it can be a correct solution because biodegradable waste of household waste are extremely difficult to detect from residual waste” and that **“the separate collection on two fractions, namely wet and dry, should be taken into account”**. Regarding the **“pay as you throw”** system, the complainant claims that it is a new one and in an experimental implementations stage in the EU;

- S.C. B S.R.L. claims that **“the tender documentation violates the obligation of the contracting authority to implement the separate waste collection system of biodegradable waste”**. Regarding the **“pay as you throw”** system, the complainant claims that the contracting entity did not implement the economic instrument in the tender documentation, by establishing one of the variants regulated by Law no. 211/2011.

The Council notes that the contracting entity does not deny the obligation of implementing the separate waste collection system of biodegradable waste but, nevertheless, it shows that **“the funding application, the feasibility study and the position paper signed by all administrative territorial units which are part of ADI Salubrizare X specify the separate collection on four fractions**

(...). The mentioned documents do not set out the separate collection of household and similar biowaste (...). Law no. 181/19th of August 2020 (...) was published after the elaboration of the tender documentation was completed (February 2020) and after the completion of the approval process by all administrative territorial units which are part of ADI Salubrizare X, carried out in the period March – July 2020. (...) the collection system will be subsequently updated”.

Hence, the Council will analyse the current complaints through the incident legal provisions, taking also into account the five-year time span of the intended award contract.

Concerning the non-implementation of the provisions of Law no. 211/2011 on the **“pay as you throw”** instrument, the Council retains that the entity aims to use the **“volume”** element.

According to Article 17 of Law no. 211/2011 as amended and supplemented: **“(1) The local public administration authorities or, where appropriate, the administrative-territorial subdivisions of the municipalities, respectively their inter-community development societies, have the following obligations:**

a) to ensure the separate collection at least for the paper, metal, plastic and glass waste of the municipal waste, to establish if the management of this waste is performed within a single sanitation service contract and to organise the award according to the made decision;

e) to implement, starting with the 1st of January 2019, but no later than the 30th of June 2019, in accordance with the provisions of Government Decision no. 21/1992 on consumer protection, republished, as amended and supplemented, the economic instrument **«pay as you throw»**, **based at least on one of the following elements:**

- (i) **volume;**
- (ii) collection frequency;
- (iii) **weight;**
- (iv) **customised collection bags.”**

In the specifications, Articles 84 – 86, the contracting authority mentioned:

*“Article 84. The users of the service in the rural environment and in the residential area of the urban environment who wish to implement the instrument **«pay as you throw»** will request containers for collecting residual waste with a smaller volume, of 80 l.*

Article 85. During the mobilisation period, the Concessionaire will identify the users from the residential area who wish to express this option, thus estimating the number and type of necessary containers for the collection of residual waste. According to estimations, the approximate number of users who will manifest their option for the first contract year is of ... households.

*Article 86. Domestic users who choose the **«pay as you throw»***

*system will benefit of the sanitation rate discount. **The mechanism concerning the implementation of the instrument is presented in the Sanitation Regulations of X County.”***

In the Organisation and Operating Regulations of the public sanitation service of X County – supplemented according to the legislation in force, the contracting entity mentioned:

“Article 32 paragraph (1) According to the legal provisions in force, the municipal waste generators will be provided with the option of applying the economic instrument “pay as you throw”. The role of implementing this instrument is, on one side, to stimulate the prevention of waste generating and, on the other side, to stimulate the separate collection of recyclable waste. This instrument **will apply to the residual waste coming from household waste by lowering the volume of the collection container/containers.**

(2) in the case of domestic users (population) from the delegation area, it will be applied as following:

a) In the rural and urban environment, in the residential area, it will be ensured the possibility to choose **a residual waste collection container of smaller capacity, respectively 80 litres.**

b) the domestic users who request the application of the instrument will benefit of a sanitation rate discount.

(3) during the mobilisation period, as well as later in each years” month of December (excepting the year when the mobilisation period is ending), the operator will identify the options of the domestic users and later purchase the necessary containers.”

Therefore, the business operators have to elaborate the bid in accordance with the technical specifications of the specifications, so including the «pay as you throw» instrument, based on the volume element, in other words ensuring residual waste collection containers with a smaller capacity, respectively 80 litres.

Regarding these aspects, the Council will reject the criticism concerning the **“pay as you throw”** system.

In addition, relevant to this case as well are the provisions of Law no. 181/2020, which regulate the following:

“Article 1, paragraph (3): **“Starting with the 1st of January 2021, the local public administration authorities** or, where appropriate, the administrative-territorial subdivisions, **must implement the separate collection biodegradable waste system, expand the door-to-door separate collection of biodegradable waste in the urban environment, doubled by the implementation of the “pay as you throw” scheme,** and encourage individual composting in the rural environment households.”

Article 2 paragraph (1): **“The separate collection of biodegradable waste intended for anaerobic composting/digestion is mandatory, including door-to-door.”**

Article 4 paragraph (2): **“The local public administration authorities have the following obligations:** ... to ensure and be responsible for the separate collection of materials or waste for intended for anaerobic composting/digestion.”

By corroborating these provisions, it results that the contracting authorities are obligated to apply the principle **“pay as you throw”**, and later take measures so as to throw away as little as possible, so that in the future the quantity of waste deposited at the landfill will be reduced and that biodegradable waste, pollutant for the environment, will not exist anymore.

Hence, the five-year duration of the contract subject to the award leads to the conclusion that, during its validity period, the implementation is mandatory. The defence of the contracting authority, according to which the collection system will be upgraded because the provisions of the respective normative act regulate that **only the collection of biodegradable waste intended for composting or anaerobic digestion is mandatory** (see in this regard the provisions of Article 2 paragraph (1) of Law no. 181/2020), as the law regulates the utilisation activity of this type of waste, cannot be acceptable.

The provisions of Law no. 181/2020 are not suppletive, of recommendation, but imperative, in the sense that the public authorities must shift to the implementation of this selective collection system for this type of waste, hence, concerning this aspect, the claims of the entity are groundless. The fact that the provisions of

Article 4 paragraph (3) letters i)-iii) of Law no. 181/2020 on the management of non-dangerous compostable waste are of imperative character for the local public administration authorities is resulting even from the content of the respective provisions, as the unfulfillment of the obligations regulated by paragraph (3) [“(i) draft their own strategies and programmes for the management of biodegradable waste; (ii) ensure and are responsible for the separate collection of materials or waste intended for composting/anaerobic digestion; (iii) ensure the informing of citizens through adequate means and through the publication on their dedicated website of the management system of biodegradable waste intended for composting/digestion”], being sanctioned with fines from 10.000 lei to 20.000 lei for the violation of the provisions of letter (iii) and from 5.000 lei to 15.000 lei for the violation of the provisions of Article 4 paragraph (3) letters (i) and (ii).

The imperative character also resides in the provisions of Article 1 paragraph (3) of the law, respectively **“Starting with the date of 1st of January 2021, the local public administration authorities (...) respectively their intercommunity development societies, must implement the separate collection system of biodegradable waste.”**

The phrase **“must implement”** emphasises its imperative character, thus the con-

tract subject to the award (with a five-year duration) must take into consideration this mandatory obligation, as well. The legal provision does not establish, as erroneously considered by the contracting authority, that if all the administrative territorial units which are part of ADI Salubrizare X have signed the separate collection on four fractions, then the collection system will be subsequently updated, but that its implementation should begin on this date.

The challenged procedure was initiated through the publication of the participation announcement via SEAP on the date of ... 2021, in the context in which Law no. 181/2020 was published in the Official Gazette on the date 20.08.2020 (therefore approximately five months before the initiation of the procedure), thus the contracting entity had clear knowledge that the activity which will develop should also take into consideration the respective regulation. Consequently, it should have taken measures and to upgrade the tender documentation with the introduction of those legal provisions at the time the procedure was initiated, and therefore implicitly, at the date of awarding the contract, the respective law was in force.

The subsequent modification of the contract following the upgrade of the collection system is illegal in the conditions in which this should have been modified immediately after the contract conclusion in order to respect all the incident legal provisions.

According to Article 100 of Law no. 100/2016, **“Concession contracts can be modified, without the organisation of a new award procedure, only in the situations regulated in the current section”**, and in the case the drafting of a tender documentation without respecting the incident legal provisions, which came in force approximately five months prior to the initiation of the procedure, cannot constitute a reason for changing the concession contract.

It is certain that the defences of the contracting entities lead to the clear conclusion that there is no strategy in this regard, that it is not certain if and when this mandatory system will be implemented.

Accordingly, this expressly shows that “the tender documentation was elaborated on the basis of the funding application (...) Thus, the funding application, the feasibility study and the position paper signed by all the administrative territorial units which are part of ADI Salubrizare provide the separate collection on four fractions (...). The aforementioned documents do not provide the separate collection of household and similar biodegradable waste. (...) Law no. 181/19th of August 2020 (...) was published after the end of drafting the tender documentation (February 2020) and after the completion of the approval process by all administrative territorial units which are part of ADI Salubrizare X, carried out in the period March – July 2020. (...) the collection system will be subsequently updated.”

The Council notes that this defence is unacceptable. The fact that the European project did not contain such facilities does not mean that the contracting entity is not liable for the application of the newly adopted law.

It is hard to imagine that such activities of general interest, like the ones related to the management of biodegradable waste, can be dragged for a period of five years, until the expiration of the contract. Also, the legal modification of the concession after the award of the contract is improbable, as Article 103 of Law no. 100/2016 on concessions clearly regulates the condition in which it may occur: **“Concession contracts can be modified without the organisation of a new award procedure when the following conditions are cumulatively met:**

a) the modification became necessary due to certain circumstances which could not been foreseen by a diligent contracting;

b) the modification does not affect the general background of the works concession or of the services concession;

c) in the case of the concession contracts awarded by the contracting authorities for the development of another activity than the ones regulated in Annex no. 2, the modification does not imply a value increase of more than 10% of the initial value of the concession, with the corresponding application of the provisions of Article 102 paragraph (4).”

Still, in the context in which the modification appears not just as predictable but even mandatory and prior to the initiation of the procedure, the contracting authority had to take into consideration the applicable legal provisions at

the time of drafting the tender documentation.

Therefore, the Council ascertains the grounded character of the claims of the complainant S.C. B S.R.L., as it is clear that non-implementing the law will have a series of serious consequences on the future contract and on the operator's activity, the latter being obligated to provide the sanitation service with the violation of law, thus even the contracting authority could be exposed to sanctions.

DECISION NO. 458/2021 COURT OF APPEAL PITEȘTI

Regarding the complaint lodged by the contracting authority, it is observed that the petitioner claims that the Council has ungroundedly and illegally accepted the criticisms invoked by ..., concerning the separate collection of biodegradable waste and Article 10 paragraph (10) of the contract template, also setting a ten-day term for the remedy of the tender documentation, insufficient for the fulfilment of the obligations regulated by the decision.

Related to the separate collection of biodegradable waste, responding to the criticisms invoked in the its complaint by the petitioner ..., the Council retained that the provisions of Article 1 paragraph (3), Article 2 paragraph (1) and Article 4 of Law no. 181/2020 are imperative. Hence, the public authorities

must switch to the implementation of a selective collection system for the biodegradable waste. The complainant does not deny the fact that the tender documentation does not contain clauses related to the separate collection of the respective waste, yet it claims that the tender documentation cannot be modified anymore, as its elaboration was completed, the documentation was signed by all the administrative territorial units which are part of ADI Salubrizare X, it is compliant with the funding application, and respects the legal provisions applicable until the occurrence of Law no. 181/2020.

The claims of the petitioner cannot be retained by the court. As correctly observed by the Council, the aforementioned legal provisions have an imperative character. It results from their content the obligation of implementing the separate collection system for biodegradable waste, while the unfulfillment of this obligation is sanctioned as contravention.

Consequently, according to Article 1 paragraph (3) of Law no. 181/2020 on the management of non-dangerous compostable waste, "Starting with the 1st of January 2021, the local public administration authorities or, where appropriate, the administrative-territorial subdivisions, must implement the separate collection biodegradable waste system, expand the door-to-door separate collection of biodegradable waste in the urban environment, doubled by the implementation of the "pay as you throw" scheme, and encourage individual composting in the rural environment households."

Article 2 paragraph (1) of the same normative act states that the separate collection biodegradable waste intended for composting/anaerobic digestion is mandatory, inclusively from door-to-door or through voluntary contribution.

In addition, Article 4 paragraph (3) states that "Local public administration authorities have the following obligations: (i) draft their own strategies and programmes for the management of biodegradable waste; (ii) ensure and are responsible for the separate collection of materials or waste intended for composting/anaerobic digestion; (iii) ensure the informing of citizens through adequate means and through the publication on their dedicated website of the management system of biodegradable waste intended for composting/digestion."

Because Law no. 181/2020 was published in the Official Gazette on the 20th of August 2020 and existed at the time when the award procedure was initiated through the publication of the participation announcement in S.E.A.P. at the date of ... 2021, and taking into account the imperative character of the cited legal provisions, the contracting authority was obligated to consider them and to upgrade the tender documentation according to the legal regulation. As a consequence, the claim of the petitioner cannot be accepted in the sense that, as long as the tender documentation was signed by all the administrative territorial units which are part of

ADI Salubrizare X, regulating the separate waste collection on four fractions (paper/cardboard, plastic/metal, glass, and residual waste), without including the biodegradable fraction, the collection system will be subsequently upgraded.

For that reason, starting with the 1st of January 2021, the separate collection of biodegradable waste was mandatory, thus the contracting authority was forced to also take into account this activity in the contract for which the challenged award procedure was initiated, especially due to the fact that this contract has a five-year duration, and the implementation of the measure must be ensured throughout the entire validity period.

Besides, a later modification of the contract under discussion following the upgrade of the collection system is contrary to the law according to which the public procurement procedure was organised in order to award the contract delegation through the concession of the public sanitation system, respectively Law no. 100/2016 on works concessions and services concessions.

Thus, according to Article 100 of the law, "concession contracts can be modified without the organisation of a new award procedure only in the situations regulated in the current section", and according to Article 103 "concession contracts can be modified without the organisation

of a new award procedure when the following conditions are cumulatively met: a) the modification became necessary due to certain circumstances which could not have been foreseen by a diligent contracting; b) the modification does not affect the general background of the works concession or of the services concession; c) in the case of the concession contracts awarded by the contracting authorities for the development of another activity than the ones regulated in Annex no. 2, the modification does not imply a value increase of more than 10% of the initial value of the concession, with the corresponding application of the provisions of Article 102 paragraph (4)".

Yet the existence of legal provisions prior to the conclusion of the contract, which are not respected at the date of its signing, does not represent a case for modifying the contract and, therefore, does not lead to its legal modification, as long as the condition regulated by law is not fulfilled, namely the modification became necessary due to certain circumstances which could not have been foreseen by a diligent contracting. In case, the obligation of implementing the separate collection system for the biodegradable waste is regulated by legal provisions which were published before the date when the award procedure had been initiated. The complainant should have known these provisions (considering the "nemo censetur ignorare legem" principle) and should have applied them.

Also, the claims of the petitioner, in the sense that the judging of the Council, according to which the modification of the contract is illegal, would put the contracting authorities which have already signed the contract in the impossibility to modify it according to the legal regulation, cannot be retained. This is due to the fact that, in the hypothesis invoked by the complainant, the emergence of Law no. 181/2020 is subsequent to signing the contract, being therefore in accordance with the modification case regulated by Article 103 letter a) of Law no. 100/2016.

Moreover, the circumstance in which the tender documentation was drafted on the basis of the funding approval, which did not regulate the separate collection of biodegradable waste, cannot exonerate the contracting authority of the obligation to apply the system imposed by the newly adopted law.

In addition, it is observed that the solution proposed by the complainant does not provide actual dates concerning the implementation of the collection system regulated by Law no. 181/2020, in the sense that there is no real certitude regarding the respective system will be implemented and the date of the respective procedure, as the only clarification states that, at present, the County Plan on Waste Management is in the process of completion, which also includes measures on expanding separate collection at the level of the county, while the collection system will be subsequently upgraded, according to the measures regulated in the planification document, once it will be adopted.

3) N.C.S.C. DECISION NO. 1704/2021 NOT MAKING AVAILABLE THE SOURCE CODES, UNCHALLENGED WITHIN THE TERM, LEADS TO THE SUBSEQUENT DISMISSAL OF SUCH A REQUEST

In a first aspect, the Council establishes that the invitation sent to the bidder in order to sustain the demonstrative session is in full accordance with those regulated at the level of the specifications in the chapter dedicated to the organisation of the respective session and shown above. Thus, it is observed that the learning objects were at the disposal of the bidders with at least 20 days before the demonstrative session, in FLASH format, with the indicated download link <https://...>

Moreover, the Council notes that the authority's answer from 30.07.2021 did not perform any change to those already established in the tender documentation and communicated to the bidder through the invitation from 21.07.2021.

As underlined in the those which precede and, therefore, as resulted from the defences of the complaint and its petitioner, practically the refusal of the contracting authority, of making available the sources of the 20 learning objects, is what it does not satisfy S.C. A S.R.L., as noted in the address no. .../30.07.2021, appreciating that the demonstrative session is impossible to accomplish in the lack of sources.

As claimed by the complainant, the sources are held not only by the contracting authority but also by another bidder, respectively Association X. In this way, a discrimination is made towards the association of which its society is a part and, also, there is a breach of the principle of equal treatment between participants.

In addition, it shows that the objects made available are in SWF format and the FLASH format can have two types of extensions, SWF or FLA, and only the latter contains a source code for FLASH apps.

Yet, the Council retains that the conversion of the learning objects from FLASH format to HTML format was established in the specifications, that the learning objects will be made available in FLASH format and will have different levels of interactivity, but without precisating that the sources which were employed will be made available, as well. Therefore, these aspects were known to the bidder since the publication date of the tender documentation, respectively of the specifications. Likewise, the bidder also had knowledge that the FLASH format can have two types of extensions and that the tender documentation did not comprise which type of extension would be used.

Consequently, S.C. A S.R.L. could challenge these aspects by lodging an appeal against the tender documentation but within the term regulated by Law no. 101/2016, being evident that any criticisms in this sense are tardy at this moment.

The complainant cannot invoke its own guilt as the lack of diligence in obtaining the necessary information, manifested through-

out the duration of the award procedure. The particularities of the award procedures for public procurements contracts impose a special rigor both from the contracting authorities and the business operators interested in participating at the respective procedures. In order to prevent an eventual dismissal of the bid, they would have to manifest an increased diligence.

The tender documentation, comprising the data sheet, the specifications, the necessary forms and the supply contract model, was not successfully challenged by any business operators, for which reason all its provisions have consolidated their mandatory force for the contracting authority and the business operators interested in participating at the award procedure, including S.C. A S.R.L. By submitting the bid, the complainant accepted the terms and conditions of the tender documentation.

The conduct of the complainant cannot be accepted as just a few months after the publication of the tender documentation in S.I.C.A.P (12.09.2020), subsequent to the submission of the bid (22.02.2021) and subsequent to receiving the invitation to the demonstrative session (21.07.2021) (a session with well-known development conditions), it expressly requested through an address the delay of the established term for organising the session and for making available the employed sources, as well as of other film/image type sources

in order to generate content in SWF format, because without those sources the conversion of these materials can be achieved only by the producer who has possession of the sources and the copyright.

Corresponding with the contracting authority, the latter maintaining those established in its documents, does not result in delaying the starting date for the legal period of lodging the complaint.

DECISION NO. 1.851/2021 – BUCHAREST COURT OF APPEAL

As it results from the complaint and the challenge which forms the subject of the current trial, the reason which does not please the petitioner S.C. A S.R.L. is practically the refusal of the contracting authority, noted in the address no. 1569/30.07.2021, to make available the sources of the 20 learning objects, appreciating that the demonstrative session is impossible to accomplish in the lack of sources. As claimed by the complainant, the sources are held not only by the contracting authority but also by another bidder, respectively Association X. In this way, a discrimination is made towards the association of which its society is a part and, also, there is a breach of the principle of equal treatment between participants.

In addition, it shows that the objects made available are in SWF format and the FLASH format can have two types of extensions, SWF or FLA, and only the latter contains a source code for FLASH apps.

Yet, the Council retains, as revealed by the Council in the challenged decision, that the conversion of the learning objects from FLASH format to HTML format was established in the specifications, that the learning objects will be made available in FLASH format and will have different levels of interactivity, but without precisising that the sources which were employed will be made available, as well. Therefore, these aspects were known to the bidder since the publication date of the tender documentation, respectively of the specifications. Likewise, the bidder also had knowledge that the FLASH format can have two types of extensions and that the tender documentation did not comprise which type of extension would be used.

In order to challenge the aforementioned problems, the petitioner S.C. A S.R.L. could challenge these aspects by lodging an appeal against the tender documentation but within the term regulated by Law no. 101/2016, any criticisms in this sense being tardy at this moment.

Moreover, as retained in the challenged decision, the tender documentation, comprising the data sheet, the specifications, the necessary forms and the supply contract model, was not successfully challenged by any business operators, for which reason all its provisions have consolidated their mandatory force for the contracting authority and the business operators interested in participating at the award procedure, including I SRL. By submitting the bid, the complainant accepted the terms and conditions of the tender documentation.

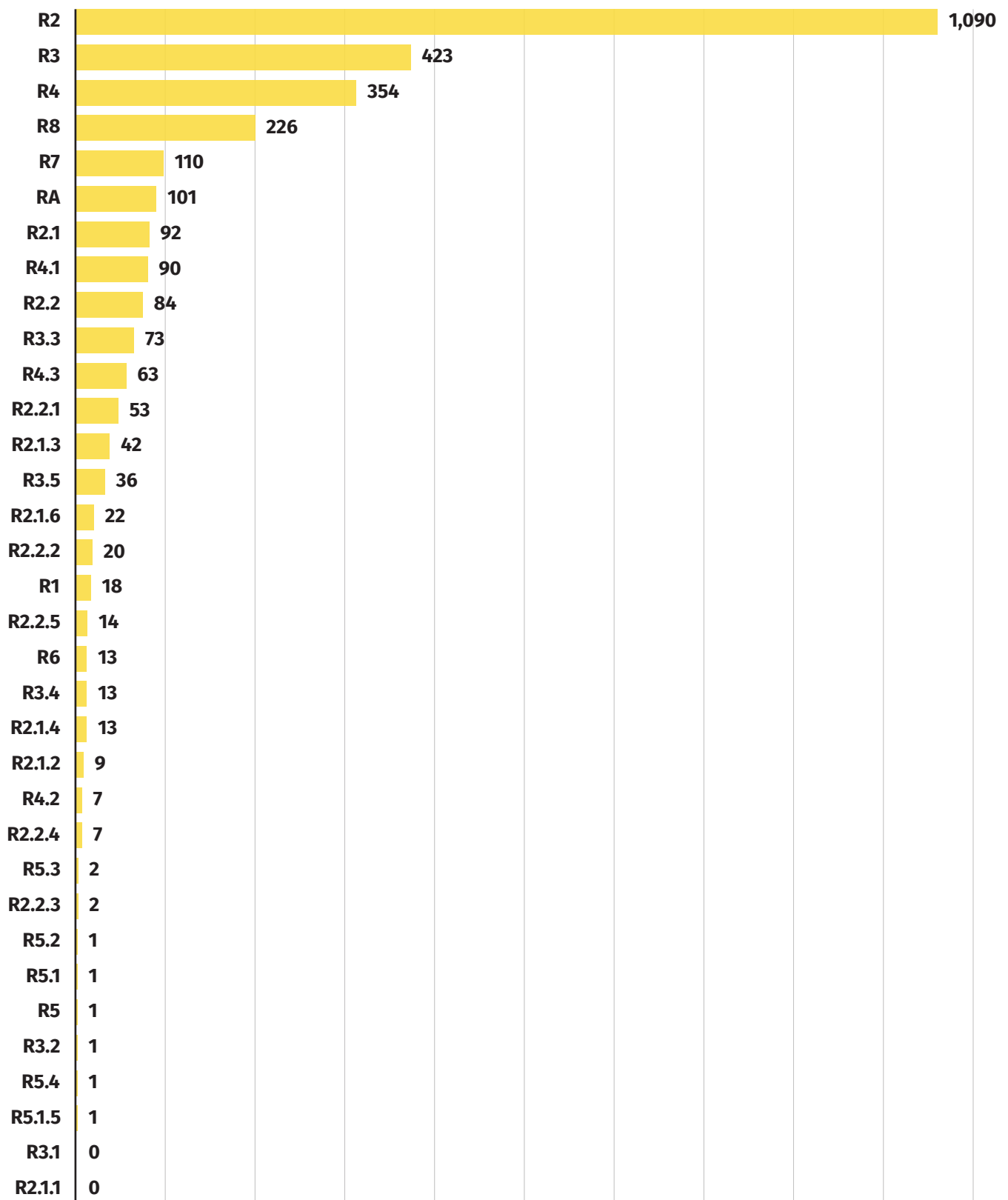
Furthermore, as retained by the Council as well, the conduct of the complainant is truly unacceptable as just a few months after the publication of the tender documentation in S.I.C.A.P, subsequent to the submission of the bid and subsequent to receiving the invitation to the demonstrative session (a session with well-known development conditions), it expressly requested through an address the delay of the established term for organising the session and for making available the employed sources, as well as of other film/image type sources in order to generate content in SWF format, because without those sources the conversion of these materials can be achieved only by the producer who has possession of the sources and the copyright.

Taking into consideration the previous analysis, the claims of the complainant concerning the association, which holds the sources and would be favoured for the demonstrative session, are groundless.

Therefore, the Court retains that the demonstrative session could have been sustained in the conditions of the specifications by the other two bidders, which as opposed to the petitioner presented themselves in order to support it, which demonstrates once more and beyond any doubt that making available the source code was not at all necessary in relation to the requirements in the specifications, including the one on the demonstrative session.

Concerning the subject of the complaints lodged against the result of the award procedure, it was observed that within the 2,751 complaints lodged with the Council on the course of the year 2020 the most numerous criticisms were:

CODE	CRITICISM	NUMBER OF CRITICISMS
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	0
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	0
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
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	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	1
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	1
R5.1	the contracting authority's failure to inform each dismissed candidate of the actual reasons underlying the decision to dismiss their candidacy, in the notice informing of the result of the procedure	1
R5.2	the contracting authority's failure to inform each dismissed bidder of the actual reasons underlying the decision for dismissal, in the notice informing of the result of the procedure	1
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	2
R5.3	the contracting authority's failure to inform each bidder that submitted an admissible yet non-winning bid of the relative characteristics and advantages, in the notice informing of the result of the procedure	2
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	7
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	7
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
R2.1.4	dismissal of the complaining party's bid as unacceptable, as it has an unusually low price	13
R3.4	the bids of other bidders in the award procedure were submitted in violation of the provisions on the conflict of interests	13
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	13
R2.2.5	dismissal of the complaining party's bid as noncompliant for other reasons than as listed in R.2.2.1-4	14
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)	18
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	20
R2.1.6	dismissal of the complaining party's bid as unacceptable for other reasons than as listed in R.2.1.1-5	22
R3.5	other reasons that render as unacceptable the bids of other bidders in the award procedure	36
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	42
R2.2.1	dismissal of the complaining party's bid as noncompliant, as it fails to properly meet the tender specifications requirements	53
R4.3	other reasons that render as noncompliant the bids of other bidders in the award procedure	63
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	73
R2.2	dismissal of the complaining party's bid as noncompliant	84
R4.1	the unusually low price of the bids of other bidders in the award procedure	90
R2.1	dismissal of the complaining party's bid as unacceptable	92
RA	other criticism of the result	101
R7	cancellation of the award procedure by the contracting authority without legal grounds	110
R8	other reasons regarding the result of the procedure	226
R4	the non-compliance of the bids of other bidders in the award procedure	354
R3	the bids of other bidders in the award procedure are unacceptable	423
R2	dismissal of the complaining party's bid as noncompliant or unacceptable	1,090

**THE SITUATION REGARDING THE CRITICISM LODGED AGAINST
THE REQUIREMENTS INFLECTED IN THE AWARD PROCEDURE**

1) N.C.S.C. DECISION NO. 2810/2021 REASONS FOR EXCLUSION

Considering the criticisms within the complaint lodged by S.C. S S.R.L., the Council retains that, in section "III.1.1) Capacity to exercise professional activity (...)" of the participation announcement, the contracting authority drafted the following minimal qualification requirement:

"Requirement 1 – The bidders, supporting third parties and subcontractors are not compliant with the situations from Articles 164, 165, 167 and 60 of Law no. 98/2016 as amended and supplemented". (...)

Respecting the previously iterated requirements of the contracting authority, the association S.C. S S.R.L. – S.C. T S.R.L. – S.C. P S.R.L. submitted the DUAE statements for the association members in the bid. Relevant for solving the complaint which forms the subject of the present is the fact that at page 3 of the DUAE submitted by the associate SC T SRL, in part III entitled **"Reasons for exclusion"** point **"A: Reasons on penal convictions"**, subpoint **"Fraud"**, this business operator responded with **"YES"** to the question **"The business operator itself or any person who is member of the administration, management or supervision body or who has representative, decision or control power within it, was the subject of a fraud conviction pronounced by means of a final decision, of a conviction pronounced no more than five years before or in which an exclusion period directly stated in the conviction is still applied? In the sense of Article 1 of the Convention on the protection of the European Communities' financial interests (JO C 316, 27.11.1995, p. 48)". (...)**

During the evaluation of the bids, the contracting authority sent the address no. .../22.09.2021 to the complainant (page 81 from the procurement file, part of the case file) through which it requested the following clarifications at point 4: **"Regarding the DUAE completed by SC T SRL, in Part III: Exclusion reasons. Section A: Reasons regarding penal convictions, please present an official/legal document issued by the court regarding the established interdiction (clarification request)".**

The association S.C. S S.R.L. – S.C. T S.R.L. – S.C. P S.R.L. responded to this clarification request through the address no. .../22.09.2021 (page 83-84 of the procurement file, part of the case file), in the annex of which it attached Decision no. X/2020 pronounced by the Court of Appeal Iași – Penal and for Minor Involved Cases Section in the file no. ... (pages 94-102), decision no. Y/2013 of the CEO of S.C. T S.R.L., through which the individual employment contract of P.A. employee was terminated, the report of the independent financial auditor on the financial situations of S.C. T S.R.L. at 31.12.2019, and payment orders of the penal fines by S.C. T S.R.L.

Through address no. .../28.09.2021 (page 112 of the procure-

ment file, part of the file case), the contracting authority requested from the association S.C. S S.R.L. – S.C. T S.R.L. – S.C. P S.R.L. **"the criminal record of the society T SRL, as well as of the administrators/associates of this society"**, this bidder complying through the address no. .../28.09.2021, to which it attached the requested documents. Relevant for solving the case was criminal record certificate no. .../10.05.2021 (page 115), according to which

S.C. T S.R.L. is mentioned in the criminal record with the following data: "Sentences to pay a fine of 60,000 lei for committing the act regulated by Article 178 paragraph (1) PC, Article 178 paragraph (2) PC, Article 5 NPC.

The fine was paid according to payment order 1080 22-11-2017, disposed through S.P. no. 59 /2017 of 28/02/2017 Court file no. X/Y/2015 defined through D.P. 750 at 13/10/2017 Penal and for Minor Involved Cases Section.

Sentences to pay a fine of 100,000 lei for committing the act regulated by Article 18 index 1 paragraph (1) of Law no. 78/2000, Article 41 paragraph (2) PC, Article 5 paragraph (1) NPC, and interdiction of rights regulated by Article 71 index 1 PC for a period of 6 months, disposed through SP no. 92 from 27/06/2018 Court case no. 1593/89/2016 defined through D.P. X at 06/07/2020 Court of Appeal ...".

Subsequently, the contracting authority dismissed the bid of the complainant (...).

With the aim to verify the grounds of the dismissal reasons of the bid submitted by the association S.C. S S.R.L. – S.C. T S.R.L. – S.C. P S.R.L. within the current award procedure, the Council will retain the incidence of the legal provisions comprised in Law no. 98/2016, variant in force at the date when the award procedure had been organised: Article 164 paragraph (1) letter c), Article 171 of Law no. 98/2016.

In the settlement, the Council also notes that the provisions of Article 164 paragraph (1) letter c) of Law no. 98/2016 transpose the provisions of Article 57 paragraph (1) letter c) of the Directive 2014/24/EU, (...)

The reason for the aforementioned provisions is to be found in the considerations 100 and 102 of **Directive 2014/24/EU: “(...)”**.

Regarding the previously mentioned conviction, the Council retains at pages 1-2 of Decision no. X/2020 (pages 94-95 of the procurement file, part of the case file), Court of Appeal X concluded that through penal sentence no. Y/27.06.2018, the Court sentenced the business operator S.C. T S.R.L. at the payment of the penal fine and the complementary penalty of interdiction to conclude new contracts for the rehabilitation and modernisation of roads with civil parts or the Ministry, for a period of 6 months.

The aforementioned sentence became definitive at the date of pronouncing the Decision no. .../... 2020 of Court of Appeal X, therefore the Council will retain that the period regulated by Article 171 paragraph (4) of Law no. 98/2016, during which the provisions of Article 171 paragraphs (1)-(3) of the same normative act are not applicable, started in the case of S.C. T S.R.L. on 06.07.2020 and was applicable for the time span of 6 months ordered by the court.

Taking into account the fact that the current award procedure was organised subsequently to the execution by S.C. T S.R.L. of the complementary penalty ordered by the court, the Council notes that the contracting authority should not have limit to the simple challenge of the entry of the penal fine in the criminal record, but should have proceeded to the analysis of the documents sent by the association S.C. S S.R.L. – S.C. T S.R.L. – S.C. P S.R.L. to the evaluation commission in order to demonstrate its credibility, as regulated by the provisions of Article 171 paragraph (31) of Law no. 98/2016.

As it results from the aforementioned provisions of the national and communitarian legislation, the existence of some mentions in the business operator's criminal record does not automatically lead to the dismissal of its bid but to the evaluation performed by the commission of evaluating the measures taken by the respective business operator.

Consequently, the right to dismiss the bid of the association S.C. S S.R.L. – S.C. T S.R.L. – S.C. P S.R.L. is subsequent to

the obligation established for the evaluation commission through the provisions of Article 171 paragraphs (1)-(3) of proceeding in a rigorous manner in verifying the evidence sent by it in order to concretely demonstrate its credibility by reference to the aforementioned reason of exclusion.

In the case C - 124/17, EUCJ pronounced as following (...):

With the aim to pronounce according to the principle of availability regulated by Article 26 paragraph (2) of Law no. 101/2016, strictly regarding the reasons which lead to the dismissal of the complainant's bid, the Council retains that, by totally ignoring its obligation regulated by Article 171 paragraph (31) of Law no. 98/2016, in fact the contracting authority did not proceed to the verification of the measures taken by S.C. T S.R.L., although the association S.C. S S.R.L. – S.C. T S.R.L. – S.C. P S.R.L. sent to the evaluation commission, in the response to the clarification request, a series of documents belonging to the category of those regulated as examples in paragraph (3) of the judicial norm previously mentioned (**decision to terminate the individual employment contract of the employee mentioned in the court's decision, the audit report, payment orders of the penal fines**). The authority had the possibility to request further actual clarifications from the complainant in the case in which it



would find them necessary, just like it has previously proceeded with the criminal record certificates.

The allegation of the contracting authority comprised in the address for communicating the result, on the alleged lack of relevance of the particular character of the complementary penalty ordered by the court, cannot be retained because the period of **6 months** in which the business operator S.C. T S.R.L. was forbidden to make use of the right to conclude contracts with certain contracting authorities was expired/ended/completed at the time of the initiation of the award procedure. Therefore, the identity of the contracting authorities, on which the interdiction to conclude contracts with the respective business operator during the applicability period of the complementary penalty had been established through penal sentence, was irrelevant from the perspective of the current procedure.

Moreover, the Council retains that through Article 171 paragraph (31) of Law no. 98/2016 the national legislator mentioned the fact that the evaluation of the measures undertaken by the business operators, and proven according to paragraph (3) of the same judicial norm, are evaluated **“taking in to consideration the gravity and the particular circumstances of the offence or the misdemeanour in sight”**. Judging on this phrase, it results that the contracting authority should be more careful especially in regards to the principle of proportionality.

Still, due to the fact that the contracting authority limited itself only to concluding the existence of such misdemeanours without ascertaining the end of the applicability term of the interdiction measure and without appreciating in any way the credibility of the complaining society acquired through the measures adopted in accordance to Article 171 paragraph (3) of Law no. 98/2016, which are mentioned as existing both in the DUAE and

the documents attached to the response at the clarification request, the Council retains that, through the excessive formalism demonstrated in the DUAE data verification stage, the contracting authority abusively dismissed the bid of the complainant by violating the provisions of Article 49 of Law no. 98/2016, which establish for the contracting authority the obligation to ensure equal and indiscriminatory treatment for the business operators and to act in a transparent and proportional manner.

For the aforementioned reasons, on the grounds of the provisions in Article 26 paragraphs (2) and (5) of Law no. 101/2016 as amended and supplemented, the Council will accept the complaint lodged by SC S SRL in contradiction with the contracting authority...

DECISION NO. 40/2022 COURT OF APPEAL IAȘI

“It is certain that the associate S.C. T S.R.L. suffered a penal conviction based on which the provisions of Article 164 paragraph (1) of Law no. 98/2016 are applied. In the lodged complaint, the contracting authority did not challenge in any way the reasoning of N.C.S.C., according to which it limited itself to conclude the existence of such misdemeanours without ascertaining the end of the applicability period of the interdiction measure and

without appreciating in any way the credibility of the complaining society acquired through the measures adopted in accordance to Article 171 paragraph (3) of Law no. 98/2016.

Therefore, the contracting authority did not make any reference to the duration of the applied complementary penalty which would have ended and which, besides, did not even mention the interdiction to participate at any procurement procedure, context in which the provisions of Article 171 of Law no. 98/2016 would be fully applicable.

The defences concerning the fact that the respective society could have avoided to speak of the conviction in the other procedures which it participated at; the management bodies of the societies involved in the current public procurement could be members of the same family and the replacement of the society's administrator would have taken place at 14.06.2021; the financial audit could have additional targets in comparison to the audit mentioned in the legal text; they are not mentioned in the initially challenged document and they tend to complete it, as non-analysing the credibility of the society in accordance to Article 171 is an essential reason for N.C.S.C to accept the complaint.

Taking into consideration the previous conclusions, the Court will dismiss the lodged complaint as groundless."

2) N.C.S.C. DECISION NO. 2,583/2021

UNASSUMING THE TECHNICAL SPECIFICATIONS OF THE TENDER DOCUMENTATION BY THE BIDDER

After analysing the technical proposal of the complaining bidder, it results that it did not include in the References section the correspondence information of the technical proposal in accordance with the specifications, the respective section being left blank. Those commentaries do not result from the submitted bid, **article by article**, which were specifically requested by the contracting authority.

Yet, the complainant's criticisms are based on the preliminary mentions of the analysis minute of the technical proposal drafted by the evaluation commission, in which there were highlighted those sections comprising texts reproduced from the specifications and there is no other proof of the conformity of its bid.

Moreover, the complainant's criticisms, based on the appreciation that it results from the tender documentation that the bid solution should have only been based on a craft project, not on already build craft, do not present interest in solving the dispute. This aspect was not retained by the evaluation commission as grounds for dismissing the bid, and the tender documentation did not mention a single participation manner in the competition (a product already manufactured/in the process of fabrication or in the project stage).

In case, the analysis of these criticisms would be lacking any effects because the real reason for dismissing the bid, as it was registered in the procedure report and presented in the contestation statement, is not challenged.

The mentions in the minute regarding the requirement's way of expression in the technical proposal, by pasting a text from the specifications, did not have exclusive relevancy on the decision to dismiss or to accept the bid. The lack of mentions in the section, where the documents/technical sheets/manual issued by their producer should have been described/highlighted, was determinant (the page from the attached technical documentation will be completed), according to the rules from the footer of Form 8.

Not presenting the tendered type and equipment, as general reason for dismissing the bid, can be countered by the complainant on its availability to send clarification/completion responses, together with the mention that the contracting authority did not request any clarification. Still, in relation to the bid's drafting manner, which did not respect the obligation to forward detailed information, in the aforementioned section-type shape, the contracting authority was entitled to dismiss the bid, as specified in the procurement's data sheet.

In addition, the legal basis invoked by the contracting

authority in taking the dismissal measure was correct – Article 215 paragraph (5) of Law no. 98/2016: **“The bid is considered non-compliant if it does not respect the requirements presented in the procurement’s documents, it was received with delay, presents clues of anti-competitive or corruption agreements, or it was considered as unusually low by the contracting authority”.**

Therefore, in the absence of effective criticisms against this finality of the bid’s evaluation, there are no grounds of law for the cancellation of the procedure report and of the communication address of the result, in accordance to those requested by the complainant. Implicitly, the definitive character of the dismissal decision, caused by the erroneous/incomplete drafting of the technical proposal, makes superfluous the complainant’s decision of contesting the conformity of its bid, based on the information which could be through clarifications.

Furthermore, the Council concludes that claims from the complaint confirm the firmness lacking character of the technical proposal of the bid. As an example, the claims that “The society tendered an identical craft at the level of the producer, model, drawn plans, with concretely assumed technical characteristics” are challenged by the footnotes of the technical proposal: “the tendered product is exemplified by the drawing attached to the bid. The final project is the one to be made in the case of contracting...”.

The claims in the complaint concerning the impossibility to mention some fixed characteristic of the future craft, in the lack of a completed project, are considered by the Council as simple speculations, in the context in which, on the one hand, the tender documentation and its clarifications have been assumed by the bidders and, on the other hand, even the footer of the interest form mentioned the obligation that those characteristics depending on the bidder, not being identified in the proposed equipment, should be presented by it through indicating the way which it considers adequate for achieving the specifications required by the purchaser (in the dedicated section of the table).

DECISION NO. 281/2021 - COURT OF APPEAL CONSTANȚA

After analysing the bid of the complaining society, it was observed that the complaining society, S.C. X S.A., did not effectively assume a large part of the obligations.

Thus, regarding the C1 requirement, the complainant effectively copied the requirement, without assuming the obligation to deliver a craft according to the requirements comprised in the technical specification and in the specifications, quality insurance standards and practices, specific to the producer, although the bid should represent an effective individual commitment to certain requirements and specifications.

Unassuming the requirements is also observed in the case of requirements

C2, C10, C12, C29, C42, C43, C45, C50, C51, C52, C53, C54, C55, C56, C57, C58, C59, C61, C63, C65, C66, C67, C68, C69, C70, C71, C76, C87, C105, C106, the language used by the complainant being impersonal due to copying the text of the requirement, without showing that it will effectively commit to accomplishing the respective requirement.

Moreover, is also concluded that, for the C9 requirement, the type of main engines, generators, number of crew members, autonomy, material for building the craft, were not indicated. It was established for the C13 requirement that the dimensions are not presented with fixed values, which should be known as the craft is in production and not custom built, as well as the fact that, in the bow area, the technical specification requires an opening of maximum one metre, while in the technical proposal the bidder specifies a large opening in the bow, in contradiction the mentions in the C12 requirement.

For the C16 requirement, it is shown that the engine type is not mentioned, the parameters indicated in on-board equipment are not clearly mentioned, the auxiliary heating system is not specified, no agreements have been made for assuming the technical specification.



For the C23 and C24 requirements, it was observed that, although the craft is in production, the bidder does not declare the type of material which will be used for its construction. Concerning the C30 requirement, it was noted that the dimensions of the tanks are not clearly presented, taking into consideration the fact that the craft is in production and that this aspect should be known. For the C38 requirement, it was concluded that there is no clear mention regarding the materials used for the thermic and phonic isolation, while for the C39 requirement it was observed that the type and model of the Webasto equipment were not mentioned, taking into consideration the fact that the craft is in production, not a new model.

Consequently, the complainant cannot prove a situation contrary to the one resulting from the analysis of the bid it has submitted, being obvious that most of the requirements from the tender documentation have not been adequately met.

It cannot be appreciated that the N.C.S.C. would have retained aspects, which the complainant was not able to challenge because it did not had knowledge at the moment of the completion of the complaint of the content of the minute no. .../28.09.2021 on the evaluation of the conformity of the technical proposal with the provisions in the specifications, of those comprised in the address no. .../11.10.2021, thus we cannot speak of the fact that N.C.S.C. took into consideration supplementary reasons besides the ones accessible to the complaining petitioner, so the limits of the complaint's devolutive effect and the complainant's right of defence have not been violated.

**3) N.C.S.C. DECISION
NO. 2,357/2021
THE INTRODUCTION OF
SOME SUPPLEMENTARY
TECHNICAL SPECIFICATIONS
FALLS IN THE DISCRETION
RANGE OF THE
CONTRACTING AUTHORITY.
THE LACK OF SOME
POSSIBLE SPECIFICATIONS
DOES NOT HARM A
POTENTIAL BIDDER.**

Regarding the criticism of the complaint's author which targets lot 2, respectively the requirement to present "the validity/stability/safety time span against contaminations, from the moment of opening the recipient", related to which the complainant requested its detailing, respectively the indication of the validity/stability/safety time span and of the documents proving the fulfilment

of this requirement, the Council notes that it is groundless, in the conditions in which the validity/stability periods from the moment of opening the recipients differ from one product/producer to the other.

Although the minimum utilisation period of the product since the opening of the recipient could present relevance in this case, the author of the complaint did not challenge the restrictive or unjustified character of this technical specification but the opportunity to establish a technical requirement which aims for an **increased efficiency of the product** from the usage period point of view (minimum utilisation period of the product). Still, in the Council's opinion and related to the legislation in force, the opportunity of procuring certain products, as well as the technical specifications imposed through them, are established by each contracting authority separately, in case being incidental the principle of liability assumption regulated by Article 2 paragraph (2) letter f) of Law no. 98/2016.

DECISION NO. 904/2021 - COURT OF APPEAL IAȘI

The challenging reason regarding lot no. 2, dismissed by the Council, targeted the detailing in the tender documentation of a technical requirement related to the indication of a certain validity/stability/safety time span against contamination since the opening of the recipient.

In fact, by the means of this criticism, the completion of the documentation with a certain technical requirement is solicited, in the conditions in which the contracting authority did not understand to impose a certain period of validity/stability/safety in time against contamination since the opening of the recipient.

In the lack of such a technical requirement, it cannot be retained, as suggested by the complainant in the challenge, that the tender documentation does not ensure a complete, correct and precise information for the business operators regarding the requirements of the procurement.

The fact that the contracting authority did not establish through the tender documentation a certain validity/stability/safety time span against contamination since the opening of the recipient, or for a minimum or maximum time span, does not mean that the business operators could not have drafted their bids and mentioned this technical requirement, specific for the bided product. On the contrary, the option of the contracting authority was to accept all the bided products, no matter the validity/stability/safety time span against contamination since the opening of the recipient.

Furthermore, by introducing a certain period of validity/stability/safety, depending on the other established technical requirements, a restriction of equal access to the award proce-

dures can be reached for the business operators, contrary to the provisions of Article 155 paragraph (6) of Law no. 98/2016.

Concerning these reasons, the Court concludes that the Council's solution to dismiss this challenge reason invoked by the complainant is grounded.

4) N.C.S.C. DECISION NO. 2391/2021 DISMISSAL OF A BID FOR BREACHING THE MAIN CONTRACT OBLIGATIONS

After analysing the decisions which approved the termination of the contracts in discussion, the Council concludes that they were taken by the County Council and the involved authorities but without the existence of a termination decision of the contract from the signatory of the contracts (Association for Community Development X). On the contrary, in the address no. 2819/30.08.2021, the association has expressly stated that the delegation of the collection service and waste transport contracts are not terminated, *as the procedure for these contracts has been initiated.*

Still, an undergoing termination procedure cannot determine taking the measure of excluding the business operator. The Council also ruled in the same sense in Decision no. 1023/2021, in which it retained, amongst others: As a result, in taken its decision, Z Town Hall con-

sidered **an undergoing investigation**, which is not completed because a new investigation is under development concerning the behaviour of S.C. X S.R.L. and of another company, on which there are clues that they did not compete in public procurement procedures, organised starting with the year 2017, which might suggest a possible intention of sharing the contracts. Such a consideration of the procedure's organiser cannot be considered compliant to the aforementioned legal provisions, because a trigger of the investigation cannot represent a reason for not taking into consideration of some measures presented by the complainant in order to prove its credibility.

The petitioner invokes the provisions of Article 17 paragraph (3) of the Statute of the Association for Community Development X in sustaining the consideration that decisions submitted with the case file are sufficient but it must be observed, on the one hand, that the association itself recognises that the contracts are not terminated, and, on the other hand, that the invoked provisions make reference to the empowerment of the General Assembly of the Association by the Association in order to exercise certain prerogatives, yet a decision of the General Assembly was not submitted.

According to Article 14 [paragraph (1) of the Statute of the Association for Community Development X, the General Assembly is formed by all the representatives designated by the parties, namely the mayors of the administrative-territorial units and the president of D CC or their authorised representatives.

Hence, as opposed to the existent documents in the case file, it can be concluded that the fulfilment of the three conditions was not demonstrated:

- serious or repeated violation of the main obligations;
- the breach of the main



obligations should have interfered the development of the following types of previously terminated contracts: public procurement contract, sectorial contract, concession contract;

- serious or repeated violation of the main obligations should have led to the following consequences (sanctions): in advance termination of the respective contract, payment of damages, other comparable sanctions.

Therefore, the bid of S.C. X S.R.L. was not correctly dismissed by the purchaser.

Moreover, it must be concluded that in order to demonstrate the fulfilment of the requirement concerning the similar experience the winning bidder submitted Form no. 5, which indicates a value of ... lei, VAT excluded, for the provision of services. In support, it was also submitted the address no. 1611/21.05.2021 (pages 76-78 of the bid submitted by S.C. X S.R.L.) from the Association for Community Development X, in which are highlighted the quantities of municipal waste approved by the association, associated to the invoiced services performed in the contracts no. 831/27.03.2019, 832/27.03.2019, 983/16.04.2019 and 833/27.03.2019.

In regards to the application of the provisions of Article 81 paragraph (1) letter c) of Law no. 100/2016, the contracting authorities/entities exclude any business operator from the award procedure of the concession contract in any of the following situations: c) committed a serious professional misconduct which questions its integrity and the contracting authority/entity can demonstrate this aspect through any adequate means of evidence, such as a decision of a court of law or an administrative authority, corroborated with Article 81 paragraph (3).

In the spirit of the provisions in paragraph (1) letter c), **serious professional misconduct** means any misconduct committed by the business operator which affects its professional reputation, like breaching the rules of cartel competition, which target the fixing of auctions or violating the intellectual property rights, committed with intention or serious misconduct.

The complainant did not indicate which are those violations which can lead to the application of the cited provisions.

DECISION NO. 747/2021 - COURT OF APPEAL TÂRGU MUREŞ

As correctly alleged by the defendant, the phrases used by the legislator presume an observation of the intervention of these sanctions, respectively their certain character at least from the perspective of the contracting authority which is part of the previous contract.

In addition, the national legislation states that: "Any business operator in any the of the following situations from Articles 79 and 81, which trigger the exclusion from the award procedure, can provide evidence in order to show that the un-

dertaken measures are sufficient for really demonstrating its credibility in relation to the exclusion reasons".

The court retains that, in case, the contracting authority requested clarifications from the business operator S.C. X S.R.L. in order to verify the incidence of the optional exclusion case regulated by Article 81 paragraph (1) letter f) of Law no. 100/2016 and, also, requested information regarding the way in which the business operator fulfils the contractual obligations in the delegation of services contracts no. 831/2019 and 832/2019.

The information was requested to the Association for Community Development X, this being the contracting authority which could have disposed the termination of the indicated contracts or the payment of damages.

In this context, the evidence documents which the petitioner refers to in the complaint lodged with N.C.S.C. (L.C.D. of approval of the termination of the contracts issued by the authorities within the Association) cannot be taken considered in the analysis of the incidence of Article 81 paragraph (1) letter f) of Law no. 100/2016 because they cannot have by themselves the effect of the anticipated termination of the delegation contract.

In fact, the only authority which can evaluate the significant character of unfulfilling the contractual ob-



ligations and can exercise the right to dispose the termination of the contracts is the Association, which explicitly informed the evaluation commission that the contracts are not actually terminated and that a good standing document was not issued.

The references to the initiation of the termination procedure in these contracts cannot be equated in regards to of Article 81 paragraph (1) letter f) of Law no. 100/2016 with the phrase “anticipated termination of the respective contract”, an aspect which implies at least a materialisation of the will to dispose the termination of the contract by issuing a notification in this matter and assuming its effects, from the perspective of the contractual clauses which establish a termination clause. Contrary to the opinion of the defendant, the existence of a court decision which confirms the termination of the contract is not absolutely necessary (see the considerations of the Court in case C41/18) but, in the analysis of the exclusion clause, the Commission must have certain information regarding the fact that, during the development of a contract, the behaviour of the business operator seemed sufficiently deficient to the contracting authority for justifying the termination.

Still, in relation to the information submitted by the Association for Community Development X, the condition of the anticipated termination fo the contract is nor confirmed.

Considering all those previously mentioned, the Court concludes that the N.C.S.C. has correctly appreciated that an undergoing termination procedure cannot determine the exclusion measure of the business operator form the procedure.

5) DECISION NO. 484/2021 THE EXISTENCE OF OWN PRODUCTION CAPACITIES FOR RAW MATERIALS CAN BE ACCEPTED FOR THE JUSTIFYING THE PRICE OF THE BID

The Council retains that the contracting authority insisted for the evaluation of the financial proposal of S.C. S S.R.L. by addressing requests concerning the production costs of crushed stone, in the conditions in which the respective bidder has its own quarry and sorting/crushing plant.

Hence, by comparing the accounting costs from 2019 and 2020, it concluded that the bidder presented different dates and did not justify the cost of crushed stone. The Council also notes that the cited legal provisions state that the authority must consider the justifications and dismiss the bid only when the provided explanations do not justify these costs, the latter being much lower that the ones on the market.

The Council also retains that the aim of the cited provisions is to protect the contracting authority from the risk of contract failure following the impossibility of sustaining the bided price, the introduction in the work of some materials of doubtful quality, but also to promote competition between the business operators so that there would not be a dumping price.

Regarding the price of crushed stone, the Council retains that S.C. S S.R.L. holds a mining exploitation licence, being its own supplier of crushed stone in this project. Holding the respective quarry and sorting/crushing plant does not represent in any way a disadvantage for the contracting authority, just like it cannot be an element leading to the dismissal of the bid. Furthermore, the operator is the one to appreciate the price of its own production which is introduced in the bid. Therefore, the dismissal of a bidder without retaining that the price is understated yet just that some inadvertencies would exist between certain “constants” having different values, respectively that the bidder invoked different productivities and presented two tables, does not respect the cited legal provisions.

Thus, the contracting authority concludes that “in order to have a pertinent analysis of the expenses of the sorting/crushing plant, the redrawing of the presented analysis is request by clarification, consequently: data will be used from the 2019 closed financial year, for filling the columns 3 and 5 of the respective table”, an aspect which cannot be justified in fact or in law.

If the bidder would have forwarded the same bid from a third party, it would have been considered as relevant, but if it presents the documents from its own

plant, the bid is not considered as relevant anymore.

On the contrary, the Council retains that holding a quarry and a sorting/crushing plant represents a supplementary advantage for the bidder and not an element which attracts the non-compliance of the bid.

In case, the bidder introduced sustainable prices, or the contracting authority did not prove in any way that these could be understated. On the contrary, the bidder demonstrates that the prices for 15 – 25 mm and 40 – 63 mm crushed stone sorts are of 30 lei/m³, therefore equal or higher than the ones recently used in contracts with the same contracting authority, the situation being the same for other products as well, submitting documents in this matter.

There isn’t any provision in the procurement or financial-accounting legislation which would prohibit the entrepreneurs who also have production capacities to introduce better prices for their own products in their bid, but on the contrary many business operators understand to develop such capacities in order to ensure more facile access to resources and become competitive. Hence, the Council retains that the contracting authority must reevaluate the response of the operator, considering also the CJEU Decision from the 10th of September 2020 (C-367/19 Tax-Fin-Lex, ECLI:EU:C:2020:685): “Article 2 paragraph (1) point 5) of the Directive 2014/24/EU of the European Parliament and the Council’s Decision from the 26th of February 2014 on public procurements and the abrogation of the Directive 2004/18/EU, as amended by the Commission Delegated Regulation (EU) 2017/2365 from the 18th of September 2017, must be interpreted in the sense that it **does not represent a ground of law for the dismissal of an operator’s bid within an award procedure of a public procurement contract just for the reason that the price proposed in the bid is of 0 euro**”.

The Council also retains as relevant the claim of the complainant against according to which the calculation of the price for these materials did not consider the cost condition from 2019 because at the time of submitting the bid the market conditions have changed dramatically in comparison to 2019, while the costs registered in 2019 have no relevancy on future prices. This is due to the fact that in the year 2019 the society did not produce a single tone of AB22,4 asphalt mixture because it did not have any projects or request for this type of mixture.

Concerning the introduction of “diverse” expense for the sorting/crushing plant, the Council notes that, as the supplier of crushed stone and the bidder share the same identity, the latter does not have to justify any type of expenses for the respective plant. The commercial policy of the bidder must not be directed to obtain profit from selling the stone to itself and also from the project it is about to win, as the way in which it

aims to obtain and distribute expenses and profit is a matter of internal organisation.

For this reason, the Council retains that holding the quarry and the sorting/crushing plant represents a fair competition advantage which does not entitle the contracting authority to the exclusion of the bidder.

DECISION NO. 569/2021 – COURT OF APPEAL TIMIȘOARA

Therefore, regarding the expenses which are requested for clarification, expenses related to stone crushing, the court appreciates that there is no ground to impute to the bidder that it did not establish and highlight these expenses in the conditions in which it holds its own quarry and sorting/crushing plant, as the business operator is free to establish and appreciate the bided price considering its own production capacities.

The circumstance in which the bidder did not introduce the expenses with the quarry and sorting/crushing plant as an element of the price is fully justified by the fact that it holds itself such a plant. Forcing the operator to include these expenses in its bid in the context in which he chooses not to establish them as such, because it holds its own quarry and sorting/crushing plant, in the absence of a legal provision which would state the obligation of also including the expenses with its own production capacities in the price, is regarded as an illegal interpretation of non-justifying concludingly from this point of view of the stone crushing expenses.

On the contrary, the bidder clarified this aspect by indicating the possession of its own quarry and sorting/crushing plant, thus explaining implicitly that it understood to use this production advantage in substantiation of the bided price, which cannot be considered as understated under this aspect. Hence, the appreciation of the contracting authority that the expenses with the quarry and sorting/crushing plant have not been conclusively justified is illegal and cannot be retained as correct.

Furthermore, the contracting authority did not retain the understated character of the bided price in relation to the alleged unjustified stone crushing expenses yet it appreciated the response as inconclusive, although the bidder has clearly shown that it is its own supplier of crushed stone, possessing the specific production means, an advantage it also understood to make use of in establishing the bided price and which cannot be legally sanctioned, because it is the attribute of the bidder. The latter has the possibility to appreciate its way of organisation and valorisation of its own production capacities in order to determine the bided price.

In addition, there is no mention of the contracting authority that there is any risk of non-executing the contract, should it be

attributed to the bidder, by non-including these expenses in the bided price and that the bided price proves to be a dumping price due to the valorisation of this advantage of the business operator which holds sorting/crushing plant.

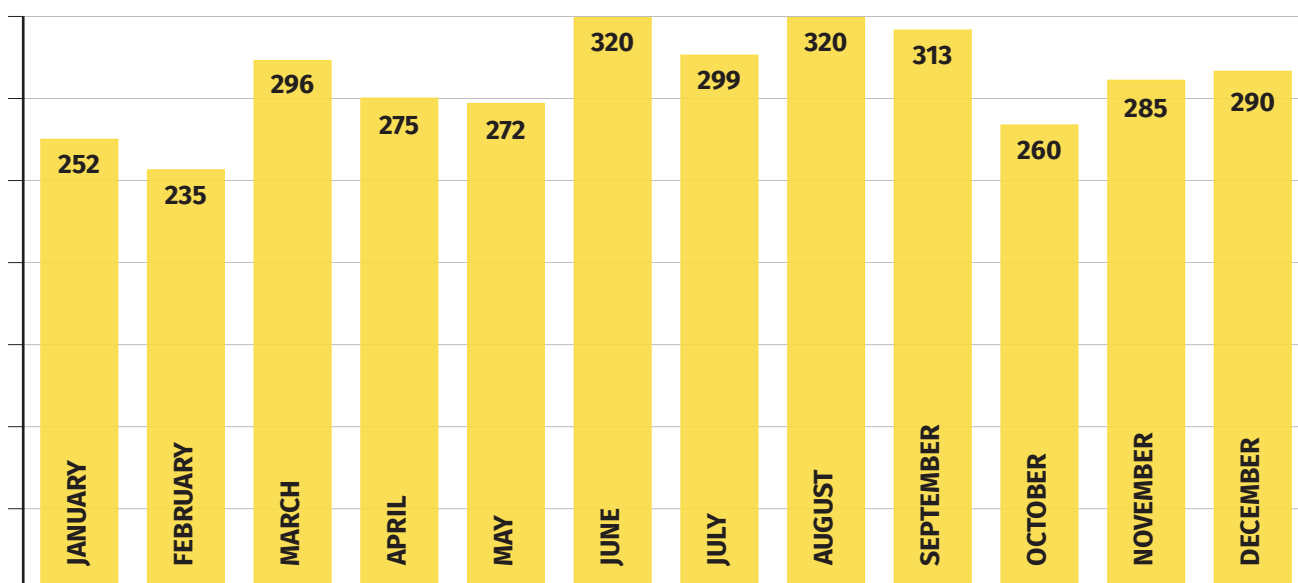
Concerning the cost of crushed stone and the different expenses with the sorting plant, the claim of the petitioner that the N.C.S.C. has wrongly considered as relevant the claims of the complainant in the sense that price formation of materials was not performed in relation to the cost conditions from the year 2019, in the conditions in which in 2019 the society did not produce a single tone of AB22,4 asphalt mixture because it did not have any request for this type of mixture, cannot be accepted by the court.

In this sense, the court retains that, on the one hand, in the conditions in which the bidder, owner of the sorting/crushing plant, understood to valorise this economic asset in order to bid a more convenient price, it results that it already has justified the stone crushing costs and, on the other hand, as the comparison with 2019 cannot be sustained because the society did not produce the mentioned asphalt mixture and in the absence of breaking a legal norm, the response to the clarifications cannot be appreciated as inconclusive, as non-judiciously proceeded by the contracting authority.

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

On the course of 2021, the solving complaints chambers within N.C.S.C. issued 2,906 decisions in order to solve a number of 3,417 complaints (files). The monthly trend of the complaints (files) ruled by the solving complaints chambers within the Council was as follows:

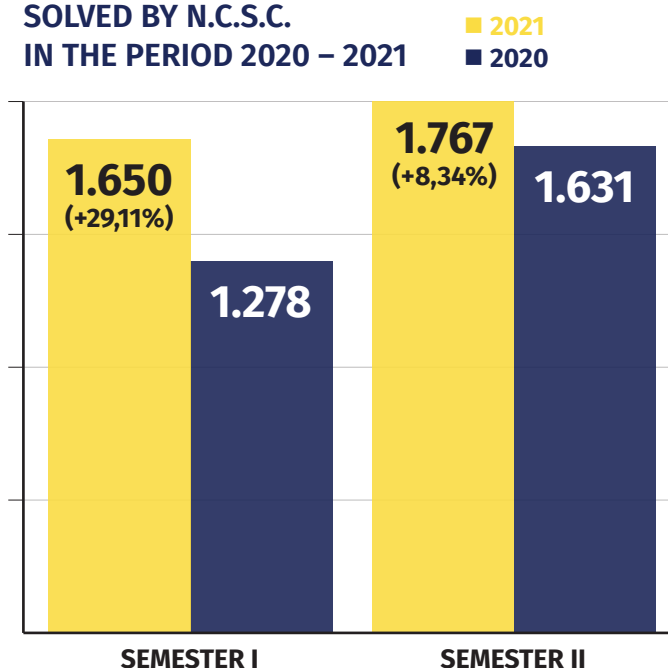
THE TREND OF THE FILES SOLVED BY N.C.S.C. IN THE YEAR 2021



Comparing the number of the complaints (files) solved by N.C.S.C. in the year 2021 with the one registered in the previous year (2,909 files), an increase of 17.46% (+508 files) may be observed.

The semestrial trend of the files solved by the Council in the year 2021 shows that in the first half of the year an increase of 29.11% was registered in comparison to the similar period of the previous year, while in the second half of 2021 the increase was of 8.39%.

THE SEMESTRIAL TREND OF THE FILES SOLVED BY N.C.S.C. IN THE PERIOD 2020 – 2021



The official statistics shows that, since the Council was created and until the 31st of December 2021, **the total number of the files solved by the complaints solving chambers amounted to 74,290, meaning a monthly average of over 406 solved files.**

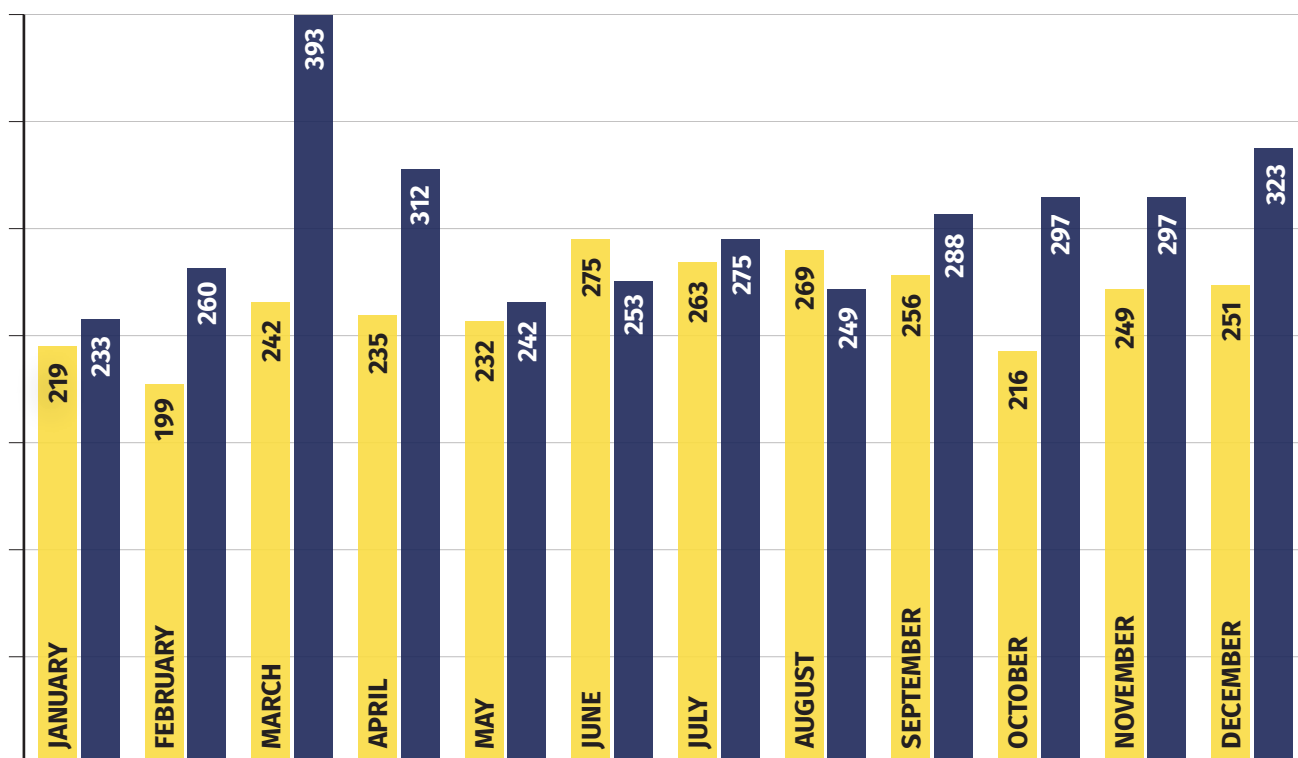


2.4. DECISIONS RENDERED BY N.C.S.C.

Concerning the decisions rendered by the Council, the official data reveal that from the 1st of January to the 31st of December 2021, the 11 chambers for solving complaints within N.C.S.C. rendered 2,906 decisions and 3,422 conclusions, totalising 6,328 decisions.

Divided per months, the statement of the Council's rendered decisions had the following trend in 2021:

THE TREND OF THE DECISIONS ISSUED BY N.C.S.C. IN THE YEAR 2021



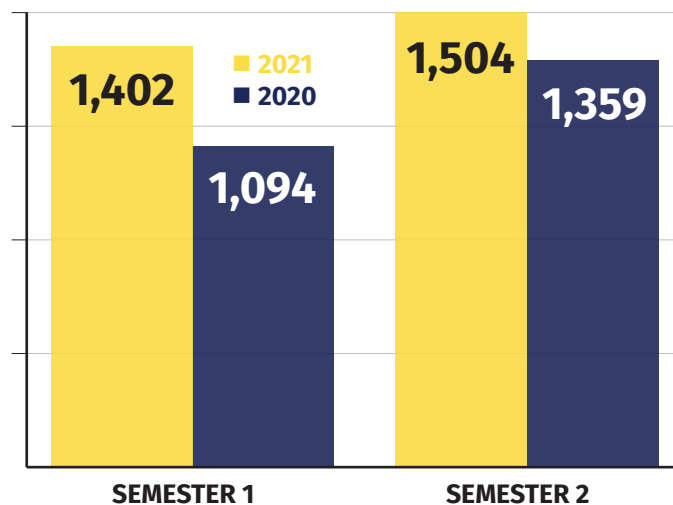
Statistics shows that in the year 2021 the number of the decisions rendered by N.C.S.C. (2,906) witnessed an increase of 18.47% (+453 decisions) as compared to the previous year when 2,453 decisions have been rendered.

It must be mentioned that pursuant to Article 17 paragraph (2) of Law no. 101/2016, as amended and supplemented, all the complaints lodged within a procedure are joined in order to ensure the rendering of a unitary solution. Therefore, it must be taken into consideration that, in many cases, a procedure was challenged by two, three or even more business operators, in which case the respective complaints were joined. In addition, there is the possibility that, within each procedure for which challenges have been submitted, one or more applications of voluntary interventions could be lodged by some business operators. Yet, in all these cases, the Council

renders a single decision, following the joining of the complaints and applications of voluntary interventions.

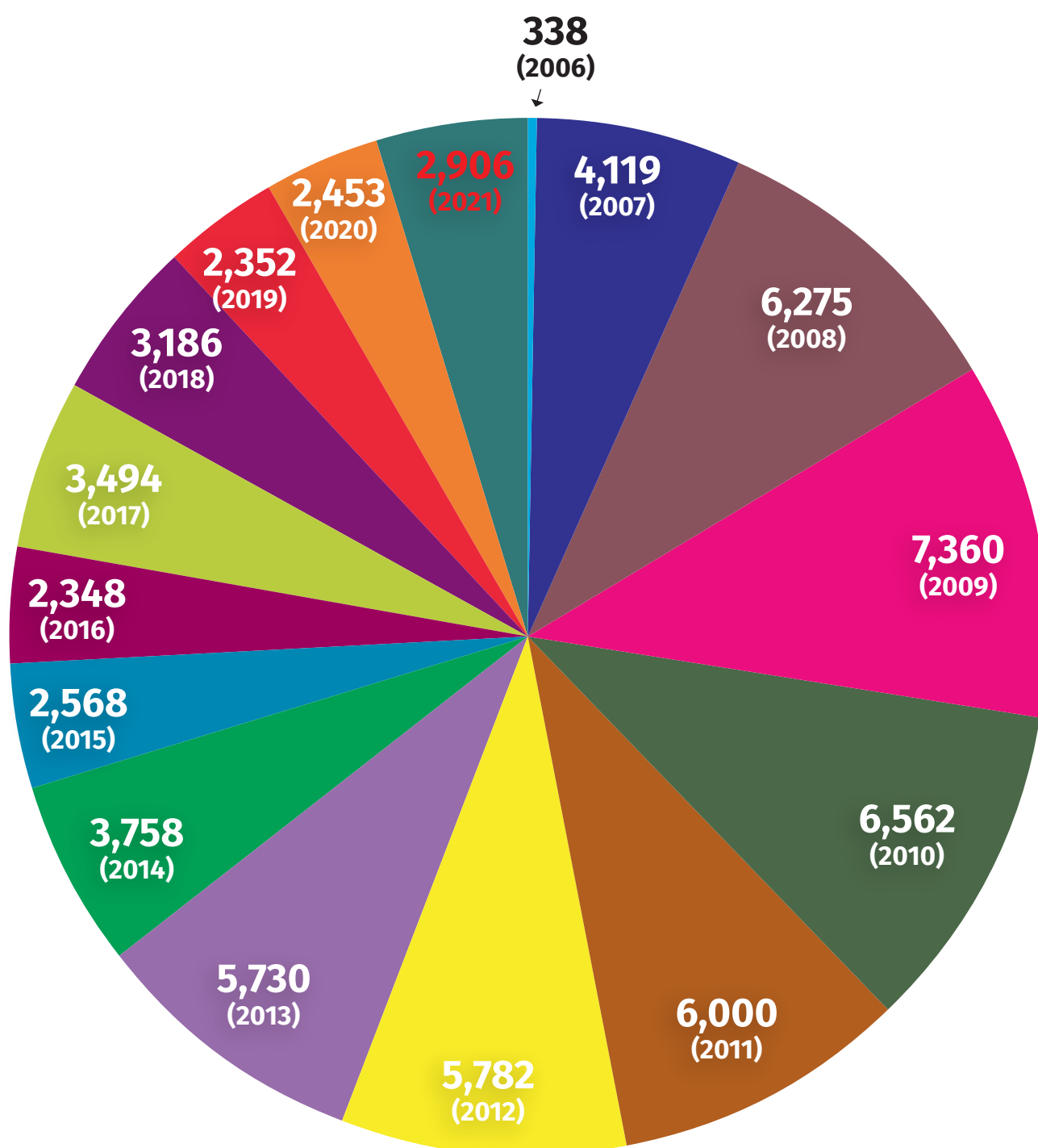
Regarding the semestrial trend of the decisions rendered by N.C.S.C. in the year 2021, in comparison the similar periods of the year 2020, it developed as follows:

THE SEMESTRIAL TREND OF THE DECISIONS RENDERED BY N.C.S.C. IN THE PERIOD 2020 - 2021



As a whole, since its establishment (September 2006) and until the 31st of December 2021, the total number of the decisions rendered by the Council amounted to 65,231, meaning a monthly average of 356 rendered decisions.

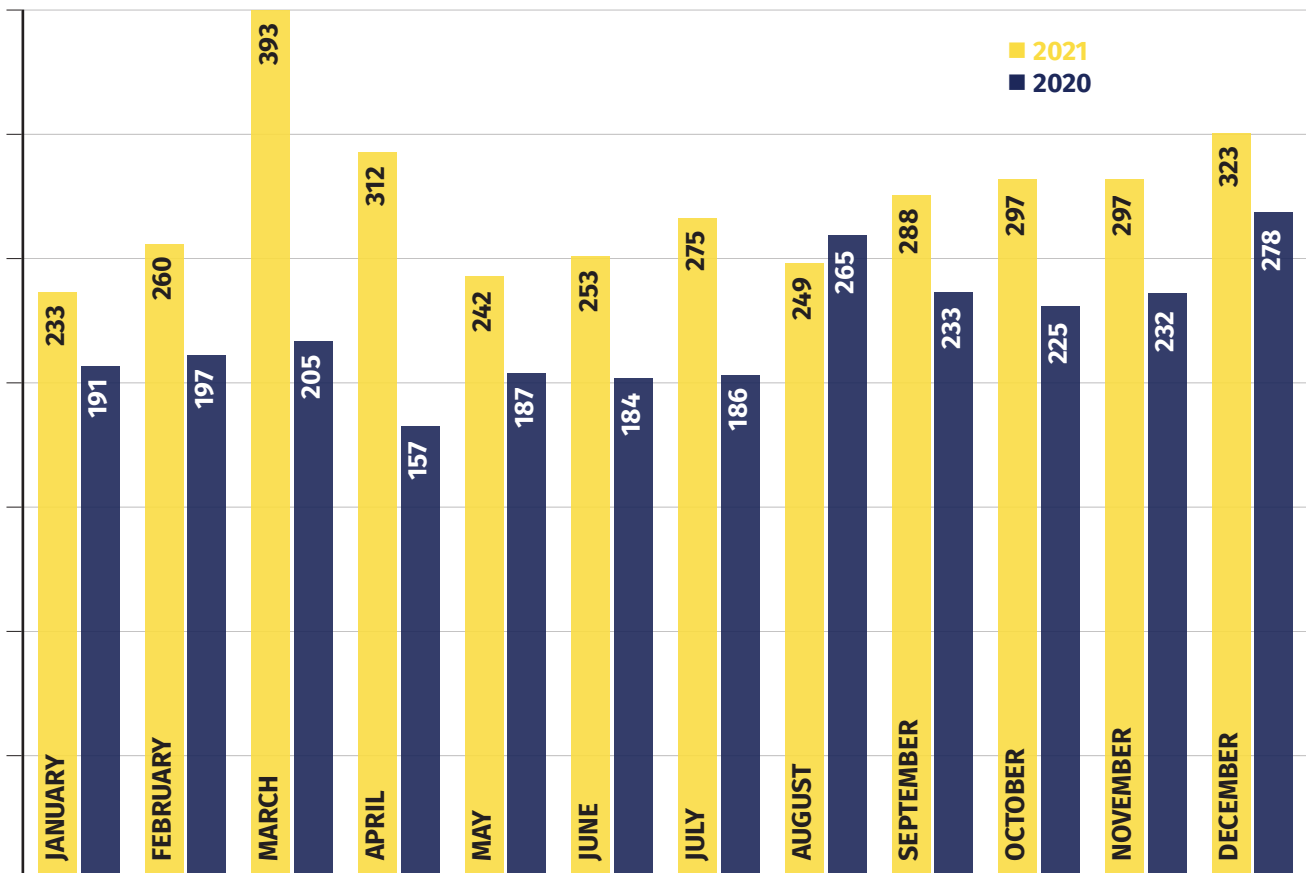
THE STANDING OF THE DECISIONS
RENDERED BY N.C.S.C. IN THE PERIOD 2006-2021



Regarding conclusions, it must be mentioned that in the year 2021 they amounted to 3,422, thus resulting a 34.72% increase (+882 conclusions) compared to the previous year.

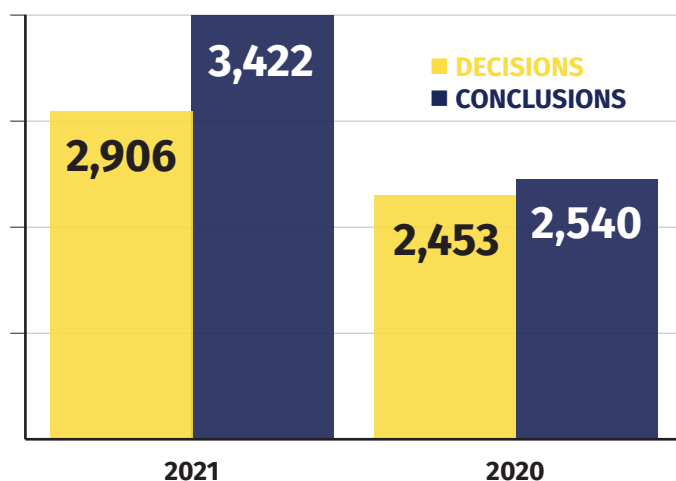
Concerning the monthly trend of the conclusions issued by N.C.S.C. in the year 2021, in comparison with the previous year, it developed as follows:

THE TREND OF THE CONCLUSIONS ISSUED BY N.C.S.C. IN THE PERIOD 2020 - 2021



Taking into account the number of decisions and conclusions issued by the Council in the year 2021, it results the total number of the decisions rendered by the Council amounted to 6,328, meaning a 24.50% increase in comparison to the year 2020, as illustrated by the following chart:

THE TREND OF DECISIONS RENDERED BY N.C.S.C. IN THE PERIOD 2020 - 2021



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

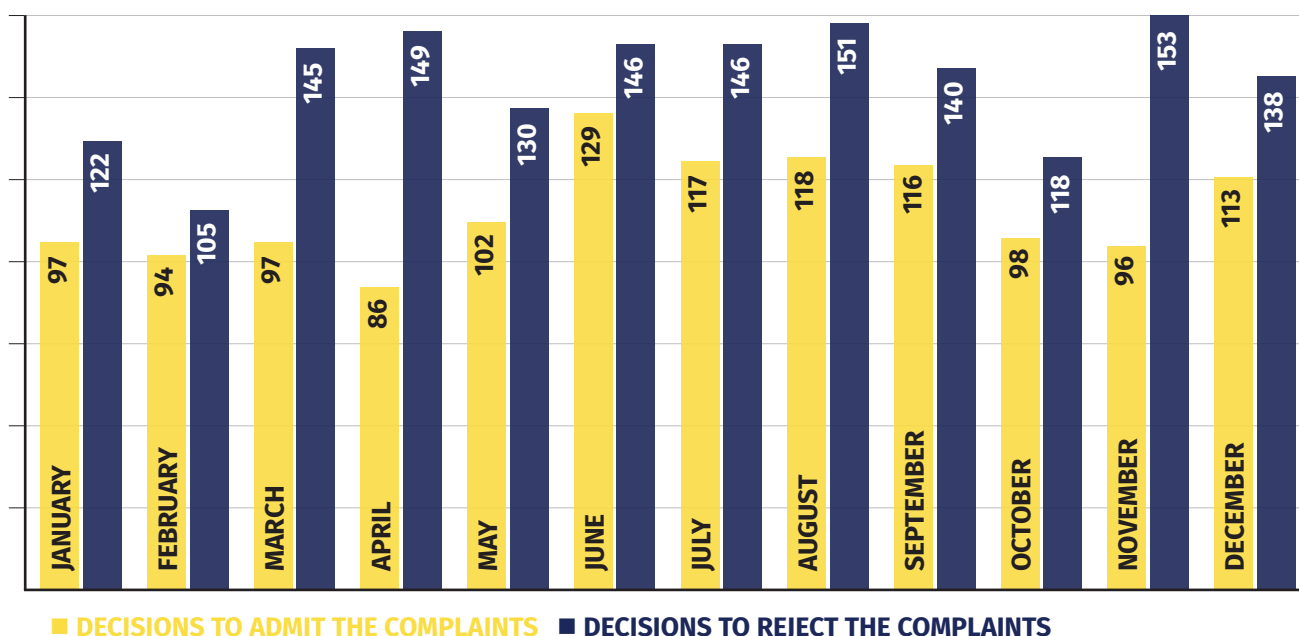
As mentioned in the chapter “2.1. THE TREND OF THE COMPLAINTS LODGED BY THE BUSSINESS OPERATORS”, the total number of the decisions issued by the 11 chambers for solving complaints within N.C.S.C. amounted to 2,906 from the 1st of January to the 31st of December 2021.

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

- 1.263 decisions under which it was ordered the acceptance of the complaints. In this case, 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 to the business operator with the rights acknowledged by law.
- 1.643 decisions under which it ordered the dismissal of the complaints, by several reasons:
 - the complaining party failed to set up the bond pursuant to Article 611 of Law no. 101/2016, as amended and supplemented;
 - 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/unfounded;
 - 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 complainant 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 file.

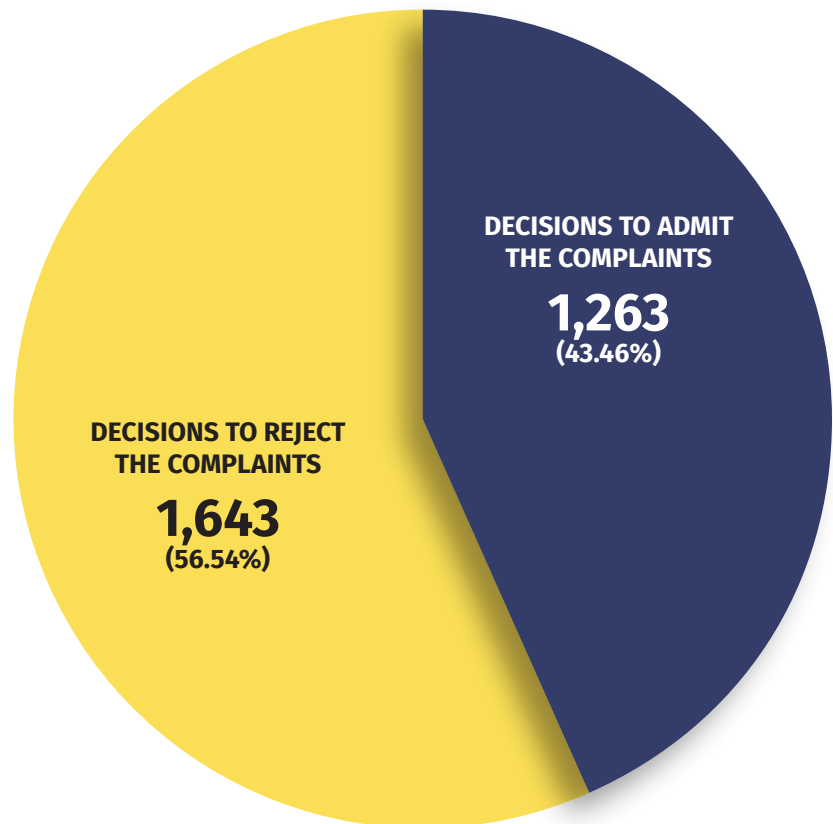
Concerning the monthly trend, the standing of the solutions rendered by N.C.S.C. following the settlement of the complaints lodged by business operators was as follows:

THE MONTHLY TREND OF THE SOLUTIONS RENDERED BY N.C.S.C. IN THE YEAR 2021



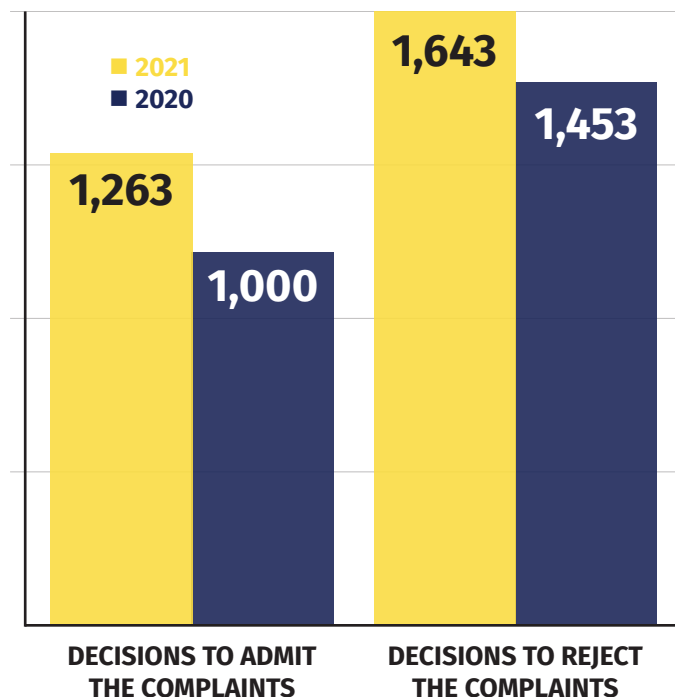
THE STANDING OF THE SOLUTION RENDERED BY N.C.S.C. IN THE YEAR 2021

Regarding the weight of the decisions rendered by the Council for accepting the complaints lodged by business operators, it amounted to 43.46% of the total rendered decisions, while for the rest of 56.54% of the total rendered decisions the Council ruled the dismissal of the complaints lodged by business operators.



Compared to the year 2020, when the weight of the decisions rendered by the Council for accepting the complaints lodged by business operators was of 40.77% (1,000 complaints) of the total rendered decisions, and of the decisions for dismissing the complaints lodged by business operators was of 59.23% (1,453 complaints), it may be observed that in the year 2021 the weight of the decisions rendered by the Council for accepting the complaints lodged by business operators increased with 26.3% (+263 decisions), while the weight of the ones for rejecting the complaints increased with 13.08% (+190 decisions).

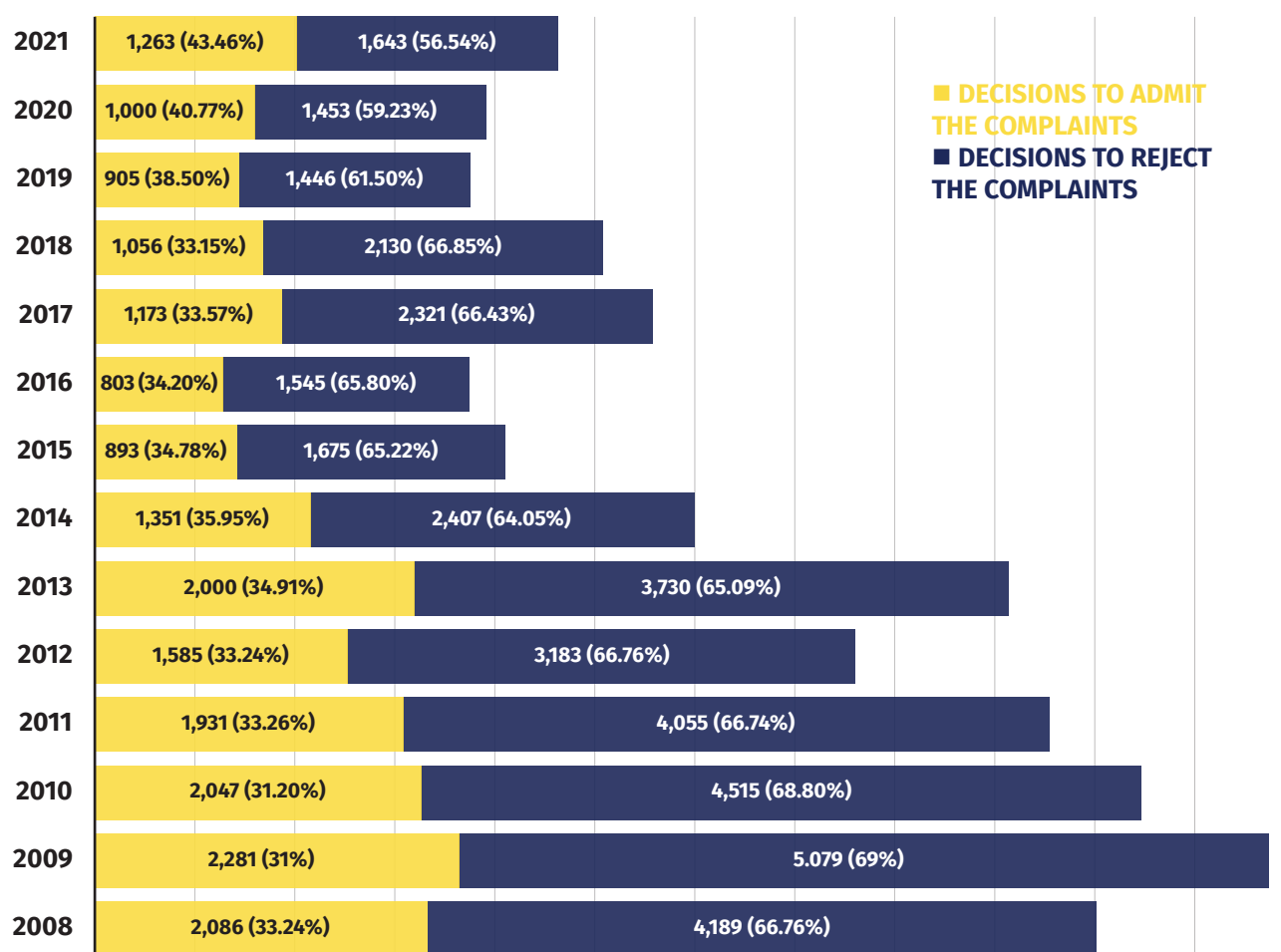
THE STANDING OF THE SOLUTIONS RENDERED BY N.C.S.C. IN THE PERIOD 2020 - 2021



It must be mentioned that in the period 2008-2019 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 business operators was maintained approximately constant (34% - accepted complaints, 66% - rejected complaints).

Yet, in the period 2019-2020, the percentage of the accepted decisions increased from approximately 38% to over 43% of the total rendered decisions, while the percentage of the rejected complaints dropped from 61% to approximately 56%.

THE TREND OF THE SOLUTIONS ISSUED BY N.C.S.C. IN THE PERIOD 2008 - 2021



This trend demonstrates, on the one hand, that the business operators – complainants proved on the course of time a better knowledge of the legislation in the field and, on the other hand, that the public procurements officials at the level of the contracting authorities are revealing more and more often a lack of transparency, efficiency and effectiveness, but especially a lack of professionalisation of the public procurement function, which often leads to an erroneous interpretation of the legislation in the field of public procurements.

Many times, in practice, the contracting authorities proved a lack of flexibility, choosing a rigid and strict approach on the legislation, focusing on the mechanic implementation of the provisions in force but without following if the procurement procedure reflects the good practices, the efficiency

of the investment (“value for money”), of the public expenses, the principles of equal treatment and transparency, or eventual conflicts of interests.

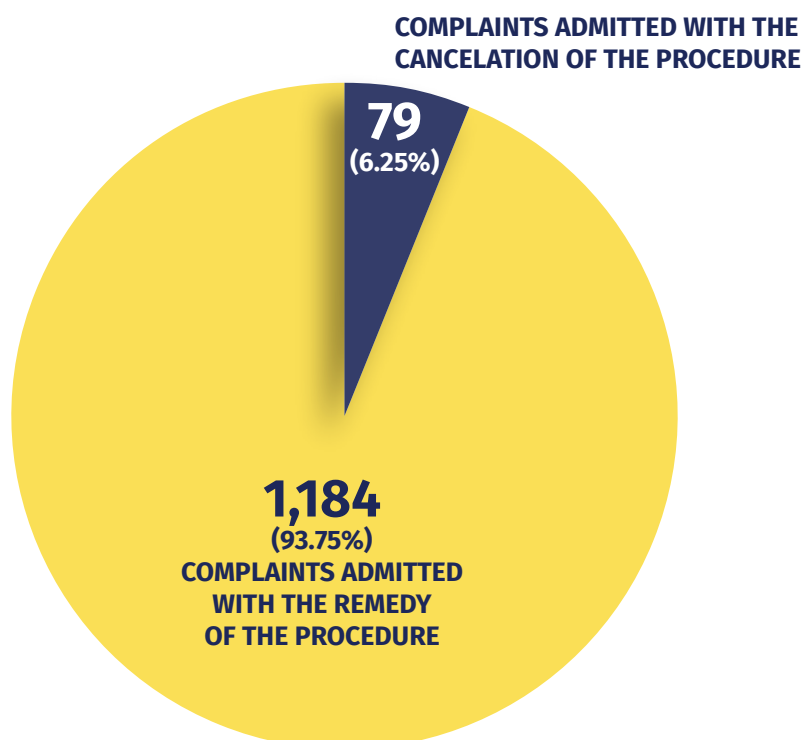
In this context, we underline that for every contracting authority the preparation phase of a public procurement procedure – by far the most important part of the process because the decisions taken in during this stage will determine the success of the entire procedure – should be the design of a strong process for providing the requested works, services or products. When this preparation phase of the public procurement procedure would be correctly completed, then the other phases will most probably develop without any difficulty. Actually, in order to avoid any problems, each public procurement contract should have specific awarding criteria and weights, qualification criteria and well-established technical specifications, which the contracting authority should define when it prepares the procurement documents, which should not be subsequently modified and which should be later verified in the bids’ evaluation phase with strictness and maximum rigour. Nevertheless, many contracting authorities often underestimated the planification phase of the process or they do not perform it at all due to the lack or trained personnel in the field of public procurements.

Hence, we consider it would be wise that the contracting authorities would counterbalance the lack of trained personnel with public procurements external specialists, especially when they perform risky and of great value complex public procurements, considering the fact that the increased professionalisation of the public procurements expert/specialist is considered as the best practice in order to avoid errors which might jeopardise the public procurement process. The best practices in the field reveal that it is worth many times that the contracting authority invests in external technical expertise or in market consultation when preparing for a public procurement, in order to guarantee that the national or European public funds are optimally spent and that the changes or costs of relaunching the process in a later stage or the cancellation of the procedure are avoided.

However, close collaboration and consulting external experts should not endanger the independence of the contracting authorities’ process of making decisions and/or create potentially conflict of interest situations which would violate the principles of equal treatment and transparency.

As to the 1,263 decisions rendered by the Council for admitting the complaints lodged by business operators, it must be noted that in the case of 79 decisions (6.25%) the chambers of solving complaints ruled the cancelation of the award procedures, while 1,184 issued decisions (93.75%) 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 2021

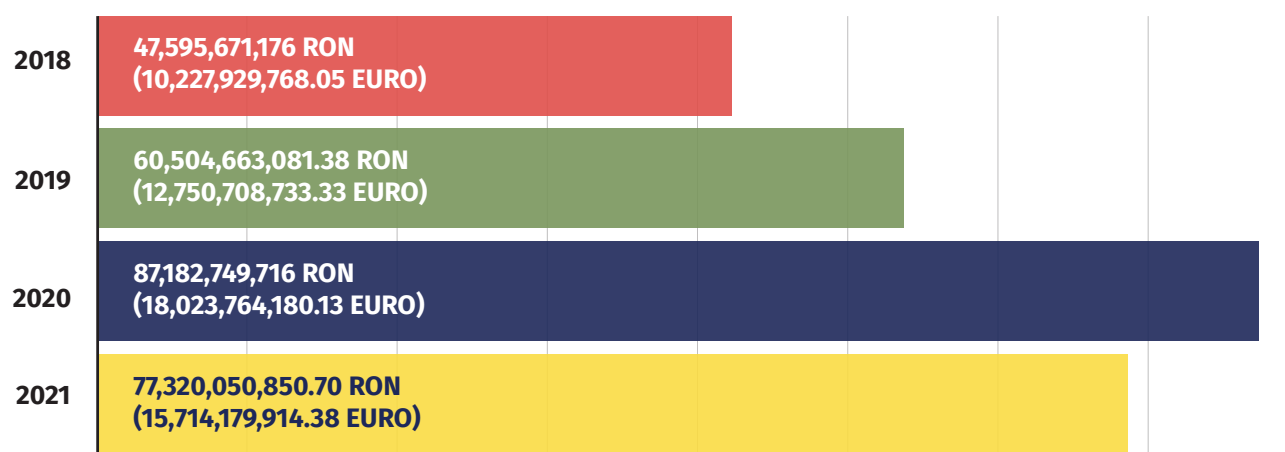


2.6. THE ACTIVITY OF N.C.S.C. IN RELATION TO THE ESTIMATED VALUE OF THE CHALLENGED AND SETTLED AWARD PROCEDURES

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

In the year 2021, the total estimated value of the award procedures under which N.C.S.C. rendered decisions was of 77,320,050,850.70 RON, the equivalent of 15,714,179,914.38 EURO¹⁶, thus resulting a value of 11.31 % lower compared to the year 2020¹⁷, yet with 27.80% higher than the year 2019¹⁸ and with 62.45% over the one recorded for the year 2018¹⁹.

THE TREND OF THE DECISIONS ISSUED BY N.C.S.C. IN THE PERIOD 2018 - 2021 IN RELATION TO THE TOTAL ESTIMATED VALUE OF THE PROCEDURES



In terms of the value, in the year 2021, 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 24,238,929,888.91 RON (the equivalent of 4,926,211,261.05 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 53,081,120,961.79 RON (the equivalent of 10,787,968,653.32 EURO).

It may be observed that, although the number of complaints, decisions and conclusions was far superior in the year 2021 in comparison with the previous year, still due to the COVID-19 pandemic – which “froze the economy” – the total estimated value of the award procedures under which N.C.S.C. rendered decisions for rejecting the complaints lodged by business operators decreased with 11.31% compared to the previous year.

Yet, the total estimated value of the award procedures under which N.C.S.C. rendered decisions for admitting the complaints lodged by business operators increased with 2.05% (488,732,207.8 RON, the equivalent of 99,327,739.17 EURO), while the value of the procedures under which N.C.S.C. rendered decisions for rejecting the complaints lodged by business operators dropped with 16.32.73% (10,351,431,072.82 RON, the equivalent of 2,103,778,366.15 EURO).

¹⁶. The amount was calculated at an annual average exchange rate communicated by the National Bank of Romania for the year 2021 of RON/EURO 4.9204

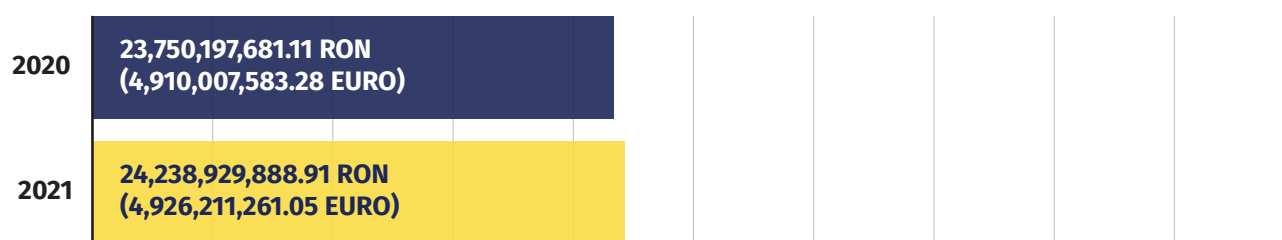
¹⁷. The amount was calculated at an annual average exchange rate communicated by the National Bank of Romania for the year 2020 of RON/EURO 4.8371

¹⁸. 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

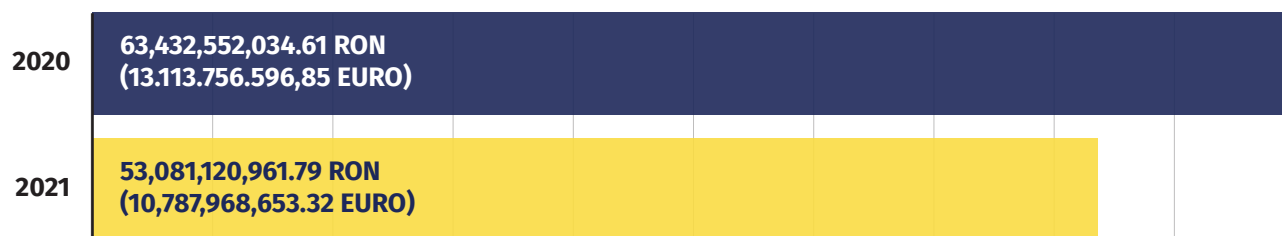
¹⁹. The amount was calculated at an annual average exchange rate communicated by the National Bank of Romania for the year 2018 of RON/EURO 4.6535

THE TREND OF THE TOTAL ESTIMATED VALUE OF THE PROCEDURES UNDER WHICH N.C.S.C. RENDERED DECISIONS OF ACCEPTING/ REJECTING THE COMPLAINTS IN THE PERIOD 2020-2021

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

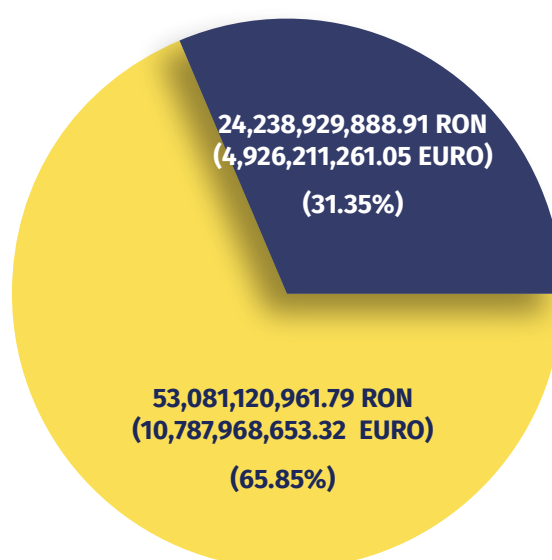


THE TOTAL ESTIMATED VALUE OF THE PROCEDURES UNDER WHICH N.C.S.C. RENDERED DECISIONS OF REJECTING THE COMPLAINTS



Thus, it is observed that in 2021 the total estimated value of the award procedures under which N.C.S.C. rendered decisions for accepting the complaints lodged by business operators (24,238,929,888.91 RON, the equivalent of 4,926,211,261.05 EURO) represented 31.35% of the total estimated value of the award procedures under which N.C.S.C. rendered decisions (77,320,050,850.70 RON, the equivalent of 15,714,179,914.38 EURO), while the total estimated value of the award procedures for rejecting the complaints lodged by business operators (53,081,120,961.79 RON, the equivalent of 10,787,968,653.32 EURO) represented 68.65% of the total estimated value of the award procedures under which the Council ruled.

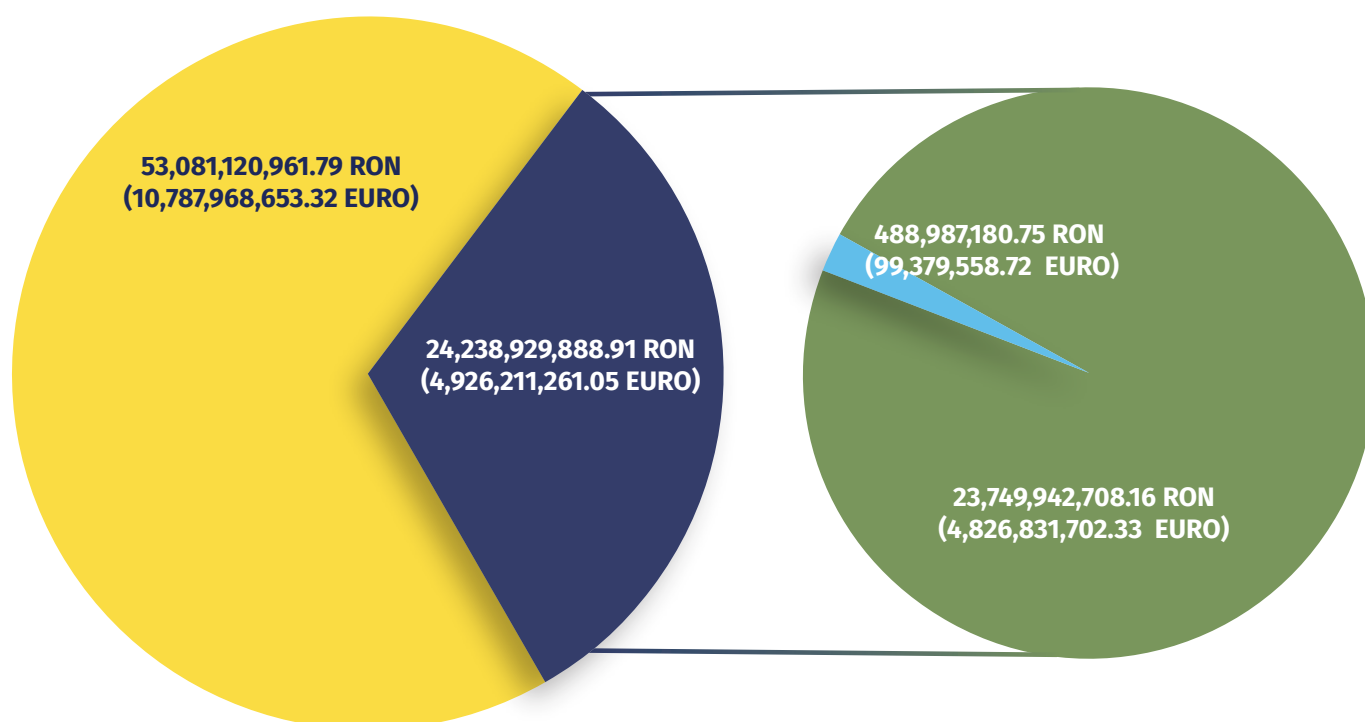
THE TOTAL ESTIMATED VALUE OF THE PROCEDURES UNDER WHICH N.C.S.C. RENDERED DECISIONS OF ACCEPTING/ REJECTING THE COMPLAINTS IN THE YEAR 2021



- THE TOTAL ESTIMATED VALUE OF THE PROCEDURES UNDER WHICH N.C.S.C. ACCEPTED THE COMPLAINTS
- THE TOTAL ESTIMATED VALUE OF THE PROCEDURES UNDER WHICH N.C.S.C. REJECTED 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 488,987,180.75 RON (the equivalent of 99,379,558.72 EURO), and that of the award procedures under which remedies were ordered was of 23,749,942,708.16 RON (the equivalent of 4,826,831,702.33 EURO).

THE TOTAL ESTIMATED VALUE OF THE PROCEDURES UNDER WHICH N.C.S.C. RENDERED DECISIONS IN THE YEAR 2021

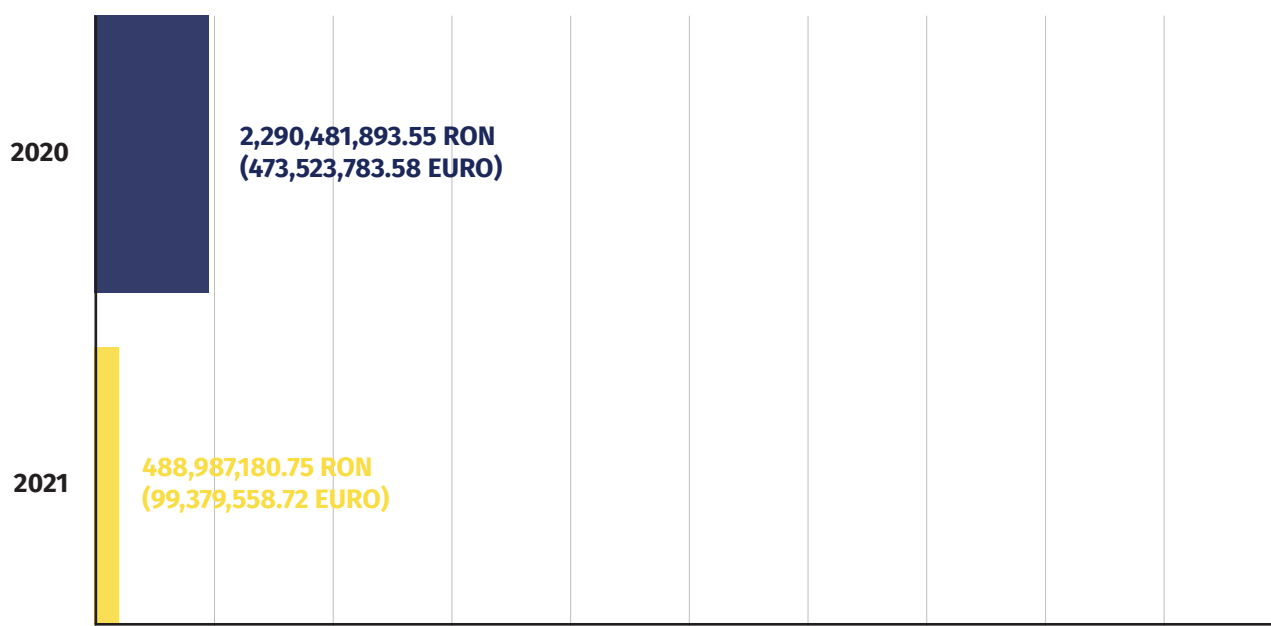


- THE TOTAL ESTIMATED VALUE OF THE PROCEDURES UNDER WHICH N.C.S.C. REJECTED THE COMPLAINTS
- THE TOTAL ESTIMATED VALUE OF THE PROCEDURES UNDER WHICH N.C.S.C. ACCEPTED THE COMPLAINTS
- THE TOTAL ESTIMATED VALUE OF THE PROCEDURES UNDER WHICH N.C.S.C. ACCEPTED THE COMPLAINTS AND ORDERED REMEDY MEASURES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

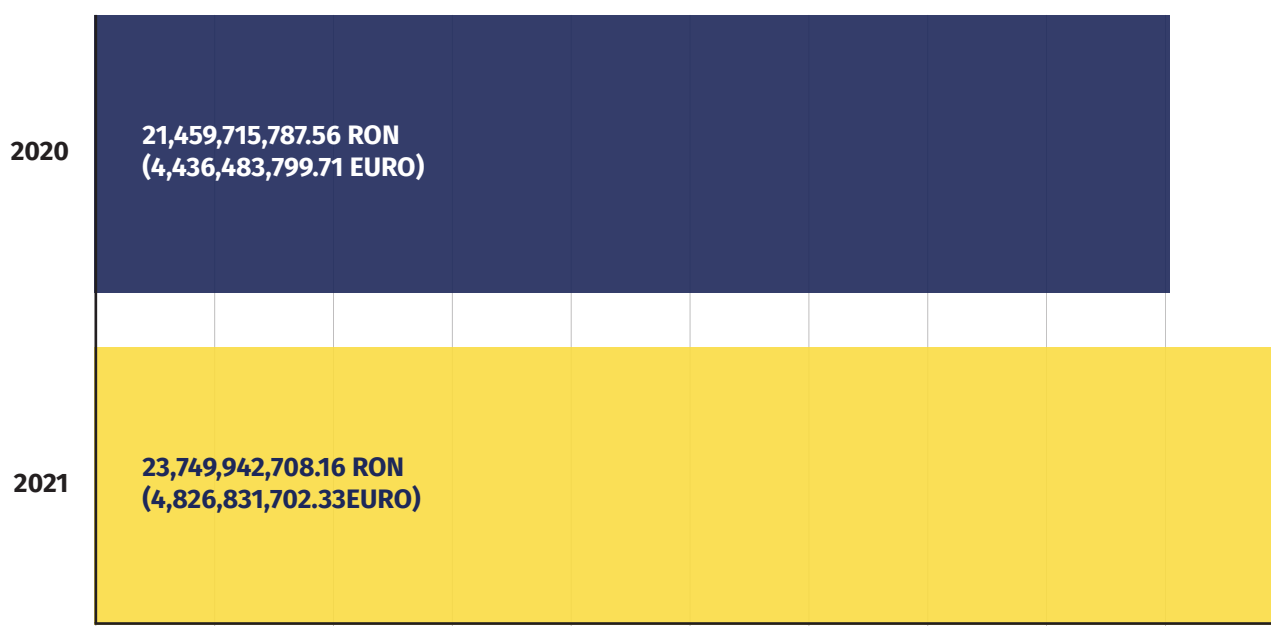
A comparison with the previous year reveals that in the year 2021 the total estimated value of the award procedures under which the Council cancelled the award procedures declined with 78.65%, while the total estimated value of the award procedures under which the Council accepted the complaints and order the remedy of the procedures increased with 10.67%.

THE TOTAL ESTIMATED VALUE OF THE PROCEDURES UNDER WHICH N.C.S.C. RENDERED DECISIONS OF ACCEPTING THE COMPLAINTS IN THE PERIOD 2020-2021

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

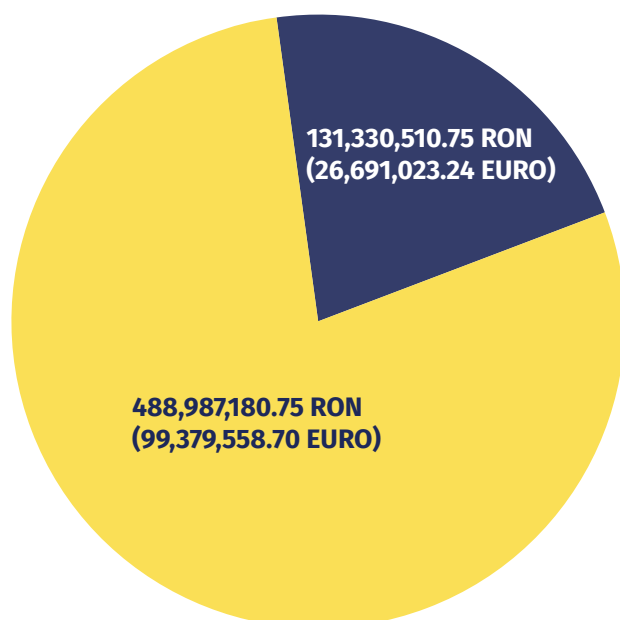


THE TOTAL ESTIMATED VALUE OF THE PROCEDURES UNDER WHICH N.C.S.C. ACCEPTED THE COMPLAINTS AND ORDERED REMEDY MEASURES OF THE PROCEDURE



Of the total estimated value of 488.987.180,75 RON (the equivalent of 99,379,558.72 EURO) of the procedures under which the Council ordered the cancellation of the procedure, the amount of 131,330,510.75 RON (the equivalent of 26,691,023.24 EURO) was represented by a number of 27 award procedures funded by European funds.

THE TOTAL ESTIMATED VALUE OF THE AWARD PROCEDURES FUNDED BY EUROPEAN FUNDS UNDER WHICH THE COMPLAINTS 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 PROCEDURE



■ 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 FUNDED BY EUROPEAN FUNDS UNDER WHICH N.C.S.C. ACCEPTED THE COMPLAINTS AND ORDERED THE CANCELLATION OF THE PROCEDURE

In terms of percentage, the total estimated value of the challenged award procedures funded by European funds which were cancelled by the Council represented 26.86% of the total estimated value of the award procedures for which cancellation decisions were ordered, and only 0.17% of the total estimated value of the award procedures challenged by business operators.

It must be mentioned that 27 of the 28 procedures funded by European funds for which the Council accepted the complaints and order the cancellation of the procedures were procurements of supply contracts in the medical field in the context of the COVID-19 pandemic.

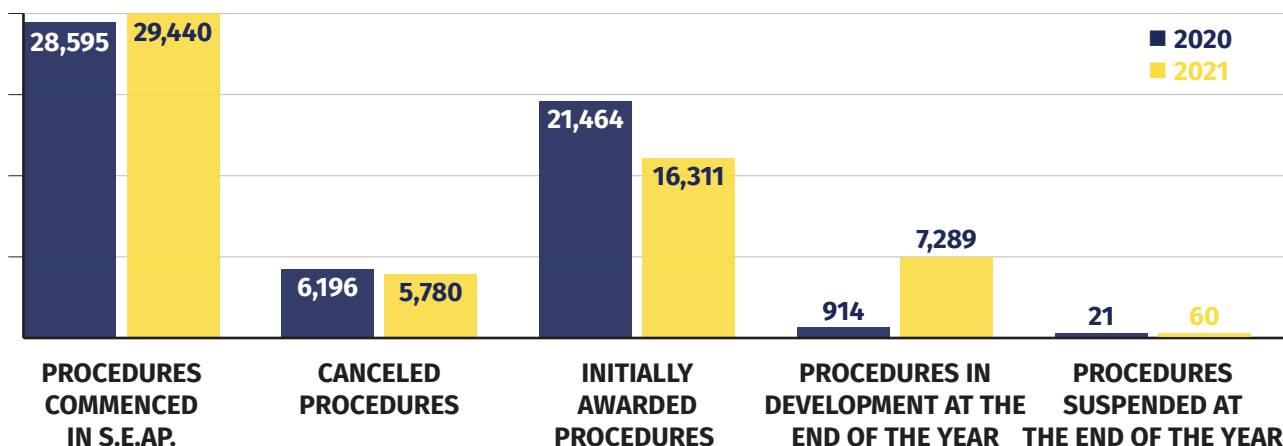
Contrary to some opinions expressed in the public space, the numbers above demonstrate that N.C.S.C. is not an obstacle in the way of the development of the public procurement procedures commenced at national level, but it represented an efficient filter for preventing a significant number of irregularities within the public procurement procedures developed on the course of the year 2021, 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.

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 2021, within the communication platform used in the award process for the public procurements contracts, a number of 29,440 award procedures were commenced through participation announcements and invitations, amounting to a total estimated value of 160.012.432,338 RON (the equivalent of 34.628.410.988,19 EURO).

In comparison to the year 2020, when 28.595 award procedures were commenced in S.E.A.P. through participation announcements and invitations, it is found that in 2021 the number of the award procedures increased with 845 (2.95%), yet due to the economy blockage generated by the COVID – 19 pandemic the total estimated value of the commenced award procedures diminished with 7,488,654,453 RON (the equivalent of 1.521.960.501,79 EURO).

THE TREND OF THE PROCEDURES COMMENCED IN S.E.A.P. IN THE PERIOD 2019 - 2021



In order to provide an image of the impact of the COVID – 19 pandemic on the economy, it must be noted that, in the year 2019, a number of 35,051 award procedures were commenced through participation announcements and invitations on the communication platform used in the award process for the public procurements contracts, with a total estimated value of 196.638.928,828 RON (the equivalent of 41.439.544.977,67 euro).

In fact, compared to the year 2019, in the year 2021 the total estimated value of the procedures commenced within the communication platform used in the award process for the public procurements contracts declined with more than 36,626 billion RON, while the number of commenced procedures decreased with 5,611. However, in comparison to 2019, the number of complaints lodged by business operators with N.C.S.C. in the year 2021 increased with 22.22% (623 complaints).

The official data provided by S.E.A.P. show that the end of 2021, of the total of 29,440 award procedures commenced in S.E.A.P, a number of 5,780 award procedures (19.63%) were listed as cancelled (either by the contracting authorities, by the administrative law courts or by decision of N.C.S.C.), 60 procedures were listed as being suspended (0.20%), 7,289 were in development (24.76%), and 16,311 were already awarded (55.40%).

Comparing the total annual estimated value of the procedures commenced in S.E.A.P. in the year 2021 (160.012.432,338 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 (77.320.050.850,70 RON, the equivalent of 15.714.179.914,38 EURO), it arises that the latter represented 48.32% of the total estimated value of the procedures commenced in S.E.A.P.

If we compare the total annual estimated value of the procedures commenced in S.E.A.P. in 2020 (160.012.432,338 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 (24.238.929.888,91 RON, the equivalent of 4.926.211.261,05 EURO), it results that the latter represented 15.15% of the total estimated value of the procedures commenced in S.E.A.P.

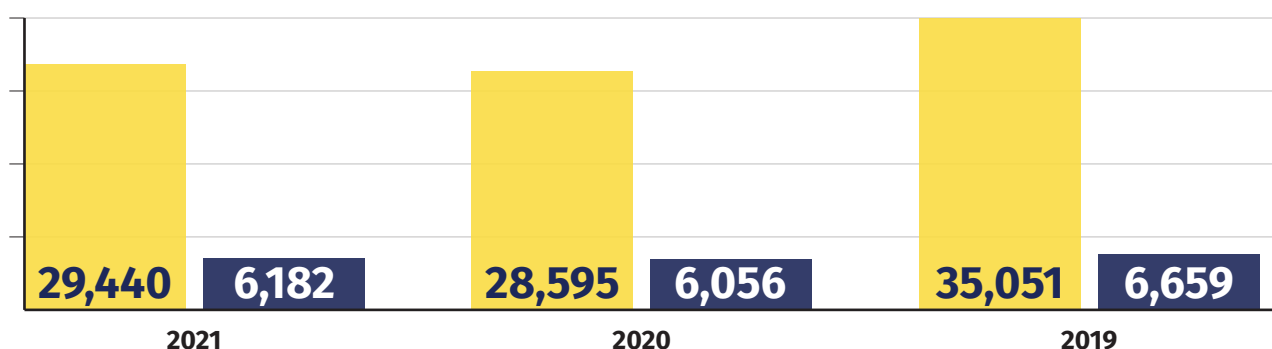
In fact, the total estimated value of the procedures under which N.C.S.C. ordered remedy measures of the challenged public procurements procedures was of 23.749.942.708,16 RON (the equivalent of 4.826.831.702,33 EURO) (14.84% of the total estimated value of the procedures commenced in S.E.A.P.), while the total estimated value of the public procurement procedures under which N.C.S.C. ordered their cancellation was of only 488.987.180,75 RON (the equivalent of 99.379.558,72 EURO) (0.31% the total estimated value of the procedures commenced in S.E.A.P.).

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 2021 show that they reach 6,182, meaning a percentage of 21% of the total public procurement procedures commenced in the system (29,440 procedures). Compared to the previous year, when 6,056 public procurement procedures funded by European funds were commenced, in 2021 their number increased with only 2.08%, a fact which indicates a low absorption of European funds.

It must be mentioned that of the total number of 6,182 public procurement procedures funded by European funds commenced in S.E.A.P. in the year 2021 through participation announcements and invitations, a number of 1,570 procedures were cancelled (27.39% of the total number of procedures commenced and financed by European funds and 5.33% of the total number of procedures commenced in S.E.A.P.), with an amount of 7.398.545.672 RON (the equivalent of 1.503.647.197,79 EURO).

AWARD PROCEDURES COMMENCED IN S.E.A.P. IN THE PERIOD 2019 - 2021

■ COMMENCED PROCEDURES
■ PROCEDURES FUNDED BY EUROPEAN FUNDS



As previously mentioned, only 27 of these procedures financed by European funds (1.72%) amounting to 131.330.510,75 RON (the equivalent of 26.691.023,24 EURO) (representing a percentage value of 1.77%) were cancelled by the decisions of the Council, the rest being cancelled by the contracting authorities or by the administrative and fiscal law courts.

As it can be observed, with personnel limited and with minimal material expenditures, the Council proved its efficiency, its employees making huge efforts to answer the specific challenges of the occupied positions. From the presented data, it can be observed that each employee of the Council 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 THE YEAR 2021

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 SUBMITTED CHALLENGES

In compliance with the constitutional principle of the access to justice, any decision rendered by the Council, as a result of the settlement of any complaint by the administrative-jurisdictional channel, can be controlled by a law court so that the remedy of the potential committed errors is allowed within the first settlement, according to legislation. Practically, this 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 type of 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 force 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 award procedures for the provision of services and/or works afferent to the

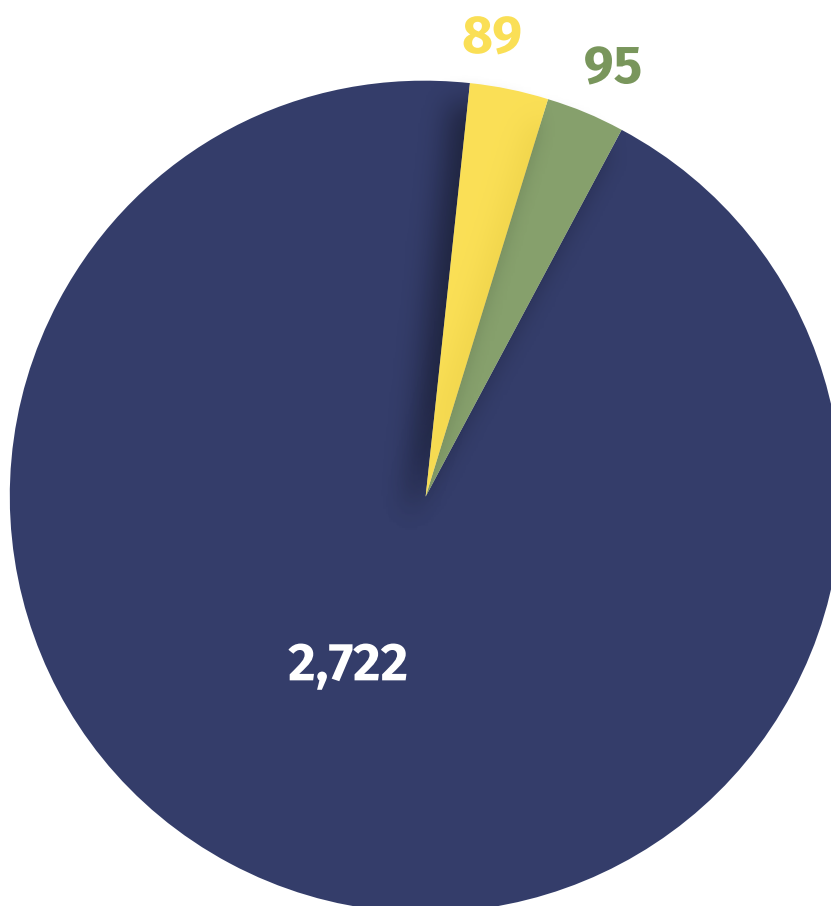
transportation infrastructure of national interest) when a complaint is lodged by the contracting authority and/or by one or more business operators participating at a procurement procedure if they consider to be harmed by the measures ordered by the Council. This fact resides in the provisions of Article 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 2021, of the total of 2,906 decisions issued by the chambers of solving complaints within N.C.S.C., a number of 683 decisions were challenged with appeal (23.50%).

Following the appeals lodged with the competent Courts of Appeal, compliant to Article 29 of Law no. 101/2016, 95 decisions rendered by the Council were fully overridden/amended/

THE STANDING OF THE APPEALS LODGED AGAINST THE DECISIONS OF N.C.S.C. IN THE YEAR 2021



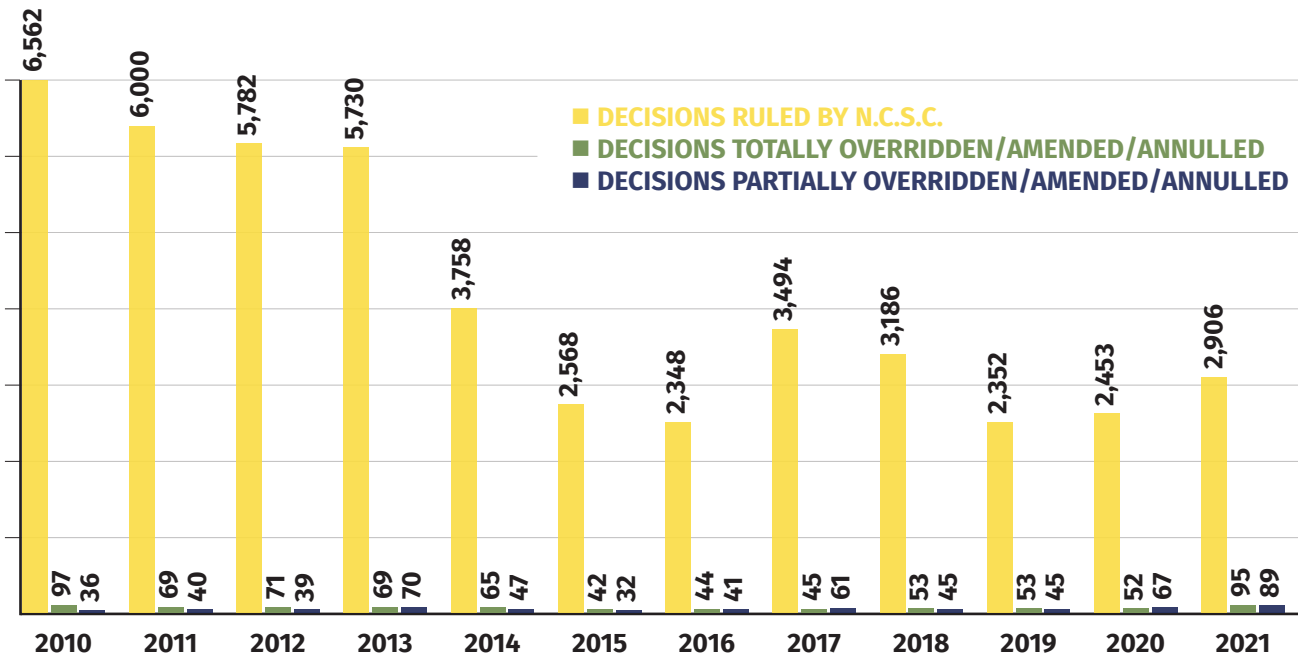
- DECISIONS REMAINED DEFINITIVE AND IRREVOCABLE
- DECISIONS PARTIALLY OVERRIDEN/AMENDED/ANNULLED
- DECISIONS TOTALLY MODIFIED/ AMENDED/ ANNULLED

annulled (3.26% of the total decisions rendered by the Council), 89 were partially modified/amended/annulled (3.06% of the total decisions issued by the Council), and 499 decisions remained definitive and irrevocable in the formed ruled by our institution.

Therefore, the official data reveal that on the course of 2021, of the 2,906 decisions rendered by the Council, a number of 2,722 decisions (93.66%) remained definitive and irrevocable in the formed ruled by the Council.

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 following the submitted complaints was maintained at a very reduced level in comparison to the percentage of decisions ruled by our institution which remained definitive and irrevocable.

THE TREND OF THE APPEALS LODGED AGAINST THE DECISIONS OF N.C.S.C. IN THE PERIOD 2010 - 2021

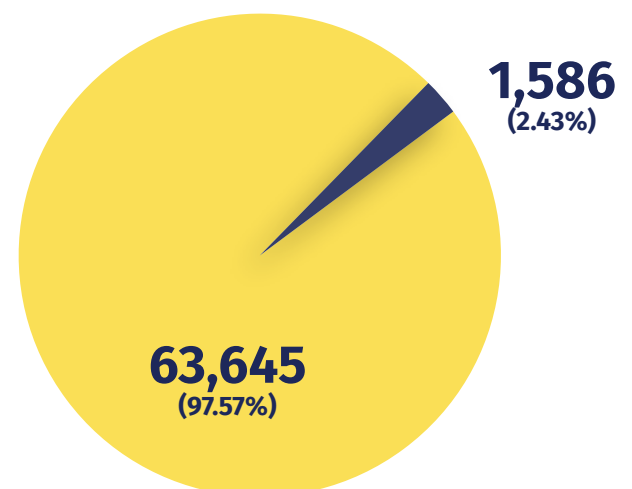


If we sum up the decisions issued by N.C.S.C. from its establishment and until the end of 2021, it arises that only 2.43%, meaning 1,586 decisions were totally or partially overridden/amended/annulled by the competent Courts of Appeal, out of the 65,231 decisions ruled by our institution during the mentioned time span. Therefore, it is revealed that in the period September 2006 – December 2021 the total number of decisions remained definitive after being challenged with appeal at the competent Courts of Appeal was of 63,645, meaning that a percentage of 97.57% of the total ruled decisions remained in the form rendered 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 and the quality of the activity developed by this institution.

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 2022 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 - 2021



■ DECISIONS REMAINED DEFINITIVE IN THE FORM ISSUED BY THE COUNCIL
■ DECISIONS PARTIALLY/TOTALLY OVERRIDDEN/AMENDED/ANNULLED

3.2. NON-UNITARY PRACTICE

Remedy regulates a mechanism for the unification of practice in the field of public and sectorial procurements or works and services concessions.

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.

Actively preoccupied by the promotion and implementation of European practices and policies on the prevention and discouragement of anti-competitive practices, but also by the growth of institutional transparency – such that the national public procurements system would benefit of a predictable, coherent and unitary functioning which would contribute to solving the complaints with celerity, implicitly to the increase of the absorption of European funds – the management of the institution has monthly organised plenary sessions, pursuant to Article 62 of Law no. 101/2016, as amended and supplemented, in order to discuss the current situations which are faced in the activity of solving the complaints.

Following these plenary sessions, the management of the institution rendered decisions on the unification of the administrative-jurisdictional practice, mandatory for all the members and employees of the Council. However, when it was noted the existence of non-unitary solutions of the courts, 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 2021 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 situation imposed the COVID – 19 pandemic mostly blocked this practice unification mechanism. This fact reflected in the national practice by the increasing number of challenged public procurements procedures. This situation was also nourished by the frequent legislative amendments from the period 2019 - 2021, as they bewildering the national remedy system.

Hence, the repetitive changes in legislation, joined by the exceptional situations generated by the COVID – 19 pandemic, have led many times to situations in which the non-unitary practice has weakened the public procurements system, with repercussions on the budgetary execution and the absorption of European funds.

For this reason, we consider that 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.

The Romanian national legislation transposes the European directives in the field of public procurements. Therefore, any change in legislation, on behalf of the legislator or the specialists in the field, should be in accordance with the respective directives. We underline this aspect considering that as long 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.

Unfortunately, it was proved at national level that 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. There are situations in which the practice established that the game rules were settled on the premises of the old regulations even after the adoption of the new law, because the intervention of the legislator was not able to unify the practice, but on the contrary.

Consequently, it is very important for the practice unification that a sufficient and relevant number of court decisions will emerge, with different motivations, so that the most equitable variant will be chosen.

CHAPTER 4

PROJECTS AND INITIATIVES



In the year 2021, the activity of the Council developed seamless and without interruptions due to the measures disposed and implemented at the level of management in the context of the COVID – 19 pandemic.

Starting with September 2020, the National Council for Solving Complaints 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”, code MySMIS 130709/SIPOCA 753, co-financed by the European Social Fund through Operational Programme Administrative Capacity 2014-2020.

The project was a necessity, considering that on the 11th of February 2020, in the context of the COVID – 19 pandemic, the Government adopted Government Emergency Ordinance no. 11/2020 on medical emergency stocks and some measures regarding the

establishment of quarantine, through which O.N.A.C. was designated as the authorised institution for organising the centralised procurement procedures of products for the accumulation, replenishing and refreshing of medical emergency stocks which are necessary for protecting the population of a mass disease.

The general objective of the project was to strengthen the capacity of O.N.A.C and its institutional partners by using innovative instruments which are necessary for the operationalisation and improvement of the centralised

procurements process and of the reduction of irregularities, as well as through the clarification of the roles and competences of the structures involved in the preparation and the management of the public procurements, in the context of the process” complexity generated by novelty elements regarding the simultaneous collection/aggregation of needs, standardisation of the technical specifications for products/services procured by O.N.A.C.

The aforementioned project had the following specific objectives:

1. Improvement of the inter/intra-institutional cooperation of the main public institutions involved in the management of the centralised public procurements system and users;

2. Increase of the quality of the centralised public procurement system through streamlining the O.N.A.C.’s internal work practices and the operationalisation of the centralised award procedures;

3. Reducing the administrative barriers in the field of centralised public procurements in the field of emergency medical services by extending the mandate of O.N.A.C. and establishing roles for the main involved actors;

4. Accessibility to the judicial practice of N.C.S.C. through re-analysing in order to identify the main issues, challenged in the complaints, concerning the award of products/services which can become the subject of centralised procurements for decreasing irregularities;

5. Development of integrate digital mechanisms for planning and monitoring the centralised award procedures in order to increase the transparency and efficiency of the system for a more efficient usage of public funds;

6. Improvement of the competences and knowledge of the O.N.A.C. personnel and of its partners (N.C.S.C. and M.A.I./D.S.U.).

The project signalled the necessity of an integrated unitary system which would ensure the decrease of the time required for the development of the centralised public procurements process and of the risk of losing information, in the conditions in which O.N.A.C. is confronting with a large amount of work due to the high number of institutions involved in centralised procurements. Moreover, the planning and monitoring phases of centralised procurements are performed manually, thus being an activity which generates a high risk of errors in centralising and aggregating the necessities or the drafting of tender documentations, respectively the impossibility to perform statistical analysis or reports in the monitoring phase.

Experts of BEI and World Bank have also been involved in the project. They completed the expertise of the involved partners on the occasion of different organised trainings in order to transpose the recommendations of the European Council in the national legislation and to enforce the capacity of the contracting authori-

ties to prepare solid tender documentations, especially regarding the transparent definition of some adequate selection and award criteria, but also to evaluate the bids.

The partnership O.N.A.C. - N.C.S.C. - M.A.I./D.S.U. was considered strategic for this project, taking into account the great number of complaints which could be considered an indicator of the dysfunctionality of the public procurements system and might lead to the delay of ending the centralised award procedures in the health field.

A total number of 180 persons took part in the project, 80 of them from N.C.S.C. (a.n. – 30 solving counsellors in the field of public procurements and 50 persons with the status of contract staff at the moment when the project started).

The involvement of N.C.S.C. within this project targeted the consolidation of its institutional capacity to address challenges and to avoid delays in issuing decisions and the reduction of the risk of prolongating the term for the award of certain public procurements procedures in the medical field.

During the development of the project, O.N.A.C. also organised two visits at Centralised Procurements Units (U.C.A.) in the health field from EU member states – identified as a good practice example (in France and Portugal), but as well two study meetings of the N.C.S.C.

delegates with their counterparts from similar European institutions (in Croatia and Estonia), with the aim to identify good practices which will contribute to effective proposals for amending the current legislative framework, including the implementation norms on performing centralised procurements in the medical field, the competence of O.N.A.C.

During the travel organised by O.N.A.C. in France (6th-10th of September 2021), with the participation of two N.C.S.C. delegates, discussions took place with officials of the Department of State Procurements (inter-ministry direction acting under the authority of the Prime Minister), Department for Modernisation of Procurements, Management Control within the Directorate of State Procurements (D.A.E.), but also with delegates involved in the PHARE Programme within the Directorate General of Health Care Provision (DGOS – structure subordinated to the Ministry of Health), and of GCS Achats en Sante d'Occitanie – regional organisation for health procurements formed by two regions, 14 hospital groups which include a total of 85 hospitals and 3 (three) public university hospitals having 18,000 active beds).

During the study trip organised by O.N.A.C. in the period 15th-19th of November 2021 in Portugal – state identified by the European Investment Bank as an example of good practice in this field, two delegates participated on behalf of the Council. They discussed with delegates from many institutions involved in the centralised procurements system of this EU member state.

Hence, a first dialogue took place with the officials of the Competition Authority – Anti-Cartel Unit from Lisbon on the subject "Fighting the staged bids in public procurements". Subsequently, study meetings took place with officials of the Common Services of the Public Administration entity (eSPap) – which ensures the development and supply of collective services in the public administration, which also has the role of designing, managing and evaluating the centralised procurements system in Portugal, as well as with the officials of the Institute of Public Markets, Real Estates and Constructions (IMPCI, IP) – institution with a history of over half a century and which handles the regulation of the constructions and real estates and public markets field or of public contracts.

During discussions, problematics concerning the stimulation for adopting an environmental policy in the field of public procurements have been debated, by approving good practices and consolidating the instruments in this field.

Furthermore, the National State Suppliers Portal from Portugal was presented – computer application based on inter-operability mechanism with the informational systems of the entities which hold the data of the portal, with the public procurements electronic platforms and with the platforms of other public entities, with the aim to simplify and streamline the verification procedures regulated by the Public Contracts Code (CCP).

Also, during this trip, a meeting with the delegates of Tribunal de Contas (Court of Audits) has been organised – independent institution which has jurisdictional and financial audit competences for all the entities (public and private) which benefit of public money or other public goods. The institution performs the ex-ante control of the public contracts with a value higher than 750,000 euro and its members are named by the president, having permanent rights and identical prerogatives with the ones of the Supreme Court of Justice. This institution is of vital importance for Portugal because every contracting authority from this European state signs contracts and then sends them to Tribunal de Contas for the ex-ante control, and the respective contract cannot produce any effects until its approval by the Court. It must be highlighted that, in emergency cases, the supply of the products can be performed until the decision of the Court but the payment cannot be made by the contracting authority. If the Court decides that the respective contract is illegal and cannot be approved, the contracting authority is forced to pay for the supply, yet the contract will be terminated. This is possible only for the contracts with an amount between 750,000 - 950,000 euro. For the contracts which surpass 950,000 euro, it is forbidden that they produce any effects until ap-

proved by Tribunal de Contas. Following the respective controls, fines can be applied for the contracting authorities, therefore the majority of the Portuguese contracting authorities prefers to respect the 30 days term for receiving the approval of Tribunal de Contas, even for contracts with a value under 950,000 euro.

On the occasion of the study meetings with the Tribunal de Contas officials, discussions took place with the delegates of the Council for Prevention of Corruption (CPC) – independent body created in 2008, without prosecution attributions, but which has the aim to develop at national level an activity in the field of prevention of corruption and related crimes.

Last but not least, a study visit was organised at the Centralised Procurements Unit of the Health Ministry of Portugal (S.P.M.S.), a public institution created in the year 2010 which functions under the tutelage of the Ministries of Health and Finances and is responsible with performing the centralised procurement processes in the field of medical goods and services.

It must be noted that Portugal invested in 2021, within the National Recovery and Resilience Plan (P.N.R.R.), the amount of 300 million euro in the digitalisation of the medical field. In addition to the activity of S.P.M.S., this fact allowed Portugal in 2021 to save over 214 million euro from the budget, at a volume of centralised procurements in the medical field of over 838 million euro.

N.C.S.C., as partner in the project, organised other two workshops in Romania (in Bucharest and Cluj-Napoca) with the participation of counsellors for solving complaints, judges of the chambers specialised in public procurements of the Courts and Courts of Appeal, experts from O.N.A.C. and A.N.A.P., university professors and different experts, as well as two external study trips at homologous institutions from other two European states, Croatia and Estonia. Their purpose was to understand the organisation way of the respective similar European institutions, as well as the optimisation methods for solving complaints in the field of centralised public procurements, but also to identify new supplementary mechanisms of ensuring unitary practice at the level of the Council on ensuring coherence and predictability in approaching the different aspects which target the solving of complaints lodged under public procurements procedures.

During the two study visits in Croatia (27th of June – 3rd of July 2021) and Estonia (3rd-9th of October 2021), a number of 50 delegates of the Council have participated, divided in two teams.

On the course of the trip to Zagreb (Croatia), the delegates of the Council had study meetings with officials of the State Commission for the control of public procurements procedures, of the State Central Office for Central Public Procurements (centralised public procurements body at national level), of the Ministry of Economy and Durable Development (body of drawing of policies in the field of public procurements), but also with judges in administrative law (without expertise in public procurements) from

the Administrative High Court (body for the examination of the complaints in appeal).

The Zagreb study trip focused on the internal organisation of the institutions involved in the public procurements sector, on the transparency of procedures, on the decision procedure and the jurisprudence of the creation control body. In this context, certain informal (unwritten) procedure regulations, adopted on the course of 17 years, were highlighted as they proved to be efficient in obtaining optimal results in the field of solving complaints.

Moreover, the problematic of practice unification and jurisprudence of the control bodies from different courts has been discussed, being one of the preliminary conditions for the judicial security in the public procurements systems.

A special attention was given to the public procurements portal (EOJN RH, the homologous of S.E.A.P.) – Croatian national platform of e-procurement which ensures a full transparency and objectivity of the decisional process and which provides a monitoring capacity of the general situation both for the complaining procedures and the public procurements procedures. It must be mentioned that within the respective platform all the public procurements procedures are recorded with a value estimated at over 66,666 euro, for works, but also the ones



for goods and services of over 26,666 euro. Yet, unlike S.E.A.P., this electronic platform provided the contracting authorities with the possibility to publish even the procedures which fit under the limits regulated in the Law on public procurements.

It is interesting that the Law on public procurements, which transposes the European Directives in the field, has not changed at all in Croatia since 2016 and, although the ex-ante control is mandatory for the contracting authorities only in the case of the projects funded by European funds, the unification system of the administrative-jurisdictional and court practice, as well as the maximum transparency of the public procurements, proved more efficient than the frequent legislative changes which confuse the public procurements market.

During the study meetings in Estonia, the delegates of the Council discussed with officials of the Commission for the Revision of Public Procurements and of the Shared State Services Centre from Tallin (a.n. – governmental agency subordinated to the Ministry of Finances from Estonia which provides support services for the central governmental agencies and which performs the function of management authority for the structural and transboundary EU funds). It must be stated that a part of the study and work visit in Estonia was hosted by E-Estonia, institution which manages the digitalisation of the public services from the EU member state.

The study trip in Tallin focused on presenting the way in which the institution managing the centralised procurements is functioning (the State Shared Service Centre), as well as on the practical implications on drafting the tender documentation within the award procedures organised in the centralised system. Real cases of breaching the public procurements procedures regarding some Estonian projects funded by European funds have been debated, an opportunity to discuss if the cancellation of an award procedure represents a rule or an exception regulated by the law in a special and limitative manner.

During the discussions, a special accent was placed on the presentation in detail of the digitalisation procedures regarding all the public services and their impact on the Estonian administration, taking into account that this process started in Estonia more than 20 years ago and it provided a transparent, safe and efficient administrative ecosystem, based on data and analytics. It must be not that at this point 99% of the governmental services from Estonia are available online, a fact which provides this country with the status of the most digitalised nation in the world and with the most advanced international cyber security live-fire exercise. As we speak, every Estonian citizen has its own digital identity due to digitalisation, through which she/he is able to solve each bureaucratic process by fully settling any problem

online, excepting marriage, divorce and the procurement of residences.

Statistics reveal that 90% of Estonia's population knows how to use both the computer and the internet, 98% of the companies are exclusively online, 99% of the banking transactions are online, and 95% of the tax returns are filled in online, the latter operation taking only three minutes. Thanks to digitalisation, 800 years calculated in work hours are saved annually in Estonia, while 2% of the national GDP (30,626 billion USD in 2020) is saved. We should mention that, in 2020, a state like Estonia with a population of just 1.331 million and a GDP of more than eight times smaller than the one of our country has recorded a GDP per capita of 23,026 USD, meaning almost double in comparison with the one recorded in Romania (12,868 USD).

Besides the aforementioned studio visits, N.C.S.C. organised within the project two workshops with the theme "Centralised public procurements (large medical devices)", developed in the period 26th-27th of May 2021 in Bucharest and 15th-19th of September in the municipality of Cluj-Napoca, with the physical participation of counsellors for solving complaints of the Council, judges of the Court of Appeal Cluj – 3rd Section Administrative and Fiscal Law, delegates from O.N.A.C., the National

Agency for Medicines and Medical Devices and national medical institutions, professors of Babeş Bolyai University, and officials of the State Commission for the control of public procurements procedures from Croatia. There was also an online participation with judges from all the Romanian Courts of Appeal, Bucharest Court, officials of the Court of Auditors, MAI, the Audit Authority, the State Shared Service Centre from Estonia, delegates of national hospitals, but also with S.N.S.P.A. professors and professors from the law faculties of Bucharest University, West University of Timișoara and “Al. I. Cuza” University from Iași.

The theme of the respective workshops (“Centralised public procurements (large medical devices)”) was chosen considering the fact that centralised procurements in the medical field witnessed a significant increase during the pandemic generated in 2020 by the SARS-COV 2 virus.

During the study meetings practical subjects were discussed concerning the priority of the tender documentation rigours, seen through the lens of the transparency principle, over the obligation to respect the normative acts, incident to the object of the contract under the public procurement, as well as matters regarding the regulations applicable to medical devices.

Furthermore, on the course of this work meeting, the application/interpretation manner of the legal provisions on the confidentiality of the bids was discussed, in the context of the justification of an accelerated procurement procedure during the state of alert.

At the end of the project “The development and implementation of certain integrated electronical devices for the development and monitorisation of centralised procurements”, code MySMIS 130709/SIPOCA 753, co-financed by the European Social Fund through the Operational Programme Administrative Capacity 2014-2020, following the partnership with O.N.A.C. and MAI/DSU, the Council drafted and presented a Practical Guide comprising information on the complaints lodged against the products and services categories defined in Article 3 of the Methodological Norms for the application of the provisions of Governmental Emergency Ordinance no. 46/2018. This document will lead to avoiding the potential blockages which could occur during the development of the centralised procurement procedures and to the decrease of irregularities. The respective guide was based on the rigorous analysis of the award procedures challenged in the last three years for the procurements of goods and services at central and local level, which could be part of the centralised procurement procedures, including the reasons of the complaints. Therefore, this document provides the contracting authorities the possibility to benefit of clear information regarding the application of adequate and transparent selection and award principles, but also concerning the evaluation of

the bids, so that the failure and the challenging risks of the award procedures and also the potential blockages which could occur during the development of the centralised procurement procedures would be avoided.

In addition, it must be mentioned that on the 24th of March 2021, pursuant to Law no. 112/2020 on amending and supplementing Law no. 84/1998 on geographical marks and indications, the management of the Council also drafted and registered with the State Office for Inventions and Trademarks (OSIM) the trademark of the institution, receiving the trademark registration certificate no. 177928 for a period of ten years.





CHAPTER 5

INSTITUTIONAL TRANSPARENCY. THE RELATION WITH MASS-MEDIA AND THE GENERAL PUBLIC

MOTTO: *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.*



The activity performed in 2021 by 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.

The general objective of the Information and Public Relations Office was the transparent promoting the activity of the Council in the public space, ensuring a periodic 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, as 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 2021 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.

Regarding the number of requests related to public information registered at the headquarters of N.C.S.C. on the course of 2021, made either by business operators or contracting authorities, public institutions, non-governmental organisations, or natural persons, they are represented by approximately 500 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.

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, supervised the drafting of the Annual Report of the Institution and the update of the Official Bulletin in which the decisions rendered by the Council are published, with their motivation and under anonymity.



CHAPTER 6

PREDICTIONS



The year 2022 will represent a real challenge for the National Council for Solving Complaints as the number of the complaints is predicted to increase as an effect of the approval of the National Recovery and Resilience Plan (PNRR), a financial instrument through which Romania will receive 29.18 billion euro (14.248 billion euro – grants and approximately 14.935 billion euro as loans).

According to the proposal in the Regulations, 70% of the grants will be engaged until the end of the year 2022, the allocation being focused on investments and real impact and long-term reforms for sustainable recovery and for improving the economic and social resilience which should contribute to achieving the climate change objective in proportion of 37% and to performing the digitalisation objective in proportion of 20%.

Considering the fact that we are witnessing a worldwide acute economic crisis, the battle for the public money will be fierce. Therefore, at the same time with the effective development of PNRR, a significant increase of the number of complaints lodged with the Council is expected, especially in the fields of transport (development of durable road infrastructure afferent to the TEN-T network, road taxation, traffic management and road safety, modernisation and renewal of the railway infrastructure), health (development of the public pre-hospital and hospital infrastructure), energy (development of new capacities of production for electricity from renewable sources and of gas distribution infrastructure from renewable sources), education (the building, equipping, operationalisation of 110 nursery schools, insurance of the university infrastructure) and digital transformation.

As mentioned in the previous chapters, we draw attention on the fact that the eventual blockages which could trigger the increase of the number of complaints lodged by business operators will be generated by the fact that many public authorities involved in the development of projects within PNRR do not have professionals in the field of public procurements and, unfortunately, in many cases the public funds are badly and non-transparently managed – which generates a lack of trust of the business operators in the national public procurements system, many times labelled as politically “polarised”.

Another problem which could create an increased wave of complaints might be related to the fact that, many times, the contracting authorities underestimate the planning phase of the project and prove a lack of flexibility, as they often approach the legislation in a rigid and strict manner, without paying a special attention to good practices, principles of equal treatment and transparency, efficiency of the investment, or eventual conflicts of interest.

Moreover, from the experience acquired by the Council, there is the risk that the majority of the complaints would also be based on the fact that many contracting authorities sometimes

refuse to apply the decisions rendered by N.C.S.C. in a correct and practical manner.

Last but not least, we draw attention on the fact that, in order to increase the absorption of European funds mentioned in PNRR and to avoid the blockages generated by complaints, we have to consider the stability and flexibility of the legislation in the field of public procurements, changes more than needed which should lead to the growth of the predictability level of the public procurements system, to the consolidation of the unitary practice in solving complaints via the judicial and administrative-jurisdictional way, but especially to the increase of the absorption of European funds.



CHAPTER 7

THE BUDGET OF N.C.S.C.

The budget of N.C.S.C. corresponding to the year 2021 amounted to 16.975 thousand RON and was distributed as follows:

- The budget provision for Current expenditures: 16.905 thousand RON out of which:
 - Personal expenses: 13.528 thousand RON.
 - Goods and services: 2.313 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	BUGET	QUARTER I	QUARTER II	QUARTER III	QUARTER IV
5000		TOTAL BUDGET	16,975	4,119	4,481	4,476	3,899
	01	CURRENT EXPENDITURE	16,905	4,119	4,431	4,466	3,889
	10	TITLE I - STAFF EXPENDITURE	13,528	3,293	3,532	3,612	3,091
	20	TITLE II - GOODS AND SERVICES	2,313	625	525	575	588
	58	TITLE X PROJECTS WITH FINANCING FROM EXTERNAL FUNDS RELATED TO THE FINANCIAL FRAMEWORK 2014-2020	974	178	350	255	191
	59	TITLE IX OTHER EXPANDITURE	90	23	24	24	19
	70	CAPITAL EXPENDITURES	70	0	50	10	10
	71	TITLE XII NON-FINANCIAL ASSETS	70	0	50	10	10
5001		EXPENDITURE – STATE BUDGET	16,975	4,119	4,481	4,476	3,899
	01	CURRENT EXPENDITURE	16,905	4,119	4,431	4,466	3,889
	10	TITLE I - STAFF EXPENDITURE	13,528	3,293	3,532	3,612	3,091
	20	TITLE II - GOODS AND SERVICES	2,313	625	525	575	588
	58	TITLE X PROJECTS WITH FINANCING FROM EXTERNAL FUNDS RELATED TO THE FINANCIAL FRAMEWORK 2014-2020	974	178	350	255	191
	59	TITLE IX OTHER EXPANDITURE	90	23	24	24	19
	70	CAPITAL EXPENDITURES	70	0	50	10	10
	71	TITLE XII - NON-FINANCIAL ASSETS	70	0	50	10	10