The National Council for Solving Complaints

# ACTIVITY REPORT 2022

# CONTENTS

# FOREWORD

**FLORENTINA DRĂGAN,** N.C.S.C PRESIDENT

Seventeen years ago, Romania has chosen to transpose and implement all the European Community principles in the field of public procurements, establishing clear and transparent rules for the award of procurement contracts and contracts of work and services concession, as well as creating a remedy system in order to swiftly, independently and legally solve the complaints of business operators. The weak spots of the system of public/sectorial procurements and work and services concessions, reported in the period 2001-2004, have been detailed in Government Decision no. 901/2005. The conclusion noted only the existence of a relatively slow and underperforming system of solving complaints.

The National Council for Solving Complaints was created with the purpose to respect an essential condition of the European Union's Directives in the field of remedy, according to which the member states must ensure the existence of effective, efficient and swift remedies against the decisions issued by the contracting authorities/entities, by providing an independent organism with the possibility of performing a re-examination and later of adopting a decision within a solving procedure.

Sixteen years ago, in the explanatory note of Government Emergency Ordinance no. 34/2006, the purpose of establishing this independent organism was specifically mentioned: 'Creating an efficient and credible public procurements system represents of the essential elements of the European Union integration process, with impact on all other areas of interest of the Community acquis related to the 'Internal market'. (...) As an overall strategic approach, the current Government Emergency Ordinance transposes the recent European law provisions wich regulate the procurements from both the 'classic' sector (Directive 18/2004/EC) and the 'utilities' sector (Directive 17/2004/EC), as well as the provisions related to the 'remedies' directives (Directive 89/665/EEC and Directive 92/13/EEC). (...) Adopting this emergency ordinance is also necessary in order to ensure the conditions for accessing the non-refundable amounts of which Romania will benefit by the means of structural/cohesion funds starting with the year 2007, as member state of the European Union. Romania's commitments within Chapter 1 – 'Free circulation of goods' impose the urgent adoption of a new legislation in the field of public procurements, the recommendations of the European Commission being explicit in this regard, particularly since the field fits in the category for which the country report from the previous year mentioned serious concern reasons (redflag)'.

Seven years ago, through the Government Decision no. 901/2015 on approving the National Strategy in the field of public procurements, the adequate courses of action for reforming the public procurement system, assumed following a structured dialogue with

the representatives of the European Commission via DG REGIO and DG GROW, in the context of transposing the new Directives of the European Union in the field of public/sectorial procurements and the concessions of works and services, as well as in the context of signing the Partnership Agreement 2014-2020 on the use of structural and investments European funds.

Within the National Strategy in the field of public procurements, the role of NCSC was reconfirmed, thus it was expressly stated that 'the activity of NCSC should develop on clear, stable and predictable coordinates, in order to guarantee the stability, professionalism and independence of this institution. (...) The current institutional framework is the result of a complex organisational process of the central functions of the public procurement system. Its foundations were set in the context of the EU accession and it was later developed in order to correspond to the challenges generated by the quality of member state and to the requirements to comply with the Community legislation. The central functions of the public procurement system are accomplished by the following institutions with key-competences in this field (situation of April 2015): (...) N.C.S.C. – first non-judicial court, independent organism with administrative-judicial activity, for solving the complaints lodged against the public procurement procedures; (...) Courts of Appeal – second court for solving complaints'.

In the previous year, within the National Recovery and Resilience Plan (N.R.R.P.), Component 14 – Good Governance, it was mentioned that 'concerning the modification of the legislation in the field pf public procurements, at the level of the General Secretariat of the Government there is an ongoing project comprising the law proposals focusing on simplifying, as well as reducing the development terms of the public procurement process. By analysing the statistical data at the level of the national system, it can be observed that the average duration of an award procedure, of medium complexity, is two years, a situation generated by an excessive and distorted usage of the remedies, with a different purpose than the one regulated by the legislation, even in the cases in which, ever since the issue of the National Council for Solving Complaint's decision, it results that the business operator which lodged a complaint does not provide the arguments to confirm the violation of one of its rights or of a legitimate interest. Therefore, one of the analysed proposals aims for the modification of Law no. 101/2016 on remedies and appeals concerning the award of public procurement contracts, sectorial contracts and of works concession contracts and service concession contracts, and for the organization and functioning of the National Council for Solving Complaints, in the sense of establishing the obligation of signing the contract with the bidder declared as winner of the procedure, after adopting the N.C.S.C. decision (i.e., without waiting for the eventual settlement of the court). (...) In this sense, it is proposed that this legislative modification shall be approved in the first half of the year 2022'.

By the adoption of Government Ordinance no. 3/25.08.2021, A.N.A.P. fulfilled the first Milestone for Component 14 – Good Governance, Reform 8 – The reformation of the national public procurement system within Romania's National Recovery and Resilience Plan (N.R.R.P.), respectively the implementation of Milestone 433, which represents one of the measures to be achieved in 2022, through which the national law on remedies has been amended (Law no. 101/2016), by introducing the obligation to sign the contract with the winning bidder after the issue of a Council solution for maintaining the result of the award procedure, even if the complaint remedy was lodged against the respective decision and the case has not been definitely solved.

Today, this measure was also assumed by the Romanian Parliament by adopting the Law no. 291/02.11.2022 on approving the aforementioned ordinance.

Achieving Milestone 433 was one of the 51 milestones which were conditioned to be fulfilled in order to forward to the European Commission the second payment request for the National Recovery and Resilience Plan.

Through the Decision of the Court of Justice of the European Union issued on 26.01.2023 in the case C-403/21, the Council's character of 'national court' has been acknowledged, in compliance with Article 267 of TFEU, aspect also retained, in a similar form, in 2022 in a series of court decisions, respectively Civil Decision no. 1577/21.09.2022 issued by Bucharest Court of Appeal, Decision no. 713/30.08.2020 issued by Court of Appeal Timișoara, and Decision no. 18/30.08.2020 issued by Court of Appeal Timișoara – Council Chamber.

Consequently, in the 16 years of activity, the role of the Council was not only recognised but even reconfirmed by the European Commission, as Romania has accordingly respected the provisions of the European Union's Directives in the field and the obligations assumed before the European Commission.

## 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/ sectorial/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 2022, 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 competition[1]. 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 members[2].

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

According to the national legislation, N.C.S.C. operates on the basis of its own Organisation and Operating Regulations, approved through Government Decision no. 1,037/2011[6].

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

Pursuant to Article 14 paragraph (1) of Law no. 101/2016, the complaints lodged by business operators via administrative-jurisdictional proceeding are assigned for settlement at random, by electronic means, to a chamber consisting of three Council members. At least one of them is graduate in law, with a minimum 10 seniority in the legal field. The chamber is chaired by one of its members, appointed in accordance with the rotation principle.

For the proper operation of the institution and for expedient settlement of the complaints lodged by the business operators, each chamber for solving the complaints receives the assigned technical and administrative staff with public servants' status, graduates in legal, business or technical fields.

The President of the Council has to be a law graduate[8] and has the quality of Chief Authorising Officer[9]. He/she is elected for a period of three years by secret voting from among the members of the Council, with absolute majority[10] of the solving counsellors' votes.

**1.** Pursuant to Article 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 40 of Law no. 101/2016
**9.** With the possibility of renewing the commission one time
**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:

- to solve the complaints lodged under the award procedures for the public private partnership contracts[11] regulated by the Government Emergency Ordinance no. 39/2018[12] as subsequently amended and supplemented;
- to solve the complaints lodged under the award procedures for the public procurement contracts in fields of defence and security, regulated by the Government Emergency Ordinance no. 114/2011[13], for which purpose the counsellors solving the complaints are authorised, in compliance with the provisions of Law no. 182/2002 on the protection of classified information, as subsequently amended and supplemented.

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

- the system of relationships with the Appointed Authority for Security - ADS (specialised unit within the Intelligence Service-SRI) was established;
- were taken the lawful measures in the relationship with O.R.N.I.S.S. (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

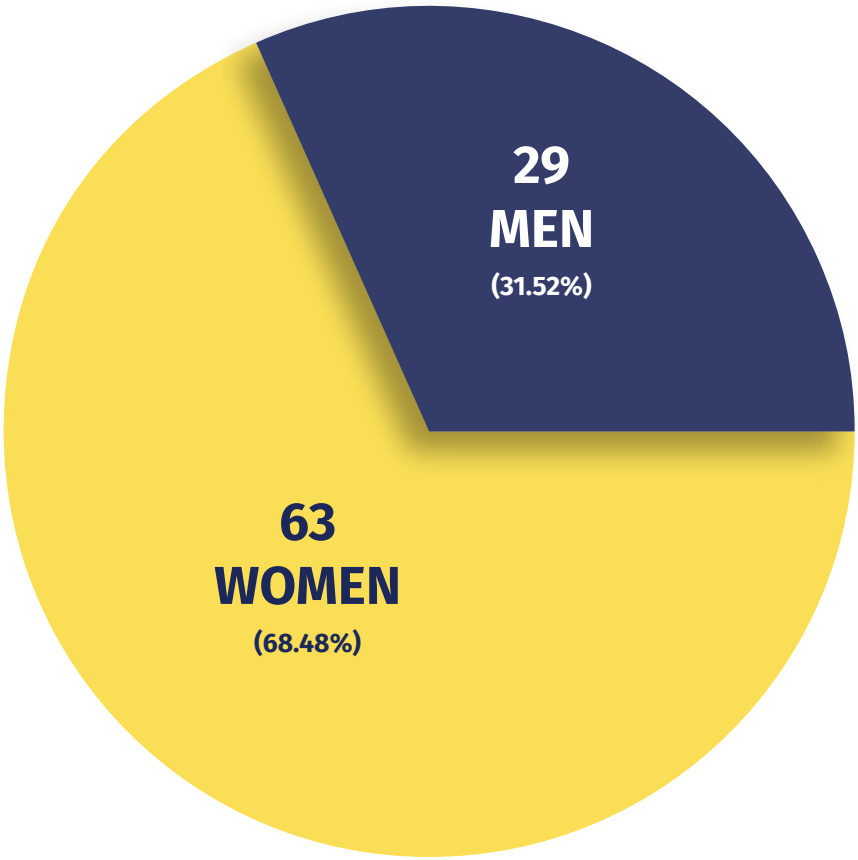
The management of the National Council for the Resolution of Appeals was ensured in 2022 by Mrs. Florentina DRĂGAN, whose mandate began on February 25, 2019 and was renewed for a period of another three years, in February 2022. In the exercise of her powers, the President of the Council was assisted by a College consisting of three members (Ms. Doina-Florica ENIȚĂ, Ms. Alina OPRIȘAN, Mr. Lehel Lorand BOGDAN), elected in 2022 with absolute majority by secret voting from the counsellors for solving the public procurement complaints. As organisational structure, the Council functioned in the year 2022 with a number of 35 counsellors for solving complaints in the field of public procurements – public servants with special status pursuant to Government Decision no. 1.037/2011, organised in 11 chambers for solving complaints in the field of public procurements.

However, the staff list of the Council was still undersized, including at the end of the year only 57 technical-administrative employees (55 salaried public servants, 2 suspended public servants and one person employed as contract staff), although 64 positions are provided to be allocated for the technical-administrative staff, pursuant to the provisions of the Government Decision no. 1037/2011 on approving the N.C.S.C. Organisation and Operating Regulations.

It should be noted that all the 57 persons employed with the status of technical-administrative personnel within the C.N.S.C. on December 31st, 2022, they have higher education.

Regarding gender structure, 63 of 92 employees of the Council were female (68.48%) and 29 were male (31.52%).

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



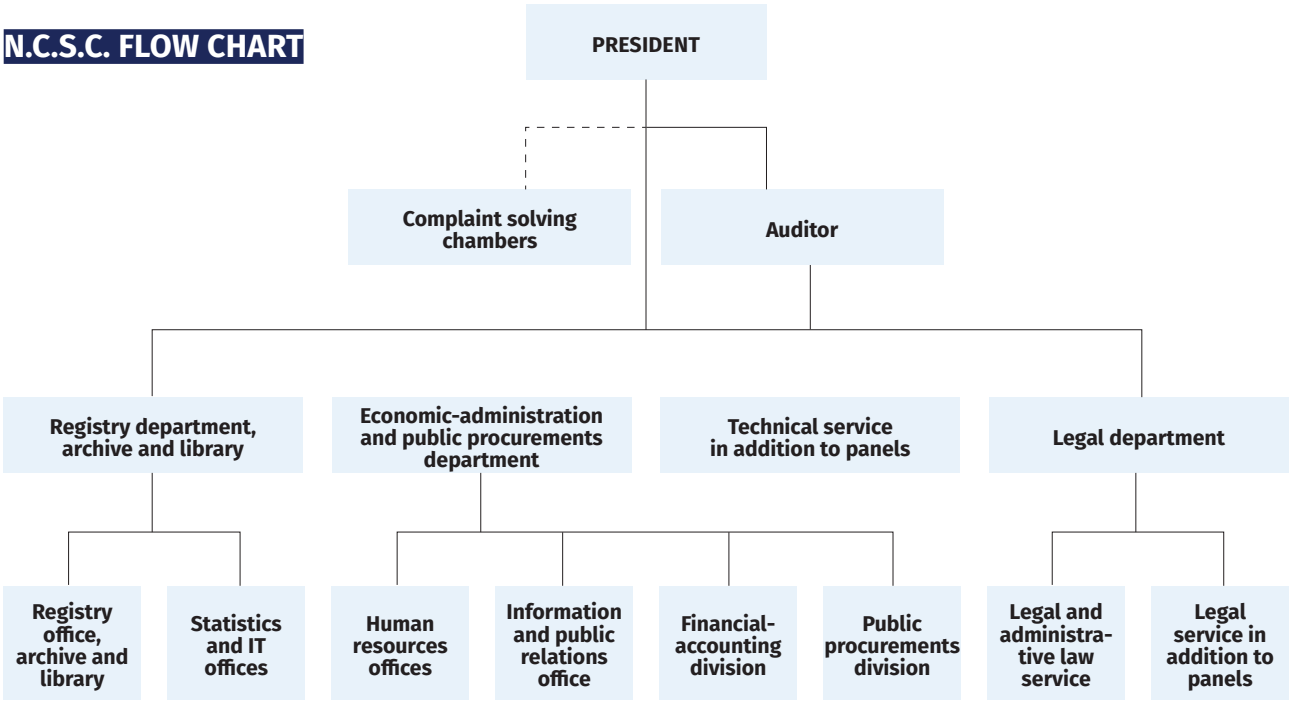
It should be stated that the proportion of female persons in the total number of C.N.S.C. employees it remains high both among the counsellors for solving complaints in the field of public procurements (60%), and among technical-administrative staf (74.07%).

The average age being 48 at the level of the institution. The average age at the level of counsellors for solving complaints in the field of public procurements was 52, while at the level of the of technical-administrative personnel the average age was 47.

According to the Council's Organisation and Operating Regulations[14], 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

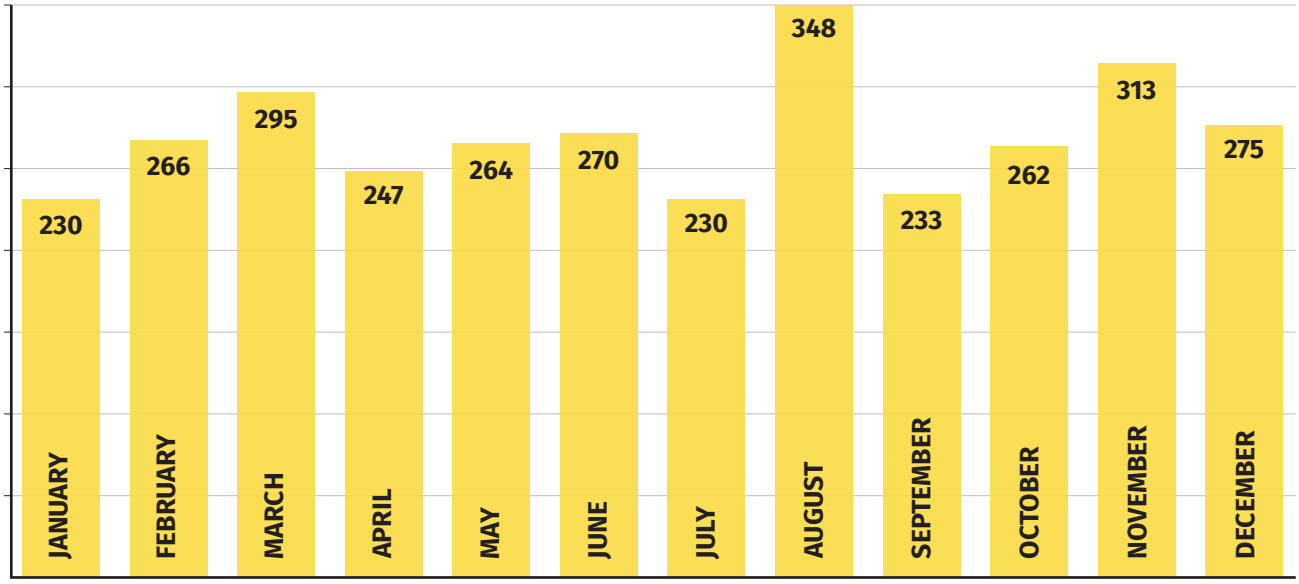
# THE ACTIVITY PERFORMED BY N.C.S.C. IN 2022

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

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

Between the 1st of January – 31st of December 2022, the number of complaints (files) lodged by the business operators and registered with N.C.S.C. amounted to 3,233 and had the following trend:

**THE TREND OF THE COMPLAINTS LODGED BY THE BUSSINESS OPERATORS WITH N.C.S.C. IN 2022**



Analysis of the evolution of the number of the complaints submitted by the business operators and lodged at the N.C.S.C. slightly decreased in both semesters, compared with the similar periods of the previous year.

Thus, comparing the total trend in 2022 regarding the number of complaints lodged by business operators to the Council with the value registered in 2021, their decrease with 5.63% can be ascertained (193 complaints).

This unsignificant decrease needs multiple explanations.

One of them consists in the decapitalisation suffered by a large number of the local business operators after the economic downturn generated by the COVID-19 pandemic, namely the establishment of the bail at the moment of lodging the complaint – this being an admissibility condition for lodging the complaint.

A second explanation concerning the decrease of the complaints' number relates to the fact that many business operators, which would have wanted to participate at a public procurement procedure and would have had the financial capacity of establishing the bail, were afraid that, in the case of rejecting the complaint, the contracting authority could perform the legal endeavours in order to retain the amount established as bail. This fact is the result of the latest legislative changes, therefore during 2022 many more contracting authorities lodged claims on the established bail, a fact which tempered the intention of some business operators to repeatedly lodge complaints.

A third explanation would be the doubling in 2022 of the limits of the direct procurements.

We mention that, according to the legislation in force, the value of a bail established by a business operator is related 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 can reach the maximum value limit of the bail of 2,000,000 lei, in compliance with the amendments brought by Government Emergency Ordinance no. 3/2021.

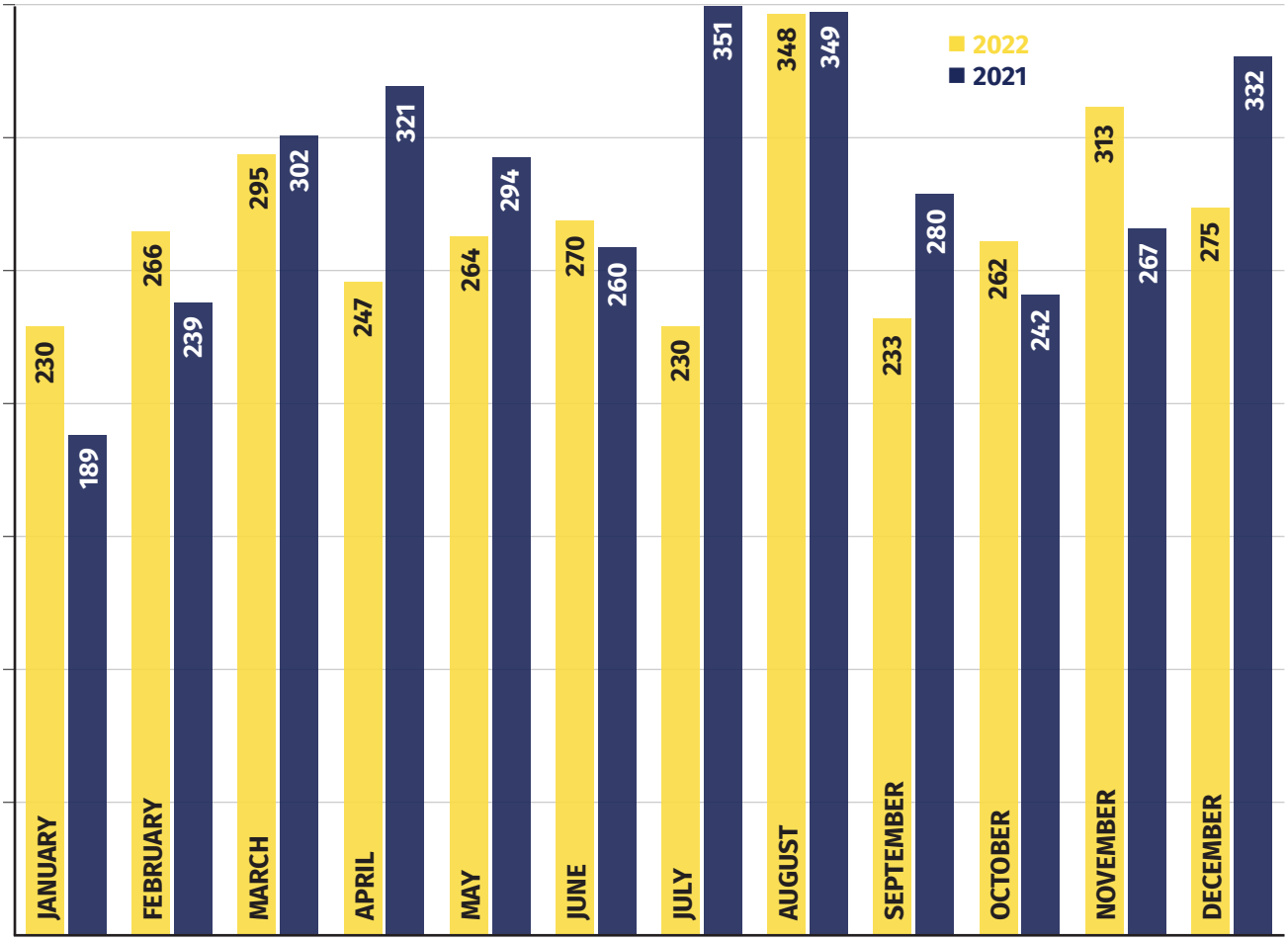
Nevertheless, there are exceptions in which the bail did not represent a boundary for certain business operators to lodge a large number of complaints.

The official data show that in the course of 2022 a single business operator lodged a number of 275 complaints, which represented 8.51% from the total number of the complaints lodged with the Council.

In this context, it must be mentioned that the second place in the complainants 'Top 10' was, at large distance, a business operator which in the course of 2022 lodged a number of 40 complaints, while on the tenth place there was a business operator which lodged only 27 complaints.

The official data show that the number of complaints lodged exclusively by the business operator on the number one place in the 'Top 10 complainants' was approximately similar with the total number of complaints lodged with the Council in the course of 2022 by all the protection and security companies which have registered to the Council complaints for different public procurement procedures (283 complaints, meaning 8.75% of the grand total of lodged complaints).

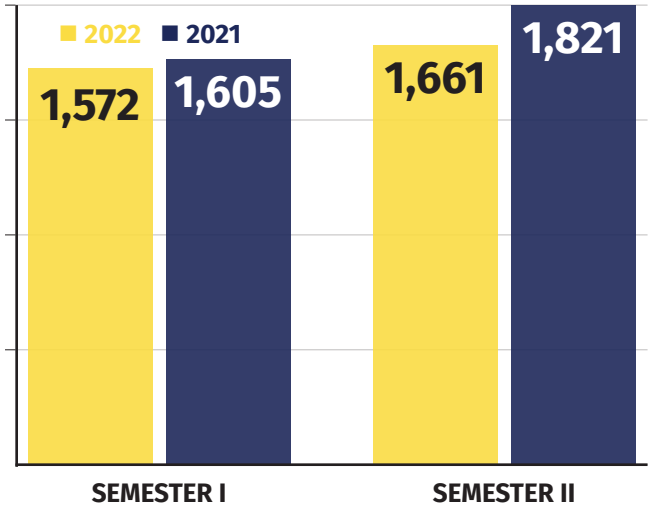
## THE TREND OF THE COMPLAINTS LODGED BY THE BUSSINESS OPERATORS WITH N.C.S.C. IN THE PERIOD 2021-2022




Concerning the semestrial trend of the complaints lodged with the Council, it may be observed that their number registered a slight decrease in both of the semesters of the year 2022 in comparison with similar periods of the previous year, as seen in the accompanying graph.

Therefore, in the first semester of 2022, the number of complaints lodged with the Council registered a decrease of only 2.06% (33 complaints) compared to the similar period in the previous year, while the decrease in the second semester was of 8.79% (160 complaints) compared to the similar period in the previous year.

## THE SEMESTRIAL TREND OF THE COMPLAINTS LODGED BY BUSSINESS OPERATORS WITH N.C.S.C. IN THE PERIOD 2021-2022



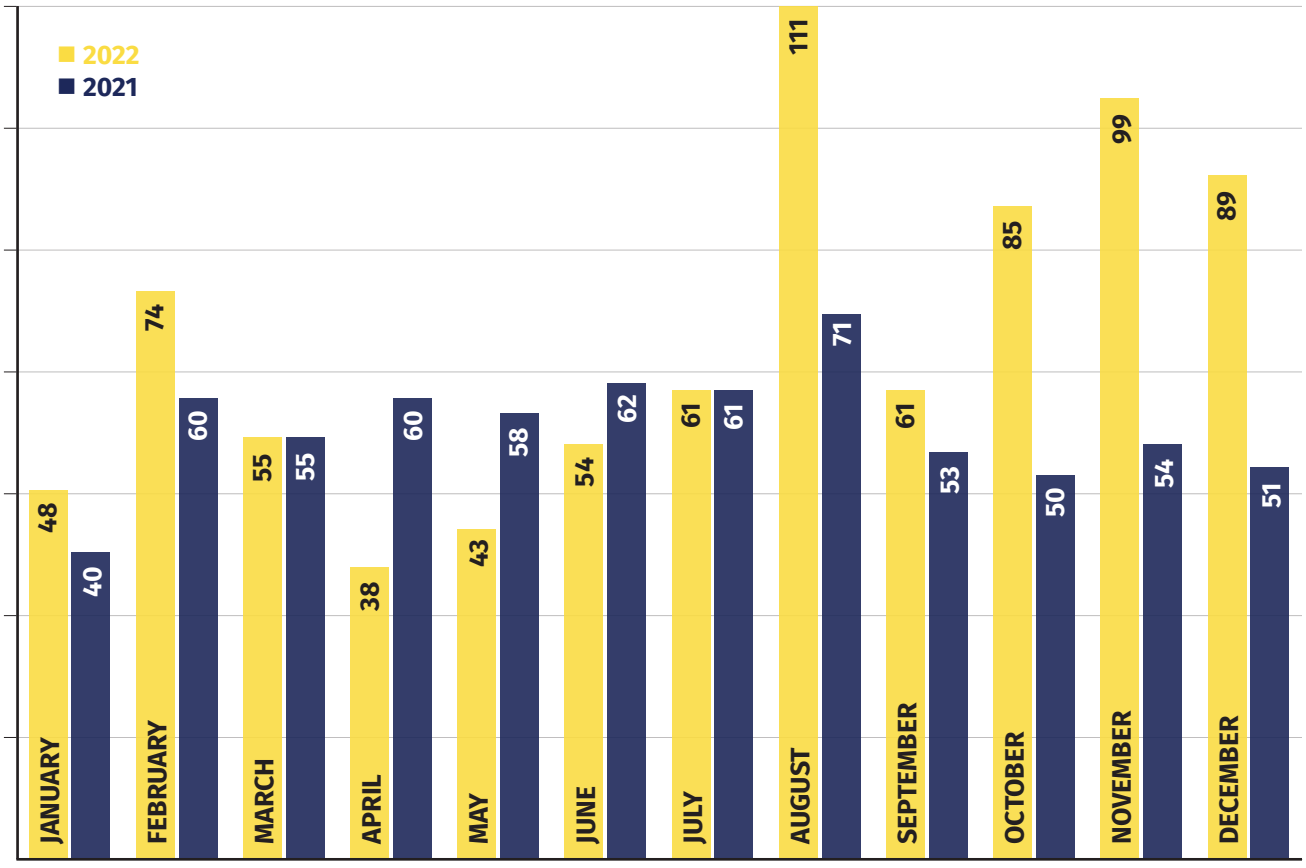
Taking this aspect into account, we can remark that the purpose of introducing the establishment of the bail by the legislator began to achieve its purpose, in the sense that the legal provisions generated a reserve from the business operators in addressing the Council following the firmer actions disposed by many contracting authorities for recovering the damages caused by delaying the award procedures.

In this context, it must be underlined that at the end of the previous year two contracting authorities received the payment of the 2,000,000 lei amount as compensation and, respectively, compensations for the damage caused by delaying the end of the award procedure of an amount calculated in compliance with the adjustment formula regulated by Article 3 paragraph (4) of Government Emergency Ordinance no. 47/2022, corresponding to the period between the date of signing the winning bid and until the solving of the complaint by N.C.S.C.

Moreover, it must be noted that in accordance to Article 61[1], paragraph (8) of Law no. 101/2016, as amended and supplemented, a number of 152 bails established by the business operators amounted to a grand total of 2,696,971.58 lei (equivalent of 546,886.66 euro)[15], for which the complainants did not request their refund in the three years term calculated from the date when the bail could have been requested, became revenue to the state budget in the year 2022.

Regarding the complaints lodged by the business operators with the Council against the tender documentation, the official data show that, compared to the previous year, a

**THE TREND OF COMPLAINTS LODGED BY BUSSINESS OPERATORS AGAINST THE TENDER DOCUMENTATION IN THE PERIOD 2021-2022**



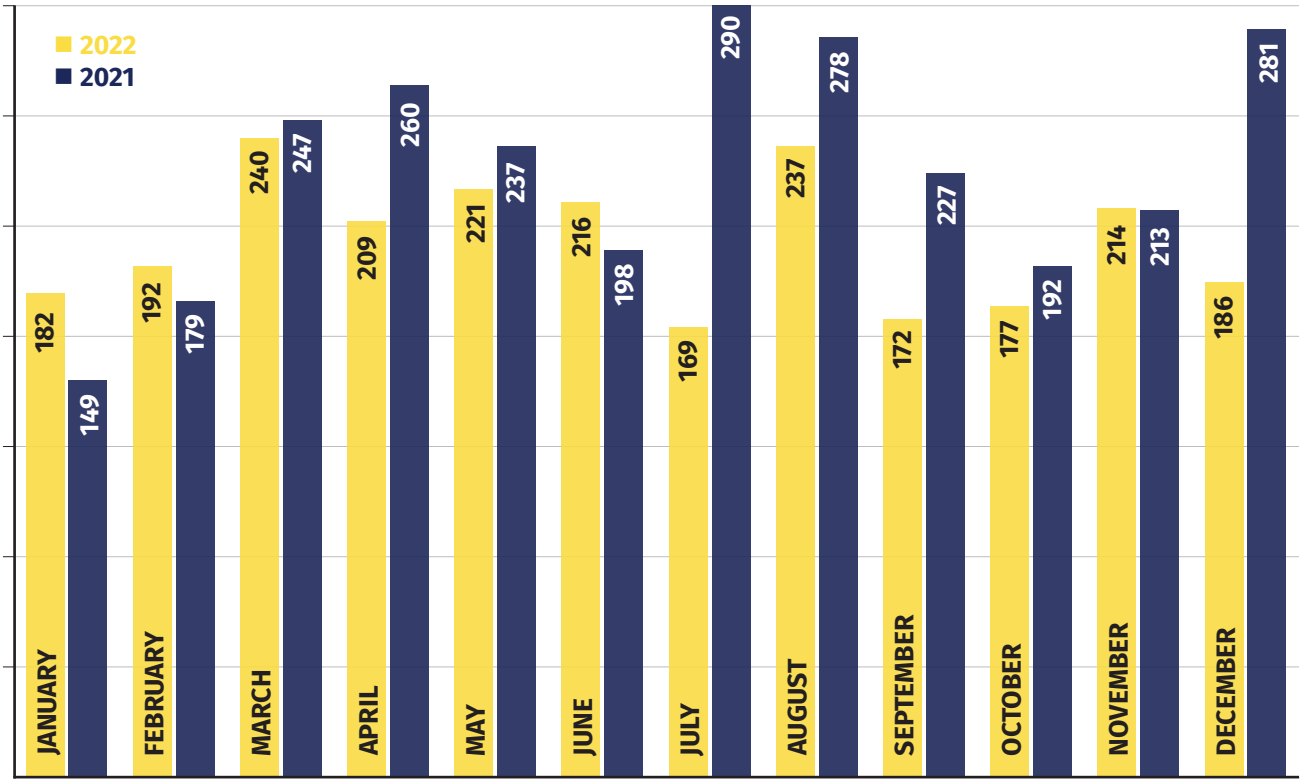

**15.** The amount was calculated at an average annual exchange rate provided by N.B.R. for the year 2022 of 4,9315 RON/EURO

substantial increase of 21.19% was registered in 2022 concerning the number of complaints submitted against in this stage (+143 complaints).

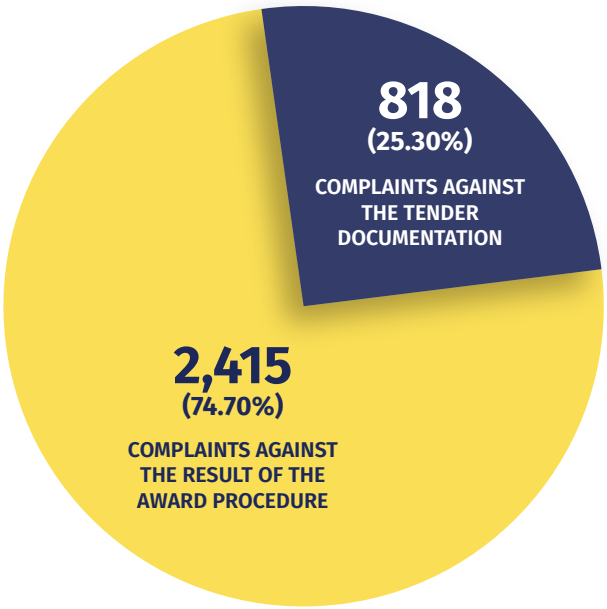
In comparison to 2019, when a number of 490 complaints against the tender documentation were lodged with the Council, their number significantly increased in 2022 with 66.94% (+328 complaints), indicating the existence of some potential problems of the contracting authorities at the moment of launching the public procurement procedures.

Regarding the complaints lodged by the business operators with the Council against the result of the procedure, the official data show that a decrease of 12.21% (336 complaints) was registered in 2022, compared to the previous year.

**THE TREND OF THE COMPLAINTS LODGED BY BUSSINESS OPERATORS AGAINST THE RESULT OF THE AWARD PROCEDURE IN THE PERIOD 2021-2022**



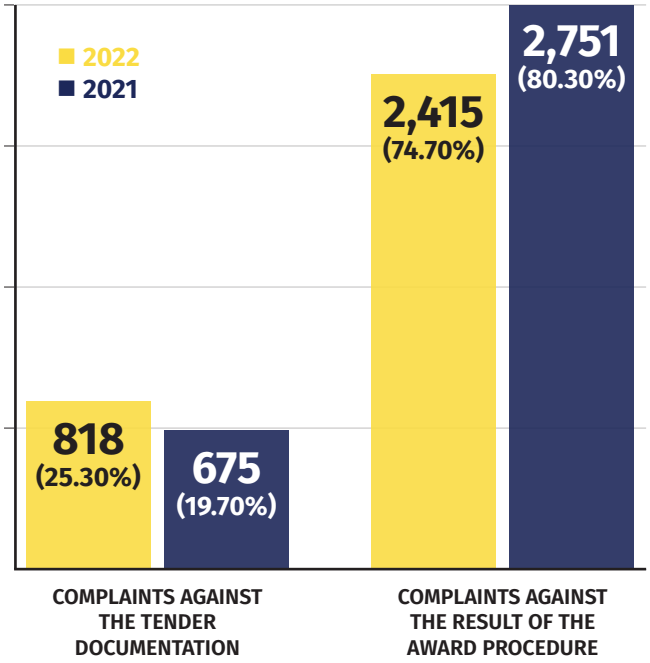
## THE SITUATION OF THE COMPLAINTS LODGED AGAINST THE TENDER DOCUMENTATION AND THE RESULT OF THE AWARD PROCEDURE IN THE YEAR 2022



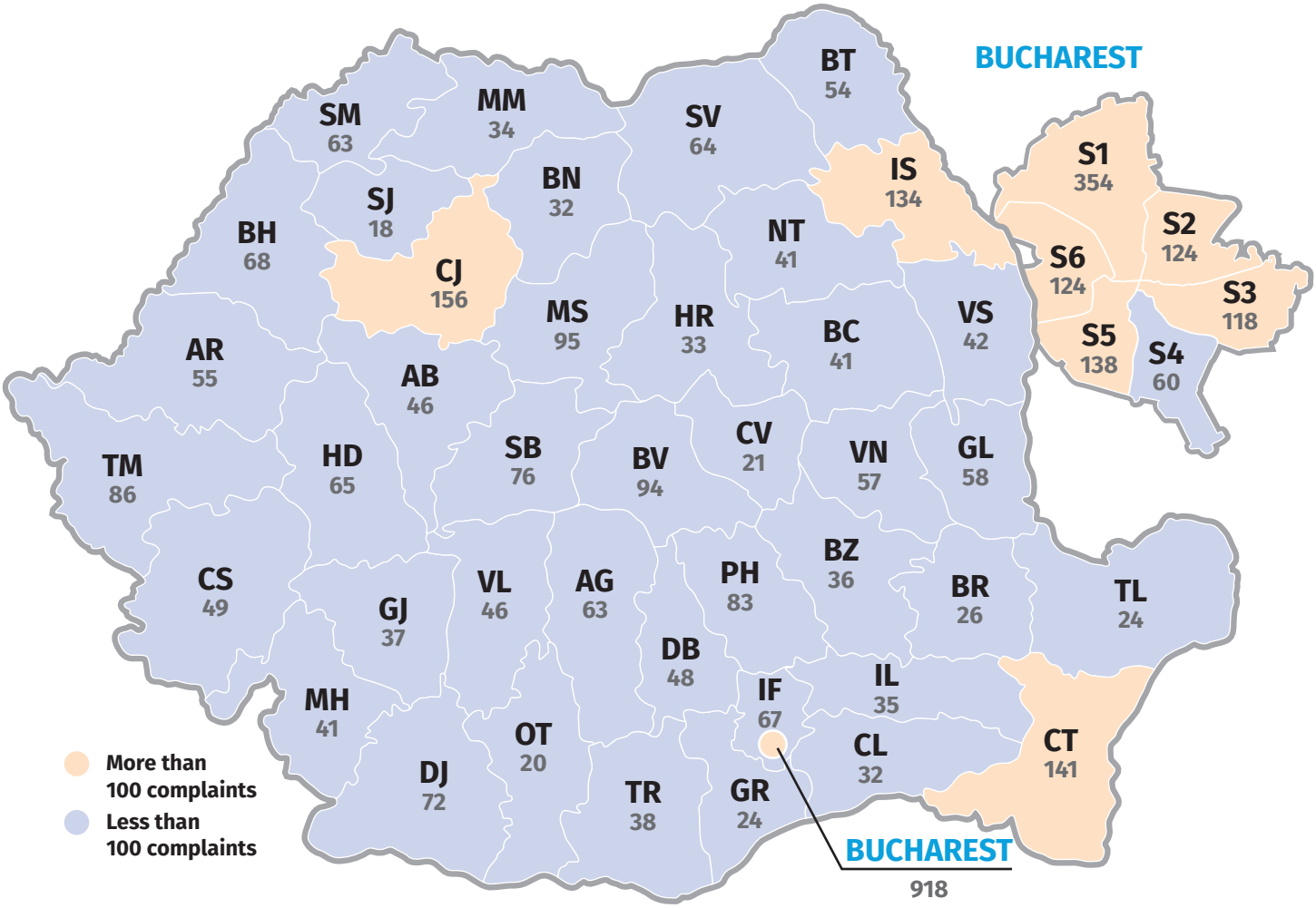

From a general perspective, it can be noted that in 2022 a percentage of 74.70% (2,415 complaints) from the 3,233 complaints lodged with the Council were submitted against the result of the award procedure, while 25.30% (818 complaints) were submitted against the tender documentations.

## THE PERCENTAGE OF THE COMPLAINTS LODGED BY BUSINESS OPERATORS AGAINST THE TENDER DOCUMENTATION AND THE RESULT OF THE AWARD PROCEDURE IN THE PERIOD 2021-2022

It results from the presented data that, in the year 2022, the percentage of complaints lodged by the business operators against the tender documentation in regards to the total number of complaints crossed the 20% average constantly registered for the previous years, while the complaints lodged against the result of the award procedure have maintained around an average of 70%.



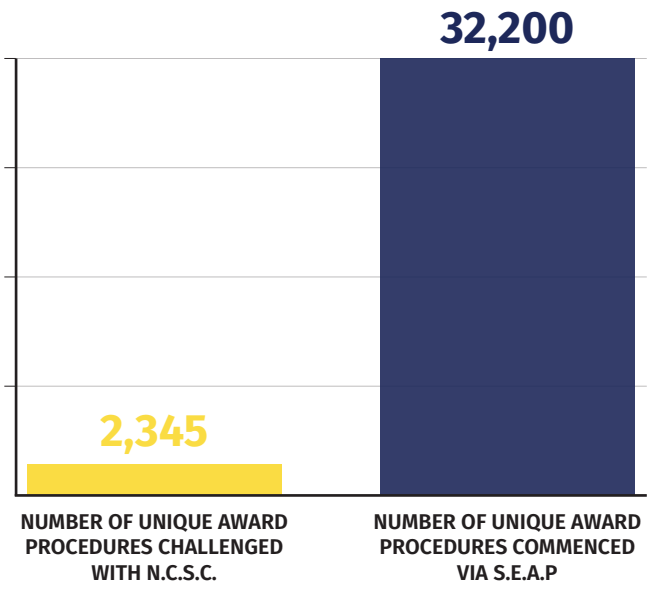
Judging on the distribution on administrative-territorial units (U.A.T.), the number of complaints lodged by business operators developed on the course of 2022 as following:



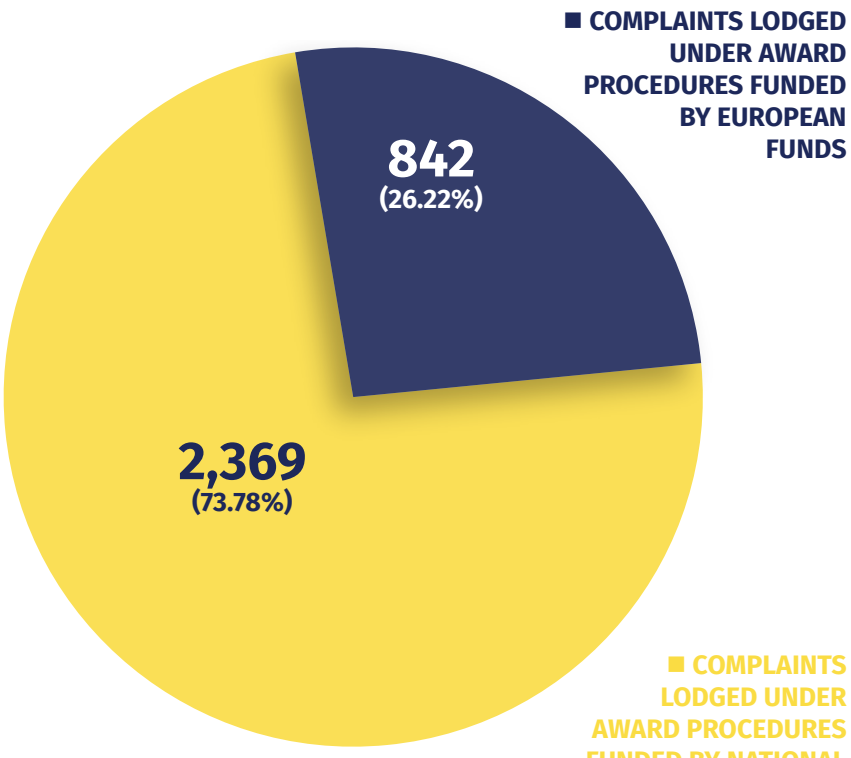

| COUNTY | COMPLAINTS | COUNTY | COMPLAINTS | COUNTY | COMPLAINTS |
|---|---|---|---|---|---|
| BUCUREȘTI | 918 | ARGES | 63 | TELEORMAN | 38 |
| CLUJ | 156 | SATU MARE | 63 | GORJ | 37 |
| CONSTANTA | 141 | GALATI | 58 | BUZAU | 36 |
| IASI | 134 | VRANCEA | 57 | IALOMITA | 35 |
| MURES | 95 | ARAD | 55 | MARAMUREȘ | 34 |
| BRASOV | 94 | BOTOSANI | 54 | HARGHITA | 33 |
| TIMIS | 86 | CARAS-SEVERIN | 49 | BISTRITA-NASAUD | 32 |
| PRAHOVA | 83 | DAMBOVITA | 48 | CALARASI | 32 |
| SIBIU | 76 | ALBA | 46 | BRAILA | 26 |
| DOLJ | 72 | VALCEA | 46 | GIURGIU | 24 |
| BIHOR | 68 | VASLUI | 42 | TULCEA | 24 |
| ILFOV | 67 | BACAU | 41 | COVASNA | 21 |
| HUNEDOARA | 65 | MEHEDINTI | 41 | OLT | 20 |
| SUCEAVA | 64 | NEAMT | 41 | SALAJ | 18 |

## THE SITUATION OF THE AWARD PROCEDURES CHALLENGED WITH N.C.S.C. IN THE YEAR 2022 RELATED TO THE TOTAL NUMBER OF PROCEDURES COMMENCED VIA S.E.A.P.

Relating the number of the challenged unique award procedures at the number of the unique award procedures commenced via S.E.A.P. in the year 2022, one may notice that, out of the 32,200 award procedures that were initiated in the previous year with the Electronic Public Procurements System, a number of 2,345 were challenged with N.C.S.C., meaning a percentage of 7.28%.




## THE SITUATION OF THE COMPLAINTS LODGED BY BUSINESS OPERATORS WITH N.C.S.C. IN THE YEAR 2022 RELATED TO THE FUNDING SOURCE OF THE AWARD PROCEDURES

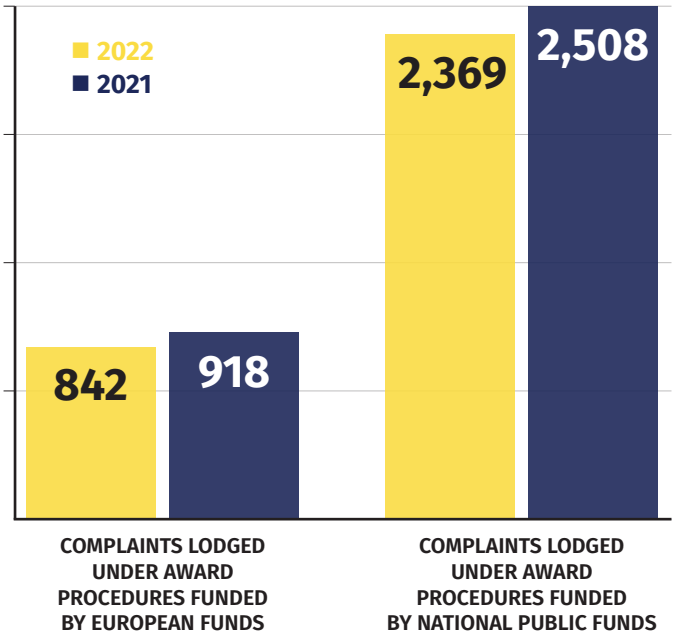



In relation to the funding source for the award procedures commenced for closing public procurement contracts, it is observed that in the year 2022 a number of 842 complaints were lodged with N.C.S.C. against the award procedures funded by European funds (26.22% of the total number of complaints), while the number of complaints challenging the award procedures of public procurement contracts funded by national public funds was of 2,369 complaints (73.78% of the total number of complaints). It should be noted that a number of 22 complaints lodged with the Council did not involve procedures funded by European or national funds.

Compared to the previous year, it can be noted that on the course of 2022 the number of the complaints submitted both under the award procedures funded by European funds and under the award procedures of public procurement contracts funded by national public funds registered an insignificant decrease.

According to the accompanying graph it is observed that in the course of 2022 the number of the complaints submitted under the award procedures funded by European funds decreased with only 8.28% (76 complaints) in comparison to 2021, whereas the number of the complaints submitted under the award procedures funded by national public funds declined with only 5.54% (139 complaints).

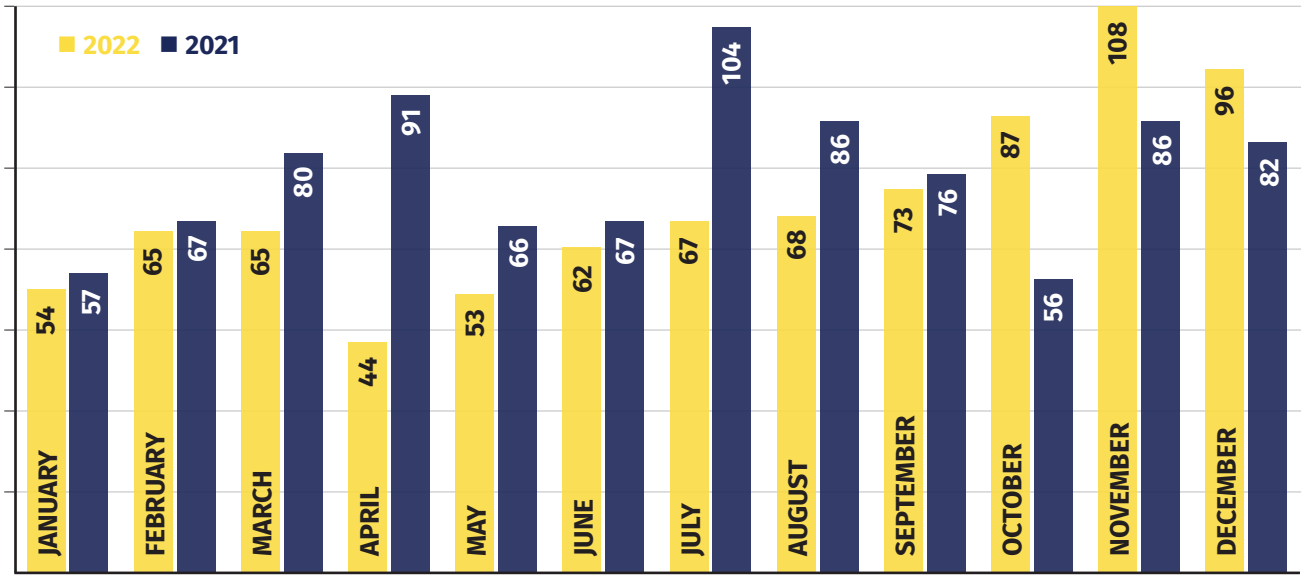
**THE TREND OF THE COMPLAINTS LODGED BY THE BUSINESS OPERATORS WITH N.C.S.C. RELATED TO THE FUNDING SOURCE OF THE AWARD PROCEDURES IN THE PERIOD 2021-2022**




Comparing the total number of the award procedures funded by European funds commenced in the year 2022 via S.E.A.P. (6,453 procedures) and the total number of complaints lodged with N.C.S.C. against the procedures funded by the respective funds (842 complaints), it results that a percentage of 13.04% of the procedures funded by European funds, commenced via the Electronic Public Procurements System, have been challenged with the Council by business operators.

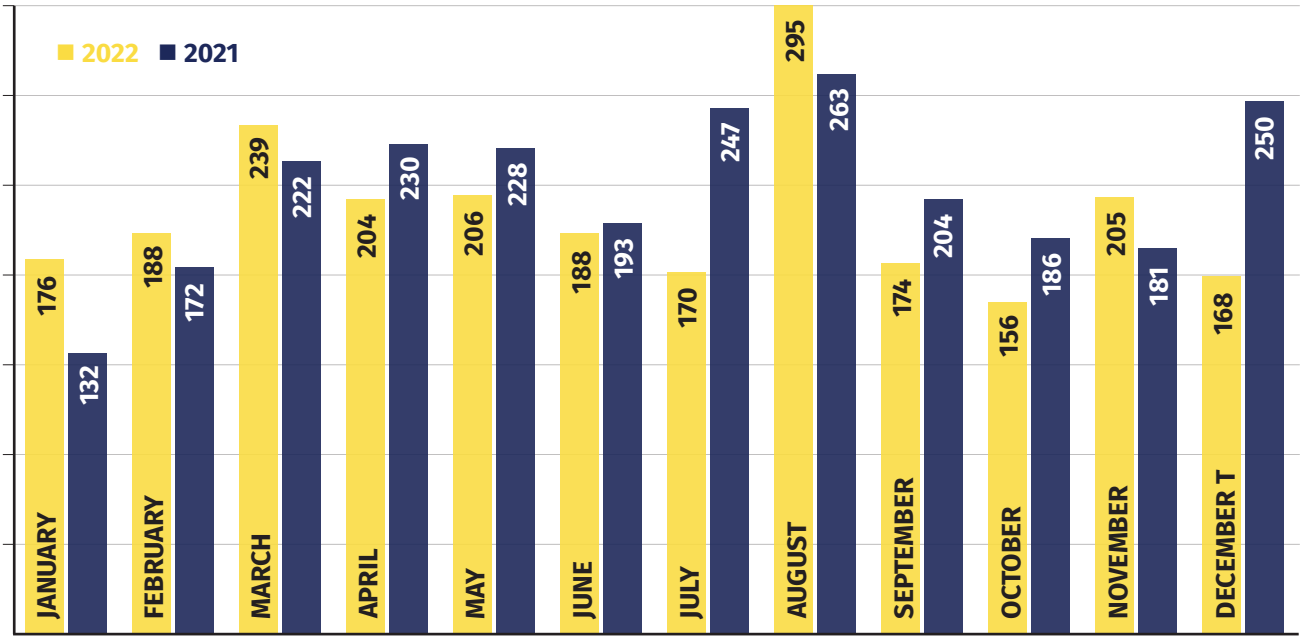
In order to draw an image of the complaints submitted to N.C.S.C. under the procedures of public procurement contracts funded by European funds, we are presenting their monthly trend for the period 2021-2022:

## THE TREND OF COMPLAINTS LODGED BY BUSINESS OPERATORS WITH N.C.S.C. UNDER THE AWARD PROCEDURES FUNDED BY EUROPEAN FUNDS IN THE PERIOD 2021-2022



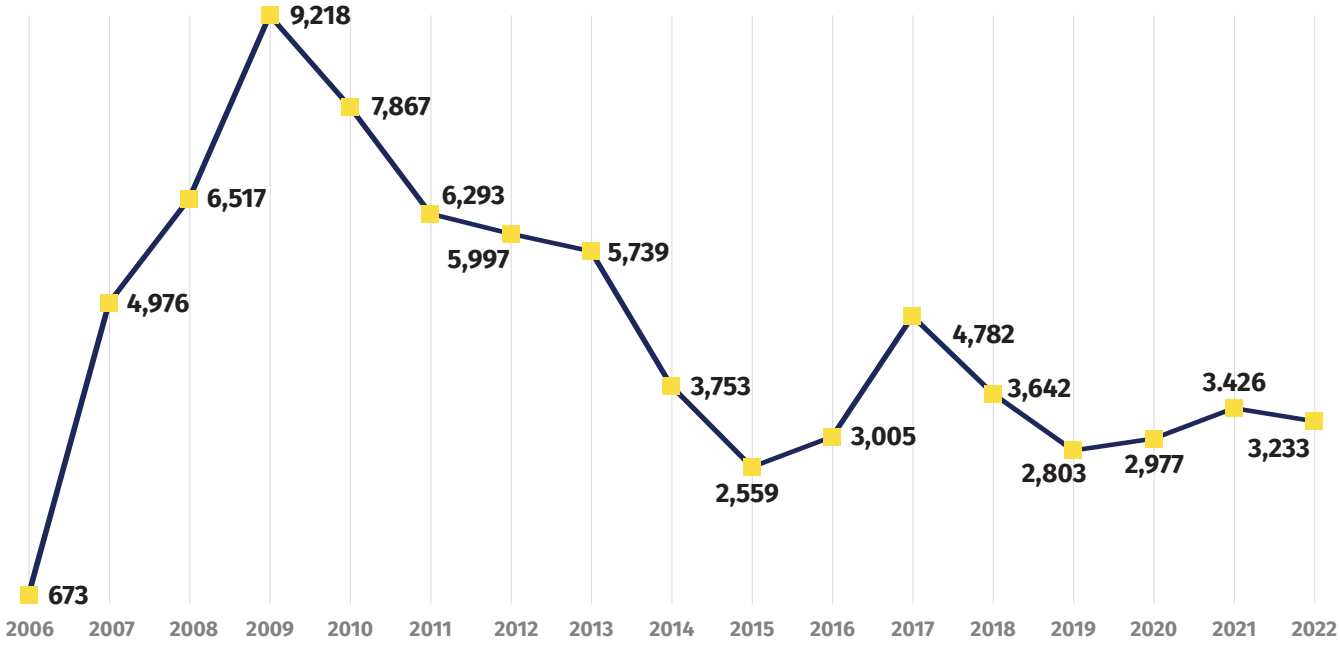

Similarly, the number of the complaints submitted to N.C.S.C. under the award procedures for the public procurement contracts funded by national public funds (local/state budget) developed in the period 2021-2022 as follows:

## THE TREND OF THE COMPLAINTS LODGED WITH N.C.S.C. BY BUSINESS OPERATORS IN THE PERIOD 2021-2022 UNDER THE AWARD PROCEDURES FUNDED BY NATIONAL PUBLIC FUNDS



Statistically, from its establishment and until the 31st of December 2022, 77,461 complaints were submitted by business operators to N.C.S.C., as revealed by the chart below.

**THE TREND OF THE COMPLAINTS LODGED BY BUSSINESS OPERATORS WITH N.C.S.C. IN THE PERIOD 2006-2022**




By analysing the chart above, it can be noticed that the number of the complaints lodged with N.C.S.C witnessed a fluctuant trend. Each year, ups and downs have been registered in direct relation to the number of procedures commenced via S.E.A.P., the legislative framework in the field of public procurements, the absorption level of European funds, the level of investments financed from the national public budget, or the financial capacity of the business operators to meet the legislative provisions concerning the possibility of challenging the procedures.

Although in the year 2022 the number of complaints witnessed an insignificant decrease in comparison with the previous year, still the number of complaints lodged with the Council was larger than the one registered for the period 2019-2020, which demonstrates that many public authorities did solve the keen lack of professionals in the field of public procurements developed by the institutional state system or they have defectively managed a series of award procedures. These matters should trigger a red flag in the context of the implementation on the course of 2023 of multiple public procurement procedures within the National Recovery and Resilience Plan (N.R.R.P.).

Although the Council performed sustained efforts for the implementation of good practices for accelerating the development of the challenged procedures, on the course of 2022 there were numerous cases in which the public procurement procedures were effectively 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.

Specifically, many contracting authorities refused to implement correctly and formally

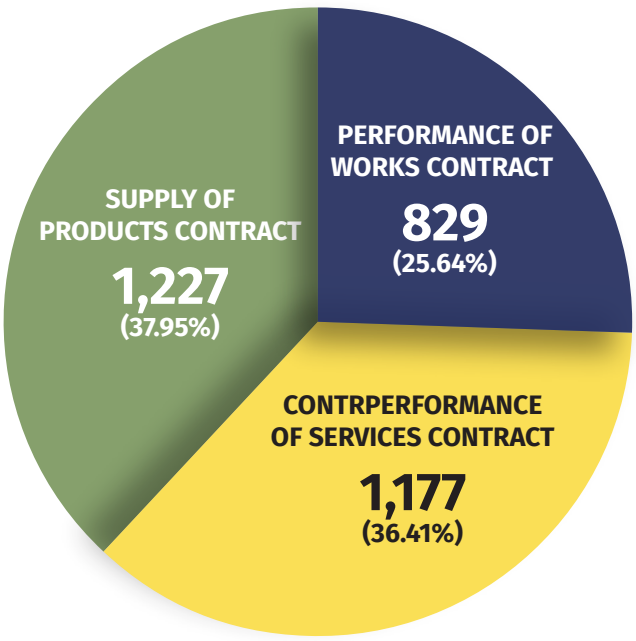
the decisions rendered by N.C.S.C., often choosing to their unjustified challenge by complaints. This fact has unnecessarily prolonged the closing of many investment projects founded by European or national public funds.

Official data show that in 2022 the number of complaints lodged to the superior court by the contracting authorities who preferred not to implement the decisions issued by N.C.S.C. within which the appeals formulated by the economic operators were admitted and the reevaluation of the offers was ordered, there were 132, which meant a 10% increase compared to the previous year.

Regarding the object of the public procurement contract – important element in the analysis of the complaints lodged by the business operators – the official data for the year 2022 shows that the complaints had the following structure:

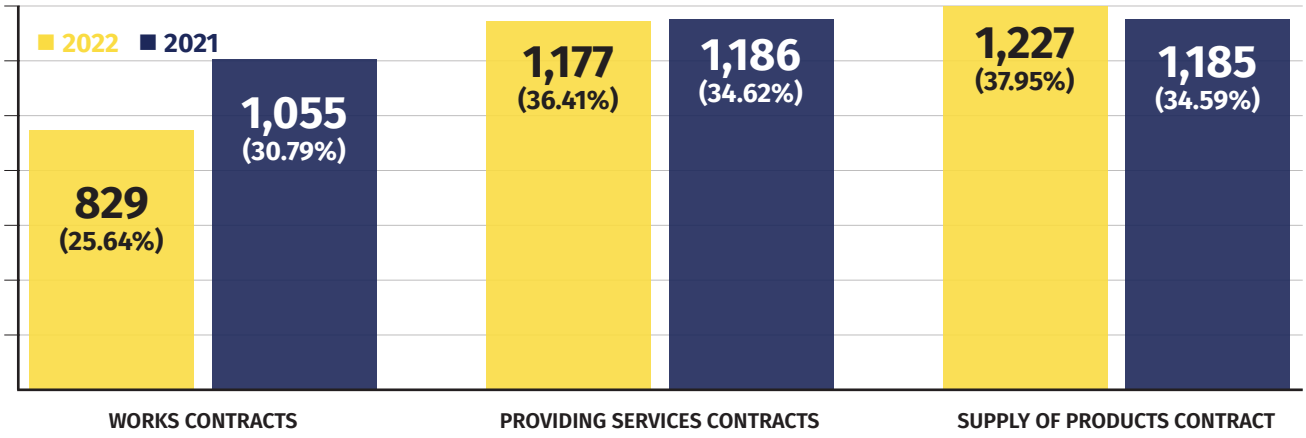
- award procedures for the public procurement works contracts – 829 complaints (25.64%);
- award procedures for the public procurement of providing services contracts – 1,177 complaints (36.41%);
- award procedures for the public procurement of the supply of products contracts – 1,227 complaints (37.95%).

## THE SITUATION OF COMPLAINTS LODGED BY BUSSINESS OPERATOR WITH N.C.S.C. IN THE YEAR 2022, RELATED TO THE CONTRACT TYPE




Analysing the trend of the complaints submitted according to the type/subject of the public procurement contract in period 2021-2022, it can be noticed that in 2022, in comparison to the previous year, we witnessed a 21.42% decrease of the number of complaints lodged against the award procedures commenced for closing performance of works contracts, while we noticed an increase of approximately 3.54% of the complaints lodged against the award procedures commenced for closing supply of products contracts.

## THE TREND OF THE COMPAINTS LODGED BY BUSINESS OPERATORS WITH N.C.S.C. RELATED TO THE CONTRACT TYPE IN THE PERIOD 2021-2022




Concerning the work volume of the solving counsellors in the year 2022, it must be mentioned that on the course of the year 2022 an average of approximately 294 complaints (files)/year were electronically 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 25 complaints (files)/chamber.

Yet, besides solving the complaints lodged by business operators, each chamber of the Council had to cope with an extremely large volume of activities, such as correspondence with business operators, contracting authorities, and Courts of Appeal, issuing resolutions, managing the securities submitted by business operators (depositing and refunding bails refund), etc.

Therefore, in the year 2022 the Council issued 3,366 resolutions. Although the number reveals a decrease of only 1.63% compared to the previous year, when 3,422 resolutions were issued, it may be noticed that the number of issued resolutions increased with 32.52%, respectively with 58.4% in comparison with the years 2020 (2,540 resolutions) and 2019 (2,125 resolutions).

Furthermore, in regards to the complexity and the work volume at the level of the Council in the year 2022, it must be also mentioned the fact that, based on Article 17 of Law 101/2016, applications of voluntary intervention in dispute were formulated within 781 complaints by the business operators interested to participate/participants under the award procedure. This contributed to the increase of the complexity level of respective files and to the accomplishment of supplementary procedures by the complaints solving chambers within the Council in order to respect the right of defence and adversarial principles.

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 2022, we must underline that hundreds of files had multiple complainants and interveners regarding both the tender documentation and the result of the procedure. Consequently, within some award procedures challenged by business operators, the Council was forced to issue more than one decision but also tens of related documents.

Although the number of the complaints and of the applications of voluntary intervention assigned for each chamber for solving complaints has been significant 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 with similar institutions, such as 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/entity[16] to issue a document or take remedy measures, acknowledging the claimed right or legitimate interest.

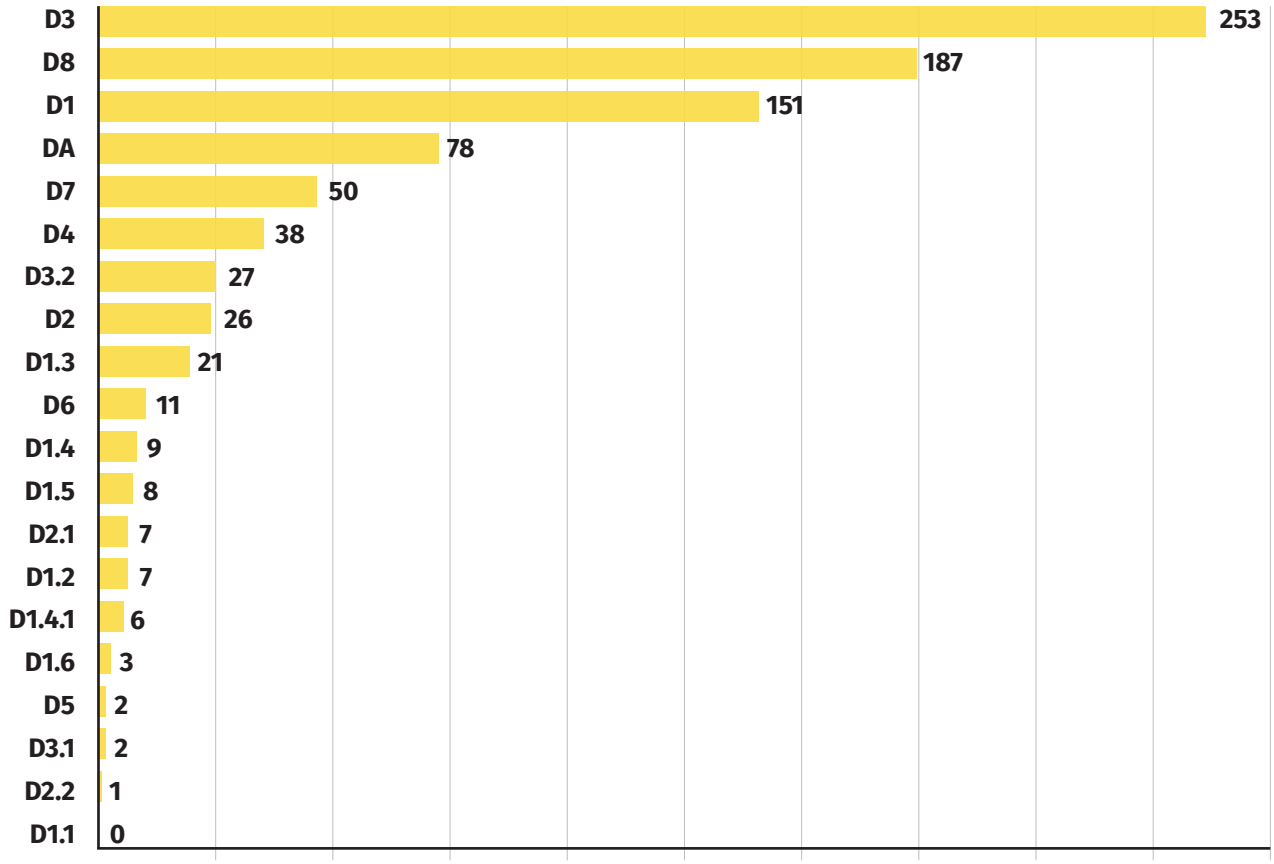
In the year 2022, after analysing the object matters of the 3,433 complaints lodged with the Council, it was concluded that 818 complaints concerned the tender documentation, while 2,415 complaints concerned the result of the procedure.

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 |
|---|---|---|
| D1.1 | restrictive requirements on the qualification/selection criteria related to the candidate's or the bidder's personal status | 0 |
| D2.2 | other requirements related to the award criterion | 1 |
| D3.1 | missing mention "or equivalent", in such cases as provided by the law in force | 2 |
| D5 | form of establishing the bid bail | 2 |
| D1.6 | restrictive requirements on the qualification/selection criteria related to environment protection standards | 3 |
| D1.4.1 | restrictive requirements on the qualification/selection criteria related to similar experience | 6 |
| D1.2 | restrictive requirements on the qualification/selection criteria related to the ability to pursue professional activity | 7 |
| D2.1 | irrelevant factors of assessment, missing calculation algorithm, with non-transparent or subjective calculation algorithm | 7 |
| D1.5 | restrictive requirements on the qualification/selection criteria related to quality assurance standards | 8 |
| D1.4 | restrictive requirements on the qualification/selection criteria related to technical and/or professional capacity | 9 |
| D6 | infliction of unfair or excessive contractual provisions | 11 |
| D1.3 | restrictive requirements on the qualification/selection criteria related to economic and financial condition | 21 |
| D2 | requirements on the award criterion | 26 |
| D3.2 | other restrictive requirements in terms of technical specifications | 27 |
| D4 | missing clear, complete, unambiguous answer from the contracting authority on the requests for clarification of the tender documentation provisions | 38 |
| D7 | failure to split the procurement by lots, in case of similar products/works | 50 |
| DA | other criticism to the documentation | 78 |
| D1 | restrictive requirements on the qualification criteria | 151 |
| D8 | other reasons related to the tender documentation | 187 |
| D3 | restrictive requirements in terms of technical specifications | 253 |

**16.** 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.**

## DECISIONS ISSUED BY N.C.S.C. AS A RESULT OF COMPLAINTS FORMULATED AGAINST THE TENDER DOCUMENTATION

### 1) N.C.S.C. DECISION

The object of the current award procedure is represented by the supply of medical devices from the category of reagents and culture media for the identification of Mycobacterium tuberculosis strains and for highlighting the multiple resistances through genotyping or fast phenotypic methods, with the aim to establish the tuberculosis diagnosis for the patients included in the National Programme for the Prevention, Monitoring and Control of Tuberculosis, as well as for monitoring the therapeutic response, in the quantities and with the characteristics provided in the specifications, as well as the supply of all the products mentioned in the specifications for the 20 lots, in the proper time span.

The complaint of S.C. S S.R.L. focuses on the estimated price, established by the contracting authority for the procurement of products from lot no. 16, against which it appreciates that it is way below the actual production price of the traditional producers on the Romanian market in the field.

Therefore, in the opinion of the author of the complaint, the value established by the

purchaser for the products of Lot 16 was performed by eluding the provisions of Article 19 paragraph (5) of Government Decision no. 395/2016 – 'The contracting authority has the obligation to publish in SEAP the result of the market consultation process but no later than the initiation moment of the award procedure', because the purchaser did not conduct a market consultation before the initiation of the award procedure, thus there is no justification of the value established for this lot. (...)

In the justification of the estimated value of the framework agreement and, implicitly, of Lot 16, when establishing the estimated value of each lot, the purchaser reported, starting from the aim of awarding the framework agreement, respectively from the identified necessities which will be covered by making the procurement, at the historical prices which were obtained in the framework agreements developed in the period 2019-2021, compared to its express requirements/necessities and taking into consideration all the costs implied by the requirements in the tender documentation, in compliance with the provisions of Article 16 paragraphs (1) and (2) of Government Decision no. 395/2016 (...)

Concerning the fact that the contracting authority did not perform a market consultation before initiating the award procedure, the Council makes note of the provisions of Article 139 paragraph (1) of Law no. 98/2016, according to which: (1) Before the initiation of the award procedure, the contracting authority has the right to organise market consultations in order to prepare the procurement, reporting to the object of the public procurement contract, and in order to inform the business operators regarding the procurement plans and related the requirements, making it known by the means of SEAP, as well as through any other means'.

Hence, this legal norm invoked by the complainant regulates the right of the contracting authority to initiate such a market consulting, not an obligation on its behalf.

Therefore, in regards to the current procedure, the contracting authority decided that a market consultation is not required because it possessed all the necessary information for estimating the procurement value as fair and as close as possible to the market level, according to the framework agreements developed in the period 2019-2021 with the business operators involved in this profile market.

**DECISION OF THE COURT OF APPEAL**

On the complainant's discontents regarding the estimated price established by the contracting authority for the procurement of the item from Lot no. 16, against which it appreciates that it is way below the actual production price of the traditional producers on the Romanian profile market, the Court concludes that N.C.S.C. has correctly observed the incidence of Article 9 paragraph (1) of Law no. 98/2016 ('The contracting authority calculates the estimated value of a procurement taking into consideration the total payment amount, VAT excluded, estimated by the contracting authority, taking into account any eventual option and extension forms of the contract, mentioned explicitly in the procurement documents'), and of Article 11 paragraphs (1) and (2) of Law no. 98/2016 ('The contracting authority does not have the right to use calculation methods for the procurement estimated value with the aim to avoid the application of the award procedures regulated by the current law. The contracting authority does not have the right to divide the public procurement contract in many distinct low value contracts, nor to use calculation methods which could lead to a detraction of the estimated value of the public procurement contract, with the aim to avoid the application of the award procedures regulated by the current law').

Moreover, the Court observes that according to Article 14 of Law no. 98/2016, also invoked by the petitioner, 'in the case of the framework-agreement or of the dynamic procurement system, the estimated value of the procurement is considered to be the maximum estimated value, VAT excluded, of all the public subsequent public procurement contracts, which are presumed to be awarded on the basis of the framework-agreement or by using the dynamic procurement system for its entire duration'.

Yet, as concluded by the Council in the consideration of the challenged decision, in the necessity report no. .../06.08.2021 issue by the Ministry of ..., as well as in the Contracting Strategy no. 3512/10.12.2021 (leaf 5 of the procurement file), for the substantiation of the estimated value of Lot no. 16, the contracting authority has taken into consideration:

- the prices resulted following the centralised public procurement, organised in 2019 by the Ministry of ..., for the medical devices which form the object of the ongoing framework-agreements;
- the prices estimated by the elaboration committee for the tender documentation, nominated on the grounds of Order of the Ministry of ... no. 570/06.05.2020 for the next four years (2021-2024), in compliance with the address no. ... of the Institute of ...

In addition, the Court concludes that the Council has also correctly noted the response issued by the Ministry of ... following the Notification no. 390/21.12.2021 lodged by the petitioner, in the sense that 'Lot 16 of the current procedure was the subject of the framework-agreement no. 160/2016 developed by the Ministry of ... in the period 19.12.2019 - 19.12.2021, a framework-agreement which was also signed by the complainant. The Ministry of ... did not develop a market consultation process because there were historical prices obtained during the procedures which had been ongoing at the time the current procurement procedure has been initiated'.

In this context, the argument brought forth by the contracting entity and validated by the N.C.S.C. appears reasonable. In accordance, for justifying the estimated value of the framework-agreement and, implicitly, of Lot 16, starting from the purpose of awarding the framework-agreement, respectively from the identified requirements to be covered by performing the procurement, for establishing the estimated value of each lot, the Ministry of ... made reference to the historical prices obtained in the framework-agreements developed in the period 2019-2021, reported to the its express requirements/ necessities and taking into consideration all the costs implied by the requirements of the tender documentation, without identifying a violation of the provisions in Chapter I, section 4, paragraph 3 of Law no. 98/2016. In the hypothesis in which the contracting authority would have been in the situation of facing impossibilities or difficulties in obtaining the necessary information for the coherent and realistic estimation of the procurement value, it would have had the possibility to apply the market consultation procedure. Yet, in this case, it had full access at the real situation of the relevant market, in the context in which it developed in the period 2019-2021 the same type of framework - agreements with the business operators involved in this profile market, and the petitioner was not able to prove the contraries.

In these conditions, the contracting authority cannot be criticised for not respecting the rules for establishing the estimated value of the procurement, in the sense of Article 14 of the law.

## 2) N.C.S.C. DECISION

Analysing the criticism of the complainant lodged against the fact that the contracting authority included 3 (three) types of products with different purpose, without resorting to their division in lots, the Council observed that the procurement object is composed of the following products:

1. sanitary protection masks - 22,753,584 pieces;
2. hand sanitisers - 541,752 l;
3. surface sanitisers - 25,080 l.

A number of 190 education units will be provided with protection equipment (sanitary protection masks, sanitary sanitisers), while 90,292 students, teachers and auxiliary/administrative personnel will be protected against infection with COVID-19.

Through its official standpoint, the contracting authority specified that it decided that the award procedure should not take place on lots, because the products are appointed within the same administrative unit, in the same location and for the same purpose (preventing the contamination with the SARS-COV2 virus), being aimed for identical or similar usage.

Also, the contracting authorithy added that the procurement was included in the presented form (single lot) in the Grant Application addressed to the Ministry of European Funds, within the Large Infrastructure Operational Programme, 2014-2020, Priority Axis 9 – Specific Objective 9.1. This Grant Application was approved in this form, therefore the Financing Agreement no. 1,021/23.02.2022 has been signed. (...)

From the drafting of Chapter II, section 3, of Law no. 346/2004, it results that the local public authorities (including by analogy the contracting authority, as well) have the obligation to encourage increasing the share of small and medium enterprises in the value of public procurement contracts regarding material goods, works and services. In this case, the respective increase can be performed by dividing the award procedure in 3 (three) lots and, implicitly, the appropriate decrease of the amount of the bid bound and of the qualification requirements.

In the same direction, in the Directive 2014/24/EU of the European Parliament and of the Council on public procurement and

repealing Directive 2004/18/EC it is shown that: 'Public procurement should be adapted to the needs of SMEs. Contracting authorities should be encouraged to make use of the Code of Best Practices set out in the Commission Staff Working Document of 25 June 2008 entitled <<European Code of Best Practices Facilitating Access by SMEs to Public Procurement Contracts>>, providing guidance on how they may apply the public procurement framework in a way that facilitates SME participation. To that end and to enhance competition, contracting authorities should in particular be encouraged to divide large contracts into lots.

Such division could be done on a quantitative basis, making the size of the individual contracts better correspond to the capacity of SMEs, or on a qualitative basis, in accordance with the different trades and specialisations involved, to adapt the content of the individual contracts more closely to the specialised sectors of SMEs or in accordance with different subsequent project phases. [...] Member States should remain free to go further in their efforts to facilitate the involvement of SMEs in the public procurement market, by extending the scope of the obligation to consider the appropriateness of dividing contracts into lots to smaller contracts, by requiring contracting authorities to provide a justification for a decision not to divide contracts into lots or by rendering a division into lots obligatory under certain conditions.'

The necessity of an open market is also highlighted by the National Agency for Public Procurement, which answered the question 'Is the division on lots mandatory?' in the following manner (https:// achizitiipublice.gov.ro/matrix/cell/331/1): 'After analysing the incidental legal provisions, it results that, although the public procurement legislation does not explicitly force the contracting authority to divide the procurement in lots, it actually binds it to ensure a competitive framework as large as possible and not to artificially limit the competition in the field of public procurement. In this sense, the latter has the responsibility to analyse the opportunity of dividing the contracts/framework-agreements in lots, depending on objective requirements and adapting the public procurement in such a way that it would allow a larger number of business operators to participate at the procedure'.

The fact that the authority has the obligation to divide the procurement in lots in order to avoid restricting the competition has been also confirmed by Civile Decision no. 3,501 of 19 September 2013 issued by Bucharest Court of Appeal, Section VIII administrative and fiscal: 'On the merits of the complaint, the Court observes that the main criticism against the Council's decision by the petitioner contracting authority targets the reasons of the Council, in the sense that the division of the procurement in many lots was required.

This criticism is groundless because the exercise of the contracting authority of its rights must respect the principles established by the Ordinance, such that grouping more different activities in a single contract or framework-agreement would not determine certain restrictions for the business operators which are interested to participate at the bid. In such a situation, it would become abusive and contrary to the principles and aims regulated by Article 2 of the Ordinance.

Restricting the tendering lot narrows significantly the number of possible bidders to those with the object of activity related to the multitude of services and works types, especially in the context in which business operators usually focus on certain types of services or works, and not on the entire range comprised in the specifications by the contracting authority.

Therefore, by accepting only bidders who have in their object of activity the provision of all types of activities subject to tendering, the authority limits the access at the public procurement procedure for authorised professionals.

In regards to the claim of the petitioner that, in compliance with the community law norms, the conclusion of a framework-agreement having a complex object, composed of a multitude of different services and works, is allowed, the Court does not deny this possibility for the contracting authority, yet this is not absolute and must respect, as shown above, the principles and aims regulated by the ordinance'. (...)

An estimated value of 40,393,301.76 lei, VAT excluded, for the entire procedure, comprising 3 (three) different

products in regards to both the manufacturing technological process and, especially, their use, is likely to violate the principles of non-discrimination, equal treatment and, especially, of proportionality, since this size of a single lot is hardly accessible for small and medium enterprises.

In the respective context, as the criticisms of the complainant on the division of the procedure are valid, the 3 (three) products being different (sanitary protection mask, hand sanitiser and surface sanitiser), having different functionalities, the contracting authority should accordingly modify the documents of the tendering's development, in the sense that the procedure should be allotted and that the submission of bids on distinct lots should be accepted, for the requested 2 (two) products (masks and sanitisers) or 3 (three) products (sanitary protection mask, hand sanitiser and surface sanitiser).

Yet the reorganisation of the procedure on lots, rightfully pretended by the complaining enterprise, is not allowed by the actual technical configuration of S.E.A.P., which does not accept changing an award procedure of a unique contract within an award procedure on lots. As a consequence, as the division request is grounded, as shown before, the finality cannot be other than cancelling the award procedure.

For establishing this finality, the Address no. 65,869/18.10.2019 was taken into account, issued by the Agency for Digital Agenda of Romania, according to which the contracting authority informed that: (...) in the case in which the contracting authority chooses to organise an award procedure on lots, these are configurated at the same time with the tender documentation and cannot be modified on the entire development period of the respective procedure. Also, Address no. 3,538/23.06.2021 was taken into consideration, issue by the same institution, according to which 'Once the tender documentation is published and the public procurement procedure is initiated by the publication of the afferent announcement, there are no technical possibilities to redivide the procurement in more lots or to merge the lots'.

Hence, the Council retains the division of the products which form the object of the current procedure is not allowed by the actual technical configuration of S.E.A.P., which does not accept changing an award procedure of a unique contract within an award procedure on lots.

For this reason, it is without doubt that adopting the remedy measure discussed in the content of the decision is impossible, situation in which the obligation of the contracting authority to adopt certain remedy measures which cannot be effectively implemented appears to lack any efficiency.

Taking into consideration that dividing the current award procedure on more lots is not possible after the publication of the participation announcement in S.E.A.P., the Council will dispose the cancelation of the procedure.

**DECISION OF THE COURT OF APPEAL**

In contradiction with the claims of the petitioner, the Court appreciates that products which form the object of the procurement are not similar but different, both regarding the manufacturing technological process and use, as they are sanitary protection masks, hand sanitisers and surface sanitisers, having different functionalities. As a consequence, it was imposed that the contracting authority would modify the tendering development documents, in the sense of allotting the procedure and accepting the submission of bids on distinct lots for the requested 2 (two) products (masks and sanitisers) or 3 (three) products (sanitary protection mask, hand sanitiser and surface sanitiser). (...)

Even if the public procurement legislation does not explicitly force the contracting authority to divide a procurement on lots, the latter has the obligation to ensure a competitive framework as large as possible and not to artificially limit the competition in the field of public procurement. On the contrary, it must analyse the opportunity of dividing the contracts/framework-agreements in lots, depending on objective requirements and adapting the public procurements, in such a way that it would allow a larger number of business operators to participate at the procedure.

As retained before by N.C.S.C. in the challenged decision, as the public procurement legisla-

tion is governed by the proportionality principle, as well as by the principle of ensuring an equal and non-discriminatory treatment for all the business operators active on the market, the decision of the contracting authority to bid all three categories of products together, although they are not similar, nor interdependent, leads to an artificial restriction of the competition, in the sense of excluding or hindering the access of business operators (SMEs) which provide only a single category of products, thus being in the impossibility to submit a complete bid, or to which an excessive task would be imposed, in these conditions, to associate with other business operators in order to participate at the procedure.

Therefore, in compliance with the ones retained by N.C.S.C., the Court appreciates that an estimated value of 40,393,301.76 lei, VAT excluded, for the entire procedure comprising 3 (three) different products in regards to both the manufacturing technological process and their use, violates the principles of non-discrimination, equal treatment and of proportionality, since this size of a single lot is hardly accessible for small and medium enterprises.

In addition, the Court does not deny the obligation incumbent upon the contracting authority to take into consideration, in compliance with the provisions of Directive 2014/24/EC, the opportunity of splitting the contract in lots, at the same time preserving the liberty to autonomously decide on the grounds of any reason considered as relevant, without becoming the subject of administrative or judicial supervision. However, it underlines the fact that this opportunity must be subsumed to respecting the public procurement principles, aspect which was not respected in this case.

Judging by the fact that the current court appreciates, in accordance with those retained by N.C.S.C. in regards to the fact that the products which form the object of the current public procurement procedure are not intended for certain identical or similar use, that the provisions of Directive 2014/24/EC are applicable in the sense that such a decision can be the object of administrative or judicial supervision.

### 3) N.C.S.C. DECISION

The Council concluded in contrary with the claims of the contracting authority that Law no. 72/2013 is applicable also to the contracts having as object the execution of works, as provided by Article 1 paragraph (1), Article 6 paragraph (1) letter a) of (...), Article 7 paragraph 1 and Article 14 of Law no. 72/2013 (...).

In conclusion, the Council retains that the future agreement to be concluded following the analysed procedure should provide bill payment terms, and these terms should respect the provisions of Law no. 72/2013, situation in which the special conditions imposed by the contracting authority (...) represent future clauses qualified by law as abusive, thus their elimination is mandatory.

Consequently, the Council will dispose the elimination of the following conditions from the procurement's data sheet:

'The award procedure/procurement is initiated under the incidence of the present conditions:

• The executor will financially support the work until completion, including the amounts which exceed the values assigned by MDLPA, until their reception or completion, while the clearing of the amounts which exceed the maximum allocated ceiling of 5,077,243.37 lei, VAT included, will take place only one time, at the completion of the works, by presenting an expense account and a 12 months due fiscal invoice.

• The clearing of the works with a value financed by M.D.L.P.A. will be performed depending on the receipts from the financier (M.D.L.P.A.), in term of 3 days from the collection of the financed amounts, as the maximum value financed through this national investment programme being of 5,077,243.37 lei, VAT included.

• For the value differences between the eligible amounts approved by the financier and the value contracted by the executor, after reaching the equivalent grant threshold, the execution expenses will be supported by the executor, the latter accepting a payment maturity of maximum 12 months.

• The bidders within the same procedure accept the use of these special conditions, assuming the entire responsibility in relation to the eventual prejudices which they light suffer in the described situation'.

## DECISION OF THE COURT OF APPEAL

S.C. S S.R.L. lodged a complaint on role with N.C.S.C. through which it invoked the fact that the tender documentation imposes illegal, abusive and disproportionate participation conditions, of nature to restrain competition between the business operators interested in participating to the award procedure.

In the challenged N.C.S.C. decision it was retained that 'the future agreement to be concluded following the analysed procedure should provide bill payment terms, and these terms should respect the provisions of Law no. 72/2013, situation in which the special conditions imposed by the contracting authority (...) represent future clauses qualified by law as abusive, thus their elimination is mandatory'.

Through the lodged complaint, the contracting authority criticises the N.C.S.C. decision in the sense that the provisions inserted in the tender documentation, respectively the participation conditions, eliminated by N.C.S.C. from the data sheet of the procurement, are grounded and legal, and the labelling by N.C.S.C. of these participation conditions as abusive represents only the result of the wrong interpretation and application of Law no. 72/2013 in regards to the current situation.

The Court retains that through the lodged complaint the contracting authority does not criticise the N.C.S.C. decision concerning the payment term of the invoices issued by the executor, it requests that the court will pronounce a decision for modifying the 12 months due payment term to 60 days, although it did not formulate such a defence during the solving of the complaint in front of N.C.S.C., claiming that by imposing a 12 months due payment term the risk of partial or incomplete execution of works is excluded and that the provisions of Article 7 of Law no. 72/2013 are not applicable for agreements of works.

Furthermore, the Court retains that through the challenged N.C.S.C. decision the contracting authority has the obligation to publish in S.E.A.P. the modified documentation, as well as to establish a new tern for submitting the bids, occasion of which it could proceed at modifying the invoice payment term.

Regarding the condition on the clearing term for the works with value funded by M.D.L.P.A., N.C.S.C. has correctly noted in the reasons of the challenged Decision that, contrary to the claims of the contracting authority, Law no. 72/2013 is applicable also to the contracts having as object the execution of works, as it results from Article 6 paragraph (1) of the law.

Therefore, in compliance with Article 6 paragraph (1) of Law no. 72/2013:

'The contracting authorities executes the payment obligation of the amounts of money resulted from the agreements concluded with professionals no later than:

a) 30 calendar days from the date of receiving the invoice or any other equivalent payment request;

b) 30 calendar days from the date of the reception of goods or provision of services, if the date of receiving the invoice or any other equivalent payment request is uncertain or prior to the reception of goods or provision of services;

c) 30 calendar days from the reception or verification, if by law or agreement a reception or verification procedure is established for certifying the conformity of merchandise or services, and the contracting authority received the invoice or the equivalent payment request at the reception or verification date or prior to this date'.

According to Article 7 paragraph (1) of Law no. 72/2013:

'The payment terms regulated in the contract for the execution of the obligations of the contracting authority cannot be higher than the terms established in compliance with Article 6 paragraph (1). By exception, the parties could stipulate a payment term of maximum 60 calendar days, if it is expressly regulated in the contract and in the procurement documentation and it is a justified objective, subject to the fact that this clause would not be abusive, in compliance with Article 12'.

According to Article 12 of Law no. 72/2013, the contractual practice or clause through which it is manifestly established as inequitable in relation to the creditor, the payment term, the interest rate for delayed payment or of supplementary damages is considered abusive.

In compliance with Article 12 of Law no. 72/2013, not being necessary the verification of the existence of the circumstances regulated by Article 13 or of any other circumstances specific for the case, the contractual clauses are qualified as abusive if they:

a) exclude the possibility of applying penalising interests or regulate penalising interests inferior to the legal penalising interest;

b) fix an obligation of formal notice in order to operate the flow of interests;

c) establish a higher term from which the debt produces interests which is higher than the one regulated by Article 3 paragraph (3) or, as the case, by Article 6 and Article 7 paragraph (1);

d) fix in the agreements between professionals and contracting authorities a payment term higher than the one regulated by Article 7 paragraph (1);

e) eliminate the possibility of the payment of supplementary damages;

f) establish a term for issuing/receiving the invoice.

With regards to these arguments, the Court appreciated that the complaint lodged by the contracting authority is groundless and, consequently, it will be rejected as such.

**4) N.C.S.C. DECISION**

After verifying the documents in the case file, the Council retains the present necessity of the contracting authority to install two storage tanks with the capacity of 11,000 litres.

Taking into consideration the necessity of the contracting authority as it has been mentioned in the tender documentation, the Council appreciates that the formulation of the technical specifics in the technicalities in the specifications is not in contradiction with the provisions of Article 156 paragraph (2) of the aforementioned Law, nor with the provisions of Article 20 paragraph (10) of Government Decision no. 395/2016, according to which the technical specifications represent 'requirements, prescriptions, features of technical nature which allow each product, service or work to be objectively described such that it corresponds to the necessity of the contracting authority', because the contracting authority (...) did not request the provision of tanks produced by a certain manufacturer but it indicated their capacity, according to its actual need.

The fact that, at present, the contracting authority is equipped with tank of smaller capacity is irrelevant, as its current necessity is much larger, respectively two 11,000 litres tanks.

In these conditions, the Council cannot consider as restrictive the request of two tanks with a capacity larger

than the one owned, as they are necessary for the optimal functioning of the hospital, in the context in which the contracting authority is equipped, at the moment, with tanks having a smaller capacity in comparison to the required one.

The fact that the complaining enterprise does not have the possibility to provide two tanks with the capacity of 11,000 litres, but of one 11,000 litres tank and of another tank of 5,700 litres, cannot lead to the conclusion that the competition was restricted.

In these conditions, the request of the complainant of forcing the contracting authority to modify the tender documentation in the sense of accepting a 11,000 litres tank and a second 5,700 litres tank will be rejected as groundless by the Council, because the characteristics and the performances of the tanks in the equipment of the contracting authority are not the object of the award procedure.

Consequently, the Council cannot sanction the contracting authority for the intention of purchasing two 11,000 litres tanks and it cannot force it to purchasing one of the smaller capacity tanks, respectively 5,700 litres, as long as the 5,700 litres one in its equipment does not satisfy its specific necessities, and the procurement of larger capacity tanks, respectively 11,000 litres (thus, equivalent with the owned ones), fit in the situation regulated by Article 156 paragraph (3) of Law no. 98/2016, according to which 'the establishment of the technical specifications through the clarification of the elements mentioned in paragraph (2) is allowed in exceptional situations, in the case in which a sufficiently precise and intelligible description of the object of the agreement is not possible in compliance with the provisions of paragraph (1); in these situations, clarification of the elements mentioned in paragraph (2) is accompanied by the words or equivalent'.

The Council takes into account that establishing the necessities is the exclusive attribute of the contracting authority and that nowhere in the legislation in force there is regulated the right of business operators to impose the modification of the tender documentation and, all the more so, the obligation of the contracting authority to modify the tender documentation following the request or proposal of a business operator who appreciates that the documentation is drafted inappropriately, based only on the reasoning that the latter cannot produce or sell the demanded product at the requested 11,000 litres capacity.

In other words, the purpose of organising the award procedure is the procurement of two tank with the capacity of 11,000 litres, which, at their turn, correspond to the necessity of the contracting authority and not to selling certain tanks from the portfolio of the challenged business operator.

Accordingly, the contracting authority did not have any legal obligation to modify the tender documentation after the will of the business operator who lodged the complaint or after the features of the products which the latter is selling; the option of modifying the requirements in the tender documentation represents a right of the authority and not an obligation. Therefore, the Council cannot sanction the contracting authority fir exercising its right to not bring modifications to the technical specifications or to other provisions of the documentation, in the conditions in which their restrictive character is not proven.

**DECISION OF THE COURT OF APPEAL**

After verifying the documents comprised in the case file, the Council correctly retains that the necessity of the contracting authority is to install two tanks with a storage capacity of 11,000 litres. The responding contracting authority has justified the necessity of the requirement in the conditions of Article 155 paragraphs (1), (2) and (6) and Article 156 paragraphs (2) and (3) of Law no. 98/2016 (...).

When analysing the justified or unjustified character of a requirement from the specifications, the administrative law court does not limit to a formal legality control, yet it must evaluate the behaviour of the authority from the perspective of the purpose of the public procurement law and the authority's own necessities.

In agreement with the Council's reasoning, contrary to the claims of the petitioner formulated in the complaint, resumed in the content of the challenge, the requirement from the specifications regarding two tanks for the storage of liquid oxygen of minimum 11,000 litres is not a restrictive one, the responding authority claiming in a transparent, justified and well-argued manner the requirement starting from the authority's objective necessity, and the valorisation of its result within the award procedure can be performed without distorting competition and/or violating the principles which govern public procurements.

In supporting the judicial endeavour, the solutions proposed by the responding authority in the content of the contestation, claimed to be technically and financially efficient (taking as hypothesis the claims that the existent foundation cannot support the weight of a 11,000 litres tank), deduced to judgement in an incidental manner, will not form the object of analysis. The bidder could have offered on its own expenses the construction of a new platform next to the existent one in order to mount a tank of larger capacity, while the contracting authority would not have the obligation to adjust to the capacity of the bidders' tanks, but they must adjust to the technical specifications and to the necessity of the contracting authority, as the latter should not have supplementary expenses with the capacity of the bidders' tanks.

This is because the authority is the one to establish the organisation manner of the procurement, describing and establishing the elements of the procurement.

Neither of the 'alternative' solutions of the petitioning bidder (the obligation of the contracting authority to modify the storage capacity of the liquified medicinal oxygen tanks depending on the technical construction documentation made available at 13.12.2021) cannot be taken into consideration. The bidder makes the 'bid' in compliance with Article 3 paragraph (1) letter hh) of Law no. 98/2016, manifesting its intention to juridically engage in a public procurement agreement, in the contractual conditions proposed by the contracting authority.

The petitioner invoked circumstances related to the current state of affairs, respectively the existence of a technical constraint concerning the existent foundation which can support the maximum weight of a cryogenic storage unit of 5,700 litres, allowing the installation of a storage unit with the same storage capacity, in the conditions in which the contracting authority requests a medicinal oxygen storage unit with the capacity of 11,000 litres; in essence, it invokes the fact that no business operator active on the Romanian market can legally participate at the procedure because no 11,000 litres cryogenic storage unit can be provided, as it could not be installed on the existent foundation which supports the maximum weight of a cryogenic storage unit of 5,700 litres.

The claim of the petitioner to force the contracting authority to modify the tender documentation in the sense of accepting a 11,000 litres tank and a second 5,700 litres tank was rejected as groundless by the Council, as it correctly retained the fact that these features and performances of the tanks in the equipment of the contracting authority do not form the object of the award procedure.

In response to the criticisms of the petitioner from the complaint, neither of the invoked pretended technological complaints, which would be imposed by the existent foundations, form the object of the award procedure.

Maintaining the requirement of supplying two liquified medicinal oxygen tanks with the capacity of 11,000 litres at the level of the specifications as one of the components of the evaluation factor cannot be considered an illegality, as claimed by the petitioner, and is not likely to restrict competition or to block access for the procedure, because the contracting authority has the right to establish its objective necessities, depending on what it considers to be a desirable advantage.

## 5) N.C.S.C. DECISION

At point 2.2.2. from the complaint, S.C. G S.R.L. shows that, if the product is intended for disinfecting surfaces, it requests the modification of the activity spectrum mentioned in the specifications taking into consideration EN 14885:2018 for a product intended for disinfecting surfaces by mechanic action, as well as the description of the support surfaces described in the specifications 'Used in sanitary units for: - pavements, walls', in compliance with Article 16 of Annex 1 of OMH no. 1,761/2021.

Moreover, it shows that if the contracting authority wishes to maintain the requirement:

'- Bactericidal/Fungicidal: EN 13697 (2.2), time of contact 5 min., ≥4.0 lg. reduction for bactericidal activity

- Fungicidal lg. higher or equal to 3', the significance of the orthographic sign '/' must be specified, if it means 'and' or 'or', also taking into account the definition of high-level disinfection which provides both activities mentioned in Article 1 letter d), Annex 1 of OMH no. 1,761/2021.

The Council concludes that the contracting authority replied to the request of the complainant as follows:

'The contracting authority decided to reformulate the requitement as: «Activity spectrum: bactericide, fungicide, levuricide, micro-bactericide, virucide, sporicide» according to the Standard 14,885/2018 of Ord. 1,761/2021, Article 17, point a) and to the epidemiologic risk specific for our institute (sporicide activity)'.

By the address no. 808/04.04.2022, the complainant maintains the criticism, showing that through the remedy measure the contracting authority did not completely and precisely clarify the micro-biocide spectrum from the specifications, reason for which it maintains the request to force the contracting authority to specify the activity spectrum provided by Standard EN 14885/2018 for a product intended for the disinfection of surfaces through mechanical action.

For solutioning these criticisms, the Council takes into consideration that the meaning of the orthographic sign has been clarified in the answer of the contracting authority, the activity spectrum being presented as 'bactericide, fungicide, levuricide, micro-bactericide, virucide, sporicide'.

Taking into account the fact that the product is intended for the disinfection of critique surfaces, the technical specifications, in this case the activity spectrum indicated in the specifications, are established in compliance with the provisions of OMH no. 1,082/2016, in force at the moment.

Furthermore, even the definition from OMH no. 1,761/2021, invoked by the complainant, is that high level disinfection is 'the disinfection procedure through which the destruction of vegetative bacteria, fungi, viruses, micro-bacteria and the majority of bacterial spores is performed. High level disinfection cannot substitute sterilisation'.

Yet, in the previously described situation, maintaining the criticism is groundless in the conditions in which the contracting authority has completely and precisely clarified the activity spectrum in the response communicated by the means of the standpoint.

**DECISION OF THE COURT OF APPEAL**

After analysing the papers and the works of the file, the Court appreciates that the complaint lodged by the petitioner S.C. G S.R.L. is groundless for the following reasons:

The petitioner critiques the N.C.S.C. solution under the aspect of rejecting the requirements of adding the bactericide and levuricide effects to the activity spectrum of the demanded biocide product, proven in accordance to Standard EN 16615, as well as the requirement that the product would be tested both in clean and contaminated conditions.

Concerning the first aspect on the mention of Standard EN 16615, the Court retains that the contracting authority has reformulated the requirements as: 'Activity spectrum: bactericide, fungicide, levuricide, micro-bactericide, virucide, sporicide» according to the Standard 14885/2018 of Ord. 1761/2021, Article 17, point a) and to the epidemiologic risk specific for our institute (sporicide activity)'.

From the content of Standard EN 14885/2018 it results that for the disinfection of surfaces through mechanical action the Standards EN 13727 and EN 16615 have to be respected of the bactericide activity, respectively Standards EN 13624 and EN 16615 for levuricide activity.

In the context in which respecting Standard EN 16615 is necessary for obtaining Standard EN 14885/2018, the Court retains that it is sufficient that Standard EN 14885/2018 is mentioned in the documentation, resulting implicitly that it is also necessary to respect Standard EN 16615.

Regarding the petitioner's claims on the wrong invocation by N.C.S.C. of OMH no. 1,082/2016, the Court retains on the one side that N.C.S.C. has invoked not only this order, but also Order no. 1,761/2021, and on the other side, OMH no. 1,082/2016 was not invoked in order to argue why it is not necessary to expressly mention Standard EN 16615, but to argue the inclusion in the spectrum activity of the activities: bactericide, fungicide, levuricide, micro-bactericide, virucide, sporicide.

In relation to the second aspect regarding not mentioning the requirement that the testing of the tendered product should be performed in both clean and contaminated conditions, the Court retains that the situation is similar with the requirement analysed above.

Therefore, following the complaint lodged by the petitioner, the contracting authority decided to complete the challenged requirement in the sense of imposing the requirement that the product 'should be efficient in the presence of interference substances, organic matter in compliance with Standard 14885/2018'.

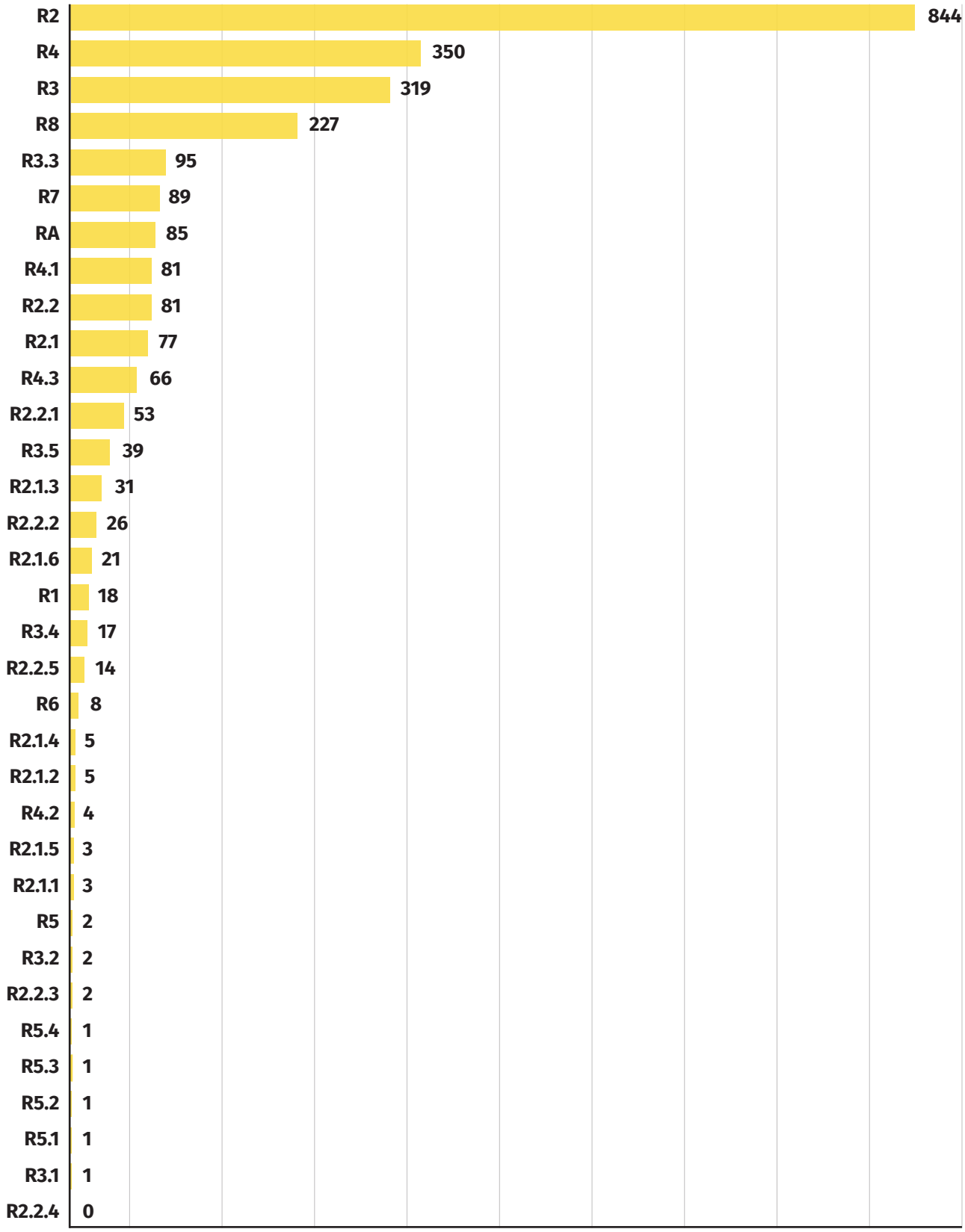
In the conditions in which, it is mandatory to test the product in both clean and contaminated conditions in order to obtain Standard EN 14885/2018, from the requirement of respecting Standard EN 14885/2018, it results implicitly that the tendered product should be tested in both clean and contaminated conditions.

Consequently, the Court retains that, by the means in which the contracting authority understood to reformulate the requirements from the award procedure challenged through the current complaint, results a complete information of the bidders concerning the imposed requirements.

Concerning the subject of the complaints lodged against the result of the award procedure, it was observed that within the 2,415 complaints lodged with the Council on the course of the year 2022 the most numerous criticisms were:

| CODE | CRITICISM | NUMBER OF CRITICISMS |
|---|---|---|
| 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 | 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 | 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 |
| 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 | 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 |
| 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 |
| R3.2 | the bids of other bidders in the award procedure were not accompanied by the bid bail in such amount, form and with the validity term as required in the tender documentation | 2 |
| 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 | 2 |
| 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 | 3 |
| 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 | 3 |
| 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 | 4 |
| R2.1.2 | dismissal of the complaining party's bid as unacceptable, as it was not accompanied by the bid bail in such amount, form and with the validity term as requested in the tender documentation | 5 |
| R2.1.4 | dismissal of the complaining party's bid as unacceptable, as it has an unusually low price | 5 |
| 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 | 8 |
| R2.2.5 | dismissal of the complaining party's bid as noncompliant for other reasons than as listed in R.2.2.1-4 | 14 |
| R3.4 | the bids of other bidders in the award procedure were submitted in violation of the provisions on the conflict of interests | 17 |
| R1 | complaints of the minutes of the bid opening meeting (failure to take into consideration the bid bail, how the bid opening meeting was held) | 18 |
| R2.1.6 | dismissal of the complaining party's bid as unacceptable for other reasons than as listed in R.2.1.1-5 | 21 |
| 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 | 26 |
| 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 | 31 |
| R3.5 | other reasons that render as unacceptable the bids of other bidders in the award procedure | 39 |
| 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 | 66 |
| R2.1 | dismissal of the complaining party's bid as unacceptable | 77 |
| R2.2 | dismissal of the complaining party's bid as noncompliant | 81 |
| R4.1 | the unusually low price of the bids of other bidders in the award procedure | 81 |
| RA | other criticism of the result | 85 |
| R7 | cancellation of the award procedure by the contracting authority without legal grounds | 89 |
| 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 | 95 |
| R8 | other reasons regarding the result of the procedure | 227 |
| R3 | the bids of other bidders in the award procedure are unacceptable | 319 |
| R4 | the non-compliance of the bids of other bidders in the award procedure | 350 |
| R2 | dismissal of the complaining party's bid as noncompliant or unacceptable | 844 |

## THE SITUATION REGARDING THE CRITICISM LODGED AGAINST THE REQUIREMENTS INFLICTED IN THE AWARD PROCEDURE



# DECISIONS ISSUED BY N.C.S.C. FOLLOWING THE COMPLAINTS LODGED AGAINST THE RESULT OF THE PUBLIC PROCUREMENT PROCEDURE

## 1) N.C.S.C. DECISION

The complainant challenges the admissibility of the bid designated as the winner of the procedure, respectively S.C. X S.R.L., considering that this bid would present an apparently unusually low price, at least for the topographic survey and the other field surveys.

The Council retains that the current procedure is organised for awarding the contract with the object 'Development Services for Feasibility Study for «Connections Street between ... »'.

Concerning the criticism - II.2. Motif II.2 - The price tendered by S S.R.L. for the activity 'Topographic Survey' is not a real, competitive and sustainable price, and criticism II.2.2. Motif II.2 - The price tendered by S.C. S S.R.L. for the other 'Field Surveys' excluding the value of the 'Topographic Survey' is not a real, competitive and sustainable price, the Council appreciates them as grounded.

Thus, the Council cannot retain as pertinent the claims of the contracting authority and the intervenient S.C. X S.R.L. related to the sustainability of the prices tendered for the respective services. The fact that the subcontractor S.C. R S.R.L. has presented a price offer (2,650 lei, VAT excluded) cannot be appreciated as being conclusive and sufficient to justify the reality of the bid, given the complexity of the services to be provided. Invoking the fact that the prices for the field services the prices are communicated by the subcontractors and that these are assumed by them does not exonerate the bidder S.C. X S.R.L. from justifying the bided prices, as the latter must make all necessary efforts for explaining the presented financial bid, including the part/parts which represent the prices bided by the subcontractors. These efforts can be materialised inclusively by requesting justifications to the subcontractor S.C. R S.R.L., which should confirm the sustainability of the bided price in relation to the total activities to be provided within the requested topographic survey in the current public procurement procedure.

In the opinion of the Council, to claim that the price offer of a subcontractor providing certain services is sufficient to justify it, without any details, is insufficient and unacceptable, as this kind of attitude creates the premises of accepting some unrealistic financial proposals, covered by the existence of some subcontracting agreements. It is true that the prices bided within the financial proposal for the field services are the prices communicated by the subcontractor/supplier and they result from the subcontracting agreements, yet they have to be real and sustainable, and not represent an attempt to bid prices which are not the result of free market principles and cannot be justified.

In case, the price difference between the bids of the complainant and of the winning bidder for the field surveys, 270,000 lei in the case of the complainant's bid, detailed amount calculated by real costs, respectively 7,150 lei in the case of the winning bid, without any calculations and apparently unjustifiable, is substantial and at this moment, in the opinion of the Council, it does not appear to be covered by a commercial relationship/negotiations between parties in order to obtain a competitive price, thus requesting some clarifications from the bidder S.C. X S.R.L. and subcontractor S.C. R S.R.L. for an adequate justification.

## DECISION OF THE COURT OF APPEAL

(...) It will be concluded that through the challenged decision N.C.S.C. considered as grounded the claims of the complainant regarding the prices bided by the current petitioner for the activities 'topographic survey', respectively 'geotechnical survey', both framed in the 'field surveys' category.

In accordance with the aspects retained by N.C.S.C., the Court will conclude that the

aspects invoked by the complainant are grounded, and the challenged decision was pronounced in conditions of legality.

Therefore, it will be retained that the assessment right of the contracting entity regarding the unusual low price must not be abusively exercised, and this fact also results from the Good Practice Guide in the field of public procurements, made available by N.C.S.C., according to which the contracting authorities have the obligation not only to formally request the justification of the bids with an unusually low price, but also to proceed with the thorough verification of the arguments presented by the bidders, in order to avoid the situations in which the decision regarding certain bids would be categorised as arbitrary for this reason.

Therefore, the simple fact that the enterprise which participates at the bid provides a part of the activities by the means of a subcontractor cannot have the significance of an exoneration from the obligations expressly provided by the special law, amongst which the one to justify the bided price. A contrary interpretation would generate certain abuses which were not taken into consideration by the legislator and which cannot be justified, as invoked, by the actual legislation. As rightfully retained in the challenged decision, any participant at the bid has the obligation to make all necessary efforts to largely widely explain the presented financial offer, even in the case in which a part of it is based on the bids of the subcontractors. The participants at the bid exclusively assume the obligations which result from the agreement to be concluded, so that its bod should comprise detailed real fact elements, which support the bided price.

The Court will retain that the business operators which bid lower prices in comparison with the estimated value, which might be considered unusually low, just like in the current case, should detail the financial proposal in order to justify step by step the way in which it was drafted. As a result, nor the contracting authority, nor the complaint solving body cannot reach the conclusion that there is a pronounced risk of non-fulfilling the object of the contract. Yet by accepting the complaint, the administrative-jurisdictional body has decided only concerning the re-evaluation of the presented bid, in the sense of requesting clarifications, so that the petitioner in the current case would have the possibility to prove the reality of its financial bid, inclusively by clarifying the bod of the subcontractor.

This position is confirmed by the European practice in the field, illustrated by Decision of the EU Court in the case T-392/15, in which it is expressly stated (note: quote paragraphs 85-89).

Contrary to the claims comprised in the current complaint, the corroborated analysis of the provisions of Article 210 of Law no. 98/2016 and Article 136 paragraph (2) of Government Decision no. 395/2016 does not lead to the conclusion that the bidder can justify the bid exclusively through the bids received from the subcontractors, as these bids are an integral part of the financial proposal and follow their legal regime, inclusively in relation to the necessity of justifying the price.

**2) N.C.S.C. DECISION**

After completing the explanations, it results that the purchasing administrative unit rejected the bid because the value of the financial proposal was lacking the costs for the supervision services during the warranty period of the works.

It was specified in the specifications that the supervision services will be provided throughout the 26 months execution period of the work, as well as during the 60 months warranty period of the works, being clear that quotation was imposed within the financial proposal of the respective services for all the execution period, including the warranty period of the works.

The following can be concluded after examining the financial proposal of M S.R.L.:

- in the Tender Form - Form no. 4, the bidder mentioned that it engages to provide and finish the services in conformity with the requirements in the specifications, in 86 (eighty-six) calendar months.

- in the Annex to the Tender Form the Period for accomplishing the services is noted:

- 26 months period of execution;
- 60 months warranty period of the works.

- in the Supporting Financial Estimate, a number of 26 months was taken into consideration at the calculation of the direct expenses, while amongst the insured listed services the ones within the warranty period of works have not been invoked.

It is certain that the information at the level of the financial proposal are inconsistent, a fact which should have determined the contracting authority to request clarifications from the bidder for removing the ambiguity on the current financial proposal, in relation to including the costs of the supervision services for the 60 months warranty period of the works, not opting for the direct rejection of the bid. As the bid is ambiguous under the retained aspect, a clarification request would have rapidly and efficiently established the real content of the financial proposal in order for the contracting authority to not have to deduce itself the essential elements of the financial proposal, based on insufficient information.

For the current situation, a punctual requirement was necessary regarding the inclusion in the content of the financial proposal of the services developed during the 60 months period, because the information of the financial proposal seem to be uncorrelated, and the authority has the obligation to ensure for the bidder all the conditions in order for them to be able to justify and prove the conformity of the bid.

The concern of the contracting authority to advantage the bidding enterprise by requesting explanations on certain elements of the bid is groundless, as it must be given the right to prove the conformity of the bid, and the simple explanations related to including/non-including the current expenses is not, by itself, sufficient to create an advantage in comparison to the competing bidders. The purpose of the clarification is obtaining the correct information which could not have been extracted from the initially lodged documents. Establishing the (un-)acceptable and/or (non-)according character of the complainant's bid will be determined after receiving and examining its clarification response, but not at this moment.

Thus, elucidating the costs of the supervision services for the warranty period of the works should have been made in compliance with Article 134 of the methodological norms approved through Government Ordinance no. 395/2016.

By determining that there is a risk concerning the bid, because some economical date related to the costs of the supervision services during the warranty period of the works were contradictory or insufficient, the authority should have not declared the bid as non-according and rejected it ipso facto, but to thoroughly clarify it, being known that any decision of the authority regarding the acceptance or rejection of a bid must be based on its thorough evaluation, under all aspects, and on conclusive evidence, not on contradictory or insufficient documents.

In regards to the assemblage of reasons exposed in the above pages, it is concluded that the evaluation of the S.C. M S.R.L. bid is based on the fault of the contracting authority in examining the contradictory data existent in the financial proposal, in relation to which it should have manifested an active role and formulate a clarification request.

## DECISION OF THE COURT OF APPEAL

The Court concludes that it was mentioned in the specifications that the supervision services will be ensured for the entire 26 months execution period of the works, as well as for the entire 60 months warranty period of the works, thus quotation was imposed within the financial proposal for the respective services, foe the entire execution period, including the warranty period of the works.

The Court retains that N.C.S.C. has judiciously appreciated as groundless the claim of the contracting authority in the sense that it would have advantaged the bidding enterprise by requesting explanations on some elements of the bid, because the elucidation of the costs for the supervision services during the execution period of the works had to be related to the provisions of Article 134 of the methodological norms approved through Government Ordinance no. 395/2016 (...).

Taking into consideration that in the tender form - form no. 4 the bidder mentioned that it engaged to provide, finish the services in conformity with the requirements in the specifications, and that in the annex of the tender form the execution

period for the works had been mentioned, respectively 26 months execution period and 60 months warranty period of the works, in the Supporting Financial Estimate, under direct expenses, a number of 26 months was taken into account, while amongst the insured listed services the ones during the warranty period of the works had not been invoked, the Court appreciates that a punctual request was necessary regarding the inclusion in the content of the financial proposal of the services developed during the 60 months period, as judiciously also retained by the Council.

The Court concludes that, if the information in the financial proposal was not corelated, the authority should have ensure all the conditions for the bidders in order for it to be able to justify and prove the conformity of the bid. Furthermore, taken into consideration the fact that certain economical data related to the costs of the supervision services during the warranty period of the works were contradictory or insufficient, the authority should not have declared the bid as non-according and rejected it, but should have thoroughly clarify it.

Hence, the Court retains the Council has correctly appreciated that the evaluation of the S.C. M. S.R.L. bid was based on the fault of the contracting authority in examining the contradictory data existent in the financial proposal, in relation to which it should have manifested an active role and formulate a clarification request.

Thus, the complaint lodged by the petitioner ... against the Decision no. 1935/2022 issued by the N.C.S.C. is not grounded, therefore it will be rejected as groundless.

### 3) N.C.S.C. DECISION

The Council retains that through the instructions for the bidders/candidates, generically entitled 'data sheet', part of the tender documentation drafted by the contracting entity for the development of the current sectoral public procurement procedure, section III – 'Judicial, Economical, Financial and Technical Information', chapter III.1) – 'Participation Conditions', point III.1.3.a) – 'Technical and/or Professional Capacity', the fulfilment of the qualification requirement concerning similar experience has been demanded, as follows:

'Information and/or minimum level(s) necessary for the evaluation of respecting the mentioned requirements:

Lots: 1,2,3,4

For the goods procurement contracts: execution of the specified type of supplies

List of the main similar product supplies performed in the last 3 (three) years, related to the dead line for submitting the bids.

The period calculation method will not be affected by the eventual delays of the deadline provided in the initially published Simplified Participation Announcement.

By supplies of similar products, one should understand the provision of servo valves, electrical distributors, other hydraulic equipment for automatic speed regulators.'.

In proving the fulfilment of the qualification requirement related to similar experience, S.C. Y S.R.L. presented during DUAE from 06.07.2022, time 13:07 (vol. 2/2 – leaf 124 – procurement file), as well as during DUAE from 06.07.2022, time 15:37 (vol. 2/2 – leaf 226 – procurement file), the following information regarding the supply of products for a number of 3 contracts (...).

The Council retains that the contracting entity admits in the

standpoint that it decided to reject the bids submitted by M S.R.L. for lots 2 and 4 based only the examination of the title of the agreements submitted for proving the fulfilment of the qualification requirement related to similar experience, as follows: 'from the titles of the agreements presented as similar experience and mentioned in DUAE, it clearly results which is the object of the respective contracts: the supply of measuring devices.' Therefore, it amply results the deficiency of the DUAE information, the entity relying exclusively on the name (title) of the agreements, and not on the content of the respective contracts. For this reason, it should have requested the bidder S.C. Y S.R.L. to submit the agreements indicated in DUAE for verifying the fulfilment of the requirement related to similar experience and not to reject the bids prior to analysing the contracts in order to ensure the appropriate development of the procedure in compliance with the provisions of Article 205 paragraph (1) of Law no. 99/2016 on sectoral procurement, as amended and supplemented.

Taking into consideration all those above, the Council appreciates that the contracting entity rejected the complainant's bids submitted for lots 2 and 4 by violating the incident legal provisions in the field of public procurements.

## DECISION OF THE COURT OF APPEAL

The petitioner considers that neither of the products listed in the agreements mentioned in DUAE is not hydraulic equipment or equipment 'superior' to hydraulic equipment, so that it would have caused a difficulty which would require clarification for the committee, but the supplied products belong to a different field, respectively control and measurement devices.

Related to these claims, the Courts concludes that they are groundless. N.C.S.C. has rightfully appreciated the fact that contracting entity did not correctly reject the bids submitted by S.C. M S.R.L. for lots 2 and 4 only by examining the titles of the submitted contracts for proving the fulfilment of the requirement related to similar experience. It should have reported to the content of the respective agreements, as it was necessary to request the bidder S.C. Y S.R.L. to submit the agreements indicated in DUAE for verifying the fulfilment of the requirement related to similar experience, and not to reject the bids prior to analysing the contracts, as correctly observed by the Council.

Consequently, the Court retains that the name of the contracts does not represent a verification criterion of their object, but the contracting entity, when verifying the fulfilment of the requirement related to similar experience, should have thoroughly analyse the content of the agreements submitted by the bidder S.C. Y S.R.L., requesting it justifying documents in order to prove the information comprised in DUAE.

## 4) N.C.S.C. DECISION

In the first criticism, it is shown that the association S S.R.L. submitted an inadmissible application, by Reporting to the obligation of the members states of the European Union of applying the regulations of policies of the EU, motivated by the fact that O. D. exercises a real control on the S enterprise.

After analysing the documents in the case file, the Council takes act of the fact that S S.R.L. is owned by associates-legal persons, companies BHB GMBH - 99.81% and S BRVZ GMBH - 0.19% (see the certificate of good standing issued by ONRC for S S.R.L.).

The majority shareholder of BHB GMBH (99.81%) is S S.R.L., while the majority shareholder of S BRVZ GMBH (0.19%) is S SE.

A part of the S S.R.L. shares, respectively over 25%, are owned by company R LIMITED, headed by O. D. (all this information was disapproved by the intervenient).

From all this, it may be concluded that R seems to control S S.R.L., at least up to 24%.

According to Article 2 of the Regulation no. 269/2014 on restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine (as amended and supplemented):

(1) All funds and economic resources belonging to, owned, held or controlled by any natural persons or natural or legal persons, entities or bodies associated with them as listed in Annex I shall be frozen.

(2) No funds or economic resources shall be made available, directly or indirectly, to or for the benefit of natural persons or natural or legal persons, entities or bodies associated with them listed in Annex I.

O. D. is also listed in Annex I of the Regulation no. 269/2014.

Regulation no. 833/2014 on restrictive measures in view of Russia's actions destabilising the situation in Ukraine (through the modifications comprised in Regulation no. 572/2022) establishes the following interdictions in Article 5k:

(1) It shall be prohibited to award or continue the execution of any public or concession contract falling within the scope of the public procurement Directives, as well as Article 10, paragraphs 1, 3, 6(a) to 6(e), 8, 9 and 10, Articles 11, 12, 13 and 14 of Directive 2014/23/EU, Article 7 and 8, Article 10 (b) to (f) and (h) to (j) of Directive 2014/24/EU, Article 18, Article 21 (b) to (e) and (g) to (i), Articles 29 and 30 of Directive 2014/25/EU and Article 13 (a) to (d), (f) to (h) and (j) of Directive 2009/81/EC, to or with:

(a) a Russian national, or a natural or legal person, entity or body established in Russia;

(b) a legal person, entity or body whose proprietary rights are directly or indirectly owned for more than 50 % by an entity referred to in point (a) of this paragraph; or

(c) a natural or legal person, entity or body acting on behalf or at the direction of an entity referred to in point (a) or (b) of this paragraph, including, where they account for more than 10 % of the contract value, subcontractors, suppliers or entities whose capacities are being relied on within the meaning of the public procurement Directives.

The interdictions regulated by Article 5k are applying whatever the percentage owned by natural and/or legal persons included in Annex no. I of the Regulation no. 269/2014, as amended and supplemented.

As the EU regulations are directly applicable, the EU member states have the obligation to respect them without being transposed into national law.

Taking into consideration the forecited dispositions of the two regulations, it results that the EU member states, through the contracting authorities, must analyse the situations in which the natural and/or legal persons, against which the interdiction is applied, appear within the public procurement procedures.

Thus, the Council cannot validate the claim of the intervenient that:

- S S.R.L. did not have the obligation to declare its 'shareholders' shareholders' shareholders';

- no legal provision in force in the field of public procurements was, actually, invoked by WB.

In this case, because R controls more than 24% of S S.R.L., it seems that have become incident the interdictions of awarding the contract (Article 5k letter c), forecited above) to a natural or legal person, entity or body acting on behalf or at the direction of an entity referred to in point (a) or (b) of this paragraph, including where they account for more than 10 % of the contract value, subcontractors, suppliers or entities whose capacities are being relied on within the meaning of the public procurement Directives.

Not applying this interdiction can be established only after the clarification performed by the contracting authority (through the evaluation committee) of the mandate possessed by S S.R.L. in relation to the implication of R in its activity and management, respectively the instructions given by R to the enterprises at which it owns shares/social parts, as regulated by Article 5k letter c).

Consequently, the Council will accept this criticism, in the sense of clarifying the incidence of the provisions of Article 5k, with the request of supporting documents.

**DECISION OF THE COURT OF APPEAL**

Reported to the criticism of the petitioner focusing on the fact that neither of the interdictions regulated by any of the two regulations are not incident in case, respectively that the re-evaluation would have been disposed without an evidentiary support for any of the relevant material elements mentioned in the content of the complaint, the Court retains that, in the challenged decision, N.C.S.C. has correctly observed, in the light of the complainant's claims related to the application field of the two invoked European regulations and of the factual situation emphasised by the respondent, that they underline the obligation of the evaluation committee within the contracting authority, national authority against which the provisions of the two regulations are directly and unconditionally applicable, to verify there are objective elements in the situation of one/some bidders which are determining the incidence of the European normative provisions, related to the structure of the bidders' shareholding and to the judicial and/or economic relationships which could trigger the existence of the obligation of applying the penalties expressly established by the provisions of the two regulations.

In this context, the Court retains that N.C.S.C. observed the existence of certain factual elements based on the claims of the complainant in comparison to the content of some public documents invoked on this occasion, which leads to the conclusion that the verification of the way in which the contracting authority, through the evaluation committee, could establish that they are not applicable, was imposed, by effect of the penalties and interdictions established by the two European normative acts, the situations regulated as such, in relation to the structure of the shareholding of the member of the petitioning association, but also of the judicial/economic relationships invoked by a natural/legal person of Russian nationality, which would exercise, at least indirectly, an influence on the member of the association by reporting to the way in which a legal person is functioning with this form of organisation, aspects which, because they are not fully challenged, have been refuted by interpreting the claims invoked in the challenge, including the current complaint.

Consequently, it was relevant for the legality of the N.C.S.C. decision the fact that neither the contracting authority, nor the petitioner, for that matter, have proven that the eventual incidence in the current award procedure of the two European regulations expressly invoked in the challenge has been verified, in the context in which they regulate factual situations the existence of which has been invoked in the challenged lodged for solutioning reported to public documents. Following this situation, in order to respect the principle of transparency applicable in the field of public procurements, the contracting authority, through the contracting authority, should resume the evaluation procedure of the bid from this perspective, even by requesting some clarifications regarding these aspects, while the bidder would have the correlative obligation to present all the necessary clarifications and documents in order to remove any kind of doubt on the existence of the risk of the incidence of such situations, sanctioned in the manner prescribed by these regulations.

In this context, the Court retains that the re-evaluation procedure from this perspective of the petitioner's bid by lodging a complaint against the N.C.S.C. decision would contravene the principles applicable in this field, taking into consideration the fact that from the challenged evaluation documents, drafted by the contracting authority, is does not result that the existence of such situations regulated by the two European regulations, directly and integrally applicable in national law, has been verified, including the field of public procurements, but even to the right of the petitioner to objectively expose all these explanations/clarifications within the administrative procedure, based on verifiable documents which would remove the risk the exclusion of which was imposed by adopting these European norms, such that on the merits analysis of these claims invoked through the complaint cannot be performed in this procedural stage, yet eventually only in the context in which the contracting authority will continue the re-evaluation procedure of the bid in case

and will expose certain reasons of fact and of law reported to all the bidder's clarifications in case, for which it would appreciate that the provisions of the invoked regulations are also applicable in the case of the petitioning association.

From the same perspective, the Court concludes in this procedural stage that the two European regulations establish certain situations which represent the field of application and related to which, through the evaluation committee, the contracting authority has not only the obligation to request clarification from the bidder, in compliance with the concrete provisions of the two regulations, especially in compliance with the provisions of Article 5k letter c) of Regulation no. 833, regarding the factual circumstances resulting from public documents, such that the occurrence of the risk of not applying these European normative provisions would be avoided, but also in order to highlight, within the bid's evaluation operation, the concrete of fact and of law aspects which would determine a certain firm conclusion related to the necessity of excluding such a bidder from the procedure, to the extent that it would be in one of the situations expressly regulated in the two European regulations, the exclusion obligation being generated exactly by the provisions of TFEU (Article 288) and Article 148 of the Constitution of Romania, to the extent that, on the one hand, the award of a public procurement contract represents, in compliance with the provisions of Article 2 paragraph (2) of the EU Regulation no. 269/2014, as amended and supplemented, directly or indirectly making available certain funds or economic sources to or in the benefit of the natural and/or legal persons listed in Annex 1 of this European regulation, and, on the other hand, in compliance with the provisions of Article 5k paragraph (1) of the EU Regulation no. 833/2014, as amended and supplemented, the award of any public procurement contract is forbidden to or with a natural or legal person, entity or body acting in the name or in conformity with the instructions of an entity mentioned at letters a) or b) from the same paragraph, and, under these aspects, the necessity of verifying the mandate which the association's member could possess in regards to the implication of R in its activity and/or management, respectively the eventual instructions given by R to the enterprises at which this entity owns shares/social parts.

However, invoking some aspects in the lodged complaint concerning the concrete activities performed by the petitioner in order to remove any such risk regarding the existence of the situations regulated by the two European regulations, like the suspension of the right to collect dividends, freezing out shares, the cancellation of an agreement with the investing shareholders, the revocation of the member of the Supervisory Board, committing to respect the penalties applied the natural person O. D., the termination of the contract with the investing shareholders, and noy paying the dividends to R, presenting the responses to the World Bank, and declaring the real beneficiary, could represent, in order to perform the re-evaluation operation, concrete elements which the authority could take into consideration yet they cannot form the object of a direct analysis in front of the court invested with solutioning the current complaint for the aforementioned reasons.

Furthermore, invoking as reason for the complaint the fact that the administrative-jurisdictional authority did not present within the decision certain objective criteria, which the contracting authority should consider when performing the re-evaluation of the current bid under the mentioned aspects, cannot be retained as grounded in the conditions in which, in the first place, the contracting authority has to concretely proceed at the application of these European regulations by reporting to the elements actually determined by the respective regulations, so that they could benefit in the national law, in compliance with Article 288 of TFEU, of a fully useful effect. Moreover, the N.C.S.C. reasons on the owned percentage concerning the partial control of shares on S S.R.L. or on the control exercised by a Russian national on the member of the bidding association do not contravene the obligation assumed constitutionally in national law which lies with the contracting authority, but the bidder as well, to verify the existence of such circumstances which generate the risk of effective non-application of the European norms.

Under the same aspects, the logical-judicial reasoning comprised in the N.C.S.C. decision does not contravene the obligation of the jurisdictional authority to solve the complaint brought to justice in the limits of the legal attributions, in accordance with its object and cause, reporting to the provisions of the invoked norms, so that the presentation of the existence, under the mentioned aspects, of an ambiguous situation and not establishing in the administrative-jurisdictional stage of the entire situation of fact, without the contracting authority proceeding at first in this regard, is in accordance with the principles applicable in the field of public procurements, including the principles of transparency and of equal treatment, in order for the bidder to effectively know the way in which its bid is evaluated exactly by the contracting, and not directly by the administrative-jurisdictional authority.

Consequently, the establishment in the current procedural stage of the contracting authority's obligation to restrict the evaluation process only to the verification of the associative structure of S S.R.L. and of the real beneficiary of S S.R.L., as benchmarks in avoiding the risk regulated by the two European regulations, normative acts with autonomous meaning, directly and integrally applicable in national law in comparison with the national provisions, could determine a violation of the norms the application of which is necessary to be verified.

In the same context, the Court retains that in the field of public procurements the obligation of the contracting authority to verify the bids under all aspects, inclusively from the perspective of evaluating the risk of violating some European regulations the existence of which has been underlined in the complaint accepted through the challenged decision in relation to certain public documents, will be achieved also by respecting the norms in the field, including the principles of proportionality and transparency, in the context in which bidder had as well the obligation of actively clarify all these circumstances, by reporting to all the aspects invoked in the current case, on the merits, but also to documents which could objectively support all the clarifications provided in this regard.

Moreover, it is concluded that, through the challenged decision, N.C.S.C. did not impose to the bidder, the petitioner in the current case, an obligation for proving the negative fact, impossible to fulfil by reporting to the burden of proof, of the circumstance in which the two regulations, although applicable in national law, still would not objectively underline, in the case of the association or its members, the existence of one of the situations for which the two regulations would impose restrictions and/or interdictions which could, al least theoretically, lead to the exclusion from the procedure, but a legal obligation to actively and entirely respond to all the clarifications request addressed to it by the evaluation committee within the contracting authority, in relation to the circumstances underlined in the accepted complaint, by reporting to the situations regulated by the two regulations.

In addition, the criticisms of the petitioner regarding the confusing/inconsistent character of the N.C.S.C. reasons, reported t the application manner of the provisions of the two European regulations invoked in the challenge of the respondent, will be removed as groundless, taking into consideration that, from the reasoning of the administrative-jurisdictional authority, it clearly results that the circumstances of fact, underlined in the complaint brought to court, could determine not only the incidence of the provisions of EU Regulation no. 269/2014, as amended and supplemented, but also of the provisions of EU Regulation no. 833/2014, as amended and supplemented, in the sense of extending the reasoning related to the possible influence and/or control exercised on the activity of S S.R.L. by the natural person mentioned in Annex 1, taking into account both the application field and the effects of a possible application of these norms, equivalent in national law with the penalty of exclusion from the procedure if the petitioner would effectively be in the situations regulated by these.

Hence, the petitioner has the possibility to clarify all the circumstances of fact by reporting to the economic/judicial connections generated by the structure of its own shareholding but also of its shareholders' shareholding, followed by mak-

ing available to the contracting authority the relevant documents supporting its own claims. In the same note and in the limit of the applicable legal provisions, the contracting authority also has the possibility to perform its own verifications by the means of the competent public authorities in order to ensure the useful effects of the European norms which are directly and primary applicable in national law, both of them inclusively from the perspective of verifying the effective possibility of the bidder to eliminate the occurrence of the risks sanctioned in the two regulations.

### 5) N.C.S.C. DECISION

Concerning the approval of the National Committee for Biocidal Products or other form of the authorisation for placing on the market request in the specifications as proof of the biocidal effect of the tendered products, the Council will retain the following provisions of the EU Regulation no. 528/2012 of the European Parliament and of the Council of 22 May 2012 on the making available on the market and use of biocidal products (normative act mandatory in Romania, in compliance with the provisions of Article 288 of the EEC Treaty, according to which the regulation is applied directly in national law, excluding any measure of national reception or everything which could dissimulate its nature and effects):

- Article 17 paragraph (5): 'Biocidal products shall be used in compliance with the terms and conditions of the authorisation stipulated in accordance with Article 22 paragraph (1) and the labelling and packaging requirements laid down in Article 69.

Proper use shall involve the rational application of a combination of physical, biological, chemical or other measures as appropriate, whereby the use of biocidal products is limited to the minimum necessary and appropriate precautionary steps are taken.

Member States shall take necessary measures to provide the public with appropriate information about the benefits and risks associated with biocidal products and ways of minimising their use';

- Article 19 paragraph (3): 'A biocidal product shall only be authorised for uses for which relevant information has been submitted in accordance with Article 20';

- Article 22 paragraph (1): 'An authorisation shall stipulate the terms and conditions relating to the making available on the market and use of the

single biocidal product or the biocidal product family and include a summary of the biocidal product characteristics.'

According to the definitions in Article 3 paragraph (1) letters o) and m) of the previously mentioned Regulation, the term 'authorisation' designates 'national authorisation, Union authorisation or authorisation in accordance with Article 26', while the term 'national authorisation' means 'an administrative act by which the competent authority of a member state authorises the making available on the market and the use of a biocidal product or a biocidal product family in the territory of the state or in a part thereof'.

In compliance with Article 5 paragraph (1) of Government Decision no. 617/2014 on establishment of institutional framework and of measures for enforcement of EU Regulation no. 528/2012 of the European Parliament and of the Council, the National Committee for Biocidal Products, specialised body of the Ministry of Health without legal personality, exercises the attributions related to the approval concerning the making available on the market and use of biocidal products on the territory of Romania. After analysis the technical proposal submitted by S.C. A S.R.L. for Lot 9, the Council retains that the respective bidder mentioned within the submitted technical proposal (pages 189-191, vol. 1/3 of the case file), related to demonstrating the fulfilment of previously mentioned requirement, reported to the tendered product, respectively O A b, the fact that 'The NFT 72-281 standard is presented.'

According to point VIII/letter B of the Approval issued in 29.09.2011 by the National Committee for Biocidal Products for SC AC S.R.L., related to the product O A b, Approval no. 451BIO/02/03.22 (verso pages 193-195, vol. 3/3 of the case file), the Application area of the aforementioned product is 'The disinfection by nebulisation and pulverisation of surfaces and of air microflora suspended and deposited on surfaces from sanitary units (operating rooms, treatment rooms, patient rooms, delivery rooms), but also outside the sanitary units (nursing homes, schools, buses, ambulances, pharmaceutical and cosmetic industry).'

Moreover, it is expressly mentioned in the respective approval that '**Bactericidal and levuricidal efficiency, inactivates viruses, sporicidal NF T 72-281, available until 29.09.2024.'

Furthermore, the Council retains that, in order to prove the fulfilment of the previously mentioned requirement in the Specifications, respectively 'To be tested according to the by air disinfection norms', for the tendered product O A b, the bidder has also presented testing reports dated in the period 2019-2021 (verso pages 305-319, vol. 3/3 of the case file), issued by Dr. Brill + Partner GmbH (Institute for Hygiene and Microbiology, Germany), reports which indicate in Methods that the tests have been performed according to NF T 72-281:2014 or NF T 72-281:2011.

Yet, in these conditions, the Council cannot retain the criticisms of the complainant regarding the technical proposal submitted by SC A S.R.L. for Lot 9, as long as the respective bidder has demonstrated, by presenting the previously mentioned documents, the fulfilment the current requirements related to testing according to the by air disinfection norms, corroborated with presenting the biocidal approval issued by the National Committee for Biocidal Products. The latter is the specialised body which exercises the attributions related to the approval concerning the making available on the market and use of biocidal products, in the sense of the EU Regulation no. 528/2012.

## DECISION OF THE COURT OF APPEAL

'Concerning the claims of claims of the petitioner lodged within the complaint in relation to the technical proposal of SC A S.R.L., submitted for Lot 9, the Council retained that the contracting authority has requested in the Specifications that 'Lot 9. Shall be tested by air according to the disinfection norms, shall present valid type 2 biocidal approval issued by the National Committee for Biocidal Products, alongside the prolongation/extension, as appropriate'.

In accordance with Decision no. 2,527/2021, 'Concerning the request 2.2.4 2, of forcing the contracting authority to modify the Specification 'Shall be tested by air according to the disinfection norms', the contracting authority explained in its standpoint that it will com-

plete the specification 'Shall be tested according to the by air disinfection norms' as follows: 'Shall be tested according to agreed European/national by air disinfection norms, as appropriate'.

Taking into consideration that the purchaser allowed the testing by both European and Romanian national norms, alternatively, N.C.S.C. retained that a reformulation is not justified in the sense requested by the purchaser. (...)

Regarding the criticism of the petitioner related to the erroneous technical evaluation of the bid submitted by the business operator S.C. A S.R.L., on the grounds that standard NF-T 72- 281 would not be agreed norm at European and national level, the court takes into consideration the fact that the petitioner mentioned that this standard NF-T 72- 281 is French national standard.

Moreover, the court retains that in case are primary applicable the provisions of Article 17 paragraph (5), Article 19 paragraph (3) and Article 22 paragraph (1) of EU Regulation no. 528/2012 of the European Parliament and of the Council of 22 May 2021 on the making available on the market and use of biocidal products, as well as of Article 5 paragraph (1) of Government Decision no. 617/2014 on establishment of institutional framework and of measures for enforcement of this Regulation, which establish the existence of an authorisation for the biocidal products, the attributions related to the approval concerning the making available on the internal market being the prerogative of the National Committee for Biocidal Products, special judicial norms in the field of verifying the technical specifications of the local products.

The claims of the petitioner regarding the applicability of the provisions of Article 156 paragraph (1) letter b) of Law no. 98/2016 do not justify the acceptance of this complaint and the partial modification of the challenged N.C.S.C. Decision, taking into account that these are general judicial norms, being provided for completing the mandatory technical norms at national level, to the extent of they are compatible with normative acts approved at European level.

As long as the business operator S.C. A S.R.L. submitted in the public procurement procedure the Approval issued by the National Committee for Biocidal Products regarding the product O A b, in which it is clearly specified that its application area is the disinfection by nebulisation and pulverisation of surfaces and of air microflora suspended and deposited on surfaces from sanitary units, and it is mentioned within this approval that the sporicidal efficacity NF T 72-28 is valid until the date of 29.02.2024, the court retains that the administrative-jurisdictional body has legally and validly rejected the petitioner's complaint also in regards to the technical evaluation of the bid submitted by business operator S.C. A S.R.L., in case being respected the provisions of Article 156 paragraph (1) of Law no. 98/2016, reported to the special judicial norms regulated by Article 5 paragraph (1) of Government Decision no. 617/2014 on establishment of institutional framework and of measures for enforcement of EU Regulation no. 528/2012 of the European Parliament and of the Council from 22 May 2012 on the making available on the market and use of biocidal products.

### 6) N.C.S.C. CONCLUSION

The Council's decision no. 2574 from 27.09.2018 remained definitive on 04.12.2018 once the Court of Appeal Craiova concluded on the complaint lodged by the Development Agency (Decision no. 3895/2018 from 04.12.2018, file no. 1,656/54/2018), and more than 3 years have passed from the date 04.12.2018 plus 30 days, thus becoming applicable the legal provision according to which 'the bail is considered revenue at the state budget at the moment when meeting the 3 years term calculated from the date on which it could have been requested'.

Seeing the provisions of Law no. 101/2016 and of Government Ordinance no. 14/2007 on establishment of the valorisation way and conditions of the goods which entered, according to law, in the private property of the state, the Order no. 132 from 22.12.2021 of N.C.S.C. President was issued, according to which:

- the technical-administrative personnel of the Chambers will draft, until the 5th of each month, for the previous month, an inventory note following the verification of the bails which were not refunded based on a

request, in accordance with the provision of Article 611 paragraphs (5) - (6) and for which the provisions of Article 611 paragraph (8) have become incidental;

- the inventory note will be drawn in two original samples, one to be handed to the National Agency for Fiscal Administration (A.N.A.F.), one sample will be preserved by the Registry, Archives and Library Service, and a copy of the inventory note will be deposited at the case file, replacing the original receipt of establishing the bail;

- on the 8th of each month, for the previous month, the speciality committee will draw, in two copies, the report for the inventory notes and their annexes to A.N.A.F.

In this context, the promissory note series EXIM3AE – 0013181, issued by X Bank on 24.08.2018 was handed over to A.N.A.F. through the delivery-receipt report no. 36243/21.07.2022 (N.C.S.C.), respectively no. A_VBB1643/26.07.2022 (ANAF-DOVBC, Goods Valorisation Service Bucharest), not anymore in the possession of N.C.S.C.

In other words, the Council cannot refund the promissory note as it is not anymore at its disposal.

It's the exclusive fault of S.C. I S.R.L. that it has chosen to transmit by e-mail on 23.08.2022 the request to the Council for refunding the promissory note, after the 3 years plus 30 days deadline in which it could have requested it had already passed, and after the promissory note was handed over by N.C.S.C. to ANAF.

The discussions concerning the establishment of the bail by promissory note, not by depositing an amount at the Treasury, CEC or any other bank, are irrelevant as long as Law no. 101/2016 stipulates that 'the bail is considered revenue at the state budget at the moment when meeting the 3 years term calculated from the date on which it could have been requested', regardless of the way the respective bail has been established.


## DECISION OF THE COURT OF APPEAL

In law, the Court retains the provisions of Article 611 paragraphs (5) - (8) of Law no. 101/2016 on remedies and appeals concerning the award of public procurement contracts, sectorial contracts and of works concession contracts and service concession contracts, as well as for the organisation and functioning of the N.C.S.C., according to which:

'(5) The deposited bail is refunded, at request, after solving the complaint by definitive decision, respectively after the termination of the effects of suspending the award procedure and/or the execution of the contract.

(6) The bond is refunded to the depositor no sooner than

30 days from the date when the decisions became definitive or, as appropriate, from the date of the termination of the effects of suspending the award procedure and/or the execution of the contract.

(7) The Council or court, as appropriate, decides on the bail refund request with the citation of the parties by a conclusion subject to appeal only to the higher court. The appeal shall suspend the execution.

(8) In the situation in which the provisions of paragraphs (5) - (7) are not applicable, the bail is considered revenue at the state budget at the moment when meeting the 3 years term calculated from the date on which it could have been requested'.

By N.C.S.C. conclusion no. 2,207/2022, object of the current complaint, the petitioner's request of refunding the bail related to its complaint has been rejected as groundless, on the grounds that the request send by e-mail on 23.08.2022 was forwarded after the cumulative term of 3 years and 30 days, in which the refund of the bail could have been requested, had passed and after the promissory note was handed over by N.C.S.C. to ANAF.

In supporting the complaint, the petitioner showed that the provisions of Article 611 paragraph (8) of Law no. 101/2016 are applicable only in the hypothesis in which the bail is set up by depositing an amount to the State Treasury, CEC Bank - S.A. or any other banking unit, or by cash deposit at the contracting authority.

Thus, as the amount of 220,000 lei representing the bail was not effectively deposited/transferred but only guaranteed by issuing the promissory note, the financial instrument could have been valorised only by respecting the terms and conditions regulated by Article 12 paragraph (2) of Law no. 58/1934 on the bill of exchange and promissory note and by points 78-79 of normative framework no. 6/1994.

The Court retains that, the previously mentioned special character provisions of Law no. 101/2016 on remedies and appeals concerning the award of public procurement contracts are applicable in case, provisions which determine the starting and ending moments of the deadline for submitting the bail refund request, respectively no sooner than 30 days from the date when the decisions became definitive or, as appropriate, from the date of the termination of the effects of suspending the award procedure and/or the execution of the contract, and no later than 3 years, calculated from the date from which it could have been requested. These terms do not exclude each other, as the legal provisions are complementing each other.

Concerning the complainant's argument related to the particularity of the current case, respectively by establishing the bail by promissory note, not by depositing an amount at the Treasury, CEC or any other bank, the Court retains the provisions of Law no. 101/2016 which stipulate that 'the bail is considered revenue at the state budget at the moment when meeting the 3 years term calculated from the date on which it could have been requested'.

Therefore, by applying the principle of interpreting the invoked legal norm according to the ubi lex non distinguit, nec nos distinguere debemus principle - where the law does not distinguish, nor the interpreter must distinguish, the meaning of the provisions of Article 611 paragraph (8) of Law no. 101/2016 is that the legislator did not distinguish by the way of establishing the bail.

In case, N.C.S.C. Decision no. 2,574/2018, through which the lodged complaint was solved, became definitive on 04.12.2018 by the decision issued by Court of Appeal Craiova, file no. 1656/54/2018, and the bail refund request was registered with N.C.S.C. on 23.08.2022.

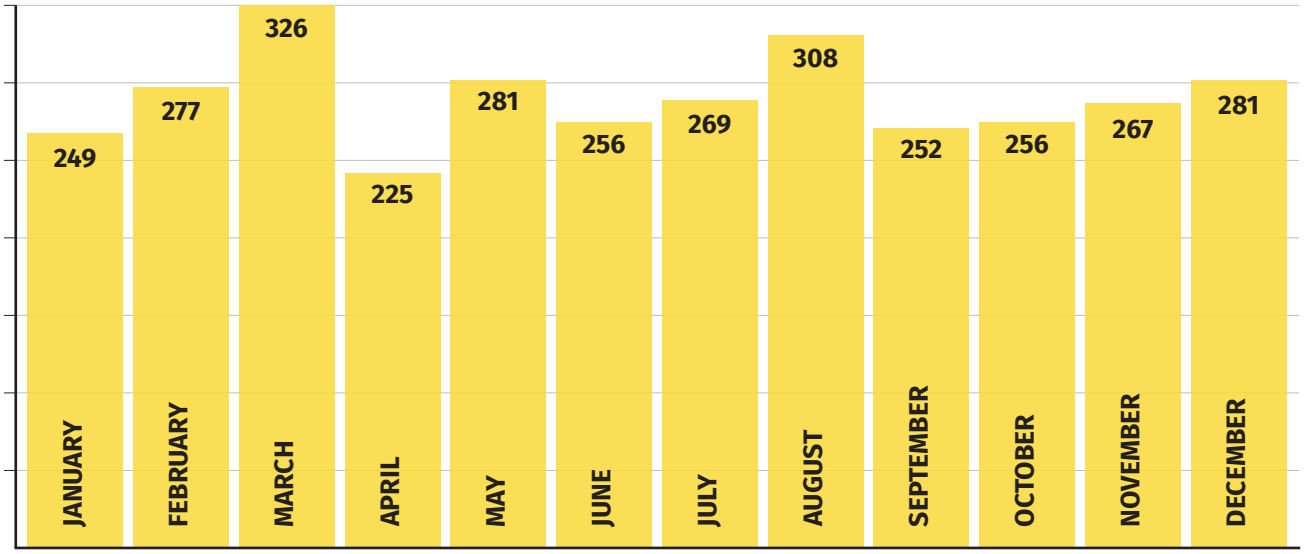
Consequently, reporting the calculation method of the refund deadline to this state of affairs, as it results from the case documents, the Court concludes that the Council has judiciously retained that the legal term for submitting the refund request, calculated by the corroborated application of the provisions of Article 611 paragraphs (6) and (8), has passed and the bail is considered revenue at the state budget.

For all these reasons, on the grounds of the invoked legal provisions, in compliance with Article 34 of Law no. 101/2016, the Court will reject the complaint lodged by the petitioner and will maintain as legal the conclusion no. 2207/ 2022 issued by N.C.S.C.

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

On the course of 2022, the solving complaints chambers within N.C.S.C. issued 2,783 decisions in order to solve a number of 3,247 complaints (files). Therefore, the monthly trend of the 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 2022



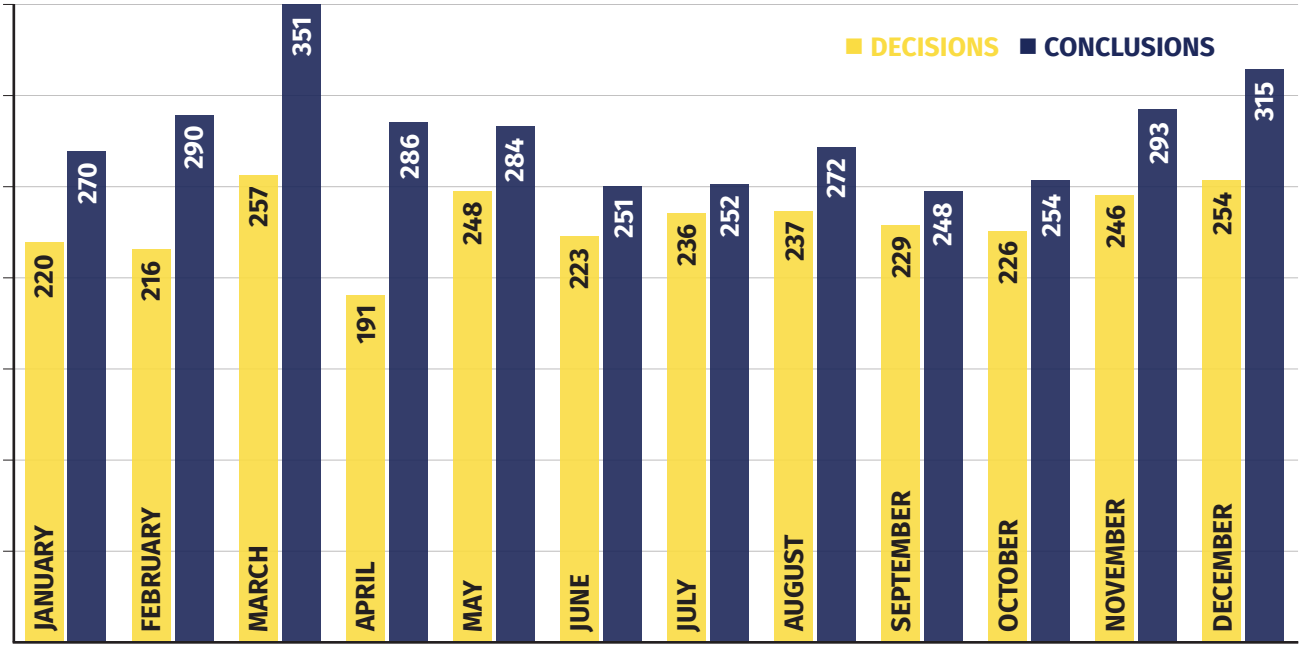

The official statistics shows that, since the Council was created and until the 31st of December 2022, the total number of the files solved by the complaints solving chambers amounted to 77,537, meaning a monthly average of approximately 400 solved files.

## 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 2022, the 11 chambers for solving complaints within N.C.S.C. rendered 2,783 decisions and 3,366 conclusions, totalising 6,149 decisions.

Divided per moths, the statement of the Council's rendered decisions and conclusions had the following trend in 2022:

### THE TREND OF THE DECISIONS ISSUED BY N.C.S.C. IN THE YEAR 2022




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.

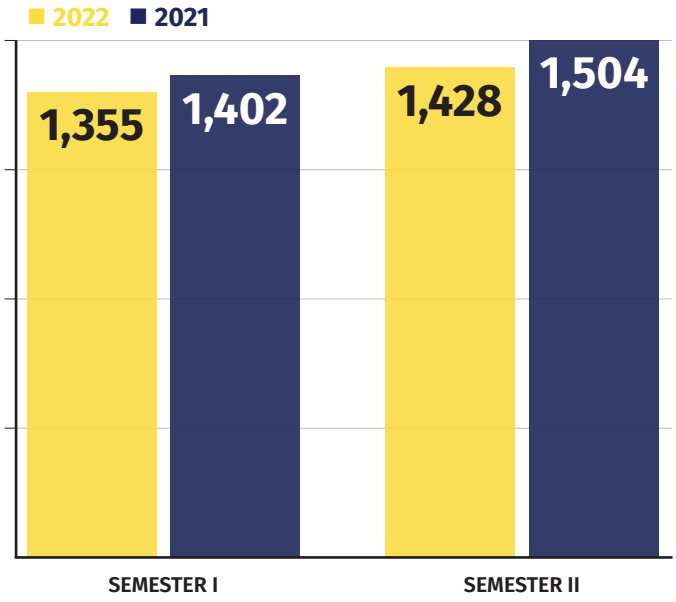
Yet in all these cases, the Council renders a single decision following the joining of the complaints and applications of voluntary interventions.

Regarding the semestrial trend of the decisions rendered by N.C.S.C. in the year 2022, in comparison the similar periods of the year 2021, it maintained at approximately the same level, only insignificant decreases being registered.

In order to shape a clear opinion regarding the complexity of the files on the role of the Council, it must be mentioned that on the course of 2022 there were unique award procedures commenced in S.E.A.P. challenged by many complainants, therefore, following the joining of some of those depending on the stage in which they have been challenged (tender documentation or the result of the procedure), N.C.S.C. issued more than one decision, as follows:

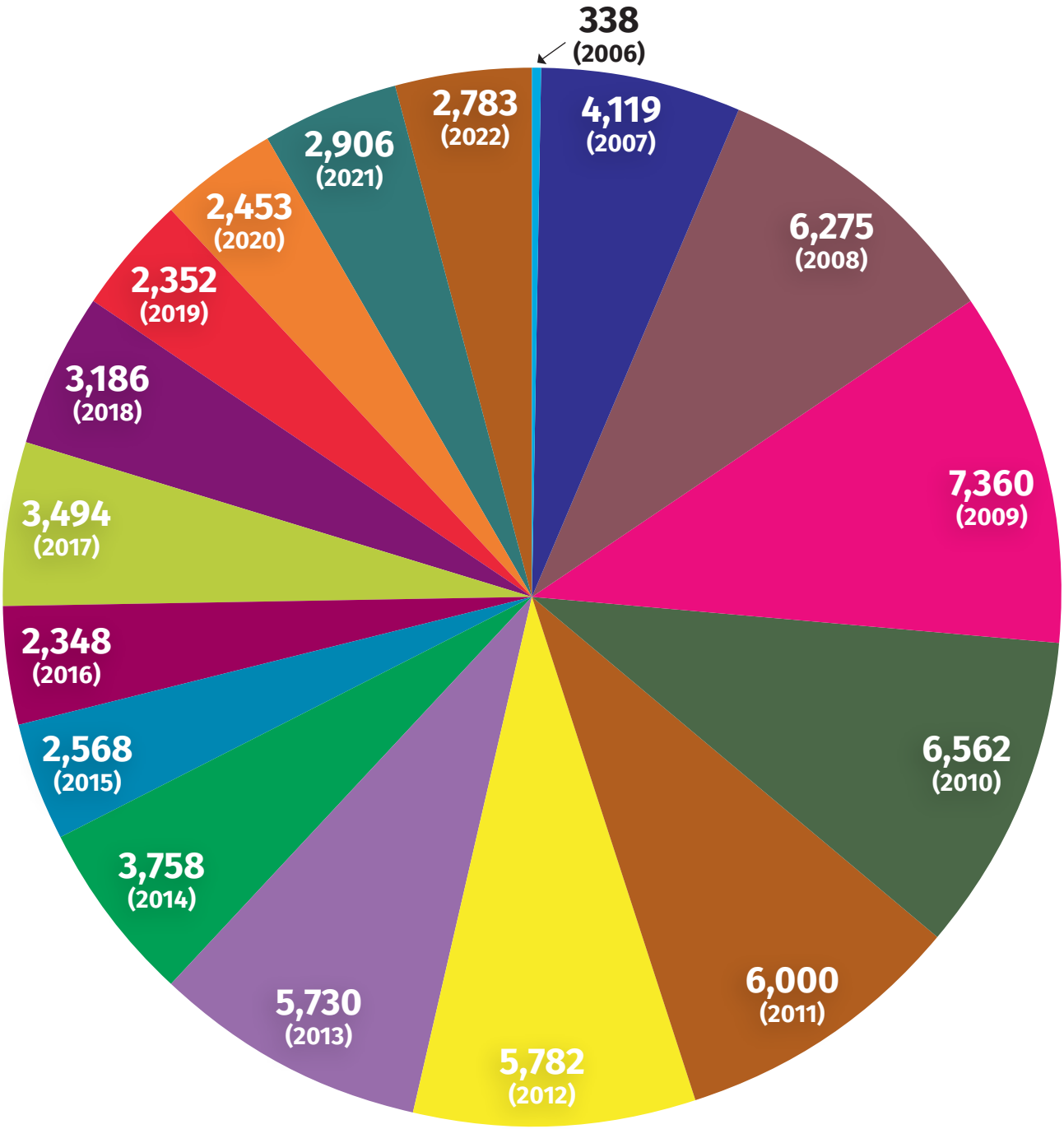
- 1 unique award procedure with 10 lodged complaints, for which N.C.S.C. rendered 5 decisions;
- 1 unique award procedure with 7 lodged complaints, for which N.C.S.C. rendered 4 decisions;
- 1 unique award procedure with 6 lodged complaints, for which N.C.S.C. rendered 4 decisions;
- 2 unique award procedures with 5 lodged complaints, for which N.C.S.C. rendered 5 decisions in each case;
- 2 unique award procedures with 4 lodged complaints, for which N.C.S.C. rendered 4 decisions in each case;
- 3 unique award procedures with 4 lodged complaints, for which N.C.S.C. rendered 4 decisions in each case;
- 63 unique award procedures with 3 to 7 lodged complaints, for which N.C.S.C. rendered 3 decisions in each case;
- 283 unique award procedures with 2 to 14 lodged complaints, for which N.C.S.C. rendered 2 decisions in each case;
- 1 unique award procedure with 39 lodged complaints, for which N.C.S.C. rendered 1 decision.

**THE SEMESTRIAL TREND OF THE DECISIONS RENDERED BY N.C.S.C. IN THE PERIOD 2021 - 2022**



**As a whole, since its establishment and until the 31st of December 2022, the total number of the decisions rendered by the Council amounted to 68,014, meaning a monthly average of 351 rendered decisions.**

## THE TREND OF THE DECISIONS RENDERED BY N.C.S.C. IN THE PERIOD 2006-2022



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

As previously mentioned, the total number of the decisions issued by the 11 chambers for solving complaints within N.C.S.C. amounted to 3,247 from the 1st of January to the 31st of December 2022.

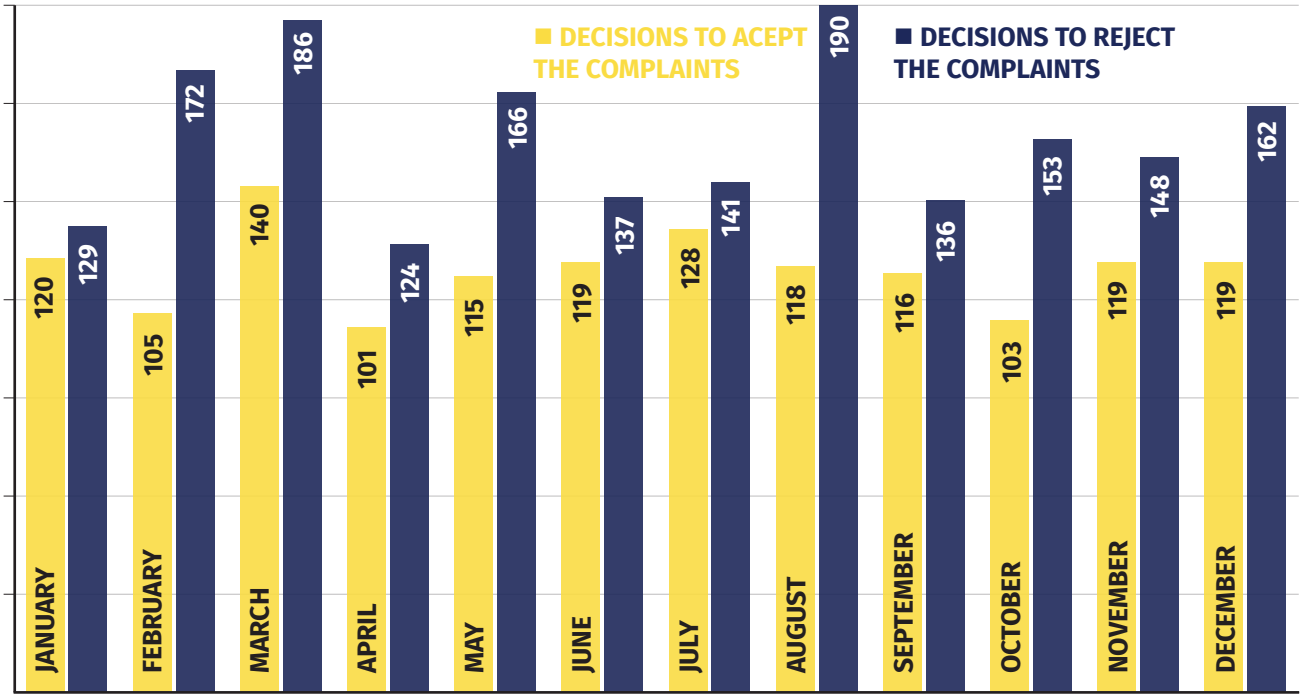
In the case of 1,403 files, the Council ordered the acceptance of the complaints, in the sense that the solution requested by the complaining party and adopted upon the deliberation by the chamber for solving complaints complied with the need of defence by administrative jurisdictional channel of the violated or unacknowledged subjective right and the reinstatement thereof, so that it provides the business operator with the rights acknowledged by law.

For the rest of 1,844 files, the Council rendered decisions under which it ordered the dismissal of the complaints, by several reasons:

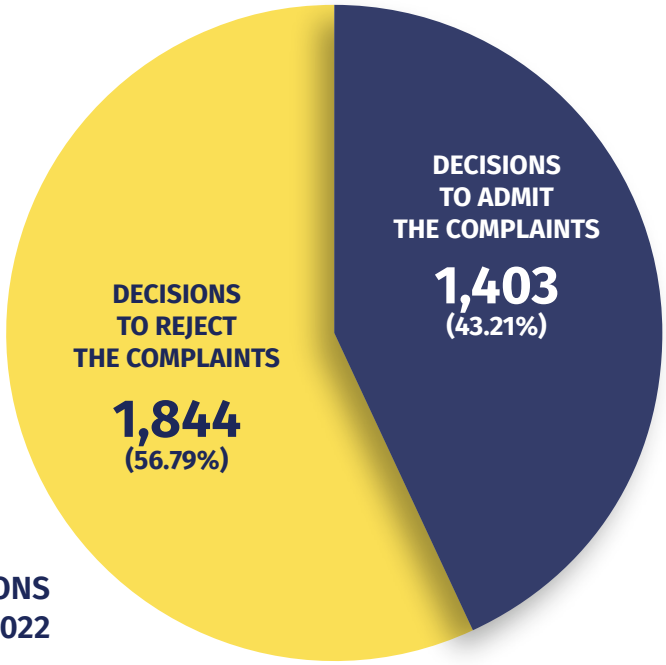
- the complaining party failed to set up the bail pursuant to Article 611 of Law no. 101/ 2016, as amended and supplemented;
- the Council considered as to the tenor of the settled complaint, to go in favour of the contracting authority as the litigation substance of the complaint submitted by a business 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 developed as follows:

**THE MONTHLY TREND OF THE SOLUTIONS RENDERED BY N.C.S.C. IN THE YEAR 2022**



Practically, the weight of the decisions rendered by the Council for accepting the complaints lodged by business operators has amounted to 43.21% of the total rendered decisions, while for a percetange of 56.79% of the total rendered decisions the Council ruled the dismissal of the complaints lodged by business operators.




**THE STANDING OF THE SOLUTIONS RENDERED BY N.C.S.C. IN THE YEAR 2022**

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 later, starting with 2019, 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%.

This trend demonstrates that the business operators – complainants proved on the course of time a better knowledge of the legislation in the field, but also 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.

As we underlined for many years, 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, without following if the procurement procedure reflects good practices, the efficiency of the investment and of the public expenses, the principles of equal treatment and transparency, or eventual conflicts of interests.

As previously noted, in comparison with the previous year, in 2022 the number of complaints lodged by business operators against the tender documentation increased with 21.18% (143 complaints). This shows that 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 – did not represent for many contracting authorities a solid process which would allow the development without any difficulties of the subsequent phases of the procedure. The Council often emphasised that 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

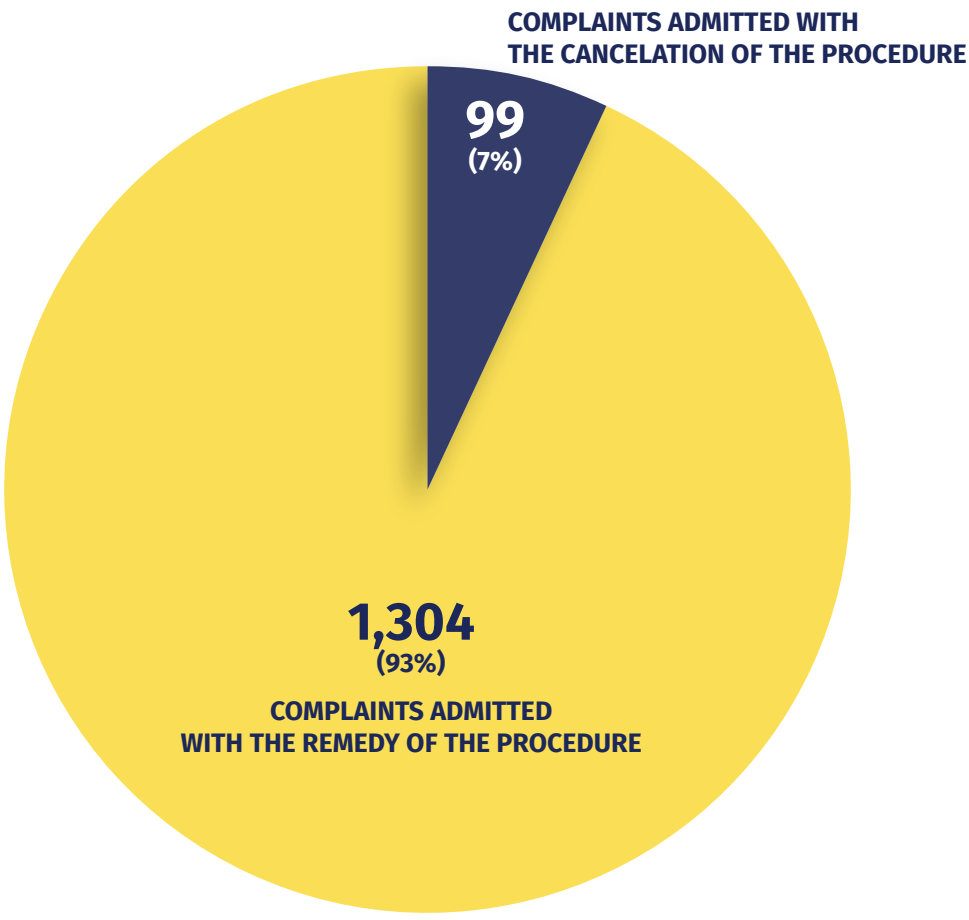
it prepares the procurement documents, which should not be subsequently modified and which should be later verified in the bids' evaluation phase with strictness and maximum rigour. Despite all warnings, many contracting authorities continued to underestimate the planification phase of the process. The contracting authorities established rigid technical specifications leading to certain products/bidders, restrictive requirements, and later, in the phase of evaluating the bids, they ignored them due to the absence of bidders. The restrictive character of the tender documentations is reflected in the number of participants, as the contracting authority has no selection pool for business operators. For this reason, the contracting authorities are ignoring their own requirements in the bid evaluation phase.

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 procurement expert/ specialist is considered as the best practice in order to avoid errors which might jeopardise the public procurement process. Nevertheless, the collaboration and consulting some external experts should not endanger the independence of the contracting authorities' process of making decisions and/or create situations of potential conflict of interests which would violate the principles of equal treatment and transparency.

Besides, the collaboration with these experts does not decrease the responsibility of the evaluation commission and of the institution's manager, the responsible analysis of the information provided to the commission being necessary. There quite a few situations in which the contracting authorities defend the drafted documents by strictly invoking the opinion of the expert, without justifying in law the ordered remedy.

As to the 1,403 decisions rendered by the Council for admitting the complaints lodged by business operators, it must be noted that in the case of 99 settled files (7%) the chambers of solving complaints ruled the cancelation of the award procedures, while 1,304 decisions (93%) 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 2022**

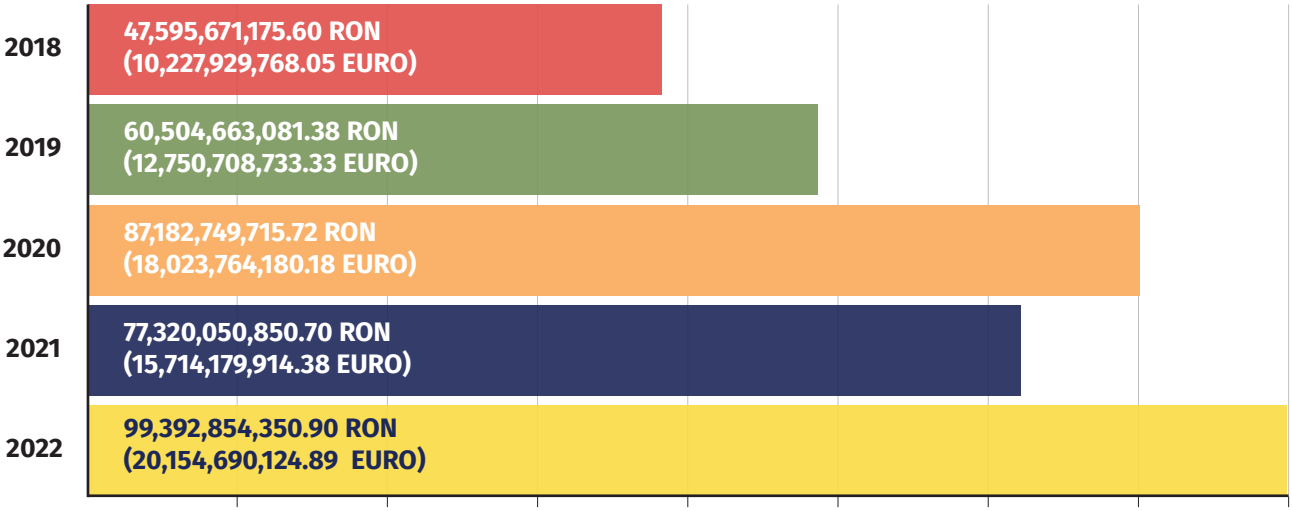


# 2.6. THE ACTIVITY OF N.C.S.C. IN RELATION TO THE ESTIMATED VALUE OF THE CHALLENGED AND SETTLED AWARD PROCEDURES

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

In the year 2022, the total estimated value of the award procedures under which N.C.S.C. rendered decisions was of 99,392,854,350.90 RON, the equivalent of 20,154,690,124.89 EURO[17], thus resulting a value with 28.55% higher compared to the year 2021[18], with 14.01% higher than the one recorded for the year 2020[19], with 64.27% over the one recorded for the year 2019[20], and with 108.83% over the one recorded for the year 2018[21].

**THE TREND OF THE DECISIONS ISSUED BY N.C.S.C. IN THE PERIOD 2018 - 2022 IN RELATION TO THE TOTAL ESTIMATED VALUE OF THE PROCEDURES**




In terms of value, at 2022, 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 46,209,412,372.16 RON (the equivalent of 9,370,254,967.49 EURO), while the total estimated value of the procedures under which N.C.S.C. rendered decisions for rejecting the complaints reached the limit of 53,183,441,978.74 RON (the equivalent of 10,784,435,157.40 EURO).

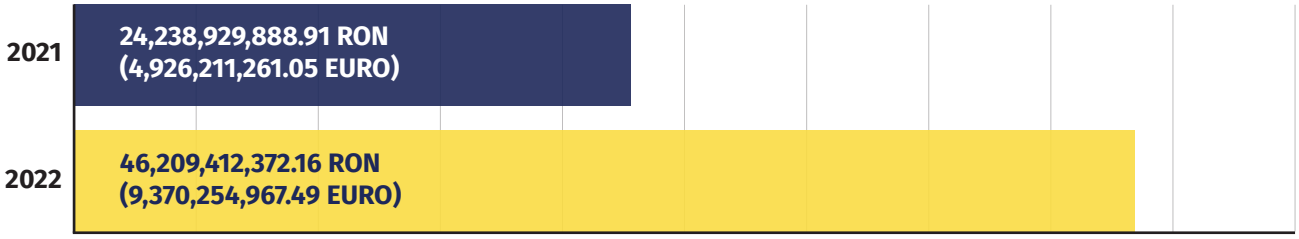
Compared to the previous year, when the total estimated value of the award procedures under which N.C.S.C. rendered decisions for admitting the complaints lodged by business operators was of 24,238,929,888.91 RON (the equivalent of 4,926,211,261.05 EURO), while the value of the procedures under which N.C.S.C. rendered decisions for rejecting the complaints lodged by business operators was of 53,081,120,961.79 RON (the equivalent of 10,787,968,653.32 EURO), one can notice that in 2022 the total estimated value of the procedures under which N.C.S.C. rendered decisions for accepting the complaints lodged by business operators increased with 90.64%, while the total estimated value of the procedures under which N.C.S.C. rendered decisions for rejecting the complaints lodged by business operators increased with only 0.19%.

**17.** Average annual exchange rate provided by N.B.R. for the year 2022 - 4,9315
**18.** Average annual exchange rate provided by N.B.R. for the year 2021 - 4,9204
**19.** Average annual exchange rate provided by N.B.R. for the year 2020 - 4,8371
**20.** Average annual exchange rate provided by N.B.R. for the year 2019 - 4,7452
**21.** Average annual exchange rate provided by N.B.R. for the year 2018 - 4,6535

In terms of value, the trend of the total estimated value of the award procedures under which our institution rendered decisions for accepting the complaints lodged by business operators and of the award procedures under which the Council rendered decisions for rejecting the complaints developed as follows:

## 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 2021-202

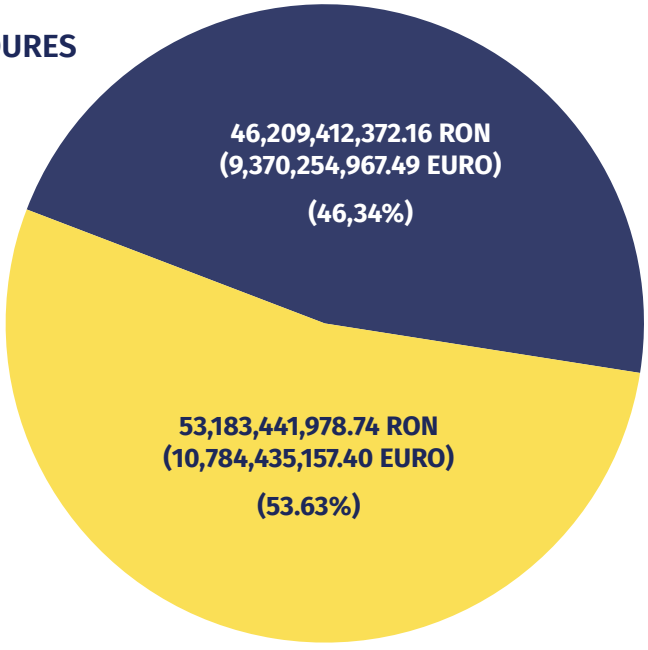
**THE TOTAL ESTIMATED VALUE OF THE PROCEDURES UNDER WHICH N.C.S.C. RENDERED DECISIONS OF ACCEPTING THE COMPLAINTS**




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


## THE TOTAL ESTIMATED VALUE OF THE PROCEDURES UNDER WHICH N.C.S.C. RENDERED DECISIONS OF ACCEPTING/ REJECTING THE COMPLAINTS IN THE YEAR 2022

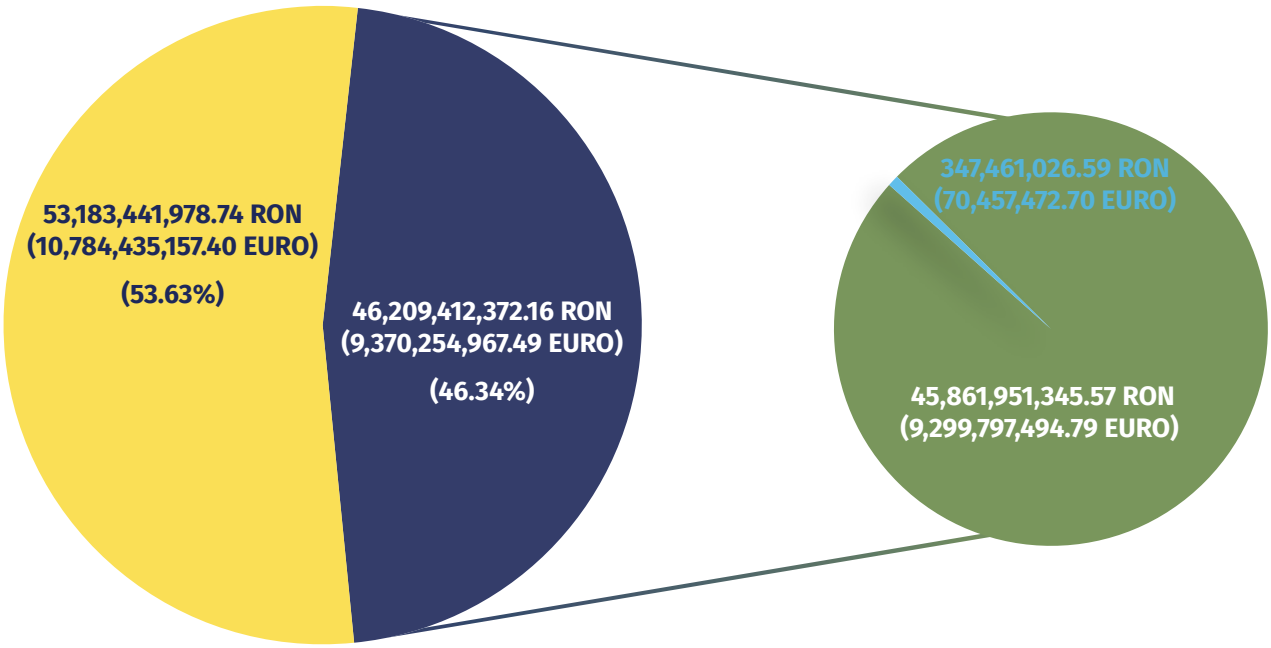
Thus, it is observed that in 2022 the total estimated value of the award procedures under which N.C.S.C. rendered decisions for accepting the complaints lodged by business operators 46,209,412,372.16 RON (the equivalent of 9,370,254,967.49 EURO) represented 46.34% of the total estimated value of the award procedures under which N.C.S.C. rendered decisions (99,740,315,377.49 RON, the equivalent of 20,225,147,597.58 EURO), while the total estimated value of the award procedures for rejecting the complaints lodged by business operators (53,183,441,978.74 RON, the equivalent of 10,784,435,157.40 EURO) represented 53.63% 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. ACCEPTED THE COMPLAINTS
■ THE TOTAL ESTIMATED VALUE OF THE PROCEDURES UNDER WHICH N.C.S.C. REJECTED THE COMPLAINTS

In regards to the total estimated value of the award procedures cancelled by the Council reached 347,461,026.59 RON (the equivalent of 70,457,472.69 EURO), and that of the award procedures under which remedies were ordered was of 45,861,951,345.57 RON (the equivalent of 9,299,797,494.79 EURO).

## THE TOTAL ESTIMATED VALUE OF THE PROCEDURES UNDER WHICH N.C.S.C. RENDERED DECISIONS IN THE YEAR 2022

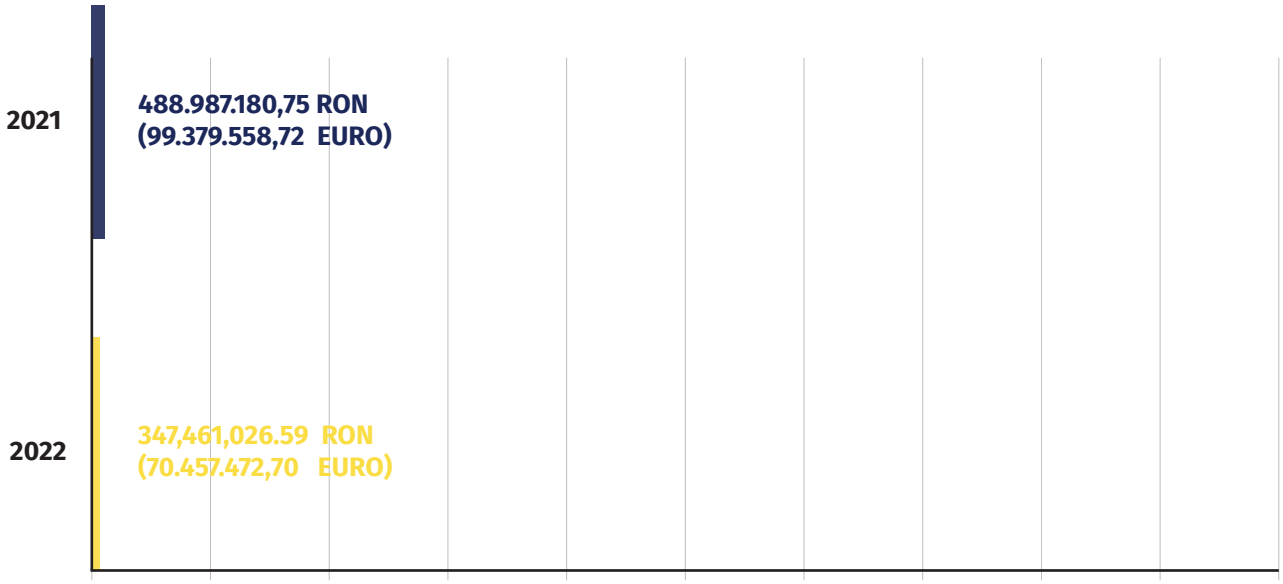



- THE TOTAL ESTIMATED VALUE OF THE PROCEDURES UNDER WHICH N.C.S.C. REJECTED THE COMPLAINTS
- THE TOTAL ESTIMATED VALUE OF THE PROCEDURES UNDER WHICH N.C.S.C. ACCEPTED THE COMPLAINTS
- THE TOTAL ESTIMATED VALUE OF THE PROCEDURES UNDER WHICH N.C.S.C. ACCEPTED THE COMPLAINTS AND ORDERED REMEDY MEASURES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

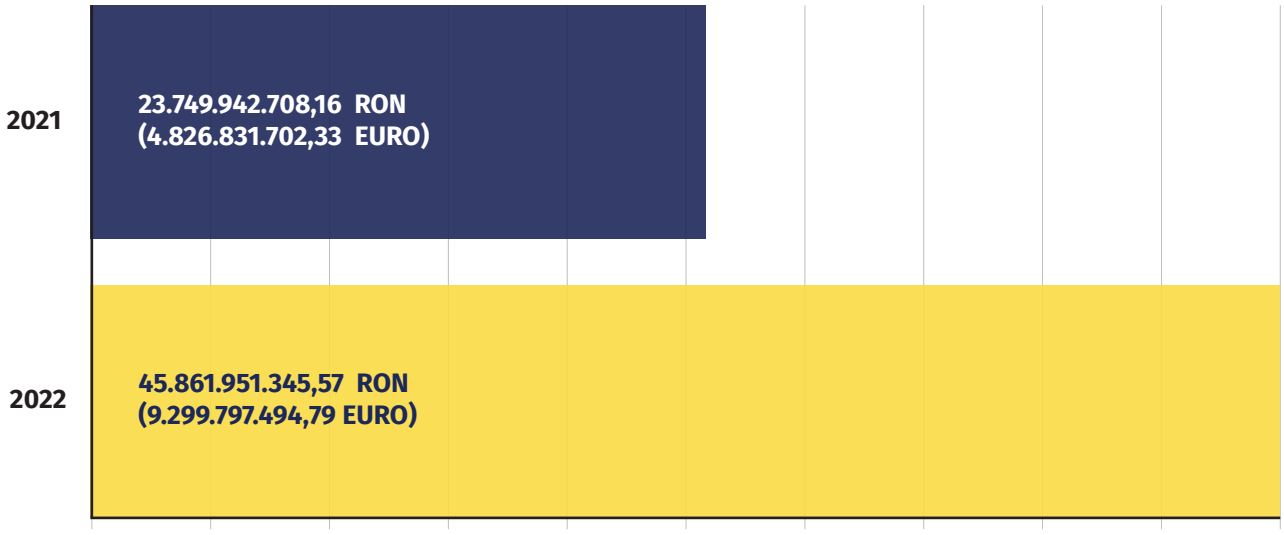
A comparison with the previous year reveals that in the year 2022 the total estimated value of the award procedures under which the Council accepted the complaints and cancelled some public procurement procedures declined with 28.94%, while the total estimated value of the award procedures under which the Council accepted the complaints and order the remedy of the procedures increased with 93.10%.

## THE TOTAL ESTIMATED VALUE OF THE PROCEDURES UNDER WHICH N.C.S.C. RENDERED DECISIONS OF ACCEPTING THE COMPLAINTS IN THE PERIOD 2021-2022

**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**




The numbers presented above demonstrate without any doubt that, contrary to some opinions expressed in the public space, 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 actually represented an efficient filter for preventing a significant number of irregularities within the public procurement procedures developed on the course of the year 2022, 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

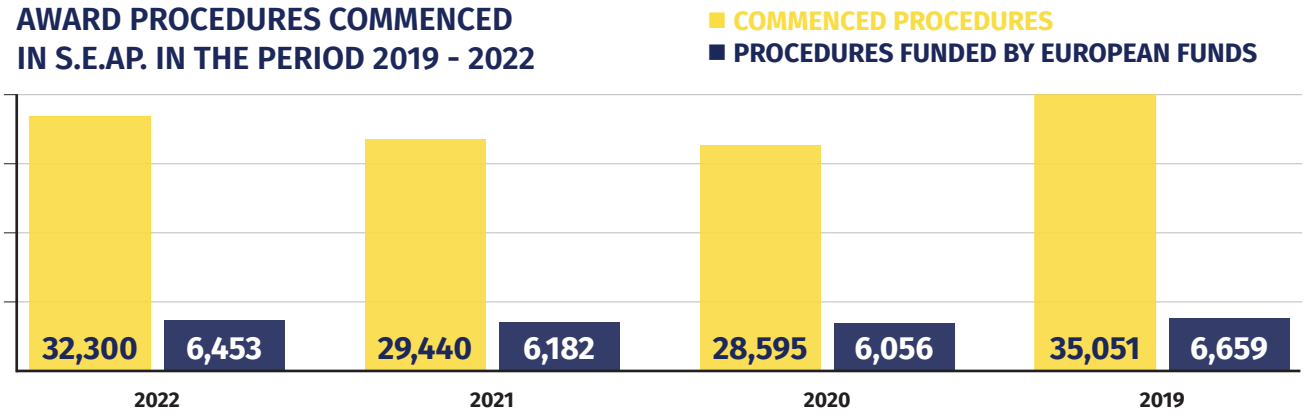
The official data provided by the Electronic Public Procurement System (S.E.A.P.) show that in the year 2022, within the communication platform used in the award process for the public procurements contracts, a number of 32,200 award procedures were commenced through participation announcements and invitations, amounting to a total estimated value of 309,904,903,875 RON (the equivalent of 62,841,915,010.65 EURO).

In comparison to the year 2021, when 29,440 award procedures were commenced in S.E.A.P. through participation announcements and invitations, it is found that in 2022 the number of the award procedures increased with 2,860 (2.95%). In terms of value, compared to 2021, the total estimated value of the commenced award procedures increased with 149,892,471,537 RON (93.68%).

However, it must be noted that although in the course of 2022 the number of award procedures commenced via S.E.A.P. through participation announcements and invitations has increased in comparison with the previous year, still their number was lower than the one registered for 2019, when 35,051 procedures were commenced, with a total estimated value of 196,638,928,828 RON (the equivalent of 41,439,544,977.67 euro).

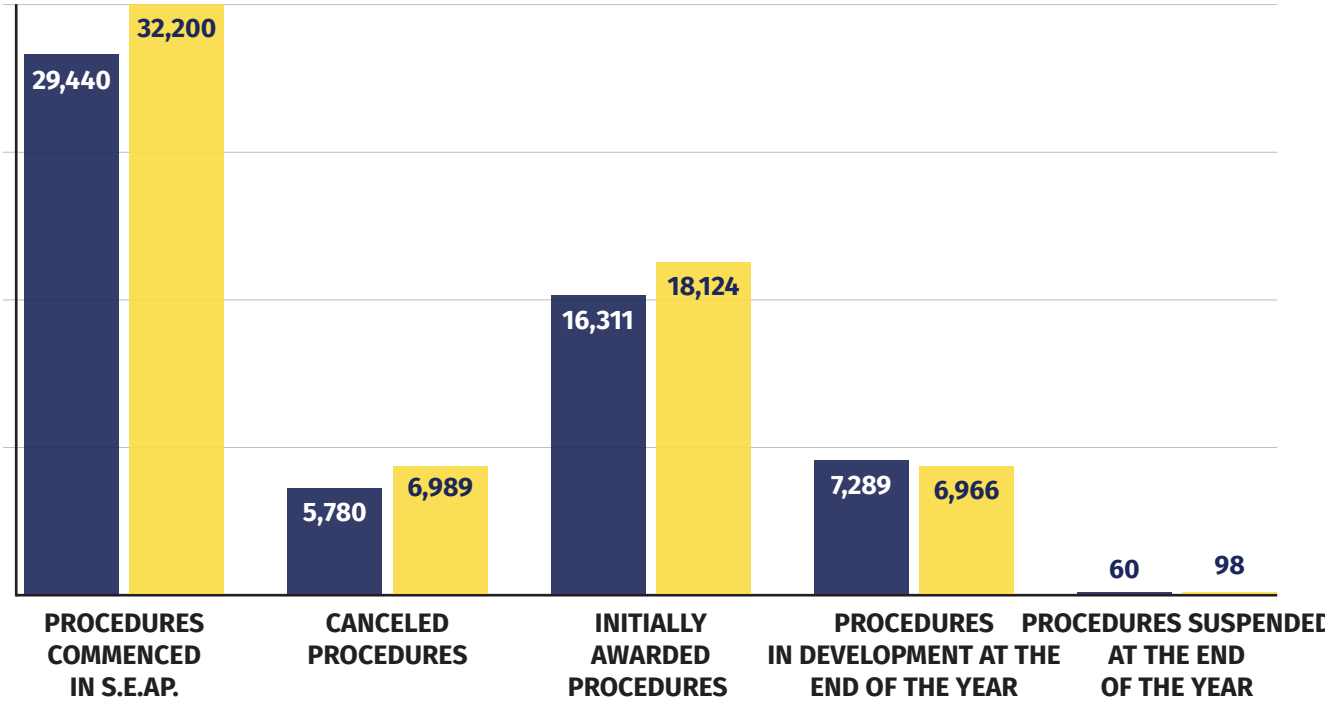
Concerning the total number of award procedures commenced in S.E.A.P. in the period 2019-2022 and the total number of procedures financed by European funds, the trend was as follows:

**AWARD PROCEDURES COMMENCED IN S.E.A.P. IN THE PERIOD 2019 - 2022**




The official data provided by S.E.A.P. show that the end of 2022, of the total of 32,200 award procedures commenced in S.E.A.P., having a total estimated value of 309,904,903,875 RON (the equivalent of 62,841,915,010.65 EURO), a number of 6,989 award procedures (21.70%), having a total estimated value of 57,420,803,395 RON (the equivalent of 11,643,679,082.43 EURO), were listed as cancelled (either by the contracting authorities, by the administrative law courts or by decision of N.C.S.C.), 98 procedures (0.3%), having a total estimated value of 106,802,950,005 RON (the equivalent of 21,657,294,941.70 EURO), were listed as being suspended, while 6,966 (21.63%), having a total estimated value of 152,743,841,476 RON (the equivalent of 30,973,099,761.94 EURO), were in development.

## THE TREND OF THE PROCEDURES COMMENCED IN S.E.AP. IN THE PERIOD 2021 - 2022




Comparing the total annual estimated value of the procedures commenced in S.E.A.P. in the year 2022 (309,904,903.875 RON, the equivalent of 62,841,915,010.65 EURO) the total estimated value of the award procedures under which N.C.S.C. ruled decisions (99,392,854,350.90 RON, the equivalent of 20,154,690,124.89 EURO), it results that the latter represented 31.32% 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 2022 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/cancellation of the procedures (46,209,412,372.16 RON, the equivalent of 9,370,254,967.49 EURO), it results that the latter represented 14.91% of the total estimated value of the procedures commenced in S.E.A.P.

Concerning the total estimated value of the procedures under which N.C.S.C. ordered remedy measures of the challenged public procurement (45,861,951,345.57 RON, the equivalent of 9,299,797,494.79 EURO), it represented 14.80% of the total estimated value of the procedures commenced in S.E.A.P. In the same period, the total estimated value of the public procurement procedures under which N.C.S.C. ordered their cancellation (347,461,026.59 RON, the equivalent of 70,457,472.69 EURO) represented a percentage of only 0.11% of the total estimated value of the procedures commenced in S.E.A.P. and of only 0.60% of the total estimated value of the procedures commenced in S.E.A.P. and cancelled.

It must be mentioned that of the total number of 6,453 public procurement procedures funded by European funds commenced in S.E.A.P. in the year 2022, a number of 1,785 procedures (27.66% of the total number of procedures commenced and financed by European funds and 5.54% of the total number of procedures commenced in S.E.A.P), with an amount of 15,779,193.486 RON (the equivalent of 3,199,674,234.21 EURO) have been cancelled by decision of the Council, the rest being cancelled either by the contracting authorities or by the administrative law courts.

As it can be observed, with limited personnel and with minimal material expenditures, the Council proved its efficiency, making huge efforts to answer the specific challenges of the occupied positions.

## CHAPTER 3

# THE QUALITY OF N.C.S.C. ACTIVITY IN THE YEAR 2022

## 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 COMPLAINTS

According to law, in order to respect 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.

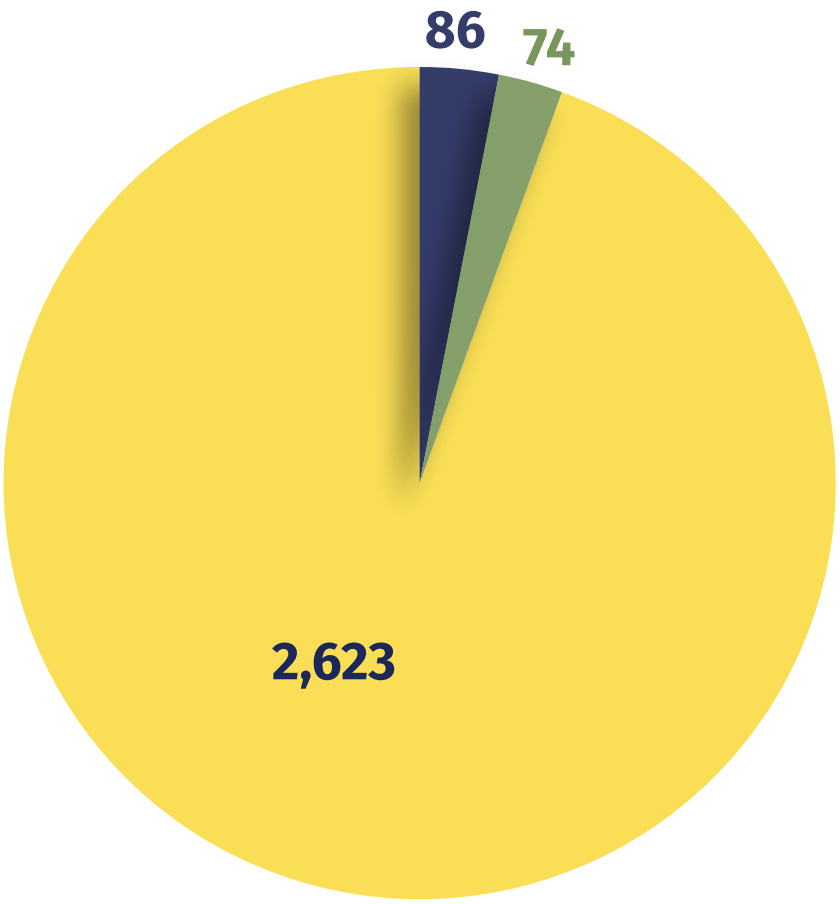
The legislation in force in the field of public procurements regulates that the decisions rendered by the Council using the administrative-jurisdictional channel can be verified by the Courts of Appeal

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 2022, of the total of 2,783 decisions issued by the chambers of solving complaints within N.C.S.C., a number of 659 decisions were challenged with appeal (23.67%). In the course of 2022, following the appeals lodged with the competent Courts of Appeal, compliant to Article

**THE STANDING OF THE APPEALS LODGED AGAINST THE DECISIONS OF N.C.S.C. IN THE YEAR 2022**

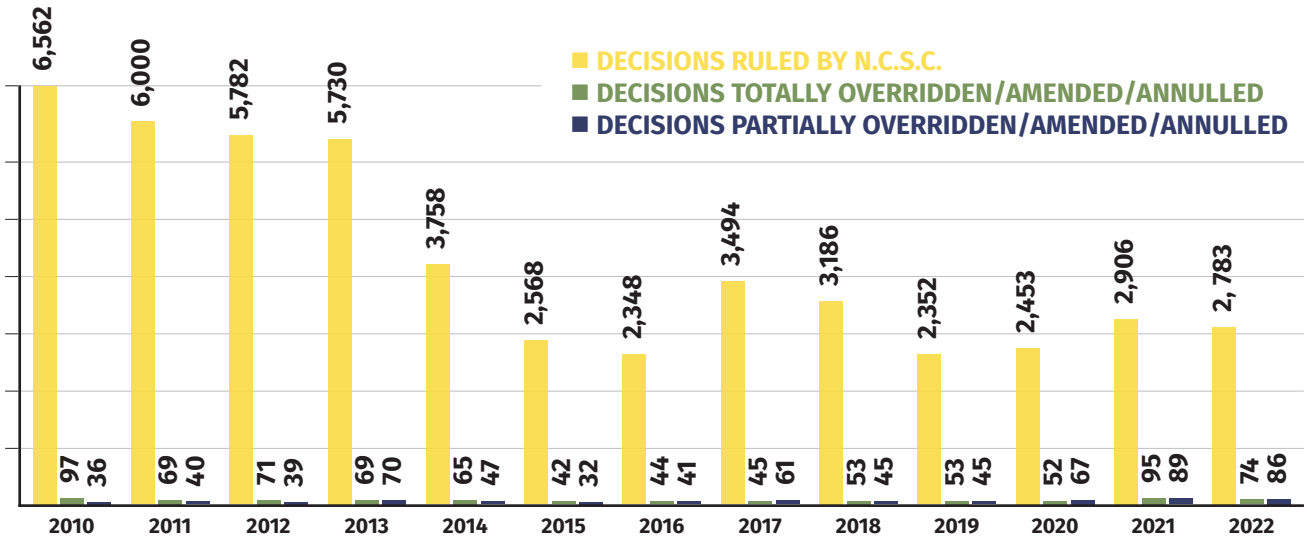



29 of Law no. 101/2016, as amended and supplemented, only 74 decisions rendered by the Council were fully overridden/amended/annulled (2.65% of the total decisions rendered by the Council), 86 were partially overridden/amended/annulled (3.09% of the total decisions issued by the Council), and 442 decisions remained definitive and irrevocable in the formed ruled by our institution.

Therefore, the official data reveal that on the course of 2022, of the 2,783 decisions rendered by the Council, a number of 2,623 decisions (94.25%) remained definitive and irrevocable in the formed ruled by the Council.

The statistical evidence for 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 an extremely reduced level in comparison to the percentage of decisions ruled by our institution which remained definitive and irrevocable.

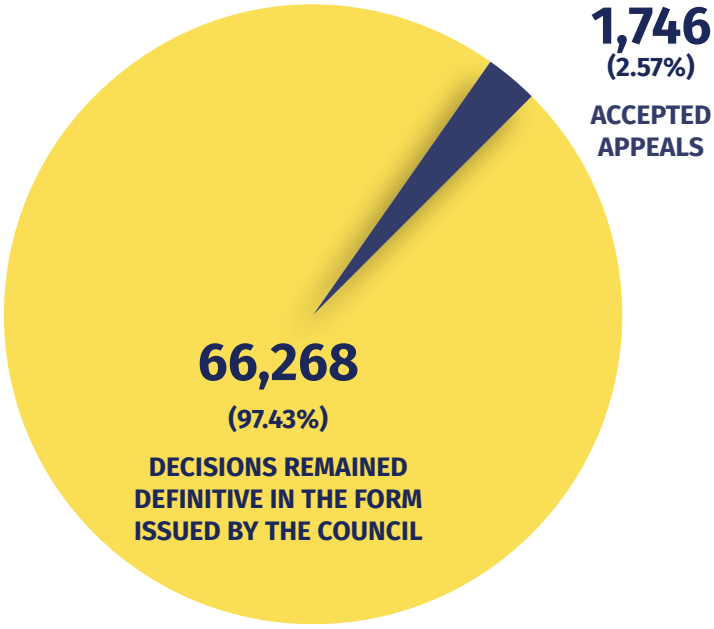
## THE TREND OF THE APPEALS LODGED AGAINST THE DECISIONS OF N.C.S.C. IN THE PERIOD 2010 - 2022




## THE STANDING OF THE DECISIONS ISSUED BY N.C.S.C. REMAINED DEFINITIVE IN THE PERIOD 2006 - 2022

If we sum up the decisions issued by N.C.S.C. from its establishment and until the end of 2022, it arises that only 2.57%, meaning 1,746 decisions were totally or partially overridden/ amended/annulled by the competent Courts of Appeal, out of the 68,014 decisions ruled by our institution during the mentioned time span.

Therefore, it results that in the period September 2006 – December 2022 the total number of decisions remained definitive after being challenged with appeal at the competent Courts of Appeal was of 66,268, meaning that a percentage of 97.43% of the total ruled decisions remained in the form rendered by the Council.



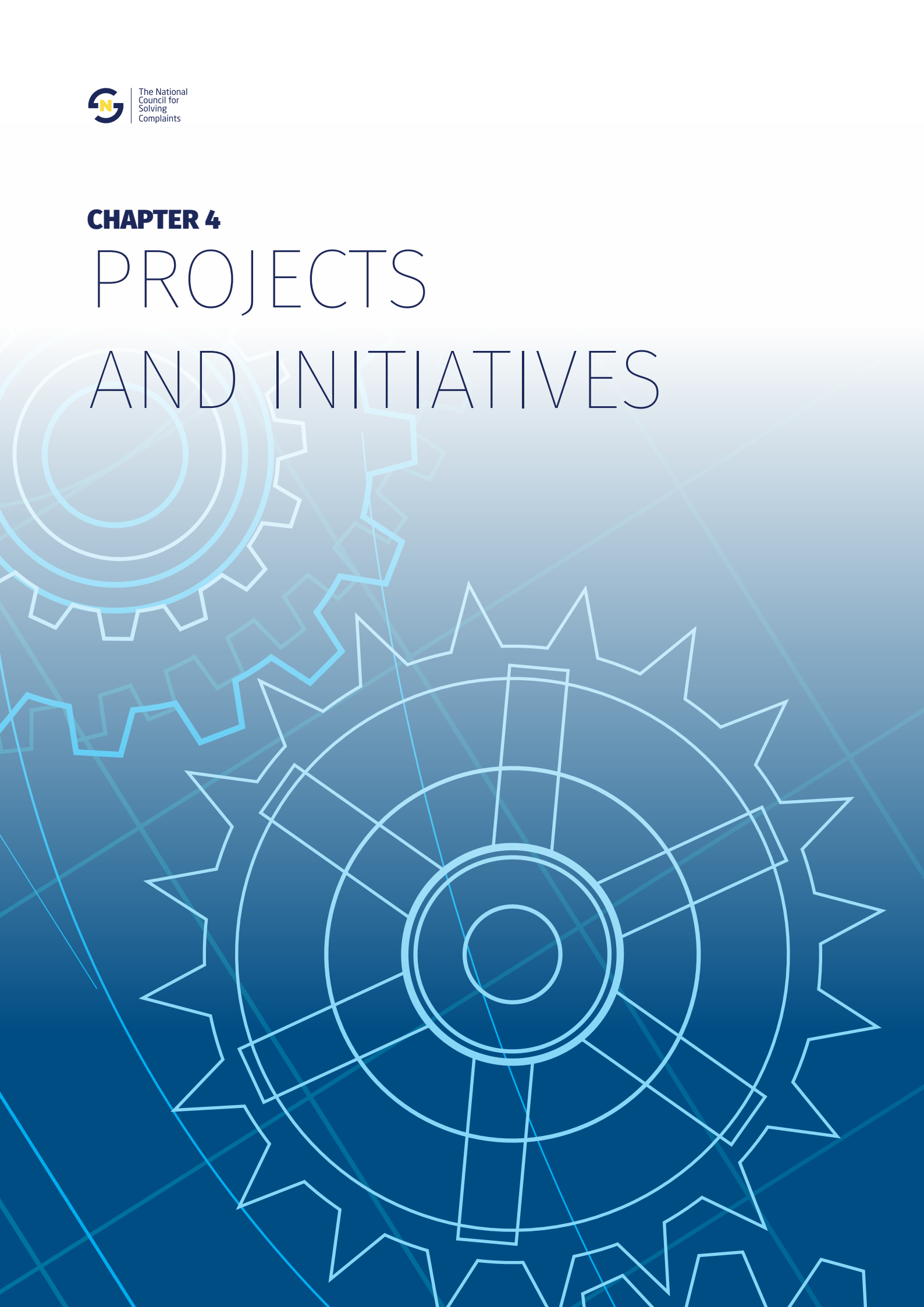

For the professionals in the field of public procurements, the current numbers confirm both the role of the Council as guarantor in its field of competence for the supremacy of the law and especially the quality of the activity developed by this institution.

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 2023 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 National Council for Solving Complaints

## CHAPTER 4

# PROJECTS AND INITIATIVES



In the year 2022, the National Council for Solving Complaints signed, alongside similar structures from Slovenia, North Macedonia, Montenegro, Croatia, Kosovo, Bosnia and Herzegovina, and Albania, a Memorandum on the establishment of the Network of Public Procurement Control Bodies of South-eastern Europe. The subject of this Memorandum concerns the improvement of the administrative-jurisdictional institutions of the mentioned states, especially the exchange of information regarding the audit experiences in the field of public procurements developed in compliance with the national law of each signatory state. By implementing this Memorandum, the signatory states will be able to provide good practices solutions in the approach of specific judicial issues, but also information concerning the decisions of the European Court of Justice in order to develop expertise related to the legislation of the European Union.

On the course of the previous year, the counsellors of solving complaints in the field of public procurements and the public servants within the chambers, as well, took part in the seminars organised by the Superior Council of Magistracy (C.S.M.) in partnership with the National Institute of Magistracy, The National School of Clerks and the Norwegian Courts Administration, within the project 'Judicial Training and Capacity Building', financed by the 2014-2021 Norwegian Financial Mechanism, which has the general objective to strengthen the judicial system by improving its efficiency.

Last but not least, the public servants within the Council's chambers of solving complaints participated at training sessions in the project initiated by ONAC, entitled 'The development and implementation of certain integrated electronical devices for the development and monitorisation of centralised procurements', code SIPOCA 753, code MySMIS 130709, co-financed by the European Social Fund through the Operational Programme Administrative Capacity 2014-2020.

During the sessions, the employees of the Council benefited from the support of the experts from the National Standardisation Body (A.S.R.O.) in order to further approach concepts related to the quality of medical devices, subjects concerning legislation, standards, directives, legal and regulation requirements applicable to medical devices, harmonised standards, and MEDDEV, GHTF and SG guides. On the course of the meetings, several topics were approached in relation to the documents which require verification by a purchaser in its activity (Declaration of Conformity – according to the EU directives and regulations, the CE marking certificate, SM-ISO certificates, medical devices registration certificates, and the authorisation issued by A.N.M.D.M.R.), the essential principles of the environment management system, and the advantages of applying the principles of this system in the field of public procurements, etc.

N.C.S.C. applied in the year 2022 for two projects at the European Commission, respectively:

1) TSI 2023 Flagship technical support project on 'PACE - Public Administration Cooperation Exchange' Enhancing N.C.S.C.'s Internal Reengineering, Green IT and EU Programmes Accessing Capacities, with the following aim:

- redrawing the internal processes meaning the optimization of the NCSC processes and systems, with the result of increasing performance and of significantly saving expenses.
- sustainable digitalisation and the ecologization of the administration itself taking into account climate changes, thus NCSC considers that it should develop a strategy through which the institution would perform all efforts in order to align its information and communication technology and long-term durability

- management training and evaluation of the EU programs and projects, as the Council considers that it should take part more and more to the network of European remedy bodies in order to identify the ways towards a maximised efficiency regarding the access, management and evaluation of the European Union's programs and projects.

2) TSI 2023 Flagship technical support project on 'Professionalization of public procurement personnel: fostering strategic methodologies, integrity and transparency. N.C.S.C. bridging with EU remedy bodies family, establishment of best principles, policies and procedures', in order to establish stable and solid communication bridges between remedy bodies for drawing a direction to be followed by N.C.S.C. and the other remedy bodies in the following 10-20 years.

## UNIFICATION OF THE ADMINISTRATIVE – JURISDICTIONAL PRACTICE

At the level of the Council there is a constant preoccupation for the unification of practice. Plenary sessions are organised each month on the grounds of Article 62 of Law no. 101/ 2016, during which each chamber, in turn, presents a report on a certain topic of choice, concerning the practical situations encountered in the activity of solving complaints. Following these plenary sessions, to the extent that there is sufficient relevant court practice on the debated issue, a decision for the unification of the administrative-jurisdictional practice is adopted, mandatory to all members. On different occasions, persons from other institutions are invited to the plenary sessions.

At least twice a year, meetings and seminars are organised with judges and other institutions with attributions in the field, where nonunitary solutions are presented from both the activity of our institution and of the courts, with the establishment of a solution to be followed. In the case in which courts' nonunitary solutions are noted, the High Court of Cassation and Justice is noticed, in order to follow the appeal in the interest of law procedure provided in Article 63 of the law.

The issues with nonunitary approach are noticed by both counsellors and the parties, contracting authorities and complainants as well, by A.N.A.P., management authorities, and even by courts. The received notifications are approached in a serious manner, being debated as shown in the plenary sessions. A solution of unitary interpretation of the law is not always accepted, yet this aspect should not be discouraging, as the divergent problem will be again proposed to debate as new decisions are issued by courts of appeal. The frequent legislative changes are not likely to clarify the divergent aspects. Most of the times they do not succeed to perfect the law but, on the contrary, to generate confusion and divergent practice.

In order to unify practice, it is natural that at the beginning it is nonunitary, especially in a relatively new judicial landscape, as the law package has six years and, already, suffered multiple changes.

Based on the provisions of Law no. 101/2016, the Council organised seminars with judges from courts and specialists from A.N.A.P., as well as with other categories of experts, during which law problems are discussed as they have led to the rendering of different solutions in similar cases, application and interpretation of the new regulations in the field of public procurements and in other fields of interest for the professional activity of the Council.

In the year 2022, two seminars have been organised, being attended by magistrates and A.N.A.P. representatives, with the following discussion topics:

- Practice of CJEU applicable in the practice of CNSC, projecting in the jurisprudence of courts;
- Practice of CJEU and HCCJ - interpretation which generated a nonunitary administrative-jurisdictional practice.

## CHAPTER 5

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

**MOTTO:**

*'Transparency is, actually, another word for truth.'*
**Neale Donald Walsch**

The activity performed in 2022 by the National Council for Solving Complaints was based on total transparency in relation to business operators, contracting authorities, governmental and non-governmental institutions involved in the field of public procurements, but to the media as well.

By means of the general objective of the Information and Public Relations Office, the Council ensured a periodic communication with the media and the official institutions, 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 briefing, the Information and Public Relations Office, in collaboration with the Statistics and IT Office within the Council, further focused in 2022 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.

At the same time, 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.

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.

Regarding the number of requests related to public information registered on the course of 2022, 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. It must be noted that absolutely all received petitions were settled with celerity in the same day that they were registered and in compliance with the legislation on personal data protection.

Furthermore, the respective structure 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

Even if this is not a round year, being the seventeenth year since establishment, challenges did not lack.

In the previous year we have successfully concluded the European project POCA 'Competence makes the difference', initiated in partnership with O.N.A.C. and we have actively participated at the seminars organised by C.S.M. in partnership with I.N.M., the National School of Clerks and the Norwegian Courts Administration in the project 'Judicial Training and Capacity Building', financed by the 2014-2021 Norwegian Financial Mechanism, which has the general objective to strengthen the judicial system by improving its efficiency.

Moreover, we signed alongside similar structures from Slovenia, North Macedonia, Montenegro, Croatia, Kosovo, Bosnia and Herzegovina, and Albania, a Memorandum on the establishment of the Network of Public Procurement Control Bodies of South-eastern Europe. The subject of this Memorandum concerns the improvement of the administrative-jurisdictional institutions of the mentioned states, especially the exchange of information regarding the audit experiences in the field of public procurements developed in compliance with the national law of each signatory state of the respective Memorandum.

For the following year, we start from the base principle according to which the access to the Council is unhindered, respectively free of all sorts of constraints and at hand for any injured persons. Only in this way Romania will be able to dimmish and prevent the corruption phenomenon in the field of public/sectorial procurements and concessions of works and services, phenomenon noticed by the European Commission in the afferent monitoring reports, documents which described us as 'an efficient filter in preventing a substantial number of irregularities within the award procedures'.

Similar to the previous years, in 2023 the Council will continue to perform all efforts in order to make justice with celerity, yet this objective depends mainly on the quality, coherence and predictability of the normative framework.

Finally, I wish to underline the undeniable remarkable efficiency of the members of the Council in achieving the objectives. In the sixteen years of functioning, our institution managed to relieve the courts of more than 75,000 cases settled in the legal terms, as the Council rendered approximately 80,000 decisions and conclusions, out of which only 2,000 decisions have been modified. This result is due to a permanent collaboration with the magistrates (in this regard, 20 seminars on unitary practice seminars took place only in 2022) but also to the experience exchange with similar remedy bodies from other countries.

## CHAPTER 7

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

The budget of N.C.S.C. corresponding to the year 2022 amounted to 20,325 thousand RON and was distributed as follows:

- The budget provision for Current expenditures: 20,255 thousand RON out of which:
  - Personal expenses: 17,200 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 2022** (THOUSANDS LEI)

| CHAPTER | GROUP/ TITLE | NAME | BUDGET | QUARTER I | QUARTER II | QUARTER III | QUARTER IV |
|---|---|---|---|---|---|---|---|
| 5000 | | **TOTAL BUDGET** | 20,325 | 5,155 | 5,019 | 5,169 | 4,982 |
| | 01 | **CURRENT EXPENDITURE** | 20,255 | 5,155 | 4,969 | 5,149 | 4,982 |
| | 10 | **TITLE I - STAFF EXPENDITURE** | 17,200 | 4,300 | 4,300 | 4,438 | 4,162 |
| | 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** | 423 | 120 | 120 | 120 | 63 |
| | 59 | **TITLE IX OTHER EXPANDITURE** | 82 | 23 | 24 | 16 | 19 |
| | 70 | **CAPITAL EXPENDITURES** | 70 | 0 | 50 | 20 | 0 |
| | 71 | **TITLE XII NON-FINANCIAL ASSETS** | 70 | 0 | 50 | 20 | 0 |
| 5001 | | **EXPENDITURE – STATE BUDGET** | 20,325 | 5,155 | 5,019 | 5,169 | 4,982 |
| | 01 | **CURRENT EXPENDITURE** | 20,255 | 5,155 | 4,969 | 5,149 | 4,982 |
| | 10 | **TITLE I - STAFF EXPENDITURE** | 17,200 | 4,300 | 4,300 | 4,438 | 4,162 |
| | 20 | **TITLE II - GOODS AND SERVICES** | 2,550 | 712 | 525 | 575 | 738 |
| | 58 | **TITLE X PROJECTS WITH FINANCING FROM EXTERNAL FUNDS RELATED TO THE FINANCIAL FRAMEWORK 2014-2020** | 423 | 120 | 120 | 120 | 63 |
| | 59 | **TITLE IX OTHER EXPANDITURE** | 82 | 23 | 24 | 16 | 19 |
| | 70 | **CAPITAL EXPENDITURES** | 70 | 0 | 50 | 20 | 0 |
| | 71 | **TITLE XII - NON-FINANCIAL ASSETS** | 70 | 0 | 50 | 20 | 0 |