



The National
Council for
Solving
Complaints

ACTIVITY REPORT 2023

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FOREWORD

REMEDY INSTITUTIONS IN THE FIELD OF PUBLIC PROCUREMENTS, KEY MECHANISMS SAFEGUARDING THE FUNCTIONING OF THE EUROPEAN UNION'S SINGLE MARKET



BOGDAN-MARIUS BOGHIU,
INTERIM PRESIDENT OF N.C.S.C.

Last year, the European Union celebrated 30 years since the establishment of the European single market, following the signing on 7 February 1992 of the Maastricht Treaty by Belgium, Denmark, Germany, Ireland, Greece, Spain, France, Italy, Luxembourg, the Netherlands, Portugal and the United Kingdom. Where initially there were only 12 Member States, their number has now reached 27, along with the member states of the European Free Trade Association (EFTA), namely Iceland, Liechtenstein, Norway and Switzerland. At this time of celebration, it can be said that the single market is one of the greatest achievements of the

European Union, ensuring that goods, services, people, and capital can move freely throughout the Union.

Given the size of the European single market, it is no wonder that public procurement is an essential element of the national economies of EU member states, with public authorities spending around a fifth of the EU's GDP on the purchase of works, goods and services every year. In these circumstances, EU public procurement legislation plays a key role in developing the single market and ensuring the efficient use of public funds, with remedy institutions being at the forefront of ensuring the transparency with which public money is spent.

Furthermore, we must not forget that, following the crisis brought on by the COVID-19 pandemic, the EU has set out an unprecedented recovery plan, the Next Generation EU plan, to relaunch the European economy and support the green and the digital transitions, to

make Europe more resilient and ready for future challenges. This plan takes the form of a comprehensive package of EUR 1,824.3 billion, combining the sum of EUR 1,074.3 billion of the EU's long-term budget for 2021-2027 (Multiannual Financial Framework [MFF]) and an extraordinary recovery effort of EUR 750 billion, the Next Generation EU instrument (NGEU). In this context, it should be noted that at the 13th meeting of the Network of First Instance Review Bodies on Public Procurement of the EU Member States, held last year in Brussels, Mrs. Maria Veronika Tovsak Pleterski, Director of DG GROW.E and Economic Adviser to the EC President, stressed the critical role of the remedy institutions in implementing the Next Generation EU recovery/resilience measures, both in general and in specific terms (a green and digital European society).

Furthermore, the Director of DG Grow.E also noted that, through the Next Generation EU program, Member States access these funds through national recovery and resilience plans, which set out their respective reform and investment agendas up to 2026, through coherent project packages in six policy areas: green transition, digital transformation, smart, sustainable and inclusive growth and employment, social and territorial cohesion, health and resilience, policies for the next generation, including education and skills.

The DG Grow.E representative mentioned that with the public procurement sector facing unprecedented challenges, the only solution for it to function within the set parameters is for the remedy institutions to continuously adapt and develop at a sustainable pace. However, we must not overlook the general objective of Romania's recovery and resilience plan, which contributes to the country's economic development by implementing essential programs and projects aimed at supporting resilience, preparedness for crisis situations, adaptive capacity, and growth potential, through major reforms and key investments with funds from the Recovery and Resilience Mechanism. This is corroborated with the reform measures for strengthening the rule of law, increasing the efficiency of judicial acts in relation to the recommendations of the European institutions on the fight against corruption and on the integration of the principles of participatory governance and transparency of the decision-making process.

According to the National Public Procurement Strategy 2023-2027, the implementation of the strategy will promote the principles underlying the application of the legislation in the field of public procurement, namely:

- non-discrimination and equal treatment, a principle which implies ensuring the conditions for the development of real competition between economic operators;
- mutual recognition of products, services, works offered on the EU market, of any diplomas, certificates or other documents issued by competent authorities of other countries, as well as of the technical specifications and/or standards equivalent to those required at national level;
- transparency, ensured by publicly disclosing all information relating to the award of a contract for the supply of goods, services and works;
- proportionality, the principle of ensuring the correlation between the necessity of the beneficiary, the subject-matter of the public procurement contract and the requirements to be fulfilled;
- assumption of responsibility, a principle that requires a clear determination of the tasks and duties of the persons responsible for public procurement, aiming at

ensuring the professionalism, impartiality and independence of decisions taken during this process.

Furthermore, the same document also mentions the European Commission's Public Procurement Strategy, which was developed around the following six public policy priorities:

- ensuring the wider uptake of strategic public procurement;
- professionalization of public procurement personnel;
- improving access to procurement markets;
- increasing data transparency, integrity, and quality;
- stimulating the digital transformation of procurement;
- cooperation for public procurement aggregation.

The above further confirm the Council's key role in guaranteeing the implementation of the National Public Procurement Strategy 2023 – 2027; the Council, in the exercise of its vocation as a remedy institution, has continued to focus on the swift and high-quality settlement of the complaints lodged by business operators throughout 2023.

It can be said that the evolutions outlined in the mentioned Strategy capitalize on the data provided by the Council, information that helps paint a picture on the irregularities occurring in the field of public procurement.

Thus, as a preview of the information presented in this report, it can be said that the subject-matter of the complaints is often related to the rejection of the challenging party's offer as non-compliant or unacceptable, the unacceptable/non-compliant nature of the tenders of other participants in the public procurement procedure or the cancellation of the public procurement procedure by the contracting authority/entity without legal basis.

At the same time, the complaints lodged against the award documentation most commonly referred to: restrictive requirements with regard to qualification/selection criteria or technical specifications, unclear/incomplete/ambiguous responses to requests for clarifications, how the award criterion was used and related assessment factors, the failure to split the public procurement by lots or the imposing of unfair or excessive contract terms.

We believe that the above-mentioned errors arise from the incorrect application of the legislation in the field of public procurement, the data presented in this report being in line with the conclusions provided in the National Public Procurement Strategy 2023 – 2027, namely:

- frequent and non-harmonized changes in the relevant public procurement legislation that have generated a different approach in the market in relation to the planning and execution of procurement contracts;
- different approaches of the authorities operating in the public procurement system to the provisions of the public procurement legislation, due to excessive regulations that have generated parallel sources of recommendations, some limiting and others extensive, depending on the legal sources to which they referred (legislative provisions in certain economic sectors, tax legislation, etc.), which has led to a non-unitary practice;

- the lack of case law and good practice guidelines to guide contracting authorities/entities in the conduct of complex procurement procedures and in the management of contractual changes;
- the shortage of specialized public procurement staff at the level of contracting authorities/entities;
- the modest compensation offered in the field, compared to the elevated level of responsibility;
- the significant fluctuations of staff in the procurement compartments.

If the above lines were not convincing enough of the importance of efficient remedy institutions, such as the Council, then perhaps we should make mention of the European Court of Auditors' constant conclusions, according to which "the EU institutions could do more to facilitate access to public procurement procedures (...) Business operators who believe they have not been treated fairly find it difficult to obtain a swift resolution for their complaints and compensation for the damage incurred (...) The Commission should propose a mechanism for the swift resolution of complaints submitted by business operators who consider that they have not been treated fairly. This settlement mechanism should intervene before business operators turn to the European Ombudsman or EU courts."

The above conclusions highlight the fact that business operators expect to benefit from an efficient system of complaint resolution, which is ensured by each of the Member States.

In this respect, the importance of the Council's decisions is further strengthened by the arguments of the CJEU's Decision of 26 January 2023, in case C – 403/21, according to which the Union court held that 'it must be ascertained that N.C.S.C. may be classified as a 'national court' within the meaning of Article 267 TFEU'.

Furthermore, assuming its key role in the field of public procurement, in 2023 the Council has initiated, through the European Commission's Technical Support Instrument TAIEX/PACE, a program to strengthen good practices among the Member States' remedy institutions, together with similar entities in Croatia, Poland and Portugal.

Looking back with pride, we can say that, for the Council, the 30-year anniversary of the European Single market has gained a double meaning by the decision of the Court of Justice of the European Union, in the sense of enshrining the European character of the institution, and reaffirming its role as guarantor of compliance with the obligations assumed before the European Commission in relation to the system of remedies in the field of public procurement.

CHAPTER 1

GENERAL CONSIDERATIONS



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

Established in September 2006 with the purpose of guaranteeing the compliance with the legislation in the field of public procurements by the contracting authorities, the National Council for Solving Complaints (N.C.S.C.) is an administrative body of public law, which observes the constitutional provisions of Article 21 paragraph (4) and is not subordinated to any public authority or institution, thus benefiting of independence in fulfilling the administrative-jurisdictional act. 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, wherein it cannot be integrated due to its nature, this organism is a part of the executive-administrative power due to its main role of remedy and, secondarily, of cancelling any illegal award procedures.

At the end of 2023, the Council had thirty-one counsellors for solving the complaints in the field of public procurements, public servants with special status, appointed by the decision of the Prime Minister, at the proposal of the Council's President, upon successfully passing a competition¹. At least half of them have a Bachelor's degree in law and a 10-year seniority in the field of law.

According to the applicable legislation, the main task of the Council members is solving the complaints lodged under the award procedures, through specialized chambers composed of three members².

Pursuant to the provisions of Article 12 correlated with Article 3 letter a) of Law no. 101/2016, the competence of the Council is limited to settling the complaints lodged under the award procedures provided by Article 68 of Law no. 98/2016³, Article 82 of Law no. 99/2016⁴, and Article 50 of Law no. 100/2016⁵.

In time, however, the competence of the Council was extended by G.E.O. 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 under its own Organization and Operating Regulations, approved through Government Decision no. 1037/2011⁶. Based on this regulatory act, In its activity, N.C.S.C. shall be subject only to the law; in exercis-

ing 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 regulated⁷, i.e. the principles of legality, celerity, *audi alteram partem*, ensuring the right to defense, impartiality, and independence of the administrative-jurisdictional activity.

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

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

According to the applicable

1. 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 procurement, as subsequently amended and supplemented

4. Law no. 99/2016 on sectorial procurement, 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. Article 15 of Law no. 101/2016

legislation, the President of the Council has to be a law graduate⁸ and has the quality of Chief Authorizing Officer⁹. The President is elected by secret voting from among the members of the Council, with absolute majority¹⁰ of the solving counsellors' votes.

The activity conducted by N.C.S.C. is reflected mainly by the number of complaints submitted, by the number of decisions and conclusions issued, and by the number of files solved.

Furthermore, the quality of the Council's activity is reflected by the number of decisions granted as definitive in the form pronounced by the Council after having been appealed with the Court of Appeal in the territorial-jurisdiction area where the contracting authority is headquartered.

In addition to the settlement of complaints lodged under award procedures for public procurement contracts, sectoral procurement, and concessions of works and/or services, the Council has the power to:

- solve the complaints lodged under the award procedures for the public-private partnership contracts¹¹ regulated by the Government Emergency Ordinance no. 39/2018¹² as subsequently amended and supplemented;
- solve the complaints lodged under the award procedures for the public procurement contracts in fields of defense and security, regulated by the Government Emergency Ordinance no. 114/2011¹³, for which purpose the counsellors solving the complaints are authorized, in compliance with the provisions of Law no. 182/2002 on the protection of classified information, as subsequently amended and supplemented. Thus, in order to exercise its competences regulated by the Government Emergency Ordinance no. 114/2011, 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 (specialized unit within the Intelligence Service-SRI) was established;
 - the applicable legal measures were taken 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 unauthorized 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, and 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 2016-2020 National Anticorruption Strategy, the Council has adhered to the fundamental values, principles, objectives 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.

8. Article 44 of Law no. 101/2016

9. Article 40 of Law no. 101/2016

10. Article 38 of Law no. 101/2016

11. Article 29 of G.E.O. no. 39/2018

12. G.E.O. no. 39/2018 on public-private partnership, with subsequent amendments and additions

13. Article 188 of G.E.O. no. 114/2011 on the award of certain public procurement contracts in the defense and security fields, published with the Official Gazette no. 932/29.12.2011

1.2. HUMAN RESOURCES, MANAGEMENT AND ORGANISATIONAL STRUCTURE

In terms of its organizational structure, according to the provisions of the Government Decision no. 1.037/2011 approving the N.C.S.C. Organization and Operating Regulations, on December 31, 2023, the institution was operating with only 31 counsellors for solving complaints in the field of public procurements, organized in 11 chambers for solving complaints. The Council's staff also included a total of 50 public servants acting as technical-administrative staff (49 public servants and one person employed as contractual personnel). In this context, it should be noted that Government Decision no. 1.037/2011 provides for the employment of 36 public servants with special status

(counsellors for solving public procurement complaints) and 64 public servants operating as technical-administrative staff.

Therefore, it is noteworthy that throughout 2023 the Council has operated with a staffing undersized by 19% compared to that provided for in Government Decision no. 1.037/2011, as at the end of 2023, the number of settlement counsellors decreased by four, as a result of one person retiring, another being suspended, and the other two being seconded to other public institutions. Furthermore, the technical-administrative staffing was reduced by seven persons as a result of their transferring to other public institutions offering superior compensation.

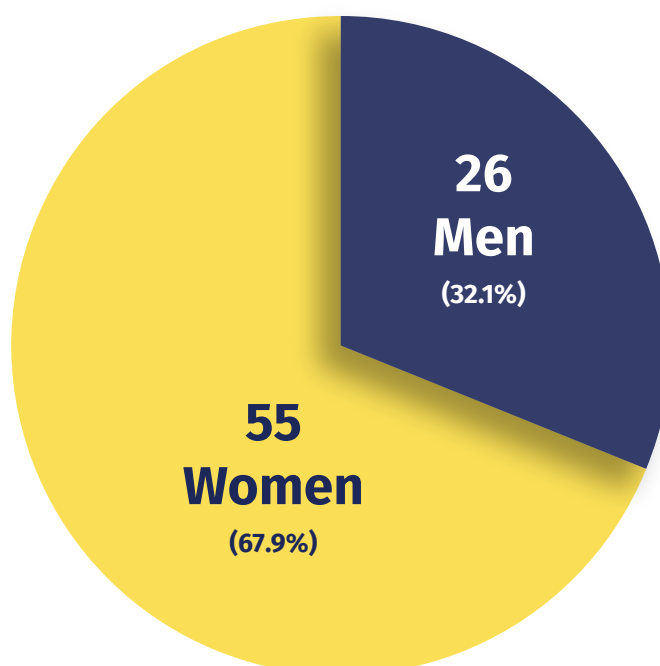
It should be noted that on December 31, 2023, all 50 public servants employed as technical-administrative personnel within the N.C.S.C. had higher education.

In terms of gender structure, among the 31 settlement counsellors, 19 were female (61.3%) and 12 were male (38.7%), while among the technical-administrative personnel, 36 were female (72%) and 14 were male (28%).

Within the entire institution, the gender distribution of the Council's employees was as follows: 55 females (67.9%) and 26 males (32.1%).

At the end of 2023, the average age of the institution's employees was 49.8 years.

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



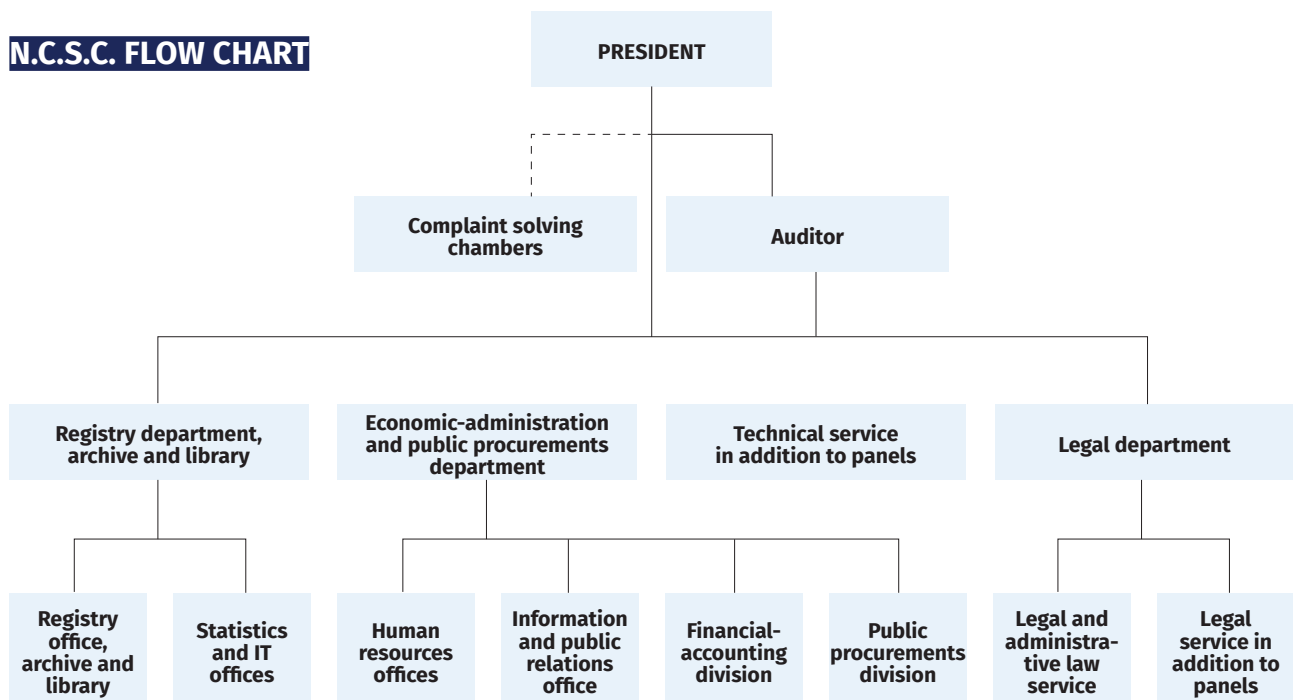


According to the Council's Organization and Operating Regulations¹⁴, the technical-administrative staff pursues its activity under the following structures:

- Legal Department:
 - Legal and Administrative Litigation Service;
 - Legal Service of the chambers for solving complaints;
- Internal Public Audit Department.
- Registry, Archives and Library Service:
 - Statistics and IT Office;
- Economic-Administrative and Public Procurements Service:
 - Human Resources Office;
 - Information and Public Relations Office;
- Financial-Accounting Department;
- Public Procurements Department;
- Technical Service attached to the chambers.

With regard to the Council's organization, it must be noted that, in accordance with the provisions of the Government Emergency Ordinance no. 115 of December 14, 2023 regarding certain fiscal-budgetary measures in the field of public expenditure, for tax consolidation, combating tax evasion, modifying and completing certain normative acts, as well as for extending certain deadlines, the institution is to be reorganized, as per the amendment of its Organization and Operating Regulations, until June 30, 2024.

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 2023

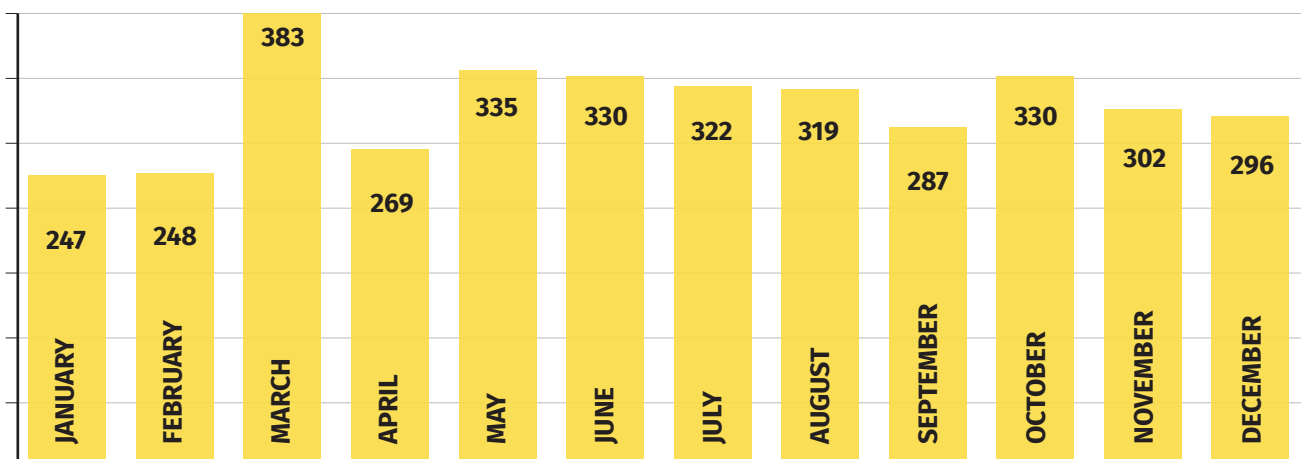
**2.1. EVOLUTION OF COMPLAINTS LODGED
BY BUSSINESS OPERATORS**

The main indicator characterizing the annual activity carried out by the National Council for Solving Complaints (N.C.S.C.) is the number of complaints filed and lodged by business operators. However, a series of additional, highly relevant indicators are also considered, such as the object and complexity of com-

plaints, their evolution and settlement, the number of decisions issued, as well as the percentage of decisions that have remained final as issued by the institution, after having been appealed at the competent Court of Appeal at the contracting party's headquarters.

The number of complaints (files) lodged by business operators and registered with N.C.S.C. between 1st of January – 31st of December 2023 was 3 668.

Thus, throughout the twelve months of the previous year, the number of complaints filed by business operators and registered with N.C.S.C. has had the following evolution:

THE TREND OF THE COMPLAINTS LODGED BY THE BUSSINESS OPERATORS WITH N.C.S.C. IN 2023

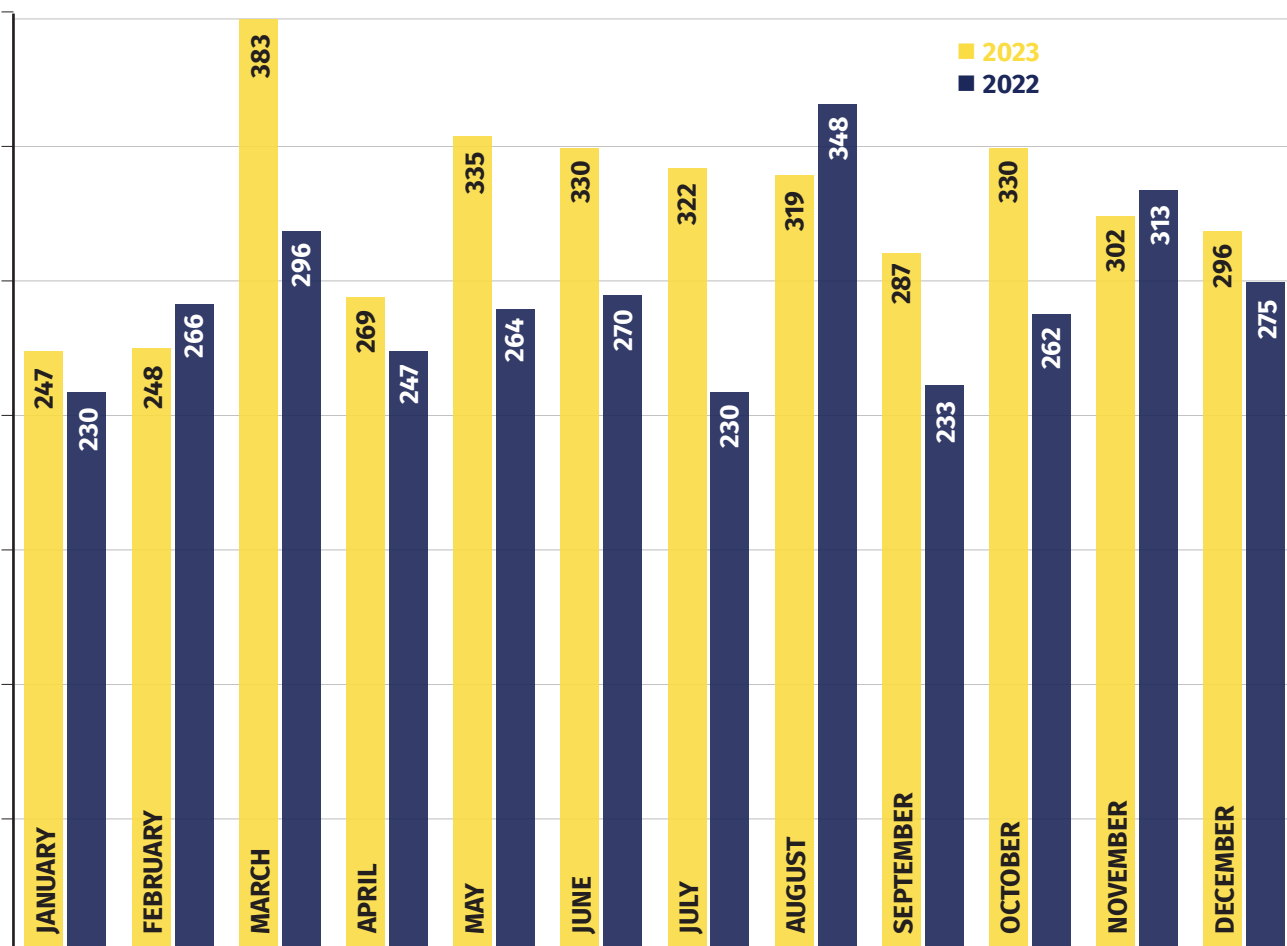


Comparing the evolution of the number of complaints lodged by business operators and registered at N.C.S.C. throughout years 2022 and 2023, respectively, we note a significant increase in the

number of complaints, in both semesters of 2023, compared to the same periods of the previous year, and throughout the entire year.

Thus, comparing the yearly evolution of the number of complaints filed and lodged with the Council by business operators in 2023 and 2022, it is noted that last year presented a 13.42% increase compared to the previous year (+434 complaints).

THE TREND OF THE COMPLAINTS LODGED BY THE BUSSINESS OPERATORS WITH N.C.S.C. IN THE PERIOD 2022-2023



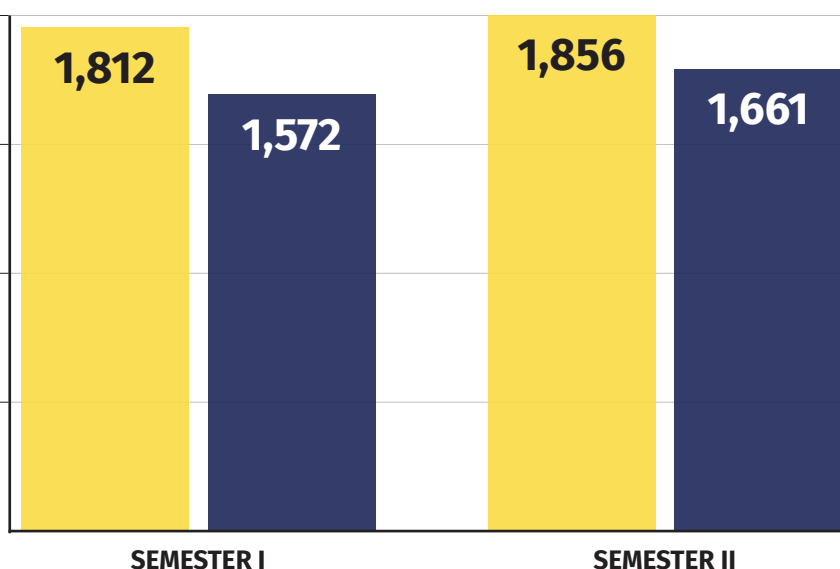


Analyzing the evolution of complaints lodged with the Council in both semesters of 2023, we can note an increase in both semesters, compared with the similar periods of the previous year. Thus, compared with the similar period of the previous year, in the first semester of 2023 the number of complaints lodged with the Council saw an increase of 15.27% (+240 complaints), while for the second semester the increase was of 11.74% (195 complaints).

As can be noticed, despite the fact business operators had the legal obligation, when lodging a complaint, to establish a bail, the amount of which is calculated based on the estimated value of the public procurement and the procedural stage of awarding during which the complaint is lodged, this did not represent a barrier in the increasing of complaints lodged. This is explained by the fact that the instrument referred to as “bail”, as per Law no. 101/2016, has failed to prove useful, given the fact that most contracting authorities refused to request the Courts of Law, within 30 days from the date on which the decisions of the

THE SEMESTRIAL TREND OF THE COMPLAINTS LODGED BY BUSSINESS OPERATORS WITH N.C.S.C. IN THE PERIOD 2022-2023

■ 2023 ■ 2022



Council were deemed final, to dispute the existence of a damage caused by a business operator that has filed a complaint and force them to pay the compensation for the damages incurred as a result of delaying the award procedures. Thus, in most files, upon the request of business operators to return the bails, most contracting authorities have expressly informed to the Council that they have not incurred any damage resulting from the complaint(s) filed by the various business operators during a public procurement procedure and have not lodged actions with the competent courts to recover any damages incurred. The result? The purpose of establishing the bail was only partially achieved by the legislator during 2023, meaning that the legal provisions did not deter the business operators from notifying the Council, being aware of the tendency of the contracting authorities to hesitate in acting firmly to prevent the abusive filing of complaints, or the occurrence of damages arising from the filing of complaints.

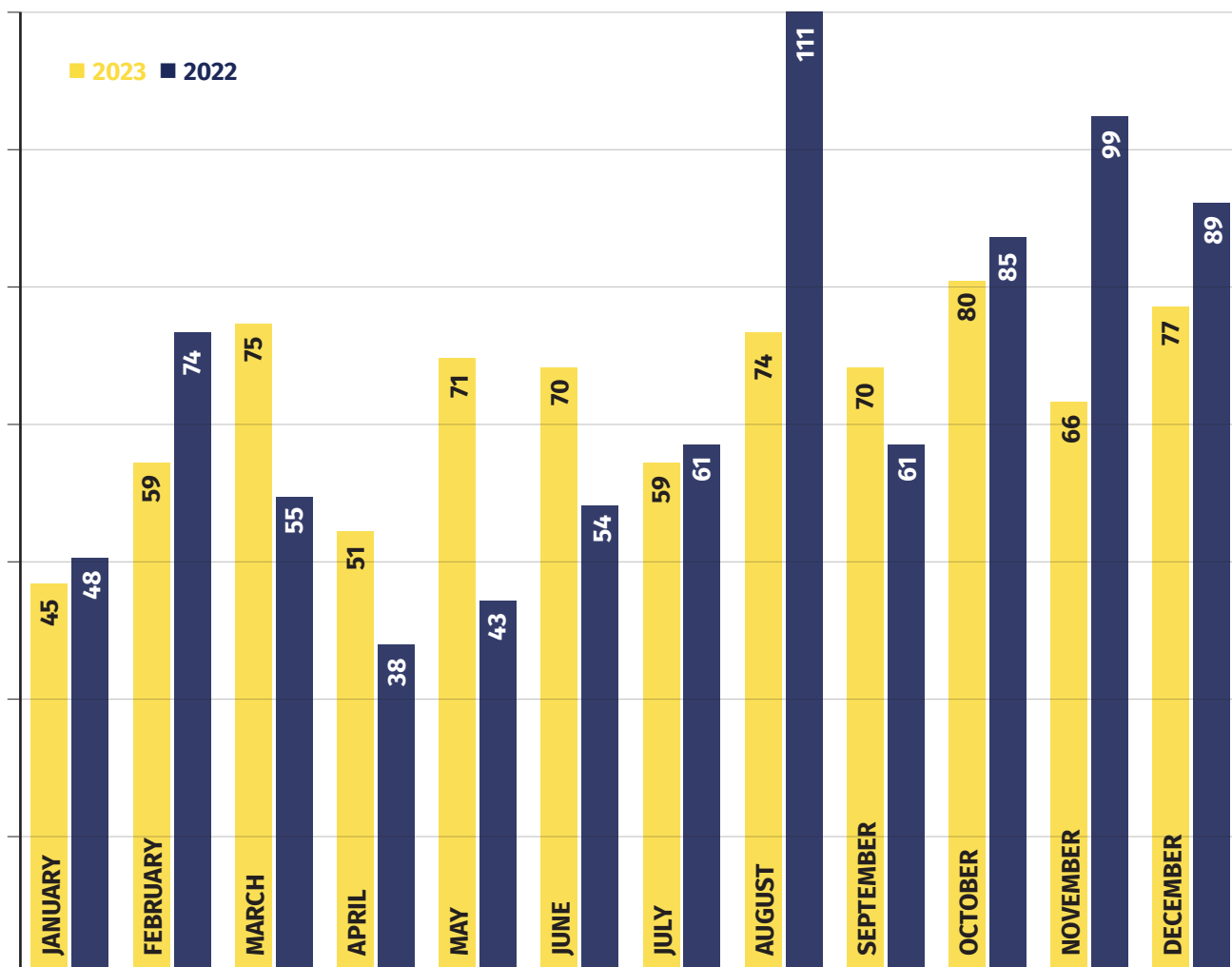
It must be noted that during 2023, in compliance with art. 611, para. (8) of Law no. 101/2016, including subsequent amendments and additions, a total of 75 bails amounting to 883,644,66 RON for which restitution within a period of three years from the date at which the bail could be requested was not requested, were transferred by the N.C.S.C. to the National Agency for Tax Administration (A.N.A.F.), thus becoming revenue to the state budget. In this context we note that since the introduction of the obligation of business operators lodging complaints to establish a bail and until the end of 2023, N.C.S.C. transferred to A.N.A.F. a number of 227 bails in a total amount of RON 3,578,116.24 lei and EUR 500 for which restitution within a period of three years from the date at which the bail could be requested was not requested.

On the topic of the large number of complaints lodged with the Council during 2023, it must be mentioned that this was also due to the implementation of certain major projects funded

through the “Anghel Saligny” National Investment Program coordinated by the Ministry of Development, Public Works and Administration, as well as through the National Recovery and Resilience Program (PNRR).

With regard to the complaints lodged with the N.C.S.C. by business operators against the award documentation, official data show that 2023 registered an inconsequential decrease compared to the previous year, i.e. only 2.57% (21 complaints).

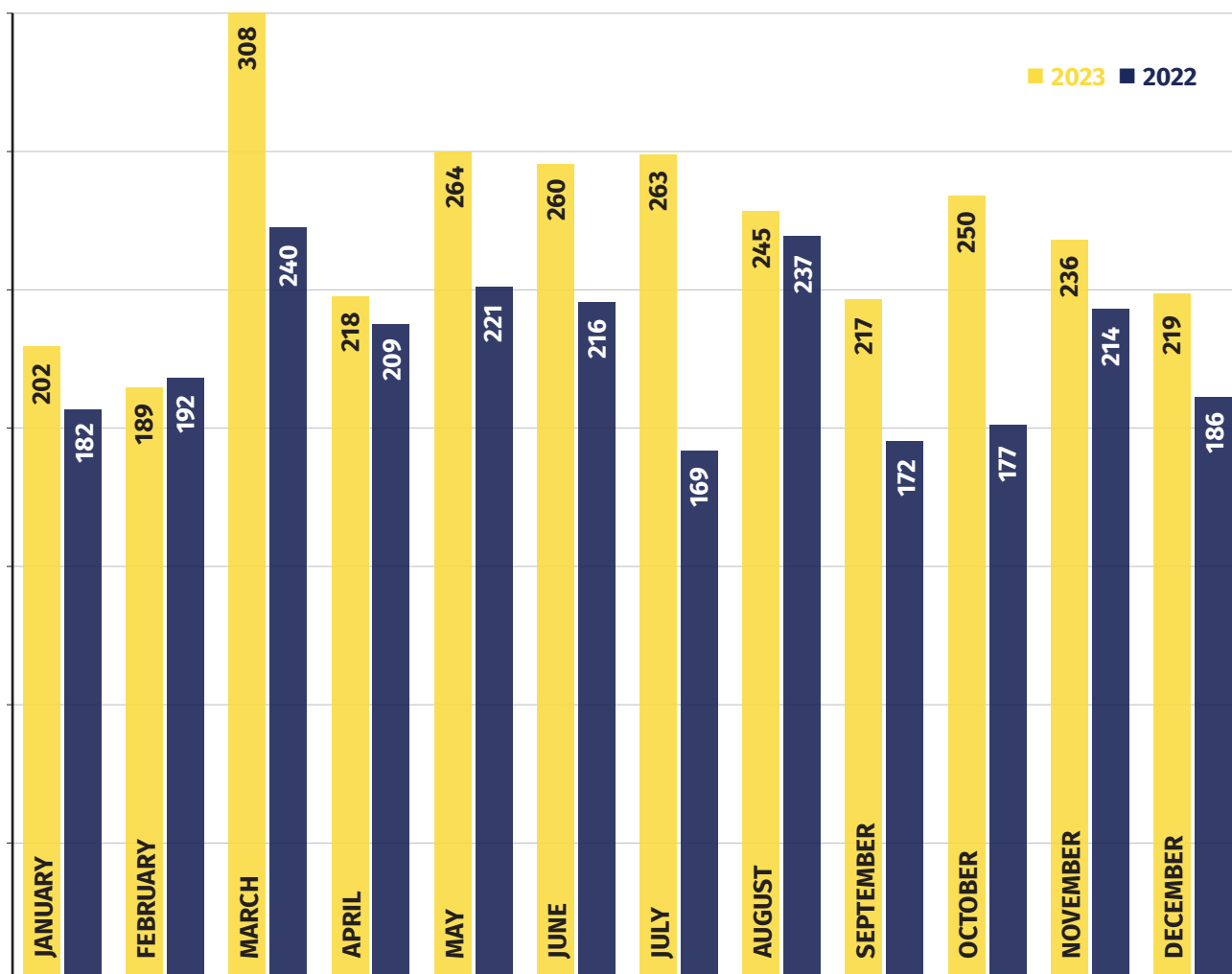
THE TREND OF COMPLAINTS LODGED BY BUSSINESS OPERATORS AGAINST THE TENDER DOCUMENTATION IN THE PERIOD 2022-2023





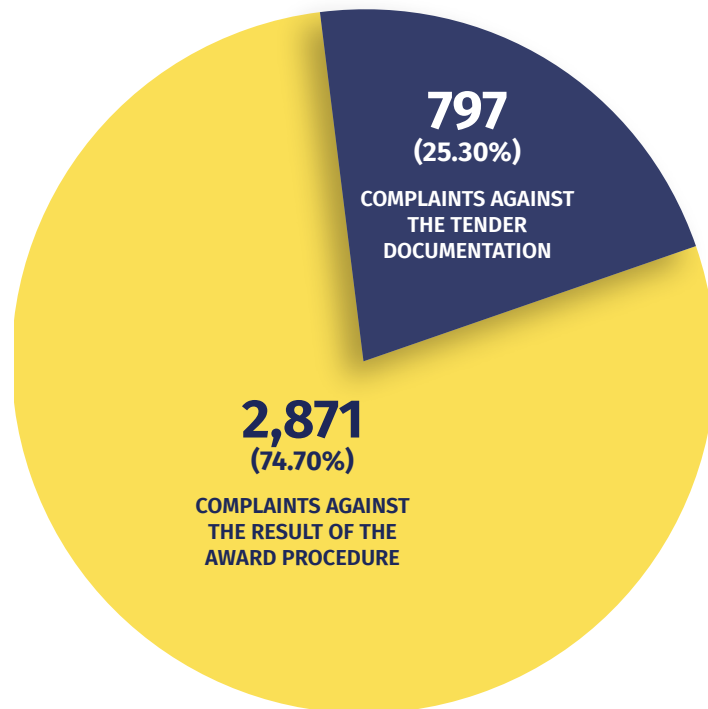
Regarding the complaints lodged by the business operators with the Council against the result of the procedure, in 2023 their number increased compared to the previous year by 18.88% (+456 complaints).

THE TREND OF THE COMPLAINTS LODGED BY BUSSINESS OPERATORS AGAINST THE RESULT OF THE AWARD PROCEDURE IN THE PERIOD 2022-2023



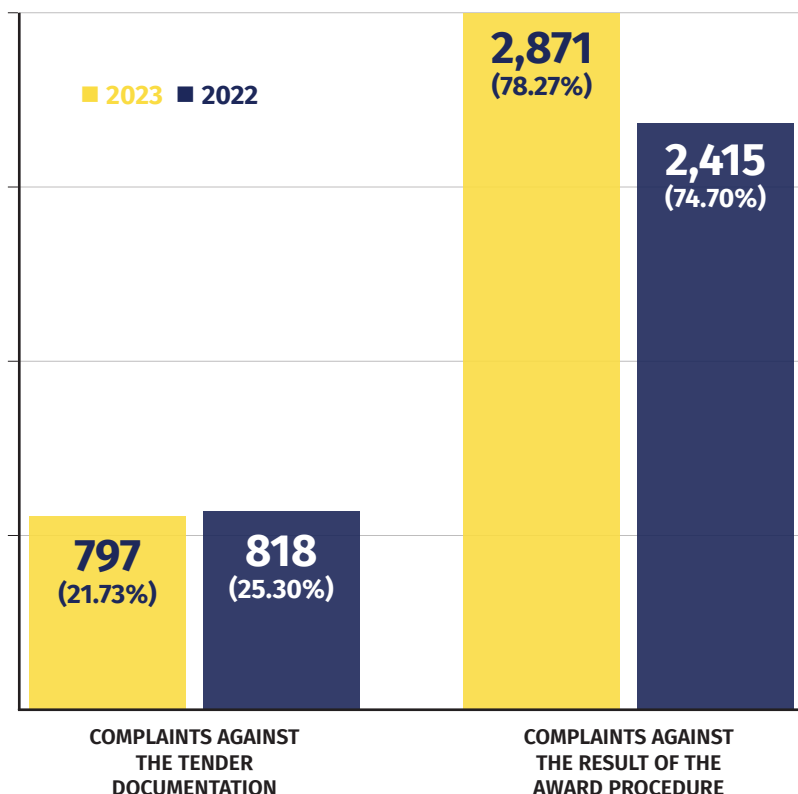
A general analysis shows that out of the 3,668 complaints lodged with the Council, 797 (21.73%) were lodged against the award documentation, while the remaining 2871 (78.27%) were lodged against the result of the award procedure.

THE SITUATION OF THE COMPLAINTS LODGED AGAINST THE TENDER DOCUMENTATION AND THE RESULT OF THE AWARD PROCEDURE IN THE YEAR 2023

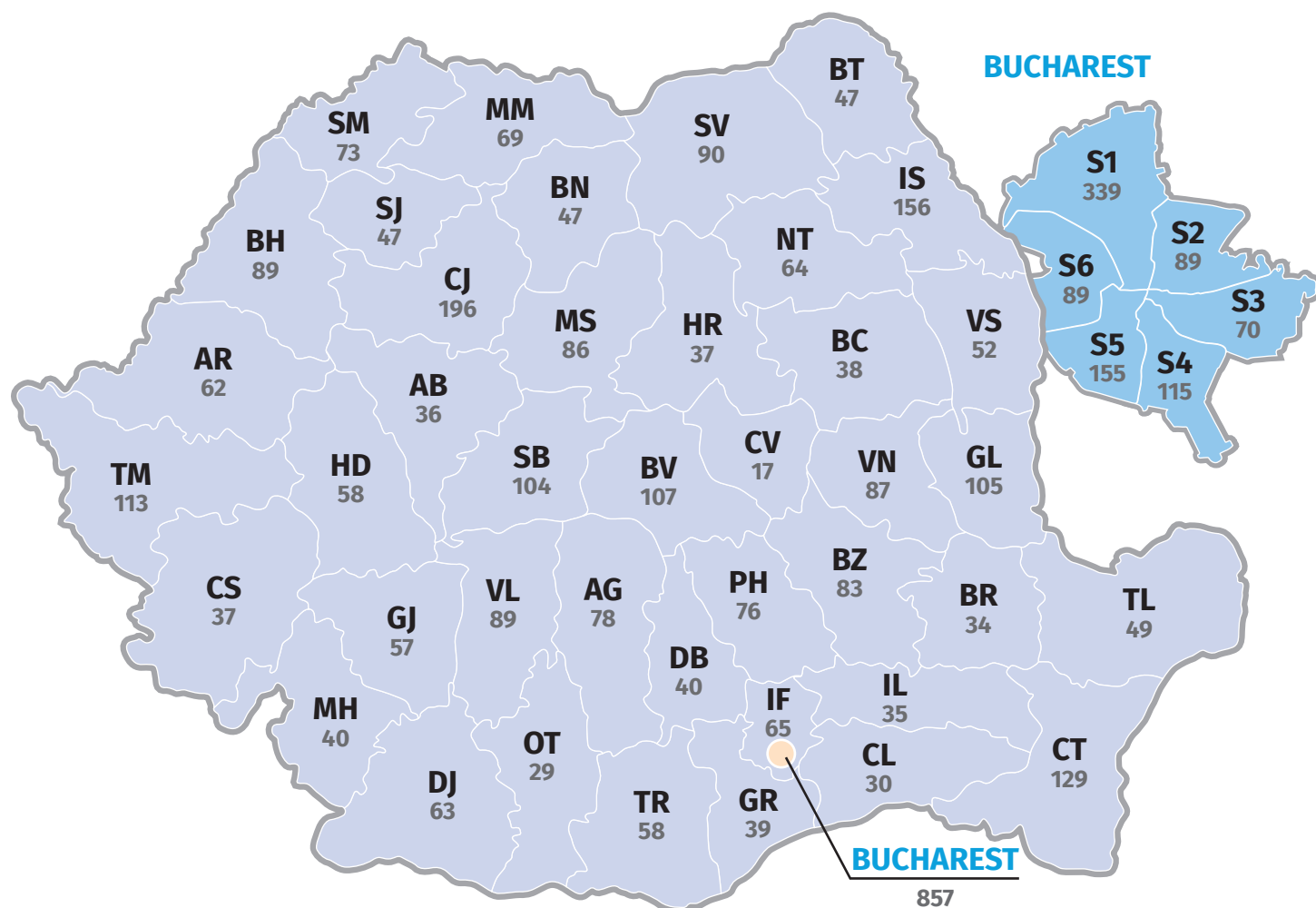


Official statistics also indicate that in 2023 the number of complaints lodged against the award documentation and against the result of the award procedure, respectively, were maintained at the values of previous years (above 20% against the award documentation and above 70% against the result of the award procedure), any differences recorded being insignificant.

THE PERCENTAGE OF THE COMPLAINTS LODGED BY BUSINESS OPERATORS AGAINST THE TENDER DOCUMENTATION AND THE RESULT OF THE AWARD PROCEDURE IN THE PERIOD 2022-2023



In terms of their distribution by administrative-territorial units (U.A.T.s), the evolution of complaints lodged by business operators in 2023 was as follows:



It must be noted that, just as in 2021 and 2022, at the end of 2023 the first four administrative-territorial units in terms of number of complaints lodged with the Council were Bucharest, Cluj, Iași and Constanța.

Official statistics analyzing the situation in Bucharest show that out of the 857 complaints lodged with the N.C.S.C., 339 (39.56%) were lodged from Sector 1, the administrative-territorial unit where many contracting authorities (City Hall, Government, ministries, government agencies, medical and educational units, companies with state capital, etc.) are headquartered.

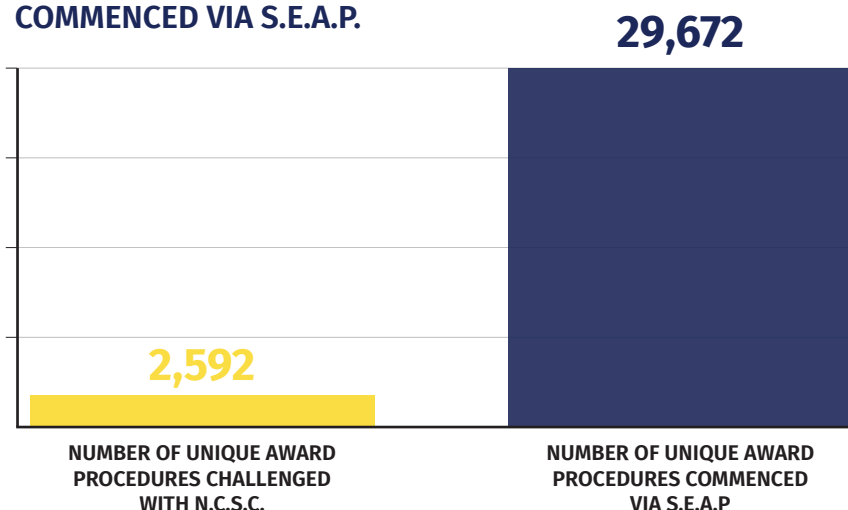
As is well known, the Council's activity in the field of public procurement is inextricably linked to the number of procedures initiated in the Electronic Public Procurement System (S.E.A.P.).

According to the official

data supplied by the Authority for the Digitalization of Romania, in 2023, a total number of 29,672 unique public procurement procedures with an estimated value of RON 667,986,720,386 (equivalent to EUR 135,042,296,651.37¹⁵) were initiated through the Electronic Public Procurement System (S.E.A.P.).

Comparing the number of unique award procedures challenged with the Council in 2023 with the number of unique award procedures initiated in S.E.A.P., it can be ascertained that out of the 29,672 procedures initiated in S.E.A.P., a total of 2,592, i.e. 9.95%, were challenged with N.C.S.C.

THE SITUATION OF THE AWARD PROCEDURES CHALLENGED WITH N.C.S.C. IN THE YEAR 2023 RELATED TO THE TOTAL NUMBER OF PROCEDURES COMMENCED VIA S.E.A.P.



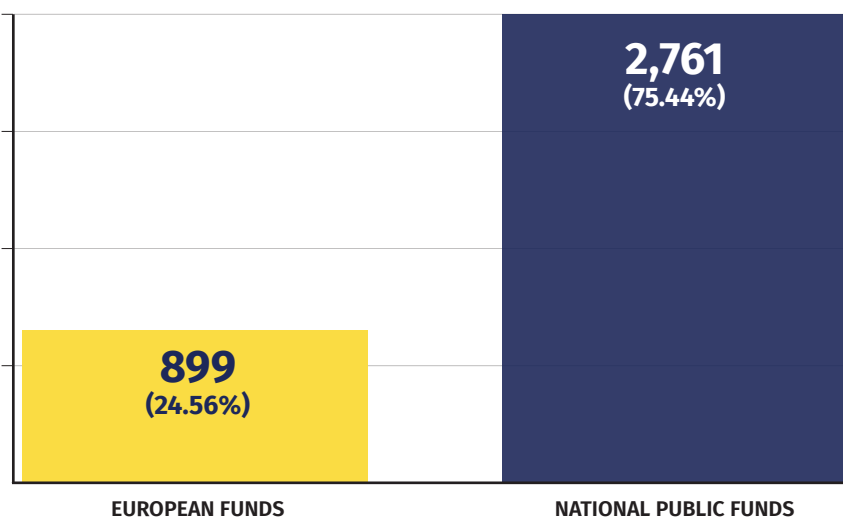
The fact that nearly 10% of the unique procedures initiated in S.E.A.P. were challenged with the Council must be interpreted as a red flag for the contracting authorities, especially considering the fact that in 2022 this percentage was only 7.82%, while the number of unique procedures initiated in S.E.A.P. was greater (32,200), and the number of unique procedures challenged with the Council was inferior (2,345).

In relation to the funding source for the award procedures commenced for closing public procurement

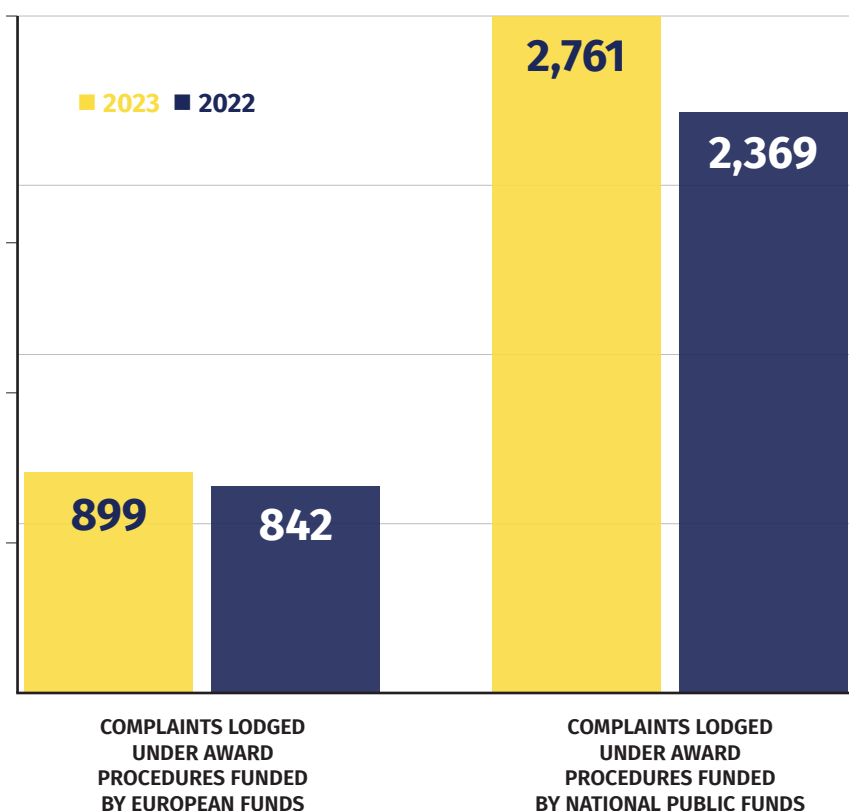
15. average annual exchange rate published by the N.B.R. for 2023 - 4.9465 RON/EURO

contracts, it is observed that in the year 2023 a number of 899 complaints lodged with the N.C.S.C. were filed against award procedures funded by European funds (24.56% 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 2,761 (75.44% of the total number of complaints). Noteworthy is the fact that eight complaints lodged with the Council did not involve procedures funded from European or national funds.

SITUATION OF COMPLAINTS LODGED IN 2023 BY BUSINESS OPERATORS AT C.N.S.C ACCORDING TO THE SOURCE OF FUNDING OF THE AWARD PROCEDURES



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 2022-2023

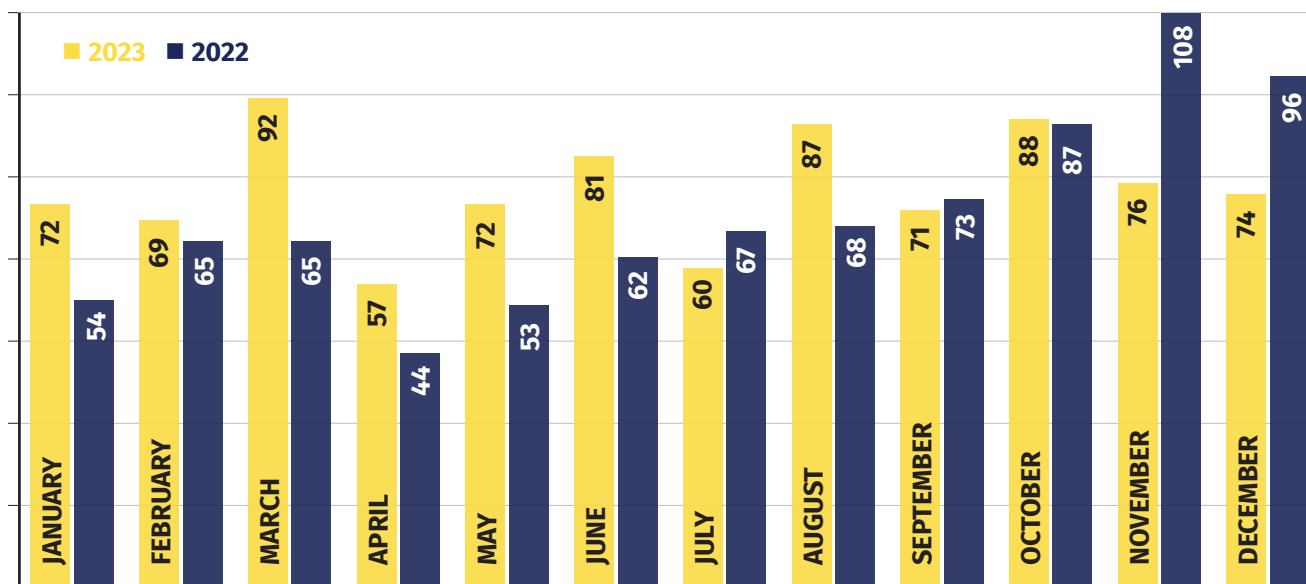


Compared to the previous year, it can be noted that in 2023 there was an inconsequential increase in the number of complaints lodged against award procedures funded by European funds (+9.1%, 50 complaints); on the other hand, an important increase was noted in the number of complaints lodged against award procedures funded by national public funds (+16.55%, i.e. 392 complaints).

Comparing the total number of the award procedures funded by European funds initiated in 2023 in S.E.A.P. (8,313 procedures) and the total number of complaints lodged with N.C.S.C. against the procedures funded by the respective funds (899 complaints), it can be ascertained that a percentage of 10.81% of the procedures funded by European funds initiated via the Electronic Public Procurements System have been challenged with the Council by business operators.

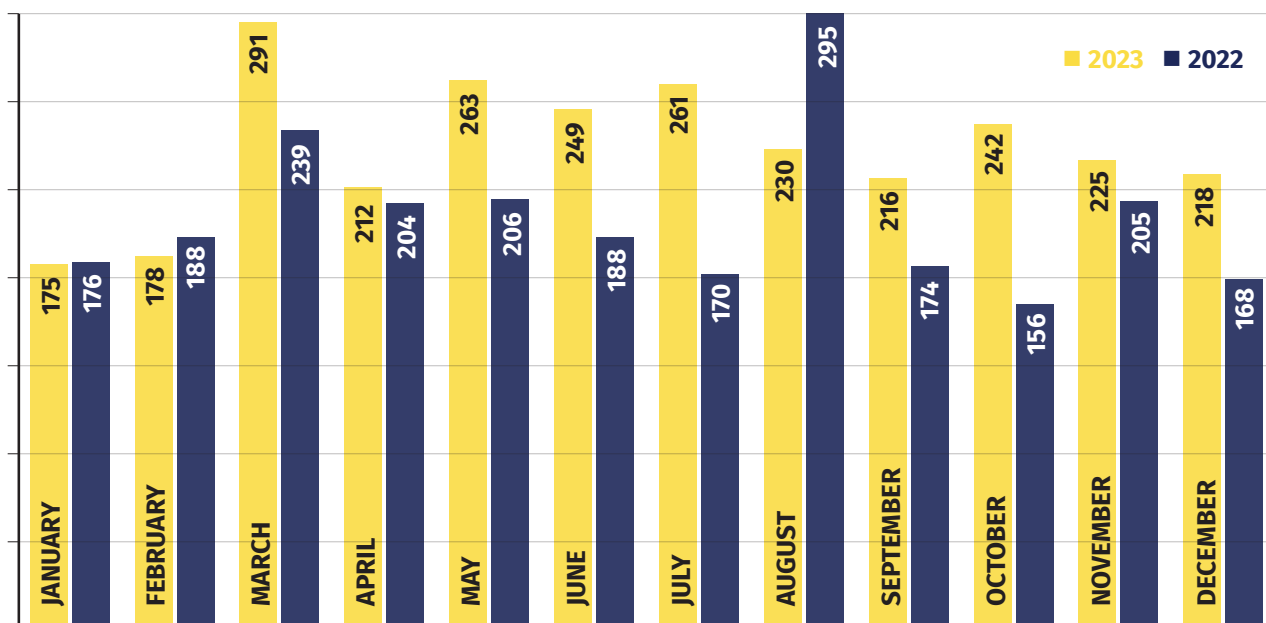
To draw an image of the complaints submitted to N.C.S.C. under the procedures for awarding public procurement contracts funded by European funds between 2022 - 2023, we have prepared a chart highlighting their monthly evolution in the mentioned period:

THE TREND OF COMPLAINTS LODGED BY BUSINESS OPERATORS WITH N.C.S.C. UNDER THE AWARD PROCEDURES FUNDED BY EUROPEAN FUNDS IN THE PERIOD 2022-2023



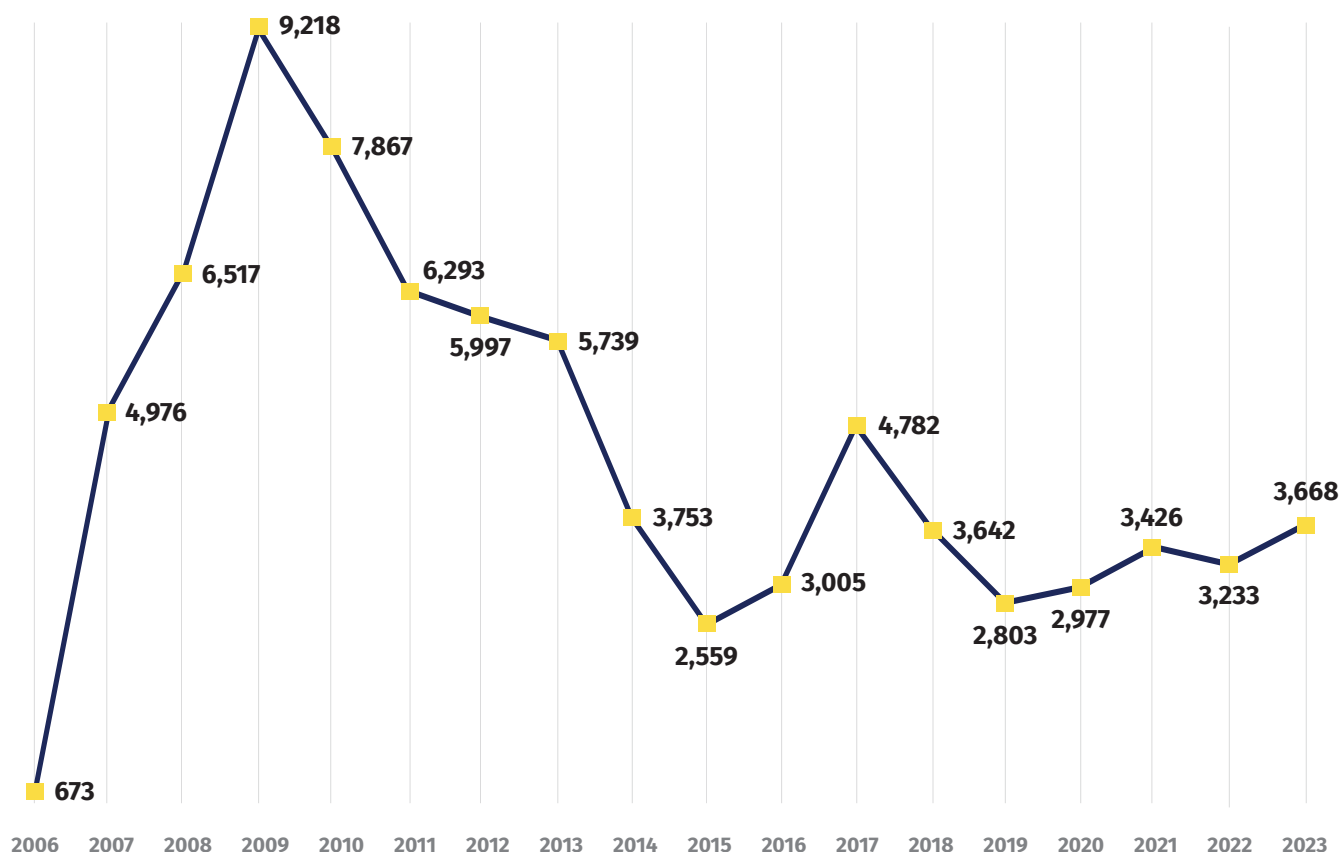
Similarly, the number of the complaints lodged with N.C.S.C. under the procedures for awarding public procurement contracts funded by national public funds (local/state budget) between 2022-2023 has evolved as follows:

THE TREND OF THE COMPLAINTS LODGED WITH N.C.S.C. BY BUSINESS OPERATORS IN THE PERIOD 2022-2023 UNDER THE AWARD PROCEDURES FUNDED BY NATIONAL PUBLIC FUNDS



Statistically, from its establishment and until the 31st of December 2023, 81,128 complaints were lodged by business operators with N.C.S.C., as illustrated by the chart below.

THE TREND OF THE COMPLAINTS LODGED BY BUSSINESS OPERATORS WITH N.C.S.C. IN THE PERIOD 2006-2023



By analyzing 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, and the financial capacity of the business operators to meet the legislative provisions concerning the possibility of challenging the procedures.

Referring strictly to the year 2023, when the number of complaints lodged has reached and even exceeded that of complaints formulated in 2018 (3,642 complaints), it can be inferred that the contracting public authorities show a lack of professional in the field of public procurement, which has led to the inadequate management of a larger number of award procedures. This should trigger a red flag in view of the implementation of the projects included in the National Recovery and Resilience Plan (PNRR).

Furthermore, the Council draws attention to the fact that throughout 2023 there have been numerous cases of public procurement procedures being effectively blocked by the contracting authorities themselves – despite being the main entities directly interested (at least declaratively) in the implementation of projects funded by national public or European funds. Specifically, there were cases where the contracting authorities refused to implement in a correct and efficient manner the decisions ruled by the

Council, resorting to their unjustified appeal, which has inexplicably and unnecessarily prolonged the completion of investment projects funded by European or national funds.

Thus, it was ascertained that in 2023, the number of complaints lodged with the superior court by the contracting authorities that refused to apply the decisions issued by N.C.S.C., within which the complaints formulated by business operators were admitted and the reevaluation of the offers was ordered, was 146, i.e. a 10.6% increase compared to 2022, and a 21.67% increase compared to 2021, respectively.

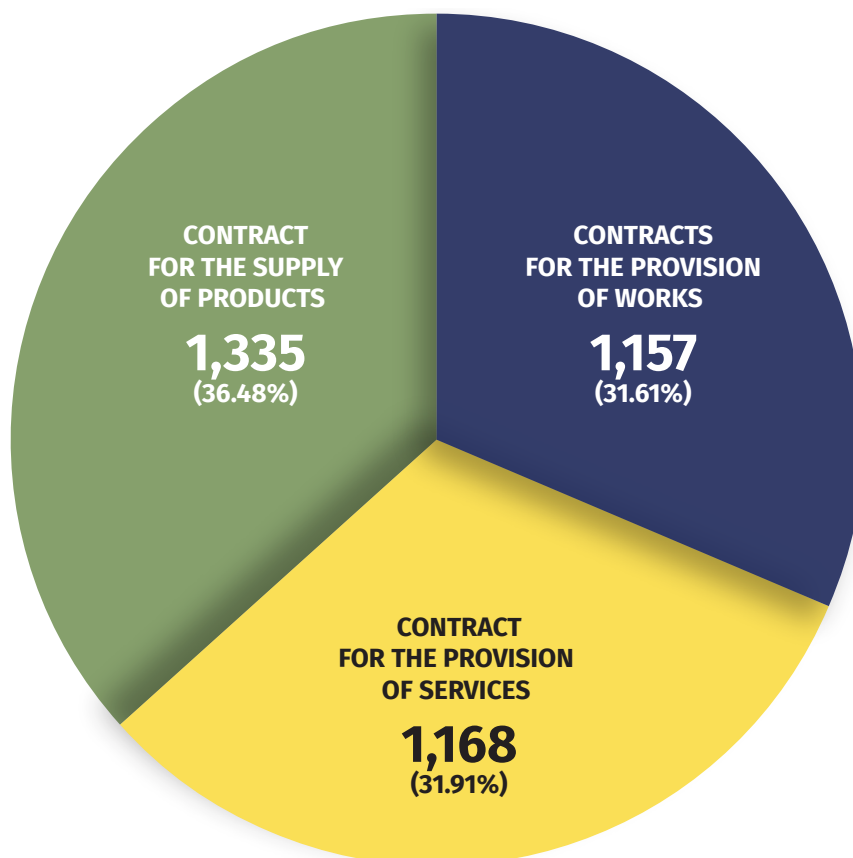
Regarding the complaints lodged by business operators, a central element in their analysis is the object of the public procurement contract. The official statistical data compiled within the institution show that in 2023 the complaints filed and lodged with the Council have targeted:

- procedures for awarding public procurement contracts for the supply of products – 1,335 complaints (36.48%);
- procedures for awarding public procurement contracts for the provision of services – 1,168 complaints (31.91%);
- procedures for awarding public procurement contracts for the provision of works – 1,157 complaints (31.61%).

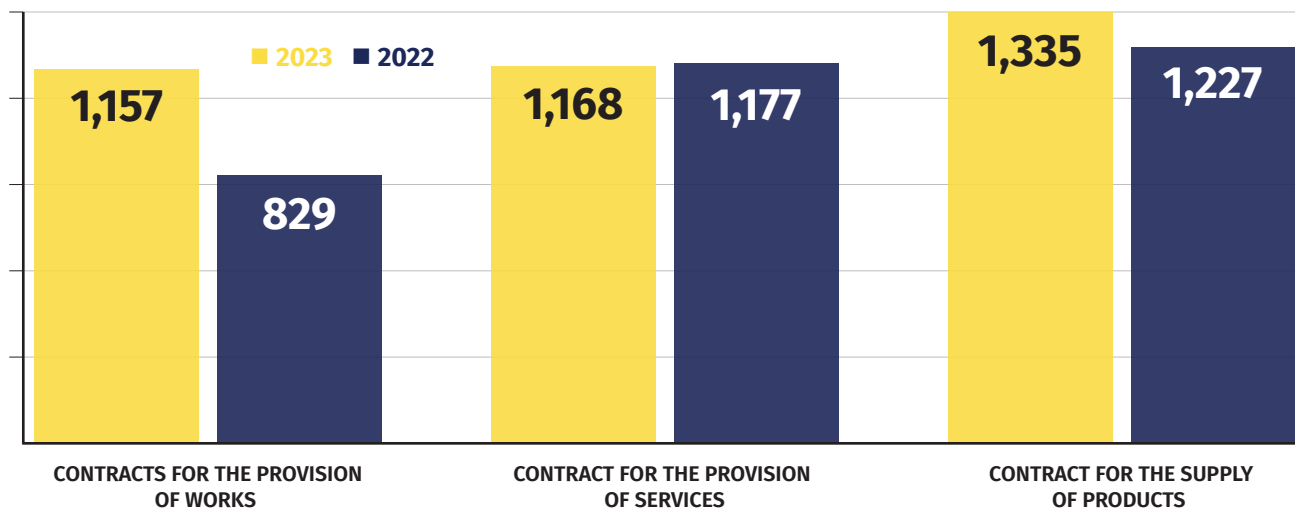
Analyzing the evolution of the complaints submitted between 2022 – 2023 according to the object of the public procurement

contract, it can be noticed that, in comparison to the previous year, a 39.56% increase was recorded in the number of complaints lodged under procedures for awarding public procurement contracts for the provision of works, and an 8.8% increase in the number of complaints lodged under procedures for awarding public procurement contracts for the supply of products. Furthermore, it must be noted that, during the mentioned period, the number of complaints lodged under procedures for awarding public procurement contracts for the provision of services has recorded an inconsequential decrease of 0.77%, practically maintaining a value equal to that of the previous year.

THE SITUATION OF COMPLAINTS LODGED BY BUSSINESS OPERATORS WITH N.C.S.C. IN THE YEAR 2023, RELATED TO THE CONTRACT TYPE



THE TREND OF THE COMPLAINTS LODGED BY BUSINESS OPERATORS WITH N.C.S.C. RELATED TO THE CONTRACT TYPE IN THE PERIOD 2022-2023



With regard to the workload of each chamber for solving complaints in 2023, the official data shows that each of the Council's 11 chambers was randomly (by electronic means) assigned an average of 333 complaints (files), i.e. a monthly average of approximately 28 complaints (files)/chamber. Comparing the data present above with those of 2022, when each chamber was assigned a number of 294 files/year, it can be noticed that the average yearly workload of each chamber has increased during 2023, compared to the previous year, by 13.25% (+39 complaints files).

However, 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 issuing resolutions, managing the securities submitted by business operators (depositing and refunding of bails established for each challenged public procurement procedure), as well as hundreds of thousands of pages of correspondence with business operators, contracting authorities and Courts of Appeal.

Thus, in 2023, aside from issuing decisions, the 11 chambers for solving complaints have also issued a total of 3,727 resolutions, with a 10.72% (+361) increase compared to the previous year.

Also on the topic of the work volume carried out by the Council's chambers for solving complaints throughout 2023, it is noteworthy that, based on Article 17 of Law 101/2016, applications of voluntary intervention in dispute were formulated within 1,143 complaints by the business operators interested to participate/participating in the award procedure, which has increased the complexity level of the respective files and had led to the chambers having to perform supplementary procedures.

In order to provide a perspective on the work volume existent at the level of the Council and on the complexity of the complaints (files) pending before the institution in 2023, we must underline that most challenged procedures had multiple complainants and

interveners, regarding both the award documentation and the result of the procedure, for which reason, in relation to certain award procedures challenged by business operators the Council was forced to issue more than one decision, along with dozens 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. A notable aspect is that the terms for settling the complaints lodged by business operators with N.C.S.C. were among the shortest in the European Union, Romania ranking higher than states with similar institutions, such as Germany, Austria, or Latvia, in this regard.

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

According to the legislation applicable in the field of public procurement, each complaint filed by a business operator under a public procurement procedure is individualized, thus becoming a litigation, the subject matter of which being the parties' claims submitted for settlement (i.e. that which public procurement settlement councilors are required to verify, assess, ascertain and settle). 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. Thus, the subject of the complaint may be either the total or partial cancellation of a deed of the contracting authority or compelling the contracting authority¹⁶ to issue a document.

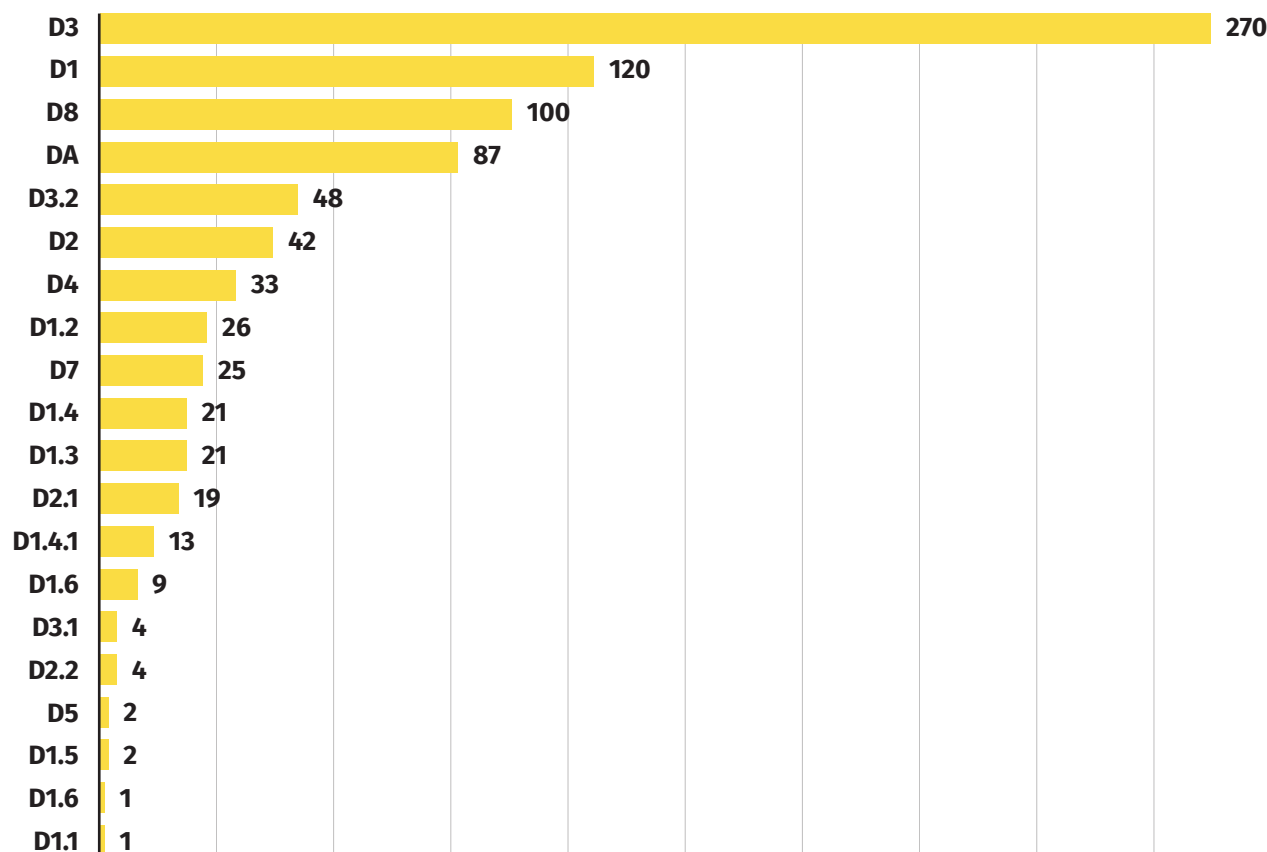
In 2023, after analyzing the 3,668 complaints lodged with the Council, it was ascertained that 797 of them concerned the award documentation, while 2,871 concerned the result of the procedure.

With regard to the 797 complaints concerning the award documentation, it was ascertained that the most common criticisms invoked in relation to the requirements imposed by the contracting authorities were the following:

CODE	CRITICISM	NO. OF CRITICISMS
D1.1	restrictive requirements on the qualification/selection criteria related to the candidate's or the bidder's personal status	1
D1.6	restrictive requirements on the qualification/selection criteria related to environment protection standards	1
D1.5	restrictive requirements on the qualification/selection criteria related to quality assurance standards	2
D5	form of establishing the bid bond	2
D2.2	other requirements related to the award criterion	4
D3.1	missing mention "or equivalent", in such cases as provided by the law in force	4
D6	infliction of unfair or excessive contractual provisions	9
D1.4.1	restrictive requirements on the qualification/selection criteria related to similar experience	13
D2.1	irrelevant factors of assessment, missing calculation algorithm, with non-transparent or subjective calculation algorithm	19
D1.3	restrictive requirements on the qualification/selection criteria related to economic and financial condition	21
D1.4	restrictive requirements on the qualification/selection criteria related to technical and/or professional capacity	21
D7	failure to split the procurement by lots, in case of similar products/ works	25
D1.2	restrictive requirements on the qualification/selection criteria related to the ability to pursue professional activity	26
D4	missing clear, complete, unambiguous answer from the contracting authority on the requests for clarification of the tender documentation's provisions	33
D2	requirements on the award criterion	42
D3.2	other restrictive requirements in terms of technical specifications	48
DA	other criticism to the documentation	87
D8	other reasons related to the tender documentation	100
D1	restrictive requirements on the qualification criteria	120
D3	restrictive requirements in terms of technical specifications	270

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 particular diversity of the cases with which the Council is invested, we deem it necessary to exemplify by presenting some decisions of the settlement chambers in parallel with the decisions of the courts that were notified in regard to the exercise of their legality control.

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

1. N.C.S.C. DECISION

Failure to split the component products of the subject of the framework agreement into lots and certain technical specifications in the tender book.

One of the challenged aspects is related to the failure to split the component products of the subject of the framework agreement into lots. The arguments invoked by the challenging party in support of the

criticism submitted are based on the following aspects:

- ✓ the products liquefied oxygen and compressed oxygen, despite being identical in fact (oxygen), are required in different forms and do not have shared costs;

- ✓ furthermore, as provided in art. 9 para. (3) letter f) of the methodological norms approved by the Government Decision no. 395/2016, the decision of the contracting authority on this matter – of not splitting the products in lots – is justified based on the contracting strategy;

- ✓ in the present case, no such justification was provided in support of not splitting the products in lots.

Thus, the challenging party ascertained that it is necessary to split the award procedure for the provision of oxygen in at least two distinct lots, namely: the purchase of medical liquid oxygen and the purchase of gaseous medicinal oxygen and carbon

dioxide in cylinders, to ensure the observance of the applicable legal provisions and general principles on the awarding of public procurement contracts.

The fact that all products are included in the same CPV code and share the same purpose /use does not prove that they should be merged in a single lot.

In the practice of the courts of law and the Council, the similarity and interdependence of the products, and not a specific purpose, such as that indicated by the contracting authority, were considered when making decisions to oblige the contracting authority to split the products into lots.

The Council acknowledges that, although, according to the claims of the contracting authority, the 2 categories of oxygen (liquid medical oxygen and gaseous medical oxygen and carbon dioxide in cylinders), have the same scope and are used for the same purpose, they are independent product categories, with distinct marketing sectors, and can be used independently from each other.

Consequently, the above-mentioned justifications offered by the contracting authority are not deemed by the Council as being relevant and in accordance with the provisions of art. 3 letter dd) and art. 141 para. (2) of Law no. 98/2016, because the products in question, under the given circumstances, should be subject to separate tenders, according to the nature and type of the products, context in which multiple interested business

operators may participate in the procedure, thus using the assigned funds more efficiently.

The Council applied the same approach when issuing Decisions no. 627/2020, 1406/2023, 1900/2023, 2178/2023, 2138/2023 and 2260/2023.

As a consequence, under these circumstances and by correlation with all the previous considerations, the Council deems well-founded the claims invoked by the challenging party, S SRL, according to which conditions are met for splitting the subject matter of the framework agreement into at least two different lots, for two categories of oxygen products, namely the purchase of liquid medical oxygen and the purchase of gaseous medical oxygen and carbon dioxide in cylinders.

As was previously mentioned, the challenging party also brought claims against certain technical specifications in the tender book. Thus, a first criticism refers to the fact that the 8-liter capacity is uncommon, and only one business operators holds the necessary Marketing Authorization ("APP") for it. The challenging party also made mention of the fact that, by analyzing the Nomenclature provided by the National Agency of Medicines and Medical Devices ("ANIVI DM"), it can be ascertained that Linde is the sole business operator offering cylinders of this capacity.

In relation to the above, the Council ascertains that it is necessary for the purchasing party to carry out a detail analysis of the challenged specifications of different manufacturers and establish them in such a way that does not limit the participation of business operators in the procedure, but also covers its needs.





2. N.C.S.C. DECISION

The challenging party requests that the contracting authority be ordered to remedy the award documentation, to extend the time limit for the submission of tenders accordingly, and to suspend the award procedure until a solution is awarded on the main issue of the matter challenged.

From the analysis of the parties' claims and of the documents on the case file, the Council notes the following:

As contracting authority, ... has initiated an award procedure, by open tender, the subject matter of the supply contract being electric minibus for passenger transport – 1 pc including 1 slow charging station and 1 fast charging station”, by publishing in SEAP the participation notice no. .../2023, together with the related award documentation.

The first issue covered by the appeal submitted by P SRL is the requirement for similar experience and more specifically the manner in which said similar experience is defined, as provided in item 3. III.1.3.a) Technical and/or professional capacity in the data sheet: “2. By supply of similar products, the contracting authority means: the supply of public transport vehicles with electric traction and braking with similar autonomy and/or similar and/or superior products in terms of complexity and/or purpose.” The applicant requests that this requirement be amended to the effect that similar supplies are to be considered as supplies of ‘passenger

minibuses’ and not exclusively ‘public transport vehicles with electric traction and braking’.

In its opinion, the contracting authority did not justify in any way its decision to deem as similar experience only the provision of electric public transport vehicles and to exclude the supply of other means of public transport.

The Council thus notes that the Contracting Strategy did not provide any justification for the fact that only the previous deliveries of electric vehicles are deemed similar experience.

Contrary to the claims of the contracting authority, the Council considers that, in fact, identical experience is required, not similar experience.

In fact, the only argument in the opinion supporting the claim that similar and not identical experience is required is

that the requirement also covers supplies 'similar or superior in terms of complexity and purpose'.

Considering the history of such procedures carried out during 2023 in Romania, the Council notes the exclusive participation, as tenderers, of suppliers (dealers) and not of manufacturers.

Further considering the nature of the supply contract, the necessary experience refers to the supply of vehicles, and not the manufacture thereof.

The differences between the supply of an electric minibus and the supply of a minibus with a thermal engine are minimal, being obvious that a party that can/knows how to supply a classic vehicle (operating on liquid fuel) can/knows how to supply an electric vehicle.

In fact, the first suppliers of electric vehicles were obviously the suppliers of classic vehicles.

Even today, in single-brand dealerships, salespeople do not exclusively sell electric vehicles or classic vehicles, but both types of vehicles.

Considering the above reasons, the Council accepts the claim in the complaint and orders the rewording of the definition of similar experience as follows: 'By supplies of similar products, the contracting authority means: the supply of public transport vehicles'.

Given that the requirement for similar experience is a qualification requirement, being also provided for in the contract notice, the correction must be implemented through the publication of an erratum to this effect.

3. N.C.S.C. DECISION

Complaint regarding the manner in which the contracting authority has established the estimated value of the procedure and certain requirements of the award documentation.

Examining the parties' claims, the evidence on the case file and the applicable legal provisions, against the criticisms regarding the level of the estimated value, i.e. in the opinion of the challenging party the amount of 2,390,997.24, excluding VAT, indicated for eight months of the contract, is insufficient, given that an





amount of 2,392,198.28 lei is required only for the costs incurred with 20 fixed human guard posts, without profit margin and indirect expenses.

The purchasing party shows that the total estimated value has been established taking into account 20 fixed posts and a position as head of objective, based on:

- ✓ addendum no. .../2022 to contract no. .../ 2022;
- ✓ the national gross minimum wage as per GD no. 1447/2022, with the application of the relevant legal benefits according to the provisions of the Labor Code;
- ✓ introduction of the head of objective according to Decision No. 1760/2022 and the Civil Sentence No. 17/CA/2022.

At the same time, the purchasing party shows that for the head of objective post it had considered a total estimated value of 45,656 lei without VAT, and for monitoring services, the amount of 680 lei without VAT, for the eight-month contractual period (May-December 2023).

From the explanations presented, it is concluded that for the 20 fixed guard posts (with a schedule of 24 hours/day, 12/24 hours/day and 8/24 hours/day), the contracting authority considered the total value of 2,344,661.24 lei, resulting from the elimination from the estimated value indicated in S.E.A.P., of 2,390,997.24 lei, of the two types of costs listed in the previous paragraph.

The Council stresses, in accordance with the challenging party's claims, that the value must take into account all the costs incurred in carrying out this type of contract, the costs imposed by the labor law, tax law, etc., as well as the indirect costs and a profit on the provider's part.

From the addendum no. .../2022 to contract no. .../2022, invoked in its justifications by the contracting authority, results the consideration of an hourly rate of:

- ✓ 22.65 lei/hour for posts with a 24/24 h/day schedule,
- ✓ 21.09 lei/hour for posts with a 12/24 h/day schedule,
- ✓ 20.54 lei/hour for posts with an 8/24 h/day schedule.

By multiplying these rates by the number of hours corresponding to each type of post, as highlighted in the pricing table, form 8.1, p. ... of the procurement file submitted by the contracting authority, namely:

✓ 22.65 lei/hour x 94,080 total hours/8 months = 2,130,912 lei

✓ 21.09 lei/hour x 8,820 total hours/8 months = 186,013.80 lei

✓ 20.54 lei/hour x 1,336 total hours/8 months = 27,441.44 lei

It is confirmed that the corresponding estimated value for 20 fixed guard posts, including posts with a schedule of 24 hours/day, 12/24 hours/day and 8/24 hours/day, is 2,344,367.24 lei.

In the context set out above, the Council will accept the challenging party's claims that the contracting authority has to estimate the value of the contract taking into account all the costs it entails and which the authority itself will subsequently incur through its payments to the provider, and bidders also have to consider the estimated value, as proposing a bid price in excess of it may result in the rejection of the bid.

The value estimated and indicated by the authority is very important in the case of contracts where the bidding margin is extremely low, as is the case for contracts for the purchase of security services, where the main cost is the remuneration of the staff, which the bidders are tempted to rate at the legal minimum, in order to have the highest chance of winning the contract.

The minimum wage provided by the law must be observed by both the contracting authority and the bidders.

Considering the type of posts for which security services must be ensured (24-hour regime, including during the night, days off, public holidays), the following provisions of the Labor Code become applicable:

✓ Art. 125 - (1) Work performed between 22.00-6.00 is considered night work.

(2) The night worker shall represent, as the case may be:

a) the employee that performs night work for at least 3 hours out of his daily working time;

b) the employee that performs night work for at least 30% of his monthly working time.

(4) The normal working time for night workers whose activity is carried out under special or outstanding working conditions shall not exceed 8 hours during any 24-hour period unless the increase of this duration is provided for in the relevant collective labor agreement and only if such provision does not conflict with the express provisions set out in the collective labor agreement concluded at a higher level.

(5) In the situation referred to in paragraph (4), the employer is obliged to grant equivalent compensatory rest periods or monetary compensation for any night hours worked in exceedance of the 8-hour limit.

✓ Art. 126 - Night workers benefit from:

a) either a work schedule reduced by one hour compared to the normal duration of the working day, for days on which they perform at least 3 hours of night work, without this leading to a decrease in their basic salary;

b) or a bonus for the work performed during the night amounting to 25% of the basic



salary, if the time worked in such conditions represents at least 3 hours of the normal working time.

✓ Art. 137 - (1) The weekly rest period shall be taken in two consecutive days, usually Saturday and Sunday

(2) Should the rest during Saturday and Sunday be detrimental to the public interest or the normal course of the activity, the weekly rest period may also be taken in other days laid down in the applicable collective labor agreement or in the rules of procedure.

(3) In the case provided for in paragraph (2), the employees shall enjoy an extra pay, as laid down in the collective labor agreement or, as the case may be, in the individual employment contract.

(4) In exceptional cases, the weekly rest period days may be taken on a cumulative basis, after a continuous activity that may not exceed 14 calendar days, with the authorization of the territorial labor inspectorate and with the agreement of the trade union or, as the case may be, the representatives of the employees.

(5) The employees taking their weekly rest period under the conditions of paragraph (4) shall have the right to twice the compensations provided for under Article 123. (2).

✓ Art. 139 - The public holidays are: ...

✓ Article 141 - The provisions of Article 134 shall not apply to workplaces where the activity cannot be interrupted due to the character of the production process or the specific features of the activity.

✓ Article 142 - (1) The employees working in the organizations provided for in Article 140 and in the workplaces provided for in Article 141 shall be provided adequate compensatory time off in the next 30 days.

(2) If, on duly justified grounds, no days off are granted, the employees shall benefit, for the activity performed during the public holidays, from an extra pay added to the basic pay, which may not be lower than 100% of the basic pay corresponding to the activity performed within the normal work schedule.

It follows from the above that, according to the law, the employer also has the obligation to comply with the provisions of the labor legislation, and the value of its compensation must reflect all the categories of expenses it incurs. Moreover, business operators must provide for the work insurance contribution provided by the Fiscal Code, as well as the so-called "disability fund," mandatory for companies with over 50 employees, according to the provisions of Law no. 448/2006, with subsequent amendments and completions. (...)

For the value estimated by the purchasing party to be acceptable, it would have been necessary to provide a detailed full calculation showing that all types of costs/expenses (bonuses and compulsory contributions) and the minimum guaranteed wage were taken into account, but such a note on the determining of the estimated value has not been identified in the procurement

file or in the defenses of the purchasing party's opinion.

Therefore, it follows that the estimated value was calculated exclusively by reference to the hourly rates used by the current provider in the provision of security posts, a method that cannot be accepted given that, from the evidence administered, it is noted that these rates were reduced by the use of subsidies obtained under Law no. 76/2002, respectively by the absence of the sum corresponding to the disability fund.

The contracting authority may not expect for all participants to be in the same situation as the current provider, such a hypothesis constituting an impermissible restriction of access to the procedure.

The Council notes that the contracting authority has failed to rigorously ascertain the estimated value of the contract, being necessary to recalculate it in line with the above.

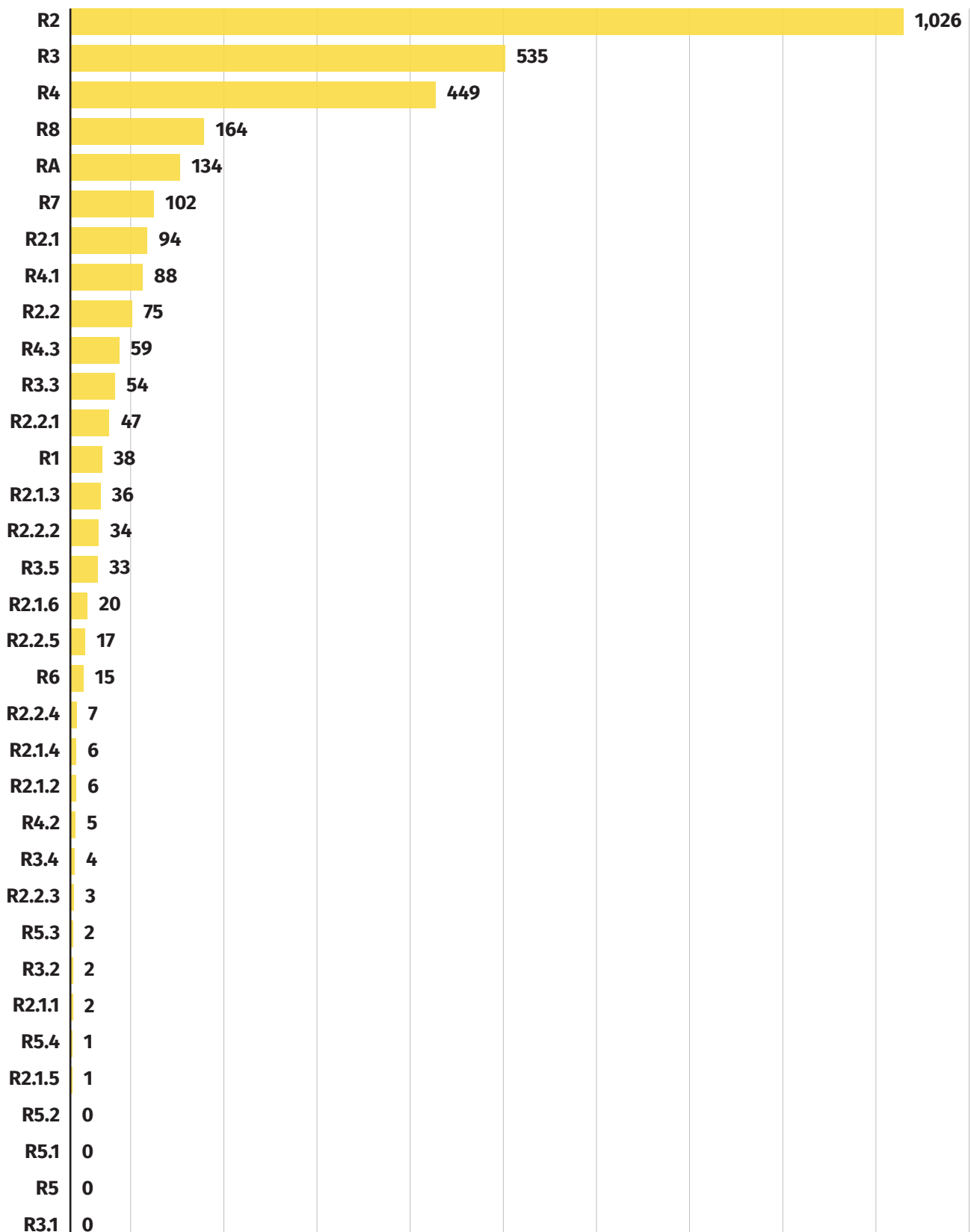
The extra-judicial accounting expert report dated 12.04.2023, drawn up by the chartered accountant.

..., submitted in probation by the challenging party, reveals costs higher than those considered by the contracting authority, while the accounting calculations in the report did not take into account any indirect expenses or profit, but only salary expenses. (...)

The Council accepts the appeal, orders the annulment of the procedure and accepts the challenging party's request to oblige the contracting authority to pay the costs incurred in settling the appeal.

Concerning the criticisms mentioned by business operators in the 2,871 complaints lodged with the Council in 2023 against the result of the award procedure, it was ascertained that the most common ones targeted the following requirements/reasons:

CODE	CRITICISM	NO. OF CRITICISMS
R3.1	the bids of other bidders in the award procedure were submitted after the deadline date and time or at another address than as specified in the contract notice	0
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	0
R5.1	the contracting authority's failure to inform each dismissed candidate of the actual reasons underlying the decision to dismiss their candidacy, in the notice informing of the result of the procedure	0
R5.2	the contracting authority's failure to inform each dismissed bidder of the actual reasons underlying the decision for dismissal, in the notice informing of the result of the procedure	0
R2.1.5	dismissal of the complaining party's bid as unacceptable, as it was submitted in violation of the provisions on the conflict of interests	1
R5.4	the contracting authority's failure to inform each candidate/bidder dismissed or declared non-winning of the deadline by which they are entitled to lodge complaint, in the notice informing of the result of the procedure	1
R2.1.1	dismissal of the complaining party's bid as unacceptable, as it was submitted after the deadline date and time or at another address than specified in the contract notice	2
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
R5.3	the contracting authority's failure to inform each bidder that submitted an admissible yet non-winning bid of the relative characteristics and advantages, in the notice informing of the result of the procedure	2
R2.2.3	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	3
R3.4	the bids of other bidders in the award procedure were submitted in violation of the provisions on the conflict of interests	4
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	5
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**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 contracting authority had excluded the tenderer on the grounds that it did not provide evidence that the measures taken are sufficient to clearly demonstrate credibility, within the meaning of Articles 171(1) and (3) of Law no. 98/2016 on public procurement.

Having examined the criticisms invoked by the challenging party, the Council notes that they concern issues relating to the groundlessness of the notice communicating the outcome of the procedure and that the challenging party believes that the said document infringes the principles of proportionality and accountability, as well as the provisions of Article 171 paragraph (32) of Law no. 98/2016 which require the contracting authority to duly justify the exclusion decision taken in respect of a particular business operator. (...)

The decisive argument brought by the purchasing party in favor of the reasoning underlying the exclusion of bidder K SRL is based on the fact that the business operator was sanctioned for violating the rules on cartel-type competition aimed at rigging tenders, by the Decision of the Competition Council no. of ... 2023, with a fine of 16,023,559.65 lei, representing 4.25% of the turnover achieved in 2022, and the evaluation commission considered that the business operator did not provide evidence showing that the measures taken by it are sufficient to clearly demonstrate its credibility within the meaning of Articles 171(1) and (3) of Law no. 98/2016 on public procurement. (...)

Taking into account the above, it is found that the issue to be settled by the Council concerns the soundness/groundlessness of the decision to apply the provisions of Article 167 paragraph (1) letter c) of Law no. 98/2016, in conjunction with Article 171 of the same normative act, under which K SRL's offer was excluded, since the evaluation commission has assessed that: "Therefore, the evaluation commission has decided to exclude your company from the award procedure, in the stage of the DUAE evaluation, in accordance with Art. 167 paragraph (1) letter c) and Art. 171 paragraph (3) of Law no. 98/2016, as you have failed to provide evidence showing that the measures taken are sufficient to clearly demonstrate your credibility within the meaning of Articles 171(1) and (3) of Law no. 98/2016 on public procurement." (...)

In particular, the tenderer informed the contracting authority

that it does not acknowledge the deed retained in the Decision of the Competition Council and that it drafted and filed, at the Bucharest Court of Appeal, Division IX of Administrative Law, a request for the cancellation of this Decision of the Competition Council, request that is the subject of File no. .../.../2023 pending before the Bucharest Court of Appeal. Furthermore, K SRL has provided at this stage a summary of the facts retained by the Competition Council through the said sanctioning decision, expressing its willingness to provide the contracting authority with all the documents necessary to clarify this situation.

Consequently, we are in the situation provided for by the provisions of Article 171 (1) – (32) of the law, respectively of assessing the measures taken by K SRL to demonstrate its credibility, deemed by the contracting authority as insufficient.

In determining the actual situation, it is taken into account that, by Decision no... of ... 2023, the Competition Council sanctioned K SRL with a fine of 16,023,559.65 lei, representing 4.25% of the turnover achieved in 2022, for violation of the provisions of Article 5 paragraph (1) letter c) of the Competition Law no. 21/1996, republished, with subsequent



amendments and completions, as well as Article 101(1) of the Treaty on the Functioning of the European Union, namely:

THE COMPETITION COUNCIL'S PLENUM HAS DECIDED:

Art. 1 With regard to the violation of the provisions of Article 5 paragraph (1) letters a) and b) of the Competition Law, republished, with subsequent amendments and additions, as well as of Art. 101 paragraph (1) of the Treaty on the Functioning of the European Union by the companies D SRL, S SRL (now K SRL) and T SRL (now T SRL), by participating in a single, continuous and complex agreement and/or concerted practice aimed at restricting competition, consisting in the coordination of the commercial policies and strategies of the competing companies, with the aim of manipulating the public procurement procedure having as object activities for design and execution for achieving the investment objective "Service HUB (center for the provision of electronic services) at the level of ...", to increase the budget allocated by the contracting authority and, implicitly, the price of the products/services/works offered on the installation services market, the communication services market and other related activities (also by the reduction of the purchased items while maintaining the initial budget), by limiting or controlling the marketing, also through an exchange of competitively sensitive information, to facilitate the coordination of market behavior, with the final aim of increasing price.

Article 2. Under Article 55 paragraph (1) letter a) of the Competition Law, republished, with subsequent amendments and additions, the companies referred to in Article 1 shall be sanctioned as follows: (...)

b) K SRL with a fine of 16,023,559.65 lei, representing 4.25% of the turnover achieved in 2022; (...).

The decision of the Competition Council shows that during the course of the procedure (K SRL has implemented a program of compliance with the competition law. The Competition Council

has analyzed the measures ordered by K SRL and has noted as mitigating circumstances when individualizing the sanction: "the application of a competition law compliance program" and "the promotion of competition rules among the company's trading partners", thus reducing the fine by 15% for these circumstances. This is apparent from Section 9.3.2.1(375-376) of Decision no./2023 (pp. 111 and 112 of the Decision). (...)

From reading the reasons indicated by the acquirer in the document notifying the result of the procedure, reasons that were the basis of the decision to exclude the bidder K SRL, a first reason was the fact that, following the verification of the documents submitted with the presumed purpose of proving credibility within the meaning of Articles 171(2) and (3) of Law no. 98/2016 on public procurement, the Evaluation commission found that most of the documents submitted are dated and registered before the issuance of the Competition Council Decision no... of ... 2023 establishing the violation of the provisions of Article 5 paragraph (1) of the Competition Law no. 21/1006, republished, as subsequently amended and supplemented and of Article 101 paragraph (1) of the Treaty on the Functioning of the European Union and the sanctioning of companies D SRL, K SRL and T SRL, while any documents aimed at proving your credibility should have been subsequent to the sanction decision.



In other words, the acquirer ascertained, in reference to some of the supporting documents regarding the measures taken by the bidder for the clear demonstration of credibility, the inconsistency of these “documents dated and registered before the issuance of the Competition Council’s Decision no... of ... 2023.”

Thus, the acquirer considered that the said supporting documents regarding the measures taken by the tenderer do not represent sufficient measures for the clear demonstration of credibility, given that they are prior to the issuance of the Competition Council’s Decision no. of ... 2023.

The fact that these documents are prior to the decision issued by the Competition Council cannot justify ignoring these documents. In establishing this finality, the arguments of the author of the complaint are retained as judicious, having also been specified in the answer provided, namely that an important series of measures capable of proving the clear credibility were taken by the tenderer prior to the issuance of the Competition Council’s Decision, after having been made aware of the object of the investigation and the nature of the facts that led to the suspicion of violation of the competition law.

Considering the aforementioned legal provisions, the Council finds that the legislator did not set a time limit from which the measures taken by business operators under Article 171 paragraph (1) could be ordered.

Furthermore, both Report no. .../18.09.2023 on the assessment of the information in DUAE-no. 2 and the opinion fail to point out which were the concrete reasons why the documents submitted by the tenderer for proving its credibility were not considered sufficient (competition law compliance program, competition law compliance guidelines, code of conduct, the

internal control system in force since 01.01.2021, training sessions carried out by experts in the field of competition law, both for their own staff and for their contractual partners, etc.), especially given the fact that the possibility of proving credibility is expressly established by the legislator. (...)

Since the Competition Council, which applied the sanction that is qualified by the contracting authority as a serious professional misconduct, has found that the measures ordered by K SRL during the investigation period, so prior to the issuance of the Competition Council’s Decision, fall within the category of mitigating circumstances justifying the reduction of the fine, it is clear that these measures are relevant for the clear establishment of the tenderer’s credibility in relation to the act ascertained by the Council.

As the challenging party has pointed out, the competition law compliance programs are not one-off measures of single applicability, but certify the implementation of an internal prevention system, which works continuously, their applicability being continuous.

In relation to the above, the Council determines that the contracting authority has not taken into account, when assessing the measures taken by K SRL for the clear demonstration of credibility, the supporting documents attesting the measures implemented prior to the issuance of the Competition Council’s Decision.

Thus, it is found that the

grounds for rejection from item 2 of the notification was wrongly retained; as such, the contracting authority shall reassess the offer of K SRL, taking into account all the measures taken by the tenderer prior to the issuance of the Competition Council's Decision no. .../...2023 (in other words, measures taken by the tenderer for the clear demonstration of credibility, regardless of the date and number of the registration of the documents attesting such measures).

As long as those legal provisions refer, in addition to the payment performed by the business operator, and the undertaking by the business operator of the obligation to pay compensations for any potential damages caused by a criminal offense or another unlawful act (...), as such, the failure to take into account the measures to restore the credibility regarding "the payment or undertaking of the obligation to pay compensations for any potential damages caused by the act retained by the Competition Council's Decision" is not judicious. (...).

In the specific case subjected to the Council's legality examination, the contracting authority is obliged to take into account the fact that the Competition Council's Decision clearly and unequivocally mentions the fact that K SRL has cooperated with the competition authority during the investigation, i.e. has implemented a competition law compliance program, which was deemed as grounds for diminishing the fine.

At the same time, it is noted that K SRL was not prohibited from participating in award procedures, the company submitting a tender, as it follows, for example, from the Decisions of the Council no. 1699/2023 and no. 755/2023.

In relation to the above, the Council determines that the contracting authority has not taken into account, when assessing the measures taken by K SRL for the clear demonstration of credibility, the supporting documents submitting by the tenderer. Consequently, the Council ascertains that the challenging party' criticisms regarding the finding that the contracting authority has removed the measures ordered under Article 171(3) sentence 3 in an unfounded manner, as well as in breach of its obligation to justify the reasons that led to the exclusion decision. (...).

2. N.C.S.C. DECISION

The challenging party requested the annulment of the result of the evaluation of the offer submitted by M SRL and that the authority be obliged to reassess it, on the grounds that certain products offered by the winner do not comply with the specifications in Annex no. 1 of the specification and violate Art. 167 paragraph (1) letter h) and i) of Law no. 98/2016.

Outlining the importance of fully complying with the rules imposed by the Authority in the tender documentation,

compliance which is the rule in the system of awarding public contracts, on the issues raised by the challenging party, the Council notes that the outcome of the assessment was established by the Authority by the award procedure report no. 520/03.10.2023, which was notified to competitors on the same day. On 13.10.2023, N SRL reacted by lodging a complaint with the Council and the acquiring authority, within the legal term of appeal, the criticisms being directed against the admission and selection of M SRL's offer", which the challenging party considers to be non-compliant and impossible to fulfil, since the declared suppliers/distributors do not have commercial relations with the bidder, i.e. the sole distributor authorizations on the territory of Romania are not observed.

The issue of the technical compliance of the products offered by M SRL, of the possibility of their supply, given the fact that the exclusive producers / distributors claim not to have relations with the company, as well as proof that those products can be delivered at the prices claimed should have been the subject of a request for clarifications from the authority, as per Article 209 paragraph (1) of Law no. 98/2016 – "If the information or documents submitted by the economic operators are incomplete or erroneous or if certain documents are missing, the contracting authority shall have the right to request within a certain period that



the bidders/candidates provide clarifications and, as the case may be, additions to the documents presented by them in the framework of tenders or requests to participate, in compliance with the principles of equal treatment and transparency. - supported by Article 134 paragraph (1) of the Methodological norms for the application of the law – “The Evaluation Commission has the obligation to establish what are the formal or confirmatory clarifications and completions necessary for the evaluation of each request for participation / tender, as well as the period of time granted for their transmission; the time limit shall be specified only as number of working days, without specifying a specific time.”;

We are discussing the edification of the content of the offer, precisely to determine whether or not it complies with the imperative clauses of the award documentation, and the authority has the obligation to provide the tenderers with all the conditions so that they can justify and prove the conformity of their tenders with the procedure, as well as the substantiation of the unusually low price (within the meaning of Article 210(1) of the public procurement law, an offer presents an unusually low price in relation to what is to be supplied, executed or provided when the offered price, excluding VAT, is less than 80% of the estimated value of the contract). The Council’s case-law is consistent in the sense that any decision of the authority on the admission or rejection of a tender must be based on a thorough evaluation of the tender in all its aspects and on conclusive evidence and not on mere assumptions that would favor or disadvantage tenderers. The authority’s request must meet the mandatory provisions of Article 134(4), a request necessary for the beneficiary authority not to have to infer essential elements

of the tenders itself, based on insufficient information.

In the light of the above, the Council notes that all the criticisms invoked by N SRL are likely to generate a substantial risk related to the technical compliance of M SRL’s offer, its financial sustainability and ability to adequately fulfil its contractual obligations, risk that the contracting authority should have eliminated by requesting clarifications from the tenderer. It is ascertained that the authority has admitted the offer of M SRL in a superficial and discretionary manner, the objections of the challenging party regarding the illegality of its admission in the light of the numerous criticisms – in relation to which the acquiring authority has not drawn up any defense – being well-grounded, in the absence of the necessary verifications, reasoned in witting, by the responsible committee. The Council may not substitute the Evaluation Commission and carry out its tasks for the detailed evaluation of the tender. Based on Article 26 paragraph (2) of Law no. 101/2016, the Council accepts the complaint of N SRL no. .../... 2023, against ..., and cancels the procedure report no. 520/... .2023 and the notices notifying the result of procedure no. 2/1348 and 2/1350/03.10.2023, in relation to the offer submitted by M SRL, obliges the contracting authority to clarify and thoroughly reassess the said offer, in the light of the issues raised in the complaint, as well as to issue a assessment

report in relation to it, in compliance with the foregoing, the public procurement legislation and the requirements of the award documentation. On the same legal basis, the Council obliges the authority to notify the two tenderers of the result of the reassessment of the tender, in compliance with the applicable legislation.

3. N.C.S.C. DECISION

The challenging party claims that the submission of two requests for clarifications to the mentioned tendered during the verification stage of the DUAE supporting documents created an unfair advantage over the other participants in the award procedure.

(...) following the notice no. 974/04.08.2023 for requesting the DUAE supporting documents, the winning bidder submitted the answer no. 393/09.08.2023, to which it attached a series of documents, including the tax registration certificate no. 7107631/18.04.2023 issued by ANAF, which was no longer valid at the date of submission and, following notice no. 1001/21.08.2023, the said bidder submitted the answer no. 399/23.08.2023, to which it attached the tax registration certificate no. 8008538/07.08.2023, as well as the DUAE supporting documents of the supporting third party (...).

With regard to tax registration certificate no. 7107631/18.04.2023, the Council notes that it attests that the bidder in question did not have outstanding tax liabilities on 31.03.2023, with the deadline for submitting tenders being 17.03.2023, while the tax registration certificate no. 8008538/07.08.2023 attests that the bidder did not have outstanding tax liabilities on 31.07.2023.

Starting from the purpose of the request for the presentation of the tax certificate, namely to demonstrate that the bidder has no outstanding tax liabilities, the Council does not accept

the opinion of the challenging party, which it considers excessively formalistic, given the fact that the successful bidder has proved without any doubt that it had no outstanding tax liabilities on 31.03.2023 (the deadline for submitting tenders being 17.03.2023), nor on 31.07.2023.

In this context, a measure rejecting the successful tender due to the consideration invoked does not comply with the principle of proportionality which requires that the acts of the institutions do not exceed the limits of what is appropriate and necessary for the purpose of achieving the objectives pursued, while it is understood that, where a choice between several appropriate measures is available, the least coercive one must be chosen, and the inconveniences caused must not be disproportionate to the purposes pursued (judgement of the Court of Justice of the European Union of 5 May 1998, National Farmers' Union and others, C-157/96, item 60).

In accordance with the principle of proportionality, as also noted by the Constitutional Court in Decision No. 662 of 11 November 2014, published in the Official Gazette of Romania, Part I, No. 47 of 20 January 2015, paragraph 28, any measure taken must be adequate – objectively capable of achieving the purpose, necessary – indispensable for the purpose to be achieved and proportionate – the fair balance between competing interests, in order to be appropriate to the purpose pursued.

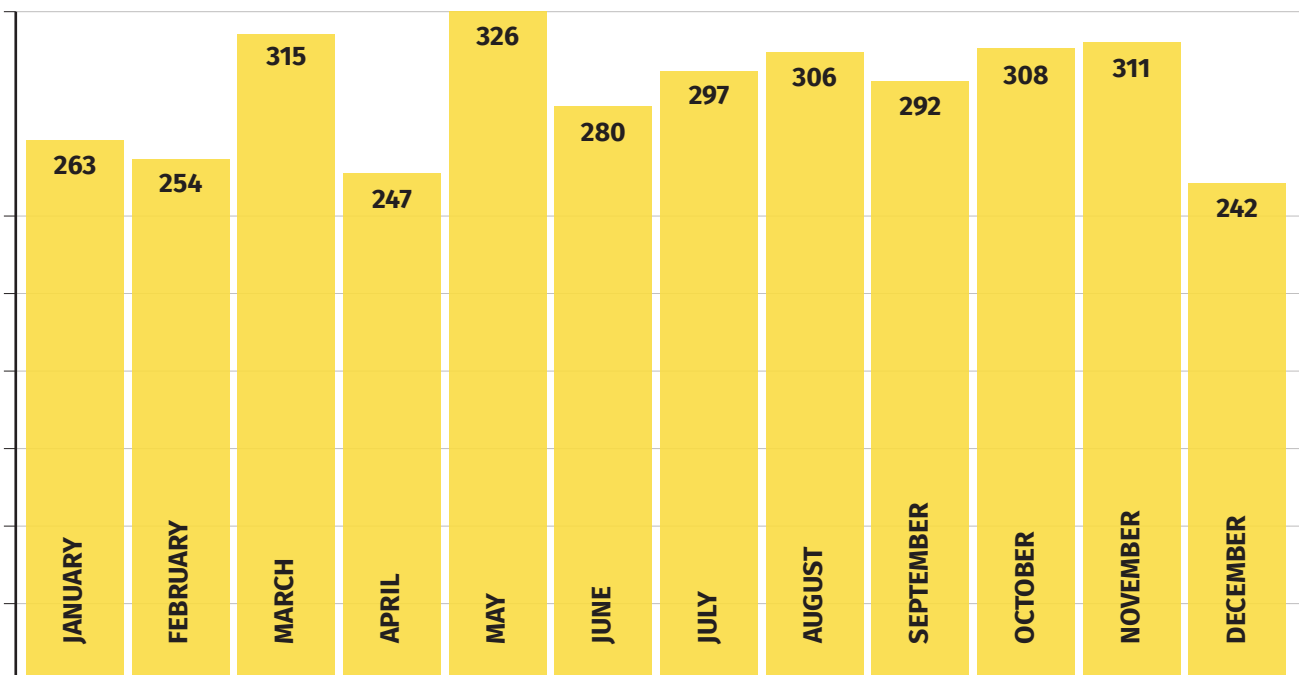


2.3. EVOLUTION OF FILES SETTLED BY N.C.S.C.

In the settlement of the 3,668 complaints filed by business operators throughout 2023, the N.C.S.C.'s chambers for solving complaints have issued a total of 3,057 decisions aimed at settling a total of 3,441 files.

Thus, the monthly evolution of the files settled by the Council's chambers between January – December 2023 is as follows:

THE TREND OF THE FILES SOLVED BY N.C.S.C. IN THE YEAR 2023



The official statistics shows that, since the Council was created and until the 31st of December 2023, the total number of the files solved by the complaints solving chambers amounted to 80,978, i.e. a monthly average of approximately 389 files settled, or a daily average of approximately 13 files settled.



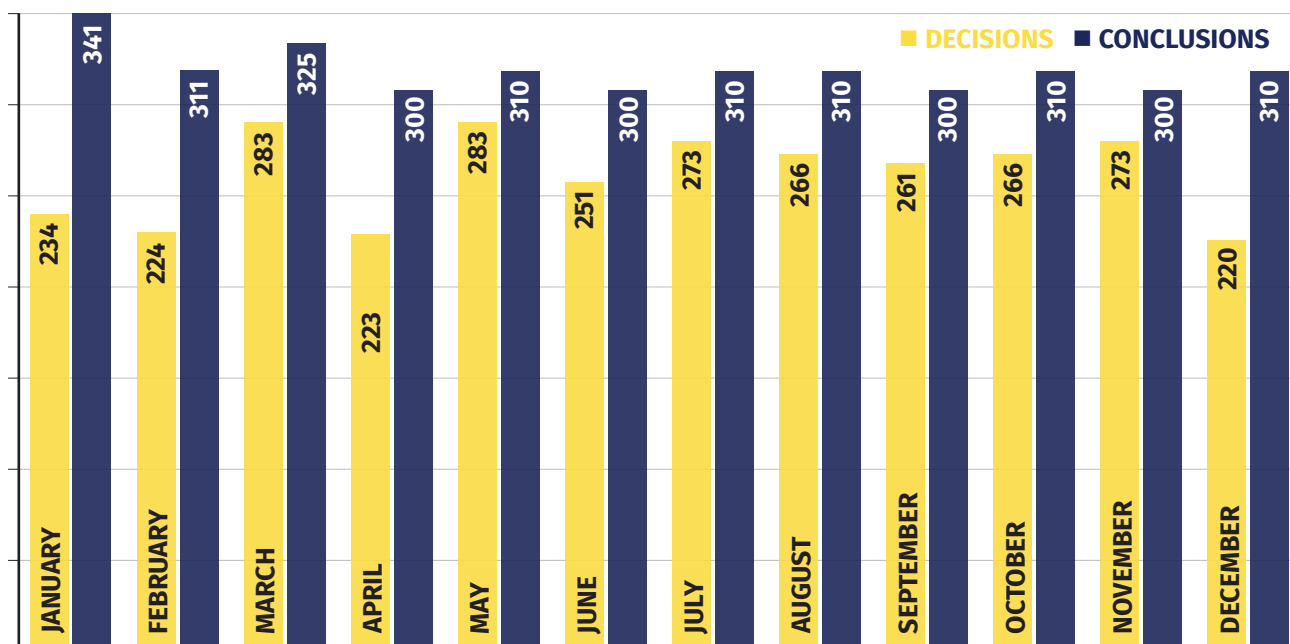


2.4. DECISIONS ISSUED BY N.C.S.C.

As mentioned previously, aside from settling complaints, the activity of the Council's chambers also consists in issuing decisions, including for the management of securities (deposit and return) constituted by business operators for each public procurement procedure contested. Thus, concerning the decisions rendered by the Council, the official data reveal that from the 1st of January to the 31st of December 2023, the 11 chambers for solving complaints have issued a total of 3,057 decisions and 3,727 conclusions. As follows, the Council has issued a total of 6,784 rulings in 2023, 10.33% more compared to the previous year, when 6,149 rulings were issued.

Divided per months, the decisions and conclusions issued by the Council in 2023 have evolved as follows:

THE TREND OF THE DECISIONS ISSUED BY N.C.S.C. IN THE YEAR 2023

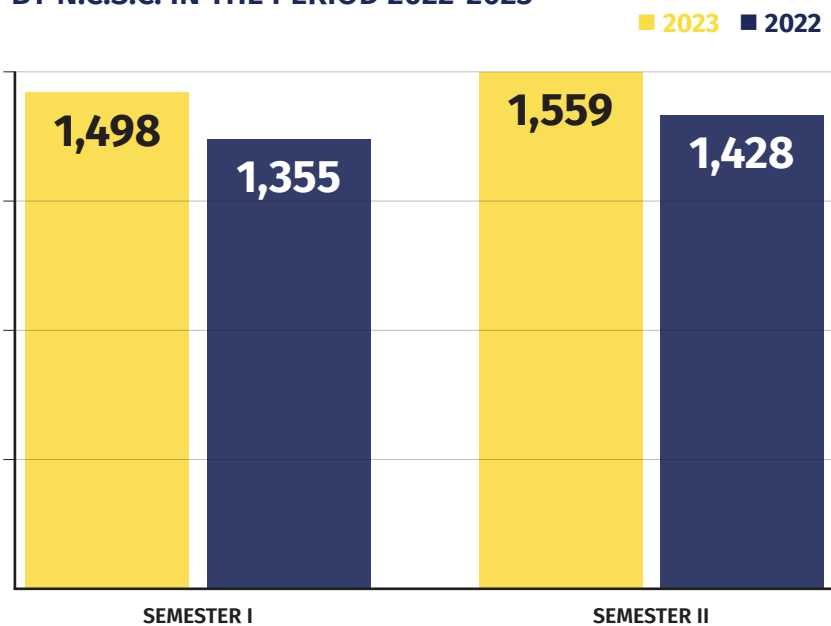


In this context, we find it noteworthy that, in compliance with the legislation applicable in the field¹⁷, all complaints lodged with the Council under a public procurement procedure are joined in order to ensure the rendering of a unitary solution. At the same time, within each public procurement procedure under which complaints have been filed, it is possible for other business operators to file one or several requests for intervention. Thus, in all situations of this type, the Council issues a single decision, resulting from the joining of all complaints and requests for voluntary intervention into a single file.

A comparison between the number of decisions issued in 2023 and the previous year shows that throughout the past year their number has increased by 9.8% (274 decisions).

In terms of the half-yearly evolution of the decisions issued by the Council in 2023, compared to the similar periods of 2022, the chart below indicates that in the first semester of the past year the number of decisions increased by 10.55% compared to the first semester of the previous year (+143 decisions), while the second semester saw a 9.1% increase compared to the previous year (+131 decisions).

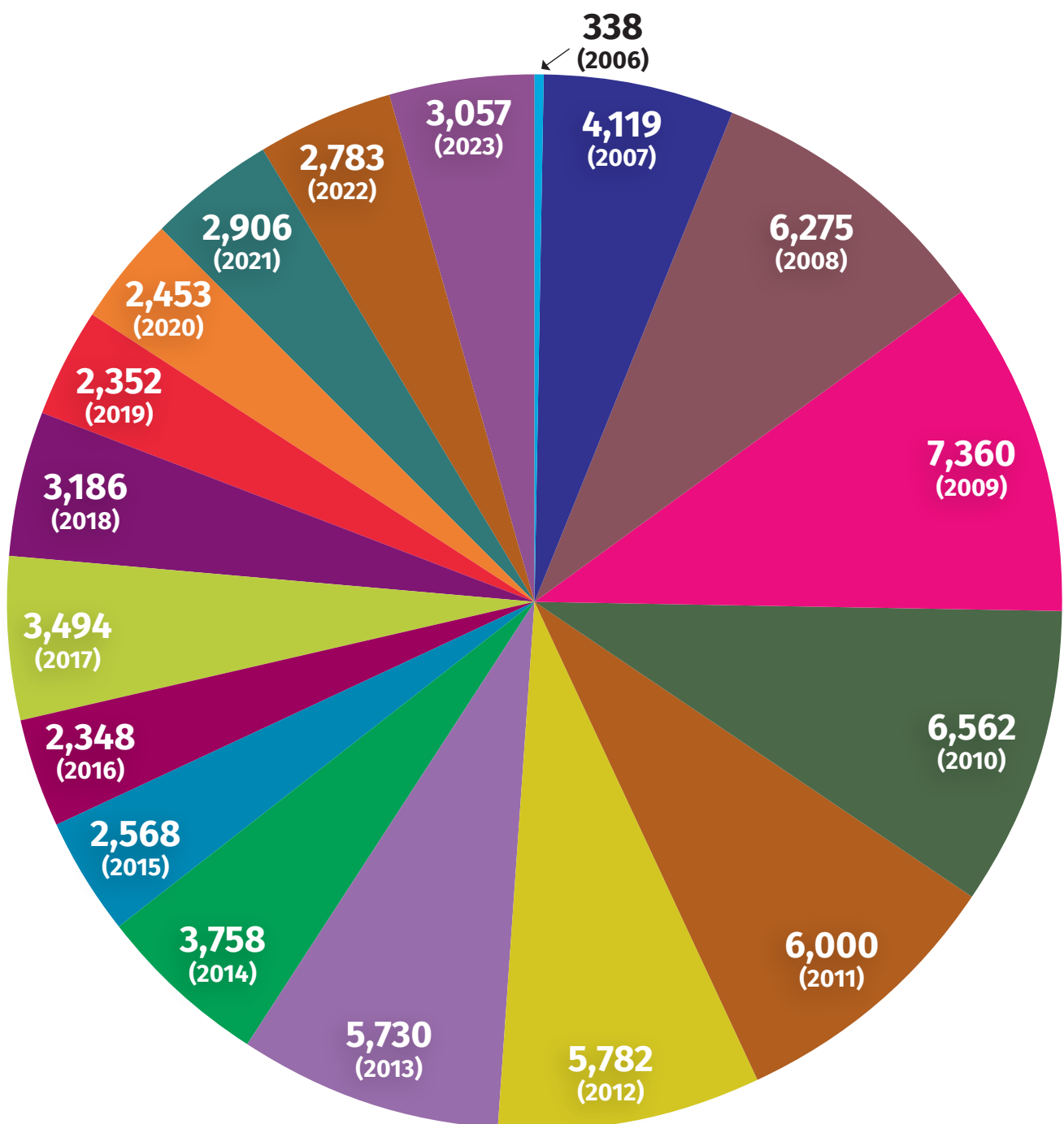
THE SEMESTRIAL TREND OF THE DECISIONS RENDERED BY N.C.S.C. IN THE PERIOD 2022-2023



¹⁷. Art. 17, para. (2) of Law no. 101/2016, amended and supplemented

As a whole, since its establishment and until the 31st of December 2023, the total number of the decisions rendered by the Council amounted to 71,071.

THE TREND OF THE DECISIONS RENDERED BY N.C.S.C. IN THE PERIOD 2006-2023



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

As mentioned in the previous chapter, the complaints lodged with the Council under a public procurement procedure are joined to ensure a single settlement. Thus, between January 1st – December 31st, 2023, through its 3,057 decisions issued by the 11 settlement chambers, the Council has settled a total of 3,441 files.

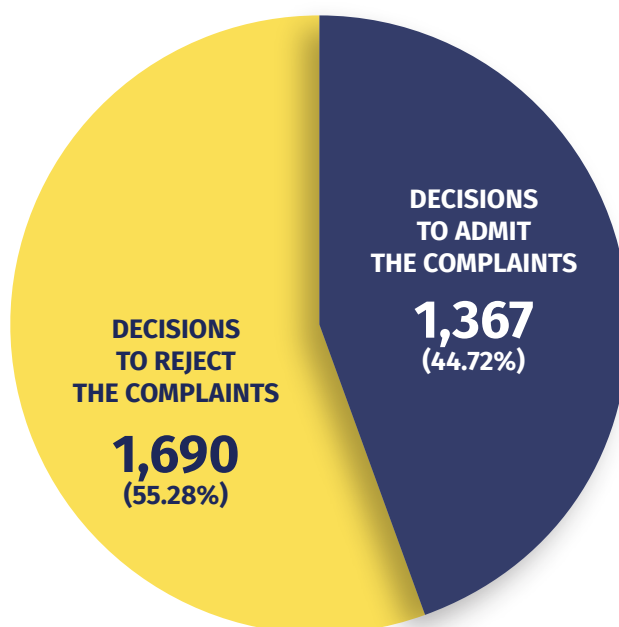
Out of the total 3,057 decisions issued, in the case of 1,367 decisions the Council ordered the acceptance of the complaints, in the sense that the solution requested by the complaining party and adopted upon the deliberation by the chamber for solving complaints complied with the need of defense by administrative jurisdictional channel of the violated or unacknowledged subjective right and the reinstatement thereof, so that it provides the business operator with the rights and advantages acknowledged by the legislation applicable in the field of public procurement.

For the rest of 1,690 decisions, 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;
- having considered the contents of the settled complaint, the Council decided to rule in favor of the contracting authority, as the merits of the complaint submitted by the business operator proved to be groundless/unfounded;
- The Council was forced to „abstain”, 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.

Percentagewise, the decisions issued by the Council in which the acceptance of the complaints filed by the business operators was ordered represented 44.72% of the total decisions, while the remaining 55.28% of the issued decisions ordered the rejection of the complaints filed by the business operators.

THE STANDING OF THE SOLUTIONS RENDERED BY N.C.S.C. IN THE YEAR 2023



It must be mentioned that starting with the period 2019-2023, the percentage of complaints accepted by the Council has constantly increased, from approximately 38% to over 44%, while the percentage of rejected complaints has decreased from 61% to approximately 55%.

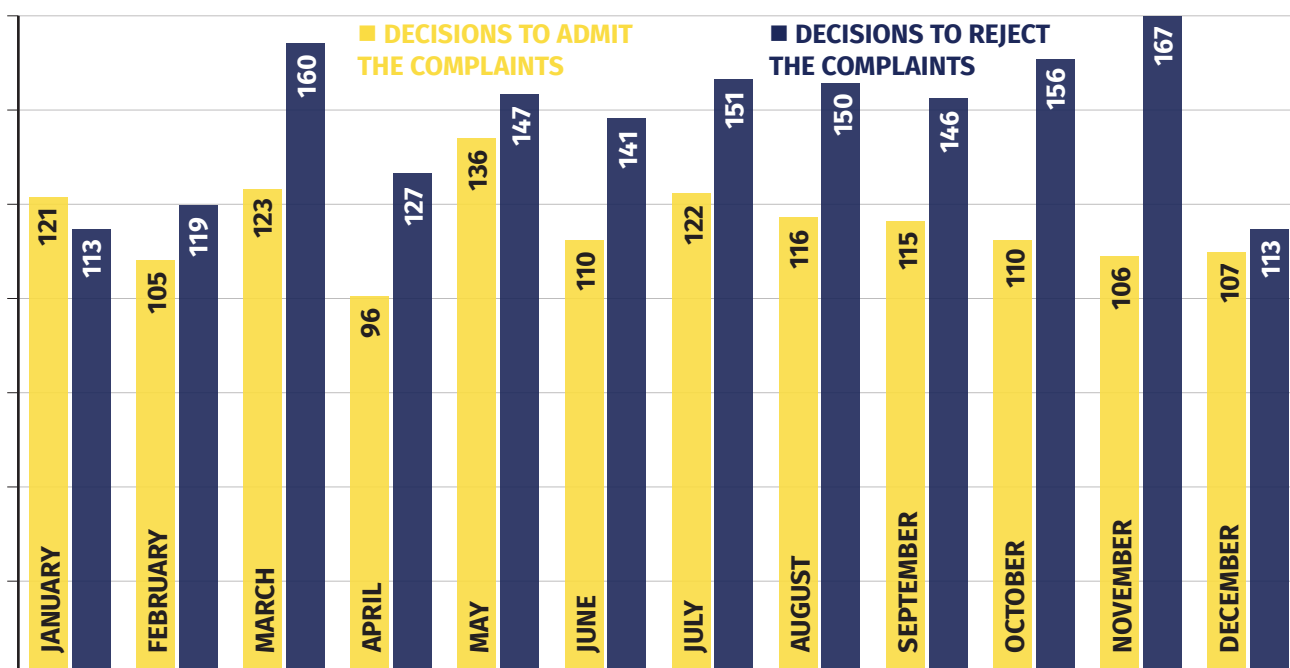
This evolution highlights two important aspects: the business operators that have lodged complaints have proven a better understanding and interpretation of the legislation applicable in the field of public procurements, while the contracting authorities have shown a lack of transparency, efficiency, effectiveness, but especially a lack of professionalization of the public procurement function, which has led to the more frequent erroneous interpretation of the applicable legislation. The case law of the past years demonstrates that the contracting authorities have exercised a strictly formal approach

to the legislation, focusing on the mechanical application of the regulations in force, without paying particular attention to whether a public procurement procedure observes the relevant good practices and seeks the efficiency of the investment, the manner in which public resources are spent, the principles of equal treatment and transparency, or any potential conflicts of interest.

We previously mentioned that in 2023, out of the 3,668 complaints lodged with the Council, 797 (21.73%) invoked claims against the award documentation. Comparing the percentage above with the one recorded in 2020 (16.46%), 2021 (19.70%), and 2022 (25.30%), respectively, it can be noticed that the preparatory phase of any public procurement procedure was increasingly contested, which proves that for many contracting authorities this was not an essential stage that would allow the unhindered performance of the subsequent stages of a public procurement procedure. Throughout the years, the Council has stressed how important it is for contracting authorities to ensure that any public procurement contract has well-established qualification criteria and technical specifications, weights and awarding criteria specifically defined when preparing the acquisition documentation, and to rigorously assess the offers against these requirements in the assessment stage. Many contracting authorities, however, have continued to underestimate the Council's recommendations and not pay special attention to the planning stage of the public procurement process, which has generated a significant increase in complaints lodged against the award documentation.

As an overview of the settlements ordered by the Council in 2023, the chart below presents the comparative monthly evolution of the settlement of complaints lodged by business operators:

THE MONTHLY TREND OF THE SOLUTIONS RENDERED BY N.C.S.C. IN THE YEAR 2023



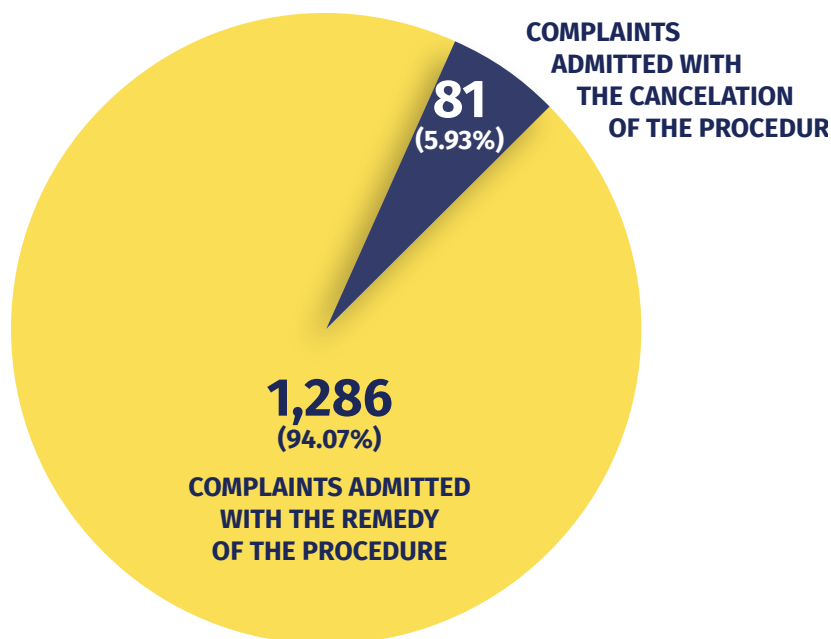


As mentioned before, throughout 2023 the Council has ordered the acceptance of complaints lodged by business operators through 1,367 decisions (44,72%), and the rejection of 1.690 complaints (55,28%).

Out of the 1,367 decisions ordering the acceptance of complaints lodged by business operators, through 81 (5.93%) the Council ordered the cancellation of the award procedure, while 1,286 decisions (94,07%) accepted the complains and ordered the remedying of the award procedures.

When considering the total number of decisions issued by the Council in 2023 (3,057 decisions), it follows that the percentage of decisions ordering the cancellation of the award procedures was only 2.65%, which proves that in 2023 the Council did not act as a

THE MEASURES RULED BY N.C.S.C. FOLLOWING THE ACCEPTANCE OF THE COMPLAINTS IN THE YEAR 2023



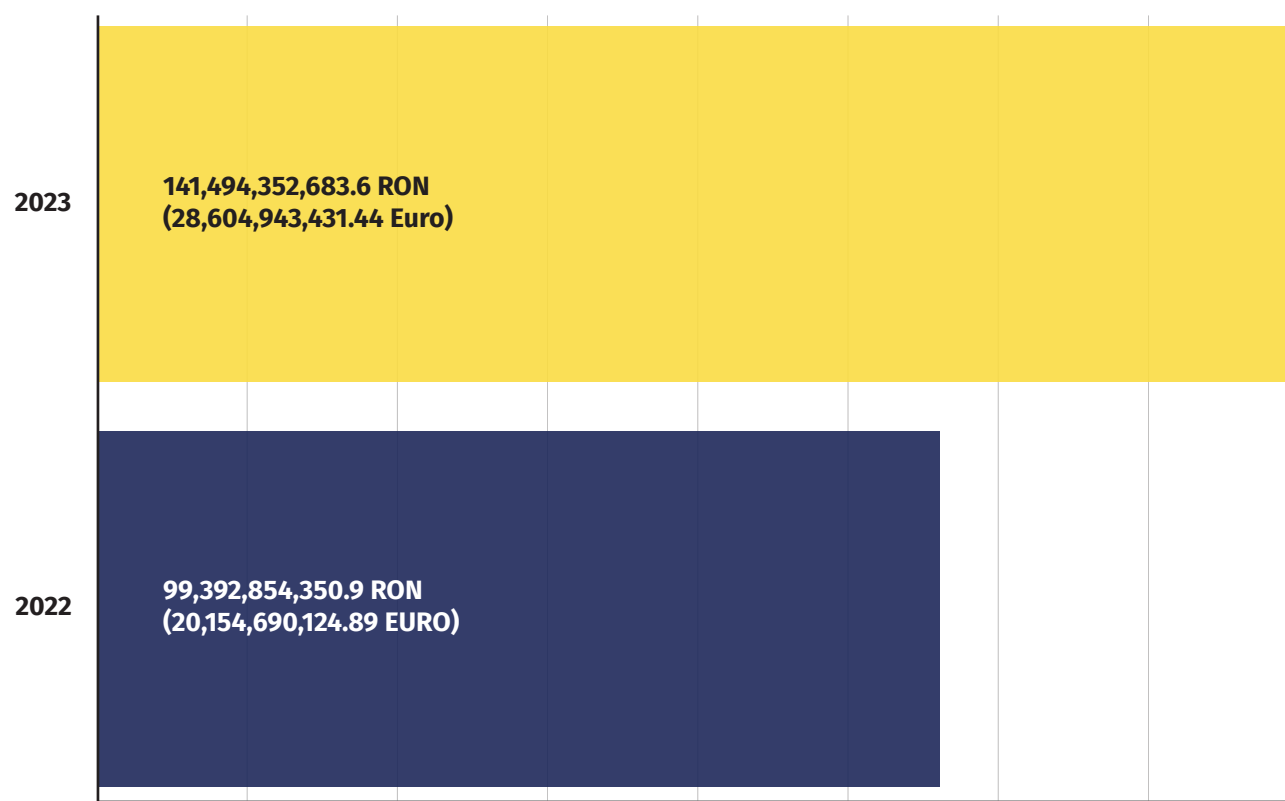
hinderance on the public procurement market; on the contrary, it had a decisive role in the correction of the award procedures, ensuring that they can continue in full compliance with the legal provisions.

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 2023, the total estimated value of the award procedures under which the Council rendered decisions was 141,494,352,683.60 RON (the equivalent of 28,604,943,431.44 Euro¹⁵). Compared to 2022, when the total estimated value of the award procedures under which N.C.S.C. rendered decisions was 99,392,854,350.9 RON (the equivalent of 20,154,690,124.89 EURO¹⁸), it can be noticed that in 2023 the total estimated value of the award procedures under which the Council rendered decisions has increased by 42.36%.

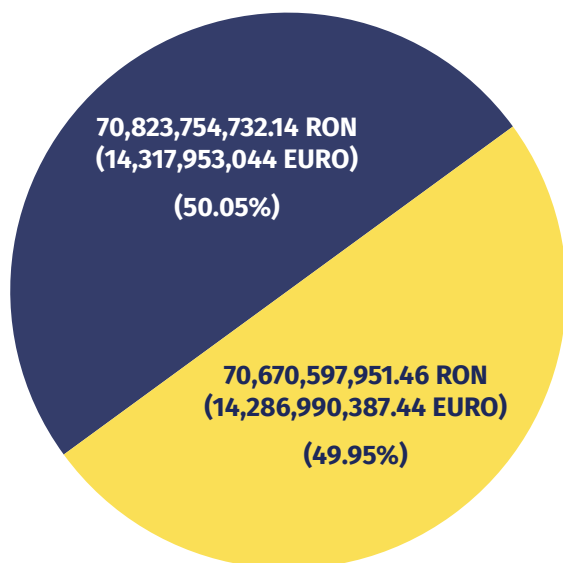
THE TREND OF THE DECISIONS ISSUED BY N.C.S.C. IN THE PERIOD 2022-2023 IN RELATION TO THE TOTAL ESTIMATED VALUE OF THE PROCEDURES



The total estimated value of the award procedures under which N.C.S.C. has issued, in 2023, decisions for the acceptance of complaints lodged by economic operators was 70,823,754,732.14 RON (the equivalent of 14,317,953,044 Euro¹⁵).

At the same time, the total estimated value of the award procedures under which N.C.S.C. issued decisions for the rejection of the complaints lodged by business operators was 70,670,597,951.46 RON (the equivalent of 14,286,990,387.43 Euro¹⁵).

18. average annual exchange rate published by the N.B.R. for 2022 – 4.9315 RON/EURO

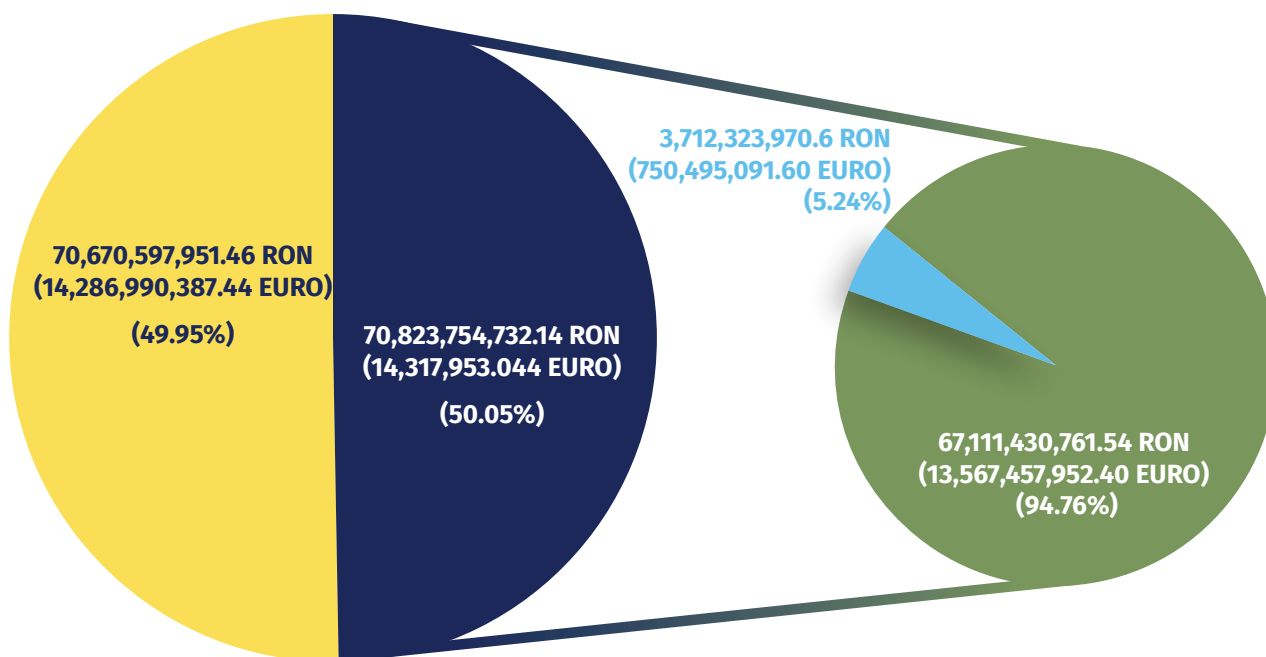


TOTAL ESTIMATED VALUE OF PROCEEDINGS IN WHICH N.C.S.C. HAS PRONOUNCED DECISIONS IN THE YEAR 2023

- 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

The total estimated value of the award procedures under which the Council has accepted the complaints lodged by business operators and has ordered the cancellation of the award procedures was 3,712,323,970.6 RON (the equivalent of 750,495,091.60 EURO¹⁵), while the estimated value of the award procedures in which the Council has accepted the complaints and ordered correction measures was 67,111,430,761.54 RON (the equivalent of 13,567,457,952.40 EURO¹⁵).

THE TOTAL ESTIMATED VALUE OF THE PROCEDURES IN WHICH N.C.S.C. RENDERED DECISIONS IN THE YEAR 2023



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

Comparing the total estimated value of the award procedures under which the Council has accepted the complaints and has ordered correction measures for the public procurement procedures in 2023, namely 67,111,430,761.54 RON (the equivalent of 13,567,457,952.40 EURO¹⁵) with that of the previous year (45,861,951,345.57 RON, or 9,299,797,494.79 EURO¹⁸), we identify a 46.33% increase.

These figures reiterate the fact that N.C.S.C. does not represent an obstacle in the way of public procurement procedures initiated at the national level but that, on the contrary, the institution has acted as an efficient filter preventing a significant number of irregularities in the public procurement procedures carried out throughout 2023, both in relation to public procurement procedures funded by national funds, and those funded by European funds; the Council's fundamental role has often been stressed in the documents published by the European Commission.



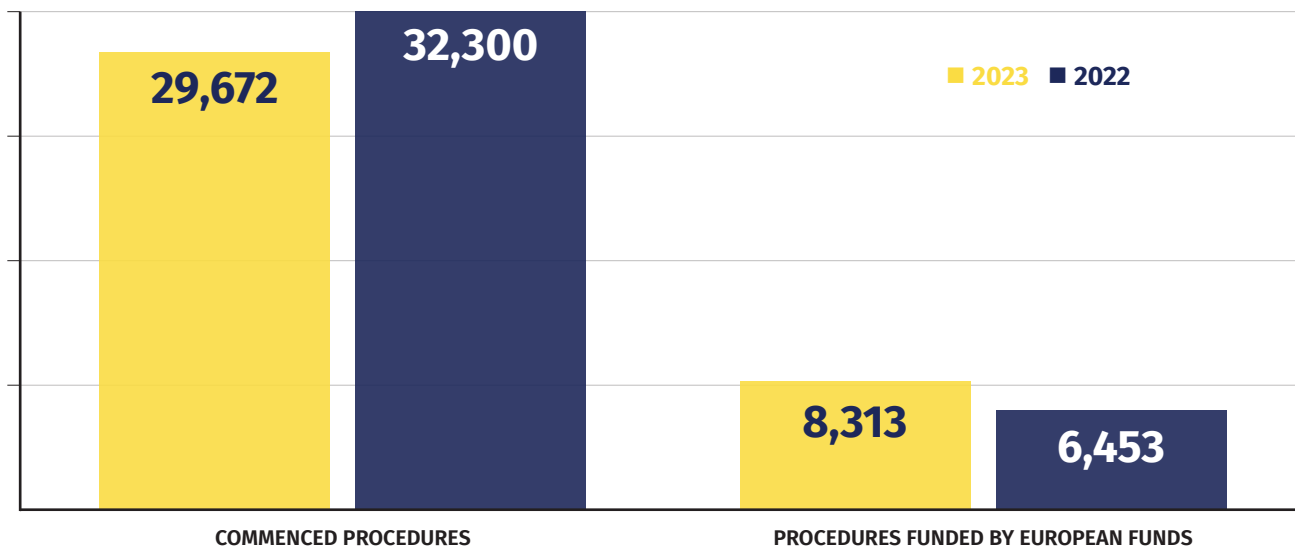
2.6.2. THE TOTAL ESTIMATED VALUE OF THE AWARD PROCEDURES IN WHICH N.C.S.C. HAS ISSUED DECISIONS FOR THE ACCEPTANCE OF COMPLAINTS, COMPARED TO THE TOTAL ESTIMATED VALUE OF PROCEDURES INITIATED IN S.E.A.P.

The official data provided by the Electronic Public Procurement System (S.E.A.P.) show that in 2023, within the communication platform used in the award process for the public procurements contracts, a number of 29,672 award procedures were commenced through participation announcements and invitations, amounting to a total estimated value of 667,986,720,386 RON (the equivalent of 135,042,296,651.37 EURO¹⁵).

Out of the total number of award procedures initiated in S.E.A.P. participation announcements and invitations (29,672), 8,313, from which 28.01%, were award procedures funded by European funds, with a total value of 130,312,162,054 RON (the equivalent of 26,344,316,598.40 Euro¹⁵).

To achieve an overview of the evolution of the number of award procedures initiated in S.E.A.P. between 2022 – 2023, it must be noted that in the past year, although the number of procedures initiated has decreased by 8.34% (2,686 procedures), the number of procedures funded by European funds has increased by 28.82% (1,860 procedures) compared to the previous year.

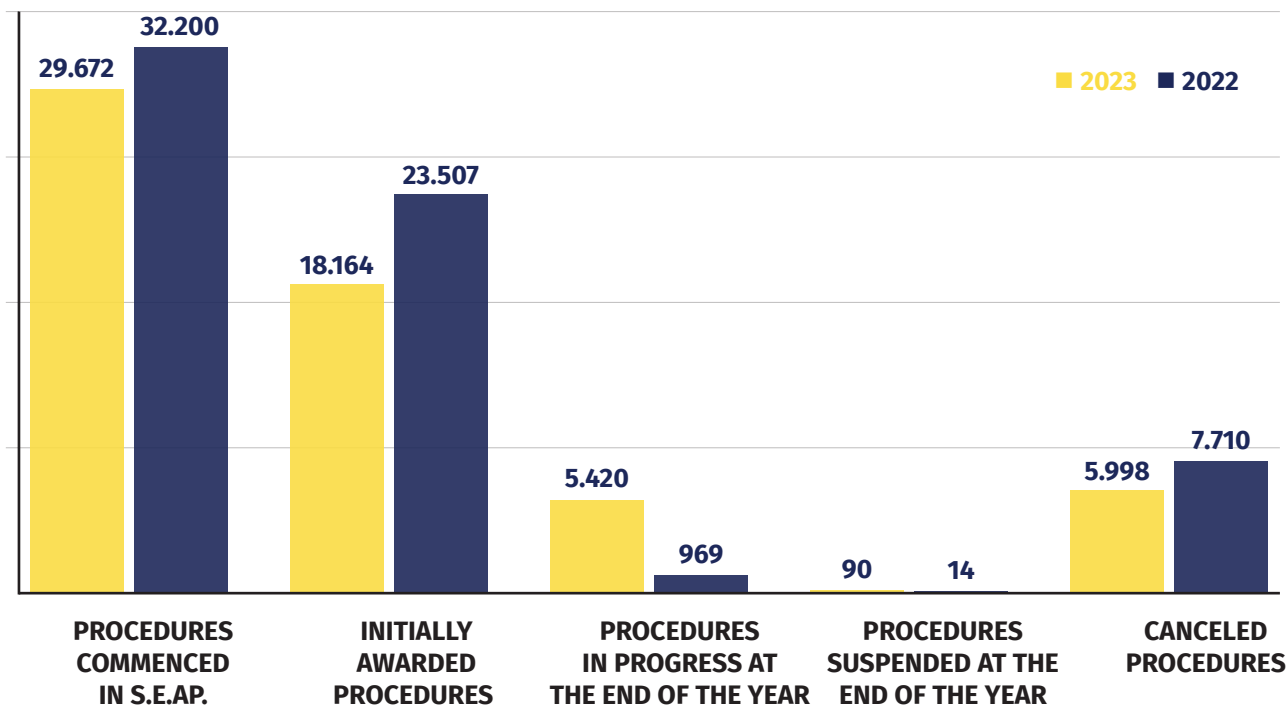
AWARD PROCEDURES COMMENCED IN S.E.A.P. IN THE PERIOD 2022-2023



The estimated value of the procedures initiated in S.E.A.P. in 2023 was 667,986,720,386 RON (the equivalent of 135,042,296,651.37 Euro¹⁵).

The official data provided by S.E.A.P. also show that out of all the procedures initiated in S.E.A.P. (29,672) in 2023, at the end of the year a number of 18,164 procedures (61.22%), with a total estimated value of 98,640,743,693 RON (the equivalent of 19,941,523,035.1 Euro¹⁵) appeared as awarded, 5,998 procedures (20.21%) with a total estimated value of 238,863,145,214 RON (the equivalent of 48,289,324,818.36 Euro¹⁵) appeared as cancelled (either by the contracting authorities, either in the administrative courts or by the decision of N.C.S.C.), 90 procedures (0.3%), with an estimated value of 6,471,218.610 RON (the equivalent of 1,308,241,910.44 Euro¹⁵) were suspended, while 5,420 (18.27%) were ongoing, to be completed in 2024.

THE TREND OF THE PROCEDURES COMMENCED IN S.E.A.P. IN THE PERIOD 2022-2023



Comparing the total estimated annual value of the procedures initiated in 2023 in S.E.A.P. (667,986,720,386 RON (the equivalent of 135,042,296,651.37 EURO¹⁵) with the total estimated value of the award procedures under which N.C.S.C. has issued decisions (141,494,352,683.60 RON (the equivalent of 28,604,943,431.44 Euro¹⁵), it follows that the latter was 21.18% of the total estimated value of the procedures initiated in S.E.A.P.

Furthermore, in relation to the total annual estimated value of the procedures initiated in S.E.A.P. throughout 2023, we notice the following aspects:


- the estimated value of the procedures under which N.C.S.C. has accepted the complaints lodged by business operators and has ordered correction measures and the cancellation of the procedures (70,823,754,732.14 RON, the equivalent of 14,317,953,044 Euro¹⁵) was 10.60% of the total estimated value of the procedures initiated in S.E.A.P.;
- the estimated value of the procedures under which N.C.S.C. has ordered correction measures for the challenged public procurement procedures (67,111,430,761.54 RON, the equivalent of 13,567,457,952.40 EURO¹⁵) was 10.04% of the total estimated value of the procedures initiated in S.E.A.P.;
- the estimated value of the procedures under which N.C.S.C. has ordered the cancellation (3,712,323,970.6 RON, the equivalent of 750,495,091.60 EURO¹⁵) was only 0.11% of the total estimated value of the procedures initiated in S.E.A.P. and only 1,55% of the total estimated value of the procedures initiated in S.E.A.P. and cancelled (238,863,145,214 RON, the equivalent of 48,289,324,818.36 Euro¹⁵).

As mentioned previously, in 2023 a total of 8,313 unique public procurement procedures funded by European funds were initiated in S.E.A.P., having a total estimated value of 130,312,162,054 RON (the equivalent of 26,344,316,598.40 Euro¹⁵).

Of them, a number of 2,208 unique procedures with an estimated value of 39,275,429,222 RON (the equivalent of 7,940,044,318.61 Euro¹⁵) were cancelled, other 32 with a total estimated value of 968,674,968 RON (the equivalent of 195,830,378.65 Euro) were suspended, 1,736 with a total estimated value of 61,588,813,984 RON (the equivalent of 12,450,988,372.38 Euro¹⁵) were ongoing at the end of the year, while 4,337, having a total estimated value of 28,479,243,880 RON (equivalent a 5,757,453,528.76 Euro¹⁵) were assigned during the year.

CHAPTER 3

THE QUALITY OF N.C.S.C. ACTIVITY IN 2023



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 the legislation applicable in the field of public procurement, in order to observe the constitutional principle of access to justice, any decision rendered by the Council as a result of the settlement of any complaint lodged by a business operator by administrative-jurisdictional means can be controlled¹⁹ by the Courts of Appeal located in the administrative-territorial area of the contracting authority's headquarters, or by the Bucharest Court of Appeal (in case of procedures for awarding services and/or works related to the transport infrastructure of national interest) if the contracting authority and/or one or several business operators participating in a procurement procedure believe to have been aggrieved by the measures ordered by the Council and lodge a complaint in this regard.

This type of control is aimed at remedying any errors occurring

during the first settlement. This institutional filter represents, for the Council's settlement counsellors, a stimulative factor concerning the fulfilment with maximum rigor and exigence of their legal attributions.

The legislation in force provides that a single decision issued by the Council can be challenged by several complaints lodged with the competent Courts of Appeal

¹⁹. Article 29 of Law no. 101/2016, amended and supplemented

located in the administrative-territorial area of the contracting authority's headquarters.

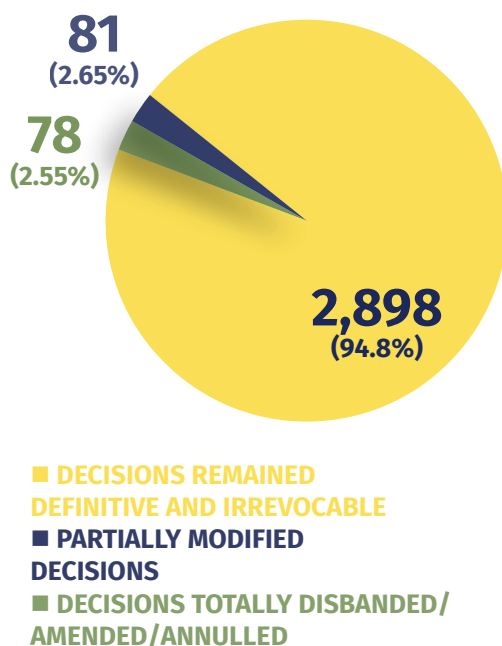
In 2023, out of the 3,057 decisions issued by the Council's settlement chambers, 778 were challenged by such complaints. Of these, a number of 146 were formulated, as mentioned before, by the various contracting authorities that refused to implement the decisions issued by N.C.S.C., which accepted the complaints lodged by the business operators and ordered the reassessment of bids.

Following the complaints lodged with the competent Courts of Appeal, until December 31-st 2023, 78 of the Council's decisions were disbanded/amended/cancelled in full (2.55%), 81 were partly disbanded/amended/cancelled (2.65%), and 577 remained final and irrevocable as issued by our institution (***) - please note that 42 complaints were not settled by the competent Courts of Appeal until the end of 2023, and are to be settled in 2024).

Regarding the decisions partly amended by the competent Courts of Appeal, it must be mentioned that in almost all cases, the courts granted certain business operators the right to benefit from court costs.

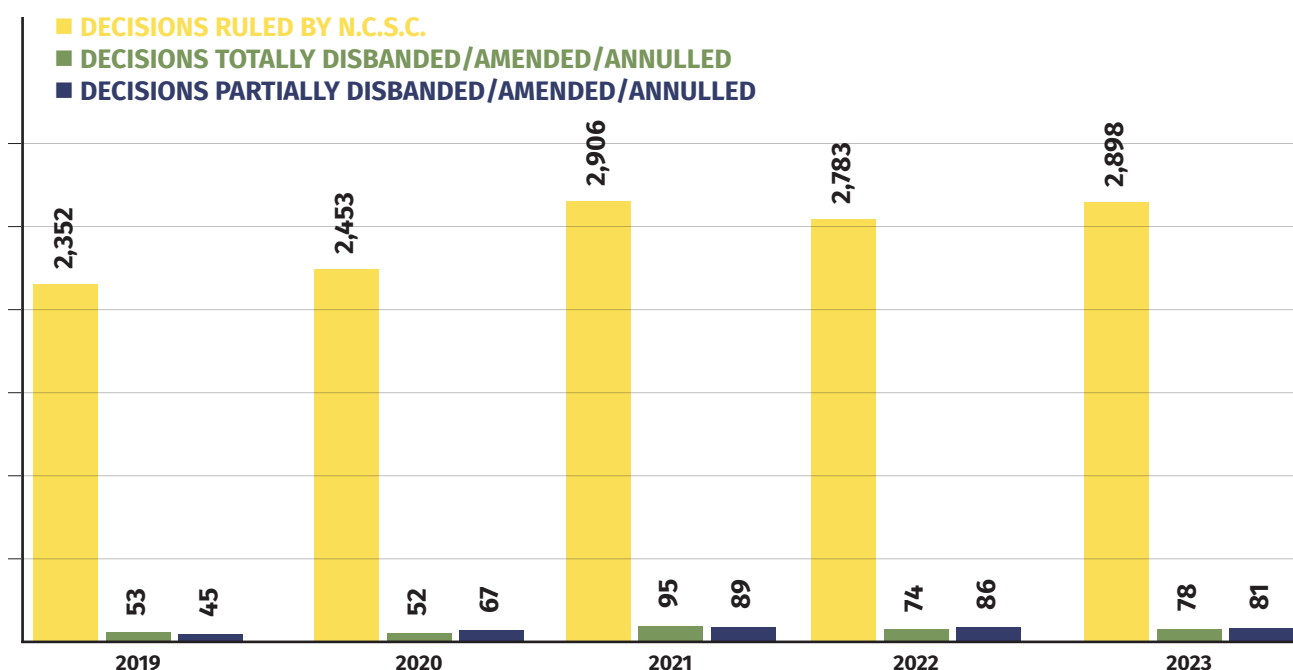
As such, official data show that by the end of 2023, out of the 3,057 decisions ruled by the Council, 2,898 (94.8%) have remained final and irrevocable in the form ruled by the institution.

THE STANDING OF THE APPEALS LODGED AGAINST THE DECISIONS OF N.C.S.C. IN THE YEAR 2023



The official statistical records for the last five years of the Council's activity demonstrate that the percentage of decisions fully or partially amended/disbanded /cancelled by the Courts of Appeal as a result of the complaints lodged has remained extremely low compared to the percentage of decisions that have remained final and irrevocable as issued by the institution.

THE TREND OF THE APPEALS LODGED AGAINST THE DECISIONS OF N.C.S.C. IN THE PERIOD 2010-2023



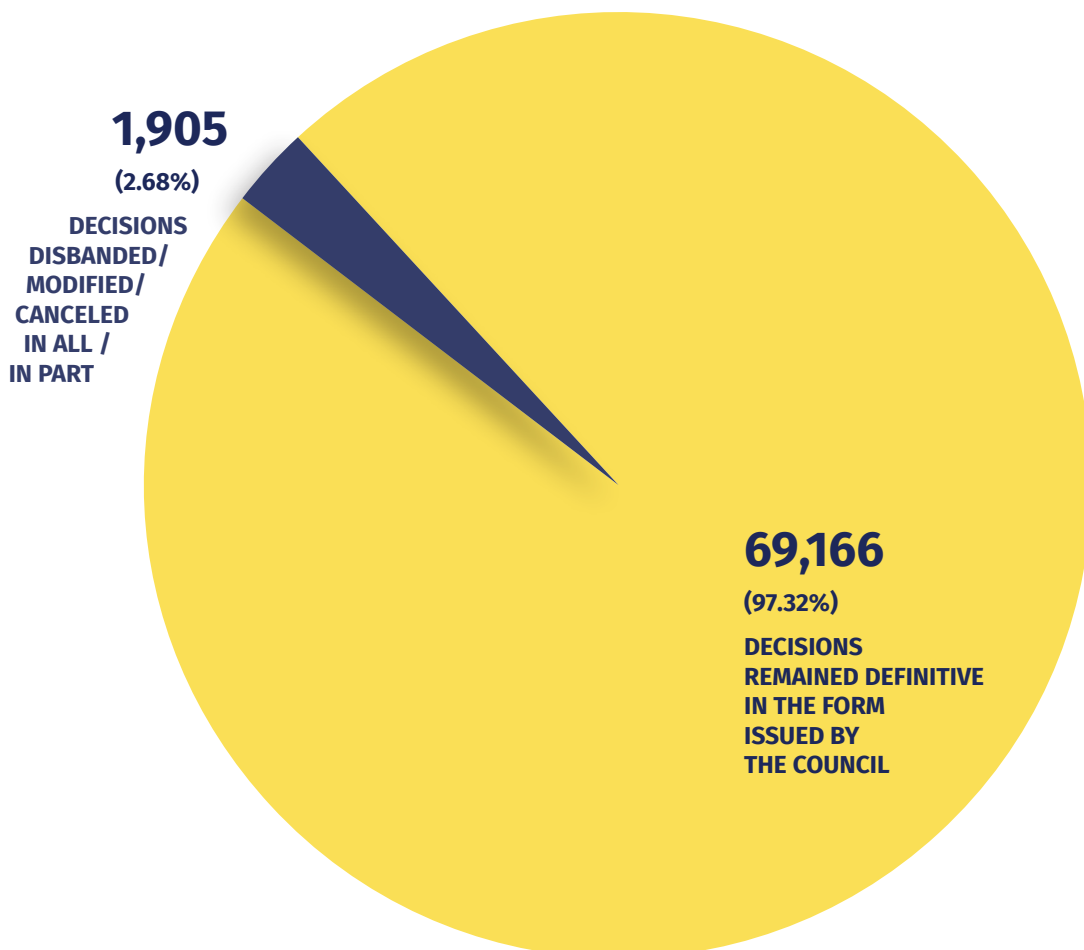
Considering the total number of decisions issued by N.C.S.C. from its establishment until the end of 2023, it can be ascertained that out of the 71,071 decisions ruled by our institution during the mentioned period, only 1,905 decisions, i.e. only 2.68%, have been fully or partially amended / overruled / cancelled by the competent Courts of Appeal.

Thus, it follows that during the mentioned period, the total number of decisions remained final after being challenged by complaints lodged at the competent Courts of Appeal was 69,166, i.e. 97.32% of the decisions ruled by the Council have remained final as issued by the institution.

For the professionals in the field of public procurement, these numbers confirm both the Council's role as guarantor of the supremacy of the law in its field of competence, and especially the quality of the activity carried out by the institution.

Consistent in enforcing and perfecting the institutional capacity that allows it to settle in a transparent and impartial manner the complaints it is vested to settle, the Council will continue in the year 2024 to solve with celerity the complaints lodged by business operators and to act as a promotor of European good practices, thus contributing to the improvement and fluidization of the award procedures for public contracts, as well as in mitigating the occurrence of acts of corruption.

THE STANDING OF THE DECISIONS ISSUED BY N.C.S.C. REMAINED DEFINITIVE IN THE PERIOD 2006-2023



CHAPTER 4

PROJECTS AND INITIATIVES

4.1. - INTERNATIONAL EXCHANGES

In 2023, The European Commission has allocated funds to support reform projects in member states, to strengthen their resilience and competitiveness.

On this occasion, in view of intensifying cooperation between the National Council for Solving Complaints and the remedy institutions of the other member states, the Council continued to focus on improving its operational capacity and efficiency in the settlement of complaints, for which reason it has initiated a project under the European Public Administration Cooperation Exchange (PACE) initiative, the purpose of which is to promote good practices among civil servants in member states, in view of strengthening the administrative capacity and enforcement powers.

The funding for the project initiated by the Council was provided entirely by European funds, through the Technical Support Instrument managed by the Directorate-General for Structural Reform Support (DG REFORM).



Meeting with counterparts from Croatia



Meeting with counterparts from Portugal



Meeting with counterparts from Poland

Although this was not the first time that N.C.S.C. accessed European funds, this time the challenge of using this type of instrument came from the fact that the funding focused on reforms related to common key priorities, which

obliged the Council to present itself at the highest standards regarding the activity of solving complaints in the field of public procurement.

The European Commission approved and funded five international exchanges, of which three were carried out in 2023 and have included visits to the remedy institutions in Croatia, Poland and Portugal, while the other two will be carried out in 2024 and will include meetings with our counterparts in Greece and Ireland.

4.2. UNIFICATION OF THE ADMINISTRATIVE – JURISDICTIONAL PRACTICE

Since its establishment, the Council has been concerned with the unification of the administrative-jurisdictional practice, therefore, pursuant to art. 62 of Law no. 101/2016, monthly plenary sessions are organized at the institution's headquarters, during which each chamber presents at least one practical situation that it faced in its activity of settling complaints. Following these plenary sessions, provided that there is enough relevant practice on the issue under debate, a decision is adopted to unify the administrative-jurisdictional practice, which is binding for all members.

Furthermore, every year, the Council organizes seminars attended by judges from the Courts of Appeal and representatives of institutions with attributions in the field of public procurement, on which occasion the non-unitary solutions from the activity of the institution and the courts are presented and debated, so as to establish a unitary solution

to follow. If non-unitary solutions issued by the courts are identified, the High Court of Cassation and Justice is notified, following the appeal in the interest of law procedure provided in Article 63 of the law.

One of the major issues in establishing a unitary practice is the fact that the legal framework is frequently subjected to changes, which generates confusion and a divergent practice.

Based on the provisions of art. 62 para. (3) from Law no. 101/2016, the Council organized in 2023 a seminar entitled "The applicability of CJEU decisions in administrative jurisdictional and judicial practice", held in Braşov between April 21 – 23, 2023.

This seminar was attended by the Council's settlement councilors, representatives of the National Agency for Public Procurement (A.N.A.P.), judges from the Courts of Appeal in Alba Iulia, Bacău, Braşov, Bucureşti, Cluj, Constanţa, Craiova, Galaţi, Ploieşti and from the Superior Council of Magistracy (C.S.M.), as well as by representatives and professionals of similar settlement institutions from Albania, Kosovo and Turkey, of the Superior Council of Magistracy of Albania and of the European Bank for Reconstruction and Development (EBRD). The aim of the seminar was to unify the administrative-jurisdictional practice, as well as to harmonize the Council's solutions with those of the courts of law and with the A.N.A.P.'s control and guidance documents, in order to eliminate jurisprudential obstacles in public procurement procedures, to respond to the urgent imperative of conducting the administrative-jurisdictional phase of public procurement procedures. During this seminar, the following legal issues were subjected to debate:

- ✓ presentation of CJEU Decision C-403/21 - applicability in national practice. Discussions, debates, possible points of view expressed by the participating representatives of the N.C.S.C., A.N.A.P., Courts of Appeal;

- ✓ opinions resulting from non-unitary administrative - jurisdictional and judicial practice - the issue of project verifiers and their participation in award procedures;

- ✓ the suspensive clause through the lens of legislation, CJEU and national practice, starting from the aspects identified in the ex-ante control by A.N.A.P.;

- ✓ the conflict of competence between N.C.S.C. and the courts of law;

- ✓ court practice regarding bail - establishment, restitution, retention.

On the topic of the CJEU Decision C-403/21 - applicability in national practice, the conclusions favored the unified application by the Council and the courts of law of the solutions established by the CJEU, namely:

- ✓ the contracting authority has the possibility to impose as selection criteria obligations resulting from special regulations applicable to certain activities that are likely to have to be carried out within the execution of a public procurement contract and that are not of significant importance;

- ✓ to the extent that the contracting authority has not established such requirements, according to the principles of proportionality and transparency, the procurement documents cannot be legally supplemented by qualification criteria resulting from special regulations applicable to activities related to the contract to be awarded that were not provided for in these documents and which the contracting authority did not intend to impose on the business operators in question, and ensure in the contract execution stage;

- ✓ it is not possible for an operator to be excluded from a contract award procedure for failing to designate the subcontractor to which it intends to entrust the execution of obligations resulting from special regulations applicable to the activities related to the contract in question, and which are not provided for in the procurement documents, when this bidder specified in its bid that it will execute these obligations by resorting to the capacities of another entity, without being linked to the latter through a subcontracting agreement.

Furthermore, regarding the conflict of jurisdiction between the Council and the courts of law, debates were held on a series of cases treated in a non-unitary manner, some regarding public procurement procedures organized under Addendum 2 of Law no. 98/2016, others regarding the restitution to the business operators of the bail established in court by the business operators. The participants in the seminar showed that in the first situation, the refusal decision should be more detailed, to avoid any situations that could delay the procedures. Regarding the second situation, the participants agreed that the courts of law must return the bails established in the

stage of appeals, but they abandoned the practice established by the competent regulator, ÎCCJ. On the matter of retaining the bail, it has been ascertained that the practice employed at the level of the contracting authorities is the majority, in the sense of its non-retention on the grounds that it was not possible to prove the existence of a prejudice generated by the lodging of a complaint by a business operator. The Council emphasized that the contracting authorities, in their vast majority, agree with the return of the bails to the business operators that established them at the time of formulating a complaint, declaring that they did not suffer damages. In turn, the judges participating in the seminar have shown that, in general, they have rejected claims for compensation made by the contracting authorities, as they were unable to prove the elements of tortious liability.

Furthermore, following the identification of the legislative obstacles, the Council decided to notify and cooperate with A.N.A.P., for this institution to exercise the attribute of legislative initiative and improvement of the legislation related to public procurement in order to achieve the desired celerity in the settlement of cases that are in the competence of the N.C.S.C., and to achieve the unification of administrative-judicial and judicial practice.

CHAPTER 5

INSTITUTIONAL TRANSPARENCY

MOTTO:

"Transparency is, actually, another word for truth"

Neale Donald Walsch



The activity carried out by the National Council for Solving Complaints throughout 2023 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.

Through its Information and Public Relations Office, the Council ensured a periodic communication with the media and official institutions, faithfully observing the terms regarding the fulfillment of requests on information of public interest submitted in compliance with Law no. 544/2001, as subsequently amended and supplemented.

At the same time, the Information and Public Relations Office, in cooperation with the Council's Statistics and IT Office, have focused on constantly disseminating statistical data and have periodically updated and developed the Council's website (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 finalized, legislative changes, as well as relevant and useful information for the promotion of good practices.

Furthermore, 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 providing the institution's management with the necessary support, as well as to answer in a duly manner any requests issued by the mass-media regarding various public procurement procedures settled by or pending before the Council.

The Information and Public Relations Office was also the link between the institution and the business operators and contracting authorities, informing them on the status of files, or clarifying certain technical issues in order to ensure the timely settlement of the files in progress. Moreover, to ensure the correct information of public opinion, Information and Public Relations Office has contributed to updating the Official Bulletin in which the decisions rendered by the Council are published, with their motivation and under anonymity, and has drafted the Annual Report of the Institution.

In 2023, the Council has received over 2,300 verbal or written requests for access to information, either from the contracting authorities, the business operators, the mass-media or natural entities. All verbal requests were settled upon transmission, while written requests have been fulfilled in a timely manner, with the strict observance of the legislation on data protection, as well as the provisions of Law no. 544/2001 on free access to information of public interest.



CHAPTER 6

THE BUDGET OF N.C.S.C.

The budget of N.C.S.C. corresponding to the year 2023, amounted to 20,236 thousand RON and was distributed as follows:

- The budget provision for Current expenditures: 20,128 thousand RON, of which:
 - Employment charges: 17,762 thousand RON.
 - Goods and services: 2,283 thousand RON.

The budget of N.C.S.C., detailed per titles and budget chapters is shown below, and can also be found on the institution's website (www.cnsc.ro).

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	20,236	5,439	5,639	5,222	3,963
	01	CURRENT EXPENDITURE	20,128	5,424	5,574	5,194	3,936
	10	TITLE I - STAFF EXPENDITURE	17,762	4,650	4,800	4,650	3,662
	20	TITLE II - GOODS AND SERVICES	2,283	750	750	526	257
	59	TITLE IX OTHER EXPANDITURE	83	24	24	18	17
	70	CAPITAL EXPENDITURES	108	15	65	28	0
	71	TITLE XII NON-FINANCIAL ASSETS	108	15	65	28	0
5001		EXPENDITURE – STATE BUDGET	20,236	5,439	5,639	5,222	3,936
	01	CURRENT EXPENDITURE	20,128	5,424	5,574	5,194	3,936
	10	TITLE I - STAFF EXPENDITURE	17,762	4,650	4,800	4,650	3,662
	20	TITLE II - GOODS AND SERVICES	2,283	750	750	526	257
	59	TITLE IX OTHER EXPANDITURE	83	24	24	18	17
	70	CAPITAL EXPENDITURES	108	15	65	28	0
	71	TITLE XII - NON-FINANCIAL ASSETS	108	15	65	28	0