



**THE NATIONAL COUNCIL  
FOR SOLVING  
COMPLAINTS**

**ACTIVITY REPORT  
2012**

CNNSC



## FOREWORD



**BOGDAN LEHEL LORAND**  
**PRESIDENT N.C.S.C.**

One of the fundamental elements of the European Union integration process was *«the achievement of an effective and credible public purchase system (...), with an impact on all other areas of interest of the “Internal Market” related communitarian acquis»*, as it was expressly regulated by G.D no. 901/2005<sup>1</sup>. Thus, the public purchase system reform involved in that stage an institutional reorganization, mentalities transformation that is the base of the old system, as well as the undertaking of financial efforts. The old challenges resolution/solution system, regulated by G.E.O. no. 60/2001, was seen as having a low efficiency that imposed the identification of new solutions for its perfection<sup>2</sup>. Under these circumstances, in order to solve such problems occurred litigations rapid resolution specialized panels concerning the application of public purchase contracts designation procedures organized within the National Council for Solving Complaints, administrative – jurisdictional body.

This litigations resolution system concerning the application of the public purchase designation procedures, regulated by E.O no. 34/2006, is in full contract with the provisions of art. 9 from the United Nations Convention against corruption<sup>3</sup> (that set in the task of every state to *„take, according to the fundamental principles of its legal system, the necessary actions to establish an appropriate public purchase system that would be based on transparency, competition and objective criteria for making decisions and that, among others, to be effective for corruption prevention”*) and is taking into account frame values, such as the existence of an *„effective internal complaint system, including an effective appellate system that*

<sup>1</sup> Concerning the approval of the Reform Strategy of the public procurements system, as well as the action plan for its implementation during 2005-2007, published in Official Gazette. no. 758/19.08.2005

<sup>2</sup> For details see chapter II. – Strengthening the legislation implementation capability G.D. no. 901/2005

<sup>3</sup> Ratified by Law no. 365/2004, published in Official Gazette no. 903/05.10.2004



would guarantee the exercise of the complaint in case of breaking the rules or procedures set according to the present paragraph”.

Thus, if initially there was asked the question „Is it possible the public money management based, in the same time on transparency, freedom, equal treatment, non-discrimination and safety?”, in the present one can state that G.E.O. no. 34/2006 – where to there are added all the subsequent acts – it is the most complex and coherent answer to this question.

If at the moment of adoption of such a regulatory document there were many skeptical people who considered that the principles and regulations in the field of public purchase are foreign of the Romanian culture, mentality and economic realities (just the same as 140 years back, the civil code seemed to be a form without a base, 6 years ago the regulation act of public purchase, *G.E.O. nr. 34/2006*, seemed a *form without base*), time proved that, after its application more than seven years, by the continuous efforts of the bodies involved, G.E.O. no. 34/2006 earned its *base*.

This report illustrates the activity performed by the Council during January 1<sup>st</sup> – December 21<sup>st</sup> 2012, highlighted by the graphs and diagrams presented as it follows.

As a resolution body, the Council has proven its efficiency and utility on the public purchase market by the number of decisions stated and maintained either due to the failure to appeal with complaints by the interested parties, or maintained by the Courts of Appeal as a result of the resolution of complaints formulated against the decisions stated by N.C.S.C.

Despite all legislative amendments brought to the emergency ordinance, in the 7 years since the establishment, the Council made efforts and continuously improved so as not to compromise from the principles expressly regulated by G.E.O. no. 34/2006 and those of common law, applicable in solving the challenges one was invested with.



## CONTENTS

<b>1. OVERVIEW .....</b>	<b>5</b>
<b>1.1. N.C.S.C. role and mission.....</b>	<b>5</b>
<b>1.2. Human Resources, Leadership and Organizational structure .....</b>	<b>8</b>
<b>2. THE ACTIVITY PERFORMED BY N.C.S.C. DURING JANUARY 01<sup>ST</sup> –</b>	
<b>DECEMBER 31<sup>ST</sup> 2012 .....</b>	<b>11</b>
<b>2.1. Complaints formulated by the economic operators.....</b>	<b>11</b>
<b>2.1.1. Evolution of the complaints formulated by the economic</b>	
<b>operators.....</b>	<b>11</b>
<b>2.1.2. Scope of the complaints formulated by the economic operators....</b>	<b>17</b>
<b>2.2. Files resolved by N.C.S.C.....</b>	<b>30</b>
<b>2.2.1. Evolution of the resolved files by N.C.S.C. ....</b>	<b>30</b>
<b>2.3.2. Situation of the complaints settled registered with N.C.S.C. ....</b>	<b>31</b>
<b>2.3.2.1. Situation of the settlement on the merits of contestation .....</b>	<b>31</b>
<b>2.4. Activity of N.C.S.C. compared to the estimated value of the awarding</b>	
<b>procedures .....</b>	<b>34</b>
<b>2.4.1. Estimated value of the awarding procedures in which N.C.S.C.</b>	
<b>issued decisions .....</b>	<b>34</b>
<b>2.4.2. The estimated value of the procedures for which N.C.S.C. issued</b>	
<b>decisions to admit the contestation, compared to that of procedures</b>	
<b>initiated in S.E.A.P. ....</b>	<b>36</b>
<b>3. EFFECTS OF ACTIVITY OF N.C.S.C. DURING JANUARY 1<sup>ST</sup> – DECEMBER</b>	
<b>31<sup>ST</sup> 2012.....</b>	<b>39</b>
<b>3.1. Situation of decisions issued by N.C.S.C. and amended by the Courts of</b>	
<b>Appeal following the complaints formulated .....</b>	<b>39</b>



<b>3.1.1. Situation of decisions given by N.C.S.C. regarding the merits of the contestations and amended by the Courts of Appeal following the complaints formulated .....</b>	<b>39</b>
<b>3.1.2. Situations of the decisions given by N.C.S.C. regarding the suspension applications for the awarding procedures until the complaints were settled on the merits following the complaints formulated .....</b>	<b>43</b>
<b>4. INSTITUTIONAL TRANSPARENCY AND STAFF CONTINUOUS TRAINING..</b>	<b>45</b>
<b>4.1. Institutional transparency .....</b>	<b>45</b>
<b>4.2. Giving the decisions regarding the occurrence of certain potential conflict of interests .....</b>	<b>45</b>
<b>4.3. Continuous professional training.....</b>	<b>50</b>
<b>4.4. Relation with the media and general public .....</b>	<b>53</b>
<b>5. BUDGET OF N.C.S.C. ....</b>	<b>55</b>
<b>Conclusions and forecasts.....</b>	<b>57</b>



## 1. OVERVIEW

### 1.1. N.C.S.C. role and mission

**National Council for Solving Complaints (N.C.S.C.)** is a specific jurisdiction body (in the field of public procurements), that was created with the purpose of guaranteeing the compliance with the legislation by the contracting authorities, due to its primary role of remediation and, subsidiary, of cancelling the illegal designation procedures.

*Dura lex sed lex*

The Council is an administrative body, with jurisdictional attributions, of public law that enjoys the independence required to the performance of the administrative – jurisdictional act, not being subordinated to any authority or public institution that complies with the constitutional provisions regulated by art. 21 section (4).

Although the activity performed (resolving the complaints formulated by the economic operators within the designation procedures of the public procurement contract) leads towards the area of the judicial power – wherein, cannot be yet integrated due to its nature – this body is part of the executive - administrative power area.

According to the legal<sup>4</sup> provisions, the 36 members of the Council, wherefrom at least half are licensed in law, are public clerks with special status, assigned to their positions by the decision of the prime minister, at the proposal of the Council president as a result of the promotion of a contest<sup>5</sup>.

The main task of the Council members is to solve the complaints formulated within the designation procedures by specialized panel formed by 3 members<sup>6</sup>.

Initially, the competence of the Council in solving the complaints formulated within the designation procedures, was limited until the moment of the contract conclusion, yet, due to the amendments occurred by Law no. 279/2011<sup>7</sup> to G.E.O. no. 34/2006 this competence limitation was eliminated, reason for the Council to formulate on the legality of the acts released within a designation procedure, should

<sup>4</sup> Addendum no. 1 to the organization and operation regulation of the National Council for Solving Complaints approved by G.D. no. 1037/2011, published in Official Gazette., Part I, no. 775 from 02.11.2011

<sup>5</sup> organized according to art. 20 from G.D. 1037/2011, according to the dispositions of the Law no. 188/1999 concerning the Status of the public servants, republished with subsequent amendments and additions, as well as those of the Government decision no. 611/2008 for the approval of standards concerning the organization and development of the public servants career , with subsequent amendments and additions.

<sup>6</sup> art. 267 from G.E.O. no. 34/2006

<sup>7</sup> Published in the Official Monitor, Part I no. 872 from 09.12.2011



it had been legally apprised, regardless if the contracting authority chose to conclude or not the public procurement contract.

According to legislation, N.C.S.C. is operating based on a Self Organization and operation Regulation, approved by the Government Decision no. 1037/2011<sup>8</sup>. In its activity, N.C.S.C. is only subject to the law; in exercising its attributions the Council adopts decisions, and in performing the activity the Council ensures the coherent application of the legislation in force, according to the principles by right expressly regulated<sup>9</sup>: legality, expediency, contradictory and the right to a defense.

Under the provisions of art. 267, sections (1) and (2) from G.E.O. no. 34/2006, the complaints formulated by the economic operators to N.C.S.C. are assigned randomly, electronically, for resolution to a panel formed by three members of the Council, wherefrom one has the quality of panel foreperson. Within each panel, at least its president needs to be licensed in law.

For the good operation of the institution and for the expedient resolution of the complaints formulated by the economic operators, to each complaints resolution panel it is assigned technical-administrative personnel with a status of contractual personnel, with legal studies, economic or technical.

The president of the Council, chosen among the members of the Councils, on a three years<sup>10</sup> period, by secret vote, with an absolute majority<sup>11</sup>, must be licensed in law<sup>12</sup> and has the capacity of main credits officer<sup>13</sup>.

The volume of the activity performed within N.C.S.C. is mainly reflected, by the number of decisions formulated and the number of files resolved, while the effects/results of the Council are reflected by the number of the decisions attacked by complaints to the Complaint Courts (inn whose jurisdiction is the headquarters of the contracting authority) and the number of complaints admitted.

Starting 2011, by the amendments brought to G.E.O. no. 34/2006 by Law no. 278/2010<sup>14</sup>, the legislator has eliminated from the content of art. 255 from the emergency ordinance the collocation „*in justice*”, leaving the administrative-

<sup>8</sup> Published in the Official Gazette, Part I no. 775 on November 2<sup>nd</sup> 2011, bill that recalled G.D. no. 782/2006

<sup>9</sup> art. 269 from G.E.O. no. 34/2006

<sup>10</sup> With the possibility of a single renewal of the sitting

<sup>11</sup> art. 258 from G.E.O. no. 34/2006

<sup>12</sup> According to Law no. 278/2010 concerning the approval of G.E.O. no. 76/2010 for the amendment and completion of G.E.O. no. 34/2010

<sup>13</sup> under Law no. 278/2010

<sup>14</sup> art. 1 p. (21) from Law no. 278/2010 – concerning the approval of the Emergency ordinance of the Government no. 76/2010 for the amendment and completion of the G.E.O no. 34/2006 concerning the public procurement contracts designation, of the public work and services concession contracts, published in the Official Monitor part I no. 898 from 31.12.2010



jurisdictional path for solving the complaints against the administrative act of the contracting authority, considered illegal, only into the task of the National Council for Solving Complaints<sup>14</sup>. Regarding this change, some practitioners drew the conclusion that the only body for complaints resolution in the field of public procurements would be the National Council for Solving Complaints, reason to apprise the Constitutional Court. This, as a result of the examination of the unconstitutionality exception<sup>15</sup>, noted that from the economy of dispositions of art. 255 section (1) it results that any person who considers oneself injured in a right or in a legitimate interest by an act from the contracting authority, by breaching the legal dispositions in the matter of public procurements, may require, by complaint, the cancellation of the act, the obligation of the contracting authority to issue an act, the recognition of the claimed right or the legitimate interest by administrative – jurisdictional means, under the conditions of the G.E.O no. 34/2006. The Constitutional Court noted that the criticized norm doesn't restrict the right of individuals who considered themselves injured to choose an attack mean in justice, right prescribed by art. 21 section (4) from the Constitution, transposed as a principle standard and in the Law of the legal administrative department no. 554/2004<sup>16</sup>.

An aspect that must be highlighted is the fact that, aside from the activity performed in the field of public procurements based on G.E.O. no. 34/2006, the Council has other competent activities such as:

- ✍ To solve on administrative – jurisdictional means the complaints formulated by any individual who considers oneself injured in a right or in a legitimate interest by an act of the public partner, by breaching the legal dispositions in the **matter of public-private partnership**<sup>17</sup>;
- ✍ To solve on administrative – jurisdictional means the complaints formulated by any individual who considers oneself injured in a right or in a legitimate interest by an act of the public partner, by breaching the legal dispositions in the **matter of public procurement contracts, including district contracts, and frame contracts assigned in the fields of defense and security**<sup>18</sup>.

Thus, in order to exercise the competences regulated by G.E.O. no. 114/2011, in force starting October 1<sup>st</sup> 2012, the National Council for Solving

<sup>15</sup> Decision no. 284/27.03.2012 published in Official Gazette . no. 344/21.05.2012

<sup>16</sup> Published in the Official Monitor of Romania, Part I, no. 1.154 from December 7<sup>th</sup> 2004

<sup>17</sup> art. 28 from Law no. 178/2010 of the public-private partnership, published in the Official Gazette. No. 676/05.10.2010

<sup>18</sup> art. 188 G.E.O. no. 114/2011 concerning the designation of certain procurement public contracts in the field of defence and security published in Official Gazette. Nr. 932/29.12.2011





Complaints «*Classified Information Holding Unit*», and therefore were performed the following actions:

- ✦ It was decided the relational regime with the Security Designated Authority – SDA (Romanian Intelligence Service specialized unit);
- ✦ There were executed the legal procedures within the relationship with ORNISS for the initiation and performance of the verification procedures in view of releasing the security certificates of the access authorizations to confidential state information;
- ✦ There were initiated actions concerning the physical protection against unauthorized access to classified information, personnel protection and information generated sources.

Considering the provisions of G.D. no. 215/2012, the Council adhered to the fundamental values, principles and objectives and monitoring mechanisms of the Anticorruption National Strategy 2012-2015 and adopted the District Action Plan wherein one has identified one's own institutional vulnerabilities and risks associated to the main work processes, as well as the consolidation risks of the already existing preventive mechanisms.

During 2012, but especially in the second semester, the Council formulated numerous observations and points of view concerning the amended propositions of G.E.O. no. 34/2006, that were partially absorbed within G.E.O. no. 77/2012 for the amendment and addition to the regulatory document that regulated the designation of the public procurement contracts, public work concession contract and services concession contracts, actively participating to the all the meetings, work groups, sessions, etc. organized by various public institutions (N.A.R.M.P.P., U.C.V.P.P, N.A.I. Competition Council, etc.) in view of interpreting the legislation within the field of public procurements and creation of a common practice in what concerns the method to approach the G.E.O. no. 34/2006 provisions.

## **1.2. Human Resources, Leadership and Organizational structure**

As an organizational structure, the Council operates with a number of 36 complaints resolution counselors in the field of public procurements (wherefrom two are suspended from the public function, under G.D. no. 1037/2011, organized in 11 complaints resolution panels in the field of public procurements.



In the Council personnel chart are also included 57 individuals with technical-administrative status (by G.D. nr. 1037/2011 for the approval of the N.C.S.C. operation and organization Regulation it is provided a number of 64 positions designated to the technical-administrative personnel), wherefrom two individuals have been suspended, during 2012, the labor contract for maternity leave.

The Leadership of the National Council for Solving Complaints is provided by mister Lehel - Lorand BOGDAN, being at his second sitting.

In exercising one's attributions, the president of the National Council for Solving Complaints is helped by a college formed by three members (Florentina DRĂGAN, Silviu – Cristian POPA, Cătălin POPESCU), elected by secret ballot, with an absolute majority, from the complaints resolution counselors within the field of public procurements, for a period of two years.

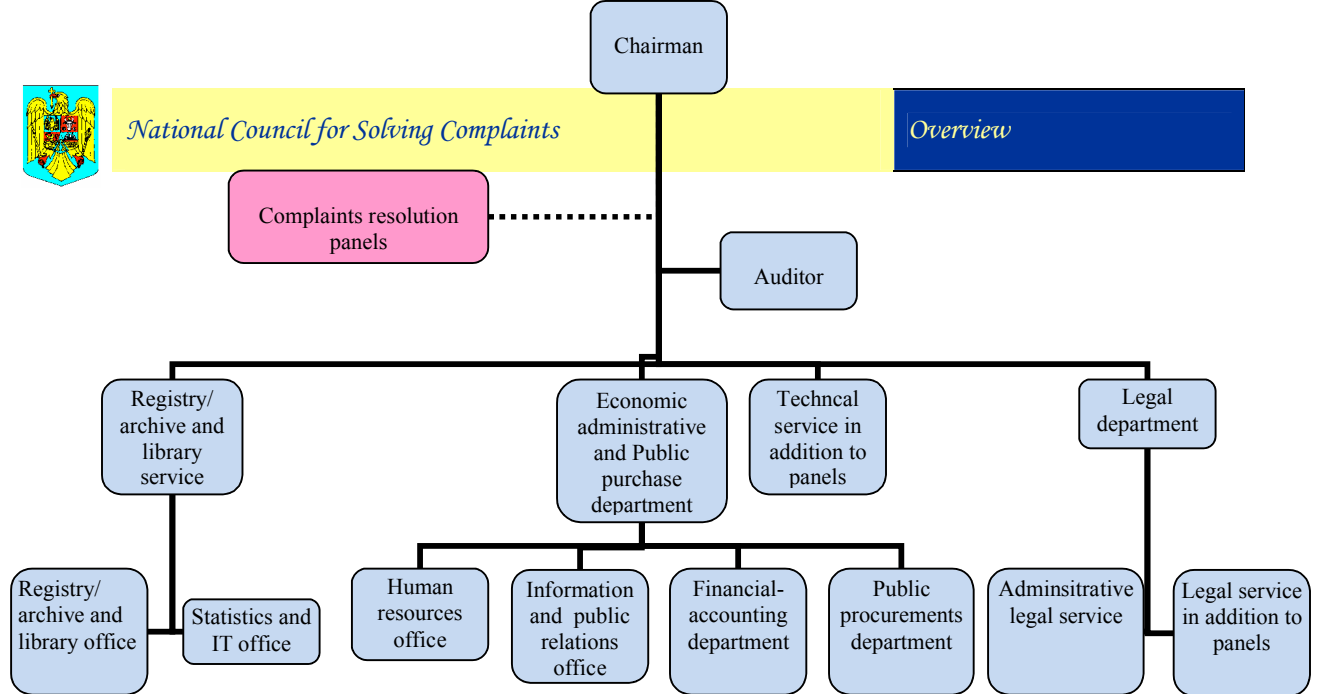
Within the National Council for Solving Complaints, on December 31<sup>st</sup> 2012 there were employed a number of 93 people (100% having a higher education degree), 63 from them being women (67,74%) and 30 males (32,26%).

According to the Council organization and operation regulation<sup>19</sup> the technical-administrative personnel is performing the activity within the following structures:

- ✎ *Registry department, archive and library*, that includes:
  - ✎ Registry office, archive and library;
  - ✎ Statistics and IT office.
- ✎ *Economic-administration and public procurements department*, that includes:
  - ✎ Human resources office;
  - ✎ Information and public relations office;
  - ✎ Financial-accounting division;
  - ✎ Public procurements division;
- ✎ *Technical service in addition to panels*;
- ✎ *Legal department*, that includes :
  - ✎ Legal, administrative law service ;
  - ✎ Legal service in addition to the complaints resolution panels;
- ✎ *Public internal audit division*;

---

<sup>19</sup> approved by G.D. no. 1037/2011



**Fig. 1 – N.C.S.C. flow chart**



## 2. THE ACTIVITY PERFORMED BY N.C.S.C. DURING JANUARY 01<sup>st</sup> – DECEMBER 31<sup>st</sup> 2012

### 2.1. Complaints formulated by the economic operators

The number of complaints formulated/formulated by the economic operators, their evolution, the object of the complaints, their complexity, but also the resolution manner, represents important indicators that can be used in the analysis made by the Council.

#### 2.1.1. Evolution of the complaints formulated by the economic operators

During **January 1<sup>st</sup> – December 31<sup>st</sup> 2012**, the number of complaints (**case files**) formulated by the economic operators recorded with the N.C.S.C. achieved the figure **5.997**.

Divided per months, during 2012 the number of complaints formulated by the economic operators and recorded with the N.C.S.C. evolved as follows:

📁 January	<b>264</b>	📁 July	<b>551</b>
📁 February	<b>349</b>	📁 August	<b>560</b>
📁 March	<b>398</b>	📁 September	<b>533</b>
📁 April	<b>450</b>	📁 October	<b>601</b>
📁 May	<b>613</b>	📁 November	<b>568</b>
📁 June	<b>577</b>	📁 December	<b>533</b>

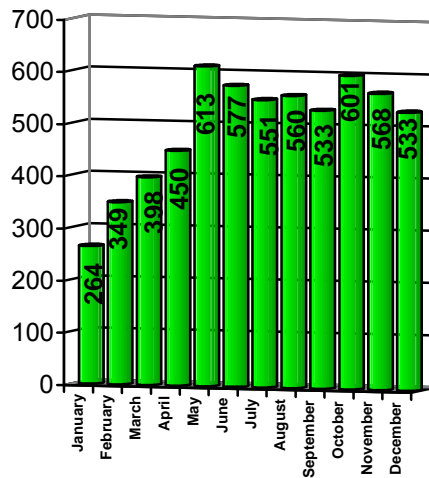


Fig. 2 – Evolution of complaints formulated by the economic operators with the N.C.S.C. in 2012

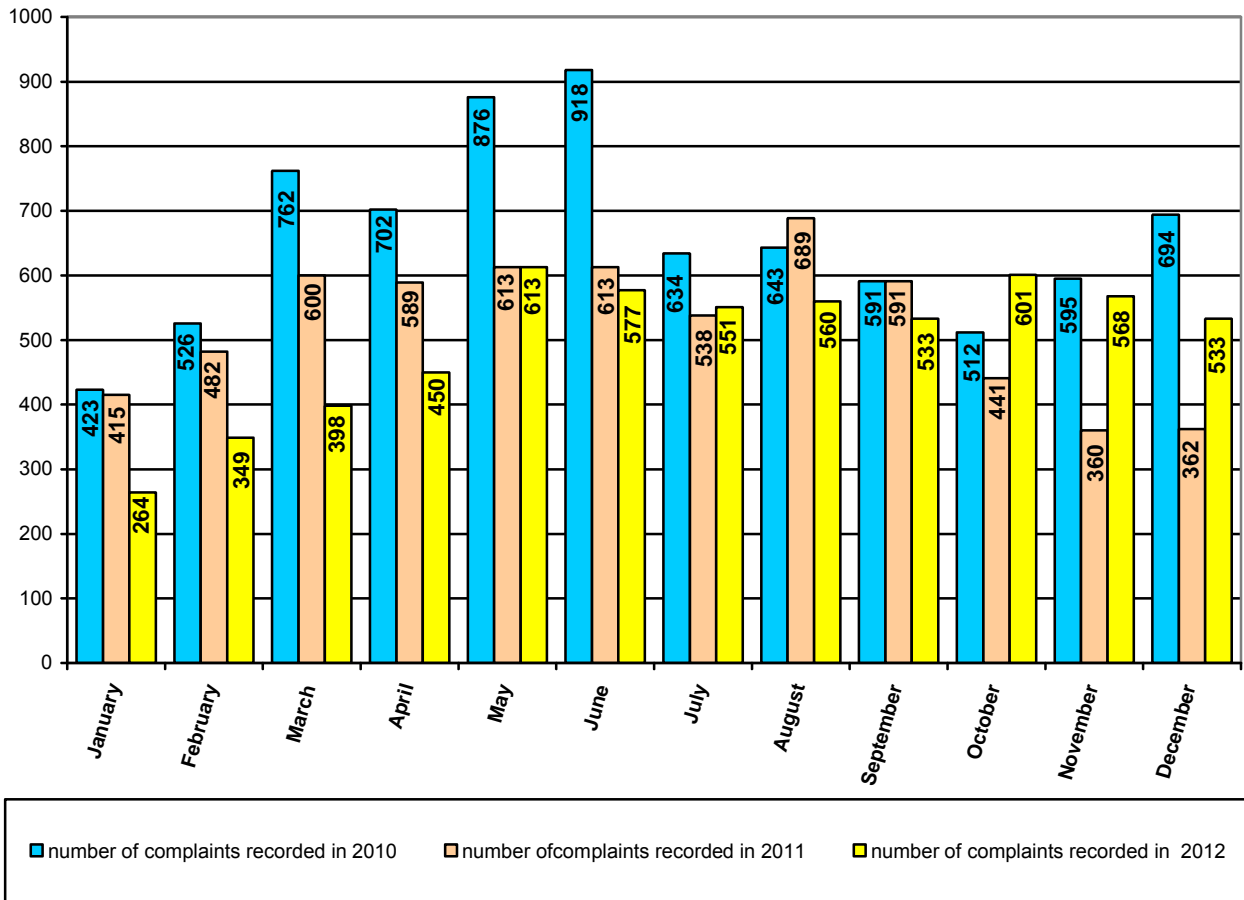


Fig. 3 – Evolution of complaints (case files) formulated by the economic operators with the N.C.S.C. during 2010 – 2012



By analyzing the evolution of complaints (case files) formulated by the economic operators and recorded with the N.C.S.C. during 2011 and 2012 was found that in 2012 took place a decrease in the number of complaints in the first semester in comparison to the similar period of the last year, but in the second part was registered an increase compared to the similar period of 2011. Nevertheless, by comparing the total evolution of the number of complaints formulated in 2012 with that registered in 2011 was found a decrease of only 4,7 %, decrease that can be considered insignificant.

As it can be seen from the previous graphic anterior (fig. 3), **the decrease in the number of complaints formulated by the economic operators in 2012, compared to 2010 is significant.** This is due, on one hand, **to the lower number of procedures initiated in the Public Procurements Electronic System (S.E.A.P) in 2012,** but also to the **legislative amendments package began at the end of 2010,** that decreased the „*appetite*” of the economic operators to formulate complaints.

Such legislative amendments, meant to temper the excess of the economic operators to formulate complaints, consisted mainly in:

- ☝ control „*ex ante*” regulation, that implies the obligation of the contracting authority to send to the Regulating National Authority and Public Procurement Monitoring (R.N.A.P.P.M.) for evaluation the designation documentation before sending for publishing the participation invitation/announcement in S.E.A.P.<sup>20</sup>;
- ☝ „*sanctioning*” the economic operators by retaining a ratio from the participation warranty under the circumstance the Council will reject the complaint as without grounds<sup>21</sup>, as it follows:
  - ✂ *between 63.000 – 420.000 RON inclusive → 1% from this value;*
  - ✂ *between 420.001 – 4.200.000 RON inclusive → 4.200 RON + 0.1% from what exceeds 420.001 RON;*
  - ✂ *between 4.200.001 – 42.000.000 RON inclusive → 7.980 RON + 0.01% from what exceeds 4.200.001 RON;*
  - ✂ *between 42.000.001 – 420.000.000 RON inclusive → 11.760 lei + 0,001% from what exceeds 42,000,001 RON;*

<sup>20</sup> Art. 33<sup>1</sup> from G.E.O. no. 34/2006

<sup>21</sup> Art. 278<sup>1</sup> from G.E.O. no. 34/2006 in force at the moment of performing the activity reported, respectively year 2012

✎ between 420.000.001 – 4.200.000,000 RON inclusive → 15.540 lei + 0.0001% from what exceeds 420.000.001 RON;

The effects of such legislative actions continued in 2012 and consisted in changing the complaints submission procedural moment/stage. From this significantly increased the number of complaints formulated against the designation documentations (stage wherein the participation warranty is not constituted), even though they have passed through the „ex ante” verification performed by R.N.A.P.P.M., these starting to match the number of complaints formulated upon result, as it can be observed from the graphic below.

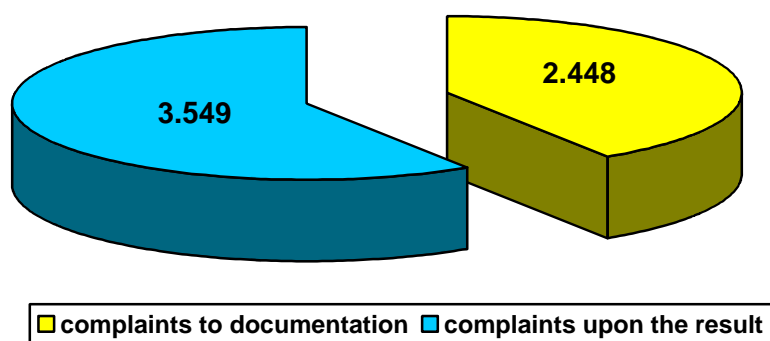


Fig. 4 – Status of complaints formulated to the designation documentation, compared to those formulated upon the result of the procedure in 2012

From the administrative-territorial distribution point of view (UAT), the number of complaints formulated by the economic operators has evolved since 2012 as it follows:

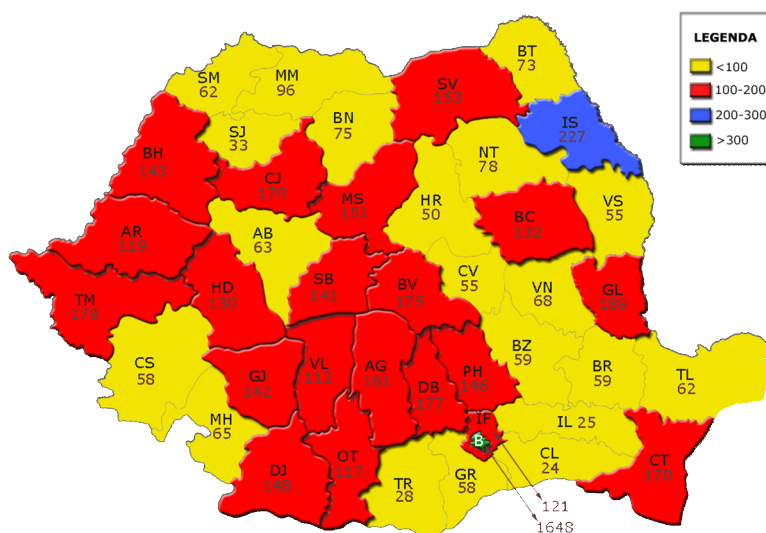


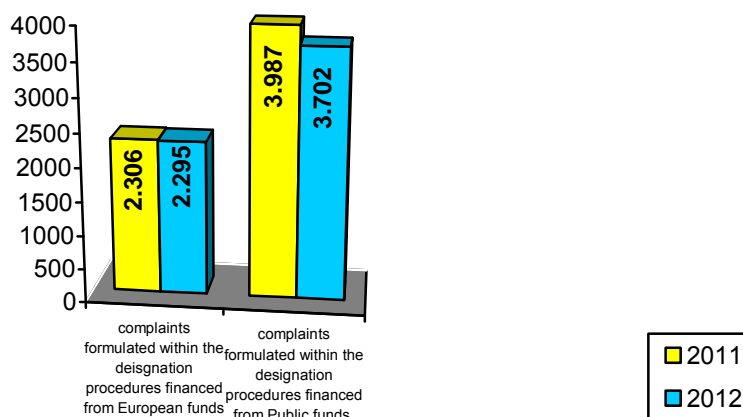
Fig. 4 – Distribution per counties of the complaints formulated by the economic operators in 2012



<b>UAT</b>	<b>Number of complaints</b>	<b>UAT</b>	<b>Number of complaints</b>
Bucharest	1648	Vâlcea	112
Iași	227	Maramureș	96
Galați	189	Neamț	78
Timiș	179	Bistrița Năsăud	75
Dâmbovița	177	Botoșani	73
Brașov	175	Vrancea	68
Cluj	170	Mehedinți	65
Constanta	170	Alba	63
Argeș	161	Satu Mare	62
Suceava	153	Tulcea	62
Mureș	151	Brăila	59
Dolj	148	Buzău	59
Prahova	146	Caras Severin	58
Bihor	143	Giurgiu	58
Gorj	142	Covasna	55
Sibiu	141	Vaslui	55
Bacău	132	Harghita	50
Hunedoara	130	Sălaj	33
Ifov	121	Teleorman	28
Arad	119	Ialomița	25
Olt	117	Călărași	24

Referring to the number of complaints formulated by the economic operators within the designation procedures of the public procurement contracts **financed from European Funds**, it must be highlighted the fact that they **2.295**, that represented a percentage of 38,27% from the total number of complaints formulated to the Council during 2012, while a number of **3.702** complaints formulated, respectively 61,73% from the total number of complaints formulated by the economic operators with N.C.S.C., have targeted the public procurements contracts designation procedures financed from **internal public funds**.

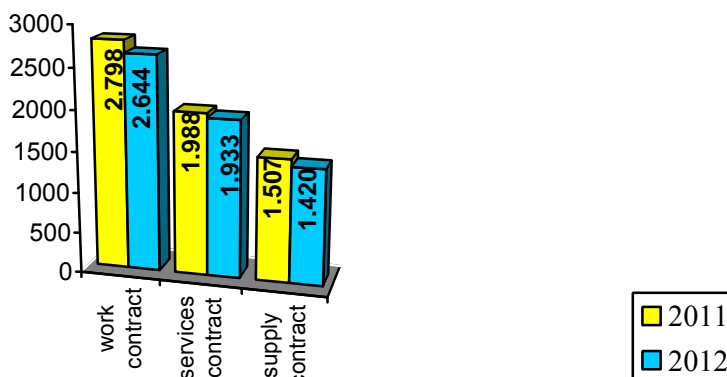




**Fig. 5** – Status of the complaints formulated by the economic operators according to the origin of the funds wherefrom the designation procedures were financed in 2012 compared with 2011

Complaints formulated by the economic operators within the designation procedures, can be classified also according to the scope of the public procurement contract, status that in 2012 presented as it follows:

- public procurement contracts designation procedures having as scope the **work execution - 2.644 (44,09%)**;
- public procurement contracts designation procedures having as scope the **products supply– 1.933 (32,23%)**;
- public procurement contracts designation procedures having as scope the **services provision - 1.420 (23,68%)**.



**Fig. 6** – Status of the complaints formulated by the economic operators according to the type of contract in 2012 compared to 2011

Analyzing the diagram referring to the complaints formulated according to the origin of the funds wherefrom were financed the public procurement designation procedures, as well as the diagram referring to the complaints formulated by the



economic operators according to the type/scope of the public procurement contract, one can notice that the number of complaints formulated in 2012 is close to the one registered in the previous year.

During 2012, to the 11 complaints resolution panels were assigned randomly, electronically, for resolution, an average of 545 complaints/case files that means a monthly “load” of approximately 45 files/complaints resolution panel.

Even though the number of complaints/ files formulated in 2012 by the economic operators was fairly high, the 11 complaints resolution panels within the institution complied in an exact manner with the complaints resolution due dates, provided art. 276, section (1) from G.E.O. no. 34/2006, amended and supplemented<sup>22</sup>.

It is important to highlight that, **since its foundation and by December 31<sup>st</sup> 2012**, with the N.C.S.C. were registered a number of **41.541 complaints** formulated by the economic operators.

### ***2.1.2. Scope of the complaints formulated by the economic operators***

Regardless of the scope of the subjective law (a performance, an abstinence), the complaint formulated within a designation procedure always has as scope the protection of such a right, but there can be instances where the scope can also be the protection of certain interests.

In the moment when it is turned to formulating a complaint, this will be individualized, thus becoming a lawsuit/litigation, and the scope of the lawsuit/litigation is constituted from what the parties understand to submit for resolution, what they claim from the counselors to verify, appreciate, find, resolve. Thus it results the „*ipso facto*” that the complaint resolution action brings on the table a matter of fact, as well as a matter of law, that the resolution counselors are called to resolve by the decision of the Council, in view of providing protection to the subjective right.

---

<sup>22</sup> The Council has the obligation to solve the complaint in 20 days upon the date of the public procurement file receipt from the contracting authority, respectively within 10 days in case of an exception incidence that prevents the analysis of the complaint, under art. 278 p. (1). In cases duly justified, the resolution due date of the complaint may be extended one time by another 10 days.



The scope of the complaint can consist of the total or partial annulment of an administrative act or the obligation of a contracting authority (in the sense of the G.E.O no. 34/2006) that refuses to issue an act or to perform a certain operation.

As it has been previously noted, as a result of the analysis of the **scopes of the 5.997 complaints** formulated by the economic operators with the National Council for Solving Complaints in 2012, resulted that a number of **2.448** among these targeted the **designation documentations (40,82 %)**, and **3.549** targeted the **result of the procedure (59,18%)**.

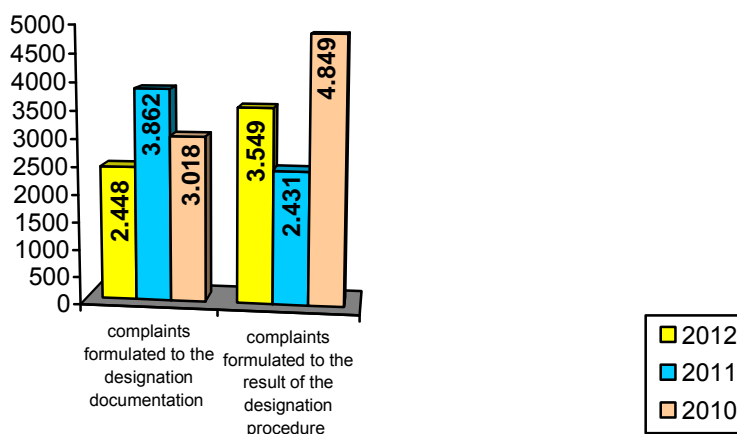
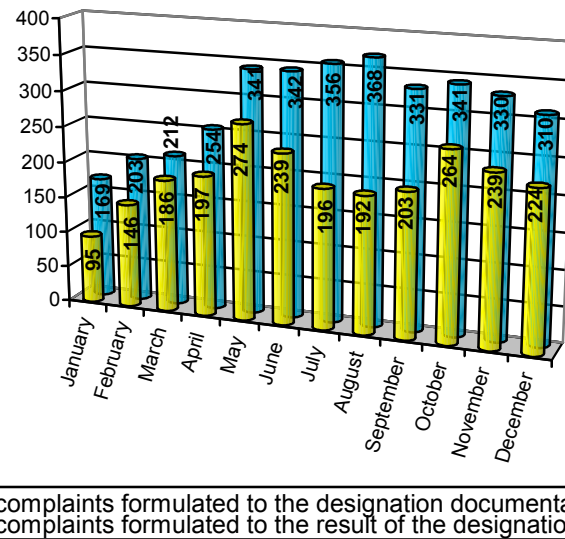


Fig. 7 – Status of the complaints formulated to the designation documentation and the result of the procedure during 2010-2012

By analyzing the diagram above, one can observe the immediate effects produced by the legislative package started in 2012, with applicability in 2011, in the sense of “matching’ the number of complaints formulated against the designation documentation with those that targeted the result of the designation procedure.



**Fig. 8** - Evolution of complaints formulated to the designation documentation compared to those formulated to the result of the procedure in 2012

By making an analysis of the scope of the complaints formulated against the requirements imposed within the designation documentation, one observed that most often than not are challenged:

- ✎ restrictive requirements concerning the qualification criteria or technical specifications;
- ✎ designation criteria and assessment factors;
- ✎ mentions within the designation procedure of certain technologies denominations, products, marks, etc. without using the phrase „or the equivalent”;
- ✎ lack of a clear answer, complete and free of ambiguities from the contracting authority to the clarification solicitations that target the designation documentation;
- ✎ establishment form of the participation warranty;
- ✎ imposition of certain excessive contractual clauses;
- ✎ the failure to divide the procurement into lots.

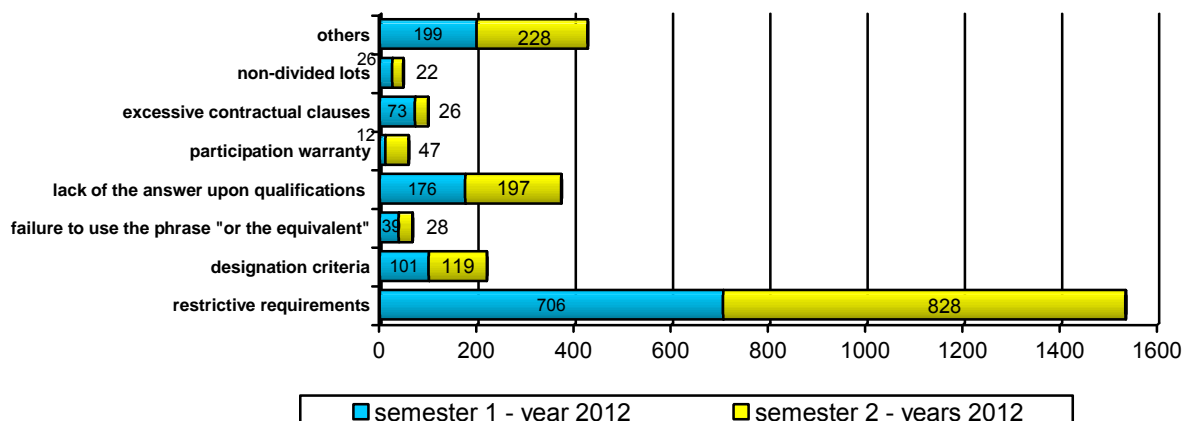
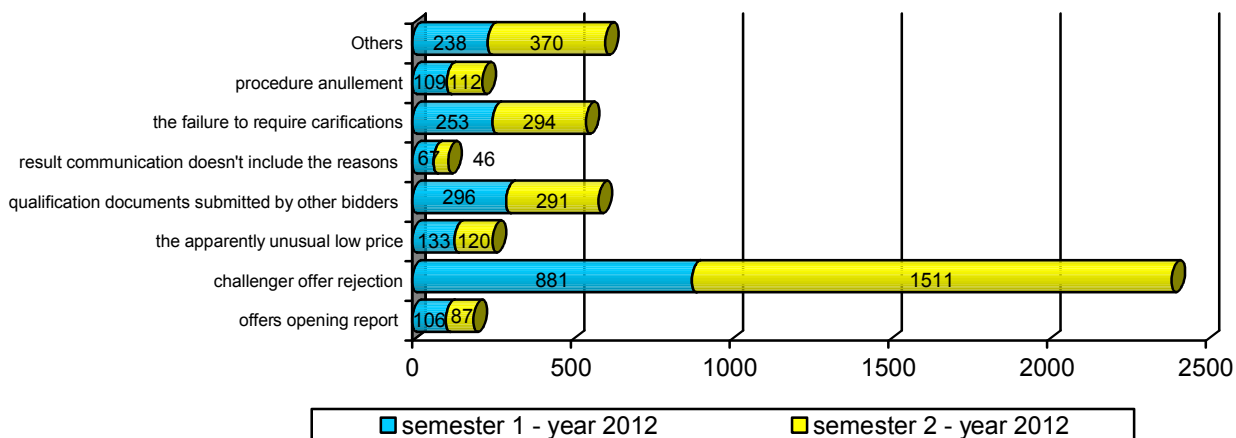


Fig. 9 – Status of complaints in relation to the critics formulated against the designation documentation – in 2012

Within the complaints formulated against the result of the procedure, on noticed that more often than those that not are challenged/criticized:

- ✍ offers opening meeting report;
- ✍ challenger's offer rejection as non-conform or unacceptable;
- ✍ the apparently unusually low price;
- ✍ qualification documents formulated by other bidders or the manner to grade/assess them;
- ✍ the failure to mention within the result communication address the reasons for the rejection of the offer;
- ✍ the failure to request by the contracting authority of the clarifications concerning one's offer or incorrect appreciation of the answer to the clarifications request;
- ✍ annulment of the designation procedure.



**Fig. 10** – Status of complaints in relation to the critics formulated against the result of the procedure– in 2012

In order to understand such aspects, we are presenting as it follows, as few practical cases:

**1. Restrictive qualification requirements in relation to the nature and complexity of the public procurement contract that is to be designated<sup>23</sup>**

Referring to the critic of the challenger with respect to the requirement for authorization/approval for products trade, the Council finds that within the Procurement data sheet, on cap. III.2.1.b) the capacity of exercising the professional activity is required: „*Authorization/Certificate for trading cleaning products/catering disposable items, in illegibly copy conform to the original, signed and stamped in order to prove that one has the right to trade such products on the Romanian market*”.

Within the point of view, the contracting authority mentions that the authorization/trade certificate of the cleaning products/catering disposable items is the document that is obtained from the local authority in whose territorial range is recorded the registered office and it is not a marketing authorization from the manufacturer/ distributor, as the challenger claims.

By the address to complete the point of view, the contracting authority is summoning in supporting such requirement the provisions of art. 23<sup>5</sup> from Law no. 148/1999.

<sup>23</sup> Decision no. 670/2012 remained definitive and irrevocable by the failure to attack by a complaint.



For the resolution, the Council notes the following provisions: art. 58 paragraph (1) and (3), art. 59 - art. 61 from Law no. 24/2000, art. 23<sup>5</sup> from Law no. 148/1999, G.E.O. no. 50/1998, art. I section 18, art. 23<sup>5</sup> and G.E.O. no. 82/1997.

Considering such aspects in conjunction with art. 62 from Law no. 24/2000, the Council finds that the provisions of the article summoned by the contracting authority in supporting the qualification and selection requirements, respectively art. 23<sup>5</sup> from Law no. 148/1999 were recalled by art. (57) paragraph (2) from G.O. no. 27/2000 starting 15.02.2000.

Moreover, the Council notes that the basic act summoned by the contracting authority, respectively G.E.O. no. 82/1997 even though it wouldn't be recalled as of the date of the procedure initiation, according to the participation announcement, is represented by the cleaning materials supply and disposable catering items products that are not subject to excise, as they were defined by art. (2) from G.E.O. no. 82/1997.

Neither the recalling act of G.E.O. nr. 82/1997, respectively G.O. no. 27/2000 is not applicable in the matter considering that according to art. 34, this regulatory document regulated the authorization regime of the economic agents who have revenues from selling alcohol, tobacco products and coffee, products that are not found among the products that represent the need of the contracting authority, and that have been expressly detailed within the specification (toilet paper, fresheners, WS stalls, disinfectants, detergent, soap, cloths, trash bags, knives, tea spoons, plates, disposable cups, etc).

To such aspects the Council finds that the qualification requirements imposed by the contracting authority within the procurement data sheet, respectively „presentation of the authorization/trade certificate for cleaning products/disposable catering items” is unjustified in relation to the nature and complexity of the contract, thus breaching the provisions of art. (8) from G.D. no. 925/2006 in conjunction to art. 179 paragraph (1) from G.E.O. no. 34/2006.

Consequentially, the critic of the challenger concerning the elimination of the requirement in question is justified, the Council following to admit it.

## 2. Assessment factors<sup>24</sup>

In the procurement data sheet, section IV.2.1), was mentioned that it will be applied

<sup>24</sup> Decision no. 1088/2012 remained definitive and irrevocable by the failure to attack by a complaint.



the designation criteria “the most advantageous offer from the economic stand point” with the following assessment factors: the price of the financial offer - 70 points; description of the work execution organization plan - 20 points; the warranty period granted to the work - 10 points.

In the section dedicated to the details concerning the application of the score calculation algorithm for the assessment factor „the description of the works execution organization plan” with a score corresponding to each element. Among such elements one can find the “work execution management” wherefore 3 points are granted.

In relation to the situation subject to resolution, the Council notes the following legal dispositions: art 199 of G.E.O. no 34/2006, art. 14 and art. 15 of the G.D. no 925/2006.

Seeing the manner the contracted authority has established as an evaluation sub-factor “the management of works execution”, the Council notes that rating the activity’s organization method by the bidder does not reflect the real and obvious advantages that the contracted authority can obtain by the use of this evaluation sub-factor, the mentioned aspect being related to the organization of the economic operator’s activity itself who participates to the procedure, organization that isn’t relevant for the contracted authority since , by the presented technical proposal, this demonstrates the fulfillment of all mandatory conditions required by the authority through the elaborated data sheet. The scoring of such aspects of the offer cannot be done inc compliance to the law, under the circumstances when the activities’ organization techniques and the human and technical resources management of any society cannot be compared and scored, these being appropriate and specific to every bidding economic operator.

In view of the given, as well as the legal prescription whereby any modification and/or completion of the mentioned evaluation factors [...] leads to the annulment of the designation procedure (art. 199, paragraph. (5) of G.E.O. no. 34/2006), the Council establishes that the continuation of the procedure is impossible by taking reparation measures of illegal aspects determined related to the application manner of the designation criteria established by the contracted authority by the designation documents and the solution of annulling the whole public procurement procedure is imposed.





**3. The complete, correct and explicit notification of the economic operators so that they can elaborate their tender<sup>25</sup>.**

The determined critics regarding the lack within the designation documentation of the geo-technical study and the topographic edifications are considered substantiated by the Council. For support, the Council considered the dispositions art. 33 align (1) from G.E.O. no. 34/2006.

As well, the Council had in sight the fact that the designing that is made based on the existent feasibility test is included in the contracts scope. For this purpose, according to Addendum no. 2 of HG no. 28/2008 regarding the approval of the content-frame of the technical-economical documentation afferent to public investments, as well as the structure and methodology elaboration of the general device for investment objectives and intervention works, the topographic and geo-technical studies are compulsory elements of the feasibility study.

The claims of the contracted authority that the feasibility study was contracted in 2007 and there are implicit modifications from the existent situation, being necessary that in the field studies (topographic and geo) to fathomed by the contractor, there are no serious reasons not to put the existent studies at the disposal of the economical operators. The contracting authority has the obligation to put the topographic and geo studies in their present form at the disposal of the economical operators, at the approval of the feasibility study. In case the present situation differs from the initial one, the contracting authority can make assignments in the designation documentation towards the necessity of their update to the current situation.

Considering the provisions of art. 6 section(1) and (6) from the Law no 50/1991, (including the fact that the feasibility test has been made), the Council considers that the contracting authority has the obligation to put the issued urbanism certificate at the disposal of the economical operators.

Regarding the water debit that can be captured on source, the Council took act that by the expertise of the National Authority "Romanian Waters"-Water Direction .... on the work "Hydrological considerations regarding the fountainhead....commune....." made by..... .

As by the regulatory document for designing the constructions of water catchment NP 028/1998, chapter 2.4. Fountainheads catchment, section 2.4.1.4. it is defined: It is recommended that the preliminary studies of conservation regarding the debit



and the quality of fountainheads' water to be extended on a period of 1-3 years, the Council considers taking into account the debit 44,6 l/s afferent to the period 2005-2007 (3 years) that covers the necessary of 44,5 l/s.

Regarding the fact that the spring.... could be a spring of a certain water flow from the discussion area, the Council determines that from the designation documentation (data sheet) no information results. If the spring... is a spring of a water course, the Council considers that the contracting authority must determine what the servitude debit is so it can be taken into account by the bidder during the phase of designing its catchment (to establish if the debit on source of 44,6 l/s is involved of other needs and can provide the necessary debit of 44,5 l/s imposed by the contracting authority for the water supply of the Beius municipality).

So, based on the dispositions of art. 278 paragraph (2), (4) and (6) by G.E.O. no. 34/2006, The Council admits, in part, the complaint and obligates the contracting authority to continue the procedure, within maximum 10 days from the receipt of the decision, by modifying the designation documentation and the communication of this action by the economical operators, under the conditions provided by art. 32 paragraph (2) of HG no 925/2006, by publishing the modifications in the SEAP.

*4. The contracting authority has not adequately/accurately assessed the offer formulated by the economic operator that was subsequently rejected because of non-conformity.<sup>25</sup>*

The Council notes that, according to the communication no 18/1/470/22.03.2012, the offer of the challenging association was declared to be con-conform, based on art. 70 paragraph (1) of the Government's Act no. 925/2006, because the given clarification explanations were not conclusive.

Relative to the first argument of the authority: "the answer to clarifications with no. 10 of act 2153/30 December 2011 does not determine the necessary resource (supplier/ source of supply) for the main material: rail", one cannot substantiate the rejection of an offer of over 1 billion lei and of an obvious complexity, as the one in argument, such a consequence being disproportionate in relation to the cause it is supported by. Besides, the conformity or con-conformity of the offer is not determined (fundamental and in facts) dependent on the mentioning or not of the

<sup>25</sup> Decision no. 1198/2012 maintained by the Bucharest Complaint Court as a result of the rejection of the formulated complaint that made the object of the file 3901/2/2012



supply source, because the source of the material does not matter, (that can be whichever, from any country), but the technical characteristic assumed for the respective material. In one's answer no. 2153/30.12.2012, at pos. 5, the challenging association has indicated the rail types being used (60E1 and 49E1), that meet the standards SR EN 13674-1+A1:2008, steel R260 and R350 HT, with certain hardness, also adding the mechanical and chemical characteristics of the two types of steel.

It is disproportionate a rejection as non-conform of a complex offer due to any minor slip in an answer of its clarification. Additionally, the consideration of the authority is not decisive in establishing the offer's conformity and has nothing in common with the demonstration of the bidder's capacity to adequately execute the bided contract.

To clarify the situation, under art. 78 paper I of the Government's Act no. 925/2006 and the principles shown above, the contracting authority had the legal obligation to re-solicit from the bidder explanations about the rail that follows to be used in the execution of the bided investment, of over a billion lei prior to considering the admissibility or inadmissibility/rejection of its offer. In conclusion, it is determined that the evaluation performed by the authority has registered deviations from the legal frame, and for this reason, it is mandatory that the re-clarification with the challenging bidder is made on the aspect in reference, knowing that any decision of the authority regarding the admission or rejection of an offer must be grounded on a solid evaluation of the offer under all its aspects, and on conclusive cases, and not on insufficient or unclear elements, which do not allow the execution of an objective assessment of the offer.

The attitude of the authority is inexplicable and excessive, of not taking into consideration the clarifying documents formulated by the contester with the address no. 2213/27.01.2012, that was supposed to be considered during the evaluation, being part of the offer's detailing. There is no explanation in the procedure's report about ignoring such clarifications, respectively what legal norm forbids the authority to retain and analyze the clarifications formulated. Indeed, it is mentioned art. 80 paragraph (3) from the Government's Act no. 925/2006, but the inconsistency of clarifications in the "vices of form" category does not automatically assume that the authority must not take them into consideration. Accordingly, if the authority doesn't wish to take act of the clarifications from 27.01.2012 presented by the bidder, then one must argue in fact and de jure one's refusal. Contrary, it is considered a



violation of the obligation to assess offers in terms of all the documents formulated by the bidder, including the ones formulated during the assessment.

On the other hand, the rejection of such a complex offer for the lack of three technologies descriptions raise serious question marks, as not the description of the technologies (that, usually reproduce the applicable standards and regulatory documents in distinct activity sectors), gives value to the offer and assures the authority as of the works quality. An offer wherein the technologies are scarcely described does not automatically lead to the conclusion that the works will be of low quality or that the bidder doesn't have the capacity to adequately execute the contract. What is important is that the contracting authority should determine the offers conformity with the technical specifications from the data sheet, given by the designer, and in the present case the authority didn't invoke such deviations. It shouldn't be omitted that the association accentuated in its answer that the "works regarding the energetic-supply specialties, the protection of the rail installations and surrounding, and lighting around the sidetracks, will be performed in compliance with the provisions in the data sheet for such specialties."

The authority should have assessed including the documents annexed to the answer no. 2213/27.02.2012, not just the reference to pages 141-150 from the technical proposal, and on the other hand, if the information given by the challenging party (and not only) were insufficient, the contracting authority was held to come back with a new clarification solicitation to the bidder, not to apply a drastic and disproportionate sanction of the rejection as non-conform to the offer for not indicating the rail's origin (first reason) and the failure to describe certain technologies (second reason). Under no circumstance the interest or the purpose of the contracting authority must be focused towards the discovery, by any means, of pretexts for rejecting the offers, but to the contrary, to attract and maintain as many potential partners in competition, providing this way the premises of a real and loyal competition, as well as the efficient use of public funds.

Against the assembly of those preceding, the Council will admit the association's challenge..., in conflict with..., will annihilate the report of the designation procedure and will obligate the contracting authority to re-clarify the challenging party's offer, to re-evaluate the offers of the implied economical operators, as well as issuing a new report of the designation procedure, by complying with the documentation of the bidding and the law regarding the public procurements.



*5. The contracting authority did not adequately/accurately assessed the offer formulated by the economic operator, who was subsequently declared winner<sup>26</sup>*

As a result of executing the actions disposed by the decision of N.C.S.C. no. 515/C5/276/281/01.03.2012, the Council determines that the contracting authority has solicited in a correct manner from the bidder declared as winner, respectively the Association... by the Address no. F385/08.03.2012, clarifications regarding the aspects evoked in the motivation of the quoted decision.

In this respect, it is to apprehend the fact that the bidder declared as winner, has replied in due time, by Address no. 219/15.03.2012 whereto one attached certain documents.

Considering the content of the presented documents, the Council notes that the bidder declared as winner did not present a clear proof of the fulfillment of the qualification requirement regarding the similar experience in discussion, under the circumstance where the formulated documents do not demonstrate the fact that: "...in the last 5 years, he/they executed a building work, in base of a contract type FIDIC or equivalent...".

Even though the presentation of the documents annexed to the response to the clarification solicitations of the contracting authority, is compliant with the provisions of art. 78 of G.E.O. no. 925/2006, the Council notes that, the documents mentioned above do not certify the fact that the bidder declared as winner "... in the interval indicated in the data sheet of the procurement date (period 28.10.2006-28.10.2011), has executed under the contract formulated as a similar experience, at least 8,5 km of water distribution networks in the urban environment and at least 40 km of sewage networks that would comprise including the construction of used waters pumping in the urban environment."

More than that, proceeding to the comparative verification of the formulated documents by the bidder declared as winner, the Association ....., in order to prove the period of execution of the contract hereby for the similar experience, as a result to the demand formulated by the contracting authority, based on Decision N.C.S.C. no. 515/C5/276/281/01.03.2012, as well as the contesting party, the Association..., the Council determines that in the laid-down contract the stages of work execution are not defined, anywhere in the content of the contract, and there is no reference

<sup>26</sup> Decision no. 1526/2012 maintained by the Court of Appeal Ploiesti after rejecting the complaints that made the object of files 486/42/2012 and no. 492/42/2012.



to the execution in phases of its object and neither is the type of works that make the object of IV phase from this contract. In the same time, the Council determines that in the documents laid-down by the contesting Association..., references are made to “stages” of works executed in different periods, some of the documents formulated being declarations of some individuals that present themselves as “responsible” of some institutions/companies, and not issued by the signatory beneficiary of the contract invoked by the bidder declared as winner, who also sustains that in reality the challenging party makes reference to another contract but the one formulated within the procedure.

In this context, the Council determines that in cause, the dispositions of art. 11 paragraph (3) of HG no. 925/2005 are applicable, in the sense that it appears to be necessary requiring information from the contracting authority, directly from the beneficiary of the contract formulated with a title of similar experience by the bidder declared winner.

In relation to the notes, the complaint appears to be partially valid, meaning that, pursuant to the endeavor made by the contracting authority based on Decision of N.C.S.C. no. 515/C5/276/281/01.03.2012, it is not clearly proven the period of the works’ execution presented by the bidder declared as winner, but in the present cause, “the inadmissible character” is not proven of the offer formulated by the Association..., invoked by the contesting party so that, based on the provisions of art. 278 paragraph (4) and (6) from G.E.O. no. 34/2006, will party admit, the complaint formulated by the Association..., and will dispose the annulment in part of the procedure report no. F693/18.04.2012, meaning the aspects relative to declaring the offer formulated by the Association... as admissible and winner, and the redoing of the procedure report, within 10 days, after the solicitation by the contracting authority of necessary relations according to the ones previously shown, and after that the designation procedure will continue.



## 2.2. Files resolved by N.C.S.C.

### 2.2.1. Evolution of the resolved files by N.C.S.C.

During 2012, the complaints resolution panels within N.C.S.C. issued **5.782 decisions**, fact that meant the **resolution**, within the mentioned time frame, of **5.786 case files**.

The annual evolution of the case files resolution by the complaints resolution panel within the Council is as it follows:

January	323	July	511
February	290	August	568
March	398	September	551
April	389	October	574
May	564	November	608
June	562	December	448

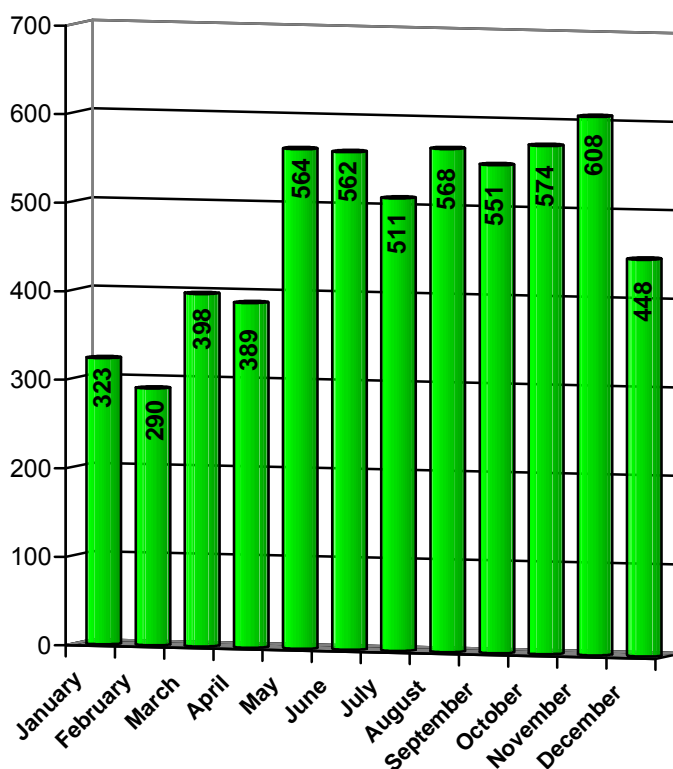


Fig. 11 – Evolution of files resolved by N.C.S.C. in 2012



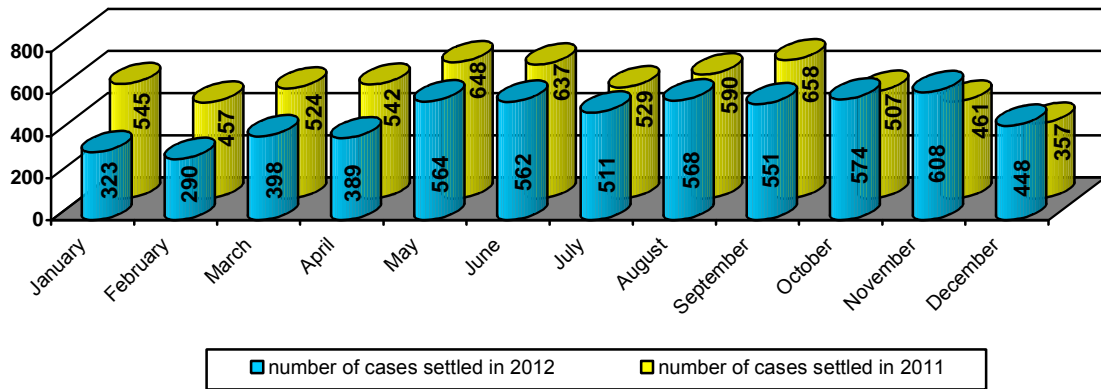


Fig. 12 – Evolution of the cases settled by N.C.S.C. during 2011-2012

Nevertheless, we have to specify that since the Council **was established until December 31, 2012, the total number of cases settled** within the institution was of **41.495**.

### 2.3.2. Situation of the complaints settled registered with N.C.S.C.

#### 2.3.2.1. Situation of the settlement on the merits of contestation

As we have specified before, **between January 1<sup>st</sup> – December 31<sup>st</sup> 2012**, there were **4.768 decisions on the merits of complaints** regarding the decisions issued by the 11<sup>th</sup> Councils for solving complaints within N.C.S.C.

Following the settlement of contestation formulated by the economic operators, the Council gave:

- ✎ **1.585 decisions** for which it disposed **to admit the contestations** formulated by the economic operators. For these cases it was considered regarding the content of the litigation legal relation formulated for settlement, giving favor to the Claimant. The solution claimed by the Claimant and adopted during the deliberations of the Council for Solving Complaints, is in line with the administrative - legal defense necessity of the subjective right violated or unrecognized and reconsidering it as to provide for its holder the advantages the law acknowledges for it.
- ✎ **3.183 decisions** by which the **denial of contestations** of the economic operators was decided as:
  - ✎ The Council considered, regarding the content of the contestation settled, to give favor to the contracting authority, due to the fact that the merits of the





appeal formulated by a economic operator was proved to be ungrounded/without merits;

- ✎ The Council had to “*keep silent*”, due to the fact that an exception on the merits or a procedural plea (the contestation was introduced lately, has become devoid of purpose, was unacceptable, lacking its object, lacking its interest, was introduced by individuals without any interest in it) was invoked by the parties or ex officio;
- ✎ The Claimant used its right to waive the contestation formulated, canceling thus its litigious action. Thus, by the simple waiver application to the contestation formulated by the person that initiated the litigation results in immediate canceling of the file.

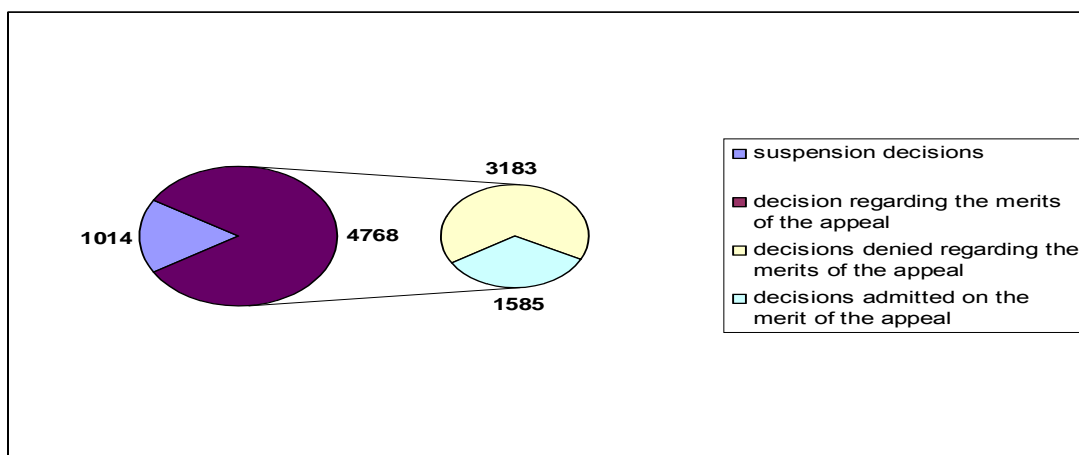


Fig. 13 – Structure of solutions given in 2012

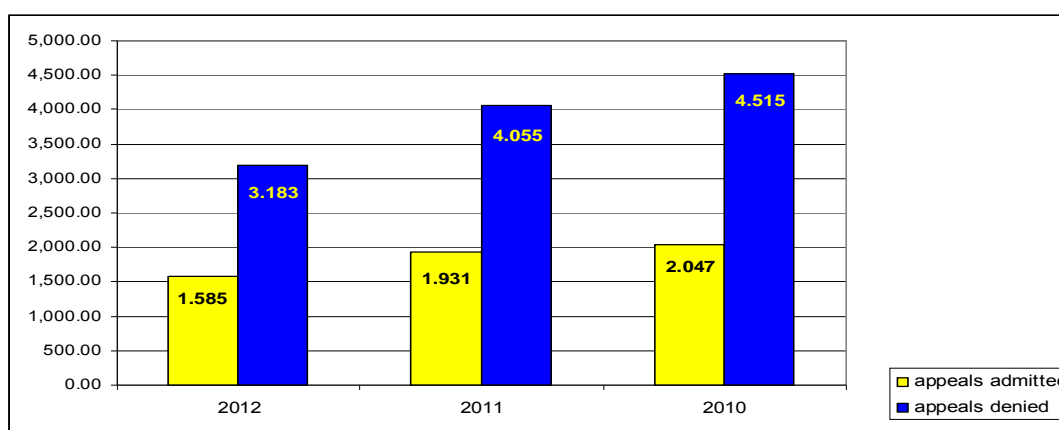
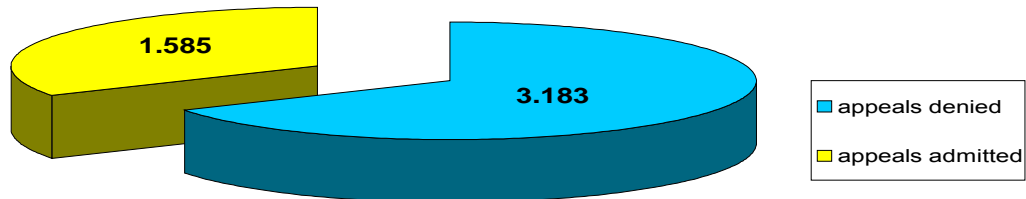


Fig. 14 – Situations of solutions given by N.C.S.C. during 2010-2012

Analyzing the chart above, there is obvious that the percent of decision given by the Council by which the contestations were admitted and that of the decisions



by which the contestations were denied for 2012 has no significant changes compared to 2011 and 2010.



The chart above indicates that following the settlement of contestations formulated by the business operators, in case of **33,24% of the decisions issued by N.C.S.C. during 2012 the contestations were admitted**, while for **66,76% of the decisions issued by N.C.S.C. the contestations were rejected** and the public procurement procedures continued.

Regarding the **decisions admitted** which concerned the merits of the contestations, respectively **1.585 decisions** given by the Council, out of statistic data existing it is obvious that for **1.404 decisions the remediation of the awarding procedures was decided**, to provide a continual compliance with legal provisions, which for **181 decisions the cancelation of the awarding procedure was decided**, the remediation being impossible to be performed without any violation of the legal provisions in force.

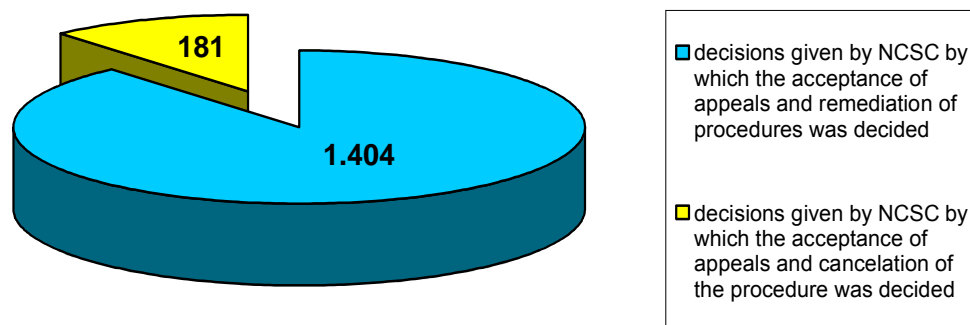


Fig. 15 – Measures disposed by N.C.S.C. following the approval of contestations



## 2.4. Activity of N.C.S.C. compared to the estimated value of the awarding procedures

### 2.4.1. Estimated value of the awarding procedures in which N.C.S.C. issued decisions

In 2012, N.C.S.C. gave **decisions within certain public procurement procedures with an estimate total value of 61.872.707.747,03 RON**, the equivalent of **13.885.257.573,39 EURO<sup>27</sup>**, resulting thus a value by 6.89 % higher compared to 2011.

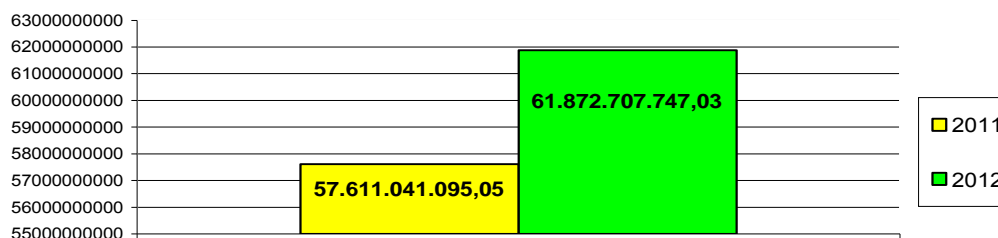


Fig. 16 – Evolution of the decision given by N.C.S.C. compared to the value estimated during 2011-2012

In terms of value, in 2012 **the total estimated value of the awarding procedures in which N.C.S.C. gave decisions to admit the contestations** formulated by the economic operators was of **18.014.454.810,33 RON**, the equivalent of **4.042.741.205,19 EURO<sup>28</sup>**.

During 2012, **the total estimated value of procedures for which N.C.S.C. issued decisions to deny the contestations** formulated by economic operators was of **43.858.252.936,70 RON**, the equivalent of **9.842.516.368,20 EURO<sup>29</sup>**.

Out of the total estimated value of the procedures for which decisions to admit the contestations, the **total estimated value of public procurement procedures for which the Council decided to cancel them** was of **1.259.966.046,02 RON**, the equivalent of **282.757.191,66 EURO<sup>30</sup>**, and that of the

<sup>27</sup> the amount was calculated at the average yearly rate of exchange communicated by N.B.R. of 4,456 RON/EURO

<sup>28</sup> the amount was calculated at the average yearly rate of exchange communicated by N.B.R. of 4,456 RON/EURO

<sup>29</sup> the amount was calculated at the average yearly rate of exchange communicated by N.B.R. of 4,456 RON/EURO

<sup>30</sup> the amount was calculated at the average yearly rate of exchange communicated by N.B.R. of 4,456 RON/EURO



awarding procedures for which remediation measures were decided amounted to **16.754.488.764,31 RON**, the equivalent of **3.759.984.013,53 EURO**<sup>31</sup>.

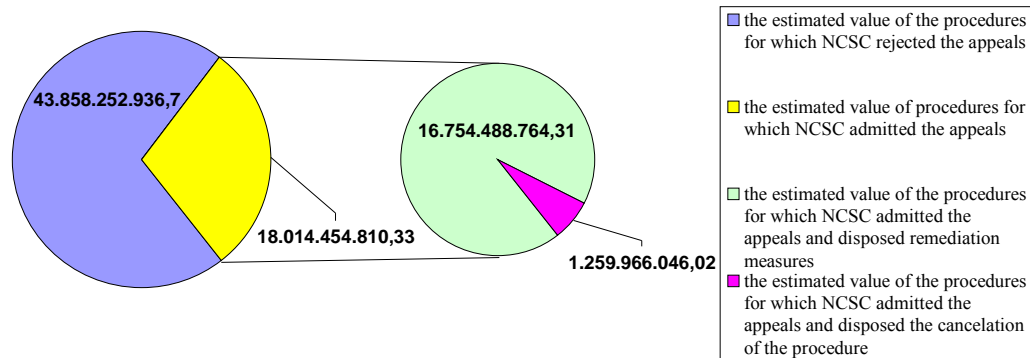


Fig. 17 – Total estimated value of the awarding procedures for which N.C.S.C. issued decision in 2012

Analyzing the chart above it is obvious that in 2012, **the total estimated value of the awarding procedures for which N.C.S.C. gave approval decisions for the contestations of the business operators (18.014.454.810,33 RON) representing 29,12% of the total estimated value of procedures by which N.C.S.C. gave decisions (61.872.707.747,03 RON), while the value of procedures for which the Council decided to reject the contestations formulated by the economic operators (43.858.252.936,7 RON), representing 70,88% of the total estimated value of the procedures in which the Council gave decisions.**

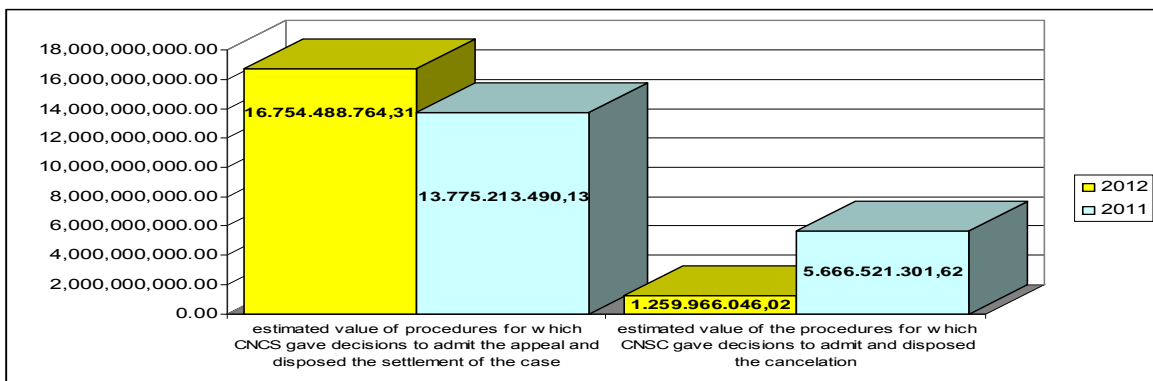


Fig. 18 – Evolution of the estimated awarding procedures for which N.C.S.C. gave decisions during 2010-2012

<sup>31</sup> the amount was calculated at the average yearly rate of exchange communicated by N.B.R. of 4,456 RON/EURO



As it can be seen, in 2012, the estimated value of the awarding procedures for which the Council admitted the contestations and canceled procedures is much lower than previous year, respectively 2011.

**2.4.2. The estimated value of the procedures for which N.C.S.C. issued decisions to admit the contestation, compared to that of procedures initiated in S.E.A.P.**

The official data provided by the Electronic System for Public Procurement (S.E.A.P.) indicate that **in 2012, within the communication platform used in the awarding process of the public procurement contracts 27.656 awarding procedures were initiated, with a total estimated value of 99.030.708.109 RON, the equivalent of 22.224.126.595 EURO<sup>32</sup>.**

Compared to 2011, when in S.E.A.P. 28.597 awarding procedures were initiated, and to 2010 where 50.454 procedures were initiated, it is observed that in 2012 the number of awarding procedures decreased by 3% compared to 2011 and by 45% compared to 2010.

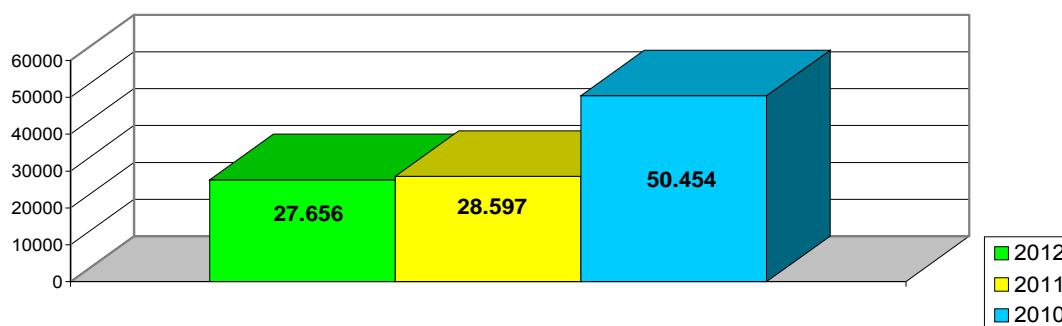


Fig. 19 – Evolution of awarding procedures initiated by SEAP during 2010-2012

Comparing the total yearly estimated value of the procedures initiated in 2012 in S.E.A.P. (99.030.708.109 RON) and the total estimated value of the awarding procedures in which N.C.S.C. gave a decision (61.872.707.747,03 RON), results that the later represented 62,48% out of the total estimated value of the procedures initiated in S.E.A.P.

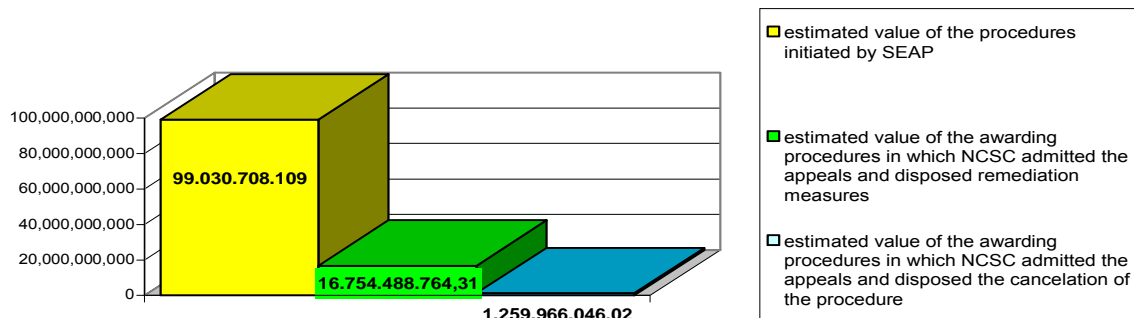
<sup>32</sup> the amount was calculated at the average yearly rate of exchange communicated by N.B.R. of 4.456 RON/EURO



If we compare the total yearly estimated value of the procedures initiated in 2012 in S.E.A.P. (99.030.708.109 RON) with a total estimated value of the procedures in which N.C.S.C. admitted the contestations formulated by the business operators and decided remediation/cancelation measures of the procedures (18.014.454.810,33 RON), results that the later represented 18.19% out of the total estimated value of the procedures initiated in S.E.A.P.

In the same time, if we compare the total yearly value estimated of the procedures initiated in 2012 in S.E.A.P. (99.030.708.109 RON) with the total estimated value of the procedures in which N.C.S.C. issued decisions to admit the contestations formulated by the economic operators and disposed certain measures, the following are observed:

- ✎ the estimated value of the procedures for which N.C.S.C. disposed remediation measures was of 16.754.488.764,31 RON (16,92% out of the total estimated value of the procedures initiated in S.E.A.P.);
- ✎ the estimated value of the procedures for which N.C.S.C. disposes their cancelation was of 1.259.966.046,02 RON, (1.27% out of the total estimated value of the procedures initiated in S.E.A.P.).



**Fig. 20** – Situation of the estimated value of the procedures initiated by SEAP and of the procedures in which the Council admitted the contestations and disposed remediation measures or the cancelation of the procedure

By comparison in terms of value between 2012 (99.030.708.109 RON) and previous years, respectively 2011 (71.349.308.543,61 RON) and 2010



**(80.105.126.944,47 RON)**, there is an increase in the estimated value of the awarding procedures initiated by SEAP by 27.95% compared with 2011 and by 19.11% compared with 2010.



### **3. EFFECTS OF ACTIVITY OF N.C.S.C. DURING JANUARY 1<sup>ST</sup> – DECEMBER 31<sup>ST</sup> 2012**

#### **3.1. Situation of decisions issued by N.C.S.C. and amended by the Courts of Appeal following the complaints formulated**

##### ***3.1.1. Situation of decisions given by N.C.S.C. regarding the merits of the contestations and amended by the Courts of Appeal following the complaints formulated***

Observing the principle of “*double degree of jurisdiction*”, the law maker determined that it is necessary for the decision given by the Council following the settlement of the contestation by administrative and legal means to be “controlled” by a court of law, as to remedy any error occurred during the first settlement. Thus, for the decisions given by administrative and legal means by the council, they are “verified” by a superior office, respectively the courts of appeal where the contracting authority is registered.

The existence of such control is a guarantee for the parties involved, meaning that any injustice can be settled/repared and for the solving counselors, it provides incentives to fulfill their duties with the utmost rigor and exigencies, knowing that their decision could be controlled by a higher court<sup>33</sup>.

Following settlement by the Council of the contestations formulated by economic operators made in accordance with art. 281, (1) of G.E.O. no. 34/2006, its decisions on the settlement of a complaint may be appealed to the court under Art. 283 (1) of the same law, within 10 days following the notification, for reasons of illegality and groundlessness.

In compliance with the legislation in force, the complaint against the decisions of N.C.S.C. can be initiated either by the contracting authority, or by one/several economic operators participant in the procedure, or by the contracting authority together with one or several economic operators involved in a public procurement procedure.

---

<sup>33</sup> Judges of the Courts of Appeal have no right to intervene in the activity of the jurisdictional administrative office – N.C.S.C, taking into account that the members of the Council are independent and subjected only to law





For this reason, against a decision issued by N.C.S.C. there are often several contestations registered, formulated to the courts of law or competent Courts of Appeal, where the contracting authority is registered.

During 2012, out of the total of **5.782 decisions taken** by the Councils for Solving Complaints within N.C.S.C. only **750 (12,97%) decisions were appealed, with complaints addressed to the competent Court of Appeal** where the contracting authority is registered.

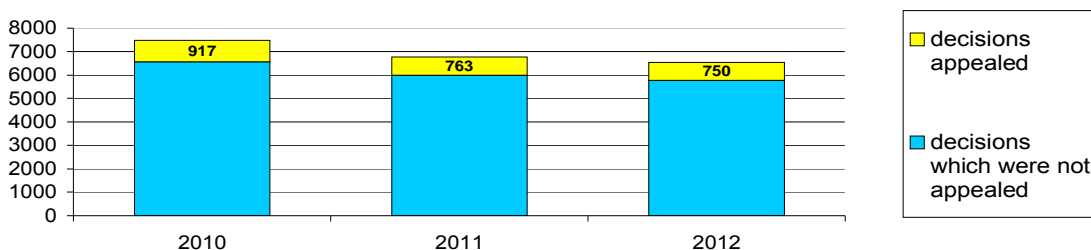


Fig. 21 – Evolution of complaints formulated against the decisions given by N.C.S.C. during 2010-2011

Analyzing the previous chart there is obvious that compared to 2012, the number of complaints formulated decreased by 1,70% compared to previous year and by 18,21 % compared to 2010. Although the percent of complaints expressed against the decisions given by the Council is small, it nevertheless is an indicator of the trust given by the contracting authorities and economic operators to the activity of the Council, compared to the decisions given by it.

**In 2012, following the complaints formulated to the competent Court of Appeal<sup>34</sup> where the registered office of the contracting authority is located, only 71 decisions issued by N.C.S.C. were under cassation/canceled in full by the courts of law (1,23% out of the total of decisions issued by the Council) and only 39 were modified in part (0,67% out of the total of decisions issued by the Council).**

<sup>34</sup> Art. 281 of G.E.O. no 34/2006 in force when the activity reported was in progress, respectively 2012

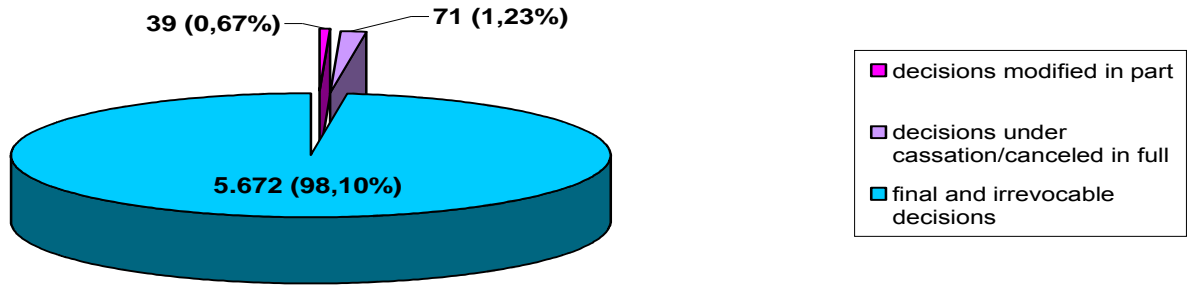


Fig. 22 – Situation of complaints formulated against the decisions given by N.C.S.C. during 2012

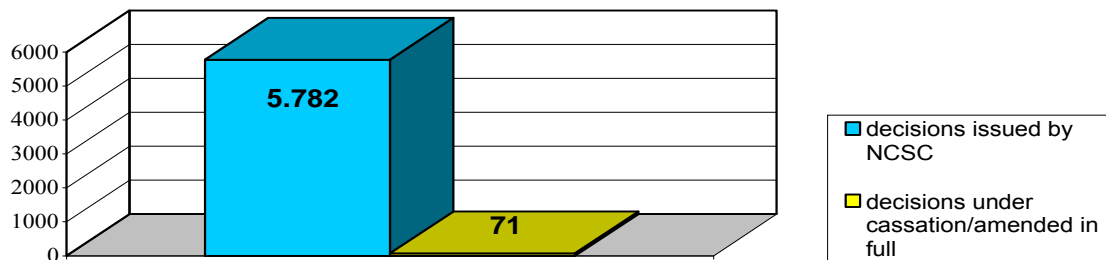


Fig. 23 – Number of decisions issued compared to those under cassation/amended in full in 2012

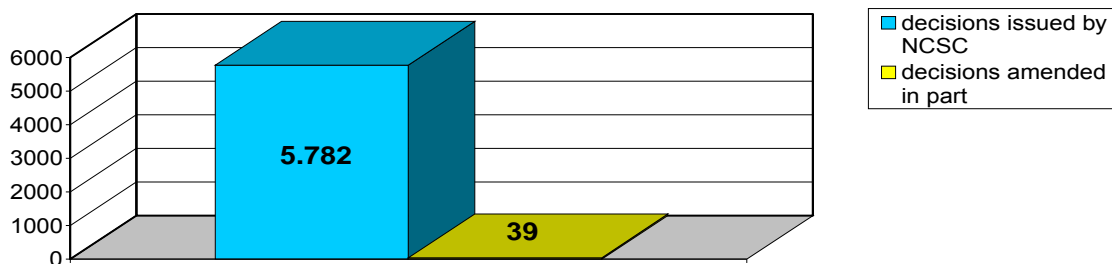


Fig. 24 - Number of decisions issued compared to those amended in part in 2012

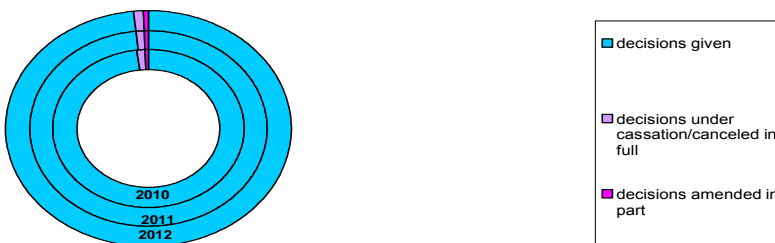


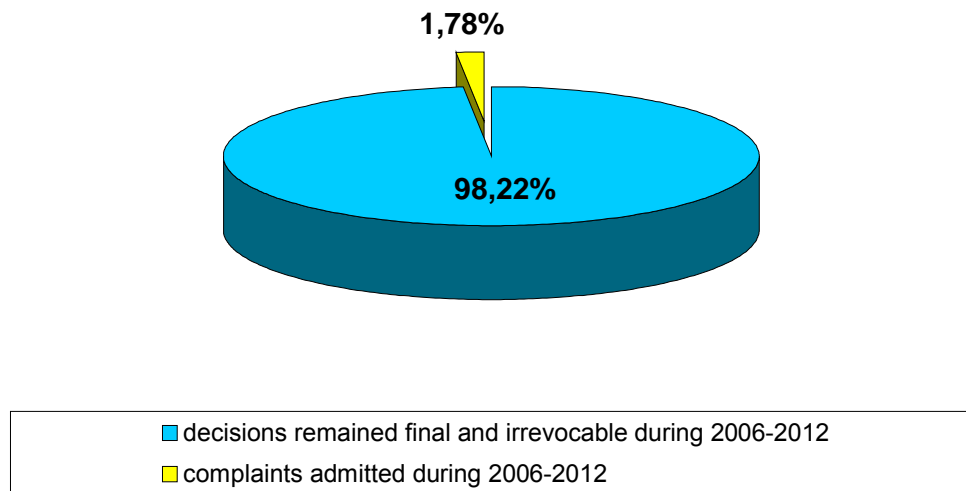
Fig. 25 – Evolution of complaints formulated against the decisions during 2010-2012

Therefore, it is obvious that during 2012, **5.672 decisions** issued by the Council (which means **98,10% out of the total of decisions issued**) were final and irrevocable as they were issued by our institution, which maintains the credibility and trust of the institution.

From the statistic documents we can draw the conclusion that the percent of the decisions issued by the Courts of Appeal after the Council was established and until the end of 2012 is constant and, at the same time, very low compared to the percent of the decisions given by it which remained final and irrevocable.

If we summarize the decisions issued by N.C.S.C. **after it was established and until the end of 2012, our institution issued 36.463 decisions.**

Comparing, **during September 2006 – December 31<sup>st</sup> 2012**, the decisions under cassation/amended in full by the competent Courts of Appeal following the **complaints of the economic operators/contracting authorities (650 decisions)**, with the number of decisions given by the Council, it is noted that **35.786 decisions issued** by our institution (**98,22%**) were final and irrevocable.



**Fig. 26** – Situation of complaints admitted by the courts during 2006-2012

As it can be noticed from the chart above, the credibility percent of the Council is high for year 2012 too, with a share of 98,22%, as for 2011 (98,21%).

Due to the total independency the Council had in the past and still has, and the profile and competence of its employees, in 2013 the quality of our institution activity and the fast settlement of complaints formulated by the economic operators (N.B. within the term of 20 days provided by G.E.O. no. 34/2006, as further amended and completed), shall be considered main elements of N.C.S.C.'s performance.

### ***3.1.2. Situations of the decisions given by N.C.S.C. regarding the suspension applications for the awarding procedures until the complaints were settled on the merits following the complaints formulated***

Another differentiating element between the decisions given regarding the merits of the complaints formulated by economic operators and the decisions given regarding the suspension applications for the awarding procedures until the complaints were settled on the merits following the appeals is the term within which a complaint against the decision given can be formulated. Thus, if against the



decisions for settling the complaint regarding the suspension application for the awarding procedure, the complaint can be formulated within 5 days<sup>35</sup>.

For this reason, in 2012, out of the 750 decisions appealed in the competent Courts of Appeal, 18 complaints were formulated against the decisions regarding the suspension of the awarding procedures until the complaint was settled on the merits, which represented 2,4% out of the number of decisions appealed. Following the settlement by the competent Courts of Appeal of the complaints formulated against the suspension decisions regarding the awarding procedures until the complaints were settled on the merits by the Council, any of the 18 contested decisions was not admitted.

Therefore, all the suspension decisions regarding the awarding procedures until the complaints were settled on the merits, given by the Council, were maintained by the Courts of Appeal.

---

<sup>35</sup> Art. 275<sup>1</sup> (3) G.E.O. no. 34/2006



## 4. INSTITUTIONAL TRANSPARENCY AND STAFF CONTINUOUS TRAINING

### 4.1. Institutional transparency

Being concerned with increasing the transparency, competition and efficiency of public procurement market, to promote the best practices on European level and disseminating its own experience in the area to its institutional partners, in 2012, the National Council for Solving Complaints gave a special attention to its own staff continual training, alongside with activities to discourage and fight anti-competition practices within public procurement area.

In this regard, N.C.S.C. gave an increased attention to institutional collaboration with offices on the public procurement market (Competition Council, National Authority for the Regulation and Monitoring of Public Procurement - N.A.R.M.P.P., Unit for Coordinating and Verifying Public Procurement – U.C.V.P.P., National Agency for Integrity – N.A.I.).

Being interested in establishing and coherent operation of the Romanian public procurement system and absorption of EU grants, the Council continued to send on weekly basis to N.A.R.M.P.P. – based on the protocols concluded with this institution – official situations on the assessment terms given by the contracting authorities for different projects in progress, the decisions of the Council and the settlement measures decided by it following the complaints of business.

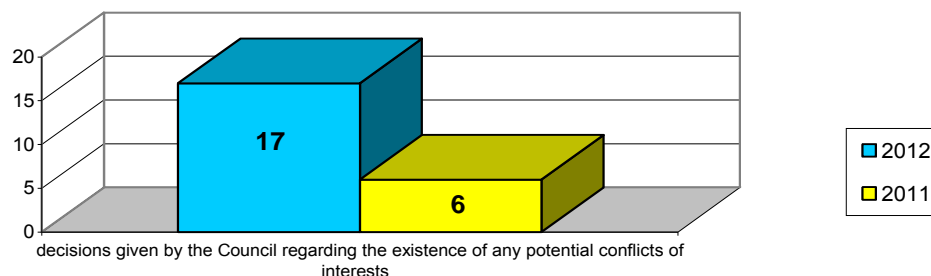
### 4.2. Giving the decisions regarding the occurrence of certain potential conflict of interests

The issue of conflict of interest within the public procurement has multiple aspects addressed in the report “Assessment of the Public Procurement from Romania” elaborated by the company Deloitte and acknowledge by the European Commission. Due to the collaboration protocols specified above, N.C.S.C. contributed and contributes at all times to create a general frame for the unitary application both of specific legislation and that within the competition area, which makes possible to identify any possible conflict of interests between the contracting

authority and different economic operators, or of unfair competition following different “agreements” between several economic operators.

Within this context, we mention that in 2012, N.C.S.C. informed the National Agency for Integrity (N.A.I.), the National Authority for the Regulation and Monitoring of Public Procurement - N.A.R.M.P.P. and the Unit for Coordinating and Verifying Public Procurement – U.C.V.P.P. regarding 17 awarding procedures for which the existence of potential conflicts of interests was invoked (*the respective cases are to be found on the web page of the institution - [www.cnsc.ro](http://www.cnsc.ro), section “Decisions 2012”*).

As compared to 2011, when only 6 potential cases of conflict of interests, it is noticed that in 2012 their number almost tripled.



**Fig. 27** – Situation of the decisions given by N.C.S.C. regarding the existence of any potential conflict of interests in 2012 compared to 2011

To facilitate the understanding of information presented in this chapter, we shall detail the settlement given for certain complaints formulated within the awarding procedures where issues concerning the existence of any potential conflict of interests were invoked, decisions against which complaints to the competent Courts of Appeal were formulated, which maintained the decisions given by the Council.

### ***1. The acceptance of critics regarding the existence of any potential conflict of interests<sup>36</sup>***

The critics of the Claimant regarding the existence of a situation of conflict of interests under the conditions CM is a member of the Assessment Commission from ..., being registered in the statement of assets and liabilities as employee of

<sup>36</sup> Decision no. 516/2012 maintained by the Court of Appeal Pitești following the rejection of the complaint formulated which was the subject of case 387/46/2012



..., and also the administrator of company ... SA, is considered by the Council as grounded. It considers that the following documents presented by the contracting authority are taken into consideration with the point of view regarding the contestation (issued prior to the opening of tenders meeting, September 22, 2011):

- The Resolution of the Council of Administration of SC ... SA, by which the position of administrator of SC ... SA of Mr. CM was ceased starting with March 1, 2011;
- The Resolution of City ... no. ..., to cancel the position of administrator of Mr. CM, starting with March 1, 2011.

In the same regard, the Council noticed that the person in discussion is not nominated in the tender documents, respectively the qualification documents, as the authorized representative of the company .... SA being BI – CEO since 2008, as indicated by his Resume.

Thus, for the case being, the incidence of provisions of art. 69 a) and b) of G.E.O. no. 34/2006 cannot be acknowledged.

However, under the conditions that he was the administrator of company ... SA, a company which participated in the association awarded winner of the Lot III contested, Mr. CM cannot be a member in the Tender Assessment Commission in the contested procedure, without falling under the incidence of provisions of paragraph c) of the same article, specified above, if the person mentioned has not been and is not a public officer, within the meaning of those claimed by the contracting authority. According to the provisions invoked, *“the following persons cannot be involved in the assessment/verification process of the tenderers/tenders: c) persons who may have an interest which may impair their impartiality during the assessment/verification process of the tenderers/tenders”*.

In the same regarding the following provisions were elaborated: from the Government Emergency Ordinance no. 34/2006 art. 66, of the Governmental Decision no. 925/2006, art. 2 (3) of the Government Emergency Ordinance no. 66/2011, by analogy art. 14 (1) and (2).

Rules on the conflict of interests can also be found in other legislative acts, as Law no. 161/2003 may be.

From the total of such law provisions we can differentiate, within the context of legal practice, an intolerance and tendency to condemn any suspicions concerning the occurrence of any eventual conflict of interests, which is rendered a more extended meaning. The theory of law makes a distinction between real conflicts and apparent conflicts, the perception of the later being as harmful as that of an existing conflict,





as it impairs the trust of public in the integrity of the institution involved and its clerks. Any financial interests can involve a real or potential gain which can be obtained with the involvement of a public officer, governmental official or a person elected by vote or by a member of such categories' families, who hold properties, hold share or a certain position in a company which participates in a public procurement procedure (Guide for awarding public procurement agreements, approved by the Order of the President of the National Authority for the Regulation and Monitoring of Public Procurement no. 155/2006, canceled now; the most of this guide's provisions were taken from the Operational Manual on the awarding of public procurement agreements, edited by the same national authority in 2009).

Both the Ordinance on public procurement and the Governmental Decision no. 925/2006 [art. 2 (3)], specifies the obligation of the contracting authority to take, during the application of the awarding procedure, all the measures necessary to avoid the occurrence of any situations which might determine the occurrence of a conflict of interests. Thus, the intention of the law maker is clear to prevent the occurrence of any conflict of interests, as the authority has no obligation to wait for the conflict to occur to take the necessary measures.

Consequently, to avoid any conflict of interest, the contracting authority must replace Mr. CM from the assessment commission.

Regarding the criticism of the Claimant on any possible situation of conflict of interests, determined by the fact that GD is at the same time member of the Administration Council of ... SA and County Counselor, a position which involves his participation in taking any decisions which might lead to obtaining financial benefices and other advantages by the Association ...,for the case being, for the member of this association ..., the Council acknowledges that they are not grounded. In this regard, the dismissal document of GD as member of the Administration Council of SC ... SA as of February 21, 2012, a document presented by the Responder was acknowledged by the Council.

In compliance with art. 278 (2) and (4) of G.E.O. no. 34/2006, the Council admits in part the contestation formulated by ..., against with ..., and cancels the report of the procedures for this lot. It disposes the reassessment of the tenders introduced for lot III, in the meaning of specifications specified in the explanatory statement.



## 2. Confirmation by N.C.S.C. of the decisions of the contracting authority by which the occurrence of a potential conflict of interests was acknowledged<sup>37</sup>

The Claimant mentions that in the notification of the procedure result, it contests that compared to the provisions of art. 2 of Order of National Authority for the Regulation and Monitoring of Public Procurement no. 170/15.05.2012, Mr. IV was a city counselor municipal within the Local Council of City of ... and approved the budget for the work (objective of the agreement) in the meeting of the Local Council of City of ... as of April 27, 2009 following which the HCL no. 192/27.04.2009 was issued, and according to the Confirmation of Company Details no. 512551/05.06.2012 issued by ORC Dâmbovița, Mr. IV is the sole shareholder of SC ... SRL.

Thus, the Claimant contests the affirmations of the contracting authority according to which the tenderer was in a conflict of interests by the tender formulated, which lead to his exclusion from the contracting awarding procedure.

On the merits of the contestation formulated by SC ... SRL, the Council acknowledged the following:

- the public procurement procedure was initiated by the contracting authority CITY HALL OF CITY OF ... by publishing the contract notice no. 325032/27.04.2012.
- when the contract notice was published, April 27, 2012, Mr. IV was both the sole shareholder of SC ... SRL and the City Counselor within Local Council of ...
- the provisions of art. 69<sup>1</sup> of G.E.O. no. 34/2006.

For the case formulated for settlement, even the sole shareholder of the economic operator – the tenderer SC ... SRL (not a relative or relatives by affinity up to fourth degree inclusive), Mr. IV, hold, when the procedure was initiated, a decisional position within the contracting authority, he was City Counselor within the Local Council of ...

- according to provisions of art. 2 of the Order no. 170/15.05.2012 of the National Authority for the Regulation and Monitoring of Public Procurement: „in the enforcement of the provisions of art.69 index 1 of the Emergency Ordinance, the contracting authority has the obligation to specify in the tender documentation the persons that held decisional positions within the contracting authority regarding the organization, development, and completion of the awarding procure, respectively all the persons that approve/sign the documents, issued concerning with or for the

<sup>37</sup> Decision no. 3683/2012 maintained by the Court of Appeal Ploiești following the denial of the complaint formulated which was the subject of case 861/42/2012



awarding procedure, including all the persons that approve the budget afferent for the contracting authority, needed for the financing the public procurement agreements”

The provisions of art. 2, final thesis of the order of the National Authority for the Regulation and Monitoring of Public Procurement no. 170/12.05.2005 issued for the interpretation of art. 69<sup>1</sup> of G.E.O. no. 34/2006 do not illegally extend the provisions of this legislative document, as the Claimant erroneously claims; they interpret the legislative act in compliance with the directives of European Commission.

Consequently, the Council indicates that it is framed within the provisions of art. 69<sup>1</sup> of G.E.O. no. 34/2006 as further amended and completed, the situation of the City Counselor IV, who was also liable for the approval of the budget afferent for the contracting authority necessary for the financing of public procurement agreements. Consequently, the Council considers that the sole shareholder of SC ... SRL, Mr. IV, was under a situation of conflict of interests by the tender formulated, which lead to the meaningful decision of the contract authority that the tenderer SC ... SRL to be excluded from the awarding procedure in compliance with provisions of art. 69<sup>1</sup> of G.E.O. no. 34/2006 and of provisions of art. 2 of the Order no. 170/15.05.2012 of the National Authority for the Regulation and Monitoring of Public Procurement.

Considering those specified above, in compliance with the provisions of art. 278 (5) and (6) of G.E.O. no.34/2006, as further amended and completed, the Council shall reject as not grounded the contestation formulated by SC ... SRL against with ... and it shall decide the completion of the procedure.

### 4.3. Continuous professional training

In compliance with provisions of Law no. 188/1999<sup>38</sup>, training and continuous professional training is both a right and an obligation of public clerks.

In order to enforce the principles of a good operation within the public sector, a solid knowledge of the administrative system and especially of public procurement system, and the requirements and exigencies imposed by such system are needed.

<sup>38</sup> Regarding the Statute of Public Clerks, republished, as further amended and completed



Under such circumstances, the training continuous professional training is considered a national priority, supporting such process falls within the competence of each central and local public authority or institution.

In compliance with regulations in force, the Council holds full competence in planning the professional training, in procuring the professional training services and to control and assess the professional training of public clerks.

Strengthening the institutional capacity of the Council is strictly determined by a proper professional training of the solving counselors within the public procurement area, by their positions of special public clerks, within areas and subjects regarding the professional training and continuous professional training which should reflect the real need of the administrative system and especially of the public procurement system and of public sector.

Providing such professional training and continuous professional training service, at high quality standards in line with the requirements of a modern public administration, in a continual change, is the main element of the general process concerning the provisions of a quality professional training of the staff within the public administration. The continuation of the reform of public positions, within the context of an ample reform of the whole administration, can be stimulated by a qualified, motivated, competitive and highly trained staff.

Maintaining and subsequently increasing/developing the professional skills at the Council's level is strictly connected to the need of continual professional training of its staff.

Thus, taking into account the obligation to improve their skills and their professional training at all times<sup>39</sup> and being interested in the continual professional training of their staff, the members of the Council attended **three workshops** in 2012, with the following subjects:

- ✍ Support for the factors involved in the administration of structural instruments to improve the public procurement system

The course was initiated by the representatives of the National Authority for the Regulation and Monitoring of Public Procurement, within the project under the same title. In this seminary, different decisions given by the Council were analyzed and different issues were analyzed regarding the interpretation and monitoring activity by the representatives of the National Authority for the Regulation and Monitoring of Public Procurement

---

<sup>39</sup> art. 50 of Law no. 188/1999 as further amended and completed



✎ The Civil Procedure Code and its implications on public procurement

The course, initiated by N.C.S.C., was organized to discuss with the judges within the Court of Appeal Constanta the implications of the new Civil Procedure Code on the public procurement system and especially on the administrative and legal settlement procedure of the contestations formulated by economic operators. Within the meeting, different cases were analyzed and interpreted, decisions issued by the Council, which were modified by the Courts of Appeal following the complaints formulated



**Fig. 28** – Course organized by N.C.S.C. with the judges from Court of Appeal Constanța

✎ Conflict of interests

The course was initiated and organized by the Council, to discuss with the representatives of the National Agency for Integrity (N.A.I.) and of the Competition Council different legal issues as:

- ✎ finding certain possible conflict of interests, types of conflict of interests, legal regulations;
- ✎ rigged bids, risks of rigged bids, measures to prevent such bids presenting several cases/examples and several case studies.



**Fig. 29** – Debate organized by N.C.S.C. with National Agency for Integrity and Competition Council on the conflict of interests in public procurement area

In parallel, the top management of N.C.S.C. gave an increased attention to the continuous professional training of the technical and administrative staff, encouraging and financially supporting the participation of two employees from the technical and administrative staff in the course “Configuring, Managing and Troubleshooting Microsoft Exchange Server 2010 Service Pack 2”.

#### 4.4. Relation with the media and general public

Concerning the **relation with the media and general public**, the activity developed by N.C.S.C. in 2012 materialized in an **interactive approach, meant to grant the institutional transparency**.

Beside the answers given periodically to media representatives, in compliance with Law 544/2001 on free access to public information, the **National Council for Solving Contestations periodically provided Official Press Releases regarding its activity** for public’s correct information.

The activity Report elaborated at the end of the first trimester of 2012 was published, as the other yearly activity reports, on the website of the institution ([www.cnsc.ro](http://www.cnsc.ro)) and it was sent by e-mail to the journalists accredited with the institution.

In parallel, in 2012, the Information Office and Public Relations, in collaboration with the Statistics and IT Office within N.C.S.C elaborated and administrated the web page of the institution; they also published the Official Journal of the National Council for Solving Complaints.



Regarding the number of request from the media, during 2012, the Information Office and Public Relations within N.C.S.C. received, in compliance with Law no. 544/2001 on the free access to public information, more than 47 requests of the journalists accredited and from different individuals.

We also must mention the activity of this office, consisting of elaboration and sending periodical press releases and the yearly activity report of the institution to more than 250 journalists.

Least but not last, we have to specify that to provide a total transparency regarding the activity of N.C.S.C., the institution created even from 2011 a Statistics Department and continued the measures initiated in 2011 regarding the upgrade of the integrated IT system, actions which:

- ✍ were finished in 2012 by the elaboration of an IT application to provide the division by chance, electronically, of the contestations formulated by the business operators;
- ✍ the elaboration of an IT application was initiated to render anonymous the decisions to fulfill the obligations determined, starting with January 1, 2013, falling within the responsibility of the Council to publish on its own website, with the Official Bulletin, the decisions to motivate within 5 days following the adoption *“with no reference to the identification data of the decision and of the parties, to personal data and those information the economic operator specifies in its tender as being confidential, classified or protected by an intellectual property right”*<sup>40</sup>;
- ✍ at all times, provided for the economic operators interested, general public and media, official data on the contestations formulated within the public procurement procedures and the decisions issued by the Council.

---

<sup>40</sup> Art. 279 (4) of G.E.O. no. 34/2006





## 5. BUDGET OF N.C.S.C.

The budget of N.C.S.C. afferent for 2012, was in amount of **9.144 thousand RON** and it was distributed as follows:

■ budgetary provision for **Current expenses: 9.028 thousand RON** out of which:

▶ **Expenses with the personnel: 7.404 thousand RON.**

▶ **Products and services: 1.624 thousand RON.**

■ budgetary provision for **Capital expenditure: 116 thousand RON.**

The budget of N.C.S.C., detailed on budgetary titles and chapters is presented on the table below.

Code	Name of the indicator	Budget approved Law 293/2011	out of total per year, out of which,			
			1 <sup>st</sup> quarter	2 <sup>nd</sup> quarter	3 <sup>rd</sup> quarter	4 <sup>th</sup> quarter
5000	Total budget	9.144	2.250	2.421	2.561	1.912
01	Current expenses	9.028	2.250	2.346	2.522	1.910
10	Title I expenses with the personnel	7.404	1.768	1.833	2.087	1.716
20	Title II products and services	1,624	482	513	435	194
70	Capital expenditures	116	0	75	39	2
71	Title XII non-financial assets	116	0	75	39	2
5001	Expenses - state budget	9.144	2.250	2,421	2.561	1.912





01	Current expenses	9.028	2.250	2.346	2.522	1.910
10	Title I expenses with the personnel	7.404	1.768	1.833	2.087	1.716
20	Title II products and services	1,624	482	513	435	194
70	Capital expenditures	116	0	75	39	2
71	Title XII non-financial assets	116	0	75	39	2
5101	Public authorities and external actions	9.144	2.250	2.421	2.561	1.912
01	Current expenses	9.028	2.250	2.346	2.522	1.910
10	Title I expenses with the personnel	7.404	1.768	1.833	2.087	1.716
20	Title II products and services	1.624	482	513	435	194
70	Capital expenditures	116	0	75	39	2
71	Title XII non-financial assets	116	0	75	39	2
7101	Fixed assets	116	0	75	39	2
5101	Executive and legislative authorities	9.144	2.250	2.421	2.561	1.912
510103	Executive authorities	9.144	2.250	2.421	2.561	1.912



## CONCLUSIONS AND FORECASTS

Generally, as it can be seen from the whole report, the activity of the Council developed during January 1 – December 31 2012 was not increasingly changed compared to the activity of 2011, the complaints settlement procedure totally observing the principles expressly regulated by G.E.O. no. 34/2006 and those of common law as may be:

- ✎ **principle of contradiction** – according to which each party must know the claims, requirements and defenses formulated by the other part, being able to express its defenses/claims in fighting the claims and defenses of the other party.
- ✎ **principle of the defense right** – this principle is granted by art. 24 of the Constitution, which, formally, is resumed to the right to employ a defender, and materially, it consists in the right to express requests, to propose evidences, to be informed on the documents in the cases, or to submit conclusions or to challenge in court. It is natural that between this principle and the principle of contradiction there is a strong connection, they go alongside.
- ✎ **principle of the active role of the complaints settlement counselor** in public procurement area which is taken into account under the following main aspects:
  - ✎ specifies exactly the complaint, compared to its content, and not concerning the name given by the party.
  - ✎ The counselor lead the development of the process, supervise the legal provisions and dispose the measures necessary for the settlement of the complaint (introducing writs, connections, splitting files, suspension of complaint settlement etc.).
- ✎ **principle of availability** – which represents the right granted for the parties to dispose of the object of the process, meaning the material right, and the means of law concerning the defense of this right, meaning the proceedings. Therefore, this principle comprises the following rights:
  - ✎ the person interested has the right to initiate or not the action in the area of public procurement by administrative and jurisdictional means ;
  - ✎ determining the limits of the complaint and defenses;
  - ✎ waiving the settlement of the complaint or its subjective right and acquiescing;



- ✍ challenging or not the decision by the remedies at law;
- ✍ **principle of legality** – according to which, state authorities, public institutions and citizens have the obligation to observe and be subjected to the law. This principle actually institutes the supremacy of law for any social activity. Thus, in a rightful state, the obligation to observe the law is essential, and the importance of complying with this obligation is essentially composed in knowing the law, in the moment of elaboration compared to the moment when it was published in the Official Gazette, in compliance with provisions of art. 78 from the Constitution of Romania. It is obvious that for the complaint settlement activity for public procurement area, the complaint settlement counselor must observe the law provisions which regulates the litigation legal relation, the proceedings and those relating to the organization and operation of the Council;
- ✍ **principle of immediacy** – the source of this principle comes from the obligation which falls within the responsibility of the Council to verify immediately and directly the elements, in full, which have a determinant role in the settlement of the complaint in compliance with art. 297 of G.E.O. no. 34/2006 corroborated with art. 22 (2) Civil Procedure Code.
- ✍ **principle of finding out the truth** – which means that all the circumstances of the case must be established by the council in compliance with reality and involves that the facts of the case must be determined materially.
- ✍ **principle of speedy trial** – according to which the case must be settled as soon as possible, before any other liabilities of the Council as it is specified by the provisos of G.E.O. no. 34/2006. Moreover, this procedure is an efficient and fast procedure for the settlement of litigation and without the possibility to delay any terms. For this end, the provisions of art. 276 (1) of G.E.O. no. 34/2006 were elaborated to determine a settlement term for the complaints of 20 days following the submission of the public procurement case from the contracting authority which can be extended once and only in reasonable cases by maximum 10 days. For the case of settlement of cases on exception, this term is of 10 days.

Even if compared to previous years the number of complaints decreased, it is considered that it was compensated and even overwhelmed by the complexity of the complaints formulated for settlement, which meant supplementary efforts from the whole personnel of the Council.



Taking into account the issues previously presented, the Council focused on the identification and efficiently addressing the causes which can generate malfunctions, as they are specified within the final evaluation report of the public procurement system from Romania for 2012.

To this end, the Council gave a special consideration to the implementation of the following recommendations:

- ✍ *considering the high number of complaints existing in spite of the legislation adopted;*
- ✍ *considering the issue of conflict of interests in the public procurement process from Romania;*
- ✍ *considering the mismatching and inconsistent practices within the public procurement process from Romania;*

*Considering the high number of complaints existing in spite of the legislation adopted.*

In this regard, the report recommends to “include a section on the complaints in the yearly report of N.C.S.C.”. Conforming to this request, in paragraph 2.1.2. of the Council’s Report (“The object of the complaints formulated by the economic operators”) are to be found, on short, a number of cases considered relevant. In the opinion of the Council, it shall have a significant contribution to the dissemination of the N.C.S.C. expertise with all the “main actors” from the public procurement system from Romania and with other entities interested from the states members of European Union.

Likewise, at present, the Council is implementing in integrated IT system to provide multiple functions/functionalities, which, among others, allows random distribution of cases, rendering the decisions anonymous and offers the parties the possibility to verify, in real time, the stage in which the settlement of their complaint is.

*Considering the issue of conflict of interests in the public procurement process from Romania.*

The issue of conflict of interest in the public procurement process from Romania is reflected inclusively within the last report issued by the European Commission for the Cooperation and Verification Mechanism.



The Council brought its own contribution to the decrease of such issue sending the decisions afferent for the complaints which comprise information on potential conflicts of interests to the National Agency for Integrity (N.A.I.). Likewise, when the “Integrated IT system to prevent and identify the conflicts of interests” is developed by the National Agency for Integrity, the Council shall be prepared to take any actions to provide the interoperability with it.

*Considering the mismatching and inconsistent practices within the public procurement process from Romania.*

Another issue addressed within the final evaluation report of the public procurement system refers to the “lack of coordination between the main actors (mainly National Authority for the Regulation and Monitoring of Public Procurement, Unit for Coordinating and Verifying Public Procurement, N.C.S.C.)”, which generates a contradictory approach.

In order to eliminate such deficiencies, the Council had a pro-active approach, powering the collaboration protocols already concluded in the previous years with the National Authority for the Regulation and Monitoring of Public Procurement and the Unit for Coordinating and Verifying Public Procurement. Thus, during 2012 the representatives of the Council participated both in the events developed by different institutions with a main role within public procurement area, and within the joint working groups, presenting, any time it was needed, specific recommendations and pertinent actions.

In order to line up the afferent practices and interpretation, this time within N.C.S.C., meetings were organized periodically during 2012 between the members of the Councils for Solving Complaints.

In 2013, taking into account the new amendments brought by G.E.O. no. 34/2006 by G.E.O. no. 77/2011 applicable starting with January 1, 2013, a slight decrease of the complaints number formulated compared to 2012, decrease which might be due to the measure imposed by the law maker to “*sanction*” the economic operators retaining a percent of the tender guarantee formulated within the awarding procedure and under the circumstances they waive their complaints, even if the contracting authority did not take any measure to resolve it.

Although the law maker by the normative acts package, initiated even since 2010 and continued in 2012, determined the following measures:



- ✍ to verify “*ex ante*” the tender documentation elaborated by the contracting authorities,
- ✍ to “*sanction*” the economic operators, under the circumstances that they used ungrounded their right to submit complaints retaining a percent of the tender guarantee if the Council rejected on the merits the complaint even if the contracting authority did not take any measure to resolve it,

Decreasing the irregularities in organizing and development of the awarding procedures and consequently decreasing the number of complaints could not be settled without:

- ✍ legislative stability;
- ✍ an increase of the staff training which develops activities within public procurement area for the contracting authorities and its selection in line with their real competencies;
- ✍ increasing the transparency and reducing the bureaucracy regarding the awarding procedures initiated in order to conclude the public procurement agreements;
- ✍ determining certain efficient mechanisms to find the incompatibility situations or conflict of interests within public procurement area.