



POSITION PAPER

Complaints Settlement Panels in Public Procurement – Between Transparency and Personal Data

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Introduction

By signing the Association Agreement with the EU in 2014, the Republic of Moldova has made a series of commitments which also relate to the reform of the public procurement system. One of the undertaken obligations envisages the creation of an efficient system of review procedures concerning the award of public contracts, by establishing an impartial, independent institution responsible for the handling and settlement of complaints lodged in the framework of public procurement procedures.

Retrospectively, the complaints settlement system in public procurement in the Republic of Moldova was created and launched in December 2016, when the Parliament of the Republic of Moldova adopted the Decision (no. 271/2016) on Establishment, Organisation and Functioning of the National Agency for Complaints Settlement (hereinafter NACS)¹. Although the legal framework was developed, NACS became operational nine months later. NACS started its activity as such, i.e. settling the complaints lodged in the framework of public procurement procedures, in September 2017.

According to Law on public procurement, the procedure for handling and settling the complaints shall be carried out in line with the principles of legality, celerity, adversarial system and respect of the right of the defence. The principle of transparency was transposed in the Decision on NACS establishment, organisation and functioning. Thus, NACS carries out its duties in line with the principles of independence and job security of the counsellors responsible for the settlement of complaints, but also, in line with the principles of transparency and impartiality in taking their decisions. The transparency in the decision-making process at the NACS level shall be ensured by complying with the provisions of Law on access to information², Law on transparency in the decision-making process³, Law on public procurement⁴, and their implementing regulations.

Currently, NACS employs various tools in view of ensuring transparency and access to data regarding the submission, handling and settlement of complaints, as well as to the decisions issued by the NACS, which will be analysed and explained in this study. Nevertheless, there are some deficiencies demanding an immediate reaction from the civil society – fact that was demonstrated in the recent public calls of the civil society concerning the need to publish the decisions of the NACS, including the names of the counsellors responsible for settlement of complaints, to publish the composition of the complaints settlement panels and to ensure a genuine transparency in the decision-making process.

This position paper intends to analyse the manner in which the NACS ensures transparency in the process of submission, handling and settlement of complaints, and how this agency ensures the publication of its decisions so that they are accessible and suitable for real time monitoring by the civil society and by the general public, which are vested to see coherence and uniformity in the solutions handed in by the agency.

1 <http://lex.justice.md/index.php?action=view&view=doc&lang=1&id=368128>

2 <http://lex.justice.md/index.php?action=view&view=doc&lang=1&id=311759>

3 <http://lex.justice.md/md/329849/>

4 <http://lex.justice.md/index.php?action=view&view=doc&lang=1&id=377937>

Provisions of the legal framework in respect of transparency in the activity of NACS

Regarding the transparency of the complaints settlement process, the legal framework foresees the obligation of the NACS to organise open hearings for the examination of complaints and to ensure that the information related to the date and place of the hearing is published on its website three business days before the scheduled day of hearings. Additionally, NACS shall send invitations to the contracting authority and the contesting party three business days before the scheduled day of hearing. NACS can invite the economic operator that was awarded the contract in the framework of the public procurement procedure to the hearing where the complaint related to this procedure will be examined. As for the decisions of the NACS, according to the legal framework, the decisions on complaints settlement shall be published on the website of the NACS within three days from the day of their delivery.

It is important to note that any interested party can attend these hearings, without prior registration, request or specific bureaucratic procedure. Open hearings examining the complaints represent a good practice and a very useful tool for the civil society and for anyone interested in the decision-making process and the activity of the NACS.

The composition of complaints settlement panels is approved by an order of the Agency's general director for a period no longer than 12 calendar months and can be maintained for no more than two consecutive periods.

Since the seven counsellors responsible for complaints settlement, including the general director and the deputy director are publicly appointed office-holders, they shall perform their duties in line with the principles of legality, free consent, transparency, personal example, liability and loyalty.

According to the reasonings of the ECtHR, public entities shall accept the interference into their privacy to a greater extent compared to common citizens, and the access degree for purposes of research shall be higher, if the public entity and the information to be disclosed are more important.

Last but not least, we shall highlight the provisions of the Regulation (EU) 2016/679 of the European Parliament and of the European Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data and repealing Directive 95/46/CE which states that the processing of personal data must be at the service of citizens. The right to the protection of personal data is not absolute; it shall be considered in relation to its role in the society, and balanced with other fundamental rights, according to the principle of proportionality.

Why is it necessary to publish the decisions containing the composition of settlement panel?

The publication of NACS decisions on its website is a necessary tool for the general public. It helps gathering the whole activity of the counsellors in charge with the settlement of complaints, ensuring consistency in the delivered decisions and solutions, and avoiding contradictory decisions while interpreting the law and non-unitary practices that are extremely damaging for the public procurement system.

Moreover, this tool is valuable and allows immediate sharing the experience of NACS with other stakeholders in the public procurement system and with law-enforcement and inspection bodies, namely, Public Procurement Agency, Ministry of Finances, Financial Inspection, National Anticorruption Centre, AC Prosecutor's Office, etc. The beneficiaries, i.e. both contracting authorities and economic operators, have thus the opportunity to analyse previously lodged complaints and the solutions provided by NACS for similar cases, and to identify and prevent potential issues that were tackled in earlier complaints. On the one hand, these complaints concern the contracting authorities, in terms of public procurement process and on the other hand, the economic operators, in terms of documents, respect of qualification and selection criteria and submission of bids, etc.

Since 18 March 2019, the decisions published on the NACS website would not include the composition of complaints settlement panel any longer, i.e., the names of the three counsellors – of the Chair and the two members of the panel. Since the delivery of its first decision (September 2017) and until this date, the decisions of the Agency used to include the names of members of the complaints settlement panel and their signatures, and there was no legal restriction in this respect. The legal framework foresees that the decisions related to complaints settlement shall be published on the website of the institution, within a period of three days from the day of their delivery. There is no provision concerning the need to depersonalise certain types of personal data, including the name and surname of the Chair and members of the complaints settlement panel.

This practice is contrary to the principle of transparency and leads to high risks of non-unitary practices that are extremely damaging to the public procurement system. Even though, there are many cases when NACS delivered non-unitary solutions; some of them were analysed in the position paper recently developed by IDIS "Viitorul" – *Non-unitary practices in the examination and settlement of complaints by the National Agency for Complaints Settlement*⁵, and some more were pointed out by the civil society.

⁵ http://viitorul.org/files/library/RO_Document%20de%20pozitie_Turcan.pdf

In addition to what has been aforementioned, counsellors in charge with the settlement of complaints are publicly appointed office-holders, and some information closely related to such a position (for instance, the name, surname, working place, etc.) is of public nature. The need to depersonalise the names and surnames of the counsellors in the NACS decisions is an insufficient argument, because the Law on the status of publicly appointed office-holders⁶ lays down that holding a public office ensues from the principles of legality, free consent, transparency, personal example, liability and loyalty.

Certainly, the key aspect of NACS decisions is their content; however, when non-unitary solutions are identified, it's essential that those who monitor the activity and decisions of NACS be able to compare the solutions delivered nowadays by some complaints settlement panels with the decisions previously adopted by the same panels, in relation to similar cases. A high level of transparency implies a bigger responsibility of the counsellors and of the institution towards the citizens.

Furthermore, the decisions delivered by NACS definitely represent documents of public interest, since they were issued as a result of carrying out its work as a public authority entrusted as such by Law no.131/2015 and Decision of Parliament no.271/2016. The decisions of NACS are acts used to pursue certain rights before other authorities, to prove the validity of certain complaints etc. Thus, by virtue of being official documents, issued by a public authority, the NACS decisions shall be published *in extenso*, in its original form, without any alteration, and with the names of the members of complaints settlement panels.

Another argument against depersonalisation of the names of counsellors derives from the provisions of the legal framework. It provides that NACS will organise public hearings for the examination of complaints and will publish the information on date and venue on its website, three business days before the date of the hearings. Consequently, any interested party who attends these hearings will learn the names of the counsellors who settled the complaint and signed the decision.

The topic concerning the use of names and surnames of counsellors in NACS decisions shall also be looked at from the point of view of free access to information of public interest. The right to information is a fundamental human right, being enshrined in art. 34 of the Constitution: "*The right of the person to have access to any information of public interest cannot be undermined*". The access to information represents an initial condition for public participation in the democratic process. The right to access to information is an essential tool to identify, monitor and report abuse, administrative errors and corruption. This right obliges the public authorities to ensure that citizens are correctly informed on public matters. The right to information can be ensured only through a high level of transparency in the activity of the public authorities.

In its caselaw, the Constitutional Court ruled that any authority and/or public institution has the obligation to provide the requested information unless there is a legitimate ground to refuse such a request (DCC no.19 of 22 June 2015 on the interpretation of article 34, para. (3) of the Constitution of the Republic of Moldova (access to information))⁷.

6 <http://lex.justice.md/index.php?action=view&view=doc&lang=1&id=336193>

7 <http://www.constcourt.md/ccdocview.php?l=ro&tip=hotariri&docid=547>

The Court mentioned that the access to information can be limited when public safety and measures to protect the citizens are concerned. However, this limitation of the right to information shall meet the following conditions:

(1) *a real and justified aim to protect a legitimate interest* in view of protecting the citizens and national security; (2) *public interest to find information shall not prevail*. Moreover, any limitation of the access to information in a democratic society *shall be foreseen by the law and necessary* for the protection of a legitimate interest. The justification of the legitimate interest is based on the severity of its impairment when certain information is published. *Public authorities shall prove that disclosure of information could seriously impact citizens' protection or national security*.

In this way, the non-publication of the names and surnames of the counsellors in NACS decisions does not meet any conditions and legal requirements and contravenes the caselaw of the Constitutional Court.

Another aspect that was analysed through the lenses of transparency principle is the composition of NACS complaints settlement panels. Although the composition of complaints settlement panels, including the chair, is approved by an order of the NACS's general director for a period no longer than 12 calendar months, such an order is not available to the public.

Following these actions of the NACS, several CSOs, including IDIS "Viitorul" made a public appeal⁸ condemning the removal of names of members in the panel, requesting that NACS waives the practice of publishing its decisions without the name/surname of the complaints settlement panel members by bringing forward the argument of depersonalising personal data.

Additionally, the CSOs requested that the order of the general director of NACS on the composition of complaints settlement panels be published on NACS website. NACS took note of the CSOs appeal and announced on its website that the decisions regarding the settlement of complaints, which are published on its website, shall contain the name of the counsellors, i.e. the members of complaints settlement panels, starting with 8 July 2019.⁹ Order no. 05 of 12 February 2019 on the establishment of complaints settlement panels for the period 12 February – 12 August 2019 was published on NACS website, although with some delay. The new composition of the panels was published on the website, on the same day. It was approved through Order no. 26 of 8 July 2019 on the creation of complaints settlement panels for the period 8 July – 8 October 2019.¹⁰

8 <http://viitorul.org/ro/content/apel-al-organiza%C8%9Biilor-societ%C4%83%C8%9Bii-civile-pentru-desecretizarea-autorilor-decizii-lor-ansc>

9 <https://ansc.md/ro/content/privind-transparenta-datelor-cu-privire-la-numele-consilierilor>

10 <https://ansc.md/ro/advanced-page-type/hotarari-si-ordine>

Conclusions and recommendations

The right to information is a fundamental human right, enshrined in art. 34 of the Constitution: *“The right of the person to have access to any information of public interest cannot be undermined”*. The access to information represents an initial condition for public participation in the democratic process. The right to access to information is an essential tool to identify, monitor and report corruption, abuse and administration errors. This right obliges the public authorities to ensure that citizens are correctly informed on public matters. The right to information can be ensured only through a high level of transparency in the activity of the public authorities.

To conclude with, having thoroughly analysed the provisions of the legal framework, the principles guiding the activity of NACS (National Agency for Complaints Settlement), as well as the duties of the counsellors for the settlement of complaints within NACS, we found that the names and surnames of the members of panels settling the complaints don't have to be depersonalised, as confirmed by the NACS. On the contrary, this information is public and anyone interested in attending a public hearing examining the complaints, will learn the names of the counsellors, i.e. members of the panel issuing the decision. Therefore, the situation when public persons who undertake full responsibility towards the citizens for the decisions they adopt, hide their names, thus proving a lack of responsibility in public affairs, is unacceptable.

Bearing in mind that NACS is a public authority governed by the law on access to information and transparency in the decision-making process, it shall ensure transparency in its decision-making process, providing open and unhindered access to all information related to its activity. The information on the composition of complaints settlement panels is of public interest and hence, the decisions/orders on the creation of complaints settlement panels shall be published.

For the purpose of ensuring a genuine transparency and providing the opportunity to monitor the decision-making process, including all decisions on complaints settlement by NACS, we recommend the timely republication of all decisions on the website of NACS (between 18 March 2019 and 5 July 2019). The decisions shall contain the names and surnames of the deciding counsellors.

