Funded by
the European Union

IPRE Institute for European Policies and Reforms ipre.md

INSTITUTE FOR WAR & PEACE REPORTING

Soros Foundation Moldova

Position Paper

on the draft law on the use of confiscated property for social purposes or in the public interest (unique no. 897/MJ/2024)

AUTHOR:

Petru Istrati and Pavel Cazacu, experts within the Justice Experts Group (JEG)

Reviewed by:

Stanislav Ghiletchi,

IPRE Deputy Director

#Justice4Moldova

The project is funded by the European Union
and cofunded by Soros Foundation Moldova

Disclaimer

This position paper was prepared within the project "Ensuring the Integrity, Efficiency, and Independence of the Justice System in Moldova – #Justice4Moldova," implemented by the Institute for European Policies and Reforms (IPRE) in partnership with the Institute for War and Peace Reporting (IWPR), funded by the European Union and co-financed by the Soros Foundation Moldova. The content of this study is the sole responsibility of the author and cannot, under any circumstances, be considered as representing the official position of the European Union, or the Soros Foundation Moldova.

SUMMARY

The Institute for European Policies and Reforms (IPRE) received the letter of the Ministry of Justice no. 03/9029 of 11.10.2024 by which the draft Law on the use of confiscated assets for social purposes or of public interest with the unique number 897/MJ/2024 was submitted for approval [hereinafter – "draft law"]. The reason for the issuance of the legislative act is the transposition of art. 18 para. (5) and Art. 19 of Directive (EU) 2024/1260 of the European Parliament and of the Council of 24 April 2024 on the recovery and confiscation of assets, CELEX: 32024L1260, published in the Official Journal of the European Union L series of 2 May 2024.

The authors of the draft pointed out that the draft law was developed in order to execute the actions of the National Program for the Recovery of Criminal Assets for 2023-2027, approved by Parliament Decision no. 342/2022.
IPRE supports the idea of the efficient use of confiscated assets for social and public interest purposes and therefore considers the adoption of the draft law important. In particular, this project is part of a series of steps to align national legislation with the requirements of Directive (EU) 2024/1260, in strengthening the rule of law and the fight against organised crime. Even if the purpose of the project is a precise and well-defined one, we believe that some aspects require in-depth analysis and detailing. In particular, it is necessary to:

- clarifying the concepts used, in order to avoid a diffuse margin of appreciation of the legal text;
- the establishment of clearer mechanisms for the valuation and allocation of assets;
- compliance with the standards of legislative technique;
- putting in place safeguards to ensure transparency of procedures and respect for fundamental rights.

Given that the social use of confiscated assets is an organised crime response mechanism that receives particular attention at international level, taking up good practices and experiences from other countries might be useful. However, the implementation of Directive (EU) 2024/1260, which is quite recent, at national level in the EU Member States is at an early stage. The authors of the draft indicated in the Justification Note that, at the level of 2020, in 19 EU Member States there was specific legislation on the use of goods in the public interest or for social purposes. However, emerging from recent legal metamorphoses, identifying well-established legal regimes that provide established examples that could be adjusted and replicated in the Republic of Moldova is a challenge with a high degree of difficulty.

A possible solution that has been exposed in some national analytical studies with a comparative component is the financing of pilot programs for the social use of confiscated assets, a model implemented in Albania, whereby more confiscated real estate is rehabilitated and rearranged for social economy activities or non-profit activities.

I. GENERAL

Given the social dimension of the draft law, we consider it appropriate to extend the list of civil society organizations for consultation (decision-making transparency aspect), especially those that carry out social activities (e.g. Diaconia, Concordia, etc.).

The project is funded by the European Union
and cofunded by Soros Foundation Moldova

In the text of the draft law, we note the use of the term "final" in reference to court decisions. We consider it judicious to replace this term with "irrevocable", in order to avoid situations when these final decisions are quashed by the Supreme Court of Justice, and the procedures provided for by this draft law have already been initiated. It is understandable that the authors of the draft opted for the "final" nature of the decision starting from the provisions of art. 466 para. (1) Code of Criminal Procedure of the Republic of Moldova, which provides that a decision in a criminal case becomes enforceable on the date on which it has become final.

However, the administration and valorization of certain assets, especially immovable property, involves more or less irreversible effects in terms of expenses, the security of civil relations, the stability of the civil circuit, the reparation of the damage caused by the unlawful actions of the criminal prosecution bodies, the prosecutor's office and the courts. The risks arising from the enforcement of a criminal judgment persist, to a lesser or greater extent, in any case, due to the possibility of review or other procedures for the reopening of proceedings and cannot be eliminated entirely. But it is essential that the legislative perimeter is as predictable as possible or, otherwise, in addition to the risks listed, the recipients of social projects may be reluctant to access such projects.

II. SPECIFIC ASPECTS

2.1 On the need for clearer definitions

- We consider it inappropriate to insert the definition from art. 2 para. (1) letter b) of the draft law in the formula in which it was exposed. In the same article 2 para. (1) letter a) provides a definition of *the assets seized in criminal proceedings.* Given that this definition does not differentiate between movable and immovable property, we understand that it refers to both categories of property. In the hypothesis in which the authors wanted to detail the definition of "*immovable property [...]*" It is advisable that the definition of '*movable property ...' should also be amended in a similar manner.*Moreover, the definition opted for by the authors of the draft law in art. 2 para. (1) letter b) is a reference to the provisions of the Civil Code, without derogating elements. In such a situation, the specified norm does not bring informative value.

A successful definition, in our view, from the perspective of public law, of the notion of "good", is contained in Article 3 of Law no. 308/2017 on preventing and combating money laundering and terrorist financing.

- In order to better understand the terms and expressions set out in art. 2 of the draft law, it is proposed to replace the norm in art. 2 para. (1) "*Terms and expressions used in this law:"* with "*For the purposes of this law, the following notions and expressions mean:".* The proposed formula is also used in other laws and accurately reproduces the fact that the terms and definitions that follow it have a certain meaning in the context of the legislative act in which it is contained.
- Considering the use in the text of the draft law of the notions of "*social purpose/nature*" and *"public interest",* we consider it appropriate to supplement art. 2 with the meaning of these notions or at least their basic elements. Unlike the notion of immovable property, on which we have explained above, which usually has only the understanding of civil law, the expression "*public interests"* has been the terrain of extensive disputes, including with multiple jurisprudence from the Constitutional Court.

In the Decision of the Constitutional Court no. 22 of June 27, 2017, examining the provisions of Article 328 para. (1) of the Criminal Code, the Court found that one of the harmful consequences of the crime of excess of power or exceeding the duties of office is the cause of considerable damage *to the "public interests".* The Court observed that Article 328 para. (1) of the Criminal Code provides for a material offence and includes the public interest in its prejudicial consequences, but the referral rule (Article 126 para. (2) of the same Code), on the basis of which the damage caused in each case is concretely assessed, does not establish *expressis verbis* "*the public interest"* as a social value that can be determined. In this regard, the Court held that, due to the general nature of the formulation of prejudicial consequences, there was a risk that the law enforcement bodies would apply Article 328 para. (1) of the Criminal Code not as a material crime, but as a formal one, i.e. only on the basis of the finding of the incriminated actions, disregarding the assessment of the prejudicial consequences (HCC no. 22 of June 27, 2017, §§ 77, 78, 81).

Subsequently, in Decision no. 180 of 15.12.2022, the Constitutional Court underlined that Article 313 of the Contravention Code sanctions the act of committing an action that clearly exceeds the limits of the rights and powers granted by law and that contravenes the public interest. On the other hand, Article 3 of the Integrity Law no. 82 of 25 May 2017 provides for the definition of the notion of "public interest". Therefore, " *public interest"* means the general interest of developing the well-being of society as a whole and achieving legitimate private interests, guaranteed by the functioning of public and private entities, as well as by exercising the service duties of the agents of the mentioned entities in strict accordance with the legal provisions, in an efficient and economical manner from the point of view of the use of resources. Therefore, the Court found that, by a reasonable and systematic interpretation, the interpreter of the law can identify the meaning of the concept in question (DCC no. 100 of 3 October 2019, § 22; DCC no. 42 of 1 April 2021, § 17).

2.2 About the omission of regulation and legislative gaps.

In repeated lines it is observed that the draft law leaves certain procedures or measures uncovered/unregulated. The enforcement of laws is a prerogative of the executive and, in this sense, it is natural for certain acts inferior to the law to establish procedures for the implementation of the law. However, in the draft law there are several times, extremely general norms that only identify a legal institution or a mechanism without legally outlining it.

For example, art. 5 para. (1) of the draft law establishes that the Agency for the Recovery of Criminal Assets (ARBI) undertakes necessary actions for the takeover, evaluation, sale, free transmission or destruction of criminal bodies and assets confiscated in criminal proceedings, *according to procedures established by the Government.* Next, in the same article, in paragraph 4, the last sentence, it is specified that 'specific measures against redemption shall be established by the *Implementing Regulation*'.

We intuit that the "*Law Enforcement Regulation"* referred to is to contain a series of norms that, inevitably, will lead to the restriction of some rights and freedoms. In this context, we emphasize the provisions of art. 54 para. (2) of the Constitution of the Republic of Moldova which enshrine a fundamental principle in a state of law, on which the supremacy of law is built, namely that "(2) **The exercise of rights and freedoms may not be subject to restrictions other than those provided by law**, which correspond to the unanimously recognized norms of international law and are necessary in the interests of national security, territorial integrity, economic well-being of the country, public order, in order to prevent mass disturbances and crimes, to protect the rights, freedoms and dignity of other persons, to prevent the disclosure of confidential information or to guarantee the authority and impartiality of justice".

In art. 7 para. (7) it is stipulated that *the Government shall establish the conditions for the sale of* the property provided for in art. 6 para. (1) provided that no application for use meets the minimum quality requirements. Article 8 para. (3) and para. (6) also refer to the Implementing Regulation.

In the light of Article 14 of Law no. 100/2017 on normative acts, "The Government Decision is an act **that is adopted by the Government for the organization of the execution of laws".** In its current wording, the draft law does not contain sufficient primary norms to achieve the purpose and spirit of the law. Or, the Government must organize their execution. In the current formula, the draft law delegates these powers to the executive, although they must be contained in the primary norm.

As the issue has been addressed in detail in the jurisprudence of the Constitutional Court, we consider it necessary to include some paragraphs of Decision no. 23 of 06.09.2013 on the exception of unconstitutionality of point 18 of the Regulation on the purchase of medicines and other products for medical use for the needs of the health system, approved by Government Decision no. 568 of 10.09.2009, although this issue of constitutionality has been returned to in Repeated lines:

77. With reference to the contested provisions, the Court mentions that the Supreme Law does not empower the Government with the right to establish primary norms in those areas of social relations that require legislative regulation. ***The acts of the Government, according to art. 102 para. (2) of the Constitution, are issued for the organization of the execution of laws.***

78. The Court mentions that the normative acts subordinated to the law must be in conformity with the Constitution and the laws, in the sense that they do not contain contrary regulations or provisions, that they do not have as their object of regulation primary areas or relationships that are within the scope of the law and that they are issued within the limits of the competence of the respective state body.

79. Thus, the Government's decisions cannot contain primary legal norms, they cannot establish general and binding norms that go beyond the legal framework. They must be subsequent to laws previously adopted by Parliament.

80. The Court mentions that paragraph 18 of the Regulation contains primary norms, which can be established only by law by the Parliament, and that the respective normative act was issued in order to implement Law no. 96-XVI of 13 April 2007 on public procurement.

81. Relating the contested provisions of the Regulation to the provisions of the Supreme Law, to the legislation in the field, the Court holds the following.

The Parliament, being the sole legislative authority of the state, according to Article 66 letter c) of the Constitution, ensures the unity of legislative regulations throughout the country. This power is achieved through the adoption by the Parliament of legislative acts.

82. The primary, original regulation belongs to the field of law. The law regulates the most important social relations. The superior legal form of the law is a consequence of the fact that it is adopted by the most representative body of the state - the Parliament.

Returning to Decision no. 23 of 06.09.2013, the Constitutional Court draws attention to the fact that:

90. [...]The technical side of the adoption of executive decisions is regulated by legislative norms. [...] Government decisions, as acts emanating from a public authority, by their nature are administrative acts of authority. They are issued (adopted) on the basis of and in order to execute the law for the creation, modification or extinction of legal relationships".

In this regard, we conclude that the draft law omits the regulation of specific measures against the redemption of confiscated property by convicted persons, their relatives or associates.

2.3 About the use of confiscated sums of money in criminal proceedings

Considering the educational and preventive role of the criminal law, as well as the role of the Ministry of Education in this regard, we recommend the completion of art. 8 para. (1) with the Ministry of Education – 10% and the reduction of the percentage granted for the criminal investigation institutions (i.e. the Prosecutor General's Office, the Anticorruption Prosecutor's Office, the National Anticorruption Center, the Ministry of Internal Affairs). We mention that in Romania, the Ministry of Education is also a beneficiary institution within similar mechanisms.

In the Substantiation Note, the authors of the draft argue that the distribution provided for in art. 8 para. (1) to boost the capacity to prevent and respond to crime, as well as to protect victims of crime. A similar distribution, as I mentioned above, can also be found in Romania.

However, although the allocation of sums of money to public authorities has apparently noble intentions, it does not fully reflect the spirit of the law and may give rise to difficulties of interpretation. The main purpose of the law is aimed at social, charitable and philanthropic objectives. The state authorities have the responsibility to carry out their duties and ensure the proper functioning of public activities. The allocation of financial resources in this regard is a prerogative and an obligation of the State, achieved through the state budgets.

If the amounts of money seized in the criminal proceedings will be allocated to the public authorities, according to the formula provided for in art. 8 para. (1), predominantly towards governmental institutions and, in particular, towards those with powers in the field of criminal prosecution, there is a risk of generating the perception of a possible "conflict of interest", manifested by the fact that these institutions will be tempted to prioritize the amount of confiscated assets to the detriment of respect for individual rights and procedural guarantees.

An independent observer might be tempted to believe that prosecution bodies might admit abuses or show overzealousness in confiscation proceedings in order to benefit from the amounts allocated under the above-mentioned rule. This could particularly affect the principle of free access to justice provided for in Art. 19 para. (3) of the Code of Criminal Procedure of the Republic of Moldova, which establishes the obligation of the criminal prosecution body to take all the measures provided by law for a complete, objective and from all perspectives investigation of the circumstances of the case, to highlight **both the circumstances proving the guilt** of the suspect, the accused or the defendant, **and those that exonerate him**, as well as the circumstances that mitigate or aggravate his liability.

We also mention that, in the event that the budget of the nominated institutions will benefit from a flow of money from the confiscation of the sums of money, the litigants could perceive this fact as an infringement of the principles of ethics and conduct of prosecutors, in particular: the supremacy of the law, independence, integrity, impartiality, professionalism, transparency, etc., principles provided for in Law no. 3/2016 on the Prosecutor's Office and in theCode of Ethics for Prosecutors.

Therefore, it is recommended to change the formula in art. 8 para. (1), so that the share of the distribution of the amounts is higher for the social, educational and health protection fields.

2.4 Improving the mechanisms for the evaluation and allocation of goods

Art. 7 para. (3) – this article refers to the evaluation of applications for use by the Ministry of Justice. However, the draft law does not stipulate the criteria for selecting the beneficiary, including the competitive criteria between potential beneficiaries or the minimum requirements that a potential beneficiary must meet in order to be awarded a good free of charge (for example: experience held, field of activity, activities carried out, etc.). The lack of criteria for evaluating applications jeopardizes the transparent and competitive nature of the final selection process. In this regard, we consider it necessary to detail these aspects either in the draft law or alternatively, by providing that the establishment of the criteria will be carried out based on a regulation to avoid the lack of meritocracy.

Also, there is no clear delimitation of the attributions of the Ministry of Justice and ARBI, according to the provisions of art. 5 para. (1) and art. 7 para. (3) and para. (4) of the draft law, which seem to contain some contradictory aspects.

In art. 7 para. (6), although the monitoring by ARBI of the use of immovable property confiscated by non-commercial organizations and public authorities/institutions is regulated, we consider that it is necessary to regulate the consequences in the situation where the property transferred for use is not used properly for the purpose for which it was assigned. Taking into account the fact that the goods can be attributed to entities that do not use them according to the declared purpose, we believe that the draft law should provide for a procedure for the recovery of goods from beneficiaries who do not comply with the conditions of the award.

2.5 Regarding the role of the heads of the public authority in the light of art. 8 para. (4) of the draft law.

In order to reduce the risks of arbitrariness, it is recommended to revise the provision of art. 8 para. (4) of the draft law, which assigns to the heads of the public authorities provided for in art. 8 para. (1) the possibility of distributing the amounts for the financing of projects or programs to prevent and combat crime.

Of course, each of the authorities provided for in art. 8 para. (1) of the draft law has its own normative framework of operation, but within the meaning of art. 8 para. (4) It is recommended that these powers be granted to a collegial body within the public authority, which may possibly have the head of the authority as president.

The Substantiation Note does not specify the reasons why in art. 8 para. (6), the Ministry of Finance is designated as the authority responsible for monitoring the use of the sums of money and the concrete results obtained, and not the Court of Accounts, according to the attributions established by Law no. 260/2017 on the organization and functioning of the Court of Accounts of the Republic of Moldova.

2.6 The need to delete Art. 10.

We recommend the exclusion of Article 10 of the draft law, since, in the form in which it is exposed, it does not bring any relevant content element from the perspective of the criteria of legislative technique provided for in Law no. 100/2017.

We recommend the complete exclusion of Article 10 of the Draft Law, since, in the form in which it is drafted, it does not bring any relevant content element from the perspective of the criteria of legislative technique provided for in Law no. 100/2017.

The extremely incomplete wording of Article 10 does not allow it to be correlated with any specific offence provided for in the Criminal Code, whether it is a "whiteness rule" or a "blank indictment", as they are defined in the doctrine. Given that Article 10 of the draft law raises issues of accessibility and clarity, it cannot be associated with any offence in the Criminal Code, in particular in Chapter XIV – "Crimes against justice" and/or Chapter XV – "Crimes against the proper conduct of activity in the public sphere.

The absence or presence of Article 10 in the draft law, in the current formula, does not contribute to the added value of the legislation on disciplinary or criminal liability.

The project is funded by the European Union
and cofunded by Soros Foundation Moldova